

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION

REVISION CAUSE NO. 05 OF 2012

NALWOGA GLADYS.....APPLICANT

VERSUS

- 1. EDCO LIMITED**
- 2. GEORGE RAGUI KAMONI**
- 3. GABRIEL MUSISI.....RESPONDENTS**

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This as an application by notice of motion brought under sections 83(a), (b) & (c) and 98 of the Civil Procedure Act, section 33 of the Judicature Act, and Order 52 rules 1 & 2 of the Civil Procedure Rules (CPR) for orders that :-

- a) Judgment in civil suit no. 384 of 2008 of the Chief Magistrate's court of Entebbe at Entebbe be revised and set aside.
- b) An order for stay of execution of civil suit no. 384 of 2008 and of High Court Miscellaneous Application No. 17 of 2011 be set aside.

The application is supported by the affidavit of **Nalwoga Gladys** the applicant. It is opposed by the respondents who filed affidavits in reply by **Joseph Musoke** Local Council (LC) 1 Chairman, Katabi sub county, Busiro, Wakiso, and **Patrick Tumwine**, the 1st respondent's Director. Counsel filed written submissions on the matter.

The applicant's case as deduced from her affidavit evidence, which also reflects the grounds of the application, is that the trial magistrate exercised a jurisdiction not vested in her in law; that the trial magistrate failed to properly exercise jurisdiction vested in her; and that the trial court acted in exercise of its jurisdiction with material irregularity and/or injustice. She also avers that she is a daughter and beneficiary of the late Micheal Weraga who was a resident on the kibanja comprised in Busiro Block 452 Plot 27 at Ntambo, the subject matter in civil suit no. 384 of 2008; that she is in physical possession of the suit land with a residential house on it; and that she was surprised to learn that the respondents were in advanced stages to evict her and her family from the suit land on the basis of civil suit no. 384 of 2008 in disregard of her physical

occupation and presence on the suit land and in disregard of her interest as a beneficiary of the estate of the late Michael Weraga. She further avers that the said estate has to date never been distributed nor a grant of the same issued; that she has never in any way transacted with the respondents concerning the suit kibanja; that her presence on the land was disregarded; that her interest and use of the kibanja was affected by the judgment.; that she was not a party to the said suit; that if the judgment is not revised or set aside but is executed it would tantamount to the applicant being condemned unheard regarding the ownership of the said land; and that the value of the subject matter in civil suit no. 384 of 2008 was above the jurisdiction of court.

In their written submissions, learned Counsel for the 1st and 2nd respondents raised a point of law that the applicant's supporting affidavit contains a falsehood. This was denied by the respondent and her Counsel submitted in rejoinder that there was no such falsehood.

I will first address the point of law raised by Counsel for the 1st and 2nd respondent that the applicant's supporting affidavit contains a falsehood. The respondents' Counsel referred to paragraph 5 of the applicant's supporting affidavit where the applicant avers that she is in physical possession of the suit land and has a residential house on the said land. He submitted that this was false as the affidavit in reply of Joseph Musoke the LC 1 Chairman is that the applicant is not and has never been in physical possession or occupation of the suit land or any part of it or on the late Michael Weraga's kibanja. He submitted that this evidence was not rebutted by any affidavit in rejoinder, and that the applicant's averment in her affidavit in rejoinder that the respondent admitted to the applicant's occupation of two acres is false as there is no such admission by either the 1st or the 2nd respondent. Counsel for the applicant submitted in rejoinder that the applicant's affidavit evidence and its annexures show that the family of the late Weraga is occupying 17.93 acres of the suit land. He referred to paragraph 11 of Joseph Musoke's affidavit in reply which avers that the relatives of the late Weraga are in physical possession of the land, and contended that the said LC 1 Chairman does not deny that the family of the late Weraga is indeed occupying the kibanja measuring about 17.93 acres.

I have carefully perused the affidavits referred to by both Counsel and addressed the submissions of both Counsel, including the law applicable in such situations.

The applicant in paragraph 6 of her affidavit supporting the application averred as follows:-

“That I am in physical possession of the suit land having thereon a residential house.”

The affidavit in reply by a one Joseph Musoke the LC 1 Chairman, Katabi sub county, Busiro, Wakiso, in paragraph 14, averred as follows:-

“That the applicant is not, and has not at any time before or after the death of Michael Weraga been, in physical possession or occupation of the suit land or any part thereof or of the late Michael Weraga's kibanja and does not have any structure, house,

development or plantation on the suit land or any part of it or on the late Michael Weraga's kibanja."

The applicant in paragraph 7 of her affidavit in rejoinder referred to some defence in previous suits on this matter which show the late Michael Weraga being in actual possession and use of the land. In paragraph 9 of the same affidavit in rejoinder, she averred that her occupation of two acres were admitted by the respondents in paragraph 12, 13 and 14 and that in law is occupation of all the 17.93 acres.

Other than suggesting that the late Wairaga was in actual possession of the land, the foregoing applicant's averments fall short of rebutting the affidavit evidence adduced by the respondents that she is not in possession/occupation of the land. However, the applicant avers that the respondents have admitted her occupation of the suit land in paragraphs 12, 13 and 14 of the 1st respondent's Director's affidavit in reply. The paragraphs state as follows:-

" 12. That the applicant has never been in physical possession or occupation of, and does not have any structure, house or other development or plantation on the suit land (save for the two acres of the late Weraga's kibanja).

13. That the applicant's interest, if any, is in the late Weraga's kibanja which the decree in civil suit no. 384 of 2008 expressly recognizes.

14. That the photographs annexed as A1 and A2 to the applicant's affidavit in support...do not represent any developments on the suit land (other than the two acres of the late Weraga's kibanja)."

I do not find anything like admitting the applicant's occupation of the suit land in the said paragraphs. If anything paragraph 12 of the said affidavit rebuts the applicant's averments that she is in occupation of the land, corroborating Joseph Musoke's affidavit evidence. Counsel for the applicant referred to paragraph 11 of Joseph Musoke's affidavit in reply which avers that the relatives of the late Weraga are in physical possession of the land. He submitted that this should infer that the applicant is in possession of it. He contended that the said LC 1 Chairman does not deny that the family of the late Weraga is indeed occupying the kibanja measuring about 17.93 acres.

Joseph Musoke did aver in paragraph 11 of his affidavit in reply that some family members were in occupation of the late Michael Weraga's kibanja, but categorically also averred in paragraph 14 that the applicant was not, and has never been in possession of the late Weraga's kibanja. It may perhaps be of importance to note that Joseph Musoke the LC 1 Chairman in the same affidavit, in paragraphs 2, 3, 4, 7, 9, 10, 11 & 13, also averred, among other things, that the late Weraga's kibanja is located in Bulenga/ Mbiru of which he has been Chairman since 1996 and resident since 1987; that he knows all the residents of Bulenga/Mbiru LC1; that following Michael Weraga's death, Kirize was installed as heir to Michael Weraga; that after the death of

Kirize the family of the late Wairaga met and appointed Gabriel Musisi to look after the late Weraga's kibanja and affairs in a meeting attended by Joseph Musoke; that since then the late Wairaga's kibanja has been looked after by Gabriel Musisi, as a non resident, and has been physically occupied by some relatives of the late Michael Weraga and Gabriel Musisi; and that the applicant is known to him as the daughter of the late Michael Weraga. This gives me the impression of a person who is knowledgeable about the suit land and circumstances surrounding it including who resides there. This makes his affidavit evidence more reliable.

The applicant was in position to rebut this in her affidavit in rejoinder, but she chose not to. Instead of re asserting her earlier averment of being in physical possession/occupation of the suit land which the respondents had rebutted in their affidavits in reply, she averred that the respondents had admitted to her occupation of the land in their affidavits in reply, which I did not find to be the case. For the said reasons, I do not accept the argument by learned Counsel for the applicant that since the respondents' affidavit evidence was that some family members occupied the late Weraga's kibanja, the applicant also did because she is a family member of the late Weraga. The fact of some family members of the late Weraga being in occupation of his kibanja does not necessarily mean that the applicant as a family member was also in possession of the kibanja, more so in this case where there is unrebutted affidavit evidence that she in particular had never been in possession/occupation of it.

It is my finding therefore that the respondent's affidavit evidence has rebutted the applicant's averment that she is in possession of the suit property, and this has not been rebutted by the applicant's affidavit in rejoinder. This renders the applicant's supporting affidavit, particularly her averment that "*... I am in physical possession of the suit land having thereon a residential house.*" to be a falsehood.

In **Bitaitana V Kananura [1977] HCB 34** it is held that an application supported by a false affidavit is bound to fail because the applicant in such case does not go to court with clean hands and tell the truth. It has been held in various case decisions that affidavits are very serious documents, and once one contains some falsehoods in one part, the whole becomes suspect, and the application supported by such affidavits is bound to fail. See **Nathan Katamba V Stephen Kabigyema [2000] KALR 777; Joseph Mulenga V Photo Focus (U) Ltd [1996] VI KALR 19; Anthony Okello V Ojok B'leo & Ors Misc. Applic. No. 26 of 2006 arising from Election Petition No. 003 of 2006.**

Similarly, in the instant case, I find that the applicant's supporting affidavit contains falsehoods on the factor of her being in possession of the suit property. This makes the whole affidavit suspect. It is accordingly struck out. This leaves the Notice of Motion unsupported by any evidence. It cannot stand on its own without a supporting affidavit. It is accordingly dismissed with costs.

Dated at Kampala this 29th day of November 2012.

Percy Night Tuhaise

JUDGE.