THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

CIVIL APPEAL NO. 019 OF 2021

(ARISING FROM FCC NO. 004 OF 2020 – RAKAI CHIEF MAGISTRATE`S COURT)

MUKWAYA BADRU :: APPELLANT

VERSUS

1. SSENTAMU MOSES :::::::::::::::::::::::::::: RESPONDENT/CROSS APPELLANT

AND

1. KATO YOKANA
2. BABIRYE RUTH
3. KIZZA YUSUF
4. KAGGWA NYANZI
5. KAMYA MOSES
6. NANYANZI MAX
7. SSENTAMU SAMSON ::: RESPONDENTS

Before; Hon Justice Victoria Nakintu Nkwanga Katamba

JUDGMENT

The Cross Appellant/Respondent filed FCC No. 004 of 2020 in the trial Court seeking orders that DNA tests be taken against himself and the Appellant and Respondents herein. The grounds of the application were that he is the son and heir to the late Nalaba Charles who died testate leaving three wives and nine children. He stated that some of the children`s parentage was doubted hence the reason for applying for an order to conduct DNA test.

The Appellant herein filed an affidavit in reply in which he stated that the Cross Appellant had no right to challenge the Respondents` paternity and opposed the application. He stated that the application was intended to deprive the beneficiaries of their share in the estate.

In his Ruling, the trial Magistrate allowed the application in regards to the 8th Respondent and Appellant herein since his parentage was I doubt and also ordered for the exhumation of the late Nalaba Charles`s remains.

Being dissatisfied with the ruling of the trial Magistrate, the Appellant and Cross Appellant filed this appeal on the following grounds;

The trial Magistrate erred in law and fact when he;

1. wrongly evaluated the evidence on record and came to an erroneous decision;
2. granted the application yet the Respondent was neither the administrator nor the legal representative of the estate of the late Nalaba Charles;
3. relied on hearsay evidence of the 7th Respondent that the Appellant was given out to another man as his but when that other man rejected the appellant Nabukenya Joweria returned the Appellant to the family as Nalaba Charles` son whereas not;
4. relied on hearsay evidence and evidence not on the record of Senior Assistant Secretary of Dwaniro Sub-county Rakai and came to an erroneous decision;
5. relied on mere allegation that the paternity of the Appellant was in doubt and held that the doubt was justified;
6. relied on mere allegations of the conduct of Nabukenya Joweria hat he gave out Mawejje Ibrahim to another man after the death of Nalaba Charles which emboldened the doubt in respect of the Appellant as well and thus came to an erroneous decision;
7. held that the late Nalaba Charles died in 1984 whereas not;
8. upheld that a DNA test against the Appellant would end contentions concerning paternity whereas not;

9. disregarded the evidence of Nabukenya Joweria the mother of the Appellant and came to an erroneous decision;
10. held that DNA be carried out in respect of the Appellant yet the application sought DNA against all the children;

The Cross-Appellant appealed on the following grounds;

The learned trial Magistrate erred in law and fact when he;

1. Wrongly evaluated the evidence on record thus arriving at a wrong decision;
2. Ruled and ordered contrary to the evidence adduced on court record;
3. Ordered a DNA test against the 8th Respondent alone contrary to the prayers and evidence requiring DNA test against all the Respondents and the Appellant himself;
4. Failed to order a DNA test against all the parties to streamline lineage, beneficiaries of the estate of the decease Nalaba Charles;
5. Failed to consider the lack of clarity in the records left behind by the deceased which did not mention or clarify on his children and order for a DNA test against all the parties purporting to be children of the deceased;
6. Failed to consider the acts of the late Nalaba`s girlfriend who gave out some children to order a DNA test to be conducted against all those considered children of the deceased;
7. Assumed that a DNA test against the 8th Respondent alone was sufficient to end contentions concerning paternity whereas not;
8. Failed to consider the application conceded to in respect of the Respondents who did not oppose the application and the 7th Respondent who concede by way of affidavit in reply;

Parties filed written submissions.

Counsel for the Appellant submitted that the law recognizes illegitimate children born of the wife if the parties are married and further that sections 67 and 71 of the Children Act do not give the Cross Appellant a right to apply for a declaration of parentage since he was

neither the father, mother nor guardian of the Appellant. Counsel further argued that the late Nalaba left a will which is uncontested in which the Cross Appellant was barred from interfering with estate and the trial Magistrate should have considered this evidence. Further that there was no sufficient cause warranting the DNA in accordance with the guidelines set out in the case ***of J MW Vs KC Kakamega MA No. 105 of 2004***. It was also counsel`s argument that the evidence that one of the Respondents had been given away by his mother, to a different man was hearsay and should not have been considered by the trial Magistrate in reaching his decision.

Counsel for the Cross Appellant argued that evidence that the Appellant was given to another man was not hearsay since the cross appellant was speaking from his own knowledge. Counsel argued that the Will cannot be relied on to prove the Appellant`s paternity and cited the case of ***Sserunjogi Charles & Anor Vs Tony Nkuubii OS. No. 07 of 2019*** where court held that if it was fond that the defendant was not the deceased`s child, the bequest to him would be void. It was also Counsel`s submission that the Appellant misapplied the provisions of the children Act and that any person with an interest in the estate can bring a suit to protect the estate and to determine paternity of any party would be an act of protecting the estate.

Determination of the appeal;

It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion ***(see Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000; [2004] KALR 236)***. In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions ***(see Lovinsa Nankya v. Nsibambi [1980] HCB 81).***

Before I delve into re-evaluating the evidence and resolving the grounds of appeal, I find it important to comment on how the parties framed their grounds of appeal as contained in the memoranda of appeal for both the Appellant and Cross-appellant.

Order 43 Rule 1(2) of the Civil Procedure Rules provides that, "the memorandum of appeal shall set forth, **concisely** and under distinct heads, the grounds of objection to the decree appealed from **without any argument or narrative**; and the grounds shall be numbered consecutively." ***Emphasis mine.***

The grounds of the appeal and cross-appeal as contained in the parties` memoranda of appeal are not only repetitive but also argumentative and in narrative form. For a matter of this nature and this being a first appeal where this court has a duty of re-evaluating the evidence, the grounds of appeal should have been very concise, properly summarized and limited to the issue in contention.

The grounds of appeal contained in both Parties' memoranda of appeal could have been summarized in two to three distinct grounds instead of the eight/ten repetitive grounds that were raised.

The parties` memoranda of appeal are contrary to the provision in ***Order 43 Rule 1(2)*** and such practice would be expected from unrepresented litigants. Lawyers should refrain from drafting such embarrassing pleadings/documents and follow the rules and guidelines stipulated in the law. Grounds of appeal should be concise, they should not be argumentative or in narrative form and they should be limited to areas where a party has suffered a miscarriage of justice.

I will now proceed to consider the grounds appeal and cross-appeal in the same order as they were argued by the Parties. I have to note that the grounds raised in the appeal and cross-appeal are similar and therefore, I will address both appeals concurrently.

Grounds 1, 2, 8 and 10;

Counsel for the Appellant argued that the Cross Appellant had no locus to bring an application for declaration of parentage and paternity. To support this argument Counsel relied on ***Section 67 and 71 of the Children Act***.

To rebut this argument, counsel for the Respondent submitted that the provisions of the Children Act are not applicable to the Cross Appellant since he is not a child in accordance with the Act.

Section 67 of the Children Act lists persons who may make an application for declaration of parentage to include; ***the mother of the child, the father of the child, the guardian of the child and the child by himself or through a next friend.***.

From the foregoing, it would deduce that the Cross Appellant being neither the parent nor the guardian has no locus to bring an application for declaration of parentage. However, the instant application has been brought for purposes of protecting the estate of the late Nalaba Charles. This is a distinct application from one that would be brought by a parent, guardian of child with the sole purpose of determining paternity.

The Cross- Appellant being a beneficiary has locus to institute an action for the protection of the estate whether he holds a grant of probate or not.

Counsel for the Appellant further argues that the late Nalaba died testate and his Will is uncontested and in the Will, the Respondent was barred from claiming any other thing including paternity of his siblings.

Counsel for the Cross- Appellant argues that the Appellant's name was not included in the Will so it cannot be believed that he was intended to be included.

I have carefully perused the late Will of the late Nalaba which is on the record and it was stated therein, that the Cross-Appellant was given property and ***"…must not argue for or control for another."*** Counsel submits that this phrase meant that he had no power to

challenge paternity of the other children. I disagree with Counsel on this interpretation since it is clear that the statement only relates to property. The statement is clear and to the effect that the Cross-Appellant was given property as a gift inter-vivos and should claim any property after the late Nalaba's death.

It was further stated in the Will that, "…***kibanja next to that of Badru…given it to…Muwanga and his young siblings***…." The Appellant seeks to rely on this statement to argue that he was expressly provided for under the Will and his paternity can therefore not be challenged.

Section 71 of the Children Act provides for prima facie and conclusive evidence of parentage and 71(7) provides that a reference, express or implied under a Will of any child as son or daughter is prima facie evidence that a person is the father or mother of that child.

I have to note that although Counsel for both Parties refer to the Will as uncontested, such disagreements amount to contestation and this is why I found it important to address the issues raised relating to the Will.

In his Will, the late Nalaba refers to Muwanga and his young siblings. I have established the said Muwanga alias Ssentamu Samson filed an affidavit in reply to the complaint on oath in which he conceded and prayed for the DNA test to be conducted on all purported children of the late Nalaba.

The use of the word, '***siblings'*** in the Will clearly refers to those children born of the same parents as the said Muwanga and since their names were not stated in the Will, this was an ambiguity and it is no wonder that such disagreements arose. Had the late Nalaba stated the names of the intended siblings, ***Section 71(7) of the Children Act*** would apply as prima facie evidence to conclusively hold that such named persons are indeed his children and their bequests would be valid. Therefore, since the said 'siblings' were not specifically stated this was an ambiguity which can only be cured through DNA testing.

Grounds 3, 4, 5 and 6

The Appellant faults the trial Magistrate for relying on hearsay evidence of the Cross-Appellant, the 7th Respondent Muwanga aka Ssentamu Samson and the report of the Senior Assistant Secretary of Dwaniro Sub-county - Rakai in reaching his decision.

Hearsay evidence is inadmissible save for the exceptions contained in ***Section 30 of the Evidence Act***, this is because hearsay evidence violates the provisions of ***Section 59 of the Evidence Act*** which requires that oral evidence must, in all cases, be direct. This means that oral evidence must be given by a party who saw or heard the evidence by themselves and not evidence from third parties.

The hearsay evidence challenge in the instant case includes evidence by the Cross-Appellant and the 7th Respondent that some of the children were once given out to other men presumed to be their fathers. Counsel for the Appellant argues that this was hearsay.

The 7th Respondent in his affidavit in reply to the complaint in oath stated that, ***"….i have of recent discovered from our family guardian….that upon the demise of my father…..my mother…gave away Ibrahim Mawejjee….. Mukwaya Gerald….to another man….."***

It is apparent from the above extract that the 7th Respondent was giving evidence of information that he received from a third party. This therefore amounts to hearsay and since the party from who that evidence was got did not testify or give evidence on oath, this court cannot rely on his evidence and the trial Magistrate should not have relied on it to reach his decision.

The Cross-Appellant in his affidavit in support of the complaint on oath stated that, "…***sometime in 1986…..Nabukenya Joweria gave out two brothers of mine to some other men….."*** In this case, the cross-appellant was speaking facts of his own knowledge and this amounts to direct evidence. The Appellant further seeks to fault the trial Magistrate on relying on "mere allegations" since Nabukenya Joweria was not called to testify and

information relating to her children was not confirmed or corroborated by any independent evidence.

Counsel for the Respondent argued that the evidence adduced by the Appellant was not contested and further that the issues of contention amongst the family should come to an end. Counsel cited and relied on the case of ***Elvaida Ndabahika Vs Adyeeri Hoe FlorenceHCMA No. 69 of 2019***.

Courts have held that in exercising its discretionary power to grant or not to grant the relief (DNA testing), court should be convinced that the application is in good faith, and that it is not actuated or designed to economically exploit or embarrass or is otherwise an abuse of the process of court. (***See MW v KC Kakamega High Court Misc. Application No. 105 of 2004)***

The main contention in the instant case is that some of the children presumed to be children of the late Nalaba Charles have their paternity being challenged by some of the beneficiaries.

The trial Magistrate relied on the report of the Senior Assistant Secretary of Ddwaniro Sub-county in which he clearly stated that the family has disagreement originating from distribution of property and even engaged in a physical fight. Although it was not expressly stated that some members of the family challenge paternity of some beneficiaries, this is evidently an issue that deserves to be resolved prior to proceedings form the grant of letters of administration.

In the instant case, it is apparent that the issue of paternity might be at the center of the dispute which affects the estate of the late Nalaba. If this issue is not resolved, this might affect the process for grant of probate or letters of administration as well as the rest of the beneficiaries of the estate. The 7th Respondent Muwanga responded to the complaint on oath and conceded to the DNA testing. The rest of the respondents save for the Appellant herein did not respond to the complaint. The law is clear that failure to respond amounts to admission of the claim raised.

I have already observed that the Will of the late Nalaba does not contain the names of his beneficiaries but rather states the '***siblings'*** of Muwanga, and these siblings can only be established through conclusive means of proving parentage. Therefore, I find that for the interest of the beneficiaries, the estate and wishes of the late Nalaba Charles, DNA test should be considered for all those presumed to be his children including the Appellant and Cross-appellant herein.

The Cross-Appellant in the lower court prayed for DNA tests to be conducted as against the samples of the late Nalaba Charles and to this end, he prayed for an order for exhumation of the remains of the late Nalaba.

The High Court in ***Civil Appeal No. 114 of 2018 Komakech Walter Vs Dr. Okot Christopher*** cited the landmark ***U.S. Supreme Court decision, Dougherty v. Mercantile Safe Deposit and Trust Company, 387 A.2d 244, 246-47 (Md. 1978), where*** Justice Cardozo stated, "***the dead are to rest where they have been lain unless reason of substance is brought forward for disturbing their repose.***"(***emphasis mine***)

Courts have to be cautious and carefully consider the evidence adduced before granting an order for exhumation. This is because the process of exhumation is not only sensitive for the family members involved but also there is need to respect and protect the final resting place of the dead. Therefore, the applicant has to prove that there are substantial grounds that warrant the order for exhumation and the order must be made for the protection and preservation of the estate and in the interest of the beneficiaries.

In the instant case, the late Nalaba Charles left a Will which remains uncontested besides the issue herein as to the paternity of some of his children. I have already observed that the Will of the late Nalaba Charles is ambiguous as to his children since their names were not specifically stated. This warrants the DNA testing. The question to answer now is whether this is a substantial question warranting the exhumation of the remains of the late Nalaba Charles to prove paternity of the children.

The ambiguity in the Will of the late Nalaba Charles relates to the relationship between the children stated in his Will and the children presumed to be his or as he stated in the Will, '***siblings'*** of Muwonge. I have to note that the late Nalaba Charles died testate and besides this issue of paternity, nothing else has been adduced to show that the estate is under any kind of danger of intermeddling. Therefore, what is important in the instant case is to establish relation of all the children presumed to be the late Nalaba's children. This can be done through a DNA relationship test which will establish the degree of relationship between all the children. I am confident that this process will be sufficient to determine the children of the late Nalaba.

I find that the question of paternity is not sufficient to warrant the order of exhumation in a bid to administer the estate of a deceased testate. The only ambiguity to solve herein relates to the 'siblings' who were not specifically named in the Will. This is not substantial enough to warrant the order of exhumation as it can be determined through a relationship test being done for all those presumed to be children of the late Nalaba. The DNA relationship test will determine even the closest relation there is amongst the children and this will resolve the wrangles in the family.

In the result, the judgment and orders of the lower court are hereby set aside and I hereby make the following orders;

1. A DNA relationship test shall be conducted on all those presumed to be children of the late Nalaba Charles at the expense of the estate;
2. No order is made as to costs.

I so order.

Dated at Masaka this 19th day of January, 2022

Signed;
Victoria Nakintu Nkwanga Katamba - Judge