

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(FAMILY DIVISION)**

**ADMINISTRATION CAUSE No. 1558 OF 2018**

5 **DELAHAIJE JOSEPH JULIUS GEERTRUDA=====APPLICANT**

**Vs**

**1. KASOLO ROBINS ELLIS}**

**2. KISEMBO JOHN }=====RESPONDENTS**

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10 **Before: Hon. Lady Justice Olive Kazaarwe Mukwaya**

**RULING**

**Background**

On the 16<sup>th</sup> day of November 2018, this court delivered its ruling in Civil Suit No. 235 of 2017. In that matter the respondents' counsel in the instant application successfully argued that this  
15 court had no jurisdiction to entertain Civil Suit No. 235 of 2017 on grounds that the subject matter of the suit was the moveable property of the late Edmond Van Tongeren (EVT), a Dutch national, who was not domiciled in Uganda at the time of his death. This was primarily based on S.4 (2) of the Succession Act Cap 162 which states that the succession of moveable property of a deceased person shall be regulated by the law of the country where the deceased had their  
20 domicile.

After court delivered the said ruling, the applicants filed this application to reseal the grant of probate to the estate of the late EVT which was issued by the High Court in Kenya to the applicant on the 19<sup>th</sup> July 2018. The respondents on seeing the public notice of intention to reseal in the newspapers lodged a caveat objecting to the application. This court set this matter down  
25 for hearing of both parties and they were heard on the 17<sup>th</sup> January 2019 hence this ruling.

## The Issues

Prior to the hearing of this application this court, together with the parties, formulated the following issues for determination;

1. Whether the respondents had a legal right to lodge a caveat against reseal of the grant of probate with written will to the estate of the late EVT issued to the applicant by the High Court of the Republic of Kenya?
2. Whether the applicant should have proceeded by way of ordinary civil suit to have the issues in this matter resolved?
3. Whether the applicant was entitled to the reseal of the grant of probate with written will to the estate of the late EVT issued by the High Court of the Republic of Kenya?

I shall resolve issues 1 and 2 simultaneously.

## Issues 1 and 2

**Whether the respondents had a legal right to lodge a caveat against reseal of the grant of probate to the estate of the late EVT issued to the applicant by the High Court of the Republic of Kenya and whether the applicant should have proceeded by way of ordinary civil suit to have the issues in this matter resolved?**

## The Arguments

Counsel for the applicant, Mr. Peter Kauma, submitted that under the Probate (Resealing) Act Cap 160, there was no provision for objection by way of caveat. He argued that S. 265 of the Succession Act which provides for procedure in contentious matters is outside the scope and is in fact distinct from the Probate (Resealing) Act. While the former is in respect to applications for grant of probate or letters of administration, the latter refers specifically to matters where a grant has already been issued by a competent foreign court and the applicant merely seeks to have the grant enforceable in this jurisdiction.

Mr. Kauma went on to argue that even if this court were to find the caveat was not an erroneous mode of objection in this matter, the respondents themselves did not have any locus standi as objectors to the application for reseal. This is because they did not fall into any of the categories

of objectors envisaged by the law. They were not beneficiaries to the estate of the late EVT, as defined under the Succession Act neither were they creditors of the estate under S.4(2) of the Probate (Resealing) Act. He added that the respondents had no ‘caveatable interest’ as elaborated by the Hon. Justice G.M Okello as he then was, in Joyce K. Byabazaire & Anor v Frances Kyomu Katatumba Civil Suit No. 629 of 1992 at page 3, where the court found that the defendant, a girl friend of the deceased, was not a dependant relative of her deceased boyfriend and that since she had no protectable interest in the estate of the deceased, the caveat was not valid, it was misconceived and wrongly lodged.

It was Mr. Kauma’s further contention that the objection to the application for reseal by the respondents, if valid, was premature. Counsel relied on Hon. Katuntu & Anor. V MTN UGANDA LTD & Others HCCS 248/2012, at page 23, where the Hon. Justice Madrama reiterated what locus standi is as defined by Osborn’s Concise Law Dictionary 11<sup>th</sup> Edition, simply as, ‘A place of standing; The right to be heard in a court or other proceeding.’ Counsel submitted that, if indeed the respondents had lodged the caveat by virtue of business dealings with the deceased, their action was premature. Their issues could be taken up by the estate after the resealing of the grant has been concluded.

Counsel for the respondents, Mr. Michael Mayambala in reply, submitted that the respondents through their lawyers in Civil Suit 235 of 2017 had a ruling in their favour wherein this court had found that it had no jurisdiction to handle the succession matters relating to the moveable property of the estate of late EVT in Uganda and that ruling had not been overturned by any competent court of law. The costs awarded to the respondents in that matter were yet to be paid by the applicant and he remained a judgment debtor. Mr. Mayambala went on to submit that if the respondents had not lodged a caveat, this application would have proceeded as though it were non-contentious. The caveat was to challenge what was going on in this court. He went on to argue that the Succession Act cannot be divorced from these proceedings since the intention of this application is to ‘succeed’. Lodging of the caveat by the respondents was the only way they could bring their concerns to the attention of this court. Mr. Mayambala further submitted that the respondents are shareholders in the company where the deceased held shares and they had some interest in these proceedings.

On procedure, counsel for the respondent insisted that since this was a contentious matter, the applicants should have proceeded by way of ordinary civil suit as provided under S.265 of the Succession Act and not by letter to the court to have the matter resolved.

### **Resolution of Issues 1 and 2**

5 The Probate (Resealing) Act 1936 is a piece of legislation put in place by the British in her colonies. Uganda was not an exception. Its short title reads; ‘An Act relating to Commonwealth probates’.

Its purpose is explained in S.2 of the Act which provides as follows;

10 *Where a court of probate in any part of the Commonwealth in any foreign country, or a British court in a foreign country, has either before or after the passing of this Act granted probate or letters of administration in respect of the estate of a deceased person, the probate or letters so granted may, on being produced to, and a copy deposited with, the High Court, be sealed with the seal of that court, and thereupon shall be like force and effect, and have the same operation in Uganda as if granted by that court.*

15 This section, by the use of ‘may’ implies that the High Court is duty bound to exercise its discretion to consider the application. S.3 gives guidance on the issues for consideration. It provides as follows;

*The court shall, before sealing a probate or letters of administration under this Act, be satisfied-*

- 20 a) *that probate duty has been paid in respect of so much, if any, of the estate as is liable to probate duty in Uganda; and*
- b) *in the case of letters of administration, that security has been given in a sum sufficient in amount to cover the property, if any, in Uganda to which the letters of administration relate,*

*and may require such evidence as it thinks fit as to the domicile of the deceased person.*

25 Besides the reference to the court’s discretion by the use of the word ‘may’, there is no indication in the Act that contentious matters, such as this instant application, were ever envisaged under the Act. In probate matters under the Act, the court’s duty is limited to satisfying itself that the

conditions in S.3 have been met and this can be done by requiring the applicant for reseal of the grant to provide the necessary information and evidence for court's review and scrutiny. Information on whether the probate duty, if any had been paid and evidence of the domicile of the deceased person.

5 Further, under S.4 of the Act, if a creditor applied to court before resealing, requiring that adequate security be given for the payment of debts due from the estate to creditors residing in Uganda, the court may make that order, after being satisfied with the merits of that particular application.

This court combed through The Probate (Resealing) Rules S.I. 160-1 made under S.6 of the  
10 Probates (Resealing ) Act which were made to regulate the procedure and practice, including fees and costs in the High Court, on and incidental to an application for sealing a probate or letters of administration. The rules provide for who may apply, the mode of application, the manner of applying and if the Registrar so requires, an advertisement of the application in the Form B in the Schedule to the rules, in such manner as may be directed; supported by an oath in  
15 Form C in the Schedule to the rules.

In the instant application, the advertisement for reseal was published in the newspaper and this was how the respondents learned of the applicant's intention to reseal the grant.

On whether the respondents had a legal right to lodge a caveat, counsel for the respondents submitted that the respondents are not beneficiaries neither are they creditors. They lodged the  
20 caveat on grounds that the applicant is a judgment debtor in Civil Suit 235 of 2017 and he owes costs which he has not yet paid. Secondly, the respondents are co-shareholders in the company where the late EVT held shares and on that premise, they were interested parties to the application.

To this, Counsel for the applicant submitted that the claims of the respondents were premature  
25 and could be sufficiently settled after the reseal had been granted.

It is this court's opinion that once S.4 of the Probates (Resealing) Rules comes into play and an advertisement of the notice to reseal is published, a door is opened wide to allow any person, with any question of contention, to respond to the notice of the court. The matter ceases to be one

between the court and the applicant, the scope is expanded to include third parties with valid claims.

There is some truth to counsel for the applicant's contention that the Probate (Resealing) Act is outside the scope of the Succession Act. The former deals with probate granted in foreign countries within the Commonwealth, while the latter succession matters within Uganda. The effect of that truth however, is not to make the two pieces of legislation separate and distinct from each other but to make them similar in terms of the duty of the court upon receipt of such applications.

As part of the procedure, local grants are advertised under the Succession Act of Uganda and the courts have over the years indicated who does and does not have the right to object to these applications through the determination of civil suits between petitioners/applicants and objectors under S.265 of the Succession Act, as counsel for the applicants has rightly pointed out.

Black's Law Dictionary defines the word 'caveat'. It is a Latin phrase which means; 'Let him beware.' A formal notice or warning given by a party interested to a court, judge, or ministerial officer against the performance of certain acts within his power and jurisdiction (See <http://thelawdictionary.org>).

The lodging of the caveat by the respondents served to bring their claims to the attention of the court. This court's duty was to determine the veracity of those claims and to make a decision as to whether it was misconceived, premature or valid.

This court is of the opinion that with regard to the resealing of grants, in cases of contention, the court should not shut out objectors but let them be heard. The court must then make a reasoned decision to accept or deny the reseal based on the evidence presented by the parties. In 1936, when the Probates (Resealing) Act came into force, Uganda was merely a British colony. On the 9<sup>th</sup> of October 1962, that status changed. The Republic of Uganda is a sovereign country and has been for the last half century. The law must catch up with the times and the facts. Sovereignty dictates that the process of resealing a foreign grant must be an orderly and meticulous one, especially in cases of contention like the instant application. Ugandan courts must be allowed to exercise their powers as guaranteed under Chapter 8 of the Constitution of the Republic of Uganda, before they can proceed to give effect to a foreign grant. The very fact that the grant is

made by a foreign country makes the foregoing process even more vital. This shall ensure that the Ugandan High Court seal is not reduced to a mere rubber stamp in such matters.

As to whether the applicants should have filed a civil suit in response to the caveat, it is clear that the applicants were taken by surprise by the unprecedented actions of the respondents whom they  
5 believed had no locus standi. The Probate (Resealing) Rules are silent on the handling of contentious applications and therefore no procedure is provided. This court invoked its inherent powers under S.98 of the Civil Procedure Act and summoned the applicant and the objectors who are the respondents to be heard in open court on the basis of the available documentation and affidavit evidence. The parties were both heard on the issues above. Counsel for the  
10 respondents' submissions revealed allegations of fraud against the applicant which allegations required a much higher standard of proof than affidavit evidence could provide.

This court finds that an ordinary civil suit is the best mode of procedure to have all the matters in contention heard and concluded between the parties. However, the failure to file a suit in the instant application did not, in this court's opinion, render the proceedings irregular. There were  
15 no rules of procedure to go by under the Act and this court took the most expedient route to have the matters between the parties determined.

### **Issue 3**

#### **Whether the applicant was entitled to the reseal of the grant of probate with written will to the estate of the late EVT issued by the High Court of the Republic of Kenya?**

20 The applicant, Mr. Delahaije Joseph Julius Geertruda filed this application seeking a reseal of the grant of probate issued by the High Court of Kenya in respect to the estate of the late EVT. The grant was attached to the application and marked 'B'. Mr. Geertruda's grounds for the application were that the late EVT was the majority share holder in six named Ugandan companies whose shares were valued at over UGX100,000,000/=. The reseal was intended to  
25 have the grant issued by the High Court in Kenya recognised in Uganda.

Mr. Geertruda filed this application in his capacity as a holder of powers of attorney (A2) granted to him by the widow of late EVT, Ms. Joyce Jelimo Maru, who according to a copy of the translated Will of the late EVT, is his named executor. Both the will and the power of attorney

are documents which were executed in the Netherlands. The Power of Attorney document was executed on the 15<sup>th</sup> of March 2017 at Zwolle, Netherlands in the presence of a Mr. A.P Fijn, a Notary Public.

5 A perusal of the petition filed by the applicant in the High Court of Kenya at Nairobi for grant of probate, with the will annexed, to the estate of the late EVT indicated that the applicant made the petition under the Kenyan Law of Succession Act, Fifth Schedule, paragraph 4 and the Probate and Administration Rules, rule 12.

Paragraph 4 of the Fifth Schedule provides as follows;

10 4. *Where any executor is absent from Kenya and there is no executor within Kenya willing to act, letters of administration with will annexed may be granted to the attorney of the absent executor, for the use and benefit of his principal, limited until he shall obtain probate or letters of administration granted to himself.*

In the preamble to the petition to the Kenya court the applicant states;

15 *‘I, Julius Joseph Geertruda Delahaije.....hereby petition this Honourable Court for a Grant of Letters of Administration with the will annexed of the estate of the above named Edmond van Tongeren(‘the Deceased’) limited until the executor named in the below mentioned will of the deceased shall obtain probate granted to herself.’*

The applicant in paragraph 2 of his petition avers that;

20 *‘The said Joyce Jelimo Maru who is absent from Kenya as she lives in the Netherlands has appointed me to be her attorney for the purpose hereof as is shown on the Power of Attorney annexed to my affidavit. No person who lives in Kenya was appointed as an executor in the said will.’*

25 Under Paragraph 9 of the affidavit of the applicant sworn in support of the petition, the applicant refers the court to a schedule containing a full inventory of the assets and liabilities of the deceased in Kenya at the date of his death.

In that petition, the applicant stated that domicile of the late EVT was in Nairobi Kenya.



When the applicant filed Civil Suit 235 of 2017 against the respondents, in this court, he averred in his petition that the late EVT was a citizen of and was domiciled in the Netherlands at Zwolle. It was on this basis that this court went ahead to dismiss that suit for want of jurisdiction since the petition related to the moveable property, of a deceased person who was domiciled outside  
5 Uganda at the time of his death. This court even went on to advise the applicant to file his petition in Europe since he stated that the late EVT was domiciled in the Netherlands.

### **The Arguments**

Counsel for the applicants submitted that the High Court in Kenya at Nairobi had declared itself on the domicile of the late EVT following consideration of the petition filed by the applicant and  
10 that it was an error for the previous advocates representing the applicant to state in the petition filed in Uganda under Civil Suit 235 of 2017 that the late EVT was domiciled in the Netherlands. He added that the translation of the will of the late EVT indicated that the late EVT was domiciled in Nairobi, Kenya.

In reply to this submission, counsel for the respondents contended that the applicant petitioned  
15 two different courts and gave two different domiciles for the late EVT in each of those petitions. In his petition to the High Court in Kenya at Nairobi vide Succession Cause No. 584 of 2017; he stated that the late EVT was domiciled in Nairobi Kenya while in his petition to this court vide High Court Probate Cause No. 1069 of 2017, he stated that the deceased was domiciled in the Netherlands. Counsel for the respondents concluded by stating that the intention of the applicant  
20 was to defraud.

This Court directed both parties to give their definition of domicile. Counsel for the applicant cited the Legal dictionary which defines domicile to mean;

*‘An individual’s principal place of residence the place to which he intends to return when he goes out. The location of a person’s domicile is typically determined by his intent, as it is the  
25 place he has established his home, having no plan to vacate it soon. In a legal sense, an individual’s domicile becomes important in determining in which court he may file a legal action, and to which state he pays his taxes.’* See <https://legaldictionary.net/domicile/> Counsel for the applicant reiterated their submissions that the late EVT’s permanent residence was in

Nairobi where he lived and worked all his life and the court in Kenya had declared itself on the matter.

Counsel for the respondents cited Black's Law Dictionary 8<sup>th</sup> Edition at page 523; The Domicile is defined as; '*The Place at which a person has been physically present and that the person regards as home to which that person intends to return even though currently residing elsewhere.*' As far as the respondents were concerned, this definition implied that the late EVT's domicile was in the Netherlands.

### **Resolution of Issue 3**

This court observed that the applicant stated that the late EVT was domiciled in the Netherlands when he unsuccessfully petitioned this court for a grant of probate. He signed the petition and this court fully relied on it in making its ruling in Civil Suit 235 of 2017. On the 27<sup>th</sup> of April 2018, the same applicant told the High Court in Kenya, vide Succession Cause No. 584 of 2017 that the late EVT was domiciled in Kenya. I find it very difficult to believe that the applicant was not aware of the contents of the Ugandan petition before he affixed his signature to it. There is no evidence to suggest that he is illiterate in the English language to justify placing the 'error' solely at the door of his advocates at the time.

Secondly, under Succession Cause No. 584 of 2017, the applicant emphasised that he was petitioning for a 'limited grant' until the Executor named in the Will returned to Kenya to apply for the grant of probate. This is because the applicant only derived his authority from the power of attorney granted to him by the executor to the Will of the late EVT, Ms. Joyce Jelimo Maru. The petition was for a '*grant durante absentia*' under the Kenya Law of Succession Act which provides that where the personal representative is outside the jurisdiction, the court may, under paragraphs 4,5 and 6 of the 5<sup>th</sup> schedule, grant representation to another person, limited to the duration of the absence of the personal representative.

In Re Mauchauffee (1969) EA 424, Harris J, directed that a grant be made to a petitioner without citing her sister who was out of the country, but limited until the sister herself applied for and obtained a grant. The applicant was able to obtain the grant from Kenya by stating that Ms. Maru was absent from Kenya. The grant according to the cited case should have been limited until Ms. Maru returned to Kenya but it was not.

In the matter before this court, the High Court in Kenya at Nairobi proceeded to issue the grant of probate to the applicant as follows:

5        *‘Be it known that on the 19<sup>th</sup> day of July 2018, the last written will of all the estate of Edmond van Tongeren deceased late of Nairobi who died domiciled in The Republic of Kenya on the*  
*13<sup>th</sup> July 2016 at Zwolle a copy of which will is hereto annexed was proved in this court and*  
*that **administration of all the estate of the deceased which by law devolves to and vests in***  
***his personal representative were granted by this court to Julius Joseph Geertruda***  
***Delahaije of...Nairobi the executor named in the said will** (emphasis mine) *having**  
10        *undertaken faithfully to administer such estate according to law and to render a just and true*  
*account thereof whenever required by law to do so.’*

There was no limitation in duration of the grant and the grant is in respect to ALL the estate of the late EVT including property within the Netherlands. The powers of attorney granted to the applicant categorically limit the scope of the estate to property outside the Netherlands, according to the ‘executorship’ power attorney, Ms. Joyce Jelimo Maru declared as follows;

15        *‘in view of the foregoing to wish to exercise her power to add an executor to herself, exclusively in respect of the goods located outside the Netherlands;*

*hereby grant power of attorney to Mr. Julius Joseph Geertruda Delahaije, born in Schinveld (the Netherlands) on 19<sup>th</sup> March 1959, to represent her in the settlement of the testator’s estate, including the transfer of shares for purposes of settlement of the estate, to the extent of the goods*  
20        *located outside the Netherlands (emphasis mine).*

It was clear from the will of the late EVT that he owned property all over the world. The grant from the High Court of Kenya, from its plain reading purported to give the applicant powers to administer all the properties under the Will regardless of their location. This vast authority was outside the ambit of the powers of attorney granted to the applicant. Only the named Executor of  
25        the Will of the late EVT was entitled to such rights.

The applicant has not given this court a plausible explanation as to why his petitions to the courts in Kenya and Uganda bore different domiciles for the late EVT. He has not explained why he filed simultaneous petitions in two jurisdictions seeking to manage one estate. He has also not

explained how his petition for a limited grant in Kenya resulted into a grant for the management of the entire estate of the late EVT.

This court can only speculate at the answers to these questions. The allegations of fraud against the applicant were not proved to the required standard by the respondents and it is for that reason  
5 that this court did not dwell on them. The answers to the foregoing questions are not as important as the poor impression of the applicant created by the existence of the questions themselves.

On domicile, this court read through the translated will of the late EVT. On page 1 of the document it states:

*‘Mr. Edmond van Tongeren, born in Dordrecht (the Netherlands) on the eighteenth day of  
10 November nineteen hundred and thirty-five, residing at Box 43239, 12 Kisembe Road, Langata, Nairobi (Kenya)...’*

And page 9 of the translated will of the late EVT, it reads as follows;

*‘XIV.CHOICE OF LAW.*

*‘The descent and settlement of my estate will be governed by the laws of the Netherlands as the  
15 exclusive inheritance law.’*

This will was not available when this court handled Civil Suit 235/2017. Thankfully it is available now. The late EVT may have lived and worked in Kenya but he died testate and clearly spelt out which law he wanted to govern the settlement of his estate; ‘the laws of the Netherlands as the exclusive inheritance law’. There is therefore no reason for this court to lend its hand in  
20 doing anything to the contrary to the wishes of the late EVT by resealing a grant to the estate of the late EVT issued under the Succession Laws of Kenya.

The application to reseal the grant of probate with written will to Julius Joseph Geertruda Delahaije by the High Court of Kenya at Nairobi is denied.

Before I take leave of this matter, I wish to point out that the late EVT in his wisdom named his  
25 wife Ms. Joyce Jelimo Maru as executor of his will. It is this court’s opinion that she should personally carry out her duties as executor as her late husband would have wished.

Application is dismissed with costs.

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**Olive Kazaarwe Mukwaya**

5 **JUDGE**

**Dated at Kampala this 24<sup>th</sup> day of January 2019**

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