

**MISCELLANEOUS CAUSE NO.005 OF 2023**

**VERSUS**

**BEFORE: HON.LADY JUSTICE NALUZZE AISHA BATALA**

**Introduction;**

i) A vesting order be issued directing the respondent to transfer the suit property comprised in Kyandondo Block 265 Plot 3690 land at Bunamwaya in Wakiso District in the names of the applicant.

ii) Costs of this application be provided for.

**Background;**

2. The applicant was the wife of the Late Godfrey Masembe who passed on the 15th day of October, 2021. She is also the Administrator of the Estate of the deceased. In 2010, the late Godfrey Masembe acquired the suit land from a one Isaac Mukasa. The late Godfrey Mukasa took immediate possession of the suit land and established developments thereon. The late Godfrey passed on before the Certificate of title was transferred in his names.

**Applicant's evidence;**

3. The application is supported by an affidavit deposed by ***Mrs, Susan Masembe*** the applicant which sets out the grounds of the application but briefly includes the following;
  - i) That the applicant is the widow of the late Godfrey Masembe and the Administrator of his estate
  - ii) That on the 11<sup>th</sup> of October 2010, the late Godfrey Masembe purchased land comprised in Kyadondo Block 265 Plot 3690 land at Bunamwaya from Mukasa Isaac and a sale agreement was executed.
  - iii) After purchasing the suit property, the late Godfrey Masembe immediately took possession of the suit land.
  - iv) The late Godfrey Masembe died on the 15<sup>th</sup> October 2021 before the vendor executing transfer forms for the suit property in his favour.
  - v) That the late has been in occupation of the property from the time of the

purchase of the same property.

- vi) A vesting order be issued directing the respondent to transfer the suit property.
- vii) It is in the interests of justice and fairness that this application be allowed.

**Representation;**

4. The applicant was represented *Mr. Seguya Paul* of M/S ASB Advocates whereas the respondent was represented by *Mr. Sekabira Moses* from the Commissioner land registration. The respondent did not file an affidavit in reply despite being served with the application. If the respondent had any objection to this application, he would have filed an affidavit in reply to guide this court in reaching its decision therefore this matter stands uncontested. The applicant filed her affidavit in support and the submissions which I have considered in the determination of this application.

**Issues for determination;**

- i) Whether the application is properly before this Court?
- ii) Whether there are sufficient grounds to warrant the grant of a vesting order?

**Resolution of the issues;**

**Issue 1; Whether the application is properly before this court?**

5. It is incumbent on this court to determine the appropriateness of actions brought before it to avoid proceeding in futility. It is trite law that before an applicant invokes the inherent jurisdiction of court, he or she must have applied first for a vesting order to the Commissioner Land Registration who for some reason must have declined to exercise his or her powers under Section 167 of the Registration of titles Act Cap 230. (See; *Mutyaba Vs Kayimbye & Anor Misc.Cause No 40 of 2018*)
6. I will reiterate the provisions of Section 167 of the Registration of Titles Act Cap.230 under which the application is brought which provides as follows; *“If it is proved to the satisfaction of the registrar that land under this Act has been sold by the proprietor and the whole of the purchase money paid, and that the purchaser has or those claiming under the purchaser have entered and taken possession under the purchase, and that entry and possession have been acquiesced in by the vendor or his or her representatives, but that a transfer has never been executed by the vendor and cannot be obtained by reason that the vendor is dead or residing out of the jurisdiction or cannot be found, the registrar may make a vesting order in the premises and may include in the order a direction for the payment of such an additional fee in respect of assurance of title as he or she may think fit, and the registrar upon the payment of that additional fee, if any, shall effect the registration directed to be made by Section 166 in the case of the vesting orders mentioned there, and the effecting or the*

*omission to effect that registration shall be attended by the same results as declared by section 166 in respect of the vesting orders mentioned there.”*

7. I have carefully read and considered the submissions of Counsel for the applicant in this case and I will determine this issue in light of the same. In his of his view that the High Court has unlimited jurisdiction and can go on and grant the vesting order even where the applicant applies directly to court without resort to the office of the Commissioner Land Registration Counsel cited the decision of Court in **Kisuule Vs Commissioner Land Registration, Miscellaneous Cause No.119 of 2016** where the Court also relied on the Court of Appeal decision of **Aida Najjemba Vs Ester Mpagi, Civil Appeal No.27 of 2005**.
8. However, I concur with the decision of my learned brother Hon. Justice Henry I. Kawesa in *Mutyaba Vs Kayimbye & Anor Misc.Cause No 40 of 2018* where he observed that Section 167 of the Registration of Titles Act makes it a procedural prerequisite that applications of this nature must be made to the commissioner land Registration before coming to court. He also went on to distinguish the facts of Mutyaba case (Supra) and those in Aida Najjemba case (supra) which I believe applies to this case as well. In answering whether the application was properly before court *Byamugish JA in Aida Najjemba Vs Ester Mpagi* observed that;“*I agree with counsel for the appellant that an application for a vesting order must be made to the registrar of titles. However, the High Court has unlimited jurisdiction in all matters. The Commissioner for Land Registration on 16th August 2004 wrote to counsel for the appellant suggesting to them the option of*

*obtaining a vesting order from court. The counsel seems to have accepted this advice when he filed the application in the High Court. In the same letter the Commissioner for Land Registration informed counsel that no transfer in favor of the respondent and her late husband could be traced and the instrument number under which their registration was purportedly effected related to a different land transaction. The loss of the transfer instrument and the use of an instrument of a different land transaction to register the respondent and her late husband raise some suspicion but it cannot be evidence of fraud on her part. In any case the respondent was not responsible for safe-keeping of documents in the land registry and cannot be blamed for the loss of the transfer instrument. I consider this to have been a unique case in which the vendor had sold the property and received the whole of the purchase price and the purchaser was in possession with the full knowledge and consent of the vendor. The vendor was dead and no representative was available to sign fresh transfer forms. The learned judge was right to grant a vesting order under section 167” (supra).*

9. From the above excerpt, it appears to me that the result in that case would have been different had the Commissioner Land Registration not suggested to the respondent the option of obtaining a vesting order from Court. In making such suggestion, it indicated that the Commissioner was disinterested in granting the vesting order. This is not the case in the instant case.

10. In the instant case, I have perused the affidavit of the applicant and it suggests

nowhere that indeed an application was made to the Commissioner Land Registration before proceeding to this Court. Counsel for the applicant impliedly admitted in his submissions that no such application was made and intended to rely on decided cases to support his view.

**11.** I stand by my position in the case **Rashid Ndawula Vs Tropical Bank and Anor,**

**Misc. Cause No.0332 of 2023** where I observed that it is in applications or actions of this nature that court is enjoined to exercise prudence and good judgment. It would not have been the intention of the framers of the constitution to divest the Commissioner Land Registration of his or her powers. Allowing parties to bring actions before utilizing the available avenues under the law would encourage noncompliance with the said section and thereby render the office of the Commissioner for land registration redundant as regards vesting orders. In times where courts are combating the problem of case backlog, I believe it is the proper approach.

**12.** I need not proceed to determine the merits of this application. Having noted that the applicant ought to have first applied to the Commissioner Land Registration before coming to Court. In the premises, I dismiss the application with no orders as to costs.

**13.** I do order the Applicant to follow Section 167 of the Registration of Titles Act and have the matter determined by the Commissioner Land Registration within 60 days from the date of service of this order onto the respondent.

**14.** If the registrar declines or fails to do so, and evidence of such failure is provided,  
this Court shall be pleased to automatically grant the said orders upon such proof.

**15.** I make no orders as to costs.

**I SO ORDER,**



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**NALUZZE AISHA BATALA**

**JUDGE**

**30<sup>th</sup>/10/2023**