

HON. MR. JUSTICE TSEKOOKO.

O 19 Rule 55

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE.

HIGH COURT CIVIL SUIT NO. 38/1988

HAJI ABUBAKAR KASAWULI PLAINTIFF

VERSUS

BOB ASQUIRE DUMBA DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE S.G. ENGWAU.

R U L I N G:

The application is under O.19 r. 55 (1) C.P.R. and O.48 rr 1 and 2 C.P.R. and section 101 of the Civil Procedure Act by the Administrator General as the administrator of the property and credits of the estate of the late Bob Asquire Dumba. 5

It is for an order to set aside the decree in H.C.C.S. No. 38 of 1988 and also to set aside an order of attachment thereto in regard to the house of Bob Asquire Dumba (deceased) at Namunsi, Nakaloke in Mbale District.

The grounds of the application are:- 10

- (a) THAT, the above suit was instituted after the death of the defendant.
- (b) THAT, the Administrator General is the administrator of the property and credits of the defendant; and
- (c) THAT, the Administrator General who is the legal administrator of the suit property and credits was not aware of the suit nor was he served with any Complaint or Claim against the estate of the deceased defendant. 15

The above grounds of this application are supported by the affidavit of one Sarah Dumba, one of the widows and also by the affidavit of one Christopher Madama for the Administrator General/ objector. 20

In paragraph 2 of Sarah Dumba's affidavit, she last saw the deceased about June, in 1987. In paragraph 3, the deceased was taken in the vehicle of the respondent/plaintiff. Paragraph 4, the Administrator General is the administrator of the estate and credits under High Court Administration Cause No. 178 of 1988. In paragraph 5, it was the R.Cs who informed her that the respondent was about to sell the suit property and as a result, in paragraph 6, she promptly reported the matter to the D.E.S., Mbale who in turn notified the Administrator General as his agent. However, she is not aware of any suit between the respondent and the deceased defendant. 30

In Madama's affidavit at paragraph 2, he received a report of the death of Dumba in June, 1988. Rosemin Dumba, another widow, provided the Death Certificate (Annexure "A"), showing that Dumba died on 29.12.87.

The Administrator General instituted a suit against Rosemin Dumba for revocation of Letters of Administration granted to her vide H.C.C.S. No. 1169 of 1988 and the said letters were revoked by consent and judgment was entered on 24.6.92. The Administration of the estate therefore vested in the Administrator General henceforth. It is the contention of the learned Counsel for the applicant that the original suit cannot stand against the deceased. Dawson Bradford Ltd., & others Vs. Dove & Another (1971) 1 Q.B.330.

Under section 190 of the Succession Act, CAP. 139, it is only the Administrator who can sue or be sued as no right to the intestate property can be proved in any court without grant of Letters of Administration. Even if the suit survived death under section 13 (3) and (4) of the Law Reform (Miscellaneous Provisions) Act, Cap. 74, the learned Counsel argues that the suit all the same is against or by the personal representative of the deceased. Under section 179 of the Succession Act, all the property of the deceased vests in the personal representative to hold in trust for the beneficiaries. But under section 191 Succession Act, property vests in the administrator as effectually as from the date of the deceased's death. Therefore under O.28 rr 1 & 2 C.P.R., suits against estates are against administrators or executors.

In the instant case, the suit was filed on 28.9.88 by that time the deceased had already died as he died on 28.12.87, about 7 months later. The suit was brought under O.33 rr 1 & 2 C.P.R., but under rule 3 of O.33, it is mandatory that the defendant be served. If the defendant is not available then substituted service would suffice. However, according to the affidavit of the respondent/plaintiff at paragraph 10, the decree was obtained on 8.11.88 after filing the suit but service was effected on the deceased's father. That being the case, actually no proper service was effected on the deceased defendant.

Court is to take judicial notice of the grant of Letters of Administration to Rosemin Dumba on 14.6.88 as proof that Dumba was dead about 3 months before institution of the suit. Under section 54 of the Evidence Act, no proof necessary of facts where the court takes judicial notice. Similarly judicial notice of the signature of Justice Manyindo on the said Letters of Administration be taken under section 55 (1) (7) Evidence Act.

It is therefore the prayer of the applicant that the suit be declared a nullity, the decree and Attachment Warrant be set aside and costs of this application be provided for.

The respondent's side of argument is that the application is misconceived and be dismissed with costs. Under O.19 r. 55 (1) C.P.R., the application is designedly delayed. The suit was instituted on 18.3.88. The father of the deceased defendant was served. Under O.5 r. 14 C.P.R., service on an adult member of the family of the defendant is an effective service as in the instant case.

On the above basis, the court took action and issued a decree on 8.11.88 and on 17.3.89 an Attachment Warrant was also issued. Rosemin Dumba was prompted on 20.4.89 to file two applications, one for substitution as Administratrix of the estate of the late Dumba and the other one is to set aside the decree.

It is the submission of the learned Counsel for the respondent that the alleged death of Dumba is fake for there is no seal on the said Death Certificate nor is there any postmortem report to accompany it. Under section 107 Evidence Act, a person is presumed dead after 7 years which is not the case in the instant case.

To set aside the execution of decree will occasion a miscarriage of justice and will amount to an abuse of court process. The applicant/defendant has no defence to the suit. The application be dismissed with costs and execution of the decree to proceed.

Having considered the submissions from both sides of the coin and also after strenuous scrutiny of the records available before me, it is hereby held:-

1. THAT, the suit was instituted in court on 28.9.88. Court process was served on one Juma Dumba said to be the father of the deceased defendant on 4.11.88 at Kacimonkoli Trading Centre, Kamonkoli Sub-County, Tororo District. Under O.5 r.14 C.P.R., where in any suit the defendant cannot be found, service may be made on an agent of the defendant empowered to accept service or on any adult member of the family of the defendant who is residing with him.

It is not established, however, that the said Juma Dumba was either an agent of the defendant empowered to accept service or that the said Juma Dumba was an adult member of the family of the defendant who was residing with him.

It is not sufficient that Juma Duma (father of the deceased) was found at the home of the defendant without proof that he (Juma Dumba) was residing with him (defendant) who was not at home at the material time.

- 2. THAT, the Death Certificate (Annexure "A") confirms that Bob Isquire Dumba died on 29.12.87. The suit was filed in court on 28.9.88, that is, 9 months after his death. It is trite law in the circumstances that he could not be sued and could not be served personally with court process and the suit is null and void.
- 3. THAT, the court issued the decree on 8.11.88 followed by an Attachment Warrant issued on 17.3.89, Since the suit is declared null and void, the decree therefrom and the Attachment Warrant which followed thereafter cannot stand. 10
- 4. THAT, under section 190 of the Succession Act, Cap. 139, it is the administrator who can sue or be sued as no right to the intestate property can be proved in any court without grant of Letters of Administration. In the instant case, Letters of Administration were duly granted to the Administrator General on 18.1.93 vide High Court Administration Case No. 178 of 1988 pursuant to the judgment on 24.6.92. 15
- 5. THAT, the Administrator General is the administrator of the property and credits of the deceased defendant, w.e.f. 24.6.92. He could not be aware nor could he be served with any Plaint against the estate of the defendant on or about 28.9.88.
- 6. THAT, Samco General Auctioneers on 8.3.93 did advertise the sale of the deceased's house to the highest bidder published in the New Vision on 11.2.93, at page 16. This application was filed in court on 8.2.93. Under O.19 r. 55 (1) C.P.R., the application is not designedly delayed taking into account the circumstances of the case.

In the end result, for reasons stated above, the suit is null and void. The decree and attachment warrant are both set aside. Each party to meet his own costs.

S.G. ENGWAU
JUDGE

10.6.93.

17.6.93: Both parties present.
Mr. Madama for applicant present.
Mr. Musiho for respondent present.
Ruling delivered in open court.

S.G. ENGWAU
JUDGE

17.6.93.