

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MUBENDE
CIVIL SUIT NO.69 OF 2019

1. NAMPIIMA JOYCE
2. NAKKUNGU JOYCE
3. NABAWANUKA CISSY
4. NAKKUNGU SARAH
5. MUGAMBE CHRISTOPHER

PLAINTIFFS

VERSUS

1. KIYONGA STEPHEN
2. SSENKUBUGE DAVID

DEFENDANTS

BEFORE HON JUSTICE MOSES KAZIBWE KAWUMI

JUDGMENT

The Plaintiffs' claim against the defendants is for an order of specific performance, general damages, interest and costs of the suit due to the alleged defendants' failure to distribute the estate of late Namutula Kibugo Yokana as per his wishes in the WILL dated 30th June 1994.

The defendants filed a Written Statement of Defence and Counterclaim asserting that late Namutula Kibugo Yokana died intestate. The defendants contend that there was a purported WILL produced by the Plaintiffs 20 years after the burial ceremony which is forged and it had been agreed in a family meeting that the estate be equally distributed between all beneficiaries.

In the course of the trial, the 1st defendant entered a Consent judgment with the Plaintiffs hence the suit proceeded only against the 2nd defendant.

Representation.

M/S Maldes Advocates represented the Plaintiffs while M/S Kasumba, Kugonza & Co. Advocates appeared for the 2nd Defendant.

Counsel filed Witness Statements which were adopted as the evidence in chief for the respective witnesses and on which they were cross examined. Submissions were subsequently filed and have been considered by the court though not reproduced in the judgment.

Background.

The 1st Plaintiff is a daughter of the late Namutula Kibugo Yokana while the 2nd, 3rd, 4th and 5th Plaintiffs are his grandchildren. It is the Plaintiffs' case that before his demise in 1995, the late Kibugo had made a **WILL** on 30th June 1994 distributing his estate to his 13(thirteen) children.

On 26th July 2016 a family meeting was held in the Chambers of the Administrator General vide file reference **Mengo/AC/2206/2001** and the defendants were appointed to apply for Letters of Administration to the estate. Letters of Administration were issued by the High court at Mubende on 14th February 2019.

The defendants however refused to distribute the estate as per the WILL claiming that the 2nd to 5th Plaintiffs are not children of the deceased. The Plaintiffs were thus compelled to file the suit for the afore stated reliefs.

The defendants contest the alleged WILL presented by the Plaintiffs after 20 years and further claim that in a family meeting held on 30th June 2019 the same had been rejected by all beneficiaries based on a number of reasons. The purported "**will**" was written by an unknown person yet the alleged testator was literate and it was produced after a long time despite pleas for anyone with such a document to avail it.



The defendants further contend that the purported testator's signature is a forgery, the witnesses to the document are unknown and that by 1994 the late Kibugo had developed mental complications and had disappeared from home at the time his body was found in a bush in 1995.

The names of the children attributed to the testator in the WILL were disputed by the defendants and he did not have thirteen children as alleged by the Plaintiffs. The defendants further contend that Kibugo was not buried at a place he had indicated in the alleged WILL which further pointed to the purported WILL not being authentic.

The defendants further disputed the WILL claiming that their father could not have wished his estate to be maintained in his name after bequeathing it to the beneficiaries.

The defendants repeated the averments in the counterclaim with prayers for a declaration that the purported WILL is a forgery, null and void, general damages and costs of the suit.

Counsel for the parties agreed on four issues for determination by the court :-

1. Whether the late Namutula Kibugo Yokana died testate and left a WILL stipulating how his estate should be distributed.?
2. Whether the purported WILL of the late Namutula Kibugo Yokana dated 30th June 1994 is a forgery, a nullity and void?
3. Whether the administrators of the estate of the late Kibugo were justified to distribute the estate equally to the beneficiaries.
4. Remedies available to the parties.

The burden and standard of proof.

In civil cases the burden of proof lies on that person who would fail if no evidence at all were given on either side. The burden of proving a particular fact therefore lies on that person who wishes the court to



believe in its existence unless the law provides that the proof of that fact shall lie on any particular person.

The standard of proof required to be met by either party seeking to discharge the legal burden is on a balance of probabilities. The evidence must carry a reasonable degree of probability but not so high as is required in a criminal case.

The facts must prove the matters beyond a mere conjecture or surmise and where the case is left in equilibrium, the court cannot incline the balance either way, the Plaintiff will have failed to discharge the burden of proof.

Sections 101 and 103 Evidence Act; Senkungu & 4 Others V Mukasa. SCCA No. 17 of 2014; Sebuliba V Cooperative Bank Ltd{1982}HCB 130.

The Law on testate succession.

A person is said to have died testate when he left a valid will under the Law. A will is deemed to be valid under **Section 50 of the Succession Act** when it was written, dated and signed by the testator of his own free will. The Will must have at least two attesting witnesses who must have seen the testator sign or affix his mark on it and they are the ones who attest to it at the time the WILL is approbated.

I wish to note from the outset that the beneficiaries to the estate of late Namukula Kibugo had a meeting in the office of the Administrator General and it was resolved that the deceased left a WILL which however did not name an Executor. This fact is reflected in the certified minutes of the meeting and a perusal of a copy of the WILL exhibited in court confirms that observation by the Assistant Administrator General who convened the family meeting.



On 26th April 2016 the family appointed the two defendants and a one Mukasa Edward Magezi being the customary heir named in the WILL to acquire Letters of Administration to the estate. The meeting was attended by all the parties to the suit together with other beneficiaries. It was on the basis of the meeting that a **Certificate of No Objection No. 19669** was issued. The court based on that consensus to grant Letters of Administration for the defendants to administer the estate.

Resolution of the 1st issue.

Whether the late Namutula Kibugo Yokana died testate and left a WILL stipulating how his estate should be distributed?

The minutes of the meetings held in the Office of the Administrator General in the presence of all the parties to the suit and which were exhibited and marked PEX2 and PEX3 resolved the 1st issue before the suit was filed. None of the disputants in this suit objected to the validity of the WILL and the only concern was its failure to name an Executor.

Any arguments challenging the authenticity of the WILL amounts to the party approbating and reprobating that fact. The defendants who were in the meeting and appointed to administer the estate cannot at the same time challenge the WILL. All issues about the document now laid out in the WSD/Counterclaim were not raised in the family meeting.

The principle of approbation and reprobation prevents a party who has taken benefit out of a course of conduct which one pursued and with which his present conduct is inconsistent.

Banque des Marchands de Mascou(Koupetschesky) v Kindersley {1951} 1 Ch. D 112; Kavuma v Barclays Bank Ltd. HCCS No.0332 of 2008; Verschures Creameries Ltd V Hull & N. S. CO. Ltd (1921)2KB 608.

In **Evans V Bartlam (1937)AC 473** Lord Russel stated at Page 483 that:-



“The doctrine of Approbation and Reprobation requires for its foundation inconsistency of conduct ,as where a man having accepted a benefit given him by a judgment cannot allege the invalidity of the judgment which conferred the benefit.”

The defendants who were in the meeting in which it was declared that there was a WILL though lacking in naming an Executor and based on which observation they were appointed as Administrators are estopped from denying the existence of the same document.

I thus hold that the late Namutula Kibuga Yokana died testate and left a WILL stipulating how his estate should be distributed but did not appoint a testator therein.

Resolution of the 2nd issue.

Whether the purported WILL of the late Namutula Kibugo Yokana dated 30th June 1994 is a forgery, a nullity and void?

The defendants pleaded fraud to include forgery of the WILL but did not lead any evidence to prove that the signature on the alleged WILL was not that of the testator. The defendants did not prove by alternative handwriting or through a report of a handwriting expert that the signature on the WILL was not the one of the testator.

The minutes of the family meeting held in the Chambers of the Administrator indicate that the testator left thirteen children four of whom had died at the time the meeting was held. The names of the deceased siblings of the defendants were spelt out and their children were listed.

The number of children left by the deceased was also indicated as thirteen by the defendants in their Application for Letters of Administration. The defendants are thus further estopped from raising this as a ground to challenge the WILL.



The delay for the WILL to be tabled does not on its own amount to fraud. Mayanja Moses(PW1) was emphatic that he saw the WILL during the last funeral rites. Nampiima Joyce (PW2) corroborated the evidence of PW1 and she was not cross examined by the 2nd defendant on the same assertion which implies that her evidence was true.

Mujeebo Stanley(PW3) was also not cross examined on his evidence to the effect that the WILL was produced and read during the Last funeral rites of the late Kibugo and there were no disputes among the beneficiaries until the death of Mukasa Edward Magezi who had been appointed as the customary heir in the WILL.

Ssemwogerere William(PW4) kept the WILL from October 1994 until he produced it during the Last funeral rites of the deceased.PW4 was not present when the WILL was written but just kept it as requested by the testator. I failed to find any evidence to support the assertion that the WILL was not produced during the last funeral rites of the testator.

The mental health of the testator was challenged by the Defendants for the contention that he could not have written the WILL. Nvanungi Florence (DW2) testified about the late Kibugo having developed mental complications and that he used to disappear from home including at the time his body was found in a bush by hunters in 1995.

The defendants did not lead evidence to prove that on the 30th June 1994 when the WILL was authored the testator was not enjoying good mental health. The defendants did not also lead any medical evidence to prove that the deceased had the alleged mental disorder and/or that it was permanent and he had no lapses of sane moments.

The allegation that the author of the WILL and witnesses were not known to the defendants do not amount to acts of fraud and were all diminished



by the agreement of the parties to accept the WILL and have Administrators appointed for it did not name Executors.

A party asserting fraud bears a heavier legal burden to prove his case beyond a mere balance of probabilities.

Fam International Ltd & Anor V. Muhammed Amid SCCA No. 16 of 1993.

It is the position of the law that fraud must not only be pleaded but must also be proved. The defendants did not prove any of the alleged acts of fraud and the WILL conformed to the dictates of Section 50 of the Succession Act.

Kampala Bottlers Ltd V Damanico (U)Ltd. SCCA No.22/1992

I find that the WILL dated 30th June 1994 was written and signed by the testator before the named two witnesses thus it is valid in law and not a forgery.

Resolution of the 3rd issue.

Whether the administrators of the estate of the late Kibugo were justified to distribute the estate equally to the beneficiaries.

A perusal of the file in Administration Cause No.176 of 2018 relating to the Letters of Administration issued to the defendants reveals that no WILL was mentioned as existing in the Petition filed by the defendants. The Court therefore issued Letters of Administration empowering the defendants to distribute the estate guided by the Intestacy provisions of the Succession Act as at the time the Grant was issued on 14th February 2019.

The present suit does not seek to review Administration Cause No.176 of 2018 or to revoke the Grant issued to the defendants under **Section 234 of the Succession Act**. The suit seeks specific performance of the WILL which would amount to reviewing AC No.176 of 2018 yet the



Letters of Administration were not issued with a WILL annexed since it was never approbated by the court.

It is the position of the law that a party cannot be granted a relief that was never pleaded. The position was reinforced by the Court in **Hannington Wasswa & Another V Maria Onyango Ochola & Others. SCCA No.22 of 1993** in which it was held that :-

“relief in court matters is an entitlement but must be pleaded and justified before it can be granted. A court cannot legally move itself.”

The court is thus constrained to make a finding that the estate should be distributed as per the wishes of the testator in a Will that was not probated by the Court in AC No.176 of 2018.

At the time the Court issued the Letters of Administration, the two widows of the testator had died and the remaining beneficiaries were all lineal descendants entitled to equal proportions in the estate under **Section 28 (1) of the Act**. The 2nd defendant led evidence to show that it had been agreed that the estate be equally distributed.

Minutes of a meeting indicating the sharing and agreement to take equal shares of 5.5 acres of the land at Namigavu by all beneficiaries was not contested by the Plaintiffs. Even if all the beneficiaries had not agreed to the equal sharing of the estate the same formula would apply since they all enjoy equal proportions in the estate per **Section 28 of the Succession Act**.

In view of the decisions made by the court about the WILL and the import of the Letters of Administration issued to the defendants coupled with the nature of the pleadings filed by the Plaintiffs, it is only just and fair

that the estate be equally distributed to all beneficiaries as earlier started on in regard to the land at Namigavu.

The Plaintiffs' suit succeeds in part and the Counterclaim succeeds in part. I make the following declarations and orders:-

- i) That the late Namutula Kibugo Yokana left a valid WILL which however did not name an Executor.
- ii) That the Letters of Administration issued by the Court to the defendants only mandates them to distribute the estate under the provisions of intestate succession.
- iii) The 2nd defendant is ordered to distribute the estate in equal proportions to all existing beneficiaries in the estate of Namutula Kibugo Yokana.
- iv) That an Inventory of the distribution of the estate shall be filed in court within 12 months from the date of this judgment.
- v) Each party shall meet its costs of the suit since all are family members who are still under a duty to ensure that the estate is distributed and harmony is maintained in the family.



Moses Kazibwe Kawumi

Judge

31st January 2024