THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HIGH COURT CIVIL SUIT NO. 63 OF 2019

(Arising from IBD Administration cause no. 066 of 2015)

KEMBABAZI ANGELLA *suing*
through KESAFARI DINAVENCE
as next friend :::::::::::::::: **PLAINTIFF**

VERSUS

BARUGAHARE SILVANO :::::::::: **DEFENDANT**

BEFORE: HON LADY JUSTICE JOYCE KAVUMA

JUDGMENT

Background

[1] The Plaintiff, a 12-year-old minor filed this suit through Kesafari Dinavence her grandmother as her next friend against the Defendant for an order revoking the grant of letters of administration to the estate of her late father Kamugisha Herbert that had been made to the Defendant vide **Chief Magistrate Court of Ibanda Administration Cause no. 066 of 2015**, an order for a comprehensive account of how the estate has been managed, an order that the Plaintiff is granted Letters of Administration to her father's estate, damages and costs.

Representation

[2] The Plaintiff was represented by *M/s Kangazi & Co. Advocates* while the Defendant was self-represented.

Counsel for the Plaintiff prayed to proceed by written submissions which he filed and I have considered them.

The Plaintiff's evidence.

[3] The Plaintiff led her evidence by witness statement through her next friend as **PW1**.

PW1 Kesefari Dinavence told this court that the Defendant is an administrator of the estate of the late Kamugisha Herbert having applied for and granted Letters of Administration vide Chief Magistrate's Court of Ibanda Admin. Cause no. 066 of 2015.

That the late Kamugisha Herbert was survived by one child Kembabazi Angella the Plaintiff and he had no other dependant relatives. The Plaintiff's birth certificate was tendered into court and exhibited as **PExh 1**.

That the deceased left behind various items to his estate, to wit; a residential house and banana plantation located at Nyamirima lower cell, Nyabuhikye Sub County, Ibanda District. That on **28th July 2015** in the absence of the Plaintiff or her representatives, the family of the late Anthony Banyagi held a meeting and confirmed the Defendant as the care taker of the estate of the late Kamugisha Herbert and Anthony Banyagi after which he applied for letters of administration. That in his application, he concealed the fact that the late Kamugisha Herbert left a child.

That having been granted letters of administration, the Defendant, in an act of mismanagement of the estate of the late Kamugisha Herbert, used the grant in **HCT-05-CV-CA-0023-2011** before this court and consented with the appellants in that case that the residential house left behind by the late Kamugisha Herbert was property belonging to the 1st and 2nd Appellants. A copy of the consent judgment was tired into court and admitted as **PExh 3**.

That the notice of application for the letters of Administration was advertised by the Defendant in the newspaper past the date of grant

of letters of administration. A copy of the newspaper and grant were tendered into court and admitted as **PExh 4 and PExh 1** respectively. That the Defendant has failed to file a true, correct account and inventory as required by law.

Analysis of the Court

[4] During the writing of this judgment, I observed an anomaly in the procedure adopted in this suit. I shall begin by pointing out this anomaly.

The instant suit arose from **Chief Magistrate Court of Ibanda Administration Cause no. 066 of 2015** wherein the learned trial Magistrate granted Letters of Administration to the Defendant on 25th August 2015. The suit seeks a revocation of the grant for just causes from this court, a court that did not make the grant.

[5] The law sets out mechanisms that aggrieved parties can use whenever they fault decisions or orders or are aggrieved by decisions or orders made by courts. Among such mechanisms is review, revision and appeal.

Appeals to the High Court are provided for under **Order 43 of the Civil Procedure Rules** and **part VIII of the Civil Procedure Act.** Reviews are generally provided for under **Order 46 of the Civil Procedure Rules** and **part IX of the Civil Procedure Act.** Finally, revision is provided for under **part IX of the Civil Procedure Act.**

Under the law, the High Court is endowed with supervisory powers over magistrates' courts; this power is provided for under **Section 17 (1) of the Judicature Act**. The provision provides that:

"The High Court shall exercise general powers of supervision over magistrates' courts".

The High Court exercises these powers through appeals and revision. In **Katende Sarah Nakitende vs Mpwanyi (Revision Cause 11 of 2019) [2021]**, this court observed that:

"It is trite that one way the High Court exercises its powers of supervision over magistrates' courts in the judicial sense is through the function of revision. This therefore calls in the invocation of Section 83 of the Civil Procedure Act Cap 71."

[6] Whereas this court has supervisory powers over magistrates' courts, the power should only be exercised in appropriate circumstances and sparingly without. necessarily assuming or taking over the lower court's jurisdiction.

Section 234 of the Succession Act gives courts power to revoke a grant of Letters of Administration or Probate for a just cause. It is the view of this court that applications and suits for revocation ought to in the first instance be made to the court that made the grant.

It is where a party is aggrieved with the decision or orders of such a court regarding the application or suit for revocation that the aggrieved party can set in motion the supervisory power of a higher court.

I hasten to add that there may be situations where such an application or suit for revocation should under the law not be made

to the same court. Such circumstances are in my view envisaged under **Section 83** of the Civil Procedure Act.

As already observed herein above, the instant suit was brought in the first instance in the High Court, the court that did not make the grant. This was a wrong procedure adopted by the litigant. The Plaintiff ought to have filed this suit in the Chief Magistrates Court of Ibanda at Ibanda the court that made the grant.

[7] **Article 126(2)(e)** of the Constitution enjoins this court to do substantive justice without undue regard to technicalities. The failure to file the suit in the appropriate court as discussed above is an irregularity curable under the aforementioned Article of the Constitution. Similarly, **Section 98** of the Civil Procedure Act gives this court inherent powers where necessary to make such orders as may be for the ends of justice to be met.

Restrictively, guided by the above legal provisions on the powers of this court, I had **IBD Administration cause no. 066 of 2015** the file in which the letters of administration were granted called from the lower court to this court so that I court dispense justice.

[8] Counsel for the Plaintiff raised two issues for resolution by this court. These were;

1. **Whether there are sufficient grounds for revocation of the grant of letters of administration.**
2. **What remedies are available to the parties?**

Issue 1: Whether there are sufficient grounds for revocation of the grant of letters of administration.

[9] The law on revocation or annulment of Letters of Administration is provided for under **Section 234** of the Succession Act, Cap. 162. Under this provision, a grant for Letters of Administration may be revoked for just cause under the following circumstances; if it is proved that the grant was obtained through substantially defective proceedings, or obtained by fraudulently making a false suggestion, or by concealing from the court something material to the case; that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though the allegation was made in ignorance or inadvertently; that the grant has become useless and inoperative through circumstances; or that the person to whom the grant was made has wilfully and without reasonable cause 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.

[10] In the instant case, **PW1** told this court that she found out that during the application process, the Defendant advertised the notice of application for letters of administration after the grant of letters had been made.

Section 250(1)(c) and (2) of the Succession Act, Cap. 162, provide that;

> *"250. High Court or district delegate may examine petitioner in person and require further evidence, etc.*

(c) issue citations calling upon all persons claiming to have any interest in the estate of the deceased to appear before the court or the district delegate before the grant of probate or letters of administration.

(2) A citation issued under subsection (1) shall be fixed up in some conspicuous part of the courthouse, and also in the office of the district commissioner, and otherwise published or made known in such manner as the judge or district delegate issuing it may direct."

The **9th Edition of the Black's law Dictionary at page 277**, defines a citation to mean *a court issued writ that commands a person to appear at a certain time and place to do something demanded in the writ, or to show cause for not doing so.* I have had the benefit of looking at the notice of application issued by the Chief Magistrate's court of Ibanda at Ibanda issued on **31st July 2015** and it is my conclusion, for all intents and purposes that is a citation within the meaning of **250(1)(c) and (2)** of the Succession Act, Cap. 162.

It is now judicial practice that when the citation is issued out by the court in the form of a notice of application, the same has to be gazetted either in the national gazette or a local newspaper of wide circulation. Any person with a just cause as to why the applicant for the letters of administration or probate should not be granted will have 14 days within which to lodge a caveat against the application according to **Section 253** and in the form provided for under **Section 254** of the Succession Act.

Where after the expiration of the 14 days no caveat has been lodged against the grant, the applicant will subject to other court procedures be granted the letters of administration or probate.

The notice of application/citation in **IBD Administration cause no. 066 of 2015** reads in part as follows;

> *"TAKE NOTICE that the application for letters of administration to the estate of the late KAMUGISHA HERBERT has been lodged in this court by BARUGAHARE SILVERNO (Uncle).*
>
> *This court will proceed to grant the same if no caveat is lodged in this court within 14 days from the date of publication of this notice, unless cause be shown to the contrary." [Emphasis mine]*

This notice as already noted was endorsed by the court on **31st July 2015**. It was published in the *Orumuri* weekly newspaper of **3rd to 9th August 2015**. It was on these days that the 14 days mentioned above started to count. Given the fact that the newspaper ran weekly, I will take **3rd August 2015** as the first day of publication. The days would have run out on **16th August 2015**. That date being a Sunday, the next work day which is **17th August 2015** would be the cut-off date after which the court could go ahead and grant the letters of administration.

The letters of administration in **IBD Administration cause no. 066 of 2015** were granted on **25th August 2015**. These were 8 days after the cut-off days.

I therefore do not agree with **PW1's** assertion that the notice was advertised after the grant was made. Similarly, I do not agree counsel for the Plaintiff's submission that the requirement that the notice be advertised in a newspaper before grant was not complied with by the Defendant.

[11] **PW 1** further contends that the Defendant concealed the fact that the late Kamugisha Herbert left behind a child; the Plaintiff. To show this she tendered into court her birth certificate.

I have been able to examine **PExh 1** the birth certificate of the Plaintiff. It is true that it shows that the late Kamugisha Herbert is the father of the Plaintiff. However, there are various anomalies I ought to point out.

[12] First, the said birth certificate was issued out by Ibanda Municipal Council a month before this suit was filed in this court, that is on **25th July 2019**. Secondly, this was 4 years after the application for the grant of letters of administration and eventual grant.

Section 71 of the Children Act provides that:

"71. Prima facie and conclusive evidence of parentage.

(1) Where the name of the father or the mother of a child is entered in the register of births in relation to a child, a certified copy of that entry shall be prima facie evidence that the person named as the

father is the father of the child or that the person named as the mother is the mother of the child.

(2) An instrument signed by the mother of a child and by any person acknowledging that he is the father of the child, and an instrument signed by the father of a child and by any person acknowledging that she is the mother of the child shall—.

(a) if the instrument is executed as a deed; or

(b) if the instrument is signed jointly or severally by each of those persons in the presence of a witness, be prima facie evidence that the person named as the father is the father of the child or that the person named as the mother is the mother of the child." **[Emphasis mine]**

The following conclusions can be drawn from the above provision:

1. Proof of parentage of a child is prima facie conclusive by entry of a name either as father or mother in the register of births in relation of that child. Production of a certified copy of the register of births in this regard is conclusive evidence of parentage.
2. An instrument signed as a deed or executed in the presence of a witness by a mother and father acknowledging to be parents of the child named in the instrument is prima facie evidence that the person named therein is either the father or mother of the child.

The question before me today is whether I can take the document issued by Ibanda Municipal Council alone with no corroboration as prima facie proof of the fact that the Plaintiff was a daughter of the late Kamugisha Herbert.

Registration of births and deaths in Uganda is now done by National Identification & Registration Authority (**hereinafter referred to as NIRA**) governed by the Registration of Persons Act, 2015, a law that was enacted before the document issued by Ibanda Municipal Council was done.

[13] Section 28 of the Registration of Persons Act, 2015 makes it compulsory for every birth within Uganda to be registered with NIRA.

Section 32 of the aforementioned Act provides for the mode of registration of births. According to this provision, a person giving notice of the birth of child shall give the prescribed particulars which shall be entered by the registration officer in the register. This person shall certify to the correctness of the entry by signing or affixing a mark to the register.

Section 35 (a) of the Registration of Person Act provides that a person shall not be entered in the register as a father of any child except at the joint request of the father and mother of the child appearing physically before the registration officer.

Section 39 of the same Act provides for the issuance of certificates of birth upon satisfaction of all the prerequisites of NIRA.

Section 39 (4) of the Registration of Person Act goes further and provides that the information contained in the certificate of birth issued under the Act is presumed to be correct and it may be received as evidence in any judicial proceedings.

Clearly, from the foregoing, **PExh 1** does not conform with the clear legal provisions of the Registration of Persons Act, 2015 as reproduced above and as such it cannot be presumed to be correct and taken as evidence of the fact that the late Kamugisha Herbert was the father of the Plaintiff.

[14] It is a settled principle of evidence that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove those facts exists. **(See Section 101 of the Evidence Act)**. It is said that this person has the burden of proof. This is the person whose suit or proceeding would fail if no evidence at all were given on either side. **(See Section 102 of the Evidence Act)**.

The standard of proof in cases like the instant one is on a balance of probabilities. **(See Miller vs Minister of Pensions [1972] 2 All ER 372.**
Where are court decides to proceed ex-parte pursuant to a default judgment, as it did in the instant case, the court sets down the suit for formal proof.
Where the court sets down a suit for formal proof after a default judgment has been made, the Plaintiff is under a duty to place before the court evidence to sustain the averments in his or her plaint. The pleadings and written submissions are not evidence.
Thus even where there is no rebuttal because of the Defendant's failure to file a written statement of defence or the defence has been struck out as was the case here, **Sections 101 – 104 and 106** of The Evidence Act apply. The Plaintiff being desirous of this court giving judgment as to legal rights or liability dependent on the existence of facts which she asserts, must prove that those

facts exist. It is not always a given that where no defence is filed or one is struck out that the Plaintiff shall automatically be entitled to a decision in their favor. The court has to be guided by the evidence adduced by the Plaintiff before it can reach a decision.

To prove that the late Kamugisha Herbert was her father, it is my view that the Plaintiff ought to have at least labored to obtain a proper birth certificate conforming with the provisions of the Registration of Persons Act 2015 or even brought her mother to court as a witness. None of this was done.

On a balance of probabilities, I am not convinced that the Plaintiff is a child of the late Herbert Kamugisha and that she was fraudulently left out of the application for letters of administration.

[15] **Section 278** of the Succession Act provides that:

"278. Inventory and account.

(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 to time appoint, exhibit an account of the estate, showing the assets which have come to his or her hands,

and the manner in which they have been applied or disposed of."[Emphasis mine]

[1] Failure to file an inventory is a just cause for revocation of a grant of letters of administration under **Section 234** of the Succession Act. The time period within which to file an inventory under the grant is mandatory under **Section 278(1)** of the Succession Act and must be adhered to strictly.

In the case of **Hadijah Ndagire and anor vs Mohammad Kasozi and ors Civil Suit No. 40 of 2014** this court observed that:

> *"The prescribed period for filing an inventory is six months. If the administrator finds herself unable to file the inventory within the prescribed time, she is duty bound to apply to the court which issued the grant for extension of time, stating the reasons for her inability to perform the required task within the 6 - month period. The court, if persuaded by the administrator's grounds for extension of time, may grant the application. This in my opinion ought to be the correct procedure under section 278(1) of the Succession Act."*

The filing of an inventory is a court order premised on the wording of the grant awarded to the applicant which expressly binds the applicant for letters of administration to an undertaking to make a full and true inventory of the properties and credits of the deceased's estate to court the breach of which is punishable. (**See Mukisa Patrick and anor vs Nabukalu Rebecca (Civil Suit 29 of 2016)**.)

The party alleging that a grantee of Letters of Administration did not file an inventory always bears the burden of proving this assertion.

This burden is satisfied by attaching to the pleadings a certified copy of the court file Administration Cause in which the grant of letters of administration was made. This file contains all information concerning the specific grant.

[16] In the instant case, I have had the benefit of examining the court file in **IBD Administration cause no. 066 of 2015** and have not found an inventory filed by the Defendant.

In **Hadijah Ndagire and anor vs Mohammad Kasozi and ors (supra)**, my learned sister Judge Olive Kazaarwe Mukwaya in her decision observed that:

> *"The filing of an inventory is a crucial and mandatory part of the succession process which has for the most part been disregarded by holders of letters of administration and grants of probate. The consequences of this laxity, which has been fueled by the failure by the courts to enforce the law on filing inventories strictly, are demonstrated in the mismanagement of estates of testate and intestate persons in this country."*

Based on the above reasoning and in the interest of justice, the **Defendant is by this judgment ordered to make a true and perfect inventory and render an account of how the estate of the late Kamugisha Herbert has been administered within 14 days after delivery of this judgment failure of which the grant in IBD Administration cause no. 066 of 2015 shall be considered revoked and inoperative.**

Issue one is answered in the negative.

My resolution of the above issue sufficiently puts to rest the last issue in this suit.

This suit is therefore dismissed. The Plaintiff shall bear her own costs of this suit.

I so order.

Dated, delivered and signed at Mbarara this 29th day of November 2022.

Joyce Kavuma
Judge