THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMAPALA

[FAMILY DIVISION]

H C C S No 79 OF 2010

1. **NABAGESERA NORAH**
2. **NASSUNA JUSTINE**
3. **NAKKAZI CHRISTINE** **:: PLAINTIFF**
4. **NAMUTEBI AGATHA**

VS

NSUBUGA JAMES :: DEFENDANT

BEFORE HON. JUSTICE B. KAINAMURA

JUDGMENT

The Plaintiffs brought this action against the Defendant seeking orders revoking the grant of Letters of Administration to the defendant to the estate of the late CRESPO KITAKA, that the defendant fraudulently obtained the Letters of Administration Vide AC No. 114 of 1981 and included the 1st Plaintiff as Co-Administrator without her knowledge and consent, that the defendant since obtaining the said Letters of Administration has fraudulently without the consent of the Plaintiffs transferred part of the said estate into names of third parties who are not beneficiaries of the estate, that to effect the said transfers the defendant forged the signature of the 1st plaintiff and that the defendant has willfully without reasonable cause failed to exhibit a true copy of a statement of account of the said estate showing his dealings as required by law. The plaintiffs seek further orders granting the Letters of Administration to all the beneficiaries or as shall be agreed upon, a permanent injunction restraining the defendant from further dealings with

the estate, an order to pay reparation occasioned due to defendants illegal dealings, an order reinstating the 1st plaintiff in the matrimonial home and cost of the suit.

The defendant denied the plaintiff's claim and averred that the application for Letters of Administration to the estate of the deceased was made by him together with the 1st plaintiff who personally participated in the whole process, that the 2nd , 3rd and 4th plaintiffs received their share in the estate of the deceased when he distributed the estate amongst all the beneficiaries, that all the estate property which he sold as Administrator was with the full knowledge and participation of the 1st plaintiff as co-administrator and the proceeds of sale were distributed among all the beneficiaries.

At the commencement of the trial, the following issues were framed:-

1. *Whether the requisite Letters of Administration were fraudulently obtained.*
2. *Whether the Plaintiffs have received their due share/benefits from the estate of the deceased.*
3. *Whether the Defendant has been involved in fraudulent transactions/dealings in respect of the said estate.*
4. *Whether the Defendant had exhibited a true accountability of his dealings in respect of the said estate.*
5. *Remedies available.*

At the trial, Mr. Henry Kunya represented the Plaintiffs while Mr. M. Serwanda represented the Defendant.

The first issue is whether the requisite Letters of Administration were fraudulently obtained.

Revocation of Letters of Administration is provided for under Section 234 of the Succession Act Cap 162 Laws of Uganda 2000.

Under the Section, grant of Letters of Administration may be revoked or annulled for "just cause". Just cause is established if it is proved amongst others that the proceeding to obtain grant were defective in subsistence, that the grant was obtained fraudulently by making false suggestions or by concealing from Court something material to the case, that the person to whom the grant was made willfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the Act or has exhibited an account which is untrue in a material respect.

The particulars of fraud upon which the plaintiffs rely are set out under paragraph 4 of the amended plaint. They are that the defendant added the 1st plaintiff's names as a co-applicant for the Letters of Administration, upon obtaining the grant forged the plaintiff's signature to transfer the estate properties and dealt in caveated land when the caveat was still subsisting.

The 1st plaintiff testified as PW1 and stated that she did not know how the defendant obtained the Letters of Administration to the estate of her late husband Crespo Kitaka and denied being a party to the application. PW2 Nakkazi Christine testified that she got to know that the Defendant had obtained Letters of Administration to the estate of her late father Crespo Kitaka when a one Kabanda sued the administrators including her mother the 1st Plaintiff. On inquiring from the 1st Plaintiff as to what they had done, the latter denied any knowledge but the defendant admitted having sold the land signing for the 1st Plaintiff. On this part,

the defendant testified that the 1st plaintiff knew about the application for letters of Administration and that they acted in concert in the process of getting the Letters of Administration.

In his submissions Learned Counsel for the plaintiffs contended that the evidence adduced by the plaintiffs pointed to the fact that the person included on the letters of Administration was not the 1st plaintiff and that the defendant did so with ill motive of denying the beneficiaries of the estate of their due share.

Learned Counsel for the defendant submitted that to proceed under Section 234 (1) of the Succession Act for revocation or annullement of Letters of Administration, the plaintiff has to prove "just cause" as more particularly set out under subsection (2) of the Section. Counsel added that from the pleadings and proceedings, it was apparent that the plaintiffs were alleging that the defendant obtained the said Letters of Administration fraudulently. Counsel went on to state that from the circumstances of the case before court, the defendant had not committed any act of fraud as alleged in obtaining the Letters of Administration. Counsel urged that notwithstanding that PW1 who is also the 1st plaintiff denied ever having obtained the Letters of Administration jointly with the defendant, her evidence or all the evidence of the plaintiffs does not go to the root of proving the alleged fraud. Counsel further urged that to rely on fraud, the plaintiffs have to prove it. Counsel cited the case of ***Kampala Bottlers Ltd VsDamanico (U) Ltd SCCA No 22 of 1992*** where Wambuzi CJ (as he then was) had this to say:-

> ***"Further I think it is generally accepted that fraud must be proved strictly the burden being heavier than on a balance of probabilities generally applied in Civil Matters"***

Counsel further cited the case of ***J.W. Kazorra Vs Rukuba SCCA No 13 of 1992*** for the proposition that the degree of proof of fraud is of strick proof not amounting to one of beyond reasonable doubt but much more then a mere balance of probabilities. Relying on Section 79 of the evidence Act Cap 6 Laws of Uganda 2000, Counsel concluded by submitting that the Letters of Administration granted under AC No.114 of 1981 to the Defendant and 1st plaintiff to the estate of Crespo Kitaka are genuine.

Courts when confronted with allegation of fraud have adopted the position set out in **Lazarus estates Ltd Vs Beastey [1956] IQB 702 at 712** where Denning LJ stated:-

> ***"No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister can be allowed to stand if it has been obtained by fraud. Fraud un ravels it vitiates, judgments, contracts and all transactions whatsoever".***

However for a court to arrive at a conclusion that the alleged fraud was indeed committed, it has to bre alive of the required standard of proof imposed on the party alleging fraud to discharge. It is now trite that the correct standard is as set out in ***R.C. Patel Lalji Makanji (1957) E.A 314*** where the court of Appeal said:-

> ***"Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required".***

I therefore agree with the position advanced by Learned Counsel for the defendant that the allegations by the plaintiffs that the Letters of Administration were

obtained by the defendant fraudulently remain but allegations. In my view, the plaintiffs have not proved the alleged fraud to the required standard set out above. From the evidence on record, more particularly that of PW1- the 1st plaintiff, the concern of the plaintiffs was that the defendant had not administered the estate to their satisfaction. My view is that the allegations of fraud were an after thought and have not in my view, been proved to the required standard.

In the result issue one fails, as no fraud has been proved to the satisfaction of court.

The second issue for resolution relates to whether the plaintiffs have received their due share/benefits from the estate of the late Crespo Kitaka. It is not in dispute that the 2nd, 3rd and 4th plaintiffs received some tenements (one roomed dwelling) from those left by the deceased at Kireka. They have since sold them. However in their testimony they all stated that that their late father left landed property at Namanve, Nambole, Butabika and Kikonko. PW2 Nakkazi Christine testified that in their quest to establish the landed property their late father left, they engaged the service of a Lawyer who helped them conduct a search but the search indicated that all the land had been sold. The Lawyer was not called as a witness neither was the search report tendered in evidence. So this piece of evidence remains but conjecture and I will treat it as such. PW2 Nakkazi Christine further testified that they engaged services of a Surveyor who prepared an area schedule for Block 234 land at Kirinya. The area scheduled form was tendered in evidence for identification as “PID2”.

It was PW2 further testimony that the inventory filed by the defendant on 30th January 2012 is not exhaustive because all the land left by the deceased is not included. However, during cross examination, PW2 confirmed that she had no proof that the land belonged to the deceased and was only informed so by PW1 Nabagesera Norah. PW3 and PW4’s evidence was along the same lines.

One Ojara Fenansio Drawing Office Supervisor in charge of Mapping with Wakiso District testified as PW5. He tendered in evidence “Exp 2” an area Schedule Form for Blocks 234 Kirinya Kyadondo earlier tendered in as “PID” 2 by PW2. He testified that the summons served on the District Surveyor requested the surveyor to prepare Area Schedule Forms in respect of Block 234 Kyadondo Plots 2295, 2695, 2655, 2652, 2653, 2655, 2674, 2659, 2658, 1265, 677, 675, 638, 659 and 278 all land at Kirinya Bweyogerere. They were also requested to produce all supporting documents on transactions relating to the above Plots. PW5 was assigned the task. In his testimony he explained that an Area Scheduling Form shows the transactions on a given piece of land showing subdivisions and plot numbers if any, and names of persons and acreage for each. PW5 further testified that Plot 659 originary 1.44 Hectares had been subdivided into 10 plots 5200 up to 5209 all in the names of Mugabi Michael and Mugabi Carol. On cross examination PW5 admitted that he cannot tell from whom Plot 659 came from and that it could well be not part of the estate of the late Crespo Kitaka. The witness further testified that their office only records names of the registered proprietors when land is being sub divided and that they do not have information on land transfers. PW6 Fred Kimuli testified to the effect that he negotiated with the defendant with a view of buying a Kibanja, interest on land belonging to the late Crespo Kitaka, he then bought part of the Kibanja, had it surveyed and obtained title in 2005. The title was later cancelled at the instance of a case brought by a one Mugabi. PW6 labelled the defendant as unreliable.

The defendant who testified as DW1 stated that as one of the Administrators of late Crespo Kitaka’s estate he tried to ascertain the property left by the deceased and found that most of the land did not belong to their late father Crespo Kitaka but to their great grandfather the late Isaac Baruti. He stated that he distributed the land (Kibanja) at Kirinya which previously belonged to the deceased and took for

himself as heir, the matrimonial home which is on land belonging to their late grandfather and is still in the names of Sanyu Natembo their Auntie who was the Administrator of the estate of their late grandfather. Isaac Baruti was father to the late Crespo Kitaka. He further testified that he never chased PW1 from the matrimonial home but she left on her own. He concluded by stating that out of the 15 children left by the deceased, it is only the 2nd, 3rd and 4th plaintiff who are dissatisfied with the distribution of the estate of the deceased at Kireka and that, that was all there was to share. The same position was re-echoed by Sarah Namazi a sister of the defendant and plaintiffs 2, 3 and 4 who testified as DW3.

Learned Counsel for the plaintiffs submitted that from the evidence adduced it was clear that the 2nd, 3rd and 4th plaintiffs did not receive their due share/benefits from the estate of their late father Crespo Kitaka. Counsel alluded to a vast estate of the late Crespo Kitaka which, with due respect, is not borne out by the evidence adduced. Ojera Venancio PW5's testimony did not help matters since he admitted during cross examination that from the records in his office, he could not tell who the registered proprietor of the lands in question was. I am in agreement with Counsel for the defendant that in absence of concrete evidence the plaintiffs have not discharged their burden to prove that indeed the deceased left behind all the landed property alleged by the plaintiffs. It is my view that the plaintiffs received all that was due to them and accordingly the second issue is not proved.

The third issue for determination is whether the defendant has been involved in fraudulent transaction/dealing in respect of the estate. In proof of this allegation the 1st plaintiff testified that the defendant sold the house left by the deceased at Mengo immediately after the last funeral rights, recently sold the property at Kireka and has been selling other land without the knowledge of PW1. However during cross examination, PW1 stated that the home at Mengo belonged to her co-

wife-the mother of the defendant and that she had no claim over it. The plaintiffs also called a one Fred Kimuli as PW6 who testified that he bought Kibanja interest on land of the late Crespo Kitaka at Kireka from the defendant. He testified that he got title for the land in 2005. He further testified that the title was cancelled at the instance of a one Mugabi who claimed ownership of the same land. However during cross examination PW6 admitted that the transfer instrument he used to process the title in 2005 was executed by both the defendant and the 1st plaintiff as Administrators of the estate of the late Crespo Kitaka. He testified that he in fact complained to the 1st plaintiff that she and the defendant had cheated him when the title was cancelled. He concluded by stating that he has since instituted a case in Court. On the basis of the above evidence, Counsel for the plaintiffs called upon Court to make a finding on the issue in the affirmative. In his submission Learned Counsel for the defendant again drew courts attention to the decision in ***J.W Kazorra Vs Rukuba*** Case (supra) on the standard of proof in an allegation of fraud and quite rightly in my view, submitted that the evidence on record did not prove any fraudulent act by the defendant. As for the matrimonial home I am satisfied from the evidence on record that the 1st plaintiff left the home on her own volition. In the circumstances the third issue also fails.

The fourth issue is whether the defendant has exhibited a true accountability of his dealings in respect of the estate. Section 278 (1) of the Succession Act enjoins the executor or administrator of an estate to within six months from grant of probate or Letters of Administration, to file an inventory containing full and true estimate of all the property in his/her possession, all the credits and all the debts owing to the estate. The period may however be enlarged by court. The same section also requires the executor or administrator of an estate to file within one year of grant an account of the estate showing the assets which have come into his or her hands

and the manner in which they have been applied or disposed off. In the instant case neither the inventory nor the account were filed in the prescribed time.

However I am also alive of what transpired during mediation whereby it was agreed in court that the defendant files an inventory which he did. I am also alive of the fact that the distribution was indeed made as I have found earlier in this Judgment. In the circumstances, the Administrators of the estate are directed to file the distribution as by law required within a period of 2 months from the date of this Judgment so that the file relating to the estate is closed.

The last issue relates to the remedies available. In view of my findings in this Judgment, the remedies prayed for are not available. I will also make no order as to costs since this is a family dispute and I am of the opinion that I should not exasperate the already existing hard feelings between the parties by awarding the defendant costs of the suit. It is time to heal.

In the result this case is dismissed with no order as to costs.

B. Kainamura
Judge
23-10-2013