

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASINDI
CONSOLIDATED
CIVIL SUIT NO. 41 OF 2021
AND
ORIGINATING SUMMONS NO.005 OF 2020

1.KYOMUHENDO CHRISTINE
2.DANIEL BAGUMA
3.KUSIIMA SAMUEL
4.KUNIHIRA DARLISON
5.KABAHUMA SARAH ::: PLAINTIFFS

VERSUS

1.MUSINGUZI MATHEW
2.KYOKUHAIRE ROZETTA KABWIJAMU ::: DEFENDANTS

Before: Hon. Justice Byaruhanga Jesse Rugyema

JUDGMENT

- [1] In this suit, the plaintiffs claim against the defendants is inter alia;
- a) A declaration that the purported last **WILL Testamentary disposition** of the late **John Kabwijamu** dated 9/9/2019 is invalid having been procured fraudulently by the defendants.
 - b) A declaration that the defendants fraudulently procured the making of a purported Deed granting property intervivos of late **John Amos Kabwijamu** dated 8/9/2019.
 - c) A declaration that the late **John Amos Kabwijamu** died intestate.
 - d) An order for equal distribution of property of the late **John Amos Kabwijamu** to all the beneficiaries of the estate.
 - e) An order for permanent injunction to issue against the defendants, their agents, servants and all other persons claiming under their authority from ever enforcing the purported last testamentary

disposition of the late **John Amos Kabwijamu** dated 9/9/2019 and undertaking in any dealings in the property of the estate based on the said purported WILL.

- [2] It is the plaintiffs' case that the parties are children (i.e, plaintiffs and the 1st defendant) and widow (i.e, the 2nd defendant) of the late **John Amos Kabwijamu who** died on the 9/11/2019.
- [3] The plaintiffs aver that upon the death of their late father, **John Amos Kabwijamu**, the defendants presented a fraudulently procured WILL and a Deed granting properties intervivos purporting to be of their late father which were read to the family members by **Counsel Kasangaki Simon** four (4) days after the burial at the deceased's home in Kihande II Cell.
- [4] It is the plaintiffs' contention that the purported WILL of their late father lacked wishes and intention of their father who preferred a united family bound by a common goal.
- [5] That the defendants have since filed **Originating Summons No.005/2020** against the plaintiffs seeking to enforce the purported WILL of the late **John Amos Kabwijamu**.
- [6] Lastly, the plaintiffs contended that owing to the conduct of the defendants, the plaintiffs have suffered loss, mental torture and inconvenience for which the plaintiffs seek punitive and general damages.
- [7] The defendants on the other hand denied the plaintiffs' allegations and contended that;
 - a) The late **John Amos Kabwijamu** left a WILL which was properly and legally executed and attested dated 9/9/2019 that conveyed his legitimate and true testamentary wishes.
 - b) The late **John Amos Kabwijamu** executed a deed of Grant intervivos dated 8/9/2019 giving his property to his children but unfortunately died before disclosing the same to his children but the terms of the Deed of Grant intervivos were similar to his dispositions in his last WILL.

- c) The plaintiffs are unhappy with the WILL because they unhappy with their bequests in the WILL which is not a ground for invalidation of the WILL.
- d) The instant **Civil Suit No.41 of 2021** offends the **lis pendens** rule since it was filed after institution of Originating Summons No.5/2020 which is pending a ruling before this court.

Counsel legal representation

- [8] The plaintiffs were represented by **Mr. Beinomugisha Charles** of **M/s Rem Advocates, Kampala** while the Defendants were represented by **Ms Ajok Harriet** of **M/s Egaru & Co. Advocates, Masindi**. Both counsel filed their respective written submissions for consideration in the determination of this suit as permitted by this court.
- [9] During Joint Scheduled conferencing and the preliminary hearing of the suit, the following were the agreed facts and orders;
 - 1. The parties are children and widow of the late **John Amos Kabwijamu**, resident of Kihande II Masindi Municipality who died on the 9/11/2019.
 - 2. The 2nd defendant (widow of the late John Amos Kabwijamu) executed a WILL dated 9/9/2019 the same date when the late **John Amos Kabwijamu** executed his contested WILL of 9/9/2019 and the two attested on the purported WILLS of each other. The contested WILL of **John Amos Kabwijamu** was produced in 4 copies which were kept with the following people; **Kasangaki & Co. Advocates, Bishop G.L. Kasangaki, Ruhweza Rujumba** and **Mirimo Mpangire** and likewise, the purported WILL of the 2nd defendant.
 - 3. The **Originating Summons H.C.O.S No.05/20** was consolidated with the present suit and the issues raised in the Originating Summons to be resolved in the present suit.
- [10] Various issues were agreed upon during scheduling but in my view, they all revolve on 2 issues, that is;
 - 1. **Whether the WILL of the late John Amos Kabwijamu was fraudulently procured through forgery by the defendants.**
 - 2. **What remedies are available to the parties.**

I find that resolution of the above 2 issues shall have the effect of resolving the various issues that were agreed upon the joint scheduling conference.

Burden and Standard of proof

- [11] It is trite law that the burden of proof in civil matters is on the plaintiff to prove his/her case and the standard of proof is on a balance of probabilities. Whoever desires court to give judgment as to his/her legal right or liability must adduce evidence to prove the existences of the facts he/she asserts to exist; **Sections 101-103 of the Evidence Act and Lugazi Progressive school & Anor Vs Serunjongi & Ors [2001-2005] 2 HCB 12.**
- [12] In the instant case, the burden of proof is squarely on the plaintiffs to prove their case, i.e, that the WILL of the late **John Amos Kabwijamu** was on the balance of probabilities fraudulently procured and or invalid and or forged.

Issue No.1: Whether the WILL of the late John Amos Kabwijamu was fraudulently procured through forgery by the defendants.

Back ground

- [13] The late **John Amos Kabwijamu**, the father of the plaintiffs and the 1st defendant died on the 9/11/2019. After his death, his purported WILL and a **Deed granting property intervivos** was produced and read to the family members by **Counsel Kasangaki Simon**, four (4) days after the burial at his home at **Kihande II** Cell, Masindi Municipality. The family of the deceased save for the defendants vehemently disputed the purported WILL (**P.Exh.7**) because of certain anomalies that they outlined in the affidavit in reply to the Originating Summons (Vide O.S No.5/2020) deposed by the 1st plaintiff which include;
- a) That the late **Kabwijamu's** place of residence was stated as **Kihande I** yet he was a resident of **Kihande II**.
 - b) The late **Kabwijamu's** date of birth was stated as 18/8/1933 instead of 5/8/1933 and the wrong date was later crossed out with a pen and not counter signed by the purported testator but by the lawyer.

- c) The WILL purported that the late **Kabwijamu's** father was called **Rwakaikara Yosamu** yet he was called **Rwakaikara Balem**.
- d) According to the impugned WILL, the late **Kabwijamu** requested to be buried at Kihande 1, Cell where he had no land.
- e) The 2nd Applicant /2nd defendant herein attested to the impugned WILL yet she was a beneficiary thereunder.
- f) The impugned WILL purported to bequeath to the 1st Applicant (1st Defendant herein) property that was irrevocably gifted to the Respondents/plaintiffs herein and developed with permanent structures during the life time of the late **Kabwijamu**.
- g) The impugned WILL clearly states that it is made up of 5 pages but on counting they are 6 pages.

It is the plaintiffs' case that the foregoing anomalies raised suspicion regarding the authenticity of the WILL.

- [14] In his testimony, the 1st Defendant/**DW4** stated that the deceased's WILL was properly and legally executed and referred to the above anomalies as mere "typos and spelling issues raised" by the plaintiffs relating to the last will as minor and which do not affect the substance and/or invalidate the will. In brief, the defendants do not deny the alleged anomalies in the WILL.
- [15] Consequent of the above, the 4th and 5th plaintiffs who were named in the impugned WILL as executors rejected the WILL and renounced their executorship because they believe the purported WILL of their father was forged and they initiated a process to obtain letters of administration in respect of the estate of their late father **John Amos Kabwijamu**. The Administrator General granted a certificate of no objection to the 2nd – 5th plaintiffs in respect of the application for a grant of letters of Administration in respect of their late father's estate (see Annex "**B**" to the originating summons).
- [16] In response, the 1st and 2nd defendants filed **Originating Summons No.005/2020** seeking confirmation of the validity and enforcement of the purported WILL of the late **John Amos Kabwijamu** hence the present suit by the plaintiffs challenging the said WILL and the Originating Summons.

[17] In his submissions, counsel for the plaintiffs submitted that it is the plaintiff's case that the purported WILL of the late **John Amos Kabwijamu (P.Exh.7)** is a forgery. That the 2nd defendant (widow to the deceased) is being kept captive under the hands of the 1st defendant. Lastly, that the anomalies in the WILL which rendered it suspect are supported and corroborated by the evidence of the Hand writing expert, **Chelengat Sylvia (PW4)** whose unchallenged expert opinion (**P.Exh.11**) is to the effect that

The writers of the signatures and handwriting in exhibits A and B i.e the WILLS of the late Kabwijamu & the widow Rozetta Kabwijamu are different from the writers of the corresponding handwriting /signatures in Exhibits C, D, E, F, G and I (P.Exh.9).

[18] Counsel concluded that **Exhibit "A"**, the purported WILL of the late **John Amos Kabwijamu (P.Exh.7)** and the signatures thereon of the late **John Amos Kabwijamu** and **Rozetta Kabwijamu** are different from their signatures appearing on documents "**C, D, E, F, G and I**" undisputed documents authored by the same people, the late **Amos Kabwijamu** during his life time and the widow, the 2nd defendant. That in the premises, while relying on the authority of **Christopher Bamweyana Vs Herman Byanguye, H.C.C.A No.24/2017** and **S.43 of the Evidence Act**, it is clear that the purported WILL of the late **John Amos Kabwijamu** was fraudulently procured by the defendants in connivance with **Counsel Kasangaki Simon** who drafted the same.

[19] Counsel for defendants on the other hand submitted that the Defence witnesses led evidence to prove that the said WILL of the late **John Amos Kabwijamu** is valid and conveys the legitimate and his true testamentary wishes. That the late **John Amos Kabwijamu** (testator) personally signed the WILL which was witnessed by **Milton Mpangire (DW2)** in the presence of **Counsel Kasangaki (DW1)** and the testator on 9/9/19.

[20] Counsel concluded that the contested WILL (**P.Exh.7**) in substance and form met the legal prerequisites for a valid will and was executed by the late **John Amos Kabwijamu** with testamentary capacity and out of own free will. That the plaintiffs are only unhappy with the WILL because they are unhappy with their bequests in the WILL which is not a ground for

invalidation of the WILL and that the suit is basically motivated by sour graping.

[21] In the instant case, I find that the submissions of the contested WILL and Deed of granting property intervivos of **John Amos Kabwijamu** together specimen signatory documents of the late **John Amos Kabwijamu** and his wife, the widow **Rozetta.K.Kabwijamu (P.Exh.9)** for analysis by the handwriting expert was by consent of both parties and their counsel and therefore, the specimen-signatures documents were not contested.

[22] Again, as already observed, the anomalies cited by the plaintiffs in the contested WILL their existence was also not contested. In the premises, it is my view that when the uncontested anomalies in the purported WILL which rendered it suspicious are considered along the handwriting expert opinion (**P.Exh.11**) of Ms. **Chelengat Sylivia** (PW4), the irresistible outcome is that the deceased **John Amos Kabwijamu** and the widow (2nd defendant) did not participate in the preparation of the contested WILL. They never endorsed thereon their signatures as clearly found by the handwriting expert whose opinion is to the following effect.

a) The last WILL and testament of **John Amos Kabwijamu (Exhibit A)** being questioned signatures attributed to **John Amos Kabwijamu** and **Rozetta Kabwijamu**, the last WILL and testament of **Rozetta Kabwijamu (Exh.B)** bearing questioned signatures attributed to **Rozetta Kabwijamu** and Deed Granting property intervivos (**Exhibit C**) bearing questioned signatures attributed to **John Amos Kabwijamu** and **Rosetta Kabwijamu** were submitted for examination and comparison with specimen signatures attributed to **Rozetta Kabwijamu** and **John Amos Kabwijamu** in his life time (**Exhibits D, E , F, G, H and I**) for purposes of establishing whether the authors of corresponding questioned signatures on **exhibits A-I** were signed by the same persons or not.

b) Findings;

I. The questioned handwriting/signatures in **Exhibit A** were significantly similar with the corresponding questioned signatures in **Exhibit B** and therefore, the writers/authors of the questioned signatures in **Exhibit A** wrote the corresponding questioned signatures in **Exhibit B**.

- II. The authors of the specimen signatures in **exhibits D, E, F, G and I** (Rozetta Kabwijamu and John Amos Kabwijamu) are similar with the corresponding signatures, and therefore, the handwriting/signatures in exhibits D, E, F, G, and I were authored by the same writers.
- III. The signatures of **John Amos Kabwijamu** on the submitted **Exhibit C** had lost most of its time details and therefore, it was excluded from the analysis.
- IV. **Exhibit H** also showed features of loss of skill and coordination due to either sickness or old age and therefore, it fell outside the range of comparison with the other corresponding signatures this was excluded from further analysis.
- V. The writers of the signatures and handwriting in **exhibits A to B** were different from the writers of the corresponding handwriting /signatures in **exhibits C, D, F, G, and I**.

[23] In my view, from the entirety of the above, I find that the signatures of the late **John Amos Kabwijamu** and **Rozetta Kabwijamu** on the contested purported WILL are not their signatures and therefore, the signatures thereon were accordingly forged. According to **Sheikh Mawanda Abdu J. Idris & Anor Vs Kobil (U) Ltd, HCCS No.350/2008 (Commercial Division)**

“If someone forges the signatures to a document, that document is wholly fictitious from the beginning to end, and it is of course, null and void as soon as forgery is proved...”

[24] In the premises, I find the purported WILL of the late **John Amos Kabwijamu** null and void for being procured fraudulently by forgery. The 1st issue is in the premises found in the affirmative.

Issue No.2; What remedies are available to the parties.

[25] The plaintiffs adduced credible evidence to prove that the purported WILL of the late **John Amos Kabwijamu** is a forgery. It is therefore declared that the purported WILL of the late **John Amos Kabwijamu** dated **9/9/2019** is invalid having been procured fraudulently through forgery by the defendants.

- a) In the premises, where the contested WILL is found invalid, it follows that the late **John Amos Kabwijamu** is found to have died intestate and the beneficiaries are entitled to a final distribution of the estate.
- b) An order for permanent injunction does issue against the defendants, their agents, servants and all other persons claiming under their authority from ever enforcing the purported last testamentary disposition of the late **John Amos Kabwijamu** dated 9/9/2019 and or undertaking dealings in the property of the estate based on the said purported WILL.
- c) In view of the fact that the contested purported WILL, the basis of the **Originating Summons No.05/2020** has been found invalid, the Originating Summons stand dismissed in its entirety. Besides, the dispute between the parties could not be justly determined on originating summons as it raised questions which required consideration of oral evidence and not affidavit evidence; **Makabugo Vs F.D.Serunjogi [1981] 13 HCB 58**. For avoidance of doubt, the Applicants therein/defendants herein are not and could not be appointed as executors of the WILL of the late **John Amos Kabwijamu** which has been found invalid for purposes of final distribution of the deceased's estate. This is besides so, because the Applicants therein/Defendants herein were never in any case indicated in the said WILL as its executors.
- d) The estate of the late **John Amos Kabwijamu** cannot remain without an administrator lest it is left to waste. In the premises, it is ordered that the interested members of the family and or beneficiaries of the estate together with the widow/2nd defendant or with her consent apply for letters of Administration to administer the estate.

[26] In conclusion, judgment is given in favour of the plaintiffs against the defendants for;

- a) A declaration that the purported last WILL of the late **John Amos Kabwijamu** dated 9/9/19 is invalid for having been procured fraudulently through forgery by the defendants.
- b) A declaration that the late **John Amos Kabwijamu** died intestate.
- c) A permanent injunction doth issue against the defendants their agents, servants, and all other persons claiming under their authority from ever enforcing the purported last testamentary of the late **John**

Amos Kabwijamu and or undertaking any dealings in the property of the estate based on the said WILL.

- d) Interested members of the family of the late **John Amos Kabwijamu** and the 2nd defendant/widow or with her consent to apply for letters of Administration for the estate of the deceased for purposes of the management and distribution of the estate to all beneficiaries of the estate.
- e) An order for general, punitive and or exemplary damages is not granted for no evidence was led as to how the defendants have been benefiting from the estate to the detriment of the plaintiffs - in any case, before distribution, the widow is entitled to the benefit of the entire estate.
- f) As the parties are all children and widow of the deceased **John Amos Kabwijamu** who are litigating over his estate, no order as to costs is issued for avoidance of escalation of the conflict between the parties.

Signed, Dated and Delivered at Masindi this **31st day of March, 2023.**

Byaruhanga Jesse Rugyema
JUDGE.