

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(FAMILY DIVISION)

CIVIL SUIT NO. 150 OF 2016

HERBERT KOLYA

=====

PLAINTIFF

Through his attorney Miriam Nambi

VERSUS

EKIRIYA MAWEMUKO KOLYA

=====

DEFENDANT

BEFORE: JUSTICE GODFREY NAMUNDI

JUDGMENT


The plaintiff brought this suit against the defendant for:

- An order directing the defendant to provide an account for all the assets of the estate of the late Israel Kimomeko Kolya,
- An order directing the defendant to distribute the property in the estate of late Israel Kikomeko Kolya in accordance with the Will,
- In the alternative, the letters of Administration granted to Defendant be revoked and,
- Costs of the suit.

The plaintiff is an administrator of the estate of late Herbert Lukanga Kolya, a paternal grandson of the defendant and the late Israel Kikomeko Kolya.

The plaintiff's case is that the late Israel Kikomeko Kolya died testate in 1997. On or about 5th April 2000 the defendant obtained letters of administration to the estate of late Israel Kikomeko Kolya Vide Chief Magistrate's Court of Mengo at Mengo Administration Cause No. 40 of 2000 without annexing a will yet the late Israel Kikomeko Kolya made a will on 27th January, 1997. Therein he bequeathed to the father of the plaintiff late Herbert Lukanga Kolya his home at Namirembe comprised in LRV 1139 folio 1 Kibuga Block 10 plot 864 and the other properties were given to Kate Nabagala, Samali Gwedda and Sarah Nalukwago (Sarah Mponye) and to other beneficiaries and the land at Butega was bequeathed to all his children.

That the defendant concealed the will and purported that the estate of late Israel Kikomeko Kolya was small whereas not. That the defendant has failed or refused to distribute the entire estate and without any justifiable cause failed to make a full or true inventory.


 The defendant filed a defence where she denied all the allegations and averred that she was legally granted letters of administration for the estate of the late husband Israel Kikomeko Kolya. This followed the agreement and decision of family members to dispense with the will, since the same was defective. She admitted to have not administered the estate.

The plaintiff filed sworn witness statements and the defendant gave oral evidence and DW2 made a witness statement. Their counsel filed written submissions in accordance with time schedules given by this court which I have considered in reaching this decision.

Decision of court

The issues for court's determination are;-

- i) Whether the plaintiff, as an administrator of the estate of the late Herbert kolya, is entitled to the property at Namirembe subject to the occupation rights of the defendants
- ii) Whether it was proper and lawful for the defendant to apply for letters of administration to administer the estate of the late Israel kikomeko kolya without annexing the will.
- iii) Whether the defendant discharged her statutory obligation in respect of the above letters of administration.
- iv) Whether the plaintiff is entitled to the remedies sought.

 **Issue 1: Whether the plaintiff, as an administrator of the estate of the late Herbert kolya, is entitled to the property at Namirembe subject to the occupation rights of the defendants**

Plaintiff's evidence

PW2 Herbert Kolya (plaintiff) stated that his late grandfather Israel Kikomeko Kolya had given a portion out of his land at Namirembe comprised in LRV 1139 Folio 1 kibuga Block 10 plot 864 to his father Herbert Lukanga Kolya whereupon he constructed a house they were living in at the time of his death and other houses on the lower part of the said plot for purposes of generating rental income.

Further that he was informed by his late father Herbert Lukanga Kolya that the said land was bequeathed to him (Lukanga Kolya) by his father the late

Isreal Kikomeko Kolya and that the defendant was to remain in occupation until death.

That after the death of his father, that his mother approached the defendant and requested for a copy of the land title since they wanted to put a second gate and a wall fence separating the two portions but the defendant refused to surrender it claiming that the late Isreal Kikomeko Kolya's house was her property.

This evidence was corroborated by the testimony of PWI Owek Dan Mulika, who attested to the will. He confirmed that the late Isreal Kikomeko Kolya executed a Will on 2nd January, 1997 and that therein, he transferred his property on Block LRV Folio 110 Plot 864 to his heir Herbert Lukanga Kolya where Herbert Lukanga had his personal house.

He further stated in cross examination that prior to the death of the Isreal Kikomeko Kolya he had allowed Herbert Lukanga to build his home on the said land.



Defence evidence

DWI Ekiriya Mawemuko Kolya (defendant) stated that she was married to Israel kikomeko kolya who died in 1997 and begat six children during the said marriage.

That her husband acquired the suit property prior to their marriage. It had a small mud and wattle house. They built another house to which she contributed to its construction with the assistance of her father. She participated in making the bricks and building. That she used to cultivate and


was working as a Mid-Wife at Mengo Hospital. That they gave part of the land at their residence to their son the late Herbert Lukanga.

Further that late Israel Kikomeko Kolya died testate and the Will was read at the last funeral rights by Hon. Dan Muliika (former Prime Minister of Buganda). That the deceased bequeathed the matrimonial property at Namirembe to Herbert and the property in Makindye which is registered in her names under Buganda land board lease to Kate Samalie and DW2.

That she does not agree with the Will because the deceased gave away the matrimonial home which she had contributed greatly to its construction since the late Isreal Kikomeko Kolya had insufficient funds.

She further stated in cross examination that during the life time of the late Isreal Kikomeko Kolya, they gave a portion out of the land at Namirembe to Herbert Lukanga who eventually developed it.

That she's not interested in that part and that the same does not form part of the estate of late Isreal Kikomeko Kolya.

 **DW2 Sarah Kolya Mponye** daughter of the defendant stated that her parents late Isreal Kikomeko Kolya and DW1 (defendant) lived together in their matrimonial home at Namirembe until the death of her father in 1997. That the defendant was gainfully employed as a midwife at Mengo Hospital and did farming to supplement the family income.

That in 1980, her parents gave her elder brother Herbert Lukanga Kolya the upper part of their home as a gift which to date is under the sole management of the plaintiff. When her father passed on, her cousin Owekitibwa Dan Mulika read the will and thereafter handed it to the Herbert Lukanga Kolya. Then family members who gathered at the reading of the will rejected it

because it the testator gave the defendant's matrimonial home to the heir and her house in Makindye to the daughters Kate Samalie and herself.

Under this issue it is imperative for court to first determine whether the suit property is a matrimonial property as claimed by the defendant and the rights of the defendant in succession?

Justice B kainamura in the case of Basheijja V Basheija & Anor D.C NO 12/2005(2013) classified property under five clusters and held that the home of the couple irrespective of when it came into existence amounts to matrimonial property.

Further In the case of **Rwabinumi Vs. Bahimbisomwe Civil Appeal No. 10 of 2009** citing with approval the authority of **Kagga Vs Kagga (High Court Divorce Cause No.11/05)**, the Supreme Court did recognize the un monetized contribution of a wife where Justice Mwangusya observed that, *"Our courts have established a principle which recognizes each spouse's contribution to acquisition of property and this contribution may be direct, where the contribution is monetary or indirect, where a spouse offers domestic services.....when distributing the property of a divorced couple, it is immaterial that one of the spouses was not financially endowed as the other as this case clearly showed that while the first respondent was the financial muscle behind all the wealth they acquired, the contribution of the petitioner is no less important than that made by the respondent."*

The defendant (DW1) stated that her husband acquired the suit property prior to their marriage; it had a small mud and wattle house. They built another house to whose construction she with the assistance of her father

using her income from to farming and her salary as mid-wife at Mengo Hospital. That she participated in making the bricks and building,

This evidence was corroborated by the evidence of DW2 who stated that DW1 (defendant) lived together with her late husband Israel Kikomeko Kolya in their matrimonial home at Namirembe until he died in 1997. That the defendant was gainfully employed as midwife at Mengo Hospital and did farming to supplement the family income.

I therefore find that the land at Namirembe comprised in LRV 1139 Folio 1 kibuga Block 10 plot 864 is a matrimonial property.

In the instant case the late Israel kikomeko Kolya stated in his will that

“My land and main home I mentioned above at Namirembe, I give it to my heir, but my wife has to say there until she dies or unless when she remarries then the heir is free to own the whole property”.

In my view the statement above, the deceased exulted the heir above the widow. A culture practice that where the heir inherits matrimonial home denying widows proprietary rights is discriminatory in nature.

According to **Article 32 (2) of the Constitution** customs, cultures and traditions that are against the dignity, interests or welfare of women are prohibited.

Article 5 of the **Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)** affirms the same principle when it urges States to modify social and cultural patterns of conduct of men and women with a view to achieving elimination of prejudices, customary and

other practices which are based on the idea of inferiority or superiority of either of the sexes.


Men and women are entitled to equal rights in marriage, during marriage and at its dissolution. See **Article 31(1) of the constitution**.

Furthermore, **Article 21(2) of the Constitution** forbids discrimination on grounds of sex. Discrimination is defined under Article 21(3) as follows:

'To give different treatment to different persons attributable only or mainly to their description by sex.....'

It was held in the case of **Adong Simon and others Vs Opolot David,**

Soroti Civil Appeal No. 46 of 2013. that the widow had a right to dispose of the land she inherited from her deceased husband as surviving spouse in light of Article 31 (1) of the Constitution that confers on men and women equal rights at marriage, during marriage and at its dissolution.

 Therefore, as death leads to dissolution of marriage, defendant as a surviving spouse has a right to inherit from her husband and she's entitled to benefit from her late husband's estate.

It was unlawful for the late Israel Kikomeko Kolya to bequeath the matrimonial property to his heir Herbert Lukanga kolya without his spouse's permission and the same could not devolve to the son when the widow survived him.

In conclusion the plaintiff as an administrator of the estate of the late Herbert kolya, is not entitled to the property at Namirembe. The same being a matrimonial property it passed on to the widow (defendant) upon the death

of her husband Israel Kikomeko Kolya and she reserves the rights to deal with it in any way she deems fit.

However since the defendant is not interested in the part given to the late Herbert Lukanga Kolya by his father Israel Kikomeko Kolya while he was still alive, the plaintiff being an administrator of the estate Herbert Lukanga Kolya is to continue occupying the same.

Issue 2: Whether it was proper and lawful for the Defendant to apply for Letters of Administration to administer the estate of the Late Isreal Kikomeko Kolya without annexing the Will.

This issue arose from the fact the defendant applied for letters of administration in respect of the estate of late Israel Kikomeko Kolya from Mengo Chief Magistrate Court without annexing the will yet the deceased died testate.

PW2 claims that the defendant concealed the Will while applying for Letters of Administration in respect of the estate of the late Israel kikomeko.

DW1 and DW2 admit that the Israel Kikomeko Kolya died testate and the Will was read at the last funeral rights by Daniel Muliika retired katikiro of Buganda.


DW1 stated that she and children did not agree with Will because in the said Will her husband (Israel Kikomeko Kolya) gave away her property in Makindye, which is registered in her name under Buganda Land Board.

He also gave away the matrimonial Home at Namirembe to the heir (Herbert Lukanga Kolya) yet she contributed greatly to its construction since her husband was not able because he had no sufficient means to develop the said property.

This evidence was corroborated by the testimony of DW2 Sarah Mponye Kolya who stated that a family meeting was held where all the beneficiaries rejected the Will because the testator bequeathed the matrimonial home at Namirembe to his son and the defendant's house in Makindye to his daughters, Kate Samali and Sarah (DW2).

That as a family they agreed that, DW1 be assisted by the Late Herbert Lukanga Kolya to pursue Letters of Administration for their father estate.

She further stated that indeed Herbert Lukanga Kolya helped DW1 to obtain Letters of Administration from Mengo Court, which were used to withdraw the money from her late father's Account in then Standard Bank and to sell and transfer a vehicle. Thereafter Herbert Lukanga Kolya kept the Letters of Administration until his death.



All that was done with consent of all family members including the children abroad.

It is incumbent upon the applicant to annex the Will on the petition for Letters of Administration. However in the instant case, the applicant did not attach the Will to the application for Letters of Administration owing to the fact that she and the beneficiaries found the Will to be defective because the testator bequeathed property which did not belong to him.

I had the benefit to peruse the Will in question. Indeed I have confirmed that the testator bequeathed matrimonial property to the heir, late Herbert Kolya

and the four rental houses at Makindye were given to his children Salami and Sarah (DW2)

The defendant claimed that the four rental houses at Makindye given Samali and Sarah (DW2) belong to her having bought the same from an old woman but the agreement was stolen during the uprising in 1966. She further stated that she registered it in her name under Buganda Land Board in 1966.

This evidence was corroborated by the testimony of DW2 who stated that the land at Makindye was acquired in the 1960's by her mother when her father failed to purchase it.

This evidence was not challenged nor rebutted by the plaintiff therefore courts takes it to be a true fact.

In circumstances where the testator bequeaths property which doesn't belong to him or her in a Will, such bequests fails. Court cannot sever the Will by separating the bequests which are contested from those which are not genuine. With such a defective Will, the defendant was right to abandon it while applying for Letters of Administration and treat the estate as an intestate estate.

Section 24 of the succession Act cap 162 provides that a person dies intestate in respect of all property which has not been disposed by a valid testamentary disposition.

Since the Will purportedly made by the late Israel Kikomeko Kolya is defective court takes it that the deceased died intestate.

Under **Section 25 of the succession Act cap 162** all the property in an intestate devolves upon the personal representative of the deceased upon trust for those persons entitled to the property under this act.

The defendant being widow (surviving spouse), she was the most appropriate person to apply for Letters of Administration. See ***Kemutogo V Katuramu* 91992-1993) HCB 155.**

I find that, it was proper and lawful for the Defendant to apply for Letters of Administration to administer the estate of the Late Israel Kikomeko Kolya without annexing the Will.

Further the plaintiff claims that the defendant obtained Letters of Administration from the Chief Magistrates' court of upon declaring the estate of late Israel Kikomeko Kolya a small estate where not.

According to **section 191 Of the succession Act Cap 162**, except as hereafter provided, but subject to section 4 of the Administrator General's Act, no right to any part of the property of a person who has died intestate shall be established in any court of justice, unless Letters of Administration have first been granted by a court of competent jurisdiction.

Letters of administration cannot be revoked or annulled for want of jurisdiction if during the administration the estate it is subsequently discovered that the value of the estate is greater than the value of the estate declared in an application for, unless the court is satisfied that the interest of the beneficiaries are thereby prejudiced. See ***Section 2(5) of the Administration of Estate (Small Estates) Special Provision) Act Cap 156.***

In the instant case apart from the plaintiff alleging that the estate of late Israel Kikomeko Kolya is not a small estate, he did not furnish court with proof of the exact value of the estate neither are the beneficiaries prejudiced in any way since there has not been any waste or mismanagement complained of.

The plaintiff's claim that the estate was not a small estate at the time the defendant obtained letters of administration is disregarded.

I find that, Court had competent jurisdiction to grant letters of administration to the defendant in respect of the estate of Israel Kikomeko Kolya.

Issue 3: Whether the defendant discharged her statutory obligation in respect of the above letters of administration.

According section 25 of the **succession Act cap 162** all the property in an intestate devolves upon the personal representative of the deceased upon trust for those persons entitled to the property under this act.


Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration has been granted at the moment after the death of the deceased (see section 180 of *The Succession Act*).

The plaintiff claims that from the time the defendant obtained Letters of Administration, she has never distributed the properties amongst the beneficiaries and failed or refused to file an inventory.

The defendant was granted Letters of Administration to the estate of late Israel Kikomeko Kolya on 21st September, 2011. The defendant admitted that indeed she has never distributed the properties among the beneficiaries.

DW1 (Administrator) stated that there was nothing to distribute. That the land at Butega was a burial ground so she could not distribute it, land at kisugu was given to Daudi Senyonga during the lifetime of the deceased, Land at Kasambya (40) acres was given to the late Israel Kikomeko Kolya by his father.

She further stated in cross examination that there was nothing to distribute, Herbert Lukanga Kolya already got his share, which is big and that the remaining portion cannot be equated to that of Herbert since the land at Namirembe is small.

 DW2 stated that the estate of her father the late Israel Kikomeko Kolya only comprised of the land at Butega, a personal motor vehicle and the sum which was on his bank account. Further that the estate has not been administered due to the cases in court since 2010. That the defendant will implement what court decides.

She stated in cross examination that the land at Kisugu was given to Daudi by the late Israel Kikomeko Kolya during his life time although he did not execute a transfer.

The administration of an estate commences with the appointment of the administrator and ends when the last asset of the estate has been distributed to the beneficiaries. The defendant as an administrator of the estate of late Israel Kikomeko Kolya has an obligation to distribute the properties of the estate amongst the beneficiaries and to exhibit in the court an inventory.

In my view the estate of the Israel Kikomeko Kolya is comprised of the property Land at Kasambya (40) acres given to him by his father, land at Butega, a personal motor vehicle and the sum which was on his bank account. Therefore the defendant being an administrator ought to have distributed the same amongst the beneficiaries accordingly

On the issue of filing an inventory, the law provides six months. See **Section 278 (1) of the succession Act Cap 162**, which is to the effect that, an executor or administrator shall, within six months from the grant of probate or letters of administration, or within such further time as the court which granted the probate or letters may from time to time appoint, exhibit in that court an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character; and shall in like manner within one year from the grant, or within such further time as the court may from time to time appoint, exhibit 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 of.

According to the evidence adduced, indeed the defendant has never filed an inventory.

Issue Four: Remedies available to the parties.

The administrator has power to dispose of the property of the deceased, either wholly or in part in such manner as he or she may think fit. See. **Section 270 of the succession Act cap 162.**

The defendant being an administrator ought to have distributed the properties amongst the beneficiaries. But it seems to me that the defendant

has not administrated the estate, due to the wrangles which have been ongoing between her and the plaintiff.

In the circumstances this court will give her the benefit of the doubt to distribute the estate properties amongst the beneficiaries since the conclusion of the administration of the said estate is long overdue.

The defendant shall distribute the estate properties amongst the beneficiaries and the relevant inventories and accounts shall be filed, and the administration of the estate concluded within one year from the date of Judgement.

This court is empowered under section 33 of the Judicature Act to grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided.

It is in that light that I now deem it fit, in the interests of justice, the defendant be maintained as the administrator of the estate the late Israel kikomeko kolya despite the dispute between the parties.

The defendant being a widow, she's the most appropriate person to administer estate of her late husband.

The plaintiff's claim cannot therefore be sustained in the circumstances.

The contested Will was abandoned by all beneficiaries and was replaced

By the Letters of Administration granted to the Defendant.

The property at Namirembe has been found to be Matrimonial property save for the portion where the plaintiff's father built his residence.

It has also been found that the Defendant obtained the Letters of Administration correctly and that they are valid.

I, accordingly dismiss the plaintiff's claim in the form it stands.

I however make the following orders:

1. An order directing the defendant to distribute the estate of the late Israel kikomeko kolya as described in this Judgment, to wit:
 - Land at Kasambya (40 acres)
 - Land at Butega
 - Personal vehicle if still available,amongst the beneficiaries.
2. An order directing the defendant to file a true inventory and account of the administration of the estate of the late Israel kikomeko kolya in court within six months of this judgment.
3. This being a family matter, I make no order as to costs.

I so order.


GODFREY NAMUNDI

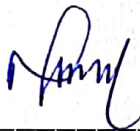
JUDGE:

DATE: 3/7/2020

Judgment delivered in the presence of:

1. Mr. Niwagaba Gilbert for the Plaintiff.
2. Mr. Ajungule Sulaiman, and Ms Kenkwanzi Rita for the Defendant.
3. The Plaintiff's appointed Attorney Ms Nambi Miriam.

C/C – Ms Namusoke Betty.



**Festo Nsenga –
Deputy Registrar**

3/7/2020 – 10:40 a/m