

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
MISCELLANEOUS APPLICATION No. 041 OF 2022
ARISING FROM ADMINISTRATION CAUSE NO. 030 OF 2010**

1. RUGOMOKA DEUS

2. FRIDAY SWIZIN KIJARA

3. KAMAIIKA MARGRET ::::::::::::::::::::::::::::::::::: APPLICANTS

VERSUS

KIJARA RUSOKE SAMALI ::::::::::::::::::::::::::::::::::: RESPONDENT

**BEFORE: HON JUSTICE VINCENT EMMY MUGABO
RULING**

This is an application by Notice of Motion under Section 98 of the Civil procedure Act and Order 52 Rules 1 & 3 of the Civil Procedure Rules for orders that the late Kijara Christopher died intestate, that the inventories filed by the respondent are illegal as they rely on a non-existent will, an order for distribution of the estate of the late Kijara Christopher in accordance with the law and costs of the application.

Each of the applicants deponed an affidavit in support and an affidavit in rejoinder.

Background

The respondent is the widow and administrator of the estate of the late Kijara Christopher having acquired the grant in January 2002. The applicants are children of the late Kijara Christopher and they bring this application on the following grounds;

- a. The late Kijara Christopher left various properties
- b. That the permanent house at Mabaale does not belong to the estate of the late Kijara Christopher but to the 3rd applicant
- c. That after the grant, the respondent grabbed the biggest part of the estate to the detriment of the beneficiaries
- d. That the respondent did not file an inventory after the grant for a period of more than 14 years
- e. That the respondent filed a false inventory
- f. The respondent forged the will of the late Kijara Christopher

The respondent opposed the application by her own affidavit in reply stating that the estate of the late Kijara Christopher no longer exists and that she distributed the same. She further contends that the affidavits in support contain deliberate falsehoods and that they offend the provisions of the Illiterates Protection Act.

Representation and hearing

The applicants are represented by Legal Aid Project of the ULS while the respondent jointly by M/s Mugabe-Luleti & Co. Advocates and Tiishekwa. A. Rukundo & Co. Advocates. The hearing proceeded by way of written submissions. Written submissions were filed on behalf of all the parties and I have considered the same in this ruling.

Consideration by court

Before I delve into the issues raised by the parties, am compelled to first deal with whether this application is properly brought before this court.

I note that this is an application challenging various actions of the respondent as administrator of the estate of the late Kijara Christopher. It is brought by notice of motion under the provisions of Section 98 of the Civil Procedure Act and Order 52 Civil Procedure Rules. The above provisions are all general provisions that refer to the powers of the High Court to invoke its inherent power to hear and grant remedies to parties. The procedure for doing so, according to the applicant appears to be derived from O.52 of the Civil Procedure Rules.

The grounds of the application as presented by the applicants as noted above are those that would amount to just cause for the revocation of the grant of letters of administration. They include the fact that the respondent has distributed property in line with a non-existent will, that the respondent failed to file an inventory for a period of over 14 years, that she filed a false inventory and she dealt with the estate property in a way that is prejudicial to the interests of the applicants as beneficiaries to the estate. Refer to **Section 234 of the Succession Act** on grounds for revocation of grant. The applicants however do not specifically pray for the revocation.

The applicants also claim that certain properties under the management of the respondent do not form part of the estate of the late Kijara Christopher.

Reading the pleadings generally however shows that applicants were avoiding to take the long course of trial by plaint and opted to shortcut the process by resorting to trial by affidavit evidence. However **section 33 of the Judicature Act** requires that any pleadings before High Court must be properly filed before it.

A notice of motion for a miscellaneous application which seeks for final determination of very contentious matters as those pleaded in this application cannot in my view be brought under Section 98 of the Civil Procedure Act. Why not proceed by ordinary plaint? Issues of property ownership, forgery, revocation of a grant may not be sufficiently dealt with affidavit evidence.

These are matters of evidence which need proof in court by the calling of evidence. There are issues to do with illegalities with the inventory filed, ownership of property being held for the estate, the distribution of the estate which a blanket notice of motion supported by affidavit evidence in my view cannot sufficiently prove.

In considering whether to proceed by originating summons, or by ordinary suit the High Court in ***Kulusumbai v. Abdul Hussein (1975) EA. 708***, held that the procedure by originating summons was intended to enable simple matters to be settled by the court without the expenses of bringing an action the usual way. ***Nakabugo v. Serungogi (1981) HCB 58*** held that it is trite law that when disputed facts are complex and involve a considerable amount of oral evidence, an originating summons is not the proper procedure to take.

The import of all this to the proceedings before me is that where a matter is contentious, and involves a considerable need to call oral evidence to prove further the facts in controversy, then the procedure of proceeding by affidavit evidence either by originating summons or other motions as in this case becomes improper. This was the conclusion reached by **Hon. J. Namundi** in ***Zalwango Elivason and Nakalema Mariam Vs Dorothy Walusimbi and Henry Bijumuko Or. Sum..3/2013***.

Section 98 of the Civil Procedure Act, aims at “preventing abuse of the process of court” while section 33 of the Judicature Act, caters for “matters properly before the court” while order 52 addresses “motions and other applications.” The above laws and Rules cannot be invoked as a standalone, where specific provisions of the law are available and applicable. **Section 265 of The Succession Act** requires that where matters become contentious in respect to a grant of letters of probate or administration, the proceedings should take, as nearly as may be, the form of a regular suit according to the provisions of the law relating to civil procedure.

Much as fraud is not specifically pleaded by the applicants, their complaints against the respondent point to this direction in respect to the estate property she allegedly apportioned to herself using an invalid Will to the detriment of the beneficiaries. I am persuaded by the Supreme Court decision in ***Kampala Bottlers Ltd v. Damnico Ltd Civil Appeal 22/92***, that “fraud is a very serious allegation to make and it is always wise to abide by the Civil Procedure Rules **O.6 rule 2** and plead the fraud properly giving particulars of fraud alleged. These are matters that require hearing of oral evidence and cannot be determined by affidavit evidence.

The present application ought to have taken the form of an ordinary suit because the controversies are contentious as envisaged by Section 265 of the Succession Act.

For the reasons given above, this application cannot be sustained and it is hereby dismissed with costs to the respondent.

I so order

Ruling of Hon. Justice Vincent Emmy Mugabo

Date at Fort Portal this 31st day of May 2022.



Vincent Emmy Mugabo

Judge

The Assistant Registrar will deliver the ruling to the parties



Vincent Emmy Mugabo

Judge

31st of May 2022.