

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT GULU
CIVIL SUIT NUMBER HCT – 02 – CV – CS – 0020 – 2005

1. **ROMANO SALIM OGWANG**
2. **OKULLU KASSIM**
3. **OTIM SAAD**
4. **APIO MONICA**
5. **ATALA HADIJA**
6. **ACIRO SADUF :::::::::::::::::::::PLAINTIFFS**

VERSUS

SAIDA ATALA:::::::::::::::::::DEFENDANT

BEFORE: HON. JUSTICE REMMY K. KASULE

JUDGMENT

The Plaintiffs sued the Defendant seeking orders revoking the grant of Letters of Administration to the defendant of the estate of the late OKULLU SALIM, that the Plaintiffs are the rightful administrators of the said estate, that the defendant gives an account of the proceeds from the deceased's estate, a permanent injunction restraining the defendant from undertaking any further dealings with the said estate, and that the defendant pays compensation and damages willfully and negligently caused to the said estate.

The defendant denied the plaintiffs' claims, asserting that she obtained Letters of Administration to the suit estate with the consent of the family members and pursuant to the will of the deceased. She denied having committed any fraud and or maladministration of the estate. She counter-claimed against the plaintiffs for their intermeddling with the suit estate and she too prayed court to order the 1st and 2nd plaintiffs to account for the proceeds of the deceased's estate, declare her as the rightful administrator, plaintiffs to pay damages and

to issue a permanent injunction restraining the plaintiffs from dealing with the estate of deceased.

On 16th November, 2006, before Kania J. the 3rd, 4th, 5th and 6th, plaintiffs having filed affidavits withdrawing from the suit, court ordered that their suit against the defendant be withdrawn. The hearing of the suit proceeded with only the first and second plaintiffs.

The following issues were framed arising from the plaint, written statement of defence and counter claim.

1. Whether or not the plaintiffs can benefit from the estate of the deceased.
2. whether the defendant obtained Letters of Administration fraudulently
3. Whether the defendant has put the estate to waste
4. Whether the Letters of Administration to defendant should be revoked.
5. Whether the plaintiffs have intermeddled with and in the deceased's estate.
6. Whether the defendant is entitled to any damages from the plaintiffs
7. What are the remedies available to the parties.

As to the first issue, a beneficiary is one who is entitled to share in the properties of a deceased person in accordance with the laws relating to succession. For example, a dependant relative of a deceased as defined by section 2(g) of the Succession Act, Cap.162, may be a beneficiary. So too is one bequeathed with any legacy in a will of a deceased testator.

The plaintiffs in this case claim to be beneficiaries of the estate of the late **Okullu Salim**, by virtue of their being biological children and/or dependants of the deceased, the late **Okullu Salim** of Bobi, Gulu District.

As to the first plaintiff, both the evidence of plaintiffs and that of defence is agreed that he was a biological son and dependant of the deceased. He is thus entitled to benefit out of the said deceased's estate.

With regard to 2nd plaintiff, his evidence and that of the first plaintiff is that he is a biological son of the deceased. He lived with the deceased who had homes in Mbale and also in Gulu. Deceased had maintained him as a child from birth, paid for his education until when he

was an adult. He (2nd plaintiff) had attended the burial of his father and no one had disputed his being son of the deceased then.

The clan and family executive committee had agreed that he shares in the deceased's estate by getting shs, 25,000 monthly out of the estate.

According to second plaintiff, from the very beginning of his childhood, his step mother, Rehema Acaka, mother of defendant and the other children named in the deceased's will, had mistreated him since he , second plaintiff, was born of a different mother. This mistreatment made it difficult for second plaintiff and first plaintiff (who also was born of a different mother) to stay with their deceased father as long as their said step mother, Rehema Acaka, remained and stayed as wife with their said father.

The defendant denied knowing the second plaintiff. She denied ever having lived with the second plaintiff in Bungoma, Kenya, together with their deceased father during exile or in Gulu, while in Uganda. She admitted however, that after the death of the deceased, at a number of clan meetings, particularly the second one, the second plaintiff attended as son of deceased. Defendant never challenged the second plaintiff's claim that he was son of the deceased.

She also confirmed that the second plaintiff was sharing in the estate of the deceased by having shs 25,000/= paid to him monthly out of the estate.

DW3 John Atim Okello, elder brother of deceased, and thus uncle to plaintiffs and defendant, testified that he only saw the second plaintiff at the second clan meeting to discuss affairs of deceased's estate. The witness accepted the second plaintiff as son of deceased at this meeting.

Later however, according to this witness, the clan leader of Omolo Acol Odyek Onywal clan, to which the deceased belonged carried out investigations and found that the second plaintiff was not a son of the deceased and that his true name was "**AFOKO**". The witness did not explain to court what kind of investigations were carried out. The clan leader or his representative did not testify before court to explain this part of evidence. The same therefore is hearsay evidence with no value to court.

Further, while the defendant denied ever living together with the plaintiff while with their deceased father, according to DW3, the defendant together with other daughters of the deceased had confirmed to him that the second plaintiff used to stay with the deceased at the deceased's home in Gulu. DW3 also confirmed the fact that the second plaintiff had been

accepted as a beneficiary of the deceased's estate and was earning shs 25000/= per month from the deceased's estate. Court saw the demeanour of the second plaintiff in court. He did not appear to be untruthful on this issue that he was the son of the deceased. By way of contrast, the evidence of the defendant and DW3, on this aspect was contradictory and unconvincing. Court prefers to believe the evidence to the effect that the second plaintiff was and is son of the deceased. Court therefore holds the second defendant to be a son and thus a beneficiary of the estate of the deceased.

The answer to the first issue is that, subject to the validity or otherwise of the deceased's will, both plaintiffs are entitled to benefit from the estate of the deceased as his children.

The second issue is whether the defendant obtained the Letters of Administration to the deceased's estate by fraud.

Section 234 (2) (a) of the Succession Act provides that grant of Letters of Administration may be revoked or annulled for just cause. Just cause is established if it is proved, amongst others, that the proceedings to obtain the grant were defective in substance, that the grant was obtained fraudulently by making false suggestions or by concealing from the court something material to the case; that the person to whom the grant was made has willfully and without reasonable cause omitted to exhibit an inventory or account or has exhibited an account which is untrue in a material respect.

The particulars of fraud upon which the plaintiff rely are, according to paragraph 5 of the plaint, that the defendant obtained the grant with full knowledge that she was not the rightful person, that the plaintiffs and other beneficiaries of the estate did not know or consent to the application, that the notice of petition for grant was advertised in the "*Sunrise Newspaper*" which is not widely read and not in circulation in Northern Uganda where the beneficiaries and estate are, and that the petition was filed in the High Court at Kampala, and not Gulu, the territorial jurisdiction where the deceased had a fixed place of abode. The plaintiffs testified supporting the above particulars of fraud. Both DW1, DW2, and DW3 testified denying the particulars of fraud.

The evidence on record establishes that the deceased executed a will on 12th October, 2001 before his death. The will is valid in all respects as to its execution. It is therefore

valid and binding. The estate of deceased, Salim Okullu, must therefore be administered in accordance with that will.

The deceased in his will provided:-

“ 3 I bequeath to my children all the property herein below to the management by an elected heir after my death for the benefit of the family.

6. All the shares of Romano Ogwang have all been vested in motor vehicle No. UPH 473 Dyna, Pick-up (2 Tons)
.....

7. Subject as aforesaid, my trustee shall and I bequeath my capital in the memorandum and articles of Association of A. Omolo Mixed Farm Ltd. in shares as I direct hereunder:-

(i) For mean time:-

10 shares to Fatuma Atim - Executive Director

10 shares to Saida Atala - Chairperson

5 shares to Faiza Oroma - Treasurer

5 shares to Salima Nekesa - Vice Treasurer

5 shares to Amony Ismail Tabu - Secretary.

55 shares in my name to be administered by Fatuma Atim and an alternative decision shall be thereafter 10 shares remain floating but to be decided on by the executive director the resolution be reached by the executive.

8. I have not bequeathed any property to all my sons who don't appear in this will because they are drunkards, immoral, smokers and therefore incompetent to manage the Estate, they shall be included if their character changes before my demise”

It follows from the above provisions of the will that the deceased restricted the first plaintiff's entitlement into his (deceased) estate to giving him (first plaintiff) motor-vehicle No. UPH 473 Dyana Pick-Up 2 tons). The evidence adduced showed that this motor-vehicle had

already been given and first plaintiff had taken ownership, possession and use of the same, before the demise of the deceased.

As to the second plaintiff, in the absence of evidence that the deceased had taken his (second plaintiff) character as changed before deceased's demise, second plaintiff, remained covered by paragraph 8 of the will. The deceased did not bequeath any of his (deceased) properties to him (second plaintiff)

It follows therefore that though as children of the deceased, both plaintiffs were entitled as beneficiaries in the estate, their entitlement is as per the provisions of the will.

In the considered view of court, the plaintiffs can only challenge the defendant as regards the administration of the deceased's estate, if the defendant has not executed the will as it provides for each of the first and second plaintiffs. None of the plaintiffs adduced evidence to this effect.

Further, it is the Law that:- **“Allegation of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”** see: **R.G. PATEL LALJI MAKANJI (1957) EA 314.**

and

Supreme Court of Uganda Civil Appeal No. 16 of 1993: FAM INTERNATIONAL LIMITED & AHHMED FARAH VS MOHAMED HAMID EL-FAITH: Supreme Court Judgments Volume1 Case No. 5

It is necessary to determine whether the plaintiffs have discharged that burden.

The defendant was properly given powers of attorney by Fatuma Atim to apply for a grant; reason being that Fatuma Atim stays in London, UK. This was done with the knowledge and consent of the rest of the estate beneficiaries vested with responsibilities under the deceased's will. While it is true that the plaintiffs did not participate in this, there is no evidence adduced that this was done due to any fraud motives as there is nothing the plaintiffs have lost according to deceased's will or been deprived of by their not having participated in the process of choosing defendant to administer the estate. It is thus not proved that defendant was not the rightful person to apply for a grant to administer the deceased's estate.

As to advertising the notice of petition for grant of Letters of Administration in the Sunrise Newspaper, a paper not widely read and in circulation especially in Northern Uganda

where more of the beneficiaries and deceased's estate are situated, court accepts the evidence of the defendant, that she did not decide and gave no specific instructions to her Lawyers, as to which paper to advertise in the notice of the petition. While it would have been appropriate to advertise in another newspaper with a wide circulation in Northern Uganda, court finds no evidence to hold that the defendant caused the advertisement to be with Sunrise newspaper as part of a fraud against the plaintiffs, or the estate as a whole.

With regard to the filing of the petition for grant of Letters of Administration in the High Court of Uganda. Registry at Kampala – outside the jurisdiction where the deceased had his fixed, permanent place of abode, that is Gulu, plaintiffs adduced no evidence to show that the defendant directed that the filing of the petition be in Kampala and that this direction was as part of a fraud against the plaintiffs.

Court takes judicial notice of the fact that, at the material time Administration Cause No. 0369 of 2003 was filed and disposed of, the High Court registry at Gulu, where the cause should normally have been filed, was, like the rest of Northern Uganda, in an area of armed civil conflict. This made its accessibility problematical in terms of security. The presence of judicial officers to dispose of causes was also uncertain. It is thus not strange that causes due to be filed and disposed of in the High Court at Gulu were being filed and disposed of elsewhere, particularly at the High Court in Kampala, the Headquarters of the Courts of Judicature.

In such circumstances, and without any specific evidence of fraud being adduced in this regard against the defendant, this court is unable to hold this aspect of the fraud as proved.

It was the evidence of the plaintiffs that the defendant was fraudulent because she did not include them and some other beneficiaries to the estate in the petition for the grant of letters of Administration.

Court notes that the deceased's will excluded the second plaintiff from benefiting out of the estate, and confined the first plaintiff's benefiting out of the estate to the motor vehicle No. UPH 473 Dyana, Pick-Up. While it would have been appropriate to have the two plaintiffs included in the petition for grant of Letters of Administration, their being left out cannot be taken as an act of fraud since each one of them was not deprived of anything out of the estate in accordance with the deceased's will.

As to the other beneficiaries of the estate none has claimed before court, and indeed plaintiff adduced no evidence, that their being left out of the petition was a fraudulent act on the

part of the defendant to deprive those defendants of their shares in the estate. On the contrary, the evidence that there is, is that the defendant has gone out of her way in administering the estate to follow the will of the deceased so as to accommodate the plaintiffs in that even where the will excluded the first and second plaintiffs from benefiting, she has offered some benefits to the two out of the estate.

Court also accepts the evidence that the defendant, DW3 and some of the beneficiaries of the estate first sought advice from the office of Administrator General as to how they would go about administering the deceased's estate. The Administrator General's Office, according to DW2, advised the defendant and those accompanying her to follow the deceased's will. DW2 himself, a senior officer in the Administrator General's Department, did not summon the plaintiffs to go to him. It is therefore understandable if the defendant only stated in the petition those names of the beneficiaries stated in the will and had not been excluded from sharing in the estate. In so doing the defendant was following guidance from the Administrator General.

In the considered view of court the mere non being included in the petition for grant of Letters of Administration per se did not amount to fraud on the part of the defendant, as long as the defendant administered and continues to administer the estate of decease in accordance with the deceased's will. It is also not proved that the defendant knew all the beneficiaries before she lodged the application for a Grant. Court holds this aspect of the fraud not proved.

It is therefore the holding of court that none of the particulars of fraud have been proved against the defendant.

The answer to the second issue is that defendant did not obtain Letters of Administration to the estate of the deceased fraudulently.

The third issue is whether the defendant has put the estate to waste. First plaintiff testified that defendant wasted the deceased's estate by selling off two (2) motor-vehicle cars of the estate, started to construct her own building on plot 10/16-11/15 Canon Alipayo Latigo Road and changed plot 76-82 into her own names contrary to the will. She was collecting rent and putting the same to her own use and not that of the estate. Defendant's husband was using the estate's 10-ton diesel truck UAE 030Q with no returns to the estate. The estate's rice machine in Mbale was being mismanaged as the same was not in working condition. Defendant was not filing inventories in court and was not availing to the estate any bank statements.

The second plaintiff supported the first plaintiff's assertions as to wastage of the estate by the defendant.

Defendant denied any wasting of the estate. On the contrary she adduced evidence that it was the plaintiffs who were causing waste to the estate.

In the considered view of court, to the extent that some of the properties said to be of the deceased's and which are alleged to have been wasted by defendant belong to the company. A. Omolo Mixed Farm Ltd, the responsibility to manage those properties is that of the company, as owner, and not the deceased's estate.

While the deceased had majority shares in the said company, he made, in his will, specific provisions as to who would own, manage and benefit out of those shares. According to the deceased's will, for the reasons already stated in this judgment, the plaintiffs were not amongst those to benefit out of these shares. It follows therefore that both plaintiffs have no basis of accusing the defendant of wasting properties that belong to a company, and not to the deceased's estate.

The above state of affairs notwithstanding, court will proceed all the same to determine whether there is credible evidence to support the assertions of the plaintiffs that defendant committed waste of the deceased's estate in the particulars alleged.

The plaintiffs did not give any particulars as to the two motor-vehicle cars alleged to have been sold by the defendant, their make, registration numbers, when they were sold, to whom they were sold, how much, and where those vehicles are now. The defendant was not cross-examined about this matter. Court holds that this aspect of wastage was not proved by the plaintiffs.

Apart from the first plaintiff's bare statement, no independent evidence was adduced to prove that defendant had transferred the property comprised in plot 76 – 82, Gulu, into her own names or that she was constructing her own building on plot 10/16 – 11/15 Canon Alipayo Latigo Road, Gulu Municipality. The building plan alleged to be in the personal names of the defendant was not exhibited to court. At any rate that fact alone, even if true, would not be sufficient for court to conclude that the property ownership was being taken over by the defendant. After all, the principle in land Law is that the owner of the land also owns the permanent fixtures thereon. Plaintiffs have not proved wastage in this respect.

As to collecting rent and putting the same to her own account and use, defendant explained that it is plaintiffs who were collecting rent from the rentable premises, until such a

time as when they were stopped by orders of this court on 6/6/2006(Deputy Registrar) and 16/11/2006 (Kania J.). Defendant further explained that the money collected goes to an account in Stanbic Bank, Gulu, and the money was being utilized to pay school fees for OTIM SAAD, her young brother, son of deceased, when he was still studying, and to support two children of her elder brother, JUMA OKULLU , now deceased. The whereabouts of the mother of these two children was unknown

Further, since she began collecting rent, she and the rest of the beneficiaries of the deceased's estate, had arranged that first plaintiff takes shs 35,000/= and the second plaintiff shs 25,000/= per month out of this rent. The plaintiffs or their respective families are taking this money.

The defendant also testified that she has, since becoming administrator of the estate, been filing in court and availing returns and other accounts showing the true position of the estate. Under cross examination, defendant showed some of these returns to plaintiff's counsel who looked at them and then did not pursue this point any further. Court infers from this conduct that plaintiffs' counsel was satisfied with the answers of the defendant as regards the preparation and filing of returns and accounts of the estate by the defendant.

On evaluating the whole evidence before court on the issue of rent collection and whether the same is being wasted by defendant, court holds that no sufficient evidence has been adduced to prove this alleged wastage.

As to the allegation that defendant's husband uses the estate's 10-ton Truck Nisan Diesel UAE 030Q with no return to the deceased estate, court received no evidence as for what wasteful purposes this vehicle is being used for. In the considered view of court, the allegation is not proved.

The defendant was also accused of wasting the rice machine in Mbale in that she had mismanaged the same. The machine was not in working condition as at the time of hearing the case. According to defendant, the management of this enterprise in Mbale was being carried out by her brother, son of the deceased, one **OMONY ISMAIL**.

Plaintiffs ought to have adduced evidence with specifics as to how the defendant had personally mismanaged this rice machine. The mere fact that the machine was not in working condition at the time of the hearing of the case is no proof that the defendant had mismanaged the machine. This aspect of wastage is not proved by plaintiffs against the defendant.

The answer of court to the third issue is that plaintiffs have not proved that the defendant has put the deceased's estate to waste.

The fourth issue is whether the Letters of Administration in High Court at Gulu Administration Cause No. 269 of 2003, Estate of the late **OKULLU SALIM**, granted to the defendant should be revoked.

Section 234 (2) of the Succession Act provides for the revocation or amendment of a grant for "**Just cause**"

" Just Cause" among others, is if the proceedings to obtain the grant were defective in substance, or the grant was obtained fraudulently by making false statements or by concealing from court something material or that the person to whom the grant was made has willfully and without reasonable cause omitted to exhibit an inventory or account or has exhibited an account which is untrue in a material respect.

See also: **REHEMA NALWANGA VS HADIJA NASSIBWA & ANOTHER (1998) II KALR 73**

Court has already held with regard to issues number two and three that defendant did not obtain the grant through fraud and that she has not been proved to have wasted the deceased's estate.

The evidence that court received is that defendant has been filing to court and availing returns by way of inventory and or account relating to the deceased's estate since she obtained the grant up to 2007. She had not been able to complete the distribution and realization of the estate because of the conduct of the plaintiffs, the trial of this suit inclusive.

Court accepts the above evidence and holds that it has not been proved that the defendant did not or willfully and without reasonable cause omitted to exhibit an inventory or account or has exhibited an account which is untrue in a material respect.

It follows therefore that plaintiffs have not proved any just cause for the annulment/revocation of the grant granted to the defendant. The fourth issue is answered in the negative.

The fifth issue is whether the plaintiffs have intermeddled with the estate and have put it to waste/caused a loss.

Defendant gave evidence that both plaintiffs resisted her administration of the deceased's estate with negative aspersions about the personality of the defendant as and because she was a

lady. As sons of the deceased, the plaintiffs refused to be under the defendant as administrator, and claimed that as such sons, they were entitled to administer their father's estate.

Plaintiffs thus forcefully proceeded to collect rent from the premises at plot 10/16 – 11/15 Paul Alipayo Latigo Road, for the years from 2005 – 2007. The total sum collected by plaintiffs being shs 1,000,000/=

The first plaintiff in 2005, with no permission of defendant, 2005 took away a water tank from the premises at plot 16/16 – 11/15 Paul Alipayo Latigo Road, but later returned the same in 2006.

In 2003 first plaintiff sold off one motor valued at shs 1,200,000 that was intended to run a maize mill. He also sold off a tipper lorry. Both articles were being kept at plot 10/16 – 11/15 Paul Alipayo Latigo Road, Gulu Municipality. Both were sold off without the consent of the defendant as the administrator of the estate.

Both plaintiffs sold off building stripes at the site on plot 10/16 – 11/15 Paul Alipayo Latigo Road, valued at shs 65,000=.

As already held in this judgment, earlier on, properties belonging to the Company A. Omolo Mixed Farm Limited, do not belong to the deceased's estate. It is therefore the company that can claim for any loss/waste caused to each one of those properties as they belonged to the company, and not the deceased's estate, the estate being a mere shareholder in that company.

The defendant and her witnesses did not, in the evidence given to court, show which of the properties that are said to have been the subject of waste and loss by the plaintiffs solely belonged to the estate and not to the company. In the absence of such evidence court is unable to hold in favour of the defendant.

Court therefore holds with regard to issue number five that the same has not been proved by the defendant against the plaintiffs.

The seventh issue is what remedies are available to the parties.

From the way the framed issues have been resolved the plaintiffs are denied the prayers of:

- i. Revoking the grant of the Letters of Administration to the defendant in High Court at Gulu Administration cause number 369 of 2003, estate of OKULLU SALIM, deceased;
- ii. Declaring the plaintiffs as the rightful administrators of the estate of OKULLU SALIM, deceased, father of the plaintiffs and defendant,

- iii. That the defendant gives to the plaintiffs an account of the proceeds from the deceased's estate
- iv. A permanent injunction restraining the defendant from undertaking any further dealings with the estate of the late OKULLU SALIM
- v. To pay compensation for the loss and damages willfully and negligently occasioned to the estate of the late OKULLU SALIM.

The defendant is granted:-

- a. A declaration that she is the rightful administrator of the estate of the late **OKULLU SALIM**, through High Court Administration Cause Number 369 of 2003
- b. An order of a permanent injunction restraining the plaintiffs from undertaking any further dealings with the estate of the late **OKULLU SALIM**.

In conclusion the plaintiffs' suit stands dismissed. Judgment is entered for the defendant jointly and/or severally against both plaintiffs on the counter-claim for the declaration and order in (a) and (b) above.

The defendant is awarded the costs of the dismissed suit and those of the counter-claim against both plaintiffs.

.....
Remmy K. Kasule
Judge
27th March, 2008