THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CV-CS-1144-1997

REV. JAMES KYAMUKAMA & ANOTHER ……..PLAINTIFF

VERSUS

CATHERINE ZARIBWEDE & ANOTHER ……..... DEFENDANT

BEFORE HON. JUSTICE LAMECK N. MUKASA

JUDGMENT:

The brief facts of this case are that the plaintiffs Rev James Kyomukama and Patrick Tugume, filed Probate and Administration Cause No. 331 of 1997 seeking to be granted probate of the Will of the late Charles Zaribwende who passed away on 6th of May, 1997. The defendants Catherine Zaribwende and Eriya Kananura, lodged a caveat on the application contesting genuineness and authenticity of the document attached to the application and claimed by the plaintiffs to be the Will of the late Charles Zaribwende. In the affidavit in support of the caveat the defendants averred inter alia, that the document, Exhibit P1 could not have been the Will of the late Charles Zaribwende because:-

(i) It purports to bequeath properties, which did not belong to the late Charles Zaribwende (here after referred as "the deceased."

(ii) It omitted several properties which belonged to the deceased

(iii) It referred to the 1st defendant Catherine Zaribwende, as the 2nd wife of the deceased whereas she was the 1st and only lawful wife.

(iv) It purported to dispossess of the 1st defendant of the matrimonial home.

(v) It purported to dispossess several of the deceased's children;

(vi) The deceased could not have authorised the document as at the time it was purportedly executed the deceased was of unsound mind due to sickness, and

(vii) The first plaintiff Rev. James Kyomukama, had openly, in a family meeting immediately following the burial of the deceased, denied the existence of a Will.

Thus this suit by the Applicants under the Probate Administration Cause pursuant to the provisions of Section 265 of the Succession Act, The plaintiffs prayers are for:-

(a) A declaration that the Will is valid and binding
(b) A grant of Probate as per petition in Administration Cause No. 331 of 1997 of the Petitioners/Plaintiff's, the Executors.

The Defendants filed a counter-claim together with their written statement of defence where they sought for the following orders:-

(a) A declaration that the deceased died interstate.
(b) That the defendants be jointly granted Letters of Administration of the estate of the deceased.
(c) In the alternative but without prejudice to (b) above that the Letters Administration be granted to the defendants jointly with Ivan Tukwasibwe (eldest son of the deceased) and Eric Babigarukamu (brother of the deceased).

This is an old cased filed on 10th November, 1997. Hearing of the case first commenced on 30th March 1998 up to 11th May before Justice I. Mukanza, now deceased. I took over the hearing of this case on 28th August 2002. The issues as agreed before my predecessor were:-

1. Whether the deceased executed a Will, which is before court - i.e. Exhibit P1.
2. Whether the deceased was of sound mind at the material time.
3. Whether the Will is valid.
4. Whether the plaintiffs were appointed Executors
5. Whether the Plaintiffs are entitled to grant a probate
6. Whether there are any other remedies

The making and validity of a Will is governed, principally, by the provisions of sections 36 and 50 of the Succession Act. I will reproduce below the portions of the above two sections relevant for the determination of this suit.

"Section 36 (1) Every person of sound mind and not a minor may by will dispose of his or her property.

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(5) No person can make a Will while he or she is in such a state of mind, whether arising from drunkenness or from illness or from any other cause, that the person does not know what he or she is doing."

"Section 50…….. every testator….. must execute his or her will according to the following provisions;-

(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;

(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."

Therefore, a Will must be in writing. The testator must not be a minor, must be of sound mind and must not, at the time of making a Will, be in a state of mind whereby he is unable to know what he is doing due to any cause. The Will must be signed by the testator or someone in the testator's presence and at his direction. The testators signature must be witnessed and attested to by two or more witnesses who must have each seen the testators signature being made. The witness must each attest to the Will in the presence of the testator.

In the instant case there is a Will (Exhibit P1) which is alleged of have been made by the deceased. The document is type written on four pages. It is divided in five parts.

Part I, II, IV, V and a portion of part III are in English, while the rest of the part III is in vernacular (Runyankole - Rukiga). On its last page it is in handwriting marked

" Dated at Kabale this 29th day of January 1994"

In part IV are named two Executors and Trustees, namely

(a) Rev. Kyomukama of Nyamuhanyi

(b) Patrick Tugume of Kambuga,

Beside each Executor/Trustees name is a signature respectively dated 29th January 1994. In part V there is first the signature of the testator which can clearly be read as "Charles Zaribwende" and beside it is a date 29th January 1994. Below it are three spaces for signatures of the witnesses. A signature is fixed in each of these three spaces. The witness's signatures clearly appear to be signatures of three different persons. Beside the first witness' signature is a stamp of "Zagyenda & Company Advocates P. O. Box 337 Kabale."

Counsel for the defendant in his final submissions argued that the documents exhibited by the plaintiff as a Will, exhibit P1 was defective. He contented that it did not conform to the provisions of section 50 of the Succession Act in that it lacked an attestation clause. He further submitted that save for the last page the rest of the pages of the document were not signed or in any way authenticated. He prayed that exhibit P1 should be rejected as a Will. The word "Will" has two basic meanings. The first refers to the total declaration of the intention of the person making it (testator) with regard to matters, which he wishes to take effect on or after his death. The second meaning refers to the actual document in which the testator makes his declaration see: Haji Sulanti Habib Jjumba and others VS Hajati Sofarani Nyinakiza Sanyu H..C.C.S. No. 718 of 1995; Administrator General VS Teddy Bukirwa & Anor (1992 - 93) HCB 192

Under section 50 of the Succession Act the signature of the testator or of some other person is his presence and by his direction is an essential element of the validity of the Will. The signature must be placed in such away that it appears that the maker intended the signature as an act of execution and intended thereby to give effect to the writing as a Will. In the instant case at

part V of the document there is a space indicated "signature of the Testator" and in the space below it is in handwriting the name "Charles Zaribwende" This is on page 4 of the document, which is the last page. The other three pages of the document do not have any signature. Normally a signature placed at the foot of the document would in most cases carry the implication of giving effect to the document and affirmative evidence would be needed to rebut it. The signature of the testator should be placed in such away that it is apparent on the face of the Will that the testator intended to give effect by the signature to the writing signed as his Will. Exhibit P1 is made on four pages. Where several sheets constituting a connected disposal of property are found together, the presumption is that they all formed the Will of the deceased. Where a Will consists of several sheets, though desirable, there is no legal requirement for the testator to sign all of them, so long as at the time of execution all the sheets are attached in the some way. In the instant case I have carefully considered the set up of the Will, the heading and numbers clearly follow each other consistently and the signature on the last page is in a space marked "signature of the testator." In the circumstances and find I that the signature was intended to give effect to the document as the Testator's Will.

Another requirement as to the validity of a Will under the above Section is that it must be attested to by at least two witnesses. The testator's signature must be made and acknowledged by him in the presence of two or more witnesses. The attesting witness must either write his name or make some mark intended to represent his name on the Will in the presence of the testator. In Administrator Generals V/S Norah Nakiyaga & others, Administration Cause No. 544 of 1990 a Will proved to have been signed by the deceased was held invalid because it was not attested as required by section 50 (i) (c) of the Succession Act.

While recognising to the fact that under the above sub section there is no particular form of attestation is necessary, Justice CK Byamusgisha in Haji Sulanti Habibu Jjumba & others VS Hajati Sofarani Nyinakiza Sanyu (above) held that it is necessary to have an attestation clause indicating that the requirements of section 50 of the Succession Act have been complied with. It is however, not mandatory to have the attestation clause, the absence of it will not invalidate a Will. To attest is to become witness to a fact or event. Therefore, the requirement under the above section that the Will shall be attested to by two or more witness ' is that the witness shall

be present at the execution of the will, be able to see the testator affix his signature and be able to testify that they saw or had opportunity of seeing his signature.

The defendants disputed the Will. DW1, Catherine Zaribwende is the wife of the deceased married to him on 19th January 1957. DW2 Eriya Kananura was the young brother of the deceased. In their respective testimony the defendants doubt Exhibit P1 to be the Will of the late Charles Zaribwende. Both defendants testified that they each knew the deceased's signature and would recognise it if they saw one. They each testified that the signature on Exhibit P1 attributed by the Plaintiffs to the late Charles Zaribwende was not his. However, while being cross-examined DW1 contradicted herself when she stated that she did not have proof to refute the signature of the deceased on the Will. Both defendants testified that they first saw the document exhibit P1 while in the court chambers of Mr. Mulangira where it was brought in a sealed envelope by Mr. Zagyenda (who happens to be counsel for the plaintiffs) and was opened and read to them and others present by Mr. Mulangira. DW2 stated that when he saw the document he was not satisfied with the signature stated to be that to the deceased. The defendants gave several reasons why they disputed the Will.

Their first reason is that during the burial period and in a family meeting following the burial inquiries were made as to whether anybody was aware of any Will or document left by the deceased. That though Rev. James Kyomukama (PW1) was present at the burial and in the meeting and claims have been present when the document was executed and personally signed on it he kept quiet about its existence until after the document had surfaced in Mr. Mulangira's chambers.

Secondly, that on 29th January 1994 when the deceased is said to had signed the document he was very sick and could not have signed. DW1 testified that the deceased was that day in theater due to illness. DW2 testified that the deceased was on that day very sick, in a talkative state and could not talk seriously and was just being lifted as he could not move.

Thirdly, that in the document the deceased made dispositions of properties which did not belong to him. DW1 adduced evidence to show that some of the properties indicated in the document as of the deceased were not of the deceased but her properties.

Fourthly, DW1 had been described in the document as the deceased's second wife while she was the legal and only wife of the deceased. Further DW1 wondered why Mr. Zagyenda who was a family friend and one of the signatories on the document had not told her of the existence of the Will. She stated that Mr. Zagyenda had instead told her that it was Rev. Kyomukama (PW1) who had told him that there was a Will.

On the other hand the Plaintiffs adduced evidence of three witness to prove that Exhibit P1 was the Will of the deceased. Both plaintiffs testified that they were both present and saw the deceased while affixing his signature on the document and that they both also signed on the document. Both Plaintiffs testified that in addition to them the other witnesses were Eric Turyakora and Joseph Zagyenda. That the deceased and all the witnesses signed at the same time and in the presence of each other. That the order of signing was PW1 first followed by PW2, the deceased, followed by Eric Turyakora and lastly, Joseph Zagyenda. Both witnesses identified Exhibit P1 as the Will of the deceased. They both identified the deceased's signature on the Will, their respective signatures and the signatures of the other witnesses. PW1 admitted that he had attended the family meeting after the burial but that he did not volunteer information about the Will first because he was not personally asked and secondly because the atmosphere at the meeting was hostile.

PW4 Samuel Ezali a frosic Examiner of questioned documents with the Uganda Police, Scientific Aid Laboratory testified that he examined various specimen, documents which were signed by the deceased, he compared the deceased signatures there with the deceased's disputed signature on Exhibit P1, the disputed Will. He made a Report (exhibit P4) in which his findings were:-

> "Specimen S1 - S3 were made 7- 14 years before the exhibit P1. The signatures seen on them are different modules from the questioned signature. The second half of the specimen S1- S3 are completely

> different from those on P1. However, the first half reading "Charles" corresponds perfectly with the first half of the questioned signature and the specimen signatures on S4. I have found that the questioned signature on P1 corresponds and falls completely within the range of natural variation found in the specimen 4 The letters Z,C, h, r, b, w, s, and d are significantly similar in general and individual handwriting characteristics. There are also similarities in character combinations e.g. a-r, a-r-l, b- w-e---"

The witness's opinion was that the similarities between them were such that the questioned and specimen signatures were made by one and the same person.

I have carefully considered both the plaintiff's and the defendants' evidence. I have found that the deceased's signatures on the specimen documents examined by PW4 are not disputed by the defence. Though the defendants were not satisfied with the signature on the Will, which is stated to be that of the deceased, the defendants did not adduce any evidence to contradict the testimony of PW4. The defendants did not adduce any evidence to show that due to the deceased poor health on or around 29th January 1994, the deceased could not write or sign. Section 36 (1) of the Succession Act provides that every person of sound mind not a minor may, by will dispose of his or her property. This clearly means that the testator should dispose of property or an interest in property belonging to him at the time of his or her death. Any disposal of property, which the testator has never had, any interest or of any property in which he had an interest at the date of his Will but has since disposed of in his lifetime must fail. Any attempt to dispose of property not belonging to him will pass no bequest to the person bequeathed, as no one can give away what does not belong to him. However, such disposition does not invalidate the Will, it only invalidates the bequest. I do not intend to go into the ownership of the properties claimed by DW1 as her personal properties. That is a dispute which can be resolved in a suit against the Executors or Administrators of the deceased estate appointed following the decision of this case. Currently, the plaintiffs do not have the locus stand; to legally represent the deceased until their application for probate is granted. See James Katende & others V/S Dan Byamukama Administration Cause No. 201 of 1992

In answer to the first issue I find that on the evidence and the law as outlined above Charles Zaribwende executed the Will exhibit P1

The second issue is whether the deceased was of sound mind at the material time when the Will was executed i.e. on 29th January 1994. Under Section 36 (1) of the Succession Act any person to be capable of making a will must be of sound mind. And under sub-section 5 of the above section no person can make a will while he is in such state of mind, whether arising from drunkenness or from illness or from any other cause, that he does not know what he is doing. While sub-section 3 of the section provides that a person who is actually insane may make a Will during an interval in which he is of sound mind. The law presumes every person sane or capable of knowing what he is doing. The onus of providing that the testator was of unsound mind or incapable of knowing what he was doing at the time he made the Will is on he who wishes the court to believe so. See Section 103 of the evidence Act, Abbass Magunda & Aur V/S Sulaiman Senoga & Others (1995) IV KALR 172. If proved that Charles Zaribwende was of unsound mind at the time he signed the Will that will render the execution null and void.

DW1 and DW2 testified that Charles Zaribwende had since 1900 been sick. DW1 stated that on 27th January 1994 the deceased had gone for treatment at Safe Clinic and among the doctor's findings was that the deceased was mentally disturbed. She further stated that on 29th January 1994 the date when the Will was executed, the deceased was taken to the theatre due to his illness. DW2 stated that by the date of execution of the Will the deceased was very sick, in a talkative mood and could not understand. That he was undergoing treatment and could not walk by himself. The defendants testimony is corroborated by that of DW3, Dr. Mutabazi Medad. He testified that he is a Medical doctor practicing privately at Safe Clinic Kabale. On 27th January 1994, (two days before the date of execution of the Will on 29th January 1994) he received the deceased in his clinic with multiple complaints. He examined the patient and recorded his findings on the Clinic Note exhibit D9. Among the witnesses findings was that the patient was poorly oriented in time and space in other words he could not tell time and where he was. Among his conclusions was that the patient suffered from immuno suppression and explained in his testimony that immuno suppression perse can cause a dislocation of ones mind. The witness did not give any treatment or make any prescription for the mental disorder. In cross-examination the witness explained that as a remedy where one's mind suffers loss of time and

place it is necessary to identify the causes and treat the causes. To do so it required a lot of other investigations which were not done due to the fact that the patient was taken away from his home to Kampala, a fact the witness learnt on his visit to the patient's home. It was the witness' testimony that after visit to his clinic on 27th January 1994, the witness for about seven days continued to visit the deceased at his home which was about a quarter a kilometer from the clinic. That on those visits, intended to ensure that the patient took the tablets the witness had prescribed, the witness found that the patients' mental condition was deteriorating. In re-examination the witness stated that any medical doctor, even if he is not psychiatrist, can diagnose a psychiatric case. He however admitted during cross-examination, that a psychiatric would make a better observation and give better treatment in a psychiatric case as he is better qualified in the field.

In his evidence during cross-examination Rev. James Kyomukama stated that when the Will was signed he did not sense that the deceased was sick. That the witness did not know whether the deceased was of sound mind when he wrote the document. Then in another statement he says that the deceased was of sound mind when he made the Will. In his evidence the second plaintiff, Patrick Tugume, stated that at the time the deceased made the Will he was in a sound health condition. In cross-examination he stated that he was not aware that the deceased had attended Safe Clinic two days before the date when the Will was made.

On the above evidence Mr. Zagyenda counsel for the Plaintiff quoted from Price's Practice on Medicine 10th Edition para B at page 1169 where it is stated that there are various degrees through which unsoundness of mind goes, developing signs as well as continuing to change and worsen. Counsel argued that Dr. Mutabazi DW3 could not advance his assertion though even one stage of the alleged unsoundness of mind. Counsels contention is contrary to the evidence on record. DW3 testified that the deceased was poorly oriented in time and space. That his further observation during the visits the witness made to the patient's home was that the deceased's mental condition was deteriorating. What is material was not the degree of unsoundness but rather whether the testators state of mind was so affected by illness that he was incapable of knowing what he was doing at the material time. The provisions of section 36 (5) of the Succession Act means that where for any cause any person is incapable of knowing what he is doing his testamentary power fails and a Will by such a person will no longer be under the

guidance of reason. The evidence of DW1, DW2, and DW3 shows that the sickness of the deceased had around the 29th day of January 1994 substantially affected his health of body and mind. The evidence of DW3 clearly shows that the deceased was around that time, incapable of knowing what he was doing. DW3 testified that on 27th January 1994 he found that the deceased could not tell time and where he was, further that when he thereafter continued to visit the deceased at his home, the deceased could not recognise the witness. The deceased's state of mind then might explain the conduct of Rev James Kyomukama and Mr. Zagyenda after Charles Zaribwende's death. Rev. Kyomukama's testimony is that he was aware of the existence of the Will and was signatory to it yet he admits that despite the inquiries about the existence of a Will immediately after the burial and during the family meeting he did not volunteer information about the Will. All that was required of him was to say that there was a Will, he was not under any obligation to talk about the contents of the Will. Any hostility of the members present could only affect him if he talked of the contents of the Will to which some members present appeared hostile. DW1 testified that when she inquired from Mr. Zagyenda, who was the family lawyer and friend Mr. Zagyenda did not reveal to her the existence of a Will. That he told the 1st defendant that it was Rev. Kyomukama who had told him, Zageyenda, about the existence of a Will. DW1s testimony in this regard was not contradicted. One wonders why this was so when Mr. Zagyenda was one of the witnesses to the Will. The conduct of the above two attesting witnesses to the Will tends to show that they had doubts as to the validity of the Will. From the evidence and the law as outlined above I find that the defendants have on a balance of probabilities proved that Charles Zaribwende was of unsound mind at the time the Will exhibit P1 was signed.

The third issue is whether the Will was valid. The law governing the capacity to make a Will is found in Section 36 the succession Act and it is clear on the provisions of that Section that a person who by reason of unsoundness of mind, however, caused does not know what he is doing and can not make a valid Will. In the circumstances my finding in the second issue above renders the execution of the Will, exhibit P1, null and void. I accordingly find the Will of the deceased dated 29th January 1994 invalid.

Issue Number 4 is whether the Plaintiff were appointed Executors. Executors can only be appointed by a valid Will. Since the Will by which the Plaintiff were purportedly appointed

executors has been declared invalid it naturally follows that the Plaintiffs are not executors as there is no Will the provisions of which to execute. Similarly the Plaintiff are in the circumstances not entitled to Probate.

Exhibit P1 shows that Rev. Kyomukama was appointed an Executor, and that he was one of the three witnesses to the execution of the Will. Section 55 of the Succession Act provides:-

> "No person by reason of interest in, or of his or her being an executor of, a Will is disqualified as a witness to prove the execution of the Will or to prove the validity or invalidity of the Will."

Therefore, Rev. Kyomukama was a competent witness. However, section 54 of the Act provides:-

> " A Will shall not be considered as insufficiently attested by reason of any benefit given by the Will, either by way of appointment, to any person attesting it or to his wife or husband, but the bequest or appointment shall be void so far as concerns the person so attesting or the wife or husband of that person or any person claiming under either of them "

Had I found the Will exhibit P1 valid then by the provisions of the above section Rev Kyomukama's appointment as an Executor there of would have been void since he attested to the Will.

With regard to the defendants counter claim it is hereby declared that the late Charles Zaribwende died intestate. The defendants sought under their counter claim to be jointly granted Letters of Administration or in the alternative that the Letters of Administration be granted to the defendants jointly with Ivan Tukwasibwe the eldest son of the deceased and Eric Babigarukamu (brother of the deceased) Evidence on record shows that the late Charles Zaribwende was survived by two widows, namely Catherine Kambungiro Zaribwende and Rose Bashabomwe and twenty-two children. The said Rose Bashabomwe has since Charles Zaribwende's death also died. The second defendant Eriya Kunanura is a brother of the deceased. On the evidence before me I see no justification for an automatic grant of Letters of Administration to the

deceased's brothers Eriya Kananura and Eric Babigarukamu. In the circumstances of this case and pursuant to the inherent powers of court under Section 98 of the Civil Procedure Act,

I make the following orders:-

1. A meeting of the surviving widow Catherine Kambungiro Zaribwende, and the children of the late Charles Zaribwende be held within 30 days from the date of this judgement.

2. At the meeting the children of the late Charles Zaribwende should choose from their numbers one of the children of deceased born to the deceased and Catherine Kambungiro Zaribwende, one of the children born to the deceased and the late Rose Bashabomwe and one other child of the deceased as the members present may deem fit and proper and a resolution making the appointments as indicated above shall be signed by the first defendant and all the children of the deceased present at the meeting.

3. The duly signed resolution of appointments as aforesaid shall be filed in court within ten days from the date of the said meeting.

4. Thereafter this Honourable court shall make a grant of Letters of Administration to administer the deceased's estate in favour of the 1st Defendant jointly with the three children of the late Charles Zaribwende so appointed as provided in two (2) above.

In the final result the Plaintiff's suit is dismissed with costs.

Lameck N. Mukasa

JUDGE