THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CV-CS-0013-2013
(ARISING FROM ADMINISTRATION CAUSE NO. 52/2013)

BEATRICE ASIRE MALLINGA……………………….…...……PLAINTIFF

VERSUS

JONATHAN OBUKUNYANG MALINGA……...……..……DEFENDANT

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

This suit is brought by the plaintiff contesting a caveat lodged by the Defendant on the plaintiff's application for probate in Administration cause No.52 of 2013. The Plaintiff is the widow of the late **Stephen Mallinga** and the defendant is the son.

Dr. Stephen Oscar Mallinga died on the 11th April 2013 leaving 6 children and one widow. Following his death, two Wills were discovered to wit the one dated 10th February 1999 and another one dated 30th December 2009 which have become the subject of contention.

The plaintiff contends that the lodgment of the caveat by the defendant is unnecessary as she was the one named as the executor of the deceased's estate in his last will of 2009. The defendant on the other hand contends the plaintiff's averments and stated that the Will of 2009 is incorrect and he is not aware of it as his father made only one Will of 1999 wherein he was named the executor of his father's estate and as such, the plaintiff is not entitled to apply for probate.
Both sides produced two witnesses to prove their case.

Both parties have filed written submissions in support of their respective cases. Counsel for the defendant contends that the plaintiff is not entitled to be granted probate in as far as she is not a lawful wife of the deceased, that she did not obtain a certificate of no objection from the

Administrator General and that the Will is a forgery since there are spelling errors of the names of the beneficiaries and that some of the property was not included and/or properly described.

Counsel for the plaintiff on the other side submitted that the plaintiff is the lawful widow of the deceased and this is not denied by the defendants in their defence. It was further submitted that the 2009 Will is valid and that it revoked the earlier Will of 1999 having dully conformed to the requirements of a valid Will under Section 50 of the Succession Act. It was counsel's submission that probate should be granted in accordance with testator's wishes as per the Will of 2009.

From the above, the issues for determination by this honourable court are:-

1. Whether the 2009 Will is valid.
2. Whether the plaintiff is entitled to be granted probate.
3. Whether there any remedies available to the parties.

The issues are resolved as herebelow.

Issue I:

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.

According to evidence of DW.1, he states that he had seen the Will of his father in 2011 and that it had been shown to him by the father. This means that if the averment as alleged is true then it ceased to be a Will at that time since he was aware of its contents.

For a Will to be valid, the provisions of Section 50 of the Succession Act must be conformed to. 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.

In the case of *Estate of* ***James Ngengi Muigai*** *(deceased), Nairobi High Court Succession Cause No. 523/1996*, **Koine J.** noted 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. Guided by these authorities it is a fact that the Will in question (as submitted by counsel for the plaintiff) conformed to the above formalities and is valid at that stage.

Having found as above, there is also a need to determine as to whether this Will of 2009 invalidated the one of 1999 which the defendant claims to be valid.

Section 48, 56 and 57 of the Succession Act provide for the various modes by which a Will can be revoked. These are by marriage or by some other writing, among others.

If there is a clear intention to revoke, but the requirements of form are not satisfied, the Will remains effective.

The instrument in which the revocation clause is contained need not be a Will, thus it need not be a document which is admissible to probate. The only requirement is that it should be executed in the same way as a Will. Re *Howard, Howard v. Treasury Solicitor (1944) P.39*.

Under Section 48 of the Succession Act, a Will is revoked by the intention of the maker at any time while he is competent to dispose his property by Will. The evidence on record shows that the deceased revoked the 1999 will in favour of 2009 Will. I notice that the defence submits that the 1999 Will is the one which is valid, because the 2009 Will left out the particulars of the land and house in Mbale and that the names of some beneficiaries were misspelt. The defence thinks that the Will is a forgery. However evidence has shown that the 2009 Will was proper inspite of some minor inconsistencies which do not go to the root of the Will to invalidate it.

In assessing this evidence, regarding the validity of the two wills on record, I concur with the submission of counsel for the plaintiff that the 2009 Will clearly indicates that the testator was revoking any other document purported to have been made and signed by him. By implication it is noted that after 10 years it is possible that the testator would have acquired some other property, produced more children and/or even changed his wishes so as to make a new Will. For example in the 1999 will, the testator had only 5 children yet in 2009 he had another child. This shows that by 2009 his properties and beneficiaries had changed.

Accordingly, the 2009 Will brought in new testaments thereby revoking the earlier Will of 1999.

This also means that legally if there were any property not included in the Will, then the testator died testate with regards to the property included in the Will but intestate with regards to the property not included in the Will.
(*See S.24 of the Succession Act*).

A person dies intestate in respect of all property which has not been disposed off by a valid testamentary disposition. (*Also Section 25 of the Succession Act*).

On whether the plaintiff is entitled to be granted probate, emphasis has to be put on the law of Succession, which provides that,

> "*A Will establishes the wishes of the testator at the time of his death and the court is inclined to interfere with the testator's wishes, unless in circumstances where equity and justice requires*."

For that reason this court notes that in his first Will, the plaintiff was the one named as executor of the deceased's estate.

The plaintiff in her witness statement states that she is a widow to the late **Stephen Mallinga** which averment is not disputed by the defendant in his defence.

What does the law provide for regarding widows in succession?

Section 201 of the Succession Act provides that those who are connected with the deceased either by marriage or consenguity are entitled to obtain Letters of Administration or probate. In this case, the plaintiff who avers that she is a widow of the deceased is covered by the law to apply for probate and hence qualifies at this stage.

Furthermore, Section 2 (w) of the Succession Act defines the word; “wife” to mean a person who at the time of the intestate’s death was validly married to the deceased according to the Laws of Uganda.

The defence contends that though the plaintiff claims to be a widow, no evidence was given in support of her averment such as a marriage certificate.
However, at this stage, it is not for her to prove that she was lawfully married to the deceased but for the defence to prove that there was no valid marriage. (*See section 101 of the Evidence Act*). Therefore by virtue of her status as a widow to the deceased, she qualifies to be granted probate unless the contrary is proved.

Under Section 186 of the Succession Act, where two or more persons are appointed as executors and one dies, the surviving executor can take out probate.
(See: *Michael Oscar Kajemba v. James Mulwana and 3 Ors. HCCS. 749/9)7*.

According to the 2009 Will which was provided to this honourable court, the deceased named the plaintiff and a one **Oscar Akol Mallinga** (son) executors of his Will. However according to PW.1 Oscar passed on leaving her as the sole executor. This means that by virtue of Section 186 of the Act she is justified to apply for and be granted probate.

Also according to the case of *Cissy Nabakara v. Alexandria Kalemela CS. 691/1991*, Court noted that the widow is the most appropriate person to administer her late husband’s estate. Similarly in the instant case since the plaintiff is a widow to the late **Mallinga**, she is the most appropriate person to take out probate of her late husband’s estate.

The other contention raised by counsel for the defence was that the widow did not obtain a certificate of no objection before applying for probate.

However according to the case of *Administrator General v. Joyce Akello Otti Civil Appeal No. 15/1993*, Court noted that a widow can apply for and obtain probate without reference to the Administrator General. This is the position and practice in Uganda. Therefore in this matter the

plaintiff is not precluded from obtaining the grant due to absence of the letter of "no objection" as a widow is justified.

The other contention referred to failure by the attesting witnesses to the 2009 will to come and testify in court. However, according to Section 133 of the Evidence Act no maximum number of witnesses is required to prove a particular fact.

However, all matters before court must be proved by evidence and courts usually admit the best evidence.

In *Administrator General v. Bukirwa & Anor. (1992-1993) HCB 192 at 196*, **Byamugisha J**. noted that in all administration causes where a Will has been executed, the best evidence which court will accept concerning its due execution will be from the witness who attested to the Will. Exceptions however follow in such cases as where the witness cannot be found, is out of jurisdiction or his production will require expenses which may not be within the means of the party calling him/her.

At that stage, court will admit the secondary evidence of such witnesses.

With regards to this case, though the attesting witnesses did not testify in court, the Advocate who drafted the Will for the deceased and who was present at attestation testified in court. Therefore this contention fails. (*See section 37 of the Evidence Act*).

On the remedies available.

1. The caveat lodged by the defendant should be immediately removed and the plaintiff is hereby allowed to proceed with the application.
2. For purposes of equity and justice, since the plaintiff is not the mother of all other beneficiaries, probate will be granted to the plaintiff and any other beneficiary chosen by the family.

I so order.

Right of appeal explained.

Henry I. Kawesa
JUDGE
13.11.2015