

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CIVIL SUIT NO. DR. MFP 6 OF 1991

(From Probate and Administration cause No. MF 11/91)

FLORENCE KEMITUNGO:PLAINTIFF

- VERSUS -

YOLAMU KATURAMU:DEFENDANT

BEFOR THE HONOURABLE MR. JUSTICE I. MUKANZA

RULING

This is an application by notice of motion brought by the applicant/plaintiff under order 37 rule 1 and order 48 rules I and 2 of the Civil Procedure Rules seeking for an order from this court for a temporary injunction to restrain the respondent/defendant from taking or in any way disposing of the stock which is in this shop which used to belong to the late David Kiiza, collecting and receiving rents from the tenants at Rwengoma, cutting bunches of Matooke from the plantation at Rwengoma, cutting eucalyptus trees from the tree plantation at Rwengoma, using money accruing from the estate of the late David Kiiza, and finally that the respondent/defendant be restrained in any way from interfering with the estate of the late David Kiiza until further orders of this court.

In her affidavit in support of the application the applicant/plaintiff deponed as follows:-

“That she is the widow of the late David Kiiza who died intestate on 22nd February, 1991. On 10th April 1991 she applied to the High Court at Fort Portal for letters of administration to be granted to her. On 17th April 1991 the defendant purportedly laid a caveat against the said application by her. In consequence the estate of the deceased remains without a legally appointed administrator.

That one Richard Sabiiti and Moses Kandole both brothers of the deceased were interfering with the estate. The said Sabiiti had since the death of the deceased run the shop and sold off most of the stock and that was likely to continue. The defendant was not only supporting the acts of Sabiiti and Kandole but also benefits from them.

That the Caveat entered by the defendant/respondent was intended to maintain the status quo. As a result of the status quo the stock in the shop has been greatly reduced from Shs. 1,940,000/= as it was originally at the time of Kiiza's death to about Shs. 200,000/= or less presently. That since the death of the deceased about ten eucalyptus trees have been cut down from the plantation at Rwengoma and that now more are likely to be cut by her sister in law with full backing of the respondent/defendant. Since the death of the deceased she has not been provided with any money to look after the children of the deceased."

In his submissions to this court the learned counsel representing the applicant read the affidavits in support of the applications. I do not therefore have to reproduce his submission.

The learned counsel appearing for the respondent/defendant submitted that the main issue there is the mutual relationship between the applicant and the respondent. By issuing a temporary applicant the honourable court would be determining the issue of the relationship between the applicant and the respondent because that would be indicating that the applicant has beneficiary interest or otherwise in the estate of the late Kiiza and the court would be deciding the main issue and thus disposing of the same. A temporary injunction cannot be granted where the effect could be to dispose of the main issue. He referred me to the case of Muslim Supreme Court .V. Mulumba and others 1980 HCB P. 11 A temporary injunction is also issued where there is a likelihood of irreparable injury caused to the applicant if the grant of such injunction were not made. He referred me to the case of Rwenzori Tea Co. Ltd vs. Kelsale ULR Vol. 8 Page 204.

He continued it was the contention of the defendant/respondent that the applicant had no beneficiary interest or otherwise in the estate of the deceased. Therefore she could not benefit from an order made by this court in this suit of the estate of the late Kiiza. She has nothing to suffer, if the deceased's estate was put to waste as she alleges. The purpose of the provisions of order 37 of the Civil Procedure rules were not meant to benefit persons without any interest in

the property allegedly being protected. The mere fact that the applicant had children with the deceased was not enough. That did not entitle her to a share in the estate of the deceased, I was referred to the case of **Christine Male & Another .V. S.M Namanda & another 1982 HCB Page 140.**

The learned counsel further submitted that following the death of the late Kiiza the family members appointed a committee to care take the Estate of the deceased. What the applicant is alleging in the application is meant to maintain the estate and look after the whole family of the deceased's children. In this Case what the respondent and other committee members were trying to do was to preserve the estate of the deceased until a proper person could apply to administer the estate. That the deceased was survived by 10 children. Therefore the said committee is using the estate left by the deceased to maintain the welfare of the deceased's children. The family could not wait until the person has been appointed to administer the estate so as to look after the welfare of the children. In other words the learned counsel commended that the family committee has taken effective control and administer the estate of the late Kiiza as deponed by the applicant in her affidavit.

In reply the learned counsel representing the applicant/plaintiff submitted that his learned friend should have concentrated on the law and not on evidence because he should have submitted an affidavit in reply. He prayed that the Honourable court does not attach any weight to part of his reply to the applicant's affidavit.

About the marital status of the, applicant the learned counsel submitted that both in the application for letters of administration and in the present application the applicant leaves no doubt that she was married to the deceased the owner of the estate. The same fact features in the plaint it was up to the respondent to swear an affidavit showing that the applicant/plaintiff was not married to the deceased.

I have had the occasion to peruse the affidavit in support of the application and also listened to the lengthy submission of the learned counsels representing the parties. The conditions for the grant of interlocutory injunctions was laid down by Spray v P in the case of **Giella vs Casman Brown and Co. Ltd [1973] EA P.358 as follows:-**

“To begin with the applicant must show a prima facie case with the probability of success.

Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

And finally if the courts is in doubt it will decide the application on the balance of convenience

See also E.A. Industries vs Truffods [1972] EA 420, Nsubuga v Anor vs Mutawe [1974] EA 487.”

In the instant case the applicant swore an affidavit to the effect that she is the widow of the late Kiiza David and had some children as a result of that union. The learned counsel representing the respondent submitted that the applicant is not a beneficiary to the estate of the deceased and that the mere fact that she had children with the deceased that alone, did not entitle her to administer the estate of the deceased. What was contained in the affidavit was evidence. The respondent never swore an affidavit in reply to controvert the applicant’s affidavit. The learned counsel submitted that there was a family committee appointed to care take the estate of the deceased. It is not known who the members of the committee are and their relationship with the deceased. The learned counsel submitted that the committee looks after the 10 children of the deceased. It is not clear whether the ten children include the issues of the applicant or they are children from other women. The respondent should have resolved the matter by filing an affidavit in reply. As far as this court is concerned there is evidence that the applicant was the widow/wife of the deceased and this in my considered opinion presupposes a valid marriage between the applicant and the late David Kiiza. Therefore under S. 201 of the Succession Act Cap 139 as amended by section 1 (p) of the Succession Amendment Decree 22 of 1972 she is entitled to grant of letters of administration. In the end the applicant had shown a prima facie case with the probability of success.

Be that as it may the estate of the late David Kiiza appears to have substantial assets. There are houses from which the respondent and his agents are collecting a lot of rent. There is a shop whose stock was worth over a million at the time the deceased passed away. The stock has now depleted to bare Sh.200,000,/= . Matooke in banana plantations are being cut down at random and

even eucalyptus trees are being cut from the shamba of trees. If at all the temporary injunction is not granted the applicant might suffer irreparable damage which would not adequately be compensated by an award of damages. It would be very difficult to measure damages that would be granted to the applicant in case the temporary injunction was not granted.

I am of the opinion that the applicant had put a strong case for the grant of a temporary injunction. I do not therefore think it is necessary to consider the last ingredient upon which the court has to consider when granting the interlocutory injunction. That is when in doubt the court would decide the application on balance of convenience.

I think it is appropriate at this stage to comment upon some of authorities cited by the learned counsel representing the respondent in support of his submission. In the case of **Christine Male & Anor .V. S.M Namanda & Anor Supra** There the court considered about the grant of letters of Administration where the deceased left a legal wife, concubine and young children with different mothers. The court held that the only person entitled to grant of letters of administration was the legal wife. The facts of that Case is distinguishable from the instant case. In that in the instant case only a wife is involved whereas in Christine case there were more than one. Also in the instant case there is no evidence to show that the applicant was not the legal wife of the late David Kiiza. With regard to the other 2 authorities referred to me i.e. Rwenzori the Estate & Muslims Supreme council. I have not been able to find a copy of HCB 1980 and the ULR Volume 7 and even the counsel failed to provide me with the authorities. Nonetheless I am satisfied that the applicant made up a strong case which entitles her to grant of a temporary injunction.

In the premises the applicant is granted a temporary injunction to restrain the respondent/defendant his servants and or agents from selling taking in any way disposing of the stock which is in the shop which used to belong to the late David Kiiza, collecting and or receiving rents from the tenants at Rwengoma, cutting bunches of matooke from the plantation at Rwengoma, cutting eucalyptus trees from the tree plantation at Rwengoma, using money accruing from the estate of the late David Kiiza, Also the respondent his servants and or agents are restrained in any way from interfering with the estate of the late David Kiiza until further order by this court. Costs of this application are provided for.

I. MUKANZA

J U D G E

30/7/91