

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**  
**HCT – 01 – CV –MA – 0018 OF 2016**

**ERISA KAKYOMYA.....APPLICANT**

**VERSUS**

**1. MR. SAMWIRI SABIITI**

**2. MR. JOHN MWANGUHYA .....RESPONDENTS**

**3. MR. SOLOMON KAGORO**

**4. THE REGISTRAR OF TITLES**

**BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE.**

**RULING**

This is an application by Notice of Motion under **Sections 165, 167, 177 and 188** of the Registration of Titles Act, **Order 58 Rules 1 and 2** of the Civil Procedure Rules and **Section 98** of the Civil Procedure Act.

This Application is for the following orders;

1. That an order directing, commanding and compelling the 3<sup>rd</sup> Respondent to produce a Certificate of Title for FRV Block 39 Plot 9 Mwenge County for land known as Kisangi Tea Estate for mutation of 57 acres and transfer of the said acres to Erisa Kakyomya the Applicant herein in accordance with the surveyed cut off deed plan.
2. That a Vesting Order doth issue in respect of 57 acres of land comprised in FRV Block 39, Plot 9 Mwenge County, known as Kisanga Tea Estate which was sold to the Applicant by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents into the proprietorship of Mr. Erisa Kakyomya in accordance with the surveyed cut off deed plan.
3. That the proprietorship of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be cancelled and the land be vested with the Applicant.
4. The costs of the Application be provided for.

The Application is supported by the affidavit of Erisa Kakyoma and the grounds of the Application are;

1. That the Applicant is the owner of the subject land having bought it from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, equivalent to 57 acres on the 14<sup>th</sup> day of September 2011 and the whole purchase price was paid.
2. That the Applicant has since the 14<sup>th</sup> day of September 2011 taken possession of the subject land with the knowledge of the 1<sup>st</sup> – 3<sup>rd</sup> Respondents who are the registered

proprietors of FRV Block 39, Plot 9 Mwenge County, known as Kisangi Tea Estate, who have acquiesced to his entry.

3. That there has not been transfer of the subject land because the land title to FRV Block 39, Plot 9 Mwenge County, known as Kisangi Tea Estate is in the possession of the 3<sup>rd</sup> Respondent brother to the vendors whose whereabouts are unknown, the 3<sup>rd</sup> Respondent cannot easily be found and efforts to find him to do the transfer have been fruitless.
4. That the 4<sup>th</sup> Respondent wrote to the 3<sup>rd</sup> Respondent to produce the title for transfer and efforts have been fruitless.
5. That it is just and equitable that the application be granted.

Samwiri Sabiiti in his affidavit in reply did not oppose the application. He stated that he and the 2<sup>nd</sup> Respondent sold their interests as registered proprietors of land comprised in FRV Block 39, Plot 9 Mwenge County, known as Kisanga Tea Estate. That the Applicant took possession of the same however, there has been no transfer because the 3<sup>rd</sup> Respondent is in possession of the Certificate of Title.

The same was reiterated by John Mwanguhya in his affidavit in reply and did not oppose the Application.

The application was however opposed by Solomon Kagoro through his affidavit in reply and he stated that the land claimed by the Applicant is a portion of a larger land comprised in Mwenge Block 39 Plot No. 9 land at Kisangi registered in his name, together with the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and their other 3 siblings as tenants in common with specific but undivided portions. That the land claimed by the Applicant is still in possession of the registered proprietors under the care of Ms. Sylvia Rwabwogo. That no transfer or vesting order can be made to the Applicant of the alleged 57 acres out of the land held by the Respondents and other tenants in common the same not having been legally apportioned as the specific share of the said 1<sup>st</sup> and 2<sup>nd</sup> Respondents without the consent of the 3<sup>rd</sup> Respondent and other tenants in common.

Kabahweza Vicky, Ruth Mataama and Sylvia Rwabogo also swore affidavits in support of the 3<sup>rd</sup> Respondent's contestations.

Ruth Aliguma Ongom in rebuttal stated that the Applicant lawfully bought the land of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents who are proprietors with specific and distinct acreage on the Certificate of title. That the subject land was surveyed, apportioned and demarcated before and after the Applicant's purchase. That Sylvia Rwabogo has no interest in the subject land and is a trespasser. That the land the Applicant bought from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents has been surveyed off and curved out and only awaits transfer from the 3<sup>rd</sup> Respondent surrendering the title.

Counsel Joseph Muhumuza Kaahwa appeared for the Applicant and Counsel Cosma Kateeba for the Respondents. By consent both parties agreed to file written submissions.

In the instant case the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as registered proprietors and tenants in common of land comprised in FRV Block 39 Plot 9 land at Mwenje County all have distinct acreage on the Certificate of title but undivided as per the 3<sup>rd</sup> Respondents contestations.

Counsel for the Applicant submitted that the Applicant's complaint is the fact that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents sold their acreage to the Applicant but the 3<sup>rd</sup> Respondent has refused to avail the Certificate of title for mutation and execution of transfer. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents do not contest the orders sought by the Applicant and nor does the 3<sup>rd</sup> Respondent deny refusing to surrender and avail the Certificate of Title.

That the 3<sup>rd</sup> Respondent however, contests the validity of the sale between the Applicant and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, that the shares held by the deceased Charles Runyunyuzi should not have been sold by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in addition to theirs without the consent of the other proprietors.

Issues for determination

1. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents validly sold their 10.1 hectares and 10.1 hectares respectively to the Applicant?
2. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents validly sold part of their shares given to them vide memorandum of understanding date 8<sup>th</sup> September 2011 formerly belonging to Charles Runyunyuzi?
3. Whether the parties are entitled to the remedies and prayers sought?

#### **Resolution of issues:**

Counsel for the Respondents raised a preliminary point of law to the effect that **Section 167** of the Registration of Titles Act empowers the Registrar of Titles to handle Applications for vesting Order and make such orders upon proof of conditions set out in the provision by the Applicant to his/her satisfaction. That in the instant case the Applicant did not first submit himself to the jurisdiction of the Registrar before lodging this application in this Court. That the Applicant in his affidavit in support merely states that he was advised by the Registrar to obtain a Court Order. That the application is therefore, premature, incompetent, barred in law, an abuse of court process. That this Court lacks jurisdiction to handle this application and it should be struck out with costs.

**Section 167** of the Registration Act provides that;

*“If it is proved to the satisfaction of the registrar that land under this Act has been sold by the proprietor and the whole of the purchase money paid, and that the purchaser has or those claiming under the purchaser have entered and taken possession under the purchase, and that entry and possession have been acquiesced in by the vendor or his or her representatives, but that a transfer has never been executed by the vendor and cannot be obtained by reason that the vendor is dead or residing out of the jurisdiction or cannot be found, the registrar may make a vesting order in the premises and may include in the order a direction for the payment of such an additional fee in respect of assurance of title as he or she may think fit, and the registrar upon the payment of that additional fee, if any, shall effect*

*the registration directed to be made by section 166 in the case of the vesting orders mentioned there, and the effecting or the omission to effect that registration shall be attended by the same results as declared by section 166 in respect of the vesting orders mentioned there.”*

Counsel for the Respondent cited the case of **Ronald Oine versus Commissioner for Land Registration, High Court Misc. Cause No. 90 of 2013**, where it was stated that;

*“I must add that it ought to be a condition that the Application must be made to the Registrar/Commissioner for Lands Registration in the first instance...”*

In my opinion, true the Registrar of Titles has powers to hear Applications for Vesting Orders however, this Court also has unlimited jurisdiction and can entertain the same. Thus, it is not prejudicial to any of the parties if this Court determined this matter. This objection is therefore overruled. Let the application be heard on its merits and not be based on mere technicalities.

Secondly, Counsel for the Respondent stated that **Sections 165 and 177** of the Registration of Titles Act are in applicable in the instant case. That **Section 165** of the Registration of Titles Act deals with the Registrar’s powers to summon the proprietor, mortgagee... in respect of any transfer, lease or mortgage to appear and explain whereas **Section 177** on the power of the High Court to direct cancellation of the title only applies to cases where there is recovery of land from the registered proprietor which is not the case in the application.

I do agree with the above submission, **Sections 165 and 177** of the Registration of Titles Act are not applicable in the instant application.

**Issue 1: Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents validly sold their 10.1 hectares and 10.1 hectares respectively to the Applicant?**

Counsel for the Applicant submitted that under **Section 55** of the Registration of Title Act, a proprietor of land is entitled to receive a Certificate of Title to such land and **Section 59** of the same Act is to the effect that a Certificate of Title is conclusive evidence of ownership of such land.

In the instant case the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are registered proprietors to the suit land with 3 others. They each have distinct hectares on the suit land and are tenants in common but with undivided shares.

Counsel for the Applicant submitted that, each party is free to sell or transfer his share at will and does not need consent from the other co-tenants.

Counsel for the Applicant further noted that the position under tenants in common is that there is no right of survivorship and a tenancy in common can be severed or come to end through or by way of sale, transfer and partition. That in the circumstances the contestations of the 3<sup>rd</sup> Respondent and the other tenants are wrong, misguided and contrary to **Article 26** of the Constitution of the Republic of Uganda, 1995 and are untenable.

That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents validly sold their shares and the 3<sup>rd</sup> Respondent's refusal to produce the certificate of title to the 4<sup>th</sup> Respondent for the purposes of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' completion of their transaction in favour of the Applicant is contrary to **Section 165** of the Registration of Titles Act.

Counsel for the Respondents on the other hand laid out the grounds for vesting orders as per **Section 167** of the Registration of Titles Act and these are;

- a. That land under this Act has been sold by the proprietor;
- b. The whole of the purchase money paid;
- c. That the purchaser has or those claiming under the purchaser have entered and taken possession under the purchase;
- d. That that entry and possession have been acquiesced in by the vendor or his or her representatives;
- e. That a transfer has never been executed by the vendor;
- f. The transfer cannot be obtained by reason that the vendor is dead or residing out of the jurisdiction or cannot be found.

Counsel for the Respondents submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have distinct shares as tenants in common but they are undivided and none of the tenants can identify their share physically for purposes of possession or sell. That a physical subdivision or partition of the said land has to be done by all the co-owners.

Counsel for the Respondent went on to cite the case of **East African General Insurance Company Ltd versus E. Ntende and 5 Others (1979)HCB 27**, where it was held that;

*“Tenants in Common hold in undivided shares but they have quite separate interests and the only fact which brings them into co-ownership is that they both have shares in a single property which has not yet been divided among them.”*

Counsel Kateeba noted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents could validly sell their shares from the land that had not been distributed with specified shares but could not grant possession that is exclusive of the other co-owners who had not joined the sale.

In the case of **Mutual Benefits Ltd versus Patel and Another [1972]1EA 496**, it was held that;

*“Mr Guatama submitted that a tenant in common of land has authority to make agreements for leases binding his co-owners. He could cite no authority for this submission and I have no hesitation in rejecting it. It is of the essence of tenancy in common that owners can deal with the title to their shares but that possession is common to them and cannot be granted by one alone.”*

Counsel for the Respondent also pointed out that the Applicant is not in actual possession of the suit land but rather Sylvia Rwabogo, the caretaker. That the Applicant's allegations of entering and surveying the land were therefore unauthorized and amounted to trespass and not possession.

Further, that the Applicant committed an illegality when he demarcated the suit land without the consent of the other tenants. That it is common practice that for the land by tenants in common or more than one proprietors to be sub-divided, the said proprietors must prior to the survey sign mutation forms for the buyer or a co-owner who intends to partition and take his/her share.

This court cannot turn a blind eye to that, basing on the principle in **Makula International Ltd versus His Eminence Cardinal Nsubuga & Another [1982] HCB 11** that a court of law cannot sanction what is illegal and illegality once brought to its attention overrides all questions of pleading, including any admissions made. Thus, the Applicant had no right to enter the suit property and demarcate the land purchased without the consent of the other tenants.

In my opinion, it is indeed true that tenants in common can sell their shares on the suit land. However, possession by the Applicant is only possible if the distinct shares have been divided and partitioned to the respective owners. Therefore, the Applicant ought to first obtain consent from all the tenants in order to determine where exactly the portion of land he bought is because the land as is, is undivided and none of the tenants can physically point out their distinct share. Though the 1<sup>st</sup> and 2<sup>nd</sup> Respondent validly sold their shares, the same cannot be transferred without the consent of the other tenants in common.

**Issue 2: Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents validly sold part of their shares given to them vide memorandum of understanding date 8<sup>th</sup> September 2011 formerly belonging to Charles Runyunyuzi?**

Counsel for the Applicant submitted that Charles Runyunyuzi died intestate and held 14.2 Hectares and on 20<sup>th</sup> September 2011 a memorandum of understanding was entered into by the surviving proprietors save for the 3<sup>rd</sup> Respondent. The shares of the late Charles were divided and shared out from which the 1<sup>st</sup> and 2<sup>nd</sup> Respondents sold 12 Hectares to the Applicant. Thus, the sale was valid backed by the memorandum of understanding and their shares were derived therefrom and not from the letters of Administration but from the biological blood relationship.

Counsel for the Respondents on the other hand submitted that an illegality was committed in respect of the distribution of unascertained portions where the 1<sup>st</sup> and 2<sup>nd</sup> Respondents together with other persons agreed to distribute the late Charles Runyunyuzi's share without his legal representative a one Antenetwa Tibesigwa. That this Court therefore cannot condone such illegality once brought to its attention.

Further that the law prohibits dealing with the deceased's estate without either a grant of probate or Letters of Administration.

In the case of **Prof. Gordon Wavamuno versus Sekyanzi Sempijja, High Court Civil Appeal No. 27 of 2010** where it was held;

*“A person who has no Letters of Administration cannot deal in the estate of the deceased person.”*

Thus, the memorandum of understanding was an illegality as a biological relationship per se cannot create a beneficial interest in the estate of an estate of an intestate as argued by Counsel for the Applicant. That in the circumstances the registered proprietors did not sell the land in issue.

I do agree with the submission of Counsel for the Respondents. In common tenancy there is no right of survivorship, thus, the share of the deceased tenant is passed through a will or intestacy. In the instant case the shares of Charles Runyunyuzi was passed on to his legal representative and could not be passed on by blood line. The memorandum of understanding that was made by some of the tenants and leaving out the 3<sup>rd</sup> Respondent and the legal representative of the deceased was illegal. This Court cannot uphold this illegality and the shares of the deceased cannot be dealt with without Letters of Administration.

Therefore, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not validly sell part of their shares given to them vide an illegal memorandum of understanding dated 8<sup>th</sup> September 2011 formerly belonging to Charles Runyunyuzi.

### **Issue 3: Whether the parties are entitled to the remedies and prayers sought?**

The Applicant prayed for;

1. An order directing, commanding and compelling the 3<sup>rd</sup> Respondent to produce a certificate of title for FRV Block 39 Plot 9 Mwenge County for land known A Kisangi Tea Estate for mutation of 57 acres and transfer of the said acres to Erisa Kakyomya the Applicant herein in accordance with the surveyed cut off deed plan.

Counsel for the Applicant submitted that this order is tenable and appropriate because the owners of the land sold it and want it transferred to the Applicant. A survey, subdivision and partition were done awaiting production of the Certificate of title by the 3<sup>rd</sup> Respondent to the 4<sup>th</sup> Respondent. The 3<sup>rd</sup> Respondent has not denied failure to produce the title to the 4<sup>th</sup> Respondent and this Court is empowered to order the 3<sup>rd</sup> Respondent to produce the Certificate of Title to the 4<sup>th</sup> Respondent for the purpose sought by the Applicant.

Be as it may that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents sold their shares validly, the two need to obtain the consent and indulgence of the other tenants in common since there is need to subdivide the land and each party be given their distinct shares physically. Until then this Court cannot order the 3<sup>rd</sup> Respondent to surrender the Certificate of Title for purposes of transferring the suit land.

2. A vesting Order doth issue in respect of 57 acres of land comprised in FRV Block 39, Plot 9 Mwenge County, Known as Kisanga Tea Estate which was sold to the Applicant by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents into the proprietorship of Mr. Erisa Kakyomya in accordance with the surveyed cut off the deed plan.

The Applicant surveyed it and entered the land only the 3<sup>rd</sup> Respondent has refused to avail the Certificate of Title so that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents can effect the transfer to the Applicant.

The Applicant entered on the suit land to survey without the consent of the other tenants and this was illegal. As per the Respondents, it is not true that the Applicant is in possession of the suit land, which am inclined to believe because there was no meeting of the minds in regard to the survey and apportioning of shares on the land physically.

3. That the proprietorship of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in FRV Block 39, Plot 9 Mwenge County, known as Kisanga Tea Estate be cancelled and the land be vested with the Applicant.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents sold their shares in the land and no longer have any interest in the same. Therefore, their proprietorship can be cancelled in favour of the Applicant.

True the proprietorship of the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents ought to be cancelled but only after the consent and subdivision of the shares of the said land to each of the tenants in common.

4. The costs of the Application be provided for.

Counsel for the Respondent in conclusion stated that the Applicant did not fulfil the conditions for the issue of a vesting order as applied for and thus the application should be dismissed.

In a nut shell, from the submissions of both counsel and the evidence adduced by way of affidavit, I find that this application is premature and lacks merit. The Applicant needs to go back on ground and ensure that the other tenants in common are part of the transaction in order for him to properly and legally have his purchased shares transferred to him. Though the 1<sup>st</sup> and 2<sup>nd</sup> Respondents do have distinct shares and validly sold, they cannot pass on the same without the consent and involvement of the other tenants because they all have interest in one piece of land that is physically undivided.

This application is therefore dismissed with costs to the 3<sup>rd</sup> Respondent.

Right of appeal explained.

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**OYUKO ANTHONY OJOK**

**JUDGE**

**23/03/2017**

Judgment read and delivered in open Court in the presence of;

1. Counsel Bwiruka Richard for the Applicant.
2. Counsel Kosma Kateeba for the Respondents.



3. James – Court Clerk.
4. 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> Respondent.

In the absence of the Applicant.

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**OYUKO ANTHONY OJOK**

**JUDGE**

**23/03/2017**