

**THE REPUBLIC OF UGANDA**

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

**CIVIL SUIT NO. 0329 OF 2020**

**1. NORAH OWARAGA  
2. BETTY ANNE APIO OWARAGA } ..... PLAINTIFFS**

**VERSUS**

**1. ROBERT IRIGEI  
2. SSEBAGALA MOSES } ..... DEFENDANTS  
3. ODULUSI JOSEPH }**

*Before:* **Hon. Lady Justice Dr. Christine A. Echokit**

**RULING ON PRELIMINARY OBJECTIONS**

**BACKGROUND:**

The plaintiffs brought this suit against the defendants who were witnesses to the Will of the late George William Owaraga and sought orders that: 1) for the 1<sup>st</sup> plaintiff against the defendants, a declaration that the purported 'Will' of George Owaraga is invalid on account of it being procured by fraud, and in the alternative but without prejudice, on account of it having been made by George while he was not of sound mind; 2) for the 2<sup>nd</sup> plaintiff against the estate of the late George William Owaraga, that the property mentioned in paragraph 2 of the plaint is not part of the estate of the deceased and belongs to the 2<sup>nd</sup> plaintiff in her individual capacity; 3) for the 1<sup>st</sup> plaintiff against the defendants, in the alternative, that if this honourable court finds that the Will was George Owaraga's last Will and testament, the same be strutinised and reviewed to remove from the estate of the deceased, properties that at the time of his death did not belong to him, the same having been sold or gifted by the deceased in his lifetime, and further that properties not included in the estate of the deceased and which ought to have been included, be included; 4) and for the 1<sup>st</sup> plaintiff, further orders from court appointing administrators to the estate of the late George William Owaraga to represent the diverse interests of his wider family as far as practicable.

## **HEARING AND REPRESENTATION:**

At the mention of the suit, Counsel Benjamin Ayebare represented the plaintiffs, counsel Catherine Naisu held brief for counsel Bosco Okiror for the first defendant, counsel Ramathan Shafic represented the 2<sup>nd</sup> defendant while counsel Machel Nyambok Omondi represented the 3<sup>rd</sup> defendant. The 1<sup>st</sup> defendant was in court. The plaintiffs and the other defendants were not in court. Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants made written submissions on the preliminary objection and highlighted on them in court. Counsel for the applicant only made oral submissions.


## **ISSUES FOR THE DETERMINATION OF THIS COURT:**

**Issue 1: Whether the plaint discloses a cause of action against the defendants**

## **DETERMINATION OF THE ISSUES BY THIS COURT:**

Counsel for the defendants raised a preliminary objection regarding lack of cause of action to be considered prior to the hearing of the main suit. Plaintiffs' counsel submitted that the preliminary objections could be handled together with the suit. Counsel for the 2<sup>nd</sup> defendant cited the Supreme Court case of Tororo Cement Co. Ltd. v. Frokina International Ltd SCCA No. 2 of 2001 where court observed that; "whether a plaint does or does not disclose a cause of action is a matter of law which can be raised by the defendant as a preliminary point at the commencement of the hearing of the action even if the point has not been pleaded in the written statement of defence".

Having listened to counsel on both sides, I will allow the preliminary objection to be raised and determined prior to the hearing of the main suit. This is because the issue of cause of action has the potential of disposing off the suit at the preliminary stage.

On another note, I have perused the pleadings on the file and note that the plaint was filed on 30<sup>th</sup> December 2020. Order 6 rule 20 of the Civil Procedure Rule allows a plaintiff to amend  his or her plaint at any time within 21 days from the date of issue of summons to the defendant



without leave of court. The summons to file a defence in respect of the 1<sup>st</sup> and second defendants were extracted on 18<sup>th</sup> January 2021. The amended plaint was filed on 18<sup>th</sup> day of November 2021 way beyond the timeframe provided by the rules. The 1<sup>st</sup> defendant filed his Written Statement of Defence (WSD) on 9<sup>th</sup> February 2021 while the 2<sup>nd</sup> defendant filed on 11<sup>th</sup> May 2022 after leave was granted to file the WSD by 9<sup>th</sup> day of May 2022. Summons to file a defence in respect of the 3<sup>rd</sup> defendant were issued on 19<sup>th</sup> November 2021 and he filed his Written Statement Defence on 16<sup>th</sup> December 2021.

It is apparent there was some laxity in compliance with the timeframes for filing pleadings, but then the registrar proceeded to issue directions. Hence, whereas this court will exercise its discretion under Section 98 of the Civil Procedure Act, I will note that the timeframes for filing pleadings must be taken seriously and the laxity of parties in this regard should not be condoned.

**Issue 1: Whether the plaint discloses a cause of action against the defendants.**

Counsel for the 1<sup>st</sup> defendant's argued that there is no cause of action against the 1<sup>st</sup> defendant. She referred to order 6 rule 28 of the of the Civil Procedure Rules and the case of Auto Garage V Motokov (No. 3) (1971) E.A. 514. She stated that the 1<sup>st</sup> defendant was merely a witness to the Will of the late George William Obityo Owaraga, that he had no idea about the content of the Will, and that he had no interest in depriving the beneficiaries of the estate and so allegations of forgery against him cannot stand because he merely appended his signature to the Will.

Counsel for the 2<sup>nd</sup> defendant also argued that there is no cause of action against the 2<sup>nd</sup> defendant. He equally referred to the case of Auto Garage V Motokov. He proceeded to state that it is not contested that the plaintiffs enjoy rights. However, the said rights if violated, were not violated by the 2<sup>nd</sup> defendant. He pointed out that paragraph 13(d)(vi) of the plaint indicates that the 2<sup>nd</sup> defendant was only a driver and a tenant in one of the houses of the deceased, which is partly true. However, the actual truth is that he drove the deceased only once when



the Ministry of Works hired vehicles from the 2<sup>nd</sup> defendant's company to transport their staff to Rwanda. Counsel for the 2<sup>nd</sup> defendant stated that the 2<sup>nd</sup> defendant is neither part of the family of the deceased nor does he enjoy anything as a beneficiary from the estate of the deceased or from the Will. As such, he has no interest in the estate property of the deceased.

Counsel for the 2<sup>nd</sup> defendant further stated that the plaintiffs claim that the 2<sup>nd</sup> defendant acted fraudulently in witnessing the Will of the deceased. However, the particulars of fraud were not indicated in the plaint. He cited order 6 rule 3 of the Civil Procedure Rules that requires the particulars of fraud to be specifically pleaded, including dates. This was not done. He cited the case of Okello v. Uganda National Examination Board CA No. 12 of 1987 reported in [1993] II KALR 133 at 135 and Kampala Bottlers Ltd V Damanico (U) Ltd Civil Appeal No. 22 of 1992, both cited with authority in Nagawa Agnes & anor v. Segawa Samuel & ors HCCS No. 27 of 2012 [2014] UGHCCD 14, where court held that order 6 rule 3 of the Civil Procedure Rules is mandatory in that particulars of fraud and dates regarding the alleged fraud should be given.

Counsel for the 2<sup>nd</sup> defendant proceeded to submit that the plaint was incurably defective as fraud was never pleaded in the statement of claim as a separate paragraph and no particulars provided, also in a separate paragraph. He prayed that court strikes out the case against the 2<sup>nd</sup> defendant for non-disclosure of a cause of action against him. He relied on order 6 rule 29 and 30(1) of the Civil Procedure Rules to buttress his point. In the alternative, counsel for the 2<sup>nd</sup> defendant argued, should court consider that indeed this matter ought to proceed against any of the defendants in a manner that would have been appropriate, the plaintiffs should have considered the 2<sup>nd</sup> defendant as a witness to help them find the truth.

Counsel for the 3<sup>rd</sup> defendant on his part argued that the 3<sup>rd</sup> defendant is only mentioned under paragraph 14(b) of the plaint by way of amendment where he was alleged to have presented the impugned Will. He is not mentioned anywhere else. He stated that there is no element of fraud that has been pleaded in a separate paragraph of the plaint and attributed to the 3<sup>rd</sup> defendant. He further submitted that the plaint does not indicate that the 3<sup>rd</sup> defendant was



either a beneficiary of the Will or that he took any benefit. Counsel for the 3<sup>rd</sup> defendant relied on the case of Tororo Cement already cited above. Accordingly, the particulars of fraud as presented against the 3<sup>rd</sup> defendant in paragraph 14 of the plaint do not meet the threshold prescribed under order 7 rule 1(e) of the Civil Procedure Rules; and as such this brings the plaint within the precepts of order 7 rule 11(e) of the Civil Procedure Rules which require such a plaint to be struck out.

In response, counsel for the plaintiffs argued that it is trite law that a cause of action refers to facts the existence of which entitle a person to obtain from court a remedy against another person. He agreed with the submissions of counsel for the defendants in regard to the ingredients of a cause of action established in the case of Auto Garage V Motokov. He argued that there is no contention that the plaintiffs enjoyed rights. However, these rights were violated through the forgery of the purported Will in question, which Will seeks to deprive the plaintiffs of their rights.

Counsel for the plaintiffs relied on the case of Kebirungi Justine V Road Trainers Ltd HCB 2008 p.72 where it was held that court looks at the pleadings and annexures to determine if the plaint discloses a cause of action. He asserted that it is clear that paragraph 4 of the plaint discloses a cause of action against the defendants. Counsel for the plaintiffs asserted that it is therefore clear that on the face of the plaint and its annexures that there is indeed a cause of action established against the defendants acting as witnesses and custodians to the Will for which they ought to answer based on Section 47 of the Succession Act which provides that witnesses to a Will should witness in the presence of the testator. It is on this basis that the plaintiff brought this action against the defendants. Counsel for the plaintiffs accordingly prayed that the preliminary objection be dismissed and the case given a hearing date for evidence to be adduced and the case determined.

Counsel for the 2<sup>nd</sup> defendant submitted that the tenets of justice demand that trial of a fundamental cause of action like fraud, proceeds when all the particulars of the alleged fraud

have been pleaded against the alleged fraudster. Where that is not done, the trial will be by ambush, and that should this court not rule in favour of the preliminary objection, the 1<sup>st</sup> defendant will be subjected to an ambush trial.

I have listened to both sides on whether or not the plaint establishes a cause of action against the defendants. The case of *Auto Garage v. Motokov* cited by counsel for the defendants discloses 3 ingredients of a cause of action, and these are;

- i) The plaint must show that the plaintiff enjoys a right
- ii) The right has been violated; and
- iii) The defendant is liable.

The parties all agree that the plaintiffs enjoy the rights of beneficiaries to the estate of the late George William Obityo Owaraga. It is apparent that those rights may have been violated. The defendants have all stated that they are not culpable in the least as they were only witnesses to the Will and did not benefit from it in any way. The plaintiffs allude to the plaint, particularly paragraphs 4, 10, 11 and 14 and related annexures as specifying the particulars of fraud allegedly orchestrated by the defendants. The issue is whether the particulars of fraud have been articulated in the plaint as required.

It is true as submitted by counsel for the defendants that the particulars of fraud must be specifically pleaded and the particulars of fraud with dates shall be stated in the pleadings. Order 6 rule 3 of the Civil Procedure Rules is very clear in this regard. The case of *Kampala Bottlers Ltd V Damanico (U) Ltd, Okello v. Uganda National Examination Board and Nagawa Agnes & anor v. Segawa Samuel & ors*, cited above as well as *Lubega v. Backlays Bank* [1990-1994] EA 294, are some of the authorities in this regard.

I have perused Order 7 rule 1(e) and rule 11(e) of the Civil Procedure Rules which are to the effect that a plaint shall contain the facts constituting the cause of action and when it arose;



and will be rejected if the suit is frivolous and vexatious. A perusal of the plaint indicates that its paragraph 4 attempts to outline a semblance of a claim. Paragraph 4 of the plaint states;

*"the 1<sup>st</sup> and 2<sup>nd</sup> defendants are Ugandan adults believed to be of sound mind, were witnesses to a document which was presented by the 1<sup>st</sup> defendant to the family of the deceased upon his death as his last Will and testament, and which 'Will' is hereunder challenged and impugned."*

(I have ignored the amended plaint filed many months after the original plaint and for which leave of court was not obtained).

In my opinion, the above paragraph is not a statement of claim in respect of fraud, thereby entitling the plaintiffs to a cause of action against the defendants. Instead, it points to the 1<sup>st</sup> and 2<sup>nd</sup> defendants being witnesses to a Will that the plaintiffs challenge, and does not assert that the 1<sup>st</sup> and 2<sup>nd</sup> defendants either forged the said Will or were fraudulent about it. To say that the 2 defendants were witnesses to a document that was presented by the 1<sup>st</sup> defendant to the family of the deceased as his Will and that the plaintiffs challenge and impugn the said Will does not disclose a cause of action against the defendants.

Counsel for the plaintiffs referred to paragraph 10 and annexure B to the plaint as showing that the deceased suffered from dementia from 2016 and was not of sound mind. He proceeded to state that the defendants in collusion, participated in the forging of the Will as detailed in the plaint, in particular paragraph 14 thereof contrary to the submissions of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. He stated that particulars of fraud are adduced in paragraph 14 of the plaint against all the defendants. In response, counsel for the 1<sup>st</sup> defendant stated that the said particulars keep referring to the content of the Will which the defendants were not aware of. Counsel for the 1<sup>st</sup> defendant further argued that paragraph 14(b) of the plaint is not categorical and convincing as regards the allegation that the defendants took advantage of the state of mind of the deceased. She proceeded to state that that the 1<sup>st</sup> defendant was a friend of the deceased does not imply any fraud on the part of the 1<sup>st</sup> defendant.



I have perused the said paragraphs and annexure referred to by counsel for the plaintiffs and seriously, the particulars outlined do not bring out the ingredients of fraud on the part of the defendants. Instead, they question the validity and content of the Will.

Counsel for the plaintiffs also referred to paragraph 11 of the plaint and annex C of the plaint as stating the date of the deceased's death as 1/11/2020 whereas in the initialed pages of the purported Will, the defendants acting as witnesses, put their signatures on 4/11/2020, 3 days after the deceased's death. In rebuttal, Counsel for the 1<sup>st</sup> defendant stated that the defendants did not indicate the dates on the Will, and that the 4/11/2020 is the day the chairman of the clan received the Will in accordance with the wishes of the deceased and is the date when he personally handed over the Will to the 1<sup>st</sup> defendant, as clearly indicated in the Written Statement of Defence of the 1<sup>st</sup> defendant.

Section 50(1)(c) of the Succession Act provides that 2 or more witnesses to a Will shall witness in the presence of the testator. I have perused the plaint and seen that indeed annexure "C" thereto is in respect of a death certificate stating that the late George William Owaraga died on 01/11/2020. The photocopy of the alleged Will bears the date of 4/11/2020 below the signature of the witness who signed at the bottom of the page. However, as to when the date was appended cannot be concluded from the arguments of counsel from either side and this court cannot make any inferences in that regard at this point.

It was argued for the 1<sup>st</sup> defendant that section 264 of the Succession Act requires a Letter of Probate to be issued for a Will to be challenged, and that it is the executors to be sued, not witnesses to the Will. As such, the defendants were wrongly sued and the plaint should be struck out with costs in favour of the 1<sup>st</sup> defendant. Counsel for the 3<sup>rd</sup> defendant pointed out that the key issue for determination in the Joint Scheduling Memorandum filed by the parties is whether the contested Will is valid. He submitted that having been sued in their capacity as witnesses, there is no law that puts the burden on the defendants to prove the validity of the Will. Accordingly, he prayed that the preliminary objection be upheld and the plaint struck out



with costs. Counsel for the 3<sup>rd</sup> defendant also stated that in regard to paragraph 10 of the plaint, it is not pleaded anywhere in the plaint that there is a particular law obliging the witnesses to inquire into the mental state of the testator or even to interrogate the Will by way of checking any spelling mistakes or correct disposition of any property.

Having listened to counsel for either side, it is my considered opinion that a witness to a will is simply a witness and nothing else. A witness is not expected to know the content of the Will he or she witnesses. This resonates with section 50(1) of the Succession Act and Halsbury's Laws of England cited below.

Section 50(1)(c) of the Succession Act provides that;

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 has 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, in the presence of the testator, sign and write his or her name and address on every page of the Will except that it shall not be necessary that more than one witness be present at the same time.

Halsbury's Laws of England Volume 50 (2005 Reissue)/1 on testamentary disposition states;

"A Will must be made in writing, and it may be written in any language, by hand or any other means, but it need not be written by the testator himself. The testator must declare in the presence of two witnesses and of a person authorized to act in connection with international Wills that the document is his Will, and that he knows its contents. ***He need not inform the witnesses, or the authorized person, of the contents of the Will.***"



Hence, for the plaintiffs to argue about the contents of the Will presupposes that the witnesses were not acting only as witnesses but knew the content of the Will. Section 47 of the Succession Act provides that a Will or any part of a Will, the making of which has been caused by fraud, undue influence, duress, coercion, mistake of fact or by abuse of position of trust or vulnerability, which takes away the free will of the testator, is void.

According to the construct of the law, it is upon the plaintiffs to prove that the Will is void. Unfortunately, the statement of claim and particulars of fraud do not specifically plead fraud as against the defendants and as such, it is practically improper in law to allow the suit to go on trial in order to adduce evidence as to whether the Will should be rendered void or not.

Order 6 rules 29 and 30(1) of the Civil Procedure Rules mandates this court to dispose of the suit on grounds of lack of cause of action or if it is frivolous or vexatious. I agree with counsel for the defendants that the plaint does not show that the rights of the plaintiffs were violated by the defendants and that the particulars of fraud were specifically pleaded as required by the law. Should the plaintiffs so wish, they can bring appropriate fresh action in the pursuit of their rights.

### **CONCLUSION:**

In the premises, I order that;

- a) The preliminary objection is sustained.
- b) Civil suit No. 329 of 2020 is dismissed.
- c) The plaintiffs shall bear the costs.

I so order.

Delivered on this ..... 26<sup>th</sup> ..... day of ..... February ..... 2024



.....  
**Dr. Christine A. Echokit**  
**Judge.**  
Right of appeal explained.