

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA
FAMILY DIVISION**

**MISC. APPLICATION NO.23 OF 2007
(ARISING FROM CIVIL SUIT NO.840 OF 2004)**

JOHN M. AGABA & OTHERS:..... PLAINTIFFS

VERSUS

JOSEPH ASIIMWE DEFENDANT

BEFORE: THE HON. MR. JUSTICE ELDAD MWANGUSYA:

JUDGMENT

The following Plaintiffs namely, AGABA JOHN, MARK MUGENYI, MARIA KABABITO, LILIAN NANSAMBA MUGENYI, JUDITH NAKACHWA, JULIET NAKASAMBA, ROBERT LUBEGA, RONALD LWANGA, JOSEPH LWANGA, STEPHEN NSAMBA, PATRICK BALIKUDEMBE AND DENNIS MUKISA sued the Defendant, namely ASIIMWE JOSEPH for the following orders:-

- (a) A declaration and a permanent order restraining the Defendant from disintitling the Plaintiff of their rights and interest to the estate of the Late Teddy Nalubega.
- (b) The revocation of the letters of Administration Cause No.0093 of 2003 to the estate of Late Teddy Nalubega.
- (c) A declaration that the Plaintiffs and other beneficiaries are entitled to their respective rights and interests in the estate of Late Nalubega.

- (d) A grant of Letters of Administration to be estate Teddy Nalubega be made to the senior members of the deceased's family.
- (e) An order for the Defendant to file a comprehensive true and correct statement of account of dealings with the estate of the late Teddy Nalubega.
- (f) A declaration or order that the transactions and or dealings made pursuant to the said "Letters of Administration" obtained by the Defendant be declared unlawful/Illegal.
- (g) A permanent injunction restraining the Defendants from illegally undertaking and or unlawfully interfering with the estate of Late Teddy Nalubega.
- (h) An order for the other property belonging to the deceased which shall be identified and or traced be restored to the said deceased's estate.
- (i) An order to pay reparation for the loss and damage negligently and unlawfully occasioned to the estate of the Late Teddy Nalubega.
- (j) Costs of this suit and interest thereon.

In his written statement of defence the Defendants denied the Plaintiffs' claim against him contending that he was rightfully granted Letters of Administration for the estate of his mother and made a counter claim for :-

- (a) A declaration that property comprised in Block 221 Plot 96 belongs to the estate of the Late Teddy Nalubega.
- (b) A declaration that the Defendant is the administrator and beneficiary of the estate of the Late Teddy Nalubega.
- (c) A permanent injunction restraining the Plaintiffs from intermeddling with the estate of the late Teddy Nalubega.

- (d) An order directing the 1st Plaintiff to disclose/account for any property belonging to the deceased in his possession
- (e) General damages.
- (f) Costs of the main suit and counterclaim.
- (g) Interests on the decretal sum at bank rate (24% p.a.) from the date of judgment till payment in full.

The Plaintiffs made a reply to the written statement of defence in which they contended that the property in issue belonged to the family of the Late Tibamanya Akiki and not exclusive to the estate of Teddy Nalubega. They made a defence to the counterclaim in which they denied all the allegations labeled against them by the defendant/counterclaimant.

At a scheduling conference held on 16.06.05 the following facts were admitted:-

1. That Teddy Nalubega is a natural sister and aunt to the Plaintiffs.
2. That she died intestate on about the 26th June 1993.
3. That she left behind property including a residential house and a parcel of land situated at Nalya.
4. That Rose Tibakanya was occupying the suit premises from the early eighties.
5. That the Defendant obtained a grant of Letters of Administration for the estate of Teddy Lubega the issues framed were as follows:-
 - (1) Whether the suit premises belong to the estate of Late Tedy Nalubega or that of Rose Tibakanya.
 - (2) Whether the Defendant fraudulently applied and obtained Letters of Administration for the estate of Late Teddy Nalubega.
 - (3) Whether the Defendant fraudulently applied for a special certificate of title to the suit premises.
 - (4) Whether the Defendant has exhibited a true account of the Late Teddy Nalubega.
 - (5) Whether the Defendant is fraudulently misappropriating the estate of the late Nalubega.
 - (6) Whether Plaintiffs are entitled to the remedies sought.

- (7) Whether the Defendant is entitled to the counterclaim.
- (8) Whether or not the Plaintiff are intermeddling in the estate of Late Teddy Nalubega.

Before resolution of the above issues court has noted that there is a mix up of two estates and their separation is essential in order to ease the resolution of the issues.

The first estate is that ROSE TIBAKANYA AKIIKI died intestate in the year 2003. During her lifetime the deceased produced five children two of whom, namely John Mary Agaba (1st Plaintiff) and Mark Mugenyi (2nd Plaintiff) are still alive. The other three, namely George William Kagoro, Lwanga Charles and Teddy Nalubega predeceased her. The Defendant together with the 3rd to 12th Plaintiff are her grandchildren and their status in her estates will be determined as will the issue as to whether or not she left any property in her estate that her beneficiaries are entitled to share.

The second estate is that of TEDDY NALUBEGA who died intestate on the 26th day of June 1993. She was a daughter of Akiki Tibakanya as already indicated in this judgment. In her lifetime she produced only one child who is the Defendant in this suit. She left property including a residential house at Kireka, shop goods and two motor vehicles. She is registered as proprietor of property comprised in Block 221 Plot 96 which is the suit property. While the Plaintiff recognize her registration as proprietor they claim an interest in the property as will be sworn in this judgment.

It is also necessary to give a background to the property in dispute before determining as to whether it falls in the estate of Tibakanya or that of her daughter.

Prior to the year 1981/1982 the late Tibakanya Akiiki lived in Bukomero Kiboga District. Following the out break of insurgency during the Civil War in Uganda she disposed of her property in Bukomero and shifted her home to Nalya where she acquired a Kibanja from one, Lawrence Lule. She developed this Kibanja where she constructed a residential house where she lived till her death. During her stay at this suit property the Landlord, one Daniel Nkalubo Sebugwawo offered to sell his registered interests in the land which cultivated into the

Registration of the title in the name of TEDDY NALUBEGA which is the basis for the Defendant's claim as a son and some beneficiary in her estate. On the other hand the first Plaintiff claimed that he had contributed towards the purchase of the land as a family project and the registration of TEDDY NALUBEGA as a proprietor was a family decision premised on the fact of all the members of Tibakanya's family a registration until her names was the most secure.

There was a lot of controversy as to the circumstances under which the first Plaintiff made a financial contribution towards the purchase of the suit property and a lot of time was spent trying to establish this contribution. From the 1st Plaintiff's own testimony and that of HENRY KYEWALYANGA (P.W.5) of the Brothers of Christian Instruction there is no doubt in my mind that the 1st Plaintiff made a financial contribution towards the purchase of the land where his mother was staying but even if he had not made any monetary contribution but it is established that the property is part of his mother's estate he would have a claim in the estate as a son.

There was also controversy as to whether the reasons advanced by the 1st and 2nd Plaintiff registration of the land into Teddy Nalubega's names were genuine. The contention of the Defendant was that while the first Plaintiff asserted that as a Brother of Christian Instructions could not own property there was evidence he did own property in the same area of Nalya which he disposed of.

To me the controversies as to how the property was registered in the names of Teddy Nalubega are immaterial. What is material is whether or not Teddy Nalubega's registration on the title excludes the rights, if any, of the estate of the late Tibakanya Akiiki who had acquired the Kibanja and developed it as a family home where all family activities including burials used to take place.

In a recent case of **JULIET KALEM VERSUS WILLIAM KALEMA AND RHODA KALEMA High Court Civil Suit No.1474 of 2000 (unreported)** this court was faced with a somewhat similar situation. The title deed, the architectural plans and occupation plans were all in the names of Rhoda Kalema who had allowed her deceased son, Martin Kalema to develop the land. On Martin Kalema's death his widow Juliet Kalema claimed the property as part of her late

husband's estate and took occupation of the premises consisting of two semi detached houses. This court while recognizing the proprietary right of Rhoda Kalema as the registered proprietor found that the developments by her son belonged to his estate. This was following guidance by the Court of Appeal of Uganda in Civil Appeal No. 95 of 2003 **Juliet Kalema vs William Kalema and Rhoda Kalema** where Byamugisha JA stated as follows:-

“Be that as it may, the suit property in my humble opinion was possessed and owned by the deceased and therefore the Applicant would be entitled to occupy the same under the provisions of the law I have cited. He had an equitable interest in he suit property capable of being registered as charge on the suit property.....”

So if in this case Tibakanya Akiiki had occupied the property from 1981/1982 till 2003 when she died there no doubt that the property was part of her estate. The case of Kalema demonstrates that the title deed pause does not exclude other interests on the property. It is significant to note that the first Plaintiff who made a monetary contribution towards purchase of the land is not claiming his own interest but the interest of his late mother's estate. It should also be noted that after Teddy Nalubega had died her mother continued staying in the land not as a beneficiary in Teddy Nalubega's estate but in her own house where she had continuously stayed from early eighties. These are some of the factors that make it even more compelling to this court to find that the suit property belongs to the estate of the late Tibakanya Akiiki but at the same time recognizes the interests of the estate of Tedy Nalubega who not only contributed towards its purchase but the deed is registered in her names.

The second issue is as to whether the Defendant fraudulently applied for Letter of Administration in his mothers estate. The particulars of fraud were stated as follows:-

- (i) Obtaining a letter of no objection and letters of Administration without a consent of the beneficiaries of the estate of late Teddy Nalubega.
- (ii) Deliberately omitting and or misrepresenting facts and particulars of no objection in order to defeat the interest of the Plaintiffs.
- (iii) Under declaiming and misrepresenting or failure to declare a true and accurate state of matter regarding the survivors and particular thereof the late Teddy Nalubega.

- (iv) Knowingly making false declarations and or depositions under oath (purify) with regard to the deceased's survived relatives and immediate family who have bonafide interest in the deceased estate.
- (v) Advertising the notice of the application for Letters of Administration on the 18th day of July 2003 in an obscure newspaper, namely Bukedde.

The above allegations are to me as a result of a misconception that the Plaintiff and Tibakanya Akiiki are beneficiaries of the estate of the Teddy Nalubega. The late Nalubega died intestate and the categories of persons to benefit from such an estate are specified in Section 27 of the Succession Act and these are a widow or widower, lineal descendants of the deceased, a customary heir and dependants. The proportions of their shares are also specified. The Plaintiffs do not fall in any of these categories. Their exclusion from the Defendants application for a certificate of no objection and a grant of Letter of Administration was not fraudulent because their inclusion was not relevant. As an only child of the deceased he was entitled to apply for Letters to administer her estate which might or might not have included the suit property at Nalya. His grant entitles him to claim her share of the estate in this property which as I have already stated does not preclude the beneficiaries in the estate of the late Tibakanya Akiiki from accessing her estate.

The above finding disposes of the issue as to whether or not the defendant is fraudulently misappropriating the estate of the late Nalubega because once he obtained a grant of Letters of Administration to her estate and that grant has not been revoked or cancelled the question of misappropriation of her estate dos not arise.

The issue as to whether the Defendant has exhibited true account of the late Teddy Nalubega's estate is immaterial to this suit which as it turned out revolved around the property at Nalya which as court has found does not belong to the estate of late Nalubega exclusively. Likewise there is no question that the Plaintiffs are intermeddling in the estate of Teddy Nalubega because the activities they have carried on the property at Nalya were carried out in the home of Tibakanya Akiiki who as court has found was owner of the home.

The issues as to whether the Plaintiff and Defendants are entitled to the remedies prayed for will be dealt with together because, again they revolve around the property at Nalya where so I have already determined both the estates of Tibakanya Akiiki and Nalubega Teddy claim an interest. It is not necessary to go through the litany of remedies prayed for because after finding that each party has an interest in that property it follows that the estate of Tibakanya Akiiki will retain the possession and occupation of the property. While the estate of the late Teddy Nalubega retains her interest in the estate. This means that it is not necessary to revoke the grant of Letters of Administration of the Defendant who represents the interest of Teddy Nalubega's estate. The question of damages or reparation do not even arise. An issue was raised about the issuance of a Special Certificate of Title to the Defendant when the original was not lost as he claimed. The original was in possession of the second Plaintiff and since the original title was in existence at the time the Special title was issued the Special title should be surrendered to the Commissioner Land Registration for its cancellation and restoration of the original title.

Judgment entered as above.

The parties will meet their own costs of this suit.

ELDAD MWANGUSYA

JUDGE

11.07.08

Court

R/A is explained.

ELDAD MWANGUSYA

JUDGE

