THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORTPORTAL

CIVIL SUIT NO. 0046 OF 2021

1. SAMUEL KABAGAMBE NTUNGWA :::::::::::::::::::: PLAINTIFFS
2. ANDREW KATO NTUNGWA
3. BILLY TASH NTUNGWA

VERSUS

FLORENCE KEKIBUGA NTUNGWA :::::::::::::::::::::::::::: DEFENDANT

BEFORE HON. JUSTICE VINCENT WAGONA

## JUDGMENT

### Introduction

The plaintiffs brought this suit jointly against the defendant for orders that: the letters of administration granted to the defendant in respect of the estate of the late Samuel Ntungwa on the 2nd June 2021 be revoked; an order of a permanent injunction barring the defendant or any of her agents from interfering with any property or funds of the testator's estate and preserving the caveats on the estate property; an order that the defendant pays to the plaintiffs special, general, exemplary and punitive damages, and interest on the decretal sum at a rate sum of 30% per annum from judgment till payment in full; and costs of the suit.

### Background

The brief background as may be discerned from the pleadings is that the 1st plaintiff is a son of the late Samuel Ntungwa while the 2nd and 3rd are grandchildren and the defendant is a widow of the late Samuel Ntungwa. That the

late Samuel Ntungwa died on the 12th September 2019 and was resident at Kabirizi Village, Kabirizi Parish, Lake Katwe Sub-County, Kasese District. It is contended by the plaintiffs that the late died testate by virtue of his last testamentary disposition dated 10th April 2008 in which he named the 1st plaintiff as his heir. That at the time of the late Samuel Ntungwa's demise, he was separated from the defendant for a long time and the two lived separate and that by virtue of that, she is at law not entitled to participate in the administration and management of the estate of the late.

That after the death of the late, the defendant petitioned for letters of administration in the High Court of Uganda at Fort Portal vide Administration Cause No. 0016 of 2021 by dishonestly advancing and claiming reliance on the minutes of the family meetings of 15th and 16th September 2019 and 12th October 2019 **(Plaintiffs' Exhibit PE7)** falsely misrepresented to court that the late died intestate with full knowledge of the last testamentary disposition of the late **(Plaintiffs' Exhibit PE2)** thus procuring the letters to the estate illegally. The plaintiffs further contended that before procuring the grant and after securing the same, the defendant embarked on dissipation of the property and funds of the estate by for instance destroying the family house and improperly alienating the estate livestock which prompted the family members and the plaintiffs to lodge complaints with Police and other Government Authorities vide SD/04/03/11/20 and SD/16/02/07/21 and other complaints.

The plaintiffs aver that the proceedings through which the defendant obtained the letters of administration were defective in substance for the defendant allegations were false, dishonest, and deceitful as she concealed a will made by the late dated 10th April 2008. That by virtue of the untrue allegations which were made by the

defendant on oath and her subsequent conduct before and after securing the letters of administration, to wit alienation of the estate and being abusive to the plaintiffs, it is just that the letters of administration granted to the defendant be revoked.

The plaintiffs contend that as a result of the wrongful activities of the defendant, that is, of dissipation of the property and funds of the estate, the plaintiffs have suffered inconveniences, deprivation and embarrassment for which they seek an award of general damages. In addition to the afore-stated, that before and after securing the grant, the defendant has acted oppressively, arbitrary and in a highhanded manner against the plaintiffs through an abusive use of the state organs against them and other family members in order to selfishly deprive them of their interest in the testator's estate and that as a result of such wanton conduct, the plaintiffs seek an award of special damages. The plaintiffs prayed that judgment be entered in their favour and that they be granted the reliefs contained in the plaint.

The defendant on the other hand denied the claims made against her by the plaintiffs and averred that she was lawfully granted letters of administration by court and that she met all the requirements under the law. She contended that she is the widow of the late Samuel Ntungwa and at the time of his demise, the two were still together as lawful husband and wife. The defendant further contended that the plaintiffs attended the meetings of the family on the 15th and 16th September 2019 and 12th October 2019 where the defendant was recognized as the only widow of the late. That in the same meetings, it was also communicated that the late did not have a will and thus died intestate and no mention of a valid will was made, nor was it produced.

The defendant also averred and maintained that she has never destroyed anything belonging to the estate but that instead it is the plaintiffs who are intermeddling with the same. She further averred that the damages suffered by the plaintiffs are self-inflicted and they are responsible for the same. That the alleged will made by the late Samuel Ntungwa **(Defendant's Exhibit DE 2)** is a forgery since the same names **Same Ntungwa** who is distinctively different from **Samuel Ntungwa** the deceased husband to the defendant. She also contended that the 2nd and 3rd defendants are not beneficiaries under the estate of the late and thus not entitled to a share from the estate of the late. She prayed that the suit be dismissed with costs.

**Issues**

1. Whether the late Samuel Ntungwa died Intestate.
2. Whether the letters of administration of the estate of the late Samuel Ntungwa Vide H.C.A.C 16 of 2021 granted to the defendant should be revoked.
3. Whether the parties are entitled to a share from the estate of the late Samuel Ntungwa.
4. What remedies are available to the parties?

To prove their case, the plaintiffs produced a total of 8 witnesses, namely: PW1 Kisolhu Jerome; PW2 Samuel Kabagambe; PW3 Andrew Kato Ntungwa; PW4 John Bahigi Ntungwa; PW5 Billy Tash Ntungwa; PW6 Kafuda Erick; PW7 Asiimwe Zainab; and PW8 Kafuda Boaz. The defendant on the other hand produced a total of three witnesses, that is: DW1 Flavia Mpanga Ntungwa; DW2 Molly Njebesa Ntungwa; and the defendant herself DW3 Florence Kekibuga Ntungwa.

**Representation**

Counsel Mugisha Rakatooke of M/s Ngamije Law Consultants & Advocates, later joined by Counsel Baluku Geofreyy Lubangula of M/s Bagyenda & Co. Advocates represented the plaintiffs. Counsel Muhumuza Sam of M/s Legal Aid Project, Fort portal office, appeared for the defendant together with Counsel Patrick Kasumba. The parties were given a schedule to file written submissions. Late submissions were received for the plaintiffs and none for the defendant.

**Burden And Standard of Proof**

In the case of ***Uganda Petroleum Co. Ltd versus Kampala City Council***[1] it was held that: ***"In civil cases the burden lies on the party who alleges to prove his or her case on the balance of probabilities. Additionally, it is also provided by Section 101 (1) of the Evidence Act cap 6 provides that whoever desires Court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts, must prove that those facts exist. In this case, the Plaintiffs bear the burden of proving the above issues on the balance of probabilities"***. Accordingly in this case the Plaintiffs bear the burden of proving the identified issues on the balance of probabilities.

**Issue No. 1: Whether the Late Samuel Ntungwa Died Intestate**

**Submissions of the Plantiffs:**

It was submitted for the plaintiffs that the late Samuel Ntungwa died testate by virtue of his last will dated 10th April 2008 (**a photo-copy was tendered as Plaintiffs Exhibit PE7**), where he appointed **Erick Nshaka, PW4 John Bahigi** and **PW6 Eric Kafuda** as Executors and left the will in the custody of Lake Katwe

[1] ***Civil Suit No.250 of 2005,***

Sub-County on 4th July 2008 where he paid UGX 5,000/= and was issued with a receipt (**Plaintiffs' Exhibit PE3**). That according to **PW1 Kisolhu Jerome** the Sub-County Chief of Lake Katwe Sub-County the will was produced during the family meeting held following the death of Samuel Ntungwa and that **PW8 Erick Kafuda** said it was **PW6 Erick Kafuda** who had got the will from the Sub-County. It was submitted that this evidence was not rebutted and was corroborated by **PW2 Samuel Kabagambe** and **PW3 Andrew Kato Ntungwa**. That **PW2 Samuel Kabagambe** confirmed the signature in the will as belonging to his father the late Samuel Ntungwa while **PW3 Andrew Kato Ntungwa** confirmed that the signature in the National Identity Card of the late Samuel Ntungwa (**Defentant's Exhibit DE2**) was the same as that in the will, although the will bore the names "**Same Ntungwa**" as opposed to "**Samuel Ntungwa**"; that PW5 stated that in some documents, the deceased used to write his name as "**Same**". It was further submitted for the appellants that **PW4 John Bahigi Ntungwa** confirmed that he, together with **Erick Nshaka** and **PW6 Eric Kafuda** signed as witnesses when the already written will was presented to them by the late Samuel Ntungwa where he had invited them at his home in Kabirizi and that the witness reported to that effect at the family meeting following the death of Samuel Ntungwa as reported in the Minutes of the meeting (**Plaintiffs' Exhibit PE7**); that it was the evidence of **PW6 Erick Kafuda** that he also testified that he signed on the will as a witness. That **PW4 John Bahigi Ntungwa** and **PW7 Asiimwe Zainab** the Senior Probation and Welfare Officer also confirmed having seen the original will at family meeting presided over by **PW7** on 21 October 2020. It was submitted that it was the evidence of **PW8 Kafuda Boaz** in cross-examination that he handed over the original will and the original minutes of the family meetings held after the death of Samuel Ntungwa to the defendant. It was furthermore submitted it was the evidence of **PW4 John Bahigi Ntungwa** that they were later advised in the office

of the Administrator General since the will was found and the testator had appointed Executors, the Executors should go ahead and apply for Probate. Finally on this issue, it was submitted for the plaintiffs that whereas what was produced was a photo-copy of the will, it is good evidence admissible under Section 64 of the Evidence Act as the original copy is under the custody of the defendant.

**RESOLUTION BY COURT:**

***(i) Vallidity of a Will:***

The **Black's Law Dictionary**[2] defines a will as a legal expression or declaration of a person's mind or wishes as to the disposition of his property, to be performed or take effect after his death. A Will by its nature is ambulatory that is, it must establish the testator's wishes and only takes effect upon death of the testator.[3] For a Will to be valid, the provisions of Section 50 of the Succession Act must be conformed to. That is: a Will must be in writing, dated and signed by the testator, it must be witnessed by two or more attesting witnesses who must see the testator write, sign or affix his mark.[4] In ***Beatrice Asire Mallinga v. Jonathan ObukunyangMalinga***[5], the Hon. Justice Henry I. Kawesa held inter-alia thus: ***"A Will establishes the wishes of the testator at the time of his death and the court is inclined not to interfere with the testator's wishes, unless in circumstances where equity and justice requires".*** The Judge further cited, ***Estate of James Ngengi Muigai (deceased),***[6] where it was held that a Will must be in writing, signed by the testator attested to by two or more competent witnesses who must see the testator write, sign or affix his mark on the document. It follows that if a will is executed in

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[2] *11th Edition at page 1772.*
[3] *Ibid.*
[4] *Mallinga Vs. Jonathan ObukunyangMalinga, HCT -04-CV-CS-0013-2013.*
[5] *HCT-04-CV-CS-0013-2013, arising from Administration Cause No. 52/2013.*
[6] *Nairobi High Court Succession Cause No. 523/1996.*

conformity with the provisions of Section 50 of the Succession Act, Courts will be reluctant to interfere with it.

*(ii)* ***The Whereabouts of the Original Copy of the Will of Samuel Ntungwa:***

In this case, no original copy of the will attributed to late Samuel Ntungwa was presented. The court worked with only a photocopy **[Plaintiffs' Exhibit PE2 (b)].** The will relied upon by the plaintiffs is contested by the defendant because the original will was neither produced, nor properly accounted for. The whereabouts of the original will was not stated in the pleadings of the plaintiffs and no original copy of the will was ever produced at trial. While it was subsequently alleged at trial that the defendant had the original will, there was no evidence that Sections 64 and 65 of the Evidence Act had been invoked requiring her to produce it and she did not comply; nor was the signature and/or handwriting of the late Samuel Ntungwa formally or properly proved in accordance with Section 66 of the Evidence Act.

**PW4 John Bahigi Ntugwa** stated that he, together with **PW6 Erick Kafuda** and **Erick Nshaka** had signed on the will of the late Samuel Ntungwa as witnesses. That he received the will from Samuel Ntungwa when it was already signed by the deceased and that he never saw him signing. The same **PW4 John Bahigi Ntugwa** chaired a family meeting on 15th September 2019 following the death of Samuel Ntungwa, where he is quoted in the Minutes of the meeting (**Plaintiffs' Exhibit PE7**) as follows: ***"The Chairman in his communication clearly informed the meeting that the deceased late Mzee Ntungwa Samuel did not leave any will book."***

**PW8 Kafuda Boaz** at a family meeting of 15th September **(Plaintiffs' Exhibit PE7)** reported that he had been given the will by the later Samuel Ntungwa who later withdrew it. The same **PW8 Kafuda Boaz** was the Minutes Secretary at the family meeting of 15th September 2019 where **PW4 John Bahigi Ntugwa** who chaired the meeting communicated that the deceased late Mzee Ntungwa Samuel did not leave any will.

**PW8 Kafuda Boaz** stated that the late Samuel Ntungwa had left his will under the custody of Lake Katwe Sub-county Chief. However **PW1 Kisolhu Jerome,** on behalf of Lake Katwe Sub-county, in a letter of 18.2.2021 **(Plaintiffs' Exhibit PE1)** informed the Administrator General that they had traced a ***copy*** of the will; no mention was made of the original or how the copy was obtained.

**PW4 John Bahigi Ntungwa** in a Minute to the Administrator General **(Defendant's Exhibit DE6)**, stated that: ***"I confirm that I only have photocopy of the will, the original copy of the will's whereabouts are unknown to me".***

**PW1 Kisolhu Jerome** who testified on behalf of Lake Katwe Sub-county, could not produce or account for the original will. In cross examination he said that he did not have the original will and that it was **PW6 Erick Kafuda** who had it; that after reading the original at the family meetings that followed the death of Samuel Ntungwa, he handed it to **PW8 Kafuda Boaz.** This is the same **PW1** who in a letter of 18.2.2021 **(Plaintiffs' Exhibit PE1)** informed the Administrator General that they had traced a ***copy*** of the will and no mention was made of the original or how the copy was obtained. Further, there was no well established evidence of proof of issuance of a receipt produced **PW1 Kisolhu Jèrome** who testified on

behalf of Lake Katwe Sub-County, Kasese District who claim to have been the custodians of the will.

**PW8 Kafuda Boaz** told court that during the family meetings following the death of Samuel Ntungwa, he received the original will from **PW6 Erick Kafuda** who had got it **PW1 Kisolhu Jerome**. **PW8 Kafuda Boaz** testified that he later gave the original will and the minutes of the family meetings to the defendant at her home in Kabirizi on 10th November 2020, who never signed for them, and that he retained photocopies. That the defendant had asked for the original will and the signed minutes of the family meetings to use them in applying for letters of administration; that he handed over the documents to the defendant in the presence of **Kabagambe Samuel (1st plaintiff).** That it was the defendant who should produce the original will.

**PW2 Samuel Kabagambe** did not provide any evidence to corroborate the evidence of **PW8 Kafuda Boaz** that the will was handed over to the defendant in his presence.

Against the above evidence, it was the clear position of the defendant in her pleadings and witness statements that there was no valid will in existence.

A critical analysis of the evidence of the plaintiffs' witnesses, cited above, as to the whereabouts of the original copy of the will, reveals many inherent contradictions which were never explained. In ***Uganda vs Hajji Musa Sebirumbi (Supreme Court Criminal AppealNO.10 of 1989)*** it was held that: ***"The principles upon which a trial Judge should approach contradictions and discrepancies in the evidence of a witness or witnesses are now well settled in this country. They were***

***stated by the predecessor of this Court in the well-known case of Alfred Tajor v. Uganda, E.A.C.A Cr. App. No, 167/1969 (unreported) and followed in many subsequent cases, two of the most recent of which are: Bumbakali Lutwama& Others v. Uganda Cr No. 38/89 (Unreported). The substance of these decisions is that in assessing the evidence of a witness his consistency or inconsistency; unless satisfactory explained will usually, but not necessarily, result in the evidence of a witness being rejected; minor inconsistencies will not usually have the same effect unless the trial Judge thinks that they point to deliberate untruthfulness, ….".***

As already cited, **PW8 Kafuda Boaz** told court that he gave the original will and the minutes of the family meetings to the defendant on 10th November 2020, at her home in Kabirizi, but that she never signed for them. That the defendant had asked for the original will and the signed minutes of the family meetings to use them in applying for letters of administration; that he handed over the documents in the presence of **Kabagambe Samuel (1st plaintiff) (PW2)**. That it was the defendant who should produce the original will. However, **PW2 Samuel Kabagambe** did not provide any evidence to corroborate the evidence of **PW8 Kafuda Boaz** that the will was handed over to the defendant in his presence. On the other hand the defendant who denied the existence of any valid will, was never cross examined regarding her alleged custody or possession of the original will. The defendant in her witness statement dated 23rd May 2022 that was adopted in court as her evidence in chief stated as follows:

> ***"4. That the will mentioned by the plaintiffs and their witnesses herein being referred to as PE.2 in the Plaintiffs' Trial Bundle is defective since during the meetings conducted on 15th & 16th September 2019, it was***

*observed that the deceased did not leave a will. (hereto attached are the minutes in the trial bundle marked as "DE.2" & "DE.3" respectively).*

5. *In the first meeting held on 15th September 2019 which was chaired by John Bahigi Ntungwa now defendant's witness, some of the participants initially thought that there was a will and it was also suspected to be in the custody of three people namely; John Bahigi Ntungwa the Chairman himself, Eric Kafuda & Dana Kashagama who also happens to be the current king of the Basongora.*
6. *That John Bahigi Ntungwa being the Chairman of the meeting, vividly made it clear that to all the participants that there was no will and accordingly adjourned the meeting to the following day in order to invite family members and other relatives who were not present at the first meeting.*
7. *In the second meeting held on 16th September 2019 which was still chaired by the said John Bahigi Ntungwa, Eric Kafuda claimed to have accessed the will from the deceased but was taken away from him by the deceased and Dan Kashagama also made it clear to the participants that he met with the late Samuel Ntungwa in his office, made a draft of the will and the next day Ntungwa got sick, taken to hospital and died before signing the said draft, a fact well known to the Plaintiffs and their witnesses.*
8. *That to my surprise, at the subsequent meetings held at the Administrator General's office, John Bahigi Ntungwa presented the purpoted will dated 10th April 2008 witnessed by himself and Eric Kafuda who had earlier denied the presence of the will in the meetings conducted on 15th & 16th September 2019.*
9. *That the purported will presented by the said John Bahigi Ntungwa was in photocopy and when asked by the Administrator General to present the*

***original, he made it clear that the whereabouts are unknown to him. (hereto attached is a copy of the said minute by John Bahigi Ntungwa marked as "DE4").***"

In ***Habre International Co. Ltd –Vs- Kasam And Others, [1999] 1 EA 115,*** at page 138 it was stated that: *"Whenever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination it must follow that he believed that the testimony given could not be disputed at all. Therefore, an omission or neglect to challenge the evidence – in-chief on a material or essential point by cross-examination would lead to the inference that the evidence is accepted subject to its being assailed as inherently incredible."* In ***Eladam Enterprises Ltd vs. SGS (U) Ltd & Ors. Civil App. No. 05 of 205, reported in [2007] HCB Vol 1***, it was stated that: *"The point to note here is that the above legal position refers to cross-examination on evidence in chief. The purpose of cross-examination is to test the veracity of the witness on his evidence in chief"*. In this case, neither the defendant nor any of the defendant's witnesses were cross examined regarding her alleged custody or possession of the original will. It must follow that the plaintiffs believed that the testimony given by the defendant in this regard could not be disputed. Further, the rest of the defendant's evidence-in-chief was not seriously or successfully challenged or controverted. The submission made on behalf of the plaintiffs that DW during cross examination confirmed to court that she received documents from PW8 hence corroborating P8's evidence that he handed the original will together with the family minutes to DW3 while at her home at Kabirizi is not born out by the evidence.

It was submitted for the plaintiffs that whereas what was produced was a photo-copy of the will, it is good evidence admissible under Section 64 of the Evidence

Act as the original copy is under the custody of the defendant. However, the plaintiffs after failing to adduce an original copy of the will and alternatively if indeed it was in the custody of the defendant, it is observed that the plaintiffs did not make any effort to have an authenticated copy form the authority that had custody of the original, and also did not plead any exceptions to adducing a photocopy in evidence under Sections 64 and 65 of the Evidence Act. Under Section 63 of the Evidence Act, documents must be proved by primary evidence except in the cases provided for. Section 64 provides for cases in which secondary evidence relating to documents may be given. They include when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, and when, after the notice mentioned in section 65, that person does not produce it.

My evaluation of the evidence leads me to the conclusion that the theory of the plaintiffs as to the custody of the will was not credible. In the pleadings filed by the plaintiffs, they never made mention that the original copy of the will was with the defendant and that they will make efforts to get the same from her. All the plaintiffs' witnesses save for **PW8 Kafuda Boaz** never made mention of the will being in custody of the defendant. **PW1 Kisolhu Jerome** stated that it was in custody of **PW6 Erick Kafuda** while **PW6** stated that it was in custody of **PW8 Kafuda Boaz. PW8 Kafuda Boaz** then came up with the version that it was in the custody of the defendant but he had never made mention of this important fact in his witness statement that constituted his evidence in chief. I find the claim that the original will was handed over to the defendant to be afterthought and not believable and it is thus rejected.

### *(iii) Analysis of the Content of the Will Relied Upon by the Plaintiffs in Relation to the Surrounding Circumstances:*

It is contended by the defendant that the signature on the will is not that of the testator and that the same differs with the previous documents executed by the late. The plaintiffs on the hand averred that the signature on impugned will is that of the testator and matched that of the testator on other documents and reference was made to the **National Identity Card** of the late, a copy of which was exhibited as **Defendant's Exhibit DE2** and an **agreement dated 7th November 2013** annexed under **ANNEX 2** on **Plaintiffs' Exhibit PE4**. Under Section 66, if a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his or her handwriting. However, the court was not assisted with any independent opinion or expert opinion on the matter, such as that of a handwriting expert.

The court has had the occasion to examine the signatures on the two documents as against the will. Court has come to the conclusion that the same differ substantially. The signature on the National Identity Card and on the agreement dated 7th November 2013 do match while the one on the will do not match with the one on the two documents in the following respects: the testator makes a disconnected line (round and it does not break) below the signature. This is consistent on both **Plaintiffs' Exhibit PE2 ANNEX 2 and Defendant's Exhibit DE2** and these documents were not contested by the plaintiffs as having not been executed by the late. On the other hand, on the signature on the will **(Plaintiffs' Exhibit PE2 (b)**, there is just a straight line from the top part of the signature down word and it is disjoined. Court also examined the handwriting and the quality of

letters on both documents. The ones on **PE2 ANNEX 2** and on **DE2** matched while the signature and handwriting of the same on the will did not match with that on the later documents.

The Court also considered the names on the will. The maker of the will per **PE2** is **Same Ntungwa** yet the testator was called **Samuel Ntungwa**. All the plaintiff's witnesses agreed in cross examination that the late was called **Samuel Ntungwa** and not **Same Ntungwa** as indicated on the will. PW1 indicated that the name **Same** could have been a mistake by the one who wrote the will. PW2 to PW8 offered the same explanation. However, the writer remained unavailable to clarify on the matter.

A will being an important document which must be executed properly and in accordance with the succession Act, I remain unconvinced as to whether the writing of the name **Same** in the purported will may be properly attributed to the late Samuel Ntungwa.

Another unsatisfactory feature relates to the manner in which the will was allegedly discovered. **PW1 Kisolhu Jerome** indicated that he traced the will and found it but did not explain to court the surrounding circumstances that led him to trace for the will. **PW4 John Bahigi Ntungwa** who claimed to have been the attesting witness to the will and was the same person that chaired the family meetings of 15th and 16th September 2020 and 12th October 2020 **(Plaintiffs' Exhibit PE7)** is quoted to have indicated at page 1 of the minutes of 15th September 2019 and accepts (and it is corroborated by the Minutes Secretary **PW8: Kafuda Boaz)** that he stated as recorded in the minutes thus: ***"The***

***communication of the chair; the chairman of the meeting (Mr. Bahigi John)is the nephew to the deceased late Mzee Samuel Ntugwa. The chairman in his communication clearly informed the meeting that the deceased late Samuel Ntungwa did not leave any will book. it is the mandate of this selected committee of the family of the late MzeeNtungwa to appoint the heir of the late MzeeNtungwa Samuel's properties, estates and the family..."***

**PW4 John Bahigi Ntungwa** in cross examination admitted that he informed members in the meeting that the late Samuel Ntungwa did not leave any will and that in the meeting he asked about the whereabouts of the will and that all what he said was recorded. **PW6 Kafuda Erick** who also indicated that he witnessed the will of the late in cross examination admitted that he attended the meeting of 15th and 16th September 2019 and 12th October 2019 and that the children gave the defendant powers to obtain letters of administration. In the minutes of the meeting, **PW6 Kafuda Erick** attended and did not inform the members in the meeting of the existence of the will of the late that he witnessed. He only indicated that the late given him his will books some years back and he had kept it for a long time but later before his death, the late Mzee Ntungwa Samuel had withdrawn his book from him.

Notably, in the same minutes Mr. Dan Kashagama who attended the meeting indicated that on the 3rd September 2019, Mzee Ntungwa Samuel had approached him at his home and he took him in a closed door meeting and told him to write a will for his family. But Mr. Kashagama Dan was a bit busy and that's when Mzee Ntungwa Samuel was admitted to Kampala International University Hospital where he passed away from and the family resolved that there is no will Mzee Samuel Ntungwa left behind for his family.

All the above proceedings that led to the conclusion that there was no will, transpired in the presence of **PW4 John Bahigi Ntungwa** and **PW6 Kafuda Erick** who claim to have witnessed the purported will and they never guided or informed the meeting of the will they allegedly attested to. In a turn of events, **PW4 John Bahigi Ntungwa** and **PW6 Kafuda Erick** came to court and strongly contended that there existed a will that they attested to and that it is the one in contention in this case.

Based on the foregoing analysis, this Court has found no sufficient evidence to prove on a balance of probabilities that the signature on the photo copy of the will presented belonged to the late Samuel Ntungwa. I find the evidence of the will relied upon by the plaintiffs and its surrounding circumstances un-credible and points to forgery. It is thus the finding of this Court based on the evaluation of the evidence that the will relied upon by the plaintiffs dated 10th April 2008 cannot be relied upon as a valid will. It is my view that the claims relating to the alleged existence of the will of the late Samuel Ntungwa were an afterthought intended to mislead court and bring chaos in the family.

Based on the above, this court finds that the plaintiffs have failed on a balance of probabilities to prove that the late Samuel Ntungwa left a valid will. Thus, the will dated 10th April 2008 purportedly made by the late Samuel Ntungwais is declared to be a nullity and or invalid. I find that the late Samuel Ntungwa died Intestate.

**Issue No. 2: Whether The Letters Of Administration of the Estate of The Late Samuel Ntungwa Vide H.C.A.C 16 Of 2021 Granted to The Defendant Should Be Revoked**

**Submissions of the Plaintiffs:**

It was submitted for the plaintiffs that the now established existence of the will alone is ground for cancellation of the letters of administration. That in this case, in terms of Section 234 of the Succession Act, the defendant's petition for letters administration was supported by false minutes of the family meetings because they were unsigned, the authentic ones being the **Plaintiffs' Exhibit PE8**. The plaintiffs cited ***Mukula International Ltd. V. His Eminence Cardinal Nsubuga & Anor, (1982) HCB 11*** where it was held that court cannot sanction an illegality and that once an illegality is brought to the attention of court, it overrides allegations of pleadings including any admissions. Further, that the defendant in petitioning court for grant of letters of administration deliberately concealed the fact of the existence of a valid will. That the acts of the defendant in not allowing her children to share in 71 acres of land and cows earlier given by the deceased by agreement of 07/11/2013 **(Defendant's Exhibit DE12)** demonstrates her selfishness, dishonesty and inability to administer the estate of the deceased. The plaintiffs relied on the case of ***Okello v. Okello (Civil appeal No. 84 of 2019) [2020] UGHC 186 (28 September)*** where it was held that the beneficiaries of an estate are entitled to have a person appointed administrator who will administer the estate fairly and impartially. Counsel concluded that in this case, the defendant obtained letters of administration by concealing the existence of the will; that she relied on false representations based on untrue minutes of family meetings; and that her personal interests conflict with those of the beneficiaries of the estate.

**RESOLUTION BY COURT:**

Section 234 of the succession Act provides grounds upon which court can revoke or annul a grant of probate or letters of administration and it states thus:

*(1) The grant of probate or letters of administration may be revoked or annulled for just cause.*

*(2) In this section, "just cause" means— (a) that the proceedings to obtain the grant were defective in substance; (b) that the grant was obtained fraudulently by making a false suggestion, or by concealing from the court something material to the case; (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though the allegation was made in ignorance or inadvertently; (d) that the grant has become useless and inoperative through circumstances; or (e) that the person to whom the grant was made has willfully and without reasonable cause omitted to exhibit an inventory or account in accordance with Part XXXIV of this Act, or has exhibited under that Part an inventory or account which is untrue in a material respect.*

The plaintiffs contend as per the pleadings that court should annul the grant of letters of administration granted to the defendant over the estate of the late Samuel Ntungwa on grounds that: (a) she concealed a fact that was necessary to the grant, that is the will dated 10th April 2008; (b) that the defendant is not entitled to participate in the administration of the estate of the late on ground that she had been separated from the late for over 10 years prior to his death; (c) that the defendant is not fit and proper to manage the estate of the late Samuel Ntungwa; (d) that the defendant has prior and after acquiring the letters of administration mismanaged the estate of the late by selling cows, goats and land which formed the estate of the late to the detriment of other beneficiaries; and (e) that the defendant failed to exhibit a true inventory or account of the estate from the time she was

appointed as an administrator. I will examine each of the plaintiff's allegation *viz-a-viz* the grounds under section 234 of the Succession Act.

The plaintiffs contended that the defendant willfully and intentionally concealed the fact to court that the late Samuel Ntungwa died testate and illegally secured a grant over his estate. Just cause as stated under section 234 of the succession Act includes concealing facts or making false allegations which are relevant to the grant of letters of administration. Section 234(2),(b) and (c) states that just cause for purposes of invalidating or revoking the grant extends to where the grant was obtained fraudulently by making a false suggestion, or by concealing from the court something material to the case; (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though the allegation was made in ignorance or inadvertently. It is contended by the plaintiffs that the defendant made untrue allegations and concealed facts relevant to the grant by stating that the deceased died intestate when she was aware of the will. It was held by the Hon. Justice Egonda Ntende in ***Stella Maris Amabilis & Anor. Vs. Esther Nabusala*** thus: "***According to Section 234 (2) (c) of the Succession Act ignorance or inadvertence does not save the situation. For as long as the allegation was untrue, whether made ignorantly as claimed in this case, it is sufficient to annul the grant***"[7]The plaintiff's contention is that the defendant made false allegations that the deceased died intestate with full knowledge of the will. The issue in this case, the issue becomes whether the late left a valid. This court has already found that there was no valid will left behind by the late Samuel Ntungwa. The defendant cannot therefore be found to have made any allegations which were untrue or to have concealed the said facts relevant to the grant.

[7] ***HCT-00-FD-CS-0072-2007, at page 3.***

The second contention by the plaintiffs is that the defendant at the time of the deceased's death was separated with him for over ten years. Section 30 (1) of *The Succession Act,* provides that no wife or husband of an intestate may take any interest in the estate of an intestate if, at the death of the intestate, he or she was ***"separated from the intestate as a member of the same household,"*** unless the court has, on application by or on behalf of such affected husband or wife, whether during the life or within six months after the death of the other party to the marriage. It should be noted that the section 30(1) does not apply to the defendant following ***Elizabeth Nalumansi Wamala v. Jolly Kasande and three others,***[8] where the Supreme Court determined that ***"living apart, not as members of the same household,"*** does not amount to separation. The Court stated that: ***"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.....".*** Therefore, the fact that the defendant was not living with the late does not deny or take away her interests in the estate. It is as an admitted fact that the defendant and the late were legally married, the two had solemnized their marriage at St James Cathedral and the marriage certificate was exhibited as DE3.

[8] *S. C. Civil Appeal No. 10 of 2015*

All the plaintiffs' witnesses confirmed that the late and the defendant had not divorced prior to his death. Thus the marriage between the two remained subsisting. The only contention was the fact that the late and the defendant were not living together as husband and wife under one roof. The defendant (DW3) offered an explanation that she was sick and her medical condition required constant attention and that she agreed with the late that she keeps in Kampala for adequate care and she attached medical records to that effect. The defendant also indicated that the late gave her land and cows to sell in 2013 to raise money for medication and the agreement made to that effect was exhibited as DE12. The defendant remained consistent during cross examination about the reason the two lived separately. DW1 and DW2 the daughters of the defendant corroborated the defendant's story and stated that they were the ones accommodating the defendant while she would be in Kampala on medical treatment and they were the ones looking after their mother who was sickly. That she had agreed with the late to live in Kampala for appropriate medical attention and that the late would occasionally visit her. It is also observed that the issue of the alleged separation did not arise in the family meetings, implying that the family knew of the whereabouts of the defendant and the reason for her absence and thus the two living apart was not intentional but as a result of the health condition of the defendant that required medical attention. This court observes based on the Supreme Court authority in ***Elizabeth Nalumansi Wamala v. Jolly Kasande and three others*** that the fact that the defendant lived separately with the late does not disqualify her from participating in the administration of the estate of the late. The two lived separately on account of the health condition of the defendant which required attention as demonstrated in the evidence of the defendant supported by her witnesses DW1 and DW2 and the medical records which are on record. It is not denied that the defendant and the late were husband and wife and that she made a contribution

towards the acquisition of the properties that form part of the estate of the late. It is also true that the family had no objection to, and instead supported her being an administrator as per the uncontested minutes of the family meetings **(Plaintiffs Exhibit PE7)** cited and relied upon by both parties. The claims of separation from the late were raised by the plaintiffs as an afterthought to question the letters of administration granted to the defendant and the said claims are rejected premised on the above. I find that the plaintiff is entitled to participate in the management and administration of the estate of the late Samuel Ntungwa.

The other contention by the plaintiffs was that the defendant is not fit and proper to manage the estate of the late Samuel Ntungwa, on account of the assertion that she has prior and after acquiring the letters of administration mismanaged the estate of the late by selling cows, goats and land which formed the estate of the late to the detriment of other beneficiaries. Per the plaint, the plaintiffs' point of contention as to the defendant not being fit and proper to administer the estate was that she had prior to and after getting the letters of administration been selling and or disposing of properties forming part of the estate to wit, cows, goats and land. All the plaintiffs' witnesses alleged that the defendant was disposing of properties forming part of the estate by selling the goats, cows, land, renting out land that forms part of the state at the detriment of the beneficiaries under the estate and when asked about the evidence to prove it, they indicated that they would produce it in the course of the trial but they all failed to do so. The plaintiffs also alleged that the defendant sold cows and goats but no further evidence was presented in proof of the claims, such as evidence by eye witnesses to the sales or some of the buyers. The plaintiffs and all their witnesses alleged that the defendant had brought people on estate land and rented out the same and committed to bring evidence to that effect, but it was not done. Thus the allegations of the plaintiffs remained

speculative and unproven on the balance of probabilities. Section 101 of the Evidence Act provides that whoever alleges a fact bears the burden to prove the same. In this case the plaintiffs alleged the defendant was selling and or disposing of properties forming part of the estate and misappropriated funds of the late; they had the burden to prove the said allegations by bringing to court evidence to that effect. No evidence was adduced by the plaintiffs to that effect as such they failed to prove that the defendant prior and after acquisition of the letters of administration was selling and or disposing properties forming part of the estate.

As regards to the competence of the defendant to apply for letters of administration, it is now settled law that a widow of an intestate has priority when it comes to administration of the estate of the late. This position was elucidated by court in ***Cissy Nabakara v. Alexandria Kalemela***[9] where court observed that a widow is the most appropriate person to administer her late husband's estate. The same position was re-echoed by the Hon. Justice Henry Kawesa in ***Beatrice Asire Mallinga Vs. Jonathan ObukunyangMalinga***[10]where he cited the position in ***Cissy Nabakara*** case that a widow is the most appropriate person to administer the estate of the late husband. In this case the defendant in her evidence in chief and in cross examination confirmed and maintained that she was married to the late Samuel Ntungwa in church in 1963 and they had never divorced and the marriage certificate was exhibited as DE3. All the plaintiffs' witnesses that is PW1, PW2, PW3, PW4, PW5, PW6, PW7 and PW8 all confirmed that the defendant was married to the late in church and that the they had no knowledge of any divorce having taken place between the two. Therefore, since at the time of the late Samuel Ntungwa's death there was a subsisting marriage with the defendant which was

[9] 691/1991
[10] ***Ibid foot note 3***

never successfully challenged or controverted, the defendant is the lawful widow of the late and thus had priority to apply for letters of administration. This court rejects the argument by the plaintiffs that the widow was a one Ainamani Gloria since by virtue of the subsisting church marriage between the defendant and the late he could not contract any valid other marriage under the laws of Uganda.

The remaining contention was that the defendant did not exhibit a true inventory as required by law. If an administrator fails to exhibit a true inventory within the time indicated in the grant without any just reason, then it is a ground for setting aside the grant. The Hon. Lady Justice Kazarwe in ***Kaheru Yasin and Anor Vs. Zinomurumi David***[11] held that exhibiting an inventory is a mandatory requirement that may lead to revocation of the grant in the event there is no compliance. She further noted that the failure to exhibit the inventory as per Section 234(2)(e), must be willful and without any reasonable excuse. It therefore follows that the one who alleges that the same was no exhibited, in court bears the burden to lead evidence that it was done willfully and intentionally. PW1, PW4, PW7, PW8, in their examination in chief do not make mention that the defendant ***willfully and intentionally*** failed to exhibit a true inventory in Court. It is PW2 under paragraph 21 of his statement who indicated that the defendant did not file an inventory of the estate as required by law and owes a duty of accountability to the estate. This is stated in PW6's evidence in chief under paragraph 21 of the witness statement, and also in paragraph 22 of the witness statement of PW3 and PW5. None of the witnesses brought evidence to prove that the alleged failure was willful and intentional. The defendant (DW3 per the record) on the other hand in her witness statement paragraph 27, stated that as soon as she obtained the letters of administration, she was fought by the plaintiffs and thus was unable to file an

[11] ***Land Civil Suit No. 0049 of 2016, at page 14.***

inventory and that she was at the same time sick. Per the grant, the defendant was to exhibit an inventory within six (6) months after the grant. The grant was signed by his Lordship the Hon. Justice Mugabo on the 2nd of June 2021 meaning the six month started to run from that time and were to expire on 2nd December 2021. The plaintiffs filed this suit on 8th July 2021 just a month after the defendant was granted letters of administration and the summons were issued out by court on 23rd July 2021. It means that the defendant was still within time to file an inventory and at the time of filing the suit, she was still within time to exhibit an inventory as required by law. In addition to the aforementioned, the filing of this case by the plaintiffs and the allegations between the parties are a lawful excuse for the plaintiff not to have filed an inventory within the 6 months. It should also be noted that a Citation Order was issued by this court on 21st September 2021, three months from the date of the grant and within the six months within which the defendant was to file an inventory. Therefore, since the Citation was issued and court withdrew the letters of administration from the defendant, she could not have continued acting as an administrator as it would have constituted contempt of court. It is thus the finding of this court that the claim of alleged failure to exhibit an inventory in court over the estate of the late was premature and it was not willful or intentional but it was as a result of the case that the plaintiffs filed in court and the Citation Order that was issued before or within the time the defendant was to exhibit an inventory in court. It is therefore the finding of this court that the plaintiffs did not prove any of the grounds that would warrant the revocation of the letters of administration. Thus the letters of administration of administration granted to the defendant on 2nd June 2021 are still valid and the same should be handed over back to the defendant with immediate effect to enable her continue executing her duties as an administrator. I therefore decline to grant

the order revoking the letters of administration that were granted to the defendant in respect of the estate of the late Samuel Ntungwa.

**Issue No. 3: Whether the Parties Are Entitled to a Share From The Estate Of The Late Samuel Ntungwa**

It was submitted for the plaintiffs that the late Samuel Ntungwa having left a will, both parties are entitled to their respective shares as stated therein. That if it is found that the late died intestate, then Section 30 of the Succession Act will apply against the defendant.

This Court shall not determine this issue on ground that the same was not pleaded by the plaintiffs. Per the plaint on record filed on the 8th day of July 2021, the plaintiff sought the following prayers, (i) an order revoking the letters of administration granted to the defendant dated 2nd June 2021, (ii), An order for a permanent injunction barring the Defendant or any of her agents from interfering with any of the properties or funds of the Testator's estate and preserving the caveats on the estate property, (iii) An order that the defendant pays Special Damages, (iv) An order for payment by the defendants General damages, (v) An order for payment by the Defendant of exemplary and Punitive damages, (vi) An order that the defendant pays costs of the suit (vii) An order for payment of interest on the decretal sum at 30% per annum from judgment till payment in full. I have also looked at the body of the plaint, the plaintiffs did not include a claim or prayer that they are entitled to the estate of the late. It is only the defendant who indicated in her defense that the 2nd and 3rd plaintiffs were not entitled to the estate of the late and they are not beneficiaries though she never included a counter claim to declare them as such and the plaintiffs never filed a reply to the defendant's written statement of defense denying the said fact. I find that this issue was framed outside

the pleadings of the parties and parties are bound by their pleadings and court should pronounce itself only to what is indicated in the pleadings of the parties. The Hon. Justice Henry I. Kawesa in ***Kitaka Peter and 12 others Vs. Muhamed Thobani***,[12] held thus: *It is trite law that parties are bound by their pleadings (O.6 r 7 of the Civil Procedure Rules).* This position was re – affirmed in the cases of ***Jani Properties Ltd versus Dar-es-Salaam City Council (1966) EA 281; and Struggle Ltd versus Pan African Insurance Co. Ltd (1990) ALR 46 -47***, wherein Court rightly observed that: *"the parties in Civil matters are bound by what they say in their pleadings which have the potential of forming the record moreover, the Court itself is also bound by what the parties have stated in their pleadings as to the facts relied on by them. No party can be allowed to depart from its pleadings" (see also **Semalulu versus Nakitto High Court Civil Appeal No. 4 of 2008**)".* He also further noted thus: *It is now well established that a party cannot be granted a relief which it has not claimed in pleadings.* In the case of ***Ms. Fang Min versus Belex Tours & Travel Ltd. versus Belex Tours & Travel Ltd,*** the *Supreme Court*, at Page 27, underscored the importance of the pleadings to describe precisely the respective cases of the parties and to define the issue in dispute for resolution by the Court. The issue of parties being entitled to the estate of the late was not pleaded by the parties and specifically the plaintiffs. I therefore decline to make orders as to who is entitled to the estate.

**Issue No. 4: Remedies Available to the Parties**

I find that the plaintiffs have on the balance of probabilities failed to prove their case against the defendant and as a result, this suit is hereby dismissed. The defendant sought costs. It is trite law as stated in section 27 of the Civil Procedure

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[12] ***Civil Appeal No. 020 of 2021***

Act that costs follow the event and a successful party is entitled to costs. I make the following orders:

(a) **That the plaintiffs shall pay costs of the suit to the defendant.**

(b) **That the late Samuel Ntungwa died intestate and the will dated 10th April 2008 is a nullity and invalid.**

(c) **That the letters of administration granted to the defendant on the 2nd day of June 2021 are valid and should be handed over back to the defendant to continue executing her duties as an administrator in accordance with all relevant laws.**

(d) **That the defendant shall file an inventory in this court over the estate of the late within two months from the date of delivering this judgment.**

(e) **That a permanent injunction is hereby issued restraining the plaintiff's, their agents and or assignees from interfering with the defendant's administration of the estate of the late Samuel Ntungwa.**

(f) **That any caveats lodged on the estate property by the plaintiffs, their agents and or assignees are hereby vacated.**

I so order.

**Dated at High Court Fort-portal this** 14th **day of September 2022.**

Vincent Wagona

**High Court Judge**