THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

CIVIL SUIT NO. 03 OF 2018

NAMUTEBI RESTY:: PLAINTIFF

VERSUS

1. SSOZI DEZI
2. CHINA RAILWAY NO. 3 :: DEFENDANTS ENGINEERING GROUP CO. LD

Before; Hon Justice Victoria Nakintu Nkwanga Katamba

JUDGMENT

The Plaintiff Namutebi Resty brought this suit against the Defendants jointly and severally seeking the following orders.

a) An order cancelling the agreement in respect of establishing a quarry on the estate of the late Nakyeyune Propera and/or sale agreement for the lock on FRV 845 Folio 1 land at Kikonda Kalungu Plot No. 73 and 76 measuring approximately 11.6780 hectares;
b) A permanent injunction stopping the Defendants from dealing in the suit land using letters of administration issued by the lower court without jurisdiction;
c) An order revoking the letters of administration granted to the 1st Defendant on the 4th day of November, 2014;
d) An order for an account of all the previous dealings on the suit estate by the 1st defendant from the time of the grant to the time of determination of the suit;
e) An order appointing the Plaintiff together with any of her siblings to assume administration of the estate;
f) General damages and costs of the suit;

The Plaintiff`s claim is that she is one of the late Nakyeyune Prospera's children who died on the 19th day of July 2014 and left among other properties; land comprised in FRV 845 Folio 1 Block 223 Plots 73 & 76 at Kikonda, Kalungu District. The 1st defendant under declared the estate and obtained letters of administration from the Magistrates' Court and has neither distributed nor shared the proceeds of the estate with the Plaintiff. The 1st defendant has used the grant to dispose of part of the estate to third parties without the consent of the beneficiaries. The 1st defendant has never filed an inventory nor made accountability to neither the court nor the beneficiaries. The 1st defendant colluded with the 2nd Defendant to establish a stone quarry on part of the estate fraudulently and hide contractual agreements for the transaction. The 1st Defendant is no longer fit to administer the estate.

The 1st Defendant's Written Statement of Defence was struck off from the record for non-conformation with the requirements of pleadings under Order 6 Rule 2 of the Civil procedure Rules.

The 2nd Defendant denied the claim and contended that all dealings it had with the 1st Defendant were lawful as the 1st Defendant is the proper holder and lawful administrator of the estate of the late Nakyeyune.

The Parties adduced evidence by way of witness statements.

In addition to the claim as stated in the Plaint, the Plaintiff Namutebi Resty stated in her witness statement that the 1st defendant under-declared the estate to be worth 10,000,000/= yet the estate entails registered land measuring over 25 acres with a rock surveyed on 6 acres. The defendants entered into an agreement for sale of 6 acres of the land at 120,000,000/=. The 2nd Defendant was aware that all the children never consented to the transaction as per the terms of the agreement. That the 2nd Defendant excavated the rock to extinction and the land was let in a sorry state and no activity can be done on the suit land in its current state.

A one Kakuru Ian Kahigi, registered valuer working with Bika Associates stated that he carried out valuation of the land in FRV 845 Folio 1 land at Kikonda Kalungu Block 223 Plots 73 & 76 and a valuation report dated the 20th of April 2021, Ref: BIKA/VAC/002/04/21 is on the court record.

That was the Plaintiff's case.

Katungye Derrick, the Assistant Project Manager/Public Relations Officer for the 2nd Defendant stated that the Defendants entered into a land user agreement for the suit land which was identified by the 2nd Defendant in 2017. Prior to the transaction, the 1st Defendant presented the certificate of title in the name Nakyeyune Propera and assured the 2nd Defendant that he held letters of administration for the estate. The 2nd Defendant demanded for consent from the beneficiaries which was secured on the 21st of January 2018. The agreement was entered into with the 1st Defendant having ascertained that he was the rightful owner of the land and the documents he held were genuine.

That was the 2nd Defendant's case.

In their joint scheduling memorandum, the Parties raised the following issues for the determination of court.

1. Whether the 1st Defendant could legally administer the estate using letters of administration obtained under the provisions of Administration of estates (Small Estates) (Special Provisions) Act.
2. Whether the 2nd Defendant legally acquired any interest in the suit estate from the 1st Defendant and whether it paid the market value for 6 acres of a rock.
3. Whether the 1st Defendant and his siblings understood the terms of the agreement they signed with the 2nd Defendant.
4. Remedies available to the Parties.

Both Parties filed written submissions.

Court's determination;

Issue one; 1. Whether the 1st Defendant could legally administer the estate using letters of administration obtained under the provisions of Administration of estates (Small Estates) (Special Provisions) Act.

Counsel for the Plaintiff argued that the suit land measuring 28 acres has several bibanja interests and could not fall under the category of a small estate. Counsel argued that the court did not have jurisdiction to issue the grant and as such the transaction arising from the said grant was a nullity. That the 1st Defendant could not therefore legally administer the estate as a small estate.

Counsel for the Defendant argued that Sections 180 and 192 of the Succession Act give the administrator power to deal in the intestate's property and since the 1st Defendant had letters of administration which have never been revoked by any court, the 2nd Defendant rightly dealt with him. Further that valuation of the land was done during the hearing of this case not at the time of obtaining the letters of administration and the figures in the report are imaginary.

The grant of letters of administration held by the 1st Defendant in the instant case was granted by the Magistrate Grade 1 at the Chief Magistrates' Court of Masaka.

Section 2 of the Administration of Estates (Small Estates) (Special Provisions) Act Cap 156 provides the jurisdiction to grant probate and letters of administration in small estates. It provides therein that the Magistrate Grade II, where the total value of the estate does not exceed ten thousand shillings; a Magistrate Grade I, where the total value of the estate exceeds ten thousand shillings but does not exceed fifty thousand shillings; and a Chief Magistrate, where the total value of the estate exceeds fifty thousand shillings but does not exceed one hundred thousand shillings.

The jurisdiction of a Magistrate Grade 1 under ***Section 207 of the Magistrates Courts Act*** is limited to matters subject matters not exceeding twenty million.

The 1st Defendant stated the value of the suit land which is the only property that has been declared as forming the estate of the late Nakyeyune Propera to be of a value not exceeding 10.000.000/=. The petition was filed in 2014 and at the time of filing the same, no valuation report was adduced to approximate the value of the land.

In the instant suit, the Plaintiff adduced a valuation report prepared by Ian Kakuru a registered surveyor with Bika Associates Ltd in which the land was valued to be Shs. 1,200,288,290/=. It is apparent that the valuation report was estimated to reflect the value of the land estimated as at the time of filing the suit and after it had been excavated by the 2nd Defendant. There is no evidence as to what the value of the land was at the time of filing the Petition for the letters of administration.

Nevertheless, ***Section 2 (5) of the Administration of Estates (Small Estates) (Special Provisions) Act Cap 156*** provides that a grant of probate or letters of administration shall not be revoked or annulled for want of jurisdiction if during the administration of the estate it is subsequently discovered that the total value of the estate is greater than the total value of the estate declared in an application for the grant unless the court is satisfied that the interests of the beneficiaries are thereby prejudiced.

From the above provision, the value of the estate does not affect the purpose/effect of the grant which is to give the administrator powers to manage the estate as a representative of the estate unless the powers are being exercised to the detriment of the beneficiaries.

Therefore, the 1st Defendant could legally administer the estate of the late Nakyeyune Propera deriving powers from the grant of letters of administration obtained from the Chief Magistrates court of Masaka if the interests of the beneficiaries are not prejudiced.

Issue one is therefore resolved in the affirmative to the extent that the 1st Defendant could administer the estate of the late Propera Nakyeyune with a grant made by the Magistrate's court if the beneficiaries interests were secure. I will determine the beneficiaries interest in Issue three below.

Issues two and three; Whether the 2nd Defendant legally acquired any interest in the suit estate from the 1st Defendant and whether it paid the market value for 6 acres of a rock.

Whether the 1st Defendant and his siblings understood the terms of the agreement they signed with the 2nd Defendant.

Counsel for the Plaintiff submitted that the Defendants entered a transaction for use of the suit land for consideration of Ugx. 120,000,000/= using a grant of letters of administration from the Magistrates Court yet the consideration is far beyond the court's jurisdiction.

Counsel for the 2nd Defendant argued that the agreement between the Defendants did not transfer any rights of ownership to the 2nd Defendant as the same was a license coupled with an interest or contractual license. Further that the Plaintiff was not introduced to the 2nd Defendant as a beneficiary and at the signing of the agreement, the Defendant was not in position to know this fact.

I have already resolved in issue one above that the letters of administration are not a nullity for the reason of lack of jurisdiction. This court therefore must consider the validity of the transaction in light of the beneficiaries' interests and the interest passed, if any.

The impugned transaction arose from an agreement for lease of land user rights for the land comprised in Block 223 Plots 73 & 76 land at Kikonda. Counsel for the Defendant argues that the agreement created a license coupled with an interest.

The agreement on the face of it was a lease for user rights. The purpose of the agreement was to grant the 2nd Defendant rights to exploit, excavate, extract rock and sand, stockpile, blasting stone on the suit land that was the subject matter. The 2nd Defendant therefore had rights to use the land for the foregoing activities. There was no right for exclusive possession nor was an interest created or transferred to the 2nd Defendant.

A license does not create an interest in land or grant exclusive possession since the owner retains ownership of the land. However, a license can be granted with an interest where the licensee is granted permission to enter onto the land and enjoy a profit a prendre. In the instant case, the 2nd Defendant had permission to enter onto the suit land and extract sand and stone from the same which amounts to a profit a prendre.

A profit a` prendre is defined by ***Halsbury's Laws of England, 4th Edition, Volume 14, paragraphs 240 to 242 at pages 115 to 117***, as follows.

A profit a` prendre is a right to take something off another person's land. It may be more fully defined as a right to enter another's land and to take some profit of the soil, or a portion of the soil itself, for the use of the owner of the right.

A profit a prendre gives rise to an interest in the land although this interest is not for ownership and is separate from the freehold interest held by the registered proprietor. The 2nd Defendant therefore by virtue of the agreement had a license coupled with an interest in the suit land.

As to whether this was legally obtained, Counsel for the Defendant argues that the 1st Defendant did not have power to pass interest since he was not registered on the certificate of title. Counsel relied on Section 54 of the Registration of Titles Act to the effect that no instrument shall be effectual until registered.

The agreement was executed between the Defendants recognizing that the 1st Defendant was leasing out the user rights in the suit land as the administrator of the estate of the late Nakyeyune, registered proprietor of the land. The interest created herein was neither *registrable* nor having any effect on the title to the land and therefore, I find that since the 1st Defendant had a valid grant of letters of administration obtained from a competent court as already held in issue one, he had the rights to execute the agreement in his capacity as administrator.

It is also Counsel's argument that the beneficiaries who consented to the agreement did not understand the contents of the agreement since the agreement was signed by them as illiterates without a translation.

I must note that in making this assertion, Counsel is giving evidence from the bar and departing from the pleadings. This issue was not pleaded and the law on departure from pleadings is clear under Order 6 Rule 7 of the Civil Procedure Rules which provides that, "No pleading shall, not being a petition or application, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading."

Nevertheless, I have carefully perused the evidence adduced by the Plaintiff and established that a certificate of translation was included on the lease agreement and the agreement was executed the same day as the consent signed by the beneficiaries. (Time difference of 2 minutes).

The Plaintiff has therefore failed to adduce evidence to prove that the beneficiaries did not understand the contents of the agreement.

The 1st Defendant as administrator had the right to enter into the agreement with the 2nd Defendant for the interests of the beneficiaries.

Issue four; Remedies available

The Plaintiff prayed for an order for cancellation of the lease agreement. The court finds that the administrator had the right to enter into the agreement provided it was with the consent of the beneficiaries and for their benefit and the issue of jurisdiction is cured under ***Section 2 (5) of the Administration of estate (small estates) Cap 156*** as resolved. The Plaintiff has therefore failed to prove that the agreement was a nullity.

The prayer for a permanent injunction was overtaken by events since the activities on the suit land have since been concluded.

The Plaintiff prayed for an order for revocation of the grant of letters of administration. The Plaintiff has not adduced any evidence to show that the late Nakyeyune's estate was more than the land in dispute and further no sufficient evidence has been adduced to meet the grounds for revocation of letters of administration.

The Plaintiff prayed for an order for an account of all the dealings on the estate by the 1st Defendant. A grant of letters of administration gives the administrator power to manage the estate and the administrator is mandated to file an inventory of account within the court. The 1st Defendant is therefore ordered to file an inventory in this court and the magistrates court for the administration of the estate within 30 days from the date of this judgment.

The Plaintiff prayed for an order appointing her together with any of the siblings as administrator of the estate, the process of administration of estates under the Succession Act is clearly established and a grant for letters of administration cannot be made unless the due procedure is followed. This order cannot be granted since the 1st Defendant's letters of administration are still valid as per this judgment.

The Plaintiff prayed for general damages. General damages are intended to compensate the aggrieved party for inconvenience suffered. In the instant case, the Plaintiff has not pleaded nor proved any inconveniences suffered as a result of the lease agreement.

In her evidence, the Plaintiff stated that the suit land was excavated and left in a sorry state, and it cannot be used for any purpose in its current state. Counsel for the Plaintiff seeks to rely on the lease agreement which stated that the 2nd Defendant would restore the land to a reasonable position upon completion of its activities.

The 2nd Defendant had a duty under the lease agreement to restore the land to a reasonable position upon completion of its activities. The Plaintiff is a beneficiary of the estate and the suit land and as such can sue for breach of the agreement since she derives benefit from the same despite having not appended her signature to the same. This is an exception to the principle of privity of contract where a party who was intended to derive benefit from the contract can sue for breach of the same although they were not party to it.

The 2nd Defendant did not dispute the claim regarding restoration of the suit land to a reasonable position whereas the Plaintiff adduced evidence showing the current state of the land. Failure to deny the allegations specifically and challenge the same is presumed to be an admission of the claim. ***(See Prof. Oloka Onyango & Ors Vs Attorney General Constitutional Petition No. 6 of 2014*** where it was stated that failure to rebut a fact specifically traversed in an affidavit amounts to an admission of that fact).

The Plaintiff adduced a report from a valuer stating that the value for restoring the land is estimated to be Ugx. 126,120,000/=.) This report is not from a certified government valuer and therefore the figures therein are disputed and do not represent the fair market value.

Furthermore, the Plaintiffs' claim that the land was undervalued appears to be simply an afterthought considering that the letters of administration were obtained in 2014 and they only sought to challenge the estate value in this suit almost as if the value they attach to the land is dependent on the 2nd Defendant's activities.

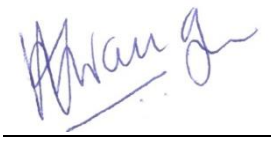
In ***Minscombe Properties Ltd v. Sir Alfred McAlpine and Sons Ltd (1986) 2 Const LJ 303 (cited in Ewadra v Spencon Services Ltd (Civil Suit 22 of 2015) [2017] UGHCCD 136 (12 October 2017)***, O'Connor LJ applied the test of reasonableness in determining whether the cost of reinstatement of land to its contracted for condition should be recoverable as damages. That in deciding between diminution in value and cost of reinstatement the appropriate test was the reasonableness of the plaintiff's desire to reinstate the property and remarked that the damages to be awarded were to be reasonable as between plaintiff and defendant.

The agreement clearly stated that the 2nd Defendant would restore the suit land to a reasonable position upon completion of its activities. The Plaintiff did not bring this suit initially for breach of contract of the said condition, therefore; I will make an order for specific performance of Clause 7 (ix) of the lease agreement in lieu of awarding damages for reinstatement. The 2nd Defendant is therefore ordered to restore the suit land to a reasonable position as agreed in the contract.

In the final result, the suit is hereby dismissed. Each party shall bear their own costs since the 2nd Defendant has been found to have breached Clause 7 (ix) of the lease of user rights agreement.

I so order.

Dated at Masaka this 3rd day of December, 2021.

Signed; 

Victoria Nakintu Nkwanga Katamba

Judge