

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

MISCELLANEOUS CAUSE NO. 84 OF 2010

KHALID YOUNIS KINENE.....APPLICANT

VERSUS

EDISA NABAWANUKA.....RESPONDENT

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This is an application by notice of motion brought under section 98 of the Civil Procedure Act, section 33 of the Judicature Act, and Order 52 rules 1 & 2 of the Civil Procedure Rules for orders that:-

1. The Respondent transfers two acres of land formerly comprised in Kibuga Block 21 plot 54 currently plots 960, 961 and 962.
2. Costs be provided for.

The grounds of the application are contained in the affidavit of the Applicant which are briefly that:-

- a) The Applicant was decreed the owner of two acres of land under his possession since 1941.
- b) The two acres are already sub divided from the Respondent's residual title and are 960, 961, and 962 all measuring two acres.
- c) It is just and equitable that the two acres be vested in the Applicant.

The Respondent did not file any affidavit in reply though she was served several times, the last one being by substituted service in the Monitor Newspaper of 28th October 2011. There is an affidavit of service to that effect on the court record, together with a photocopy of the page of the said newspaper. The Respondent did not attend the hearing either when the application was called for hearing. The matter proceeded *ex parte* and Counsel for the Applicant was requested to file written submissions.

In his written submissions, learned Counsel for the Applicant relied on the supporting affidavit of **Khalid Younis Kinene** the Applicant. The Applicant avers in his supporting affidavit that that he is the administrator of the estate of Yusufu Tebukoza (deceased) , formerly of Kabale Busega, Kampala district while the Respondent is the administrator of the estate of Ignatio Sekiro (deceased who was the Defendant in Mengo Chief Magistrate's Court Civil Suit No. 1213 of 2008. In a memorandum dated 3rd February 1942, Ignatio Sekiro (the Respondent's father) transferred and handed over possession of the suit land, consisting of two acres and a house, to Yusuf Tebukoza (the Applicant's father) who subsequently lodged a caveat on the land. Yusuf Tebukoza entered and remained on the said land until his death on 30th August 2003 leaving his family on the land. Unfortunately, Ignatio Sekiro died before

effecting a formal transfer of the land into Yusufu Tebukozza's names. The Applicant approached the Respondent about effecting a formal transfer of the suit land and removed the caveat whereupon she signed mutation forms for sub division of the two acres from the residual estate of Ignatio Sekiro. After that the Respondent sub divided off the two acres vide Kibuga Block 21 plots 960, 961 and 962 but the Respondent refused to sign the transfer forms. Instead she demanded fresh payment, yet there was no balance owing. The Applicant sued the Respondent for orders compelling her to transfer the land into his names and the matter was decided in the Applicant's favour. He requests this court to require the Commissioner Land Registration to transfer the suit land into his names as decreed by court in Civil Suit No. 1213 of 2008.

I have perused the court record as well as the application and its supporting affidavit.

On the issue of not filing a defence, in this case, an affidavit in reply to the application and its supporting affidavit, order 9 rule 11(2) of the Civil Procedure Rules (CPR) provides that where the time allowed for filing a defence has expired and the Defendant has failed to file his or her defence the Plaintiff may set down the suit for hearing *ex parte*.

There are court decisions to the effect that in such circumstances, the Defendant will not be allowed to participate in the proceedings though he or she may be present in court. In **Kubibaire V Kakwenzire [1977] HCB 37** court held that since the Appellants had been served with summons and failed to enter appearance, they had by that failure put themselves out of court and had no *locus standi*. Also see **Musoke V Kaye [1976] HCB 171**. This was the reason the case proceeded *ex parte*. However, whether a case proceeds *ex parte* or not, the burden of the Applicant to prove his or her case on the balance of probabilities remain.

The Applicant's affidavit was not challenged by the Respondent since she did not file any affidavit in reply. However, though the affidavit makes averments purportedly supported by annexures, no such annexures are on the court record. Paragraph 2 of the supporting affidavit mentions a copy of a caveat, memorandum and agreement as being annexed to the affidavit as **A, B** and **C**. Paragraph 5 mentions mutation forms for sub divisions of the two acres of the residual estate of Ignatio Sekito as being annexed as **D**. All the said documents are not annexed to the affidavit contrary to what the affidavit is averring. Secondly, paragraph 8 of the affidavit avers that the Applicant requires the Commissioner for Land Registration to transfer the suit land into his names as decreed by court in civil suit no. 1213 of 2008. A copy of the said judgment was not annexed to the affidavit.

I stated above that whether a case proceeds *ex parte* or not, the burden of the Applicant to prove his or her case on the balance of probabilities remain. In this case, the Applicant has not annexed the documents he avers to be annexed to his supporting affidavit. He also did not include a copy of the judgment in civil suit no. 1213 of 2008 which he uses as a basis to pray that the suit land be transferred in his names. Instead the Applicant's learned Counsel submitted from the Bar that Mengo Chief Magistrate's court determined the suit in the Applicant's favour. The prayers he is making are serious prayers involving transfer of real property namely two acres of land formerly comprised in Kibuga Block 21 plot 54 currently plots 960, 961 and 962 into his names by way of vesting order.

In the premises, and for the foregoing reasons, I am not satisfied that the Applicant has proved his case on the balance of probabilities. I accordingly dismiss this application. There will be no order as to costs.

Dated at Kampala this 21st day of December 2011.

Percy Night Tuhaise

JUDGE.