

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA
HCT-00-FD-CS-000127-2006
(Arising from Administration Cause No. 0061-2003)

Fred Musoke
Charles Kyagulanyi
Richard Yawe
Nankabirwa Justine

Plaintiffs

Versus

Robinah Nalwanga

Defendant

BEFORE

THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

JUDGMENT

1. The plaintiffs bring this action seeking multiple reliefs against the defendant. The defendant is the administrator of the estate of the late Ernest Yawe of Mutundwe, Kampala who died on the 2nd February 2002. She is a daughter of the plaintiff. The plaintiffs contend that there are children of the late Ernest Yawe, hereinafter referred to as the deceased.
2. The plaintiffs contend that the defendant fraudulently applied for and obtained letters of administration to the estate of the deceased. The particulars of fraud include the allegation that the defendant, in her petition to the court, stated that the deceased was survived by only 4 children whereas this was not true. The defendant obtained a letter of no objection from the Administrator General without the consent of all children of the deceased. The defendant provided false information to the Administrator General to the effect that all family members had agreed whereas it was not true.

3. The plaintiffs further contend that after the defendant obtained letters of administration she mismanaged the estate including failing to distribute the estate to all the deceased's children and disbursing the estate to the persons not entitled to benefit from the estate. The plaintiffs claim to have suffered great damage and loss and now seek: (a) Revocation of the letters of Administration; (b) A new grant of letters of administration in favour of the plaintiffs; (c) An order for an account in respect of the assets of the deceased which the defendant disposed of; (d) General damages and interest thereon at the rate of 20% p.a. and (e) Costs of this suit.
4. The defendant opposes this action on the ground that it has no merit. Save for the plaintiff no.1 the rest of the plaintiffs are not children of the deceased. The consent of all surviving children of the deceased was obtained prior to application for letters of administration. All the children of the deceased have received their shares of the estate. The sale of the 3 cows, poultry and some land was to defray expenses of the estate. The land at Natete was sold and Shs.97,000,000.00 was obtained and it was distributed by agreement to the beneficiaries of the estate. An inventory showing how the estate was distributed was filed in court.
5. PW1 was Peter Musoke, the plaintiff no.1. He stated that his father was called Ernest Yawe and that he passed away. He was survived by 8 children, Lameck Bugembe, Fred Musoke, Kyagulanyi, Mukasa Yawe, Nankabirwa and Makumbi. The deceased left property which included land at Nakinyuzi, land and a house at Natete, land and developments at Mutundwe, cows and chicken.
6. The defendant sold the house at Natete. She gave him Shs.3,000,000.00 only. She has not distributed the deceased's estate to his other brothers and sisters. In cross examination he stated that the deceased left a will in which he listed the names of his children and the properties he had. With regard to the names of the children it was not accurate as it included children already dead and excluded some children who were living. The will must have been read during

the funeral. The will was never witnessed by any one though signed by the deceased.

7. He stated that the defendant obtained letters of administration without his knowledge. He admitted that he signed a document to the Administrator General, admitted in evidence as exhibit D3, and its English translation admitted as exhibit D4. He admitted that he witnessed agreements of sale of land by the defendant. He admitted receiving the Shs.3,000,000.00 from the defendant but he was not told why it was being paid to him.
8. PW1 admitted that the defendant had carried out repairs to the family home at Mutundwe, including building a perimeter wall. Some of the deceased's grand children are living in the family home.
9. In re-examination he stated that the deceased was a hot tempered man and that could explain why he had not mentioned some children in his will.
10. PW2 was Nankabirwa Justine, Plaintiff no.4. She is 68 years old. She testified that the deceased was her father. Her mother was Yayeri Namamonde. She married her father at Namirembe Cathedral on the 13th June 1936. Initially the deceased and her mother stayed at Kinawa but their house was burnt and they purchased land at Mutundwe where they constructed a residential house and moved into it. She went to school up to P6. The deceased paid the school fees.
11. The deceased was survived by 8 children. Their names included, James Makumbi, Kyagulanyi, Yawe Mukasa, Robinah Nalwanga, Musoke Fred, and the witness herself. The deceased left land at Mutundwe, Salama and Natete. The deceased left a will but it was not correct. She has never been consulted in any way as regards the administration of the Estate. Nor has she been given her share of the deceased's estate.
12. DW1 was the defendant. She testified that she is 49 years old and the deceased was her father. He was survived by 4 children. These are Lameck Bugembe, Fred Musoke, Kasibante, and the witness. Bugembe subsequently died. She knows this because the deceased wrote it in his will, exhibit D1. In the will the deceased stated that he produced 8 children. The others died before the

deceased died. The will was being kept by Bamulide Nyanzi John. The plaintiffs save for Fred Musoke were not named in the will as children.

13. She obtained letters of administration to the estate of the deceased on 4th March 2003. In the petition for letters of administration she named the deceased's surviving 4 children. Prior to applying for letters of administration they held a family meeting at the Administrator General's office in which it was agreed she applies for letters of administration.
14. The deceased left land at Nakinyuguzi, Salaama, Mutundwe and Nateete. He left 3 cows and poultry at home. The cows and birds were sold prior to the last funeral rites before letters of administration were obtained. Land at Nakinyuzi was also sold to clear debts. He gave some to the Plaintiff No.1 and some other people. She sold the land at Nateete and applied the money as set out in the inventory. She gave the Plaintiff No.1 Shs.6,000,000.00.
15. She distributed the estate in accordance with the will of her father. Her father's will was properly signed by her father and two witnesses. PW1 was not entitled to anything in accordance with that will. The other plaintiffs are not children of the deceased according to his will. She did not give them any share of the property.
16. In cross examination she testified that she was a daughter of the deceased. Evidence to support that was the will and also a baptismal certificate. Kyagulanyi, Richard Yawe and Nankabirwa were not children of the deceased. She knew them. While the deceased was alive she used to see them visit the deceased's home. She was unaware if they belonged to the same clan as she did. This is the Mbogo clan.
17. She was present during the last funeral rights for the deceased. The Plaintiffs were present save for Richard Yawe Mukasa during the last funeral rights. They were all treated as children of the deceased and necessary cultural rites done upon all of them as children of the deceased.
18. The will was read in family meetings and during the last funeral rights. It was a mistake for her not to tell the court that the deceased left a will when she

applied for letters of administration. She realised it was a mistake when this case started. She did not go back to court to make a fresh declaration.

19. She has sold and or distributed all the land left by the deceased save for one acre of land on which the family house and burial grounds stand. The land in Mutundwe was shared by the six girls in accordance with the will. The remaining piece of land is registered in the names of the girls in accordance with the deceased's wishes expressed in a letter prior to his death. Land at Natete was sold for Shs.97,000,000.00. He gave Musoke Shs.5,000,000.00 only because he had no share in it. She built a house in Mityana for Bugembe as agreed between her and Bugembe. The cost was Shs.7,000,000.00. She could not recall how much was raised from selling the Nakinyuzi land. She shared the money with Musoke, Kasibante and Kunoba. Kasibante was mentally disturbed.
20. DW2 was Yosia Zena Buzibwa. He is 65 years old. He is a pastor and cultivator. The deceased was his uncle. The deceased was a brother to his father. He attended the last funeral rites of the deceased. The will was read. At the last funeral rites he played the role of head of lineage to ensure that the heir was installed. The only children of the deceased he knew were those mentioned in the will. He did not know the total number of children left by the deceased.
21. He used to visit the deceased's home with his father. He knew Nankabirwa Justine. He found her as a child in the home of the deceased. It is only the father who would know his children. He knew Richard Yawe. He knew Charles Kyagulanyi. He saw Kyagulanyi in the deceased's home. Both those names belong to the Mbogo clan.
22. The parties agreed on 4 issues arising in this case. I will discuss the evidence and law issue by issue. The first issue is whether plaintiffs no.2, 3 and 4 were children of the deceased. The evidence for the plaintiffs on this issue was adduced by PW1 and PW2. Plaintiffs' no.2 and 3 did not appear in court and did not testify. According to PW1, who is a son of the deceased, Plaintiffs no.2, 3 and 4 were children of the deceased. He explained that their father was

hot tempered and may simply have left them out of his 'will' as a result of his bad temper.

23. PW2 testified that she was a daughter of the deceased, the second eldest child, in that family. She grew up in her father's home. DW1, the defendant in this matter, stated that they are not children of the deceased because they do not appear on the list of the deceased's children set out in his last will. She, however, admitted seeing the plaintiffs in question at their father's home. She stated that during the last funeral rites her grandmother carried out all the necessary rituals that customarily are performed upon the children of the deceased.
24. DW2 admitted knowing the plaintiffs in question and finding them in the home of the deceased when he visited. He was evasive with regard to whether he knew them as children of the deceased stating that only a father would know his children.
25. Mr. Lutakome objected to any reliance being placed on the so called will of the deceased by reason of Section 67 of the Evidence Act. Section 67 states,

'If a document is required by law to be attested, it shall not be used as evidence until one attesting witness as least has been called for the purpose of proving its execution, if there is an attesting witnessing witness alive, and subject to the process of the court and capable of giving evidence.'
26. The will was alleged to have been witnessed by 2 witnesses by DW1. No mention was made as to whether they were alive or not. What is clear though is a will must be attested by 2 witnesses who must witness the testator signing the document under Section 50 (c) of the Succession Act. There was no evidence by any of the attesting witnesses to support the will in question to be a will of the deceased.
27. The burden of proof does rest upon the party who was to prove the will in question to show that it was attested by at least one attesting witness. And in case there was no attesting witness the burden of proof was upon the party

who wanted to rely on the document to show that the attesting witnesses are not alive or even if they or one of them is alive, they are not subject to the process of this court. This was not done by the defence.

28. In the result I must agree with the plaintiffs' counsel, Mr. Lutakome, that the will cannot be used in evidence in this case in light of the provisions of Section 67 of the Succession Act. Nor has the defendant been able to show that any of the exceptions to that rule can be availed to her in the circumstances of this case. In the result no reliance in this suit can be placed on the alleged will of the deceased.
29. With the will out of the way the defence in effect has no evidence at all with regard to whether the plaintiffs in question are children of the deceased or not. PW2 has asserted that she was born of the deceased and her mother in the home of the deceased. It is clear that on the death of the deceased the defendant together with plaintiffs went through the necessary funeral rites reserved for the children of the deceased. PW1 testified that he knew the rest of the plaintiffs as children of the deceased.
30. On a balance of probability I am satisfied that the plaintiffs in question are children of the deceased. Issue no.1 is answered in the affirmative.
31. I now turn to issue no.2, which is whether or not the defendant has mismanaged the estate. The defendant obtained letters of administration to the estate of the deceased, who, she asserted, had died intestate. No sooner had she obtained letters of administration than she purported to distribute the estate in accordance with the will of the deceased. Her testimony and the inventory she filed is very clear on this. This in itself is sufficient evidence of mismanagement. One cannot initially assert intestate succession and obtain court authority to that effect and then purport to apply terms of a testamentary disposition that was never proved before court.
32. The defendant started selling properties of the estate before she obtained letters of administration, and contrary to the statutory scheme for distribution of the estate of the deceased, she came up with a scheme of her own to

distribute the estate, including to people like the 'bakuza' who are not entitled to the same. She refused to pay people entitled their full or fair share including the plaintiffs.

33. Issue no.3 is whether the defendant obtained the grant through fraud. The particulars of fraud are that

'(a) the defendant falsely stated in her petition to court that the deceased was survived by only 4 children whereas it was not true.

(b) the defendant obtained a certificate of no objection from the Administrator General without consent of all the children of the deceased and they were not consulted and they never appeared before the Administrator General to express their consent to the defendant's application for the grant.

(c) The defendant provided false information to the Administrator General that all family members had given her permission to take out the grant whereas it was not true.'

34. From the evidence in this case it is clear that the defendant knew that plaintiffs' no.2, 3 and 4 were children of the deceased, given the funeral rites that were performed upon them, and of course that she saw them in her father's home. She ignored them while she was applying for letters of administration. I am satisfied that she did so fraudulently to deny them their share in the estate of her late father exhibited by her refusal to distribute their shares to them. She only consulted 3 children of the deceased about letters of administration yet all the other 7 children of the deceased enjoyed the same priority with regard to the administration of the estate.

35. I am satisfied that she obtained the letters of administration fraudulently with intent of denying the other beneficiaries their share of the estate. This is even more so in the case of Plaintiff no.1, Fred Musoke, who received less than he was entitled to as a child of the deceased, with the defendant claiming that their father had refused the plaintiff no.1 a share in the estate, under his will.

She claimed so in spite of the fact that she had claimed in her application that the deceased had died intestate!

36. Issue No.4 is whether the plaintiffs are entitled to remedies sought. The plaintiffs seek multiple remedies. Firstly they seek the revocation of letters of administration granted to the defendant. Revocation is possible for just cause as provided for by Section 234 of the Succession Act. Just cause is defined under Section 234 (2) to mean several things which include,

‘(b) that the grant was obtained fraudulently by making a false suggestion, or by concealing from the court something material to the case;’

37. The defendant concealed from court the existence of 3 other children of the deceased. This is material to the case as all these concealed children were beneficiaries. They were entitled to share in the estate. They ought to have been set out in the application for letters of administration. This is sufficient cause to revoke the letters of administration in question.

38. In addition the suggestion that there were only 4 children of the deceased in the application for letters of administration was false since they were actually 8 children at the time the application for letters of administration were made.

39. Lastly the Final Inventory that purports to show how the estate was distributed reveals that estate funds were distributed to people who were not qualified to share in the estate and had not been set out in the application for letters of administration as beneficiaries. Payments are made to Bamulide, Buzibwa and Rogers Mawejje who were not entitled to share in the estate of the deceased.

40. No mention is made of the funds that were realised from the sale of the cows, poultry and land at Nakinyuzi. Those funds are not accounted for in the final inventory. The final inventory is therefore not a true account in several material respects. This alone is sufficient justification for the revocation of the letters of administration, in light of the provisions of Section 234 (2) (e) of the Succession Act. The final Inventory is not a true account of the estate of the

deceased. Accordingly I do revoke the letters of administration issued to the defendant.

41. The plaintiffs prayed for letters of administration to be granted to them. It is important that someone or some people are appointed to take care of the estate of the deceased in light of the revocation of the earlier grant. Of the 4 plaintiffs 2 did not come to court at all when this case was heard. I would hesitate to appoint people that have not turned for the hearing of this suit.
42. I shall therefore appoint Plaintiff No.1, Fred Musoke and Plaintiff No. 4 Justine Nankabirwa, who appeared before me as the administrators of the estate of the deceased.
43. The defendant is ordered to render an account without delay, and in any case not later than 30 days from today, to the administrators of the estate, all that which came into her hands on account of the estate including the handover of all assets, liquid and otherwise, to the administrators of the estate now appointed.
44. The plaintiffs prayed for general damages for the losses caused by the defendant and interest thereon. What the plaintiffs did show was that the defendant had dissipated the deceased's estate through payments to people who were not entitled. These were specific sums that could have been claimed by special damages. She transferred land totalling to $\frac{3}{4}$ acre to Namagambe Victo, Lilian Nakyonyi and Nakirabira Gladys who were not named in the application for letters of administration as beneficiaries of the estate. And these people have also sold the land.
45. I am somewhat at a loss. Given that I have given an order for an account by the defendant, which is yet to happen, there is a possibility of further or fresh proceedings in relation to the defendant's management of the estate of the deceased. The loss to the estate caused by the defendant's mismanagement of the estate may only be truly ascertainable only after a true and correct account has been done. I will therefore not grant any order for damages in these proceedings.

46. I award the plaintiffs costs of these proceedings.

Signed, dated and delivered at Kampala this 26th day of February 2009

FMS Egonda-Ntende

Judge