

**THE REPUBLIC OF UGANDA**

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

**CIVIL SUIT NO. 45 OF 2005**

- 1. BRENDA BUKIRWA KYAGULANYI**
- 2. STEPHEN LWANYAGA KYAGULANYI       :..... PLAINTIFFS**

**VERSUS**

- 1. JOSHUA STEFF KIBIRIGE**
- 2. KEVAS KAYANJA                       :..... DEFENDANTS**

**BEFORE: HON. JUSTICE ELDAD MWANGUSYA**

**JUDGMENT**

The Plaintiffs, namely **BRENDA BUKIRWA KYAGULANYI** and **STEPHEN LWANYAGA KYAGULANYI** are daughter and son respectively of the late **ERISA N.G. KYAGULANYI** who died on the 10<sup>th</sup> March 1991. Prior to his death the deceased had executed a Will in which he appointed the defendants, namely, **JOSHUA STEFF KIBIRIGE** and **KAYANJA KEVAS** to be the executors of his Will. The two were granted Probate by the High Court on the 24<sup>th</sup> March 2004. This was more than thirteen years from the date the deceased died.

Clause 1 of the deceased's Will provided as follows: -

**“My only children are:**

- (i) Stephen Lwanyaga Kyagulanyi, the proposed heir and**
- (ii) Brenda Bukirwa Kyagulanyi”**

The deceased bequeathed all his property to his children and in Clause 9 of the Will he provided that:

**“The children will take over the effective control of their property when they reach the age of twenty one years”.**

So when the Plaintiffs reached the age of twenty one years they demanded for the estate property as provided in the Will. The defendants did not comply with this requirement of the Will and neither did they comply with the requirements of Section 278 (1) of the Succession Act. Instead the defendants claimed that there were other children claiming from the estate as children of the deceased. The Plaintiffs filed this Suit for revocation of the grant issued to the defendants and issuing the same to the Plaintiffs. In full the cause of action against the defendants is stated in paragraph 4 as follows: -

**“The Plaintiffs cause of action against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally is for the revocation of the grant of Probate and grant the same to the Plaintiffs jointly; rendering a true inventory and accountability of the estate properties; payment to the Plaintiffs of proceeds from disposition or compensation for the estate properties; an order to the Registrar of Titles to cancel the Defendants names and register the Plaintiffs jointly onto the estate/and titles; handover the control and administration of this estate to the Plaintiffs; general damages for breach of trust; interest and the Costs of this Suit”**

In their Written Statement of Defence the Defendants denied any liability contending that they were prepared to put the Will of the deceased into effect but their efforts were

frustrated by two persons, namely, Joseph Mukwaya and Vincent Makumbi who claimed to be children of the deceased and had filed a Civil Suit against them.

Initially there were efforts to have an out of Court settlement of the Suit but when all the efforts failed the Suit was set out for hearing. Two issues were framed for determination as follows: -

- (1) Whether the defendants have breached the trust under the Will as its executors.
- (2) What remedies are available under the circumstances.
- (3) Costs.

The Plaintiffs adduced evidence of their mother, **RACHEL KAVUMA KYAGULANYI** (P.W.1) and their uncle, **KAVUMA STEVEN LUGUDE** (P.W.2) to prove their case **KAVUMA STEVEN LUGUDE** is their appointed Attorney to prosecute the Suit as they live in the United Kingdom. They did not testify at the trial but from the evidence adduced by the witness there was no doubt that there has been non compliance with the provisions of the Will as the Plaintiffs have not accessed the estate of their father as provided in the Will. There is also no doubt that the defendants have not filed an inventory as required under S.278 (1) of the Succession Act which will be set out in this Judgment.

The case for the Plaintiffs was closed on 10.06.08. Mr. Sulaiman Musoke representing the defendants applied for an adjournment to enable him consult the defendants who had not attended Court on that day. The Suit was adjourned to 14.07.08 when Mr. Musoke appeared in Court without the defendants or any witness. He informed Court that Mr. Joshua Kibirige the only witness he intended to rely on was sick and he sought an adjournment to enable the witness come to Court and defend the Suit. The adjournment was granted but when the case was called for hearing on 23.09.2008 **CEPHAS KAYANJA** instead of Joshua Kibirige testified on behalf of the defence. In his testimony **KAYANJA CEPHAS** stated that following their grant of Probate two persons who were not named in the Will of the deceased were claiming from his estate as his children and

had even filed a Civil Suit against him and his Co defendant claiming from the estate. According to this witness they were ready to distribute the estate of the deceased in accordance with his Will if it had not been for the claim by these other children and the Civil Suit filed against him and his co defendant.

After the testimony of this witness Mr. Musoke, who had previously informed Court that he intended to call only one witness to establish the defendants case now turned around and informed Court that he intended to call three other witness including the first defendant and one, Martin Mutebi a maternal uncle of the children claiming to be children of the deceased. He stated that he required a month to trace the said Martin Mutebi because his whereabouts were not well known. This was amazing given that the trial of the case had been going on for sometime and the defence, had, from 10<sup>th</sup> June 2008 when the Plaintiffs closed their case to 23.09.2008 when Cephas Kayanja testified more than ample time to assemble their witness. So defence was given ten days instead of the one month they had requested for but no other witness was produced and then a request for more time was rejected.

I have given this background in respect of the way the defence was conducted because Mr. Musoke who made an issue of it blamed Court for not allowing the defendant to bring witnesses to testify on the issue of the other claimants on the deceased's estate. He submitted thus:-

**“Indeed the parties held several meetings to discuss the issue of the other claimants. These two children were represented by FIDA ad M/S Kusiima Advocates. Court did not allow the Defendants an opportunity to bring the officials from FIDA. This omission seriously affected the Defendants’ defence. The Plaintiffs have failed to prove any breach of trust in the Will on part of the Defendants. It is our Submissions that this issue should be resolved in favour of Defendants”.**

As far as this Court is concerned the duty to produce witnesses lies with the party that intends to rely on their testimony. So if from the time this case was filed and throughout the trial the Defendants did not know the whereabouts of a vital witness, they have themselves to blame.

Secondly the only witness whose whereabouts were unknown was Martin Mutebi who was stated to be an uncle of the children claiming from the estate. The witnesses from FIDA, if any were never mentioned as I understood the role of FIDA to be that of assisting the defence to trace Mutebi who would in turn lead them to the children claiming from the estate.

The issue as to the existence of the children featured prominently in the trial. In my view whether or not the children exist is not the issue. The issue is what the defendants have done with grant of probate since its issuance on 24<sup>th</sup> march 2004 and in this respect the requirements of S.278 (1) of the Succession Act came into issue. The provision is as follows: -

**“S.278 (1) An Executor or Administrator shall, within Six months from the grant of Probate or Letters of Administration, or within such further time as the Court which granted the Probate or Letters may from time to time appoint, exhibit in that Court an Inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character; and shall in like manner within one year from the grant, or within such further time as the Court may from time appoint exhibit an account of the estate, showing the assets which have come to his or her hands, and the manner they have been applied or disposed of.”**

In the instant case neither an inventory nor account have been exhibited and yet evidence was adduced that the Defendants have transferred Land titles into their names as executors of the estate. Evidence was also adduced that some persons are occupying

some land belonging to the estate and one of these persons claims to have bought the land from the Defendants. The Defendants admit having made a claim (yet to be paid) for compensation for destruction of part of the estate land by the construction of Northern By Pass Road. All these activities are a clear indication that the estate of the deceased came into the hands of the Defendants and they were required to file an inventory and account within the periods prescribed by this Section and this requirement has nothing to do with the existence or non existence of other claimants other than those named in the Will. Under S.234 (1) and S.234 (2) (e) their grant may be revoked. Section 234 (1) provides that the grant of Probate or Letters of Administration may be revoked for just cause and just cause under S.234 (2) (e) is that the person to whom the grant was made has wilfully and without reasonable excuse omitted to exhibit an inventory or account in accordance with part XXXIV of this Act, or has exhibited under that part an inventory or account which is untrue in a material respect.

So if an inventory which was supposed to be filed within six months of the grant and an account that was supposed to be filed within twelve months of the grant have not rendered in a period of almost five years I am left in no doubt that the Defendants have failed in their obligations and if they cannot account to this Court as to the status of the estate and evidence is adduced that is being tampered with under their watchful eye, I have no hesitation finding that as persons who were entrusted with the estate under the Will and the grant of this Court that trust has been breached and this Court that made the grant has to save the estate from waste and find a remedy that will ensure that the wishes of the deceased are effected.

The first remedy the Plaintiffs prayed for was for an order of revocation of the grant of Probate to the Defendants and grant of the same to the Plaintiffs jointly. The prayer for revocation of the grant to the Defendants will be granted and if the wish of the deceased had been effected the Plaintiffs would have acquired their shares in the estate on attainment of the age of 21 which they have now attained. I grant their prayer that the grant of Probate should be made to them.

The second prayer is for an order to the Defendants to render and exhibit to Court and the Plaintiffs a true and upto date inventory and accountability of all the trust properties in the deceased estate. I have already stated that rendering an inventory and account is a Statutory requirement under S.278(1) of the Succession Act and since the Defendants have run the estate for almost five years and according to the 2<sup>nd</sup> Defendant all the estate is intact they should file the inventory and account within one month of this Judgment.

The third prayer is for an order for payment to the Plaintiffs of the proceeds from dispositions and compensation of any and or all the trust properties. This prayer included payment of the compensation for the Northern By-pass Road and apart from this payment which will be made to the Plaintiffs once they get a grant of the estate, this Court is unable to ascertain any other compensation available to the Plaintiffs and to that extent Court is unable to order for such compensation.

The fourth is for an order to the Registrar to cancel the Defendants names and register the Plaintiffs jointly into the deceased's land or trust properties. The other option would have been to order the Defendants to effect transfer of the properties directly into the Plaintiffs' names but this may not be feasible given the background. I will therefore order for cancellation of the Defendants names from the titles of the estate property so that they are registered in the names of the Plaintiffs.

The fifth prayer is an order to the defendants to hand over the control and administration of the entire deceased's estate to the Plaintiffs. This is repetitive because once a grant to the Defendants is revoked and they account for the estate the new Administration of the estate will take it over.

The Sixth and Seventh prayers are for general damages and for interest on all sums payable. I am not inclined to order for payment of General damages because in absence of any testimony from the Plaintiffs themselves to any damage that they may have suffered it is difficult to ascertain any damage until accountability for the estate has been finalised. The question of interest does not arise.

On costs I order for payment of costs of this Suit by the Defendants to the Plaintiffs as it is their failure to administer the estate in accordance with the Law that the Plaintiffs incurred the costs.

Judgment is entered as above.

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**ELDAD MWANGUSYA**

**JUDGE**

**09.01.2009**