

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
MISCELLANEOUS APPLICATION NO. 1727 OF 2022
ARISING FROM CIVIL SUIT NO. 1088 OF 2021

1. LADHA KASSAM & COMPANY LTD
2. EBRAHIM KASSAM & SONS PROPERTIES LTD
3. NUHU WADEMBERE **APPLICANTS**

VERSUS

1. ZALWANGO MARGRET NALONGO
2. LUMASI JOHN KAZIBWE
3. KIMERA EDDY **RESPONDENTS**

(Administrators of the estate of the Late

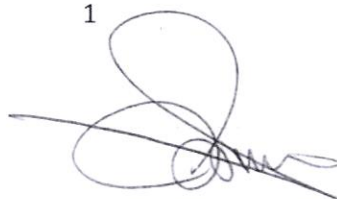
Festo Banja suing through their Attorney Kiconco Medard)

BEFORE: HON JUSTICE DR. FLAVIAN ZEIJA

RULING

This is a ruling in respect of an application by the Applicants brought under Order 6 rule 28, 29 & 30, Order 7 rule 11 (a), (d) & (e) and Order 52 rules 1 and 3 of the Civil Procedure Rules for Orders that;

- a) The head suit (Civil Suit No. 1088 of 2021) lacks a cause of action against the 1st, 2nd and 3rd Defendants, thus it should be struck out.
- b) The head suit is barred by the law of limitation and it should thus be struck out.
- c) The head suit and Plaint offends and contravenes the legal principle of "delegatus non potests delare" and should as such, be struck out.
- d) The head suit contravenes the mandatory provisions of the Succession Act.



e) Costs of this application be provided for.

The grounds in support of this application are set out in the affidavit of the 3rd Applicant. Briefly, that the 1st, 2nd, 3rd Defendants through their respective Written Statements of Defense vide ***H.C.C.S No. 1088 of 2021 Zalwango Margret Nalongo & Ors vs Ladha Kassam & Ors***, indicated to court that they would raise the foregoing preliminary objections before the trial. The determination of the said preliminary objections as raised will substantially dispose of the entire suit and that it is just and equitable that the said preliminary objections are heard and determined before the suit is set down for hearing.

In opposition, Medard Kiconco, the Respondents' lawful attorney deposed that this application is defective and an abuse of court process because the objections raised by the Applicant herein were already determined by this Honorable Court in Miscellaneous Application No. 2202 of 2021 and the same were determined and dismissed. The Applicants have never (whether by way of appeal or otherwise) challenged the court's decision dismissing the said objections and that the affidavits in support of the application are not substantiated with evidence.

It was Counsel for the Respondents' submission that the preliminary objections raised in this application were disposed of in Miscellaneous Application No. 2202 of 2021 and the same were overruled by this court. In response to this, Counsel for the Applicants made no rejoinder.

I have had the occasion to revisit my decision in Miscellaneous Application No. 2202 of 2021 which was an application for a temporary injunction restraining the current Applicants, their Agents, assignees, personal representatives, attorneys, licencees, successors and /or any other person acting in their stead from dealing with and /or alienating by way of transferring, occupying, disposing of, depositing building materials, grading and /or erecting structures on the suit land until the determination of the main suit. One of the preliminary objections determined therein which also arises in this application relates to whether the Respondents herein (as Administrators to the estate of the Late Festo Banja) have authority in law to grant



powers of attorney to a one Medard Kiconco to prosecute court matters relating to the said estate. I stated and I reiterate that the rationale of section 264 of the Succession Act was to shield away persons not clothed with legal power from exposing estates of deceased persons to the far reaching repercussions of court processes. It however does not include duly authorized attorneys in light of Order 3 rule 2 of the Civil Procedure Rules.

Similarly, in Miscellaneous Application No. 2202 of 2021, Counsels for the Respondent therein raised a preliminary point of law that the head suit is barred by the law of limitation. The same objection has been raised in this application in total disregard of its prior determination by this court. This court's finding in Miscellaneous Application No. 2202 of 2021 was that the head suit was filed well within the limitation period.

It has also been contended for the Applicants that the head suit is devoid of a cause of action against the Applicants (Defendants in the main suit).

A cause of action is defined as every fact which is material to be proved to enable the Plaintiff succeed or every fact which if denied, the plaintiff must prove in order to obtain a judgment. **See; Cooke vs Gull LR 8 E.P 116, Read v Brown 22 QBD P.31).** It is disclosed when it is shown that the Plaintiff had a right, and that right was violated, resulting in damage and the defendant is liable. This position has been reiterated in the Supreme Court decision of **Tororo Cement Co. Ltd v Frokina International Limited SCCA No.2 of 2001.**

The question as to whether a Plaint discloses a cause of action must be determined upon perusal of the plaint alone together with anything attached so as to form part of it. **See; Kebirungi v Road Trainers Ltd & 2 others [2008] HCB 72, Kapeka Coffee Works Ltd v NPART CACA No. 3 of 2000.**

In the head suit paragraph 6 of the amended plaint, the Plaintiffs instituted the suit for a declaration that the land comprised in Plot No. 3 Block 408 land at Sisa belongs to the estate of the Late Festo and that the Defendants fraudulently converted and subdivided the same into Freehold titles. By these averments alone, the Plaintiffs are asserting a right which they claim was violated by the fraudulent acts of the Defendants in the head suit. A cause of action therefore exists.

It is apparent that the Applicants, despite being manifestly alive to the fact the preliminary objections raised in this application have previously been addressed by this court in Miscellaneous Application No. 2202 of 2021 and Miscellaneous Application No. 1040 of 2022, have yet again opted to maliciously abuse court process. **Section 98 CPA of the Civil Procedure Act** which vests this court with inherent power also enjoins it, *inter alia*, to curtail abuse of court process. Similarly, **Section 33 Judicature Act** empowers court in its administration of justice to, as much as possible, avoid multiplicity of suits.

In **Attorney General vs. James Mark Kamoga & A'nor, SCCA No. 8 of 2004**, Mulenga JSC (R.I.P) in the lead judgment concurred with the definition of "abuse of court process" as proffered by authors of **Black's Law Dictionary (6th Ed)** and held that;

"Abuse of court process involves the use of the process for an improper purpose or a purpose for which the process was not established."

The learned Justice went further to state that;

"A malicious abuse of legal process occurs when the party employs it for some unlawful object, not the purpose which it is intended by law to effect; in other words, a perversion of it."

It is my considered opinion that one such abuse of court process lies in maliciously raising questions for court's determination, well aware that such issues have previously been directly or substantially determined. Certainly, Advocates must be apportioned the blame for negligence or egregious misconduct. In the case of **Kamurasi Charles v. Accord Properties Ltd. and another, S. C. Civil Appeal No. 3 of 1996**, the Supreme Court dismissed an appeal against an order striking out the plaint between the applicant and the respondents for abuse of the process of the Court and ordering that Counsel for the appellant in that case, to personally pay the costs in the suit. Counsel for the appellant had filed two suits in the High Court, each naming two different sets of defendants. The advocate was found to have indulged in deception and abuse of court process.

In this case, I am only restrained from condemning Counsel for the Applicants to costs personally because the issue of Counsel for the Applicants paying costs personally was not specifically raised by the Respondents to enable Court accord them an opportunity to be heard on the same. Although counsel's conduct in the instant case appears to be blame-worthy, justice demands that they should not be condemned to costs personally without being

heard on the issue. See, *Abraham v. Justin*, [1963] 2 ALL.E.R.402, and *J.B. Kohli and others v. Bachulal Popallac* [1964] E.A 219). However, Counsel for the Applicants are warned to desist from maliciously abusing court process. Counsel for all parties in the case should focus their attention on prosecuting the main case to its logical conclusion.

In the whole, this application is disdainfully dismissed for being an abuse of court process. I shall not order for costs against the applicants as this is the fault of Counsel.

Dated at Kampala this th14 day of February 2023



Flavian Zeija (PhD)

PRINCIPAL JUDGE

