

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

MISC. APPLICATION NO. 0140 OF 2018

(Arising from Civil Suit No. 0013 of 2018)

1. CHARLES SSEKUUMA KIGGUNDU
2. KYEYUNE HENRY
3. AMOS AGABA
4. ANGELO DAMULIRA
5. KASIFA NAMUSISI
6. BYAMUNGU LIBUYE BAHABA:.....:APPLICANTS
7. ABBAS KAZIBWE MUSISI
8. HENRIETTA KATABAIZIBWE
9. MARIA GORETTE MUSIMENTA
10. CYPRIAN KAIRUMBA KAGABA
11. MARIA KENJEYO MAKUNDA
12. MUHEEKI CONCEPTAR
13. MUSIIME JOSEPH
14. SEBADUKA SIRAJE

VERSUS

SSEMPIJJA MUWANGA JONATHAN:.....:RESPONDENTS

*(Administrator of the Estate of the  
Late Maria Nakaberenge)*

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

**RULING**

This is an application under O.26 r1 and 3 of the Civil Procedure Rules for orders that the Respondent furnishes security for costs estimated at shs. 200, 000,000/= only (*two hundred million*).

The Applicants prayed for costs of the application.

The Respondent, in the capacity of administrator, sued the Applicants vide Civil Suit No. 0013 of 2018 claiming for a declaration that the kibanja occupied by the Respondent belongs to the estate of the late Maria Nakaberenge, an eviction order against the Respondents, demolition

order against all structure on the said kibanja, a permanent injunction, general damages and costs of the suit.

The brief background of the dispute between the parties herein is that there was a dispute in 1992 between the 2<sup>nd</sup> Applicant and John Kaweesa (former administrator of the estate of the late Maria Nakaberenge) concerning land comprised in Mengo District, Kibuga county block 12 plot 542 (hereinafter the suit land) in the Chief Magistrate Court vide Civil Suit No.0103 of 1992. Upon a survey, Court established that block 12 Plot 542 had been subdivided in 1959 into 7 plots, that is; 810, 811, 812, 813, 814, 815, 816. Court then decreed that the land in Plots 811 and 812 belonged to the 2<sup>nd</sup> Applicant. No evidence was given to Court as to whether the land in other plots was occupied. Court was then convinced that the rest of the land belonged to John Kaweesa and hence, issued a warrant to give vacant possession in favor of the 2<sup>nd</sup> Applicant in respect to all the plots.

The warrant was successfully challenged in respect of plots 810, 813, 814, 815, 816 in an objector proceeding vide **MEN-00-CV-MA-Nos.0112/2000 & 0106/2000 arising from Civil Suit No.0103 of 1992** by the 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, and 11<sup>th</sup> Applicants who claimed to be in possession at the time of attachment and, as registered proprietors.

John Kaweesa's application to set aside the decree was dismissed. His appeal to the High Court was also dismissed.

Later in 2009, John Kaweesa (the former administrator of the Estate of the late Maria Nakaberenge) brought a suit in the High Court vide Civil Suit No. 179 of 2009 against the 1<sup>st</sup>, 2<sup>nd</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, Hajjati Nasula Juma and the Registrar Land Titles. In that suit, he claimed that the Defendants had fraudulently acquired the suit land (Block 12, Plot 542). According to the plaint in that suit, he stated that the late Maria Nakaberenge was registered as proprietor of the suit land in 1957 and that even before registration; the late had been paying Busuulu.

He further stated that he had settled on the suit land, with her late Auntie the late Maria Nakaberenge, in 1960 until 1992 when he was evicted by the 2<sup>nd</sup> Applicant upon a decree in Civil Suit No. 0103 of 1992.

This suit was dismissed for want of prosecution after the Plaintiff (John Kaweesa) disobeyed a Court order for the production of relevant documents.

In 2010, the Respondent herein (current administrator of the same estate) instituted a suit in the High Court vide Civil Suit No. 131 of 2010 against the 1<sup>st</sup> to the 13<sup>th</sup> Applicants and the Commissioner Land Registration in respect of the suit land. This was dismissed in 2010 on the ground of *res judicata*. The Respondent herein sought leave to appeal in HCMA No. 1631 of 2016 arising out of Civil Suit No. 131 of 2010 but this was denied.

The grounds of this application are that;

1. The Respondent and his late father John Kaweesa are administrators of the Estate of the late Nakaberenge who have instituted several High Court Civil Suits and several applications against the Applicants severally and jointly and lost all of them in favor of the Applicants with costs which are not yet paid. Consequently, the Applicants are unlikely to recover costs incurred in defence of this suit.
2. The filed civil suit No. 0013 of 2018 is time barred, *res judicata* and, intended to waste Court's time as all the presented grounds were adjudicated upon and determined.
3. That the Applicants are being put to an undue expense of defending a *frivolous* and *vexatious* suit.
4. The Applicants have a good defence to the suit with a high likelihood of success.
5. The Applicants are bonafide purchasers for value without notice of fraud who are in possession of their respective land and with titles of mailo interest.
6. The Respondent's source of income is unknown by the Applicants and, therefore, unlikely to have the assets to satisfactorily discharge any order to pay costs, in the event that the Applicants succeed in their defence.

The 1<sup>st</sup> to the 13<sup>th</sup> Applicants filed an affidavit in support of the application, and in rejoinder, deponed by the 11<sup>th</sup> Applicant, through M/s. Tayebwa, Sserwadda & Co. Advocates.

The Respondent also deponed and filed an affidavit in reply through M/s. Kiwanuka & Co. Advocates.

Counsel for the Applicants submitted that the factors to consider in applications for security for costs are that the Applicants have been put to an undue expense of defending a *frivolous* and *vexatious* suit; that the Applicants have a good defence to the suit that is likely to succeed; and that mere poverty of the Applicant is not itself a ground for ordering for security for costs, but where there is a legitimate cause, Court has a discretion to grant security for costs. Counsel relied on *Namboro versus Kaala [1975] HCB 315.*

Counsel added that the Respondent has previously instituted suits involving the same parties, and has not paid costs in those suits yet he keeps instituting similar suits, in order to delay justice.

Counsel relied on *Order 26 r. 1 CPR* and the case of *GM Combined (U) Ltd versus A. K. Detergents (U) Ltd SCCA No. 34 of 1993* and submitted that this Court has discretion to determine the amount of security for costs. In this case, Counsel stressed that the source of income or assets of the Respondent are unknown to the Applicants and the Respondents appears to be a man of limited means.

Further, that the Respondents' suit, like the previous ones, is time barred, *res-judicata* and, frivolous and vexatious. He prayed that Court orders the Respondent to deposit not less than Ug. Shs. 200,000,000/- only (*two hundred million*) as security for costs.

Counsel for the Respondent in reply, submitted that the Applicants are merely speculating of the Respondents' inability to pay costs since there is no proof that the Respondent is a pauper or bankrupt. Counsel added that the Applicants have not commenced execution against the Respondent to determine whether he is incapable of paying costs and, that the Respondent want to use this Court as the Execution Court so that they can recover costs in the previous suits in this suit.

Counsel added, that if this Court orders payment of security for costs, it would contravene Article 126(2) (a) which provides that; *justice shall be done to all irrespective of their social and economic status* and Article 126(2)(e) which provides that; *justice shall be administered without undue regard to technicalities of the Constitution.*

Lastly, that the authorities cited by Counsel for the Respondents are distinguishable since those cases were decided on appeal.

I have had considered the submissions by both learned Counsel. I now wish to consider the merits of this application.

O.26 r1 of the Civil Procedure Rules gives Court discretionary powers to order payment of security for costs where it deems it fit to do so. **Ssekandi Ag. J., in Anthony Namboro and Anor versus Henry Kaala [1975] HCB 315** held that the main considerations to be taken into account in an application for security for cost are;

- a) *Whether the Applicant is being put to undue expenses by defending a frivolous and vexatious suit;*
- b) *That he has a good defence to the suit which is likely to succeed.*  
*Only after these factors have been considered would factors like inability to pay come into account.*

**Oder JSC in G.M. Combined (U) Ltd v. A.K. Detergents (U) Ltd. C.A. No. 34 of 1995** considered the matter of security for costs extensively and concluded that;

*“In a nutshell, in my view, the Court must consider the prima facie case of both the Plaintiff and the Defendant. Since a trial will not yet have taken place at this stage, an assessment of the merit of the respective cases of the parties can only be based on the pleadings, on the affidavits filed in support of or in opposition to the application for security for costs and any other material available at this stage”.*

I will go forth to consider the prima facie case of both parties with such care as to avoid touching the merits of the main suit.

In the present case, the Applicants averred in paragraph 4, 5, and 9 of their affidavit in support of the application that the Respondent’s suit is time barred, *res-judicata* and intended to waste Courts’ time. They attached copies of the plaint in Civil Suit No.0013 of 2018, a ruling of this Court dismissing **Civil Suit No.179 of 2009 and Civil Suit No.131 of 2010.**

Under paragraph 4(a), (b) of their written statement of defence, they also contend that the suit is time barred since the Plaintiff is a successor in title to his father, the late John Kaweesa, who got letters of administration on the 30<sup>th</sup> January 2008. A copy of the said Letters of Administration was attached thereto.

They add under paragraph 6 of their affidavit in support, that the main suit is likely to be lengthy which will attract substantial costs of about Ugshs. 200, 000,000/- only (*two hundred million*). They attached a skeleton bill of cost in support of this deposition.

In respect to the second consideration; the Applicants deponed in paragraph 10 of their affidavit in support of the application that they have a good defence to the suit which is likely to succeed. They accordingly attached a copy of the written statement of defence. They attached copies of the plaint in Civil Suit No.179 of 2009, a ruling of this Court dismissing **Civil Suit No.179 of 2009 and Civil Suit No.131 of 2010 and a Ruling of the Chief Magistrate Court in MEN-00-CV-MA-Nos.0112/2000 & 0106/2000 arising from Civil Suit No.0103 of 1992.**

In reply to the Applicants' averments, the Respondent averred in paragraph 3 and 4 of his affidavit in reply that they (Respondent and his father, the late John Kaweesa) have instituted several suits against the Applicants which have been dismissed on technical grounds without going into the merits.

That notwithstanding, he added that the suit in Court is different from the previous ones. On this, he deponed under paragraph 5 that in the previous suits, they (the Respondent and his father) were misled by their lawyers to believe that their suit was related to legal title of the suit land. Under paragraph 6 of his affidavit, he avers that unlike the previous suits, the suit now before Court is based on a claim of a kibanja that was previously owned by the late Maria Nakaberenge and therefore, is not *frivolous* and *vexatious*. On the plaint, the Respondent attached copies of receipts of payment of Busuulu between the years 1955-1992 and other documents relating to the suit land.

Under paragraph 4(1) of the plaint, the Respondent contends that no action took place from the time of eviction of his father since no body had taken out Letters of Administration in respect of the late Maria Nakaberenge's estate.

I need to note that, in paragraph 4(g) of their written statement of defence, the Applicants contend that the receipts of payment of Busuulu and other documents attached to the plaint by the Respondent/Plaintiff are a forgery.

In view of the averments in the affidavits and claims asserted in the pleadings by both parties, it is clear from the plaint that, unlike the previous suits, that the Respondents' suit against the Applicants in the main suit is based on a claim of a kibanja on the suit land. It is also clear that the late John Kaweesa first became administrator of the estate of the late Maria Nakaberenge on the 30<sup>th</sup> of January 2008.

My observation is that it is difficult, at this point, to determine whether the Respondent's suit is *frivolous* and *vexatious*, on the ground of being *res judicata*, or time barred, without going into the merits of the main suit. It is more or less the same in respect of whether the Applicants' defence is likely to succeed since the Applicants' defence rotates around the principle of *res-judicata* and the law of limitation.

In my opinion, both the Applicants and the Respondent have a *prima facie* case.

I will next consider whether the Respondent will be unable to pay costs to the Applicants.

It is trite law that mere poverty of a Plaintiff is not by itself a ground for ordering security for costs. The rationale is that if this were so, poor litigants would be deterred from enforcing their legitimate rights through the legal process. See *Anthony Namboro and Anor versus Henry Kaala [1975] HCB 315.*

The Applicants averred in paragraph 8 of their affidavit in support of the application that the sources of income and assets of the Respondent are unknown to the Applicants. Accordingly, they averred that the Respondent is unlikely to pay costs. In reply to this averment, the Respondent deponed in paragraph 7 of his affidavit that the Applicants are merely speculative of his inability to pay cost.

It is now a settled proposition of law as held, by *Mulenga JSC.*, in *Bank of Uganda versus Joseph Nsereko & 2 Others Civil Application No. 7 of 2002*, that; *lack of knowledge on part of*

*the Applicant cannot amount to evidence of the Respondent's inability to pay costs. The learned Justice of the Supreme Court linked this to 'a fishing expedition, namely putting in the application as a challenge to the Respondent to disclose their 'whereabouts' and value of their assets, if any.'*

Basing on this authority, I find the Applicant's claim that the Respondents' will be unable to pay costs in this suit baseless. The Applicants have not shown any proof of the Respondents' inability to pay. Neither have they shown that their unsatisfied decrees are because of the fact that the Applicant has no assets to attach.

In conclusion, after consideration of the circumstances of this case, it is my finding that the application is not proved.

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Henry I. Kawesa

**JUDGE**

11/5/2018



11/5/2018

Mr. Sserwadda for Applicant.

Ms. Henrietta representing the Applicants

Mr. Kiwanuka Richard for Respondents.

Respondent present.

Clerk – Irene.

Court: Ruling delivered in chambers.

Before me.....

Samuel Emokor

DEPUTY REGISTRAR

11/05/2018