

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
H.C.C.S NO. 227 OF 2004

(By way of originating summons)

YOZEFU MARIA SSERWANGA :::::::::::::::::::: PLAINTIFF

VERSUS

1. RICHARD MUBIRU

2. FARASIKA NAMUBIRU :::::::::::::::::::: DEFENDANT

BEFORE: HON. JUSTICE REMMY K. KASULE

JUDGMENT

In this suit, by originating summons, the plaintiff, Yozefu Maria Sserwanga, prays this Court, by way of originating summons, that the defendants, Mubiru Richard and Namubiru Farasika, do surrender to this Court the Letters of Administration granted to them in **High Court Administration Cause Number 517 of 2003**, estate of late Kizito Francis, so that the same are revoked by this Court.

The main grounds for revocation are that the plaintiff had already been granted Letters of Administration in respect of the same estate by the Grade II Court, Kakiri, under Chief Magistrate's Court, Mpigi at Kakiri Grade II Court, **Administration Cause, Number 003 of 2003 on 07.04.03**. Further, that the first defendant Mubiru Richard, was never a biological son of the deceased, Kizito Francis, and so he was not entitled to administer the estate. Plaintiff also asserts that the defendants obtained Letters of Administration fraudulently.

The plaintiff prayed that he be left to administer, alone, the deceased's estate.

No issues were framed at the commencement of hearing. In the considered view of Court after studying all the affidavits filed, the testimonies of witnesses and the submissions made in support of and also against the originating summons the issues for determination are the following:-

1. Who of the plaintiff and defendants is entitled to administer the estate of the late Kizito Francis?
2. Is the first defendant a beneficiary in the estate of the late Kizito Francis as a biological son of deceased or otherwise.
3. Did the defendants obtain letters of Administration from the High Court fraudulently.
4. What remedies are the parties entitled to.

Court received affidavit evidence but also took testimony evidence from the plaintiff, the first defendant and five other witnesses, including PW1, Bena Nambi, the mother of the first defendant.

One Kizito Francis, was younger brother of the plaintiff. A Roman Catholic priest, Father Luka Mubiru, was their youngest brother, while Rosemary Namayanja, PW2, was their sister. Both Kizito Francis and Father Luka Mubiru are now deceased.

Kizito Francis is currently survived by two biological daughters, Juliet Namayanja, and Namubiru Farasika, the second defendant. Two sons of late Kizito Francis, are also dead. They are Kennedy Kizito and Nsubuga. As to whether the first defendant survived the

said Kizito Francis, as a biological son, or otherwise, is the subject of dispute in this suit. This dispute will be reverted to later on in this Judgment.

The deceased, Kizito Francis, died intestate in 1995. As already stated, in April 2003, the plaintiff being appointed by the Grade II, Kakiri Court, became administrator of the said deceased's estate while in December 2003; the defendants were appointed administrators of the same estate by the High Court under Administration Cause Number 517 of 2003.

Part of the properties of the deceased's estate is a piece of mailo land situate at Kambe village, Gombolola, Mut. II, Kakiri, Wakiso District.

The first issue is who of the plaintiff and the defendants is entitled to administer the estate of the deceased.

The plaintiff, both in his affidavit dated 07.12.04 in support of citation; and also in his testimony before this Court, does not dispute the fact that the second defendant, Namubiru Farasika, as biological daughter of the deceased, is entitled, and has priority over the plaintiff, to administer her father's estate. This court also infers from the fact that the first defendant, having applied jointly with the second defendant to administer the deceased's estate, he, the first defendant, has no objection to the second defendant administering her father's estate.

None of the witnesses who testified in Court or filed affidavit(s) in this suit, including the plaintiff, disputed the eligibility, capacity and ability of the second defendant to administer the estate of her deceased's father.

The main dispute between the plaintiff and first defendant is that first defendant, not being a biological son of the deceased, cannot administer the deceased's estate and also cannot be a beneficiary to estate. Plaintiff's case is that first defendant is a son of one Eriakimu Kibuuka of Kambe village, Kakiri sub-county, Wakiso District, and that first defendant's mother so publicly stated so to the deceased's clan and to the Grade II Court, at Kakiri.

However, according to PW1: Bena Nambi, mother of the first defendant, the said first defendant is a biological son of the deceased to whom she was a wife at the material time of the birth of first defendant.

According to this witness, she was never a party to a document titled "complaint on oath" dated 13.03.01 purportedly filed as an affidavit in the Family and Children's Court, at Kakiri, in **Miscellaneous Application Number 01 of 2001: In the matter of Mubiru Richard**
and

In the Matter of an Application for a Declaration of Parentage.

In the said document, this witness, is recorded as having deponed that:- "

" 1. That I am the real mother to the child and do very well know that the said child is not for Sserwanga Yozefu Maria (Respondent) as alleged, but for one Kibuuka Eriakim (deceased) of Kambe village, Kakiri Sub-county in Wakiso District.

2. That I got married to Kibuuka Eriakim (deceased) in 1963, and God blessed us with five children, and Mubiru is our first born."

The proceedings of **Family Children’s Court Miscellaneous Application No.1 of 2001** were not availed to this Court. It is unknown under what law the proceedings were held. Court also observes that by the time the proceedings were held, that is 13.03.01 or thereabout, the first defendant in this suit was thirty seven years old and was already father to seven children (see Para 5 of the alleged Nambi Bena’s affidavit). No evidence was availed to Court that the first defendant was a party to, let alone made aware in anyway, of these proceedings.

This Court physically saw Bena Nambi, the alleged deponent of this “complaint on oath” affidavit give testimony. She is a peasant, illiterate in the English language. She testified in this court in luganda language. There is no certificate of translation of the contents of the said affidavit from luganda to English, which she is alleged to have deponed to. The contents in the affidavit of “*complaint on oath*” cannot be said therefore to have been translated to the deponent in the Luganda language which she understood.

Court, therefore, on the evidence before it, rejects the affidavit titled “*complaint on oath*” dated 13.03.01 as not proper evidence to establish the paternity of the first respondent.

Court notes from the evidence before it that PW2, Rosemary Namayanja, sister to deceased, confirmed that first defendant stayed with the deceased before the said deceased died, that first defendant’s deceased’s child’s remains were buried at the ancestral grounds of the plaintiff and deceased, Kizito Francis; and further that at the

wedding of the plaintiff's daughter, one Annette Nansasi, the first defendant carried out the role of "brother-in-law i.e the muko", which role in Kiganda Custom, is carried out by a brother of the bride.

PW4, Tanansiyo Musoke, an elder, stated that, even though he did not know how first defendant settled on the land, for the period of three years he saw the first defendant, his – first defendant's house, was on Francis Kizito's land. This was the position even before Francis Kizito died.

The evidence of PW2 and PW4 contradicts the evidence of the plaintiff that the first defendant had not settled on Francis Kizito's land at Kambe village, Kakiri, by the time of the death of the said Francis Kizito.

The plaintiff also gave no plausible explanation as to why the first defendant was allowed to bury the remains of his child to the ancestral grounds of plaintiff and late Francis Kizito, and also of being brother-in-law i.e. Muko, to the daughter of the plaintiff, at her wedding, if he, first defendant, had not been accepted by the deceased, Kizito Francis as his son. All these pieces of evidence lend credence to PW1's assertion, as a mother of the first defendant, that Kizito Francis was the father of the first defendant, and that the said Kizito Francis had accepted this fact.

The plaintiff, through his witness, PW7, Rev. Father Charles Lwanga Ssendo, attempted to prove that the Baptismal certificate produced by first defendant showing deceased as his father was a forgery. There was however no evidence that first defendant

was responsible for the forgery. At any rate, the overriding consideration is the fact that deceased died having accepted first defendant as his son and or member of his family.

This court therefore holds that on the basis of the evidence before it, the deceased, Kizito Francis, died, having agreed and allowed the first defendant either as his biological son or as a member of his family, or otherwise, to settle and live on part of his land at Kambe village, Kakiri Sub-county, Wakiso District.

It is also asserted by the plaintiff that the defendants fraudulently obtained the letters of Administration to late Francis Kizito's estate because they stated that one John Kennedy Kizito, a son of the deceased, was stated to be a surviving son of the deceased, when in actual fact, he was already dead.

In paragraph 8 of his "statement on oath" dated 07.12.04, the plaintiff states that John Kennedy Kizito died on 01.05.04 and was buried on 03.05.04 at Kambe village, Kakiri, Sub-county. This is contrary to what is stated in annexure "C" to the said statement on oath, where it is stated that the said John Kennedy Kizito died in the year 2003.

At any rate, the Court file of Administration Cause No.517 of 2003, clearly shows that the defendants informed court that John Kennedy Kizito was dead. This was before Letters of Administration were granted to them. They thus acted truthfully.

This court on the basis of the contradictory nature of the evidence of the plaintiff, the fact that the death of John Kennedy Kizito was made known to court by the defendants, is unable to hold that any fraud has been conclusively proved against the defendants.

Court observes that the deceased, Kizito Francis, died possessed of land and house in Mulago, Kampala District, and also at Kambe, Kakiri Sub-county, Wakiso District. In the High Court the value of deceased's estate was stated to be Shs.3,000,000/=. Court believes this estimation of the value of the deceased's estate.

The value of such properties obviously made the deceased's estate to be outside the monetary jurisdiction of the Grade II Court. It follows therefore that the grant of Letters of Administration to the plaintiff in respect of Francis Kizito's estate was made by a Court that was not seized of pecuniary Jurisdiction to do so at the material time. Such a grant was a nullity.

Court therefore answers the first issue to the effect that the defendants as children, and or accepted member of the family of deceased in case of the first defendant, of the deceased, are entitled to administer the deceased's estate. The grant made to the plaintiff by and in Kakiri Court Administration Cause Number 003 of 2003 on 07.04.03, was made by a court that was not seized of pecuniary Jurisdiction to do so. The grant was thus a nullity. The same is therefore set aside by reason thereof. The grant made by the High Court, in **Administration Cause Number 517 of 2003**, is a valid grant and the same shall continue to operate.

The second issue is whether the first defendant is a beneficiary in the estate of the late Francis Kizito or otherwise.

This Court has already held that, on the evidence adduced, the deceased, Kizito Francis, had already accepted and allowed the first defendant to settle at the land in Kambe,

Kakiri Sub-county, Wakiso District. To that extent the first defendant is a beneficiary to the estate of the deceased.

The third issue is what remedies are the parties entitled to.

As already held, the plaintiff is not entitled to administer the late Kizito Francis's estate on the basis of Letters of Administration granted to him by the Kakiri Grade II Court in Administration Cause Number 103 for 2003 as that grant was made by a court without jurisdiction.

The defendants are entitled and shall continue administering the estate of the deceased under **High Court Administration Cause number 517 of 2003**. Court however feels that both defendants be joined by Juliet Namayanja, the other surviving daughter of the late Kizito Francis, in administering their late father's estate.

The estate is to be administered in such a way that Richard Mubiru, Farasika Namubiru, Juliet Namayanja and the estate of the late John Kennedy Kizito, become owners in equal shares, of the lands, homes, buildings and other properties of the late Kizito Francis.

As regards the land at Kambe, Kakiri, Wakiso District, the first defendant is to get his portion of the land where he had settled and built his house before commencement of these proceedings.

Court feels that this was a dispute within the estate of the deceased; and therefore no one particular person should be punished with costs of the proceedings. Accordingly it is ordered that each party is to bear his or her own costs of this suit.

Remmy K. Kasule

Judge

29th May 2009