

**THE REPUBLIC OF UGANDA**  
**IN THE HIGHCOURT OF UGANDA**  
**MISCELLANEOUS APPLICATION NO 251 OF 2019**  
**ARISING FROM CIVIL SUIT NO 34 OF 2013**

**1. ROBINAH MUSUMBA**

**2. INTRA COMMODITIES LTD ::::::::::::::::::::; APPLICANTS**  
**VERSUS**

**NILE AGRO INDUSTRIES :::::::::::::::::::: RESPONDENT**

**BEFORE HON LADY JUSTICE FARIDAH SHAMILAH BUKIRWA NTAMBI**

**RULING ON PRELIMINARY OBJECTIONS**

**Introduction**

The Applicant filed this Application seeking for orders that;

- a. The impugned default judgement / decree vide Civil Suit No.34 of 2013 be declared erroneous, illegal, null and void and the same should be set aside.
- b. Execution of the impugned default judgement/ decree be stayed and/ or set aside;
- c. The Applicants be granted unconditional leave to appear and defend Civil Suit No.34 of 2013;
- d. Costs of this Application be provided for.

**Background**

The Plaintiff in Civil Suit 34 of 2013 entered into an agreement with the Intra Commodities Ltd and Martin Musumba (the Defendants) to store 476 metric tons of white cleaned and dried maize valued at 285,600,000/=. That however, without the consent of and notice of the Plaintiff, the Defendants sold the said maize to an unknown third party. The Defendants promised to refund the said maize or pay the said sum but this has been in vain.

**Applicant's Evidence**

The 1<sup>st</sup> Applicant led her evidence through an Affidavit in Support of the Application in which she stated that;

- a. She swears the Affidavit as the 1<sup>st</sup> Applicant in that capacity.
- b. She is also the sole surviving joint shareholder/ director of the 2<sup>nd</sup> Applicant and a widow of the late Martin Musumba, the 2<sup>nd</sup> Defendant vide Civil Suit No.34 of 2013.

- c. The service of summons in summary suit vide Civil Suit 34 was not effectively served.
- d. At the time the impugned default judgement was entered in favour of the Respondent on 08.10.2015, Martin Musumba, the 2<sup>nd</sup> Defendant, had long passed away in March 2015.
- e. Subsequently, the Respondent proceeded on 28<sup>th</sup> of October, 2015 to extract a decree in which it was decreed that the 2<sup>nd</sup> Defendant, the late Martin Musumba pays to the Respondent (as Plaintiff) Ug shs 285,600,000/= together with interest and costs of the suit.
- f. On 28<sup>th</sup> of February, 2019 the Respondent through his current lawyers applied to this Honourable Court for execution of the said impugned decree against Martin Musumba, the deceased 2<sup>nd</sup> Defendant.
- g. Consequently, the Respondent on the 22<sup>nd</sup> of July 2019 extracted a notice to show cause why execution should not issue against the 2<sup>nd</sup> Applicant and the late Martin Musumba.
- h. The attachment, sale if any of the 1<sup>st</sup> Applicant's matrimonial home and farm land in execution of the purported default decree is fraudulent, illegal, null and void.

#### **Respondent's Evidence**

Immaculate Tugume, the legal officer of the Respondent made an Affidavit in Reply in which she stated that;

- a) The Respondent was well within its rights to commence the said proceedings because the 2<sup>nd</sup> Applicant was still and is still indebted to the Respondent.
- b) The service upon the Defendants in Civil Suit No. 34 of 2013 was proper and effective especially as against the 2<sup>nd</sup> Applicant herein.
- c) The 2<sup>nd</sup> Applicant is still in existence, has never been wound up and as such, judgment made against it by this court in Civil Suit No.34 of 2013 should stand.
- d) The Respondent was exercising its rights as judgment creditor in Civil Suit No.34 of 2013 in order to recover the monies owed to it.

During the hearing, Counsel for the Respondent raised preliminary objections that the Applicant's counsel has no instructions to represent the 2<sup>nd</sup> Applicant in this Application and that O.36 r 11 does not permit the setting aside of a judgement by a party who is not a party to the suit.

#### **Representation**

Counsel Isabirye John represented the Applicants while Counsel Juma Omollo represented the Respondent.

**Determination of Preliminary Objections**

Counsel for the Respondent raised a preliminary objection that the 1<sup>st</sup> Applicant has no locus to bring this Application. Counsel submitted that the 1<sup>st</sup> Applicant has no locus to bring this Application since she is not a party in Civil Suit No.34 of 2013 in which the ex-parte decree was given; neither is she a personal representative of the Defendants so as to be clothed with the locus to bring the Application moreover in her own name. For this reason, the present Application is bad and barred in law and an abuse of court process on the part of the 1<sup>st</sup> Applicant.

Counsel submitted that this Application is brought in accordance with Order 36 rule 11 of the Civil Procedure Rules. That a non-party like the 1<sup>st</sup> Applicant has no locus under this rule. He submitted that the decree which is issued under Order 36 rule 3(2) is issued against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for money owed by them to the Plaintiff/Respondent. And as such, the decree is personam. He cited the case of **Jacques vs Harrison (1883-4)12 AC 165** to support this submission.

In reply to this objection, counsel for the Applicants stated that the Respondent's contention that the 1<sup>st</sup> Applicant has no locus to bring the present application since she is not party in civil suit No.34 of 2013 and that she had to obtain letters of administration first in order to file the present application as the personal representative of the 2<sup>nd</sup> Defendant the late Martin Musumba is erroneous and misleading because the 1<sup>st</sup> Applicant as a beneficiary of the late Martin Musumba's estate by virtue of being a widow of the deceased 2<sup>nd</sup> Defendant in Civil suit No.34 of 2013 has locus to sue in her own name to protect the estate of her late husband for her own benefit, without having to first obtain letters of administration. Counsel cited the case of **Israel Kabwa v Martin Banoba SCCA No.52/1995 reported in 1996** where the Supreme Court held that a beneficiary of the estate of an intestate has locus to sue in his own name to protect the estate of the intestate for his own benefit without having to first obtain letters of administration.

Counsel submitted that in the present Application, the immovable property sought to be attached in execution by the Respondent is family land on which their matrimonial home and family burial grounds are situated at Nawaka in Luuka District on Plots 4 and 5 of Block 34.



### Analysis of Court

It is trite law that a preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by other side are correct. It cannot be raised if any fact has to be ascertained by evidence. See (**Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd [1969] E.A)**

The term locus standi was defined by Hon Justice Stephen Mubiru in **Dima Dominic Poro v Inyani Godfrey & Anor High Court Civil Appeal No.17 of 2016** as a place of standing, a right to appear in court and conversely to say that a person has no locus standi means that he has no right to appear or be heard in a specific proceeding.

In her Affidavit in support of the Application, the 1<sup>st</sup> Applicant swore her affidavit in the capacity of her position as 1<sup>st</sup> Applicant. She states that she's a widow to the late Martin Musumba the 2<sup>nd</sup> Defendant in Civil Suit No.34 of 2013.

This implies that she brings this Application in her own names and not as an administrator of her late husband's estate. Further she claims to be the surviving Director of the Applicant company but still swears the Affidavit in her personal capacity and not as Director of the 2<sup>nd</sup> Applicant.

The Civil suit which she intends to defend was against Martin Musumba and Intra Commodities Ltd and yet she has no locus to represent either of the Defendants.

In my opinion, the 1<sup>st</sup> Applicant should have brought this Application either as Administrator of the Estate of the late Martin Musumba, the 2<sup>nd</sup> Defendant in the main suit which she wishes to defend or as Director of the 1<sup>st</sup> Defendant now the 2<sup>nd</sup> Applicant.

The 1<sup>st</sup> Applicant has no locus to set aside this judgement on the basis that she is a beneficiary of the late Martin Musumba and intends to protect the family and matrimonial property attached in execution. As stated by counsel for the Respondent, the best way she would have proceeded is by filing Objector proceedings.

The Applicant is therefore a stranger to the proceedings and has no locus to bring this Application.

### **Impropriety of the Proceedings in the name of the Company and lack of proper instructions by the 2<sup>nd</sup> Applicant**

Counsel for the Respondents raised another Preliminary Objection and submitted that this Application is improper since at the time of filing the Application, the company was incapacitated and the existing Director could not institute any suit at all.

He further submitted that the 1<sup>st</sup> Applicant's Affidavit in support states that she is the sole surviving joint shareholder/ director of the 2<sup>nd</sup> Applicant and the Memorandum and Articles of Association are attached providing that the number of directors in the 2<sup>nd</sup> Applicant shall not be less than two.

However, counsel for the Applicant in his submissions in rejoinder submitted that this objection is barred by the doctrine of Approbation and Reprobation. He submitted that the Respondent's contention that the present Application is improper since at the time of filing the Application, the company which was the 1<sup>st</sup> Defendant in Civil Suit No.34 of 2013 was incapacitated and the existing director could not institute any suit at all amounts to approbating and reprobating because the Respondent/plaintiff having obtained a benefit of a default judgement/ decree against the 2<sup>nd</sup> Applicant company in Civil Suit No.34 of 2013 cannot now allege that the same company is now incapacitated because it is not properly constituted and therefore has no authority to commence and conduct this suit or instruct an advocate to institute the suit on its behalf.

#### **Analysis**

Hon Justice Richard Wejuli Wabwire in **Mubende Parents School Limited Vs Uganda Development Bank Ltd & 2 others**, HCCS No.662 of 2015, cited the case of **Evans v Bartlam (1937)AC 473** where Lord Russell stated that;

*"The doctrine of Approbation and Reprobation requires for its foundation inconsistency of conduct; as where a man having accepted a benefit given by a judgement cannot allege the invalidity of the judgement which conferred the benefit."*

The Applicant's contention is that by the time of obtaining judgement, the 2<sup>nd</sup> Applicant was incapacitated but still the Respondent went against it and obtained a decree. That the Respondent's current allegations that the same company is incapacitated and no authority to commence proceedings because it is not properly constituted and therefore has no authority to commence and conduct this suit or instruct an advocate on its behalf amounts to approbation and reprobation.

I am in agreement with counsel for the Applicant regarding this principle and it so applies. However, an illegality cannot cure an illegality. The capacity in which the 1<sup>st</sup> Applicant swore her Affidavit does not give her authority and the capacity to represent the company. She swore the Affidavit in her capacity as the 1<sup>st</sup> Applicant and not in her capacity as a company director.

Be that as it may, Article 33a of the Company's Articles of Association provides that the company shall be constituted by not less than two Directors. As such, there is need to appoint a new director so that the company can become functional and carry out its duties and mandate under full quorum.

The company if well constituted can commence a suit and object to the execution proceedings through any of its directors.

I therefore uphold all the objections. Each party to bear its own costs

I so order



JUDGE

**LADY JUSTICE FARIDAH SHAMILAH BUKIRWA NTAMBI**

Delivered on this .....<sup>3<sup>rd</sup></sup>..... day of .....July..... 2024

