

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
FAMILY DIVISION
CIVIL SUIT NO.89 OF 2014

- 1. SILVER WAKAYINJA**
- 2. JUSTIN WAKAYINJA**
- 3. CYRUS OPIGO.....**
.....PLAINTIFFS

VERSUS

- 1. PETWA BABIRYE (Administratrix of the estate of the late Silvester Wakayinja).....**
.....DEFENDANT

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

JUDGMENT

The plaintiffs brought this suit against the defendant for revocation of probate and administration granted to the defendant in Probate and Administration Cause No. 473 of 2001 in the High Court of Uganda at Kampala; a declaration that the plaintiffs and other grandchildren are entitled to a share in the estate of the late Silvester Wakayinja as beneficiaries; an order directing the defendant to furnish a true account and inventory of the administration of the estate of the late Silvester Wakayinja; an order of permanent injunction restraining the defendant from undertaking any further dealings with the estate of the late Silvester Wakayinja; an order for the other property belonging to the deceased which shall be identified and/or traced to be restored to the said deceased's estate; an order for the grant of letters of administration of the estate of the late Silvester Wakayinja to the plaintiffs to manage and implement the deceased's wishes as implemented in the last will; general damages for losses caused to the estate of the late Silvester Wakayinja; a permanent injunction restraining the defendant from administering or in any way meddling with the estate of the late Silvester Wakayinja; costs of the

suit; interest at the rate of 6% on general damages from the date of judgement till payment in full; and any other relief this honourable court shall deem fit and just.

The plaintiffs' case is that they are grandchildren of the late Silvester Wakayinja who died testate on 18th September 1997. The 1st and 2nd plaintiffs are biological children of the late Peter Wakayinja while the 3rd plaintiff is a biological son of the late Angella Kaseke. The late Silvester Wakayinja was survived by seven children including the defendant. On 7th September 2001 the defendant together with Angella Kaseke and Peter Wakayinja obtained letters of administration to the estate of the plaintiffs' grandfather. In his will the plaintiffs' grandfather had distributed land to the plaintiffs' deceased parents, which the plaintiffs, their mothers and other beneficiaries have been utilizing. However, after the death of her co administrators to their late grandfathers' estate, the defendant started issuing eviction threats to the plaintiffs, their families and other beneficiaries. The plaintiffs also contend that the defendant has willfully and without reasonable cause omitted to exhibit an inventory and account of the administration of the estate of the late Silvester Wakayinja, and has mismanaged or misappropriated the said estate for her selfish and personal gain. They also contend that the inventory purportedly filed on 28th September 2011 was done outside the six months' mandatory period.

The suit was set down for hearing *ex parte* by the Registrar of this Court under Order 9 rule 11(2) of the Civil Procedure Rules (CPR), following the defendant's failure to file a defence to the suit within the required fifteen days. The matter therefore proceeded *ex parte*. However, whether a case proceeds *ex parte* or not, the burden on part of the plaintiff to prove the case to the required standards remains, as was held in **Yoswa Kityo V Eriya Kaddu [1982] HCB 58**. The plaintiffs filed sworn witness statements. Their counsel filed written submissions in accordance with time schedules given by this court.

The matter will be deliberated along the following issues:-

- i) Whether the defendant willfully and without reasonable cause omitted to exhibit an inventory or account of the assets and liabilities of the estate within the required time.

- ii) Whether the defendant has exhibited an inventory which is untrue in a material aspect.
- iii) Whether there is just cause for revocation or annulment of the letters of administration granted to the defendant.
- iv) Whether the plaintiffs are entitled to the prayers, reliefs or remedies sought.

Issue i: Whether the defendant willfully and without reasonable cause omitted to exhibit an inventory or account of the assets and liabilities of the estate within the required time.

The 1st and 2nd plaintiffs' sworn witness statements reveal that the defendant, jointly with Peter Wakayinja and Angella Kaseke, obtained probate to the estate of the late Silvester Wakayinja, the plaintiffs' grandfather who died testate, vide AC 473/2001. The late Silvester Wakayinja left behind several unregistered immovable properties in Busowa village, Bugiri district, and a piece of undeveloped land with commercial premises at Naluwere trading centre now comprised in LRV 3981 Folio 18 Plot 10 Lwankinda Road and 28 Grant street, Bugiri. The proceeds from the estate under the management of Silver Estates were to be used inter alia for the plaintiffs' and other beneficiaries' education and the rest to be banked untouched beginning 1998. The same could be lent out to the deceased's children including the defendant.

The sworn witness statements also reveal that the administrators, especially the defendant, who is the sole surviving administrator of the estate, did not implement the provisions of the will. The plaintiffs later established upon perusal of the record of AC 473/2001 that the estate of their late grandfather was not administered in conformity with the law; that the defendant had among other things failed to file an inventory in court or give an account regarding the management and affairs of the estate; that the inventory purportedly filed by the defendant on 28/09/2011 was done outside the mandatory six months' period; and that the said inventory is untrue in that the land at Naluwere is in the defendant's personal names jointly with Mary Naigembe, Consulta Wamudhuha and Agripina Nkoma; and the defendant is solely responsible for collecting income from the said premises.

This evidence is corroborated by annexures to their sworn witness statements namely copies of the will of the late Silvester Wakayinja, the grant in AC 473/2001, the defendant's inventory of 28/09/2011 filed in this court, a letter from the Registrar of this court dated 27/01/2009 that the defendant was the sole surviving administrator of the estate following the death of the other two administrators, and copies of the certificate of title to land comprised in LRV 3981 Folio 18 Plot 10 Lwankinda Road, and 28 Grant street, Bugiri, among other related documents.

The record shows that on 22/05/2012 the beneficiaries through their counsel M/S Rugambwa, Gadala Advocates wrote to the Deputy Registrar of this court to establish whether an inventory has ever been filed by the administrator of the estate of the late Silvester Wakayinja. The Registrar replied by a letter dated 13/06/2013 confirming that an inventory dated 26/09/2011 was filed in court on 28/09/2011. A copy of the inventory in question is annexed as **E** and **E3** to the 1st and 2nd plaintiffs' sworn witness statements respectively. It was filed in court on 28/09/2011. The grant of probate is annexed as **B** and **B3** to the 1st and 2nd plaintiffs' sworn witness statements respectively. It shows that the grant was initially issued to Peter Wakayinja, Angella Kaseke and Petwa Babirye (defendant) on 7th September 2001. Later, the Deputy Registrar of this court issued a letter dated 27th January 2009, annexed as **BB** to the 1st and 2nd plaintiffs' witness statements. It was to the effect that following the death of the other two administrators, the defendant became the sole surviving administrator of the estate of the late Sylvester Wakayinja by virtue of section 273 of the Succession Act.

Section 278 of the Succession Act requires the executor or administrator to, within six months from the grant of probate or letters of administration, or within such further time as the same court may from time to time appoint, exhibit an inventory containing a true and full estimate of all the property in possession, and all credits and debts owing by any person to which the executor or administrator is entitled in that character, to the court which granted the probate or letters of administration. In the same manner, the executor or administrator shall, within one year or such other time as the court may from time to time appoint, exhibit an account of the estate, showing the assets which have come to his or her hands, and the manner in which they have been applied or disposed of. The said legal provisions are mandatory.

In this case, the inventory filed by the defendant was clearly outside the six months period required by the Succession Act and the Administration Bond the defendant signed before a Commissioner for Oaths prior to being granted probate. There is no evidence to show that there was reasonable cause for the defendant not to file the said inventory, or that the court had extended the period within which to file the inventory and account of the estate, or that the defendant's omission to file the inventory and account was not willful. In the same inventory, in clause 3, the defendant stated that no income has been realized from the said properties, since, according to her, "*they are being utilized by selfish end users who have not allowed the administrator to take her responsibility over the estate*". She declared the inventory to be a true and accurate account of the property of the late Silvester Wakayinja. In a way, this reads like the inventory also included an account of the estate, in as far as the statement that there was no income registered from the estate is concerned.

In view of the adduced evidence and the foregoing legal provisions, this court finds that the defendant willfully and without reasonable cause omitted to exhibit an inventory or account of the assets and liabilities of the estate within the required period. This was a clear breach of the provisions of section 278 of the Succession Act which are mandatory.

Issue i is answered in the affirmative.

Issue ii: whether the defendant has exhibited an inventory which is untrue in a material aspect.

It is also the plaintiffs' case that the inventory purportedly filed by the defendant on 28/09/2011 is untrue in a material particular in so far as the plot of land measuring 0.096 at Naluwere is concerned. The plaintiffs maintain that the said property is not registered as property of the estate but is in the personal names of Mary Naigembe, Consulta Wamudhuha, Agripina Nkoma, and the defendant; and that the said persons are not registered as administrators of the estate of the late Silvester Wakayinja. The plaintiffs further maintain that the defendant is solely responsible for collecting income from the said premises.

Clause 2 of the inventory identified the property of the deceased to be solid land of approximately 90 acres not measured or surveyed at Busowa, Bugiri District; three

plots of land at Busowa, Bugiri District; ancestral burial ground at Busowa, Bugiri District; a plot of land of approximately 0.096 hectares with a commercial building at Naluwere Trading Centre; and land at Nawanjuki, Bugiri District.

It is clear from clause 2 of the inventory that the defendant exhibited the plot of land of approximately 0.096 hectares with a commercial building at Naluwere to court as part of the estate of the late Sylvester Wakayinja. The plaintiffs' affidavit evidence is to the effect that this plot is now comprised in Plot No. 10 Lwankinda Road, and 28 Grant Street Bugiri Town in Bugiri District. Copies of the certificate of title and of the lease by the Bugiri District Land Board, together with the search letter by the Commissioner Land Registration, Jinja, annexed as **C1** and **C2** to the 1st plaintiff's sworn witness statement, and as **C5** and **C6** to the 2nd plaintiff's sworn witness statement, however, shows that the said land is registered in the names of Mary Naigembe, Consulta Wamudhuha, Agripina Nkoma and Petwa Babirye (defendat) as joint tenants, and not as administrators of the estate of the late Sylvester Wakayinja. This was vide Instrument No. 413229 registered at 8.03 am on 19/05/2009.

This alone renders the defendant's inventory to this court untrue, at least regarding the plot of land at Naluwere. This is so, considering that the inventory was filed in September 2011, two years after the land was registered jointly in the names of the said persons who include the defendant.

Issue ii is answered in the affirmative.

Issue iii: Whether there is just cause for revocation or annulment of the probate and administration granted to the defendant.

Section 234 of the Succession Act Cap 162 provides that the grant of probate or letters of administration shall be revoked for just cause. Just cause is defined to mean that the proceedings to obtain the grant were defective in substance; the grant was obtained fraudulently by making a false suggestion or concealing from court something material to the case; the grant was obtained by means of an untrue allegation of a fact essential in a point of law to justify the grant though the allegation was made in ignorance or inadvertently; the grant has become useless and inoperative through circumstances; or **the person to whom the grant was made has willfully and without reasonable cause omitted to exhibit an**

inventory or account under Part XXXIV of the Act, or has exhibited an inventory which is untrue in a material aspect. (emphasis mine).

It is already a finding of this court on issues i and ii above that the defendant who is the sole surviving administrator of the estate of the late Silvester Wakayinja has willfully and without reasonable cause omitted to exhibit an inventory or account under Part XXXIV of the Act, and has exhibited an inventory which is untrue in a material aspect. Besides, the evidence on record has not been challenged or rebutted by the defendant. It was held in **Massa V Achen [1978] HCB 279** that an averment on oath which is neither denied nor rebutted is admitted as the true fact.

The defendant's conduct is in breach of the provisions of section 278 of the Succession Act, in addition to the Administration Bond she signed, since it bound her to administer the estate according to the law by filing true inventories and accounts pertaining to the estate, in respect of which she was granted the probate and administration.

In that regard, on the adduced evidence and authorities, it is my finding that there exists just cause for the revocation and/or annulment of the grant of probate and administration of the late Silvester Wakayinja's estate to the defendant.

Issue iii is therefore answered in the affirmative.

Issue iv: Whether the plaintiffs are entitled to the prayers, reliefs or remedies sought.

The plaintiffs have proved their case against the defendant that the defendant, who is the sole surviving administrator of the estate of the late Silvester Wakayinja, has willfully and without reasonable cause omitted to exhibit an inventory or account under Part XXXIV of the Act, and or has exhibited an inventory which is untrue in a material aspect. It has already been resolved against the defendant that there is just cause for revoking the probate granted to her by this court under 234 of the Succession Act. On that basis alone I would revoke the probate and administration granted to the defendant in respect of the estate of the late Silvester Wakayinja.

The plaintiffs prayed for an order for the grant of letters of administration of the estate of the late Silvester Wakayinja to the plaintiffs to manage and implement the deceased's wishes as implemented in the last will. The adduced evidence, which

has not been rebutted, shows that the estate of the late Silvester Wakayinja has, since 2001, when probate was granted to the three administrators, two of whom have since passed on, not been administered in conformity with the law and or the deceased's will.

This court is empowered under section 33 of the Judicature Act to grant such remedies, on such terms and conditions it thinks just, as any of the parties is entitled to in respect of any legal or equitable claim, so that matters in dispute may be completely or finally disposed of and multiplicities of legal proceedings are avoided. This is in addition to section 98 of the Civil Procedure Act which leaves this court with inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of court process. It is in that light that I would deem it fit, in the interests of justice, to grant the plaintiffs, who are beneficiaries to the estate of the late Silvester Wakayinja, and children of the two deceased administrators of the said estate, letters of administration to the said estate, with the will annexed, subject to the succession laws. This is to ensure that the wishes in the will of the deceased are finally implemented, the relevant inventories and accounts are filed, and the administration of the estate concluded within one year from the date of judgement. The conclusion of the administration of the said estate is long overdue.

The plaintiffs prayed for general damages, in addition to other reliefs. It is trite law that damages are the direct, natural or probable consequence of the act complained of. Such consequences may be loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering. Damages must be prayed and proved. See **Kampala District Land Board & George Mitala V Venansio Bamweyana SCCA 2/2007**. In **Robert Coussens V Attorney General Supreme Court Civil Appeal No. 8/1999** it was held that the object of an award of damages is to give the plaintiff compensation for the damage loss or injury suffered. Damages can be pecuniary or non pecuniary, the former comprising of all financial and material loss, like loss of profit and income, or expenses like medical expenses; and the latter representing all losses which do not represent inroad on a person's financial or material assets, like physical pain or injury to feelings.

There is evidence that the defendant has already used the grant to the prejudice of the plaintiffs as beneficiaries of the estate. The defendant's inventory which has

already been found to contain falsehoods, states in clause 3 that no income has been registered from the properties exhibited by the defendant. Yet, annexures **C1** and **C2** to the 1st plaintiff's sworn witness statement, and as **C5** and **C6** to the 2nd plaintiff's sworn witness statement, show that some of the land forming part of the estate, namely plot 10 Lwankinda Road and 28 Grant Street in Bugiri town has been mortgaged by the defendant to M/S Centenary Rural Development Bank vide instruments 438021 and 548780 on 26/10/2010 and 24/11/2011 respectively. The late Silvester Wakayinja's will, annexed as **A** and **A3** to the 1st and 2nd plaintiffs' sworn witness statements respectively, in clause 2, states that the administrators were to use the revenue to pay for, among other things, the education of his children and grandchildren. The inventory does not show that this was done. This leads to the conclusion that the defendant's use of the estate is not benefitting the plaintiffs as beneficiaries of the said estate.

The defendant's using the estate for her own personal gains, instead of administering it in accordance with the will to benefit the children and grandchildren of the deceased, subjects the said estate to loss and injury. An award of general damages to compensate for such loss and injury would not be misplaced in the given circumstances. I would, in the given circumstances, award general damages in the sum of twenty million Uganda Shillings (20,000,000/=).

All in all, I find that the plaintiffs are entitled to the orders sought against the defendant.

I therefore enter judgment for the plaintiffs against the defendant for:-

- (i) An order for revocation of probate and administration granted to the defendant in Probate and Administration Cause No. 473 of 2001 in the High Court of Uganda at Kampala.
- (ii) A declaration that the plaintiffs and other grandchildren of the deceased are entitled to a share in the estate of the late Silvester Wakayinja as beneficiaries.
- (iii) An order directing the defendant to furnish a true inventory and account of the administration of the estate of the late Silvester Wakayinja.

- (iv) An order of permanent injunction restraining the defendant from undertaking any further dealings with the estate of the late Silvester Wakayinja.
- (v) An order for the other property belonging to the deceased to be identified and/or traced so that it is restored to the said deceased's estate.
- (vi) An order for the grant of letters of administration with the will annexed, of the estate of the late Silvester Wakayinja, to the plaintiffs, subject to the succession laws, including them being properly identified by this court, to manage and implement the deceased's wishes as implemented in his last will, and to conclude the administration of the said estate within one year from the date of this judgement.
- (vii) General damages for losses caused to the estate of the late Silvester Wakayinja in the sum of U. Shs. 20,000,000/= (twenty million).
- (viii) Interest at the rate of 6% on general damages from the date of judgement till payment in full.
- (ix) A permanent injunction restraining the defendant from administering or in any way meddling with the estate of the late Silvester Wakayinja.
- (x) Costs of the suit.

I so order.

Dated at Kampala this 9th day of April 2015.

Percy Night Tuhaise

Judge.

