

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
MISCELLENEAOUS APPLICATION NO 2417 OF 2023
(ARISING FROM CIVIL SUIT NO 211 OF 2011)

1.KASOZI JULIUS
2.KALUUMA GODFREY
3.LUBEGA RICHARD
4.NAKAFUMA PROSSY(Suing as beneficiaries to the estate of the late Joseph):::APPLICANTS

VERSUS

1.KASOZI HERMAN
2.PAULINE NAMATA KASANA
3.MUZOORA KENNETH T/a MUKERA ASSOCIATES
4.AGUMA FRED ::: RESPONDENTS

BEFORE; HON. LADY JUSTICE NALUZZE AISHA BATALA

RULING

Introduction;

1. **Kasozi Julius, Kaluma Godfrey, Lubega Richard and Nakafuma Prossy** hereinafter referred to as the applicants brought this application against **Kasozi Herman, Pauline Namata Kasana, Muzoora Kenneth t/a Mukera Associates and Aguma Fred**

hereinafter referred to as the respondents under Article 26(1), 28(1), 44(c), 126 (2)(e) of the 1995 Constitution, Sections 24,25,26,27,29,191 & 192 of the Succession Act Cap 162 as amended, Section 77 of the Registration of titles Act Cap 230,Section 82 and 98 of the Civil Procedure Act Cap 71, Section 33 of the Judicature Act Cap 13, Rule 11, 15 & 20 of the Judicature (Court Bailiffs) Rules SI 13-16, Order 46 Rules 1,2 & 8, Order 1 rule 13 & Order 52 Rules 1,2 & 3 of the Civil Procedure Rules SI 71-1 as amended for orders that;

- i) The consent judgment executed by the 1st and 2nd respondent on the 10th day of February 2015 and endorsed by Hon Lady Justice Eva Luswata on the same date in respect of Civil Suit No.211 of 2011 be reviewed and/or set aside for inter alia illegality, being null and void ab initio.
- ii) The warrant to give vacant possession of the suit land issued by the honorable court in respect of Civil Suit No 211 of 2011 be reviewed and set aside and or reversed.



iii) The sale and purchase of the suit land currently known and described LRV 4194 Fol 15 Kyandondo Block 273 Plot 275 land at Namasuba by the 3rd respondent to the 4th respondent on the 31st day of March 2022 be set aside and or nullified for inter alia illegality, being null and void ab initio.

iv) An order that High Court Civil Suit No 211 of 2011 be restored, heard de novo and the applicants be added as plaintiffs thereto and further that the plaint and summons thereof be amended and served upon the 1st respondent accordingly.

Background;

2. The applicants are biological children of the late Joseph Kasana. The 2nd respondent was the spouse to the late Joseph Kasana. The 2nd who instituted Civil Suit No 211 of 2011 against the 1st respondent seeking among others for declaratory orders that the 2nd respondent is the beneficial owner of land comprised LRV 4194 Folio 15 Kyadondo Block 273 Plot 275 land at Namasuba. The 1st and 2nd respondent entered a consent judgment that was endorsed

by Honorable Lady Justice Eva Luswata on the 10th day of February 2015. The 3rd respondent as bailiff resultantly sold the property to the 4th respondent. It is against this background that the applicants bring this application before this court.

Applicants' Evidence;

3. The application is support by affidavits deponed by **Kasozi Julius, Kaluma Godfrey, Lubega Richard** and **Nakafuma Prossy** the applicants but briefly are as follows;

- i) At all material times, the suit land currently known and described as LRV 4194 FOL 15 Kyadondo Block 273 Plot 275 at Namasuba was initially on a kibanja that belonged to the late Joseph Kasana.
- ii) That the suit land forms and constitutes part of the estate of the late Joseph Kasana and indeed the deceased's matrimonial home where he resided with his wife until his death.
- iii) That the applicants are children and beneficiaries to the estate of the late Joseph Kasana who died intestate in August 1995 and left a number of properties including the suit land.

- iv) That after the demise of the deceased, the 1st respondent purported to be owner of the suit land, fraudulently applied for a lease and thereafter acquired a leasehold certificate of title over the suit land from Buganda Land Board without the knowledge of the applicants.
- v) That the 1st respondent did not have letters of administration to deal with the suit land and while applying for a lease from Buganda Land Board he did not disclose the fact that the suit land was formerly a kibanja that belonged to the late Joseph Kasana.
- vi) That the 2nd respondent instituted High Court Civil Suit No 211 of 2011 against the 1st respondent seeking among other orders that the suit land comprised in LRV 4194 Folio 15 Kyandondo Block 273 Plot 275 at Namasuba formed and constituted part of the estate of the late Joseph Kasana.
- vii) That on 10th day of February 2015, the 1st and 2nd respondents who were defendant and plaintiff respectively in respect of Civil Suit No. 211 of 2011 illegally executed a consent judgment wherein they agreed and decreed that the suit property comprised in LRV 4194 Folio 15 Kyadondo Block

273 Plot 275 at Namasuba be sold and the proceeds of the same be shared.

- viii) That the suit land was grossly undervalued and thereafter, it was disposed off by the 3rd respondent after which the proceeds of sale were shared with the 1st and 2nd respondents.
- ix) That the 3rd respondent's sale of the suit property to the 4th respondent emanated from the illegal consent judgment.
- x) That at the time of executing the said consent judgment, the 1st and 2nd respondents were/are not personal representatives of the estate of the late Joseph Kasana.
- xi) That there was collusion and/or connivance between the respondents to deprive the applicants of their interests and rights in the estate of the late Joseph Kasana.
- xii) That the 1st, 2nd and 3rd respondents took advantage of the illegal consent judgment they executed in respect of civil suit No.211 of 2011 to dispose off the suit land to the 4th respondent and indeed, the 4th respondent acquired nothing from an illegality.
- xiii) That the applicants are in possession of the suit land, they were not parties to High Court Civil Suit No 211 of 2011 from

which the warrant of sale and attachment of the suit property emanated. There are substantial questions of law with a high probability of success if High Court Civil Suit No 211 of 2011 is restored and heard de novo and the applicants are added as plaintiff thereto.

xiv) That the consent judgment dated 10th February 2015 was irregular, premature and illegal since no right to any property of a person who has died intestate shall be established in any court of Justice, unless letters of Administration have been granted by a court of competent jurisdiction.

xv) That the respondents have commenced execution proceedings and the applicants are on the verge of being evicted from the suit land without a fair hearing.

xvi) That it is just and equitable that this application is granted.

Respondents' evidence.

4. The respondents (**Kasozi Herman, Paulina Namata Kasana & Aguma Fred**) on the other hand opposed the application by their affidavits in reply and briefly maintained that;



- i) The suit property was never a matrimonial home and that the matrimonial home was located in Nyendo Masaka.
- ii) The suit land was given to the 1st respondent by their father while he was still alive and allowed the applicants to occupy the same.
- iii) The applicants are not beneficiaries to the suit land because the suit land does not form part of the estate of the late Joseph Kasana.
- iv) The execution was completed upon the sale to the 4th respondent therefore the application is overtaken by events.
- v) The 1st respondent sold the suit land without letters of administration.
- vi) The 2nd respondent and the 1st respondent also agreed that the consent rested all matters concerning the estate of the late Joseph Kasana.
- vii) That as a result of the oversight, shortcomings, mistake and negligence of her former advocates, the 2nd respondent signed the consent judgment touching the estate of the deceased with the letters of administration.



- viii) That the orders sought for are not tenable by this court and that the application raises no grounds for review.
- ix) That following an advert published in the Daily Monitor Newspaper of the 12th day of February 2022, the 4th respondent duly purchased the said land.
- x) That there was no irregularity in the process leading to the sale of the land and the sale became absolute on the payment of the full purchase price.
- xi) That if indeed the applicants claim that the suit land comprised a matrimonial home which is in contestation, then it only follows that the 2nd respondent needed no letters of Administration to deal with the property which remained as her property at Law being the surviving spouse

Representation.

5. The applicant was represented by **Mr. Charles Mbogo** of M/S Mbogo & Co. Advocates whereas the 1st respondent was represented by **Mrs. Sunday Happy** of M/S Serwadda, Muhereza

& Co. Advocates, the 2nd respondent was represented by **Mr. Muhimbi Derrick** of M/S Sam kiwanuka & Co. Advocates and the 4th respondent was represented by **Mr. Joseph Waswa** of M/S Jawass Associated Advocates . All the represented parties filed their affidavits which I have considered in the determination of this application.

Issues

- 1. Whether the consent judgment in Civil Suit No 211 of 2011 should be set aside?***
- 2. Whether the applicants should be added as plaintiffs to the suit and if yes whether plaint should be amended?***

Resolution and determination of the issues;

Issue 1; whether the consent judgment in Civil Suit No 211 of 2011 should be set aside?

- 6.** The law on consent judgments is now clear. Parties to a civil suit are at liberty to settle their matters and consent to a judgment being entered. The consent may be recorded by a judicial officer where the parties consent orally or may be prepared by the parties for the endorsement of court after which it is a binding judgment

against the parties to it. **(See; Order 25 Rule 6 of the Civil Procedure Rules)**

7. It is trite law that once a consent judgment has been entered, it may be vitiated, varied or set aside where it is established that it was entered into without sufficient material facts or in misapprehension or in ignorance of material facts, or it was actuated by illegality, fraud, mistake, contravention of court policy or any reason that would enable court set aside an agreement.

(See; Attorney General & Anor Vs James Mark Kamoga & Anor SCCA No.8 of 2004)

8. In the instant case, it is the applicants' case that the consent judgment entered into by the 1st and 2nd respondent was entered into illegally thus being null and void. This court will proceed and investigate this allegation.

9. It is the position of the law that a consent judgment is passed on terms of a new contract between the parties to the consent judgment. In other words, a consent judgment constitutes a valid contract between the parties to it. **(See; Mohamed Allibhai Vs W.E. Bukonya & Anor SCCA No 56 of 1996)**

10. A consent judgment as between the parties and court is merely a judgment however as between the parties themselves it is a valid contract. To that end it can be vitiated where it is actuated by illegalities because the same would vitiate a valid contract/agreement. The general principle of illegality is that court will not enforce an illegality. **(See; Holman Vs Johnson (1775) 1 Cowp 341)**

11. I have keenly perused all the lengthy affidavits filed by all parties and I will proceed to determine this matter in light of the same.

12. According the affidavits in support of the application in paragraph 2 the applicants state that they are the biological children of the late Joseph Kasana who purchased the suit land initially as a Kibanja at Namasuba.

13. The 1st respondent under paragraph 3 of his affidavit in reply admits to the fact that the suit land was indeed purchased by the Late Joseph Kasana as a Kibanja at Namasuba, Wakiso District.

14. In addition, the applicants state in Paragraph 5 of the affidavits in support of the application that the 1st respondent did not have letters of administration to deal with the suit land and while

applying for the lease from the Buganda Land Board he did not disclose the fact that the suit land was formerly a kibanja that belonged to the late Joseph Kasana.

15. The 2nd respondent who was a party to the consent judgment clearly states under paragraph 22 and 24 of her affidavit in reply that she was not properly advised by her lawyers and that is why she executed the above consent judgment touching the estate of her late husband without letters of Administration.

16. However, the 1st respondent contends under paragraph 6 of the affidavit in reply that the suit land was given to him by his late father during his lifetime and the same no longer formed part of the estate of the Late Joseph Kasana.

17. I have noted that there is no evidence adduced by the 1st respondent to substantiate the gift inter vivos by his late father Joseph Kasana during his lifetime. The 1st respondent merely stated that his father gave him the land and the same does not form part of the estate the Late Joseph Kasana.

18. A gift inter vivos is defined in the **Black's Law Dictionary 8th edition at Page 710** as; ***“a gift of personal property made during the lifetime and delivered to the donee with the***

intention of irrevocably surrendering control over the property”

19. Mellows in the Law of Succession 5th Edition, Butterworth 1977 pages 9 to 10 stated as follows; ***“Various formalities are necessary for gifts inter vivos. Thus, a gift of land must be made by deed.”***

20. In the instant case, as far as this application is concerned, I hardly see any convincing evidence of such gift as alleged by the 1st respondent and therefore find such allegation unsubstantiated. I need to emphasize that this is as far as this application is concerned.

21. Given the averments contained in the affidavits of all parties and the 1st respondent’s admission that indeed this property was bought by his father as a Kibanja one thing is certain, that in absence of any evidence of the gift inter vivos as it is in the instant application, the suit land belongs to the Estate of the Late Joseph Kasana on the face of it.

22. The general position while dealing with property of the deceased person under the law as per Section 191 of the Succession Act is that; ***“Except as hereinafter provided, but subject to Section***

of the Administrator General's Act, no right to any part of the property of a person who has died intestate shall be established in any court of Justice unless letters of Administration have first been granted by a court of competent jurisdiction."

23. The above provision renders null and void any act committed on the deceased's estate by any person in absence of letters of administration or authority granted by court. ***(See; Nviri Vs Olwoc & 2 Ors Civil Suit No 926 of 1998)***

24. I have also taken cognizance of paragraph 16 of the affidavit in reply deponed by the 4th respondent where he states that that if indeed the applicants claim that the suit land comprised a matrimonial home which is in contestation, then it only follows that the 2nd respondent needed no letters of Administration to deal with the property which remained as her property at Law being the surviving spouse

25. However, this is whittled down by the admissions contained in paragraph 22 and 24 of the affidavit in reply by the 2nd respondent where she states that she was not properly advised by her lawyers and that is why she executed the above consent judgment

touching the estate of her late husband without letters of Administration

26. Now the question to be asked is “Whether the 1st and 2nd respondent had the capacity to consent in the circumstances touching the estate of the deceased without Letters of Administration?”

27. In my view having considered the law the answer to the question is no. The parties consented to land they did not have authority to deal with under the law; this constitutes an illegality sufficient to vitiate the consent judgment. One of the major facets of a valid contract is a lawful objective.

28. The objective of the consent judgment which constituted a contract between the parties was to distribute and/or deal with the property of the deceased person without Letters of administration.

29. In the premises, the first issue is answered in the affirmative.

Issue 2; Whether the applicants should be added as plaintiffs to the suit and if yes whether the plaint should be amended?



30. Joinder of parties to a suit is governed by Order Rule 10 of the Civil Procedure Rules which states as follows; ***“The court may, at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any who ought to have been joined, whether a plaintiff or defendant, or whose presence before the court may be necessary in order to enable court effectively and completely to adjudicate upon and settle all questions involved in the suit, be added”***

31. **Section 33 of the Judicature Act Cap 13** provides thereof that as far as possible all matters in controversy between the parties should be completely and finally determined and all multiplicities of legal proceedings concerning any of the matters be avoided.

32. The law on amendment of pleadings is found in Order 6 rule 19 which provides thereof as follows; ***“The court may, at any stage of the proceedings, allow either party to alter or amend his or her pleadings in such a manner and on such terms as may be just, and all such amendments shall be made as may be***

necessary for the purpose of determining the real questions in controversy between the parties.”

33. The overriding rule when it comes to matters of amendment of pleadings is that the multiplicity of proceedings should be avoided as far as possible and amendments which avoid multiplicity should be allowed. **(See; Gaso Transport Services Ltd Vs Martin Adala Obene SCCA No 4 of 1994)**

34. In the instant case, it is not contested that the applicants are biological children of the late Joseph Kasana which implies their beneficial interest in the estate of the deceased. Beneficiaries of the estate of the deceased have a right to bring an action to protect the interest of the deceased person. **(See; Israel Kabwa Vs Martin Banoba Musiga (Civil Appeal No. 52 of 1995 [1996] UGSC 1)**

35. In the instant case, I have carefully perused the plaint in Civil Suit No 211 of 2011 and among other the following orders are sought;

a) A declaration that the plaintiff is the beneficial owner of a kibanja and house located on land comprised in LRV 4194 Folio 15 Kyadondo Block 273 Plot 5751 at Namasuba.



b) An order for cancellation of title for the above said land.

36. From my reading of the plaint in Civil Suit No 211 of 2011, it appears to me that the 2nd respondent who is the plaintiff sought for specific orders against the 1st respondent who is the defendant that she is a beneficial owner of the Kibanja and not that the Land belongs to the estate of the Late Joseph.

37. Be that is may, it appears to me that there is a nexus between the question as to whether the plaintiff in Civil suit No 211 of 2011 is a beneficial owner of the suit land and the question of whether the suit land belongs to the estate of the Late Joseph Kasana. The finding of court on the latter will have a huge bearing on the former. All these questions suggest one motive, to protect the estate of the deceased person.

38. When you peruse all the affidavits in support of the application, there is an allegation that pervades all of them and that is the 1st respondent applied for the lease from the Buganda land board fraudulently. This question is also to be investigated in Civil Suit No 211 of 2011.

39. Furthermore, it is not contested that the applicants are biological children of the Late Joseph Kasana. It is trite law that

the beneficiaries of an estate can bring an action to protect the estate of the deceased person. **(See; Israel Kabwa Vs Martin Banoba Musiga (Civil Appeal No. 52 of 1995) [1996] UGSC 1)**

40. Accordingly, it will be preposterous for this court to deny the applicants from being added as parties to civil suit No 211 of 2011 who speculatively may later bring an action or actions against the 1st respondent and/or the 2nd respondent hinged on the same subject matter and asking the same questions. Similarly, the amendment will not cause any injustice to the 1st respondent. **(See; Hilton Vs Sutton Steam Laundry [1946] K.B 65).**

41. In the premises, this issue is answered in the affirmative.

42. In consideration of the foregoing, the application succeeds with the following orders;

i) The consent judgment executed by the 1st and 2nd respondent on the 10th day of February 2015 in Civil Suit No 211 of 2011 and the warrant arising therefrom are hereby set aside.

ii) The purchase of the Suit Land currently known and described as LRV 4194 Fol 15 Kyadondo Block 273 Plot 275 land at Namasuba by the 3rd respondent to the 4th respondent is hereby set aside.



- iii) Civil Suit No 211 of 2011 be set down for hearing and heard de novo inter parties on the merits.
- iv) The plaint in Civil Suit No 211 of 2011 be amended to add the applicants as plaintiffs and be served onto the 1st respondent within 21 days from the date of this ruling failure of which the suit will be heard without them as parties and shall have to seek leave of court to file out of the 21 days.
- v) The respondent is ordered to file his amended written statement of defense in Civil Suit No 211 of 2011 if any within 15 days from the date of service of the amended plaint.
- vi) No orders as to costs.

I SO ORDER.



NALUZZE AISHA BATALA

JUDGE

29th/11/2023