THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO. 918 of 1993

PAULO KAWEESA::PLAINTIFF

VERSUS

1. **THE ADMINISTRATOR GENERAL**
2. **BIRIZITA NALWANGA**
3. **MARIA NAKKU :: DEFENDANTS**

BEFORE: HON JUSTICE V.F. MUSOKE-KIBUUKA

JUDGEMENT

Introduction

The plaintiff sued the defendants and prayed court to grant to him the following orders:

a) a declaration that the plaintiff is the duly appointed and installed customary heir of Yowana Sserwanga Muyunga (deceased);

b) an order directing the first defendant to re-issue a certificate of succession to the plaintiff in respect of the suit property;

c) a declaration that the plaintiff is the duly appointed guardian of the suit property and the principal residence of the deceased and as such, he is entitled to possession and use thereof;

d) an order directing the second and third defendants to give vacant possession of the suit property to the plaintiff;

e) an order awarding the costs of this suit to the plaintiff.

Alternatively, but without prejudice to the reliefs set out above, the plaintiff prayed for judgment against the defendants, jointly or severally, for an order requiring the deceased's estate to be distributed in accordance with the deceased's Will or the

Kiganda customary law and practices which obtained at the time the Will was made by the deceased.

FACTS AND PLEADINGS:

The deceased, the late Yowana Sserwanga Muyunga, died way back on 17th August, 1956. He died testate. He died at his home at Katimagondo, in Masaka District, now Lwengo District. In his Will written in 1955, he named the plaintiff as his customary heir.

In addition, the deceased, who owned about six square miles of land at the time of his death, distributed a very large part of it in his Will to his heir, children, relatives and to several friends and civic, church and cultural leaders. The deceased left at Katimagongo, some 590 acres of land, which constitutes the suit property. He referred to that suit property, in his Will, as his "butaka" (obutaka bwange). He further ordained in his Will, that with regard to that land of 590 acres, which was to be regarded as his **"Butaka",** it was to be his heir who would solely benefit or enjoy all proceeds derived there from ("Omusika wange yanalyanga ebivaamu".)

The Will of Yowana Sserwanga Muyunga was approved by the Lukiiko, the Katikkiro and finally by the Kabaka in accordance with the law of succession pertaining in Buganda at the time. The plaintiff was subsequently duly installed as heir to Yowana Sserwanga Muyunga, in 1960.

In 1993, the plaintiff applied, in respect of 590 acres of land, to the Administrator General for a certificate of succession, issued in accordance with the **Land Succession Law** of 31st October, 1912, of the kingdom of Buganda, and in accordance with the ***Local Administrations (Performance of Functions) Instrument, 1967*, (S1. No. 150 of 1967).** The Administrator General, on 26th February, 1993, issued succession certificate No. 30557, to the plaintiff, in respect of the suit property, comprising Buddu block 628, plot 7.

However, on 7th September, 1993, the first defendant, by letter 3/R14/1165, addressed to the Registrar of Titles, Department of Land Registration, Masaka, cancelled the certificate of succession he had earlier issued to the plaintiffs in respect of the suit

property. He ordered the registrar of titles to reverse any transactions which he might have already carried out following presentation to him of that certificate of succession by the plaintiff.

The first defendant did not stop at that. He went ahead and distributed the suit property among those he perceived to be the beneficiaries of it. He gave the plaintiff some 45 acres out of it. He then issued certificates of succession to all those to whom he had distributed the suit property to enable them secure certificates of title in relation to whatever they had received from him. All of them are currently registered owners of what the first plaintiff gave to each of them.

Presently, the principal family house at Katimagondo and the burial grounds surrounding it, are in the control of the 2nd and 3rd defendants children, namely, Teo Lubega and Henry Ssewanyana. They are neither members of the Ffumbe Clan nor direct beneficiaries of the estate of the deceased.

The first defendant also ordered the plaintiff to vacate the principal residence of the deceased in which the plaintiff had lived for well over 30 years, from the time of his installation as heir to the deceased. The first defendant purported to distribute the principal house to the second and the third defendants and virtually, to Henry Ssewanyana and Teo Lubega, who turned it into offices for their business.

Upon another dimension, the second and third defendants arranged, apparently with the help of their children, a function in which the plaintiff was purported to be removed as customary heir to the late Yowana Sserwanga Muyunga. They did so in 1993. In the plaintiff's place, they installed PW3, Joseph Kawesa, a son to the plaintiff. However, PW3, afterwards disclaimed the heirship instead of his own father. He claimed that he had been lured to the function at which he was installed heir, by trickery perpetuated by Henry Ssewanyana and Teo Lubega, son and daughter to the second and third defendants.

For their defence, all the three defendants filed a joint defence. In it, they denied all the plaintiff's claims. They averred that the plaintiff was not the deceased's customary heir. They claimed that he had lost that status long before when he had misbehaved and the Ffumbe (civet-cat) clan leaders installed another customary heir to the late Yowana Sserwanga Muyunga.

The defendants claimed that the plaintiff had fraudulently obtained the certificate of succession to the suit property from the Administrator General. They averred that the plaintiff was not entitled to any of the reliefs he was seeking from this honourable court. They prayed that the plaintiff's suit be dismissed with costs to them.

ISSUES:

During the scheduling conference, the following issues were agreed upon for determination by court.

a) whether the plaintiff is the customary heir to the late Yowana Sserwanga Muyunga;

b) whether the plaintiff is entitled to the 590 acres (suit property) comprising Buddu Block 628, Plot 7; and

c) what remedies are available to the parties.

However, after listening to all the evidence in the case, court has invoked the provisions of Order XV rule 5 (1), of the Civil Procedure Rules, and framed one additional new issue to take care of the first defendant's action of administering and distributing the suit property. With the additional issue, the issues for determination now are:-

a) whether the plaintiff is the customary heir to the late Yowana Sserwanga Muyunga;

b) whether the first defendant was justified to administer and to distribute the suit property;

c) whether the plaintiff is entitled to the suit property (590 acres) comprising Buddu Block 628, Plot 7;

d) what remedies are available to the parties.

FINAL SUBMISSIONS:

Regrettably this suit has had a checkered history. It's hearing was unusually, extended over a long time. The suit first came before the Honourable Justice Mukanza (RIP) in 1997. In 2001 it was re-allocated to the Honourable Justice Okumu Wengi.

Subsequently, the file was re-allocated to me. I returned it for re-allocation when I was posted as Resident judge to Masaka. When I returned it was re-allocated to me.

All along learned counsel, Mr. Lwere, represented the plaintiff. Mr. Kasule, now an honourable justice of court of Appeal, represented all the defendants jointly. When he was appointed a judge of the High Court, Mr. Mubiru Stephen, also from Messers Kawanga and Kasule Advocates, took over representation of the defendants.

At the last hearing on 29.04.2009, court made an order requiring either counsel to file written submissions. Court provided a specific programme for the parties. While Mr. Lwere filed his final submissions for the plaintiff, though slightly late, on 29th May, 2009, Mr. Mubiru never filed any final submissions to date. This Judgment, therefore, has taken care of only the plaintiff's final submissions.

The parties agreed upon the fact that Yowana Sserwanga Muyunga named the plaintiff, as his chosen customary heir, in his last Will dated 8th March, 1955. The report of the ***"olukiiko lw'ekika kye Ffumbe",*** dated 8th December, 1958, exhibit P1, which was approved by the Lukiiko, the Katikkiro of Buganda and finally by the Kabaka, Sir Edward Mutesa, in 1960, stand as unshaken testimony to that fact.

The fact that the plaintiff was installed as customary heir is also not in dispute. After Sserwanga's demise and after the approval by the Lukiiko and the Kabaka, the plaintiff was rightly installed as the customary heir. He was installed in 1960. He enjoyed all the benefits of that office including residing in the principal residence of the deceased because the deceased left no widow. He used the principal residence as his home without any one raising a finger for about 30 years.

However, subsequently in 1993, the second and third defendants alleged that the plaintiff had misbehaved. They moved the clan leaders in particular DW6, Lameck Kigozi Ssalongo, the sub-clan head (Ssiga head) called Nagaya, to remove the plaintiff from the customary heirship and install his son PW2 as the customary heir of the deceased.

During the trial the defence gave the following, inter alia, as the reasons that forced them to cause the removal of the plaintiff as the customary heir of the deceased:

- exhuming a dead body from the family burial ground allegedly without reason;

- frogging his elder brother's dead body and refusing to attend his burial;

- disposing off vital land which constituted part of the deceased's estate;

- engaging into witchcraft and devil worshipping, contrary to the family's strong Christian foundation and legacy; and

- generally failing to properly and satisfactorily discharge his duties and obligations as the deceased's customary heir.

In addition, Mr. Mutesa Ndawula, DW4, who was holding the office of Administrator General at the time, testified that the plaintiff had fraudulently obtained the certificate of succession with regard to the 590 acres. He testified that the plaintiff had informed him falsely that the deceased 's family had given to him the green light to obtain the certificate of succession to enable him register the land under his names. He testified that on account of that fact, he cancelled the certificate of succession and decided to distribute the 590 acres among the beneficiaries of Sserwanga' Estate.

Whether The Plaintiff Is Still The Customary Heir Of Yowana Sserwanga Muyunga.

The evidence of the plaintiff, including that of himself as PW1, Joseph Kawesa PW3, PW4 Ntege Kizza and PW5, Omutaka Abdul Kyeyune Mulindwa, when evaluated against that of the defence witnesses court comes to only one conclusion that the plaintiff is still the rightful customary heir of the deceased because his purported removal was improper, illegal and was contrary to the known customary rules. In particular the removal was unjustified because:-

- all the reasons, given for his removal did not justify such action; and

- most important of all, once the Kabaka of Buganda had ultimately confirmed the plaintiff as the customary heir to Sserwanga Muyunga, nobody in Buganda had the authoririty to undo what the Kabaka had done. Doing so would amount to contempt of the Kabaka who possessed ultimate authority in those matters. The clan leaders of Ffumbe clan had no jurisdiction to remove him.

On the other hand, the defendants' witnesses testified that the plaintiff had been duly removed as the customary heir and replaced by PW3. But two defence witnesses contradicted that general defence. One was DW1. She testified that she had read the Will of the deceased and she had not found anywhere in it where the deceased had named the plaintiff as his customary heir. To her the plaintiff was not merely removed. He was never the rightful customary heir in the first place. She was totally wrong because the deceased's Will is very clear. The plaintiff was named the customary heir.

The other witness who contradicted the general defence was DW5, Professor Liningstone Walusimbi, who testified that he was a specialist in languages and linguistics and a professor of the Luganda language, with vast knowledge and experience on Buganda customs. He did not support the defence contention that the Ffumbe clan leaders had validly removed the plaintiff as heir to Sserwanga Muyunga and replaced him with his son PW3, Joseph Kawesa.

In Prosser Walusimbi's view, the Kabaka has ultimate authority in matters of succession under custom in Buganda as in other customary matters requiring his decision. Once the Kabaka had confirmed the heir, nobody would have authority to remove that heir. For nobody in Buganda had power to change the decision of the Kabaka. Such decision could only be changed through an elaborate customary procedure e.g. through the Kisekwa court, whose decision would then be approved or rejected by the Kabaka. According to DW5, the act of PW6, Lameck Mukasa Ssalongo, the Nagaya the purportedly removing plaintiff as the customary heir of the deceased, after the Kabaka had confirmed him, as such, was null and void and of no customary effect at all.

Professor Walusimbi went further to testify that even in the absence of the Kabaka in 1993, should that have been the case, there was the Ssebataka's Council. The matter ought to have been channeled through that Council and not merely handled by the clan leader, Nagaya, who had no power to untie what the Kabaka had tied.

The evidence of professor Walusimbi fell squarely in tandem with that of PW5, Omutaka Mulindwa, who was presented as an expert on Buganda customs and traditional matters by the plaintiff's side. He was a very impressive witness. He too testified that in Buganda, on succession matters and in all other matters requiring the

Kabaka's decision, the Kabaka was final authority and nobody had any authority to overrule him.

However, both DW5 and PW5 agreed in general that a customary heir, an ordinary one not succeeding to land and, therefore, not by law requiring the Kabaka's confirmation could be replaced by the clan leaders if he misbehaved. To DW5, such a customary heir could be removed upon several grounds of misbehavior. He would be removed if, for instance, he sold the obutaka land. The clan members would be justified to strip him of the heirship upon that account. To PW5, such ordinary customary heir, not confirmed by the Kabaka, could be removed from heirship only if he or she committed what is known in luganda as a ***"kivve"*** That, according to PW5, was an act which is not permitted to be done by any person in Buganda, under any circumstances. He could think of only one such act; marrying one's own mother.

Since, the instant case does not fall under the ordinary category of heirship where the customary heir has not been confirmed by the Kabaka, court will not delve into any discussion in relation to the reasons given by the defence to justify the removal of the plaintiff as heir to the deceased:-

- exhuming the dead body of Aloysio Masambala Kigozi
- frogging the dead body of John Baptist Sserwanga, elder brother to the plaintiff;
- disposing off vital land which constituted part of the deceased's estate;
- engaging into witchcraft and devil worshipping, contrary to the family's strong catholic foundation and legacy; and
- generally failing to properly and satisfactorily discharge the plaintiff's duties as customary heir.

Suffice it to say that when placed under strict evidential analysis, of the evidence as borne out by the record, most of the above charges cannot also be found to have been proved upon the balance of probabilities.

However, the important dimension upon which court places imphasis with regard to this issue is the element of lack of authority by the clan leaders to remove the plaintiff as heir after his confirmation by the Kabaka. The evidence of professor Walusimbi and that of Omutaka Mulindwa, is amply supported by E.S. Haydon in his book ***" law***

and Justice in Buganda Batterworths, African Law Series No. 2. At pages 193 to 200. The author writes: ***"after the Kabaka has confirmed the heir or heirs and all their respective shares, there is no alternation in what he has confirmed,*** at page 198.

In the instant case, the Kabaka himself, under his hand, sealed the confirmation and the declaration of the plaintiff as the heir of the deceased, as exhibit P1 shows. No clan leader had power to remove him. Court duly agrees with the opinion of professor Walusimbi and Omutaka Mulindwa on that point.

Secondly, the plaintiff was appointed customary heir by the deceased's own Will. The plaintiff was not appointed by the clan leaders or the children of the deceased in a family meeting before staging the last funeral rites. Under the Succession Act, a Will is the last testamentary disposition of the wishes of a deceased person. Under section 74, of the ***Succession Act, Cap. 162***, the intention of the testator is not to be set aside because it cannot take effect to the full extent but effect is to be given to it as far as possible. In other words, the removal of a customary heir can ordinarily easily be effected where the customary heir is not appointed in the Will by the testator but just appointed by either the members of clan leaders or the deceased's family.

In the instant case, the plaintiff could not be removed as heir not only because he had been confirmed by the ultimate customary authority, the Kabaka, but also because replacing him and upon flimsy grounds amounted to re-writing the testator's Will. Neither the clan leaders nor the children of the deceased had any right or power to do so. It would clearly be idle to say that the plaintiff is not Sserwanga's customary heir. Besides, Joseph Kawesa, PW3, who DW2 and DW3 were banking on to replace the plaintiff as the deceased's customary heir, disowned them and declined to take the position.

The first issue, therefore, must be and is answered in the affirmative. The plaintiff is still the rightful heir of Yowana Sserwanga Muyunga. His purported removal by the Ffumbe clan leaders in particular Nagaya, and the children of the deceased offended the Kiganda customary rules and amounted to contempt of the Kabaka. It also offended the law of Uganda as contained in the Succession Act.

Whether The First Defendant Was Justified To Administer And To Distribute The Suit Property.

It is trite law that in order to administer any property of a deceased person, one must be either an executor appointed under the Will of the deceased person, and he or she obtains Probate of the Will or the person applies for letters of administration granting him or her the power to administer the property.

There must also be property in existence requiring administration. Exhibit P1 clearly shows that the suit property had been administered by the clan leaders. The only property which they reported to the Kabaka as a residue and which the Kabaka confirmed as such was 34.06 acres (See page 3 of the clan leaders' report exhibit P1). It is a matter of very great surprise, indeed, that the first defendant failed to appreciate that fact. He appears to have deliberately chosen to overlook it.

The first defendant had no authority to administer what had already been administered. The power transferred to the first defendant by S.I. 150 of 1967, only relates, to issuance of certificates of Succession in respect of estates already administered and distributed before 18th August, 1967. That is merely an implementation function.

In any case in order to obtain power to administer the suit property, if the first defendant genuinely believed it not to have been administered and distributed, he had to apply to court to obtain letters of administration in relation to that property. The Supreme Court of Uganda, in ***Administrator General Vs. Akello Joyce Otti And Donato Otti, SCCA No. 5 of 1993,*** stated that the Administrator General had no absolute rights, under the Administrator General's Act, to administer or to obtain letters of administration to every deceased's estate. The administrator General could, however, always apply for letters of administration under the circumstances listed in section 5 (3) of the Administrator General's Act. But even then, the court could refuse to make the grant to him and grant them to deserving relatives of the deceased.

DW4, Ndawula Otavious who was the Administrator General at the time and who was the main actor in relation to the suit property in the instant case, created the impression before court and indeed asserted that the Administrator General had the power to administer and distribute the suit property. Court was left in deep doubt whether DW4 genuinely believed the evidence he gave before court in that regard. There appears to be no basis in law for that assertion. Court has, certainly, found none.

Mr. Ndawula testified that all he did with regard to the suit property was based upon powers given to the Administrator General by the **Local Administration**

(Performance of Functions) Instrument, 1967, S.I 150 of 1967. He claimed that that instrument gave him that power. Court cannot agree with him.

That instrument, in view of court, does nothing more than vest power previously exercised by the Buganda Lukiiko under the ***Buganda Land Succession Law of 1921,***to issue certificates of succession in respect of estates already administered under customary law. The instrument does not vest any administration powers into the Administrator General. For avoidance of doubt, paragraph 2, which is the relevant provision of S.I 150 of 1967 is set out in full below:-

> "2. ***The power vested in the Lukiiko by section 2 of the Land Succession Law to issue certificates of succession in respect of estates administered according to customs of succession in the Kingdom of Buganda prior to the 18th August, 1967, shall be exercised by the Administrator General" .***

The power that was previously vested in the Lukiiko under the ***Land Succession Law*** of the Buganda Kingdom as enacted in 1912, and as it was transferred to the Administrator General, reads in the original Luganda language as below:-

> ***"2. Omuganda bw'anafanga ng'alina ettaka***
>
> ***Mu Buganda tewali muntu anayinzanga okukola ku ttaka eryo ekintu kyonna wabula ng'amaze okufuna okuva eri olukiiko olupapula olw'obusika olugamba nti y'asanira ofulifuna.***

3. Empapula ezo ez'obusika zinayinzanga okuweebwa omuntu alaamiddwa ettaka, oba nga tewali kulaama, zinawebwenga ng'empisa ez'obusika bwe ziri mu Buganda, oba zinaawebwanga omukuza, oba omuntu omulala ku lwaabantu abasaanira okufuna ettaka eryo" .

It can, therefore, not arise that S.I. 150 of 1967, granted any powers to the Administrator General either to administer or to distribute any property beyond merely issuing certificate of succession. All estates to which the power to issue certificates of succession under S.I. 150 of 1967 relates, to estates which were already administered under customary law before 18th August, 1967. Thus the question of administering or distributing any property, to which that power relates, by the Administrator General is clearly outside that power. It is ultra vires.

Thirdly, the first defendant did not only have no powers to administer and distribute the 590 acres but also he had no powers to cancel the certificate of succession once he had issued it to the plaintiff. With the abolition of the kingdoms the power to issue certificate of succession which had been previously exercised by the Buganda Lukiiko by virtue of the Land Succession Law of 1912, was vested in the first defendant. The first defendant pursuant to that power issued a certificate of succession to the plaintiff in 1993. He later, after seven months, cancelled it by letter and ordered the registrar of titles not to honour it and to reverse any transactions taken upon it's existence.

Mr. Ndawula's reason for cancelling that certificate of succession was that the plaintiff had fraudulently presented to him falsely that the family did not object to him obtaining the certificate of succession in respect of the suit property. This, in the view of court, was not a sustainable reason.

In the first place, it was not false that both the second and third defendants had agreed that the plaintiff secures the certificate of succession. The record bears out that fact.

Secondly, the plaintiff did not need any permission or consent from the second and third defendants because the Will of the deceased had clearly bequeathed the 590 acres to him. The record bears that out clearly as well.

Thirdly, once the first defendant had issued the certificate of succession to the plaintiff, he was **functus officio.** He could not cancel such certificates of succession in respect of the same property. Doing so amounted to blantant abuse of the power transferred to him under S.1. 150 of 1967. There is a series of earlier decisions of this court on this point to that effect**.** ***In Re H.C. Kaggwa, Misc. Appl. No. 42 of 1952,*** where the issue was whether a certificate of succession, once issued could be altered or rescinded by the Kabaka or the Lukiiilo, Low J, held that up to the time of issue of a certificate of succession, the clan and the Kabaka or the Kabaka acting on his own, could vary the choice of the succession and distribution of an estate. The learned Judge held further that neither the Lukiiko nor the Kabaka could cancel a certificate of succession once they had issued it. They would be **functus officio.**

Similarly ***Pearson, in J. Bugembe Vs. Kiwanuka And Others HCCA No. 42 of 1951***, held that the clan, after it has determined succession and distribution of the

estate of a deceased person, becomes **functus officio** and any claims which might arise in respect of succession or the distribution of the property could only be settled through the courts. ***In Sewava Vs. Kaggwa And Others (1954) EACA 30, Briggs JA,*** held that once distribution of the estate has been settled and expressed in formal certificates of succession, the Kabaka and the Lukiiko are **functus officio**. The first defendant, therefore, who was merely exercising powers originally vested in the Lukiiko, could not himself, on his own, widen the scope of that power by canceling the certificate of succession once he issued it. He also could not issue the various certificate of succession to the second and third defendants and the other persons to whom he distributed the 590 acres, which had not been distributed to them before 18th August, 1967. In doing so, he took on power which was never vested in him. He acted absolutely ultra vires.

Both the cancellation of the plaintiff's certificate of succession and the certificates issued to the various persons whom the first defendant regarded beneficiaries of the 590 acres were a nullity. So was the registration and certificates of title that were subsequently based upon those certificates. In the eyes of the law, the 590 acres are still intact and are all one as bequeathed to the customary heir by the deceased in his Will.

The last reason why the first defendant could not lawfully cancel the certificate of succession which he had issued to the plaintiff and why he could not validly distribute the 590 acres, is simply that by virtue of obtaining a certificate of succession, the plaintiff by the operation of the law, had immediately became the administrator of the 590 acres. What was remaining was merely conveyancing under section 141, of the ***Registration of Titles Act***. The Administrator General did not have authority to cancel the certificate of succession without filing a court action for it's revocation in the same way a grant of probate or letters of administration are revoked or annulled.

Section 1 (j), of the ***Registration of Titles Act, Cap. 230,*** appears to be clear about this point. It defines letters of administration in the following terms:

> ***"letters of administration" includes, in the case of the estate of a deceased African of Uganda, a certificate of succession or other document from a competent authority declaring the right of any person to deal with that estate, and "administrator" includes that person" .***

It is, therefore, clear that immediately upon being issued with the certificate of succession in respect of the 590 acres, the plaintiff became the administrator of that property. That right, as the administrator of that property, could not be taken away from him just arbitrarily without due process of law.

Court, accordingly, answers issue number two in the negative. The Administrator General had no power at all either to administer or to distribute the suit property. All the Administrator General did was contrary to law. He could not administer what had already been administered. He could not distribute what had already been distributed or clearly bequeathed by the testator.

Whether The Plaintiff Is Entitled To The Suit Property (590) Acres) Comprising Buddu Block 628, Plot 7.

The resolution of this issue depends entirely upon exhibit P1. It depends upon what interpretation is to be attributed upon the testamentary statement contained in the Will of the deceased to the effect that "**590 za butaka** ***bwange***. ***Omusika wange yanalyanga ebivaamu"*** In the report of the clan leaders to the Kabaka and the luliiko they stated, ***"Acres 590 ez'obutakabwe volume 491, Folio 22. Yalaama omusika yaba alyanga ebivaamu".***

Each party produced an expert at the trial. PW5, who testified that he was an expert on the Kiganda customs and the rules of Succession, testified that in his opinion the testator fully bequeathed wholly the 590 acres to his customary heir entirely. He did not consider the provision in the deceased's Will to have created a mere life time annuity but it was a total bequest to the heir who would keep the line of heirship to the deceased going while deriving all sorts of benefits which were unlimited both in nature and time.

DW5, Professor Walusimbi, testified that in his opinion, the testamentary statement on the 590 acres was clear and unambiguous. The land was given by the testator to the heir. He had to derive benefits indefinitely. According to him, it meant that the land had to remain as one. The customary heir would have the right to benefits from it. He testified that the customary heir would allow relatives to settle on the land but they would pay ***busuulu*** to him. That meant that ownership had to vest in the customary heir.

Both PW5 and DW5 uniformly agreed that as an ordinary Muganda, who was not a clan leader at any level, the deceased did not have any **"Butaka"** to which he could bequeath the 590 acres. Professor Walusimbi stated in his evidence that the term "**Obutaka bwange"** as used in the Will by the testator, was used in innocent ignorance on his part. The testator by that phrase only meant that the 590 acres constituted his personal estate which his customary heir would inherit and enjoy. He did not have any ***butaka*** and therefore, he could not have left the bequest to nothing. PW4, Ntege Kizza, the ***"omukubiriza w'olukiiko lw'ekika ky'e ffumbe"***, was equally generally of the same views.

Secondly, the clan leaders of the Ffumbe clan, appear to have been of similar views when they wrote their report to the Lukiiko and the Kabaka in 1958. Their report had a very careful logical setting. It had two separate and clear parts. The first part contains the property of the deceased and how he distributed those properties in his Will. That part covers the first three pages and the top part of page 4 which he distributed in his Will. The fourth page has a large heading. "***Olukiiko Lw'ekika okugaba Ebintu Omufu Byatagaba."*** The 590 acres are found among the properties that the clan leaders thought and reported to both the Lukiiko and the Kabaka as having been distributed by Yowana Sserwanga Muyunga in his Will. They fall in the first part of the report. The person to whom the property was bequeathed was the ***omusika***. The clan leaders appear, indeed, to have wished to emphasize the fact that the deceased distributed the 590 acres to the customary heir. On Page 3, of their report, they mention that bequest twice. They, indeed, obviously regarded the 590 acres as having been distributed by the deceased.

Clearly, Mr. Ndawula's assertion that the 590 acres were a residue is baseless. There is nothing in the Will of the deceased or in the report of the clan leaders to the Kabaka to support that assertion.

Mr. Ndawula appears to have acted upon principles that were clearly wrong. He did not only purport to distribute the 590 acres, but he stated, in his evidence, that he gave the plaintiff only 45 acres out of the 590 aces because the plaintiff was not a real son of the deceased while the other beneficiaries were. If he had cared to scrutinize the distribution made by the deceased himself or the clan leaders, he would have found out that under the Kiganda custom, the Musika took a larger share than anyone else. For example, when

the deceased distributed his Shs. 3,200/= which he left in his account in the bank, he gave his customary heir shs. 500/= while he gave each of his four daughters Shs. 375/=, including the second and third defendants. When the clan leaders distributed the property which they found that the deceased had not disposed of in his Will, they gave the customary heir 14 out of the 16 cows. The same principle was followed when the clan leaders distributed land which the deceased had not distributed (at page 4 of exhibit P1). The customary heir received a total of 84 acres. Elizabeth Nalumansi got 61 acres. Birizita Nalwanga got 55 acres while Miriam Nanteza also received 55 acres.

The above principles which were applicable to the customary inheritance rules in Buganda, as far as distributing the deceased's property was concerned, was well documented by ***E.S. Haydon (Supra).*** At page 200 of his book he writes of the distribution of the deceased Muganda's property, in cases of intestacy among the Baganda, in the following words:

"The successor usually takes the lion's share of the land and often, no doubt, of the personal goods. As to what is left, this is distributed according to what seems right and proper in the circumstances, though again, custom may give general guidance" .

It cannot, therefore, be surprising that Yowana Sserwanga would have bequeathed the 590 acres to his customary heir on top of the other specific bequests he had given to him. The clan leaders did the same thing when they distributed what the deceased had left undistributed. They gave a larger share to the customary heir.

At the very bottom line, the 590 acres could be taken to have constituted an annuity of a life time for the plaintiff as the legatee. Section 160 of the Succession Act permits the creation of such annuity. But owing to all the facts and circumstances of this case, the testator did not create any annuity in this case. He bequeathed the suit property to the plaintiff who would enjoy all the benefits from it and keep the deceased's name going.

In light of the analysis set out above, it is court's finding that the plaintiff is entitled to the suit property. It is to him that it was bequeathed. Court has no doubt about that.

Similarly, the plaintiff is equally entitled to the principal residence of the deceased. In the deceased's mind since he left the 590 acres to his heir, it followed that he would reside in the principal residence and therefrom enjoy all the benefits of that personal estate. This could have been the reason why the deceased never said a word about the

principal residence in his Will. The clan leaders too, in their report to the Kabaka appear to have treated it as normal and quite well understood that the customary heir takes over the principal residence. They reported to the Kabaka that they gave 4 tiled houses to the plaintiff and gave one tiled house to the four girls, including the second and third plaintiffs. It is important to note that by the time of writing his Will and by the time the clan leaders distributed the house, the plaintiff was residing in the principal residence with the deceased. All the daughters except one were married. For the one who had left her marriage, the deceased had provided a separate ***kibanja*** and a separate tiled house.

If the clan leaders had intended to give the principal house to those daughters, indeed, they would have specifically said so since such an act would have been out of the ordinary. None of the four girls lived at the deceased's residence by the time of the deceased's death. The plaintiff lived with the deceased in the principal residence. He continued to live and regard it as his home from the time he became heir in 1960 till 1993, when the first defendant evicted him from it and in what appears to court to have been a rather violent and degrading manner.

Both the second and third defendants recognized the plaintiff's entitlement to the principal residence. In DW1's evidence, she revealed that the clan leaders continued recognition of the plaintiff's right to the principal residence. At P. 127 of the record, she stated, ***" the clan leaders told Kawesa that in order not to remove him from the house, his elder son would be installed in his place as the heir".***

It is, therefore, surprising that the first defendant did write in his letter to the registrar of titles at Masaka, the following words:

> ***"The legal status of Paulo Kaweesa on the said land is that of a Kibanja holder to the extent he has effectively utilized the same as of the date hereof. He has also been given a period of 6 months (six months) from the date hereof to vacate the main residential house he has been occupying as it belongs to the 4 daughters of the deceased according to the confirmed distribution in this office. However, he will move to the smaller "Kigango" or annex house nearby and continue using the rest of the land he has been using before as a kibanja holder" .***

Clearly, the first respondent who by virtue of **S.I. 150 of 1967,** is required only to implement what was administered had no powers to redistribute the property. He could

not, while he testified in court, prove his statement set out above. That led court to believe that there was an extraordinary institutional abuse in this case by the first defendant.

In the view of court, the plaintiff is entitled to the principal residence of the deceased as well.

What Remedies Are Available To The Parties.

The plaintiff sought a declaration that he is the duly appointed and installed customary heir of the late Yowana Sserwanga Muyunga. For the reasons already set out in this judgment, court issues that declaration.

The plaintiff sought an order requiring the first defendant to re-issue to the plaintiff a certificate of succession in respect of the suit property. That order cannot issue because the first defendant having issued the first certificate of succession has now no powers to issue the certificate of succession. He is **functus officio**. That relief is now not available to the plaintiff.

Court issues a declaration that the plaintiff is entitled and has always been entitled to the suit property, not as a guardian, but as the beneficiary thereof, under the Will of the deceased.

The plaintiff sought an order for vacant possession against the second and third defendants. Court is aware of the fact that the suit property was parceled up by the first defendant and registered in the names of various wrongly presumed beneficiaries. Court shall issue orders for vacant possession against each one of them and it shall also issue consequential orders requiring the Commissioner for Land Registration to cancel each certificate of title issued, in relation to the suit property, following the distribution of it by the first respondent.

Similarly, court issues an order against the Commissioner for Land Registration under section 177, of the Registration of Titles Act, Cap. 230, requiring the Commissioner to register the suit property in the names of the plaintiff save for the 6.9, acres also for the burial grounds, which the Ffumbe ***Ssiga*** head, Nagaya, is the trustee and should be registered under his names as trustee.

Lastly, although the plaintiff did not include in the pleadings players for special and general damages, both featured in the final submissions of Mr. Lwere. Upon the

general rule of procedure that special damages must be both pleaded and strictly proved, ***Lloyd vs. Grace, Smith And Company (1912)*** ***AC 716 and Jack Busigye And 2 Others Vs. T.M.K. HCCS No. 15 of 1990,*** court rejects the prayer for special damages.

With regard to general damages, the plaintiff did not plead them but prayed for them in the final submissions.

In court's view by virtue of ***Order VII rule 7,*** of the ***Civil Procedure Rules,*** general damages may be awarded by court where court finds it appropriate to do so even where a party has not specifically stated them as a relief sought. The amount to be awarded as general damages is a matter of discretion of the trial court which must be exercised judicially. ***Crown Beverages Ltd. Vs. Ssendi Edward, SCCA No. 2005***.

In the instant case, court agrees with learned counsel, Mr. Lwere, that the plaintiff suffered mental anguish and humiliation, at the hands mainly of the first defendant who deprived him of his bequest for up to 19 years to date. He suffered deprivation of his status as the customary heir and his ownership and enjoyment of the residence of the deceased. He was tied ***Kandoya*** during his brutal eviction from the principal residence. His property got damaged and lost. He stayed homeless for over one month. In any case the first respondent showed a great deal of arbitrariness and institutional abuse. In those circumstances, it is just for court to grant general damages to the plaintiff against the first defendant in particular.

Court awards to the plaintiff a sum of Shs. 110,000,000/= as general damages in that regard.

The plaintiff shall recover his costs against the first respondent as well.

RESULT:

Court enters judgment in favour of the plaintiff against the defendants. It issues the following declarations and orders:-

a) a declaration that the plaintiff is the customary heir of the late Yowana Sserwanga Muyunga;

b) a declaration that the plaintiff is and has always been entitled to the suit property as the beneficiary thereof under the Will of the late Yowana Sserwanga Muyunga;

c) an order awarding Shs. 110,000,000/= to the plaintiff as general damages against the first defendant;

d) an order awarding the costs of this suit to the plaintiff and requiring the first respondent to pay them entirely; and

e) an order imposing interest upon (c), above, at 20% per annum from the date of judgment to the date of payment in full.

Similarly, court makes the following consequential orders:-

a) an order, under section 177, of the Registration of Tittles Act, requiring the Commissioner, Land Registration, to cancel the certificates of title issued following the purported distribution of the suit property, Buddu, Block 628, Plot 7, by the first defendant in favour of various persons, include the following:-

i) Joseph Kawesa – 10 acres

ii) Paulo Kawesa – 45 acres

iii) Maria Nakku – 120 acres

iv) Birizita Nalwanga – 140 acres

v) Mirani Nanteza – 120 acres

vi) Nalumansi – 2 acres

vii) Nabeyego – 10 acres

viii) Kigozi – 10 acres

ix) Elizabeth Nalumansi – 120 acres

or any other persons taking title under any of them; and

b) an order, under section 177, of the Registration of Titles Act, requiring the Commissioner, Land Registration to register the suit property in the names of the plaintiff.

For the avoidance of doubt, the certificate of title comprising 7 acres registered in the names of Lameck Kigozi Ssalongo (Nagaya) should remain so registered in his names

as the trustee as the deceased willed although the actual acreage appearing in the report approved by the Kabaka is 6.9 acres.

V.F. Musoke-Kibuuka

(Judge)

19.06.2012.