

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT NO 789 OF 1997

1. AIDA MBWALI
 2. SANTABEN alias ZULABEBI
 3. NATUBHAI KHIMJI alias
ZUBAIRI HABIBU
- :PLAINTIFFS

VERSUS

ASHOKUMAR K. JETHWA:DEFENDANT

BEFORE HON. JUSTICE GIDEON TINYINONDI:

RULING:

A preface to this unfortunate file shows that on 17/08/1999 I reserved a ruling following two preliminary points raised by Counsel for the Plaintiff. Thereafter the file went missing. I am now (05/05/2006) informed that the file has been retrieved from the High Court archives.

I now proceed to write the ruling.

The plaint reads: -

- “1. The First Plaintiff is an adult Ugandan of Sound mind and a widow of the late **KHIMJI JUTHABHAI TAILOR** also known as **KHIMJI J. JETHWA** and her address for purposes of this suit is C/o **M/s Byaruhanga & Co. Advocates, P. O. Box 6491 Kampala, Uganda** and **Messrs Muhanguzi, Mugisha & Co. Advocates, Total House, Plot 29/33 Jinja Road, P. O. Box 8376 Kampala, Uganda.**

2. The Second Plaintiff is an adult Ugandan of sound mind and a daughter of the First Plaintiff and the late **KHIMJI JUTHABHAI TAILOR** and her address for purposes of this suit is **C/o Byaruhanga & Co. Advocates, P. O. Box 6491, Kampala Uganda** and **Messrs Muhanguzi, Mugisha & Co. Advocates Total House Plot 29/33 Jinja Road, P. O. Box 8376 Kampala, Uganda.**
3. The Third Plaintiff is an adult Ugandan of sound mind, the son of the First Plaintiff and the late **KHIMJI JUTHABHAI TAILOR** and address for purposes of this suit is **C/o Byaruhanga & Co. Advocates, P. O. Box 6491 Kampla, Uganda** and **Messrs Muhanguzi, Mugisha & Co. Advocates Total House Plot 29/33 Jinja Road, P. O. Box 8376 Kampala, Uganda.**
4. The Defendant is an adult believed to be of sound mind, the administrator of the estate of the late **KHIMJI JUTHABHAI TAILOR** and will be served by the Plaintiff's Advocates.
5. The Plaintiff's claim against the Defendant is for:
 - a). Revocation and/or Annulment for just cause of the letters of administration granted to the Defendant for the estate of the late **KHIMJI JUTHABHAI TAILOR** in the High Court Administration Cause no. 132 of 1994.
 - b). A grant of letters of administration of the estate of the late **KHIMJI JUTHABHAI TAILOR** to the Plaintiffs jointly;
 - c). A declaration that property comprised in Plot 6 Owen Road, Jinja constitutes the matrimonial home and that the Plaintiffs should continue to occupy it.
 - d). A Permanent injunction to restrain the Defendant from evicting the Plaintiffs from the residential holding-cum-matrimonial home on the said Plot 6 Owen Road, Jinja;

- e). The Plaintiffs are entitled to their respective shares in the estate of the late **KHIMJI JUTHABHAI TAILOR** as envisaged under the succession Act Cap. 130 as amended by the Succession (Amendment) Decree 22 of 1972;
- f). Costs of this suit and interest thereon.

6. The facts constituting the case of action areas hereunder:

- a). In **High Court Civil Suit No. 19 of 1994** (Jinja District Registry) it was established that the First Plaintiff is a widow of the late **KHIMJI JUTHABHAI TAILOR** and the Second and Third Plaintiffs are issues of the marriage; (A certified copy of the High Court Proceedings will be produced at the hearing of the above suit and will be relied upon);
- b). In **Civil Appeal No. 1 of 1996 of the Court of Appeal of Uganda** arising from the said **High Court Civil Suit No. 19 of 1994** the First Plaintiff's claim in the lower court that the property on the said Plot No. 6 Owen Road Jinja did not form part of the late **KHIMJI JUTHABHAI TAILOR'S** estate was not entertained. (A certified copy of the Court of Appeal Proceedings will be produced and relied upon at the hearing of the above suit).
- c). In the said **Civil Appeal No. 1 of 1996** the Court held that whether or not the return of the property and Plot No. 6 Owen Road Jinja would leave the First Plaintiff and her children in the cold was a matter to be pursued under The Succession Act;
- d). The Proceedings to obtain the grant of letters of administration in **Administration Cause No. 132 of 1994** were defective in substance in that;

- i). The Plaintiffs were not disclosed as members of the family or other relatives of the late **KHIMJI JUTHABHAI TAILOR**;
 - ii). Property including Plot 6 Owen Road Jinja left within the jurisdiction of the High Court of Uganda was not disclosed;
 - iii). The Petition for the letters of administration was not subscribed by the Petitioner's advocate.
- e). The grant was obtained fraudulently;

PARTICULARS OF FRAUD:

- i). The Defendant falsely stated that the Defendant and his mother were the only survivors of the deceased **KHIMJI JUTHABHAI TAILOR** when he knew or ought to have known that the Plaintiffs were also members of the family of the deceased;
 - ii). The Defendant falsely implied that the Defendant's mother **SANTABEN KHIMJI JETHMA** was the only person whose consent was required when he knew or ought to have known that all the First Plaintiff being the lawful widow of the deceased her consent was duly required;
 - iii). The Defendant concealed the existence of the Plaintiffs and the property on Plot No. 6 Owen Road, Jinja which were material to the application for letters of administration;
- f). The Defendant being the Administrator of the estate of the late **KHIMJI JUTHABHAI TAILOR** has willfully and

without reasonable cause omitted to file an inventory of the property and credits in court within the prescribed period;

g). The property at Plot No. 6 Owen Road, Jinja was owned by the late **KHIMJI JUTHABHAI TAILOR** as a residential holding and the deceased's matrimonial home by the time of his demise;

h). At all material times the Plaintiffs were the occupiers of the said property and they were entitled to continue occupying the said property.

7. By reason of all the foregoing the Plaintiffs will contend that there is just cause for revocation and/or annulment of the letters of administration granted to the Defendant;
8. The Plaintiff aver and contend that since the passing of judgment of the Court of Appeal i.e. on the 21st day of February, 1997 the Defendant through his authorized agents and/or servants has threatened and continues to threaten the Plaintiffs with eviction from the above said matrimonial home.
9. The Plaintiffs aver and contend that they do not have any other alternative accommodation and if evicted they stand to suffer irreparably.
10. The Plaintiffs will rely on the documents on the list annexed to the plaint.
11. Notice of intention to sue was communicated to the Defendant.
12. The cause of action arose in Kampala within the jurisdiction of this Honourable Court.”

The Defendant filed a written statement of defence stating: -

- “1. The Defendant denies every allegation of fact stated in the plaint as if each were put forth and specifically traversed Seriatum save as herein admitted.

2. Paragraphs 1, 2, 3 and 4 are admitted.
3. The Defendant's address of service shall be c/o M/s Beyanga & Barigye Advocates P. O. Box 31423, Kampala.
4. In reply to Paragraph 6 of the plaint the contents whereof he denies the Defendant shall aver and contend that: -
 - (a). The court of Appeal in Civil Appeal No. 1 of 1996 (arising from Civil Suit No. 19 of 1994) found that the issue of whether or not the First Plaintiff was married to the Defendant had been wrongly raise in the High Court and should/be perused under the succession Act. Reliance shall be had on the court of Appeal judgment and proceedings therein.
 - (b). The **Late Khimji Juthabhai Tailor died intestate** in London in 1981 and was not at the time of his death in occupation of Plot 6 Own Road Jinja as his residential holding or at all.
 - (c). The **late Khimji Juthabhai Tailor** was not living with the first Plaintiff at Plot 6 Owen Road Jinja at the time of his death as husband and wife or at all.
 - (d). The late **Khimji Juthabhai Tailor** was not married to the first Plaintiff.
 - (e). The court of Appeal in the said Civil Appeal No. 1 of 1996, set aside the judgment and orders of High Court in Civil Suit No. 19 of 1994 and;
 - (i) Substituted an order dismissing the said High Court Suit;
 - (ii) Ordered vacant possession to be given to the Defendant though his lawful attorney.

- (f). The proceedings leading to the grant of Letters of Administration to the Defendant in High Court Administration Cause No. 132/94 were not defective in substance or at all because: -
- (i). The Plaintiffs were not known to the Defendant as wife and children of the late Khimji Juthabhai Tailor.
 - (ii). There was no caveat or other objection lodged against the said grant by the Plaintiffs or anybody.
 - (iii). At the time, the Defendant had no details of the property such as Plot 6 Own Road Jinja left by the late Khimji Tailor although he knew he had some property left in Uganda at the expulsion of Asians from Uganda in 1972.
 - (iv). The petition was drawn and filed by the applicant without an Advocate and could hence not be subscribed by an advocate.

7. The Defendant denies that the grant of Letters of Administration was obtained fraudulently and shall aver and contend that: -

- (a). he could not state the Plaintiffs as Juthabhai Tailor as he did not know them as such.
- (b). the first Plaintiff is not a widow of the late Khimji Juthabhai Tailor, and her consent was not required.
- (c). the Defendant did not conceal the existence of the Plaintiffs' because he did not know them as members of late Khimji Tailor's family.

8. The Defendant as Administrator of the estate of late Khimji Juthabhai Tailor denies that he has willfully and without reasonable cause omitted to file an inventory of the property and credits in court, and will contend that: -
 - (a) The sole property so far ascertained as forming part of the estate of the late Khimji is Plot 6 Own Road Jinja.
 - (b) The aforesaid property has since its lawful repossession at the instance of the Defendant in 1994 been subject of litigation in High Court Civil Suit No. 19/94, Civil Appeal No. 1/96 and intended Appeal in the Supreme Court, all at the instance of claim of ownership by the First Plaintiff.

9. The Defendant shall aver and contend that the First Plaintiff is not entitled to a grant of letters of Administration for the estate of the late Khimji Jethwa Tailor because: -
 - (a) at the time of his death in 1980 the late Khimji Tailor had been living in London separate from the First Plaintiff.
 - (b) at the time of his death in 1980, the late Tailor was not living at Plot 6 Owen Road Jinja as his residential holding or matrimonial home or at all.
 - (c) since 1980, year the late Tailor died, the First Plaintiff had fraudulently held out as the lawful owner of property at Plot 6 Owen Road until Civil Appeal No. 1/96 when it was established it still belonged to the late Tailor's estate and she was ordered to give vacant possession to the Defendant's agent.
 - (d) On 25/02/1997, the First Plaintiff through her Lawyers filed a Notice of Appeal in the court of Appeal against the judgment in Civil Appeal No. 1/96, thus still pursuing her alleged right of ownership of Plot 6 Own Road Jinja against

the interests of the lawful administration of the estate of the Late Khimji Tailor. A copy thereof is attached and marked "A".

10. The Defendant shall aver and contend that: -

- (a). The First Plaintiff has for a long time been renting out for hire, the property at Plot 6 Owen Road Jinja and has therefore not been physically occupying it for accommodation.
- (b). the Plaintiffs have alternative accommodation at plot No. 3 Haji Tamachi Road Jinja owned by the 1st Plaintiff.

11. The Defendant admits having issued quit-notices from Plot 6 Owen Road Jinja to the First Plaintiff, for purposes of fulfilling his duties as Administrator of the estate of the Late Tailor.

12. The Defendant shall aver and contend that: -

- (a). the First Plaintiff has at all material times refused and/or resisted handing over the property at Plot 6 Owen Road Jinja to the Defendant as part of the estate of the late Tailor for its lawful administration by the Defendant.
- (b). The first Plaintiff has made the Defendant's Work as Administrator of the estate of late Tailor virtually impracticable by filing Civil Suit No. 19/94 wherein she fraudulently claimed outright ownership thereof and has in the same light to date filed the instant suit claiming to be a widow and beneficiary to the estate of Late Tailor.

13. The Defendant shall aver and contend that for the foregoing reasons there is no just cause for revocation and/or annulment of the letters of Administration granted to the Defendant in Administration Cause No. 132/94."

At the hearing Counsel for the Defendant raised a preliminary point that this matter was res judicata. That it had first been arbitrated by the Jinja High Court in HCCS. No. 19/94 where judgment was entered for the Plaintiff on 29/04/1996. That the Defendant appealed (CA 1/96) and the judgment of the High Court was reversed on 05/03/1997. That in the Jinja High Court Civil Suit the Plaintiff sought a declaration that Plot 6 Owen Road, Jinja belonged to her and her children. That, that claim was similar to the claim in paragraph 5 (c) and (d) in the present suit.

The Court of Appeal rejected a document (exhibit "P1") relied on by the Plaintiff's deceased's mother that the property in question had been given to her by her alleged husband as a wife to own together with her children and therefore entitled them to live in the house. That the Court of Appeal had rejected the document as a forgery. That no appeal had been preferred against this ruling. That the Plaintiffs could not therefore claim any benefit from the deceased's estate because there was no evidence that the Plaintiffs were the widow, son and daughter of the deceased. Referring to the Court of Appeal decree Counsel stated that orders 1 to 6 in essence dispossessed the Plaintiff and all her children of any interest in Plot 6, Owen Road, Jinja. That in view of the above arguments, this Court should not entertain this suit. He cited Section 7 of the Civil Procedure Act in his aid.

Counsel for the Defendant's second preliminary point was that the Plaintiffs had no cause of action and no locus standi. That they had been misled by the obita dictum of the D.C.J in the Court of Appeal-CA No. 1/96 who had pointed out that the matter could have been resolved under the law of succession and had gone ahead to file the present suit. {I must confess my inability to appreciate Counsel's trend of argument under this head of objections and so will not pronounce on it}.

Counsel for the Plaintiff replied in the following tone. The matter was not res judicata. The issues in the Jinja case were whether the late Khimji Juthbhai Tailor had transferred Plot 6, Owen Road to the Plaintiff and whether the repossession of it by the Plaintiff in the Jinja case was valid. In that case Kato, J. held the transfer valid and repossession having done within the law. That the Court of Appeal considered the issue of repossession when at Page 7 paragraph 3 the DCJ stated: -

“In my view the crux of the matter here is whether Khimji was a departed Asian whose property was vested in Government by Decree No. 27/73 and Act No. 9/82.”

That the issues now before this Court were in paragraph 12 (a) of the plaint, that is to say:
an order of revocation or annulment of letters of administration granted to the Defendant in Administration Cause No. 132/94.

Counsel for the Plaintiff further contended that res judicata applies where issues are the same in the previously instituted as in the subsequently instituted suit. He referred to page 9 paragraph 1 of the Civil Appeal judgment where it was stated:

“The learned trial judge seems to have been unnecessarily bothered by the fact that by returning the suit property to its owner the respondent and her children would be left out in the cold as it were. In my view that was a matter to be pursued under the Succession Act.”

From this passage the said Counsel argued that the Court of Appeal had not decided on the matter but had instead advised that it be pursued under the Act. Counsel for the Plaintiff referred to paragraphs 2 and 3 of the plaint to answer that the Plaintiff had a cause of action and locus standi.

In order to appreciate these arguments reference has to be had to the pleadings both in the Jinja Court and this Court and the judgments of the Jinja Court and the Court of Appeal of Uganda.

Having carefully perused the two records I am of the considered opinion the preliminary objection should be overruled on two accounts:

- i). The issue of revocation of letters of administration granted to the Defendant was not an issue in the Jinja High Court, while it is before this Court.
- ii). The Court of Appeal was not seized of the matter in (i) above because it was not an issue in the lower Court.

Accordingly the preliminary points stand over-ruled. The Defendant to pay the costs of this application in any event.

I hand this file back to the Registrar to re-allocate it to the appropriate High Court circuit.

Sgd: Gideon Tinyinondi

JUDGE

05/05/2006.

05/05/2006 – 10.00 a.m.

Mr. Oging for Defendant

No appearance for Plaintiff

Ms. Kauma , Court Clerk

Court:

Ruling read in open court.

Sgd: Gideon Tinyinondi

JUDGE

15/05/2006