

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
CIVIL SUIT NO. 053 OF 2022**

1. MUMBERE WILLIAM
5 2. BWAMBALE JAMES
3. MASEREKA ERIAS
4. BIIRA JANE ::: PLAINTIFFS

VERSUS

MASIKA JOY ::: DEFENDANT

BEFORE: HON. JUSTICE VINCENT WAGONA

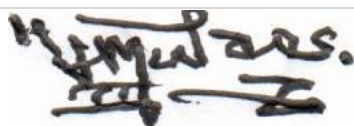
JUDGMENT

Introduction:

15 The plaintiffs brought the suit against the defendant for orders that:

1. A declaration that the plaintiffs are the only beneficiaries of the estate of the late Mbusa Augustine Bihuku with rights to hold and use the estate properties until an administrator is appointed to distribute the same.
2. A declaration that the defendant is not a beneficiary of the estate of the
20 late Mbusa Augustine Bihuku and has no interest to claim there from.
3. General damages and costs of the suit.

The case of the Plaintiffs:

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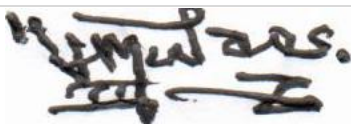
It was averred by the plaintiffs that they are sons of Mbusa Augustine Bihuku (deceased) who died intestate on 17th September 2021 and at the time of his death he was survived by 4 children who are the plaintiffs and that he had separated with all his three wives. That at the time of his death, the deceased had several properties
5 to wit: customary land at Kasokero in Kyondo Sub County, Kasese District; customary land at Katunura – Balinghisa sub county, Kasese District; and one Lock up shop at Kisinga Town Council, Kasese District which the plaintiffs have taken hold of pending appointment of an administrator.

10 That to the plaintiff's surprise, the defendant came in July 2022 claiming to be a beneficiary of the estate of the Mbusa Augustine Bihuku and went ahead and reported a criminal case of intermeddling with the estate of the deceased to assert her interests. They prayed for judgment in their favour.

15 **The case of the Defendant:**

The defendant denied the allegations by the plaintiff and averred that they have no cause of action against her and thus not entitled to any relief. That she was a legal wife of the deceased since the two were legally wedded. The defendant averred that
20 the plaintiffs have denied her access to any properties of the deceased. That the plaintiffs and their relatives chased her away from the matrimonial home and she only returned to demand her share and upkeep from rentals managed by the 2nd plaintiff. The defendant alleged that the lock up at Kabira Kisinga had been sold by the plaintiffs.

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The defendant averred that she was legally wedded to the deceased for 17 years until his demise and they had worked together to acquire the properties in issue and as such she was entitled to her share. The defendant pointed out that several mediations meetings were called over the plaintiff's claim with no meaningful outcome. That
5 after the arrest of the 2nd plaintiff, police demanded for the marriage certificate which was in his custody but he refused to produce. That while in Court the 2nd plaintiff admitted being in custody of the certificate and undertook to give the same to the defendant and when granted bail, he declined; that the defendant later opened up a criminal case of theft/destruction of exhibits to wit a marriage certificate vide
10 SD/33/29/07/2022 and the case was still undergoing investigations. The defendant thus asked court to dismiss the suit with costs.

Issues:

15 Two issues were framed at scheduling thus;

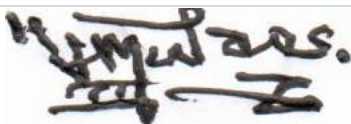
(1) Whether the defendant is a beneficiary of the estate of the late Mbusa Augustine Bihuku who died intestate on 17/09/2021.

(2) What remedies are available to the parties?

20 **Representation:**

Mr. Michelle Geoffrey appeared for the plaintiffs while *Mr. Sibendire Geoffrey* represented the defendant. Both counsel filed written submissions which I have relied upon in this judgment.

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CONSIDERATION BY COURT:

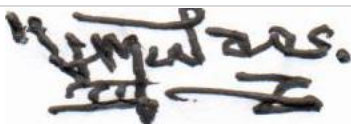
Burden of proof:

5 The burden of proof is in two broad categories that is the legal burden and the evidential burden. Sections 101 and 102 of the Evidence Act Cap 6 rests the burden of proof on whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts to prove that those facts exist or who would fail if no evidence is adduced at all. Therefore, the
10 plaintiff bears the legal burden of proof to prove his case on the balance of probabilities.

Section 103 of the Evidence on the other hand places the evidential burden on any party who alleges the existence of a set of facts to prove such facts. It provides
15 thus: *The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*

**Issue No. 1: Whether the defendant is a beneficiary of the estate of the late
20 Mbusa Augustine Bihuku who died intestate on 17/09/2021.**

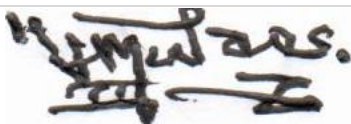
Sections 27 of the Succession Act as amended states those entitled to a share of a person who dies intestate as the spouse, dependent relatives, lineal descendants, and customary heir. In the case before me, the defendant claimed that she was a spouse
25 of the deceased as such entitled to the estate of the late. The definition section of the

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Succession Act defines "spouse" to mean a husband or wife married in accordance with the laws of Uganda or in accordance with the laws of another country and recognized in Uganda as a valid marriage.

5 In the present case the defendant stated in paragraph 5 of her witness statement that constituted her evidence in chief, that she was the only legally married wife of the deceased having contracted a monogamous church marriage on 24th December 2005 but that the plaintiffs had withheld the marriage certificate. In the absence of the original marriage certificate the defendant relied on a copy of the marriage certificate
10 obtained from the church (Exhibit PE6) and a record from the parish which was admitted as DE1 that shows that the church marriage took place on 24/12/2005. In cross examination she stated that the original copy of the marriage certificate was hidden by the plaintiffs and the one she had was secured from the parish. She maintained that they made the vows on 24th December 2005 at mid-day. All the
15 plaintiff's witnesses confirmed that the defendant was a wife of the deceased and the two lived together as husband and wife. PW4, a brother to deceased stated thus; ***"I know the defendant in this suit. She was once married to the late Mbusa Augustine Bihuku and she once stayed with him for some good time."*** PW2 also stated in chief thus; ***"I know that in his life, my late father had married three wives, the defendant inclusive. That at the time of his death, he had no wife since the defendant had abandoned him as he battled with a disease known as Hepatitis B."***
20 I believe on a balance of probabilities that the defendant was a wife or spouse of the deceased based on a church marriage and under the Succession Act she was a beneficiary under the estate of the deceased.

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The other argument raised by the plaintiff's counsel was that since the defendant was not living with the deceased at the time of his death, it disentitles her of a share under the estate. Learned counsel cited section 30 (1) of the Succession Act to support his argument.

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Section 30 of the Succession Act as amended states as follows:

(1) A surviving spouse of an intestate shall not take any interest in the estate of the intestate if, at the death of the intestate the surviving Spouse was separated from the intestate as a member of the same household.

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(2) Subsection (1) shall not apply where-

(a) the surviving spouse has been absent on an approved course of study in an educational institution;

(b) the intestate was, at the time of his or her death, the one who had separated from the surviving spouse as a member of the same household; or

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(c) the intestate is the one who caused the separation.

The above provision of the law is to the effect where in this case the defendant had separated from the deceased at the time of his death, she would not be entitled to a share in his estate. However, the Supreme Court has clarified in *Elizabeth Nalumansi Wamala v. Jolly Kasande and three others, S. C. Civil Appeal No. 10 of 2015* as follows:

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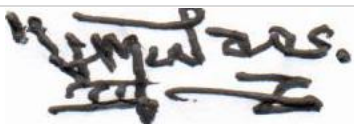
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“It seems to me what section 30 of The Succession Act does is to take away a surviving spouse's right to a share in the property on the simple ground that he or she was not literally staying in the same household with the intestate deceased spouse. It

disregards a surviving spouse's contribution which may have been monetary or indirect through provision of domestic services and provision of emotional support and comfort. Needless to say that this spousal contribution creates an interest in the property. This section therefore deprives a surviving spouse of his or her interest in the estate of the intestate without even providing for prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of property. I opine therefore, that this provision is not consistent with Article 26 of The Constitution of the Republic of Uganda.....”

This court has held before, that the fact that the surviving spouse was not living with the deceased at the time of death does not deprive her of a share in the estate. (See *Samuel Kabagambe Ntungwa & 3 others v Florence Kekibuga Ntungwa, civil suit no. 46 of 2021*).

In the present case, the defendant testified that she lived with the deceased from 2005 till 2021 when they got misunderstandings. The defendant stated in paragraph 7 of her witness statement that in the month of March 2021 while the deceased was sickly, and while she was taking care of him, the plaintiffs together with a few family members chased her from the matrimonial home, but it did not mean that she had separated from the deceased. She relied on DE8 which was a letter dated 30/04/2021 which was an invitation to the deceased by his in laws to have a reconciliation with the defendant, following her being sent away from the home. This evidence was not controverted. This clearly means that the separation was not permanent but was a



result of the differences in their marriage. This did not take away her entitlement under the estate.

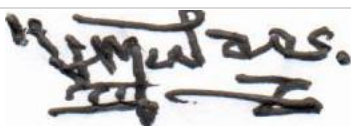
5 It is therefore my find that the defendant was at the time of the deceased's death, a lawful wife of the deceased within the meaning of the Succession Act and is entitled to a share there from.

10 The follow up issue on this is that there is a claim by the plaintiff that the child the defendant has is not a child of the deceased. The defendant on the other hand insisted that the issue was for the two. I find it in the interest of justice to resolve this issue once and for all to avoid it coming back to court.

15 It is settled law that a child of a deceased who died intestate need not prove dependency in order to inherit from the estate of their deceased parent. (*See In re Estate of John Kihara Njau alias Kihara John (Deceased) [2021] Eklr*). Therefore, if one claims to be a child of the deceased, evidence must be lead to that effect.

20 In this case, the defendant in cross examination stated that the child in issue was 1 year and 11 months and this was on 3rd October 2023. The defendant testified in chief that the deceased died on 17th September 2021. This by implication would mean that by 3rd October 2023, the child would be two years from the time the deceased passed on. The evidence of the defendant is not clear whether the deceased left her when she was pregnant or when she had given birth. I believe the facts raise the need for an inquiry regarding the paternity of the said child by the deceased.

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This question can be solved by conducting a DNA test with the plaintiffs whom the defendant stated in examination and cross examination that they were children of the late Mbusa Augustine Bihuka. Therefore, a DNA test shall be conducted on the defendant's alleged issue with the 1st and 3rd plaintiffs to confirm her paternity with the late. In the event the results turn positive, then the issue shall be considered as a beneficiary under the estate.

Issue No. 2: Remedies:

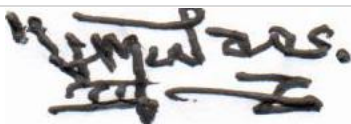
The plaintiffs asked for a cocktail of remedies which I believe the resolution of the first issue in the negative, the suit fails. I therefore make the following declarations and orders:

1. A declaration that the defendant is a beneficiary of the estate of the late Mbusa Augustine Bihuku and has an interest to claim there from.

2. That the child that the defendant asserts belongs to the late Mbusa Augustine Bihuku shall be subjected to a DNA test to prove the paternity of the said child within 30 days from the date of delivery of this judgment at the cost of the defendant.

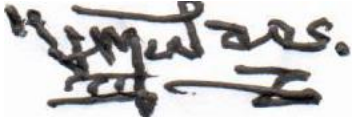
3. That should the results of the said DNA test prove that the said child belonged to the late Mbusa Augustine Bihuku, the said child shall be a beneficiary of the estate of the late Mbusa Augustine Bihuku.

4. That since the parties herein are close relatives and are all beneficiaries under the estate, granting costs shall widen the communication gap

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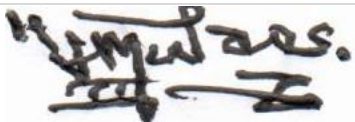
between the parties. I therefore order that each party bears their own costs.

It is so ordered.

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5 Vincent Wagona
High Court Judge
FORTPORTAL

DATE: 13/11/2023

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