

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KABALE
LAND CIVIL SUIT NO. 0049 OF 2016

5 1. KAHERU YASIN
 2. KABARAMBUZI BENSON -----PLAINTIFFS

VS

10 ZINOMURUMI DAVID -----DEFENDANT

Before: Hon. Lady Justice Olive Kazaarwe Mukwaya

JUDGMENT

15 The plaintiffs sued the defendant seeking:

1. Revocation of probate to the estate of the late Rwababi issued to the defendant by the High Court in Mbarara under Administration Cause No. HCT-05-CV-AC 312-2009
2. An Order for grant of letters of administration to the estate of the late Rwababi
 20 to the 2nd Plaintiff
3. An Order for the cancellation of the defendant's name on the certificate of title to Plot 116 Block 11 Ruzhumbura
4. An Order for cancellation of a special certificate of title issued to the defendant on Plot 116 Block 11 Ruzhumbura

5. A declaration that the suit land is part of the estate of the late Rwababi
6. An eviction order against the defendant
7. Mesne profits
8. A permanent injunction restraining the defendant from further intermeddling
5 with the late Rwababi's estate
9. General damages
10. Costs of the suit

Facts

10 The plaintiffs and the defendant, being biological sons to the late Rwababi (deceased), who died in the year 2000, are all beneficiaries to his estate. At the time of his death, the deceased had distributed his land (bibanja) between his two wives; Kemitano (Senior wife) and Gababiri (Junior wife). This distribution excluded the suit land, comprised in Plot 116 Block 11 Ruzhumbura.

15 All the deceased's land was registered under the Registration of Titles Act namely; Plots 46, 16 and 116 Block 11 Ruzhumbura. He remained the registered proprietor of all properties up to the time of his death.

20 The defendant made an application before the High Court of Uganda at Mbarara for a grant of probate and it was entered before the Hon Justice Lawrence Gidudu, on the 7th December 2009 when the defendant was appointed/confirmed as executor of the deceased's alleged will.

25 On the basis of the probate, the defendant successfully applied for a special certificate of title to the suit land. It was issued on the 15th March 2011 under instrument No. RUK 5494. Having secured the special certificate of title, the defendant applied to the Registrar of Titles at Mbarara land office to be registered as proprietor of the title to the suit land. He was registered on the 21st March 2011 under instrument No. RUK 5505 as executor of the estate of the late Rwababi. The defendant is currently in occupation

of the suit land and derives all the benefits from it to the exclusion of all other beneficiaries.

Plaintiff's Claim

Mr. Kaheru Yasin and Mr. Kabarambuzi Benson are step brothers to the defendant Mr. Zinomurumi David. It is the plaintiffs' contention that the late Rwababi, their father, died intestate in the year 2000. According to the plaintiffs the defendant forged a will allegedly executed by the deceased. Upon this forged will, and without the knowledge of the plaintiffs and other family members, the defendant applied for and was granted probate to the deceased's estate by the High Court Mbarara on the 7th December 2009. With this authority, the defendant was subsequently issued with a special certificate of title to the suit land comprised in Plot 116, Block 11 Ruzhumbura upon claims that the original title was lost, when he was aware of its whereabouts.

The plaintiffs added that the deceased during his lifetime distributed land (bibanja) between his two wives, the late Kemitano and the late Gababiri. They each shared their portions between their respective children. The suit land was family grazing land, 2.8 acres of which comprised the land the deceased had given to the late Gababiri, the defendant's mother. After the deceased died, the late Gababiri sued the defendant her son, in the local council court over his sole claim of ownership of the 2.8 acres on which the defendant had built his house, and his claim over the entire suit land. While the dispute was decided in the plaintiff's favour, the proceedings in the local council court were later declared null and void by the High Court in Civil Revision No. 006/2011.

The forgery of the purported will, the breach of trust of the family members by applying for grant of probate without their knowledge and participation on basis of a forged will, the failure to file an inventory since 2009, the defendant's acquisition of a special certificate of title when he knew the original existed, were all acts of fraud for which the plaintiffs were entitled to the prayers sought.

Defence

The defendant denied the plaintiffs' claim. He contended that the deceased died testate in respect of the suit land, Plot 116 Block 11 Ruzhumbura. The will upon which the grant of probate was made was not a forgery. The suit land was given to the defendant
5 in 1978 and he took possession of it, built his homestead, planted coffee and banana plantation and enjoyed quiet possession during and after the death of the deceased in 2000. Both plaintiffs and their brother Ntooki got land at Kahoko in Mitooma Cell. After the deceased died, the land which was left, was distributed among the beneficiaries and no one complained. The suit land did not form part of the undistributed
10 property of the deceased since it had already been given to the defendant during the lifetime of the deceased.

It was the defendant's contention that this claim by the plaintiffs was an afterthought after they had already disposed of their shares. He had never been invited to a family meeting to discuss the suit land neither was he a party to the resolution to appoint the
15 2nd plaintiff administrator to the estate of their late father.

The defendant prayed for dismissal of the suit and a declaration that he is the rightful registered proprietor on the suit land comprised in Plot 116 Block 18 Ruzhumbura.

A locus in quo visit was conducted on the 5th March 2020.

Counsel for the plaintiffs, Mr. Julius Muhurizi and Counsel for the plaintiff, Mr.
20 Godwin Masereka both filed final submissions.

Issues

- 1. Whether the late Rwabibi Yakobo left a valid will?**
- 2. Whether the Probate dated 7th December 2009 was fraudulently obtained?**
- 3. Whether there was fraud in obtaining a special certificate of title and the
25 defendant's registration as proprietor thereon?**

4. Whether the suit land is part of the late Rwababi's Estate?
5. Whether the defendant was in breach of his duties as executor under the Will?
6. Whether the 2nd Plaintiff is a right and proper person to be granted Letters of Administration to the late Rwababi's Estate?
7. What remedies were available to the parties?

RESOLUTION

Issue 1, 2 &4

Whether the late Rwabibi Yakobo left a valid will?

10 Whether the Probate dated 7th December 2009 was fraudulently obtained?

Whether the suit land is part of the late Rwababi's Estate?

Section 50 of the Succession Act provides that;

'..... every testator must execute his or her will according to the following provisions;

15 *(a) the testator shall sign or affix his or her mark to the Will or it shall be signed by some other person in his or her presence and by his or her direction;*

(b) the signature or mark of the testator or the signature of the person signing for him or her shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will;

20 *(c) The Will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his or her mark to the will or have seen some other person sign the Will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his or her signature or mark or of the signature of that other person; and each of the witnesses must sign the Will in the presence of the testator, but it shall not be necessary that more than one witness*

be present at the same time, and no particular form of attestation shall be necessary."

Counsel further submitted that under sections 3 of the Illiterates' Protection Act Cap 78 S.3 provides for verification of documents written for illiterates as follows;

- 5 *Any person who shall write any document for or at the request, on behalf or in the name of any illiterate shall also write on the document his or her own true and full name as the writer of the document and his or her full address, and his or her so doing shall imply a statement that he or she was instructed to write the document by the person for whom it purports to have been written and that it fully and correctly represents his or*
- 10 *her instructions and was read over and explained to him or her.*

Mr. Masereka for the defendant, did not make any submissions in reply on this point.

This court has perused Exb. P.4/ D.1. It is a hand written document dated 1st September 1996. For emphasis, I shall reproduce it here.

15

Rukaraara

Nyakabungo

Kahoko

Nyakagyeme

20

Rukungiri

1/9/1996

‘Authority/ Will over my land at Rukarara Nyamusesya, Kahoko’.

I, Rwababi (thumb print) before my grandson, Kato Victor, son of Kamusharara, my young sister who follows me, I do thumb print this document to permit and give my son, ZINORUMURI authority to transfer my certificate of title pertaining to the land where he has a home stead, into his personal and exclusive name.

- 5 This land is registered in my name RWABABI. It was transferred from the name of Baryahikahi.

He will continue to give accommodation to all relatives.

Cows: Kakyimpi is his and will continue the relationship of exchanging cows with the children of KYIMPI, a brother to my uncle.

10 Witnessed by;

1. Charles Kyarugundu
2. Joseph Rubagasira
3. Gershom Kimpe
4. Bangirwoha
- 15 5. A. Kasimba
6. Donor/Giver: RHT
7. AUTHOR: Kato Victor

Confirmed by Ndyabagira James, Chairperson LC111, Nyakagyema S/C – Stamp-date 12.04.2007.

20

S.4 makes it an offence for the writer of the document or witness to the signature of the illiterate not to write his full name and address. This is meant to protect the illiterate from endorsing a document he or she does not understand. The individual has a freedom to decide what he will be bound by. See Stanbic Bank Ug. Ltd V Ssenyonjo Moses CA
 25 No.147 of 2015.

It is evident that DW2 provided his name. A description of who he is contained in the text and he endorses the bottom of the document as Author. In this Court's view the protection of the deceased's interests as in illiterate was taken care of by the presence of the witnesses, DW3 and Dw4 who testified that they read through the contents before they signed. They told this Court that they understood the purpose of the document and the deceased had explained to them what his wishes were.

Checking Exb P.4/D.1 against the requirements of s. 50 of the Succession Act, it was thumb printed and witnessed by four witnesses. DW2, Kato Victor testified as its author, DW3, Gershom Kimpe testified as the 3rd witness on the list and DW4, Bernard Mbangirwoha, testified as the 4th witness on the list. Mr. Muhurizi for the plaintiffs submitted that Exb.P.4/ D.1, was not the will of the deceased. He submitted that the evidence of DW1, the defendant, Zinorumuri David; DW2, Kato Victor; DW3, Kimpi Gershom and DW4 Bernard Mbangirwoha raised serious contradictions. DW2 testified that the document was executed at 1pm and yet the other witnesses stated that it was 10am to 11am. Counsel also raised the issue that DW1 and DW2 testified that the document was read on the day of the burial while DW3 and DW4 testified that the reading took place the day after the burial. Mr. Muhurizi implored this Court to treat the evidence of the defence witnesses as unreliable on those grounds.

In Uganda v Kavuma (Criminal Sessions Case No. O819 of 2016)[2018] UGHCCRD 145 (4 July 2018), the Hon. Justice Stephen Mubiru had this to say;

It is settled law that grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected. The law on contradictions in the testimony of witnesses is that contradictions are categorized into minor and major contradictions. Minor ones, unless they point to deliberate untruthfulness will be ignored. (See Alfred Tajar V Uganda EACA Cr. Appeal No. 167 of 1969). The gravity of the contradiction will depend on the centrality of the matter it relates to in the determination of the key issues in the case. What

constitutes a major contradiction will vary from case to case. The question always is whether or not the contradictory statements are material, i.e, 'essential' to the determination of the case. ...It will be considered minor where it relates only on a factual issue that is not central, or that is only collateral to the outcome of the case.

5 The contradictions as highlighted by Counsel for the plaintiffs concern the time the defence witnesses participated in the meeting where the document was eventually drafted. In this Court's opinion, it was a minor contradiction. The time variance was less than two hours. And by the time the witnesses testified, it was 24 years after the event. All three witnesses, DW2, DW3 and DW4 were very consistent when it came to
10 the purpose of the meeting and the contents of Exb. P.4/ D.1. The deceased wished to give the defendant the land, where the defendant's home stead was situated. The document does not give particulars of the certificate of title but states that it is '*registered in the deceased's name and it was transferred from the name of Baryahikahi*'. This is the suit land.

15 The document does not pertain to any property or to any other beneficiary of the deceased's estate. The plaintiffs' PW1 and PW2 and their witnesses, PW3, PW4 and PW5 all agreed that the deceased gave his children property through their mothers, his two wives, Kemitano and Gababiri. This was during his life time. It is the finding of this Court that Exb. P.4/ D.1 was the Will of the deceased expressing his wishes
20 pertaining to the defendant. The property described is the suit land and the only beneficiary is the defendant.

Counsel for the plaintiffs submitted that;

S. 61 of the Succession Act Cap 162 provides for wording of a will as follows;

*It is not necessary that any technical words or terms of art shall be used in a will, but
25 only that the wording shall be such that the intentions of the testator can be known from the wording.*

A perusal of Exb. P.4/ D.1 shows that the intentions of the deceased were clear. He wished to transfer the suit land into the name of the defendant.

Counsel made submissions pondering how the Mbarara High Court granted probate to the defendant and this court finds that the reading of Exb. P.4/ D.1 on the face of it, was valid justification to grant probate. The Court documents tendered into evidence and marked Exb. D.10B are instructive. They indicate that on the 15th October 2009, the defendant lodged an application for Letters of Administration with Will attached. The notice in the *Entaasi* Newspaper for the period October 20th -26th 2009 indicated that the Will was attached.

S. 182. of the Succession Act provides that Probate can be granted only to an executor appointed by the will. Further, s.183 provides that the appointment of an executor may be express or by necessary implication.

In the instant case the defendant was the only beneficiary named in the Will. Therefore, by necessary implication, he was the executor appointed by the deceased's Will.

The grant of probate was specific to the Will annexed. According to the grant; '..... administration of the property and credits of the said deceased, and in any way concerning his Will, was granted to ZINOMURUMI DAVID- EXECUTOR'

The purpose of the Will was to ensure that the suit property was transferred into the name of the defendant. The facts of this case as agreed by both parties demonstrate that the defendant is the registered proprietor of the suit property as executor of the deceased's Will dated 1st September 1996 and proved before the learned Justice under HCT-05-CV-AC 312 2009.

The suit property did comprise the estate of the deceased, for the express and sole benefit of the defendant under the deceased's Will.

I resolve Issues 1 and 4 in the affirmative and Issue 2 in the negative.

Issues 3,& 5

Whether there was fraud in obtaining a special certificate of title and the defendant's registration as proprietor thereon?

Whether the defendant was in breach of his duties as executor under the Will?

- 5 S.64 of the Registration of Titles Act provides that the estate of a registered proprietor is paramount. Any other interests in the estate, except for fraud shall be ineffective. In the instant suit, the plaintiffs were aggrieved by the defendant's registration of himself on the suit land. They pleaded a number of grounds of fraud.

Ownership of the suit land

- 10 The plaintiffs testified that 2.8 acres out of the suit land did not belong to the defendant but to the deceased's junior wife Gababiri. The other part of the suit land was the deceased's family land. It was situated on the hill where the Airtel mast has been erected.

- A visit to locus in quo at Mitooma Cell, Kakoko Parish, Nyakagyeme Sub county, 15 showed that the defendant is in actual possession of the suit land and has been since the deceased allowed him to use the land in 1978. He testified as much. The mast is erected on a hill above the defendant's house. PW2 showed this court the top of the hill and stated that it was family land. It was 14 hectares less 2.8 acres for Gababiri, the defendant's mother. PW3 testified that her mother gave her a piece of land to cultivate, 20 out of her share PW3 utilized it for 3 years until the defendant threw her out. The witness at locus, Mr. Rwemiti Eliphazi testified that he was the former Chairman of Mitooma Cell. As far as he knew, the defendant was in exclusive occupation of the land.

- A perusal of the plaintiffs' amended plaint makes no mention of the 14 hectares. The land is merely described in Paragraph 10 as grazing/ farm land. This acreage of the 25 grazing farm land constituted a departure from the plaintiff's pleadings. In Interfreight

Forwarders V East African Development Bank (1990- 1994) EA 117 page 125, the Supreme Court held that;

5 *'a party will not be allowed to succeed on a case not set up by him and be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of pleadings'*

The plaintiffs were not at liberty to introduce a matter of such crucial importance at this stage of the trial. The suit land is registered land. If there was a distribution scheme regarding the suit land, this was not tendered into evidence. There was a family meeting, Exb. P.6, held in 2000, after the deceased's death, to share the undistributed estate of
10 the deceased among his beneficiaries. The suit land was not described as one of the properties distributed. This Court finds that in the absence of a documented demarcation of the suit land by the deceased, his Will provides the ultimate instruction on its ownership.

Defendant's acquisition of grant of probate

15 To further demonstrate the defendant's fraudulent intent, the plaintiffs averred that the defendant locked them out of the application for grant of probate. They reiterated this position in their testimonies before this court. Mr. Muhurizi, Counsel for the plaintiffs added that the defendant circumvented the office of the Administrator General in making his application, which was not supported by a Certificate of No Objection. Mr.
20 Masereka for the defendant submitted that all requisite steps were followed by the defendant.

S.5(1) of the Administrator General's Act Cap 157 provides as follows;

25 *'No grant shall be made to any person, except an executor appointed by the will of the deceased or the widower or widow of the deceased, until the applicant has produced to the court proof that the Administrator General or his or her agent has declined to administer the estate...'*

This Court has already found that the defendant was the appointed executor in the deceased's Will, by necessary implication. It was therefore not necessary to obtain a Certificate of No Objection from the office of the Administrator General.

5 Under Paragraph 17 (a) of the Amended Plaintiff, the plaintiffs assert that the defendant forged the Will. Incidentally, no evidence of forgery was led by the plaintiffs in this regard. On the other hand, the defendant produced three witnesses who were present when the Will was made and their evidence as regards the deceased's role in making the Will stood unrefuted.

10 The Plaintiffs in their testimonies, testified that the defendant acted stealthy in filing and obtaining the grant of probate. This Court has already found that the process was transparent and within the ambit of the law.

Existence of original certificate of titles

15 Thirdly the plaintiffs' witnesses testified that the original titles were in the safe custody of PW5, Fred Nturanabo and that it was a well-known fact in the family. PW5, testified that the deceased handed over the original titles to him in the presence of family members including the defendant. When the defendant was cross examined on this matter, he denied knowledge of this information. He testified that he tried to trace the original title to the suit property in vain. And added that his mother Gababiri later told him that the deceased's original titles had been stolen at the deceased's burial.

20 Mr. Masereka for the defendant, submitted that fraud must be attributed to the transferees. He relied on the case of David Sejjaaka v Rebecca Musoke, Civil Appeal No. 12 of 1985 where it was held that fraud must be attributable to the transferee, either directly or by necessary implication. The transferee must be guilty of some fraudulent act or must have known of such an act by somebody else and participated in it or taken
25 advantage of it.

It was not enough for the plaintiffs to make allegations, they had an evidentiary burden to establish their claim to the required standard. To prove fraud, they had to demonstrate that the defendant set out to deceive them, and intentionally deceived them, to their detriment. This Court has not found any evidence of fraud attributable to the defendant
5 directly or by necessary implication.

Failure to File Inventory

Mr. Muhurizi pointed out that the defendant had failed to file an inventory within the required six (6) months. He relied on section 278 of the Succession Act. The defendant claimed that he was not informed of the requirement under the law. Mr. Masereka for
10 the defendant submitted that it was not mandatory since the grant of probate was to the defendant's sole benefit.

While I do not agree that the failure to file an inventory amounts to an act of fraud, it is under law a mandatory requirement that may led to revocation of the grant.

S. 234 of the Succession Act provides as follows;

15 *(1) The grant of probate or letters of administration may be revoked or annulled for just cause.*

*(2) In this section, "just cause" means— (a) that the proceedings to obtain the grant were defective in substance; (b) that the grant was obtained fraudulently by making a false suggestion, or by concealing from the court something material to the case; (c)
20 that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though the allegation was made in ignorance or inadvertently; (d) that the grant has become useless and inoperative through circumstances; or (e) that the person to whom the grant was made has willfully and without reasonable cause omitted to exhibit an inventory or account in accordance with
25 Part XXXIV of this Act, or has exhibited under that Part an inventory or account which is untrue in a material respect.*

Under s. 234(1)(b) omission to file the inventory must be willful and without reasonable cause. This court finds that the intention to willfully and without reasonable cause, omit to file the inventory the deceased's estate was not proved by the plaintiffs against the defendant.

5 I resolve issue 3 and 5 in the negative.

Issues 6 & 7

Whether the 2nd Plaintiff is a right and proper person to be granted Letters of Administration to the late Rwababi's Estate?

What remedies were available to the parties?

10 The 2nd Plaintiff is a son to the deceased. By his own admission, he received a share of the deceased's estate. So did the 1st Plaintiff, PW3, PW4 and PW5. This Court has already found that the Will pertained to the suit land. The defendant was the only named beneficiary in the Will. This suit was filed specifically with respect to the suit land. It therefore follows that this question is moot. I agree with Counsel for the defendant that
15 there was nothing to administer regarding the suit land.

During the trial, it was not clear if the deceased had property comprising his undistributed estate. If it turns out that the two other properties of the deceased, whose original titles were apparently held in safe custody by Mr. Nturanabo, PW5, then the family may decide whether, the 2nd Plaintiff is their preferred representative.

20 The purpose for the grant of probate under the Will was to effect the transfer of the suit land into the name of the defendant. This has been done and the purpose of the grant has been fulfilled. The defendant should therefore file an inventory and final account as executor under the grant of probate since he has been made aware of his obligations under sections 234 and 258 of the Succession Act Cap 162. The inventory and final

account should enable the plaintiffs pursue their rights to whatever property may have been overlooked by the family.

This Court has exercised its discretion not to make an award of costs in this suit. I take the view that such an award would further aggravate the strife within this family.

5 **In the final analysis, I dismiss this suit and order as follows;**

1. The Late Rwabibi Yakobo left a valid Will in respect to Plot 116 Block 11 Ruzhumbura.

2. Plot 116 Block 11 Ruzhumbura comprises part of the Estate of the Late Rwabibi bequeathed solely to the defendant.

10 3. The Probate dated 7th December 2009 vide HCT- 50-CV- AC 312-2009 was lawfully obtained.

4. The Special Certificate of title to Plot 116 Block 11 Ruzhumbura was lawfully registered.

15 5. The Defendant shall file an inventory together with final account of the Probate granted to him vide HCT- 50-CV- AC 312-2009 within 3 months from the date of this Judgment. A received copy of said inventory and final account shall be served upon the Plaintiffs within 7 days of filing with the Court.

6. Each party shall bear its own costs.

20

.....

Olive Kazaarwe Mukwaya

Judge

25 25th June 2020.

Representation: Plaintiffs: Mr. Julius Muhurizi- M/S Tibaijuka & Co. Advocates

Defendant: Mr. Godwin Masereka- M/S Beitwenda & Co. Advocates.

Delivered by email on the 25th June 2020

5

10

15

20

5

10

15