

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
AT KAMPALA
CIVIL APPLICATION 080 OF 2014

5 **SOPHATIA BEITHI**
 NGOBI FRED
 MUTAKA TOM
 JOSEPHINE KAIRU }**APPLICANTS**

VERSUS

10 **NANGOBI JANE**
 NANGOBI ROSE
 IRENE WAMBI }**RESPONDENTS**

15 **CORAM: HON. MR. JUSTICE REMMY KASULE, JA**

HON. MR. JUSTICE KENNETH KAKURU, JA

HON. LADY JUSTICE PROF.LILLIAN E.TIBATEMWA, JA

RULING OF HON. MR. JUSTICE KENNETH KAKURU, JA

20 This is an application by way of notice of motion brought under Section 6(2) of the Judicature Act. It seeks the following orders.

a. *The intended third appeal of the Supreme Court concerns matters of Law of great public or general importance.*

25 b. *Execution of the judgment of the Court of Appeal be stayed.*

c. *Costs of the suit be provided for.*

The grounds upon which the motion is premised are set out therein as follows:-

1. *The intended appeal touches on matters of public importance and important points of law, i.e. whether there are specific circumstances under which a testator can make a will, whether the circumstances override what the testator has written as a will.*

2. *Whether the express words of a will can be varied so as to turn a bequest into a gift inter vivos.*

3. *Whether there is specific language for making wills in Uganda.*

The application is supported by the affidavit of Josephine Kairu one of the applicants. I am constrained to reproduce it in full.

It stipulates as follows:-

2. *That in 2005 I bought land at Magamaga measuring 60feet x 198feet from Sophatia Beithi, the First Applicant.*

3. *That the Respondents challenged the sale in the Iganga District Land Tribunal, but the case was subsequently transferred to a Grade I Magistrate's Court which held in favor of the Respondents.*

4. *That I, along with the other 3 Applicants, appealed to the High Court at Jinja which acknowledged and upheld the sale.*

5. *That the Respondents appealed to the Court of Appeal which declared the sale null and void and ordered that I be refunded the purchase price I had paid.*

6. *That I, along with the other 3 Applicants, intend to appeal and a notice of appeal has thereby been lodged in this Honorable Court. (A copy of the notice of appeal is hereto attached marked 'A')*

7. That an application for a certificate to the effect that the appeal to the Supreme Court concerns a matter of law of great public or general importance is being pursued together with an application for stay of execution.

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8. That I am in current occupation of the suit land and I have substantially developed and invested in the suit land to wit I have set up a school, which is operational.

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9. That there is an imminent threat of execution of the orders of the Court of Appeal if an order for stay of execution is not granted.

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10. That I will suffer irreparable damage through the eviction and closure of the school for the indefinite period until disposal of the appeal.

11. That I will further suffer irreparable damage through the destruction of my developments on the suit land.

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12. That it would be in the interests of justice, fairness and equity to grant this application.

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13. That I swear this affidavit in support of an application for stay execution.

14. That whatever I have stated herein above is true to the best of my knowledge.

It is also supported by the affidavit of Sophatia Beithi the 1st appellant dated 6th March 2014, the relevant paragraph of which state as follows:-

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1. That I am a male adult Ugandan of sound mind and the first Applicant in the above matter.

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2. That on 15/612000 I made a will in luganda language which I signed in the presence of 3 witnesses namely, Nsete Samuel,

Waidha Richard and C. Mwenda. (A copy of the will and its translation are hereto marked 'A').

- 5 3. That by the said will, I expressly stated that I had bequeathed the suit land at Magamaga measuring 60 feet x 198 feet to the Respondents.
- 10 4. That in 2005 I withdrew the bequest and sold the suit land to the fourth Applicant, Josephine Kairu.
- 15 5. That the Respondents originally challenged the sale in the Iganga District land Tribunal, but the case was subsequently transferred to a Grade I Magistrate's Court which held in favour of the Respondents.
- 20 6. That I, along with the other 3 Applicants, appealed to the High Court of Uganda at Jinja which acknowledged my will and upheld the bequest and my right to withdraw it before my death.
- 25 7. That the Respondents appealed to the Court of Appeal which held that the document I executed and my express bequest therein amounted to a gift inter-vivos.
- 30 8. That the said Court of Appeal did not address itself to the actual words I used in the said will in the Luganda language but challenged my said will in the manner it was translated into English.
- 35 9. That I am informed by my lawyers, MIS Okalang Law Chambers, which information I believe to be true that the document I executed amounted to a valid will which only takes effect upon death.
10. That I am also informed by my lawyers, which information I believe to be true, that I was at liberty to make my will in any form or language and distribute my property in the manner I saw fit and to withdraw the same thereafter.
11. I believe to be true, that I was at liberty to make my will in any form or language and distribute my property in the manner I saw fit and to withdraw the same thereafter.

12. That I am further informed by my lawyers, which information I believe to be true, that my express intention to bequeath my property as expressly stated in my will cannot be turned into gift inter-vivos.

13. That it would be in the interests of justice, fairness and equity to grant this application.

14. That I swear this affidavit in support of an application for grant of a certificate that this intended appeal concerns matters of law of public or general importance.

Jane Nangobi filed an affidavit in reply. That affidavit reads as follows:-

1. That I am an adult Ugandan citizen of sound mind and the 1st Respondent herein and I make this affidavit in that capacity.
2. That I have, with the assistance of Mr. Joseph B. Rukanyangira the Respondents Advocate herein, read and understood the affidavit sworn by Josephine Kairu in support of the application herein, to which I respond as follows.
3. That I am advised by the said Joseph B. Rukanyangira and verily believe it to be correct that the decision of the court of appeal against which the applicants intend to appeal does not involve a matter of law of great public or general importance so as to warrant an appeal to the Supreme Court.
5. That immediately we, the Respondents, received the suit land from our father, I and the 2nd Respondent built thereon one big house as the main house and a block of tenements (commonly known as mizigo) for rent.
4. That it is true that Josephine Kairu is in occupation of the suit land and is running a school thereon, but it is not true that she

has substantially developed and invested in the land as the school is housed in the buildings constructed on the land by myself and the 2nd Respondent immediately it was given to us.

- 5 5. That the 4th Applicant is operating her school in what we built as tenements and renting out the main house and collecting rent there from.
6. That the only new thing the 4th Applicant brought on the land is a metallic cargo container which she installed in front of the main house and which she is renting out for use as a shop.
- 10 7. That" the said Josephine Kairu has enjoyed the suit land since 2005 and I verily believe that the only loss the said Josephine Kairu is likely to suffer if the execution of the decree is not stayed would be the income she has been getting from using our buildings thereon.
- 15 8. That I and my sister the Second Respondent have no intention whatsoever of destroying the buildings on the suit land in which the 4th Applicant is operating her school, which buildings we ourselves built.
- 20 9. That as decree holders, we are entitled to and should be allowed to enjoy the fruits of our success as granted by the decree.
10. That I verily believe that the intended appeal has no chance of success and this "application is calculated to enable the 4th Applicant to continue enjoying our land to our detriment.
- 25 11. That it would not be fair, equitable or in the interest of justice to allow the said Josephine Kairu to continue enjoying our land until the final disposal of the intended appeal, considering how long matters in the Supreme Court take before they are disposed of, in the event that the intended appeal fails.
- 30 12. That what is stated hereinabove is true and correct to the best of my knowledge save what is stated in paragraph 3

which is true and correct to the best of advice received as stated therein and what is stated in the latter part of paragraphs 7 and in 10 which is true and correct to the best of my belief.

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At the hearing of this application **Mr. Robert Okalang** appeared for the applicants while **Mr. Joseph Rukanyangira** appeared for the respondents.

10 It was argued for the applicants that the intended appeal to the Supreme Court in respect of which a notice of appeal had already been lodged raises great matters of law and Public importance and that this court ought to exercise its discretion and grant a certificate under Section 6(2) of the Judicature Act to enable the applicants appeal to the Supreme Court.

15 The applicants are also seeking an order of stay of execution of the decree and judgment of this court the subject matter of the intended appeal until the hearing and determination of that intended appeal.

20 Counsel then went on to expound on the grounds upon which this application is premised as they are set out in the two affidavits in support of the notice of motion already reproduced in this Ruling.

25 Mr. Okalang stated that the applicant seeks a certificate from this court to the effect that the intended third appeal to the Supreme Court raises issues of law of great Public importance. He stated those issues to be the following

(1) Whether there are special circumstances under which a testator can make a will.

(2) Whether those circumstances override what a testator has written in the will because the Judgment of this court said "we are considering the circumstances"

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The second leg of this application is that this court be pleased to grant a stay of execution of its Judgment pending a third appeal to the Supreme Court.

5 Mr. Rukanyagira for respondent relying on the affidavits sworn in reply opposed the application.

First he challenged the validity of the affidavit of Sophatia Beithi sworn in support of the motion. He contended that it did not comply with the law. He asked this court to reject it.

10 He contended that the finding by this court that document presented as a will by the applicant was in fact a gift *inter vivos* and not a bequest. This finding he argued was a question of fact and not one of law.

15 He also opposed the application for a stay of execution pending the intended appeal because according to him the intended appeal had no likelihood of success, and that the applicant had not proved irreparable loss in the event that the order of stay is granted.

I have had the opportunity of studying the court record and the authorities cited to us. I have also listened carefully to the submissions of both counsel.

20 I have also noticed that the affidavit in reply and that in rejoinder of Sophatia Beithi the 1st applicant dated 26th March 2014 are both accompanied with a certificate of translation as required by the Illiterates Protection Act (CAP 78). However, the affidavit of the same person in support of the notice of motion is not accompanied
25 by any such certificate and as such it does not comply with the above cited law. To that extent it is inadmissible. However, this is cured by the fact that the motion is supported by two affidavits deponed to by two different applicants.

An application such as the one before me is required to satisfy the requirements of Section 6(2) of the Judicature Act (CAP 13).

That Section stipulates as follows:-

(2) ***“Where an appeal emanates from a judgment or order of a chief magistrate or a magistrate grade 1 in the exercise of his or her original jurisdiction, but not including an interlocutory matter, a party aggrieved may lodge a third appeal to the Supreme Court on the certificate of the Court of Appeal that the appeal concerns a matter of law of great public or general importance, or if the Supreme Court considers, in its overall duty to see that justice is done, that the appeal should be heard.”*** (Emphasis added)

5 The instances in which this court may issue a certificate referred to in Section 6 (2) of the Judicature Act above are restricted to only the following:-

(1) *Where the subject matter of the intended appeal concerns a matter of law of great Public importance.*

10 (2) *Where the intended appeal concerns a matter of law of general importance.*

This was the holding of the Supreme Court in the case of ***Namudu Christine vs Uganda Criminal Appeal No. 3 of 1999 (Supreme Court)*** (Unreported). Wambuzi CJ noted as follows:-

15 ***“Under subsection (5) of S.6, this Court will grant leave if the court, in its overall duty to see that just is done, considers that the appeal should be heard. In other words this court is not bound by the restrictions placed on the Court of Appeal, when that court is considering an application for a***

certificate. The Court of Appeal grants a certificate where it is satisfied:

(a) that the matter raises a question or questions of law of great public importance; or

5 **(b) that the matter raises a question or questions of law of general importance.**

10 **On the other hand, this Court will grant leave if it considers that in order to do justice the appeal should be heard. Anything relevant to doing justice will be considered including questions of law of general or public importance.**

15 **It appears to us that in deciding whether or not to grant leave we are not restricted to questions of law like the Court of Appeal. We have power to consider other matters.”**

In this particular case the questions the applicant intends the Supreme Court to adjudicate upon are set out in the notice of motion as follows:-

20 **1. The intended appeal touches on matters of public importance and important points of law, i.e. whether there are specific circumstances under which a testator can make a will, whether the circumstances override what the testator has written as a will.**

25 **2. Whether the express words of a will can be varied so as to turn a bequest into a gift inter vivos.**

3. Whether there is specific language for making wills in Uganda.

All the above questions do not in my view raise any issues of law. They are concerned with issues of fact. I am also not satisfied that the questions as framed raise any issues of great Public importance of general importance as required by Section 6(2) of the Judicature Act. All that was resolved in the decision that is sought to be appealed against to the Supreme Court is that given the facts of the case the first respondent gave his land as a gift *inter-vivos* to his children both the 2nd and 3rd applicants as well as the respondents. While the boys (2nd and 3rd applicants) sold the piece of land that was given to them, the girls (the respondents) kept their land and build on it. All this was done with the knowledge and consent of the children's father, the 1st applicant who had given out the said land.

Further, circumstances under which a will is made are issues of fact not of law. Words and or language used in a will are also issues of fact not of law.

Even if they constituted issues of law, which was not the case in this case, the applicant would still be required to satisfy court that, those issues of law are either of great public importance or of general importance.

The two terms "**great public importance**" and "**general importance**" are not defined in the Judicature Act. The authorities cited by both counsel were not helpful as regards their respective meanings.

While considering a similar issue in this court, in **Charles Lwanga Masengere Vs God Kabagambe and 2 Others Court of Appeal (Civil Application No.125 Of 2009)**, the Court sought guidance from a decision of the Supreme Court of Kenya in the case of

Hermanus Phillippus Steyn vs Giovanni Gnech
Application No. 4 of 2010 (Supreme Court of Kenya).

The Supreme Court of Kenya while determining a q
similar nature stated as follows;-

5 **“A matter of general public interest co**
 different forms for instance, an envi
 phenomenon involving the quality of air
 which may not affect all people, yet it a
10 **identifiable section of the population, a sta**
 law which may affect a considerable number
 in their commercial practice or in their enj
 fundamental or contractual rights or a holdi
 which may affect the proper functioning
 institutions of governance or the Court's
15 **dispensing redress or the mode of discharge**
 public officers.

20 **The governing principles that a matter before**
 merited certification as one of general public
 importance were:

25 **i for a case to be certified as one i**
 matter of general public import
 intending appellant ought to have sa
 Court that the issue to be canvassed
 was one the determination (
 transcended the circumstances
 particular case and had a significa
 on the public interest;

30 **ii. where the matter in respect**
 certification was sought raised a po
 the intending appellant ought
 demonstrated that such a poin
 substantial one, the determination
35 **would have a significant bearing on**
 interest;

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iii. *such question or questions of law must have arisen in the lower courts and must have been the subject of judicial determination;*

iv. *where the application for certification had been occasioned by a state of uncertainty in the law arising from contradictory precedents, the Supreme Court could either resolve the uncertainty as it may determine, or refer the matter to the Court of Appeal for its determination;*

v) *mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of the Constitution;*

vi. *the intending applicant had an obligation to identify and concisely set out the specific elements of general public importance which he or she attributed to the matter for which certification was sought;*

vii. *determinations of fact in contests between parties were not by themselves, a basis for granting certification for an appeal before the Supreme Court.”*

Although the above decision does not define the terms “**great public importance**” and “**general importance**”, it explains the context in which the two terms ought to apply.

I find the reasoning of that court persuasive and I adopt it.

In this particular application, I find that the applicant has failed to satisfy this court that there exists a question of law of great public or general importance that requires to be settled by the Supreme Court. The issues resolved by the courts in this case were personal to the father and his children, both boys and girls, and how they handled the land that their father gave to them as his children, and whether or not a third party, the 4th applicant ever acquired proper ownership of the land that the girls developed.

I find therefore that there is nothing in this case that raises a question of law of great public or general importance as required by Section 6(2) of the Judicature Act.

This ground therefore fails.

Having found as I have done above, I find no reason to order stay of execution pending appeal. I am of the view that the main objective of this application was for the applicants to buy time since they are in occupation of the suit property and are profiting from it as long as the proceedings remain pending in this and other courts of law.

I find no merit whatsoever in this application, which is hereby dismissed with costs to the respondents.

Dated at Kampala this18th..... day ofMarch.....2015.

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HON. MR. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL