

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA
(COMMERCIAL COURT DIVISION)**

HCT - 00 - CC - MA - 627 - 2007
(Arising from Civil Suit No. 711 of 2007)

- 1. **MARY NYAMUSANA**
 - 2. **CHRISTINE N. KUNUNKA**
 - 3. **IMARA JIMMY KUNUNKA**
- } **APPLICANTS**

VERSUS

- 1. **NTANGANDA EMPHRAIM**
 - 2. **JACKSON MUGISA KUNUNKA**
- } **RESPONDENTS**

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

R U L I N G:

This is an application under Order 22 rules 55 and 56; Order 52 rules 1 and 2 to set aside a warrant of vacant possession and that the judgment in Civil Suit No. 711 of 2007 also be set aside.

The Applicants were not parties to the main suit that was brought against their relative (son and brother) the second Respondent. The first Applicant is a sister and co-Administrator with the Respondent of

the suit property. The second Applicant is the mother of the second Respondent while the third Applicant is a customary heir and brother to the second Respondent.

The Applicants contest the disposal of land comprised in Block 3 Kibuga, Plot 821, Makerere Mengo Kyadondo by the second Respondent without their consent or the consent of other beneficiaries of the Estate of the late Dr. Barnabas N. Kununka. The alleged disposal actually resulted from a summary suit brought by the first Respondent against the second Respondent which was not contested. The first Respondent in the summary suit sought to recover the suit land which he had bought from the second Respondent. The second Respondent then sold the land to M/S Phoenix Petroleum (U) Ltd.

The Applicants swore several affidavits. The case for the Applicants as deponed by the second Applicant (the widow) in her affidavit dated 2nd October 2007 is that the said sale of the suit land was fraudulent. She depones that she and other beneficiaries of the estate are in possession and occupation of the suit land.

The first Respondent in reply deponed that he had bought the suit property from the second Respondent at Ushs.190,000,000/=. The first

Respondent further depones that the second Respondent refused to vacate the suit property when he had been fully paid which led to the legal action to evict him. The first Respondent accordingly depones that the current application has been overtaken by events and is superfluous.

Mr. A. Wabwire appeared for the Applicants while Mr. I. Tareemwa appeared for the Respondents.

The Applicants in their application seek to object to a warrant to give vacant possession against the second Respondent.

Applications under Order 22 rules 55 and 56 are in the form of an objection proceeding that are investigated by the court.

In the case of **Haider Somani V Najbu Mubiru & Anor** MA 234 of 2005 (unreported)

I held that based on legal authorities there are two basic tests that must be met in such an application.

The first is whether at the time of attachment it was the Judgment Debtor or the Objector who was in possession of the suit property. Secondly, if the objector was in possession, then whether the Objector

held the property on his own account or in trust for the Judgment Debtor or some other person.

In this particular case the Judgment Debtor who is also the second Respondent has continuously remained silent. He did not contest the main suit and did not file an affidavit in reply in this application. It must be assumed that the second Respondent does not contest what is going on.

The suit property is part of what was the Estate of the late Dr. Barnabas N. Kununka. Annex 'A' to the affidavit in support of the motion by the second Applicant is The Will of the late Dr. Barnabas N. Kununka. A review of The Will at page 3 para 6(v) reads as follows

"...I give and bequeath to Jackson Mugisa Kununka my house situated at Kisenyi Plot No. 589 and my house at Makerere Plot 231..." (emphasis mine)

Annexure 'A' to the affidavit of Mr. Abdul Karim Ali the Managing Director of M/S Phoenix Petroleum (U) Ltd is a copy of a land title that shows that Plot 821 which is the subject of this application, was carved out of the original Plot 231 that was bequeathed to the second Respondent.

This is evidence that the suit property belongs to the second Respondent. This seems to be corroborated by minutes of the Kununka family attached to the supplementary affidavit of the second Applicant (the widow) dated 24th October 2007. The family maintains elaborate minutes of their meetings which is commendable. In that meeting the third Applicant reports at page 6 that the second Applicant recognizes that the house at Makerere belongs to the second Respondent according to The Will of their late father.

It is also clear that this was one of the reasons why the family allowed the second Respondent to have the title deed of the property. In another set of minutes dated 16th February 2006 at page 3 the third Applicant is reported as asking other members of the family to exchange some of their land with the second Respondent so that he may not sell the suit property. This is further recognition that the suit property now belonged to the second Respondent.

Now given that background it is important to establish who was in possession at the time of the eviction. The second Applicant deponed by affidavit that the beneficiaries to the Estate and herself were the people in possession and occupation of the suit land. This contradicts sharply with the affidavit of the first Applicant dated 10th September 2007 where she at paragraph 11 depones

“...That the second Respondent ordinarily resides at the suit land vide Block 3, Plot 821 together with his children...”

The court record shows that the court bailiffs M/S Armstrong Auctioneers on the 7th September, 2007 filed a return on a warrant to evict none other than the second Respondent from the suit property. Furthermore the family minutes of the 12th February 2006 at page 6 show that the second Applicant was complaining that if the suit property was sold *“...she will... have no place to sleep when she comes to Kampala for treatment...”*

The evidence on record shows that the other beneficiaries including the first and third Applicants are grown up with their own homes and other properties bequeathed to them by their late father. Their mother (the second Applicant) stays at their *“principle home”* at Kikande – Masindi.

As to the first test I therefore find that the Applicants are not in possession of the suit property. That being so this application must fail on the first test alone.

It is understandable that, the Applicants attach great emotional significance to the suit property for historical reasons. That does not present a legal basis for court to vacate the warrant. The suit property

was bequeathed to their son/brother the second Respondent with no limitations as to how he should deal with it. I suppose that is why the second Respondent has not contested this motion.

In the circumstances I dismiss this motion with costs.

Geoffrey Kiryabwire

JUDGE

Date: 11/03/08

RULING