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THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT TORORO

CIVIL SUIT NO. 005 OF 2022

(FORMERLY CIVIL SUIT NO.009 OF 2017)

ARISING FROM ADMINISTRATION CAUSE NO.130 OF 2015

FLORENCE OKELLO BETTY ::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

REHEMA NANDITA ::::::::::::::::::::::::::::::::::: DEFENDANT

JUDGMENT

BEFORE HON. MR. JUSTICE HENRY I. KAWESA

The plaintiff instituted this suit against the defendant claiming to be an executrix of the estate of the late Linus Okello Olwa who died on the 25th September 2015. The plaintiff alleged that the deceased left a Will, several properties, children, and no widow. She also claimed that the defendant lodged an unnecessary caveat disputing the deceased's Will, and the grant of probate to her; and that the defendant has been intermeddling in the estate of the deceased by confiscating its Tipper Lorry Registration No. UAV 087C.

The plaintiff seeks:

1. An order for removal of the caveat lodged by the defendant;
2. Admittance of the Will of the late Linus Okello Olwa to probate;
3. General damages for inconvenience and mental anguish amounting to Ugx.25,000,000;
4. A permanent injunction against the defendant, her kin, servants, agents, fiduciaries, invitees, assignees, successors in title, or any person claiming or deriving under her, from intermeddling with the estate of the late Linus Okello Olwa;
5. Special damages amounting €7000 being the cost of travel and attendant expenses;

6. A declaration that Tipper Lorry Registration Number UAV 087C forms part of the estate of the late Linus Okello Olwa;
7. Costs of the suit.

The defendant filed a written statement of defence claiming to be a Widow of the late Linus Okello Olwa; and that their customary marriage was celebrated on the 26th March 2015. That she was living with the late Linus Okello Olwa as husband and wife in a matrimonial home found in Busia, and that she is entitled to be the administrator of his estate. Further, that the Will before court is invalid because the deceased was sick and in hospital when he executed it.

Representation

The plaintiff is represented by **MUKUVE & CO. ADVOCATES**; and the **M/S BAGOROGOZA, KAALI & CO. ADVOCATES**.

The Trial

The defendant or her Counsel never turned up for trial of the suit on several occasions, prompting the plaintiff to pray for an ex parte order against her. The court granted the ex parte order against her and set down the suit for hearing.

The plaintiff had filed a scheduling memorandum wherein she proposed the following issues for determination:

1. *Whether the defendant is a widow of the deceased?*
2. *Whether there is a valid will executed by the deceased?*
3. *What remedies are available to the parties?*

The plaintiff called John Baptist Okello Okello (PW1) as her witness. His evidence in chief was given by way of a witness statement whose contents are on record.

Determination of the Issues

Counsel for the plaintiff filed written submissions, which the court shall consider.

Issue No.1: Whether the defendant is a widow of the deceased?

PW1 testified, under paragraph 16 of his witness statement, that the late Linus Okello Olwa was not married to the defendant. That the messaging communication of 18th of June 2015 between the late and the defendant clearly show the defendant accusing the late of refusing to marry her, which implies that the defendant knows that she was not married to the late Linus Okello Olwa. A copy of the messages between the late and the defendant was adduced as annexure “E” and admitted by Court.

This court has seen the said messaging communication. It is mindful that the defendant did not appear to challenge the plaintiff’s evidence. It understands that *“in civil proceedings, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon that person”* (**Section 106 of the Evidence Act Cap.6**).

In this case, the plaintiff adduced evidence that the defendant was not married to the late Linus Okello Olwa. This evidence was not rebutted by the defendant. The fact of marriage between the defendant and the late Linus Okello Olwa is a fact within the knowledge of the defendant. Her failure to prove it leaves this court with no option but to believe the plaintiff’s assertion that she (defendant) was probably not married to the late Linus Okello Olwa.

Consequently, the court finds issue one in the negative.

Issue 2: Whether there is a valid will executed by the deceased?

The court has looked at the alleged Will of late Linus Okello Olwa which is annexed to the witness statement as annexure “A”.

The witnesses to the said Will are Florence Spencer-Baafi (Awany), and Beatrice Okello. None of those witnesses was called to prove its execution.

According to **Section 67 of the Evidence Act Cap.6**, it is provided that:

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive, and subject to the process of the court and capable of giving evidence.

A Will is a document required by law to be attested to by at least two witnesses (**Section 50 of the Succession Act Cap.162**). Since no witnesses to the said Will was called, and in the absence of any explanation as to why none of them was called, this court is unable to rely on annexure "A" in view of the provisions of **Section 67 of the Evidence Act Cap.6**.

Counsel for the plaintiff argued that the alleged Will was admitted by Court under **Section 135 of the Evidence Act Cap.6**; and that it ought to be considered since it was not disputed by the defendant. However, the court considers that that section does not override the provisions of **Section 67 of the Evidence Act**. Consequently, the court finds that the plaintiff has failed to prove existence of a valid Will. This issue is found in the negative, therefore.

Issue No.3: What remedies are available to the parties?

The court considers that the plaintiff's cause of action in the plaint was largely premised on the Will which it disregarded; and that most of the remedies she sought depended on proof of that Will. These among others include, an order for removal of the caveat lodged by the defendant, an order admitting the Will of the late Linus Okello Olwa to probate; general damages; and a declaration that Tipper Lorry Registration Number UAV 087C forms part of the estate of the late Linus Okello Olwa. In addition to that, the Will, upon which **ADMINISTRATION CAUSE NO.130 OF 2015** is premised, having not been proved, this court shall invoke its inherent powers under **Section 33 of the Judicature Act Cap.13** and dismisses the said cause.

As for the other remedies sought in the plaint; the court finds that the claimed special damages were not strictly proved as required by law. However, it is inclined to grant a permanent injunction against the defendant and half of the costs of the suit considering the finding on the first issue.

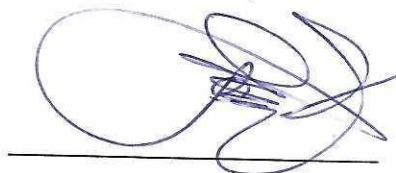
Result

The suit partially succeeds and judgment is entered in favor of the plaintiff on the following orders;

1. A permanent injunction against the defendant, her kin, servants, agents, fiduciaries, invitees, assignees, successors in title, or any person claiming or deriving under her, from intermeddling with the estate of the late Linus Okello Olwa.
2. Administration Cause No.130 Of 2015 is hereby dismissed.
3. An order that the defendant pays half of the costs of the suit.

It is so ordered.

Delivered at Tororo this 8th Day of November 2023



HON. JUDGE

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In the presence of:

1.....Mukave mugaga CSI for the Plaintiff.....

2.....

3.....

4.....