

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
AT KAMPALA (FAMILY DIVISION)
CIVIL SUIT NO. 171 OF 2013**

ELIZABETH KUTOSI MUZITO ::
PLAINTIFF

VERSUS

DAVID MUZITO BAGENDA ::
DEFENDANT

BEFORE: HON. JUSTICE SUSAN OKALANY

JUDGMENT

INTRODUCTION

[1] The plaintiff brought this suit against the defendant seeking for the following orders:

- a) A declaration that the defendant’s caveat on the plaintiff’s petition for letters of administration lacks merit and justification;
- b) An order for removal of the caveat lodged in Administration Cause No. 49/2013 and a grant of letters of administration to the plaintiff;
- c) General damages;
- d) Punitive damages;
- e) Interest on (c) and (d) at the rate of 25% from the date of judgment till payment in full;
- f) Costs of the suit; and
- g) Any other further and better remedy this Honourable Court may deem fit.

BACKGROUND

[2] The plaintiff’s case is that on 31st August 2008, at St. John Church of Uganda Kanyanya, she got married to the late Theodore Daniel

Muzito (herein after referred to as the deceased). A certificate of marriage confirming the celebration of their marriage was issued by St. John Church of Uganda Kanyanya, as well as the parent Church – Namirembe Diocese of the Church of Uganda (hereinafter referred to as Namirembe Diocese). The couple’s matrimonial home is in Kanyanya, where they lived together until the death of the deceased. After the burial of the deceased, the defendant who had flown in from Sweden for his father’s funeral, was chosen as the deceased’s customary heir, being his first-born son, born to the deceased and his first wife Florence Nabulo Muzito, who passed away in 1992.

- [3] Because the deceased had passed away intestate, his family in a meeting held after the funeral rites, agreed to engage the services of M/S. Ambrose tibyyasa and Co. Advocates to process letters of administration in respect of the deceased’s estate. The plaintiff subsequently petitioned for letters of administration in June 2013, vide Administration Cause No. 491/2013, wherein she duly disclosed all the children and property of the deceased.
- [4] The defendant lodged a caveat, forbidding the issuance and grant of letters of administration to her. Furthermore, the defendant through his advocates M/S Kulumba – Kiingi & Co. Advocates, directed the plaintiff to vacate her matrimonial home, referring to her as a gold digger, a thief, a fraudster, an imposter and the concubine of the deceased.
- [5] According to the plaintiff, she is entitled, as the deceased’s widow, to administer his estate on behalf of his children and therefore the caveat placed on the petition for letters of administration is baseless, unjustified and ought to be vacated. She asserts that she has suffered mental anguish and torture from her harassment via letters addressed to her by the defendant’s advocates. She claims that her reputation has also suffered from the allegations made

against her by the defendant and that his conduct towards her has been disrespectful, uncalled for and uncivilised. She also claims that she issued the defendant a notice of intention to sue.

- [6] On the other hand, the defendant denies the claims of the plaintiff, stating that the marriage between her and the deceased is not valid. He maintains that the plaintiff merely cohabited with the deceased, which conduct caused embarrassment to his late mother - Mrs. Florence Nabulo Muzito.
- [7] He denies receiving any notice of intention to sue from the plaintiff, claiming that the plaintiff had instead ignored correspondences issued to her by his legal representatives, Ms Kulumba - Kiingi & Co. Advocates.
- [8] He additionally claims that the plaintiff is incapacitated by age and chronic illness and cannot therefore ably administer the estate in issue. He asserts that the plaintiff is not entitled to costs, because he is justified in lodging the caveat against a grant of letters of administration to her, as he is the donee of the suit property by the deceased. It was his prayer that the plaintiff's suit be dismissed with costs.
- [9] The defendant filed a counterclaim against the plaintiff/counter-defendant, wherein he reiterated the contents of his written statement of defence. According to him, there was no valid marriage celebrated by the Rev. David Kyambadde, and that therefore, the certificates of marriage issued by St. John Church of Uganda Kanyanya and Namirembe Diocese, dated 31/8/2008, each bearing the same serial number, i.e. No. 25, were fraudulently obtained by Mr. Ambrose Tebyasa, together with the petitioner's older son, James Steven Mpango alias Jim. That the particulars of fraud are that the deceased and the plaintiff were wedded by the same Rev. David Kyambadde at different churches; one of the marriage certificates allegedly issued to the couple, and attached

as **Annexure “B”** of the plaint, was not signed by parties and the presiding minister.

[10] Furthermore, he alleges that the plaintiff has failed to adduce other documentary evidence to prove that the marriage between the deceased and herself took place, such as photographic evidence of the wedding, showing the members of the congregation and family members who attended the ceremony. That the absence of such evidence is proof that there was no valid marriage celebrated between the plaintiff and the deceased. According to him, what transpired between the plaintiff and the deceased was not an actual wedding but a mere blessing by the church.

[11] He states that when he was chosen as the deceased’s heir, he prepared a draft document on the distribution of the deceased’s estate property, but his proposal was rejected even before its contents were discussed and instead, the plaintiff was fronted as the sole administrator of the deceased’s estate, despite her knowledge that the property in Kanyanya belonged to the defendant as its equitable owner, being a gift *inter vivos*, given by his deceased mother. That therefore, the house referred to as matrimonial property herein, does not form part of the deceased’s estate, since it was gifted to him by his mother.

[12] He maintains that the plaintiff/ counter defendant is not a fit and proper person to petition for letters of administration considering her age, health condition and criminal propensity.

[13] He prayed for the following:

- a) A declaration that the purported certificates of marriage issued at Namirembe Diocese and St. John Church of Uganda in Kanyanya are illegal, void ab initio and are forged;
- b) A declaration that the defendant is the equitable owner of the suit land, with the residential buildings and other

developments comprised in Mailo Register Kyadondo Block 207, Plot No 564;

- c) A declaration that the plaintiff is not entitled to the grant of letters of administration;
- d) An order directing the deceased's council of clan elders to call and convene a family meeting to be attended by all the surviving beneficiaries to agree and select a person to be granted letters of administration;
- e) An order that the plaintiff produces in court the duplicate certificate of title for the property described above;
- f) An order that the plaintiff vacates the deceased's residential buildings and gives vacant possession of the same;
- g) A permanent injunction restraining the plaintiff, her biological children, particularly James Steven Mpango (whose paternity had at all material times been denied by the deceased and his blood relatives), from accessing the home without his express consent and approval;
- h) Costs of the suit; and
- i) Any other or further relief as the court deems fit.

[14] In rejoinder to the defendant's written statement of defence and in response to his counter claim, the plaintiff denies the allegations of the defendant and reiterates her statements in the plaint. She insists that her marriage to the deceased was valid. She declares that notwithstanding her old age and general body weakness, she is of sound mind.

[15] She declares that her relationship with the deceased did not affect the welfare of the defendant as alleged. That the land comprised in Kyadondo, Block 207, Plot 564 which is part of the estate of the deceased could not have been given to the defendant by his mother, who was never its owner. The plaintiff affirms that her husband died intestate and did not give away any property during

his life time. She maintains that she communicated the notice of intention to sue to the defendant on several occasions and prays that the counter claim should be dismissed.

[16] In a joint scheduling memorandum, the parties raised the following issues for determination:

1. Whether the plaintiff is entitled to applying for letters of administration of the estate of the late Theodore Daniel Muzito;
2. Whether the plaintiff is a fit and proper person to apply for letters of administration of the estate of the late Muzito;
3. Whether the defendant's caveat on the plaintiff's petition for letters of administration of the estate of the late Muzito is valid and justified under the circumstances; and
4. What remedies are available.

[17] When the matter came up for hearing, the plaintiff testified as PW1 and led the evidence of four (4) witnesses, namely: PW2 – Rev. David Kyambadde, PW3 –Irene Wadamba and PW4 – James Stephen Mpango, while the defendant called Samuel Ezati as DW1 and testified via zoom as DW2.

[18] The plaintiff in her testimony, stated inter alia that she is the surviving widow of the late Theodore Daniel Muzito and is the defendant's stepmother. Prior to her marriage to the deceased, there was a long period of cohabitation between herself and the deceased. It was her testimony that she was wedded to the deceased by the Rev. David Kyambadde on 31st August 2008. Her matron was Mrs. Irene Wadamba (PW2), while the deceased's best man was Mr. L.B.B. Tamale, who passed away on 17th August 2018. She lived with the deceased in their matrimonial home, while the defendant lived overseas most of the time.

[19] The deceased was survived by four children, namely: the defendant, James Mpango, Estella Muzito and Emmanuel Bagenda.

Upon her husband's demise, the defendant was chosen as his customary heir and the family as a whole agreed to engage the services of Ms. Ambrose Tebyasa & Co. Advocates to process letters of administration for the deceased's estate. She accordingly petitioned for letters of administration, but was shocked to receive a caveat lodged against her petition by the defendant, forbidding the issuance of letters of administration to her.

[20] In the said caveat, the defendant insulted her when he called her a gold digger, a thief, a fraudster, a grabber and a concubine among other things, which statements were false and defamatory. The same insults were repeated in other correspondences made against the plaintiff.

[21] Additionally, the plaintiff testified that she was directed to vacate her matrimonial home on the instructions of the defendant, who claimed to be the owner of the said property.

[22] She further testified that she is entitled to the issuance of letters of administration of the estate of the deceased, to administer it for the benefit of all the deceased's children. It was her evidence that apart from the defendant, all the deceased's children, including the deceased's brother, a one Michael Kibwika Bagenda are comfortable with her appointment as administrator of the estate.

[23] She declared that the insults thrown at her by the defendant have injured her reputation and subjected her to mental torture.

[24] It was additionally the testimony of the plaintiff that she met the deceased in 1972 at a friend's home in Kampala. She was then staying in Mengo, but subsequently relocated to Bukoto flats, where she lived until January 2000. She was aware that the deceased was married to the late Nabulo Muzito since 1967.

[25] Her relationship with the deceased started in 1972 and together, they had three children, namely: James Steven Mpango who was born in 1977, Estella Muzito who was born in 1980 and Emmanuel

Bagenda, born in 1985. The deceased first moved into her house to live with her in 1995. In 2000, she moved together with him into the matrimonial home.

[26] The deceased suffered a stroke in 1996, leading to the amputation of his leg and to his confinement in a wheel chair in 2001. In June 2010, the deceased fell ill and subsequently passed on.

[27] She declared that her maiden name was Namahe, which is the name that appears in her matrimonial certificate. She is also known as Elizabeth Ida Kutosi. And the name Kutosi is her official name, while Namahe is her maiden name. The names Elizabeth Ida Namahe and Elizabeth Ida Kutosi Muzito are her names, although she had not sworn a name verification affidavit.

[28] It was also her testimony that she never celebrated any customary marriage with the deceased. That the deceased and herself completed the application for marriage bans as an intending couple, a few days before the wedding was conducted in 2008 and the said bans were announced in church. The bans were announced for three weeks. It was her testimony that by the time she moved to Kanyanya, the impugned matrimonial home was already constructed.

[29] She stated that she never informed the Administrator General before petitioning for letters of administration and therefore did not have a Certificate of No Objection issued to her by him.

[30] The plaintiff admitted the fact that the deceased constructed the said matrimonial home with his late wife Nabulo Muzito and that the defendant had a share in it. The witness stated additionally that when the defendant informed her that the house in issue belonged to him, she expressed to him the position that she did not have any problem with his claim, but needed time to vacate the said house without being evicted from it and needed an alternative home to be provided for her before she could leave the said home.

[31] She complained that the defendant had tarnished her reputation, especially when he claimed that her son James Mpango was not fathered by the deceased and due to the fact that he had refused to apologize for his said utterances against her character.

[32] Rev David Kyambadde is the current parish priest of Kawempe in Namirembe Diocese. He testified as PW2. He stated that he has celebrated marriages in places of worship since December 1996. His testimony mainly corroborated the testimony of PW1. He met the deceased and the plaintiff in 2004 as members of his parish, when he was posted to Kanyanya Church. Additionally, he testified that the plaintiff's name 'Namahe' which he wrote on the marriage certificate, was the same name appearing on her baptism certificate that was produced to him by the plaintiff before her wedding to deceased, as proof of her baptism in church.

[33] According to the witness, a couple that wishes to be wedded are required to produce their baptism certificates and a letter from the parents of the bride to be. If all requirements are fulfilled, which includes participation in counselling sessions, the couple is registered for bans, which are advertised in church for three consecutive Sundays. That in the case of the plaintiff and the deceased, counselling was only done for one day since the couple had been living together and they were given a date for their wedding. Registration fees were paid, including fees for the two marriage certificates that were issued by the Parish and the Diocese.

[34] It was PW2's further testimony that the couple in issue made no formal request to be wedded, since it was not mandatory for intending couples to do so then, unlike the current practice, where a couple wishing to wed must fill a registration form. The bans of marriage were recorded in a register book but not advertised elsewhere. He did not and was not required to sign the marriage

certificate he issued on behalf of Namirembe Diocese, except that he wrote his name on it as the person who conducted the marriage ceremony between the plaintiff and the deceased. The marriage register book was signed by the couple and is still in existence.

[35] The witness testified that he was unaware that the deceased suffered from amnesia; he only knew that the deceased had a physical disability with his legs. According to him, the plaintiff and the deceased appeared to be of a normal state of mind when he wedded them.

[36] He testified further that the couple had produced before their wedding, a letter of proof of a customary marriage. PW2 explained that it was an established norm and practice in Namirembe Diocese that when a church marriage is celebrated, the minister issues the couple with a certificate of marriage, which if they wish, they can take to the Registrar of Marriages who registers their marriage. A second certificate authenticated with the seal of the Diocese is also issued to the couple, which may be framed by the couple and hanged in their house. He confirmed having issued both marriage certificates tendered in evidence, to the plaintiff and the deceased after presiding over their church marriage. He maintained in cross-examination that the plaintiff and deceased were duly married at St. John Church of Uganda, Kanyanya and that the said ceremony was attended by several other persons.

[37] PW3 (Irene Wadamba) corroborated the evidence of the plaintiff and PW2. She stated further that she had known the couple for a very long time and confirmed that she was the matron at the plaintiff's and deceased's wedding in Kanyanya. She witnessed the wedding and signed the marriage certificates issued to them. She met both the plaintiff and the deceased together in 1974, when the deceased was living with plaintiff. It was her testimony that the

plaintiff's marriage to the deceased was announced in church three times.

[38] She testified that the defendant was aware about the wedding in issue, since he telephoned his father and congratulated him during the wedding reception at the couples' home in Kanyanya.

[39] She signed the marriage register, which was also endorsed by the Reverend who wedded the couple.

[40] The testimony of PW4 (James Stephen Mpango) supported in effect, what the other witnesses of the plaintiff stated. He further testified that the deceased started cohabiting with the plaintiff uninterrupted, from 1995 until 2008 when they were married at St. John Church of Uganda Kanyanya. It was also his testimony that he personally attended the wedding in which his parents exchanged vows voluntarily and without undue influence or duress. They were issued marriage certificates before the congregation, a fact he witnessed.

[41] That upon the passing of the deceased, the rest of his children agreed that they would apply for letters of administration of his estate jointly, but the defendant rejected that proposal under the misguided belief that being the deceased's eldest son and heir, he was entitled to owning all the estate property.

[42] The witness however subsequently contradicted himself when he testified that he did not attend the church ceremony, because he was in charge of transporting the couple's relatives and could not attend the church ceremony.

[43] Samuel Ezati was DW1. He testified that he is a handwriting analyst, formerly working with the Uganda Police. He authored a laboratory report after examining the authenticity of the signatures on the marriage certificates. The purpose of the examination was to establish whether the two marriage certificates mentioned above, were signed by the same author. It was his conclusion after

analysing them that the signatures therein were not comparable. According to the witness, under the principle of comparison, likes are comparable, but that in case presented to him, the signatures attributed to the Reverend David Kyambadde were different, and incomparable. The signature on **Exhibit "A"**, (the certificate issued by St John Church of Uganda Kanyanya) is highly individualized, meaning that the characters forming the signature are so much simplified, while the signature in **Exhibit "B"** (the marriage certificate issued on behalf of Namirembe Diocese) is written in normal alphabet and can be read, meaning that those two signatures are different. He would have been able to state who the author of **Exhibit "A"** was if he had been given similar specimen signatures to compare, and the same applies to **Exhibit "B"**.

[44] He testified additionally, that the author of **Exhibit "A"** could have written **Exhibit "B,"** since it is possible that a person who writes in small letters can also write in capital letters. In his experience, in the same type of document, the same type of signatures is maintained and that it was uncommon in practice for someone to use different types of signatures on the same type of document.

[45] The defendant - David Muzito Bagenda testified as DW2. He stated in his evidence that when he visited his deceased father in 2004, the deceased was living with his Bukoto family in Bukoto. The deceased passed on while cohabiting with the plaintiff in their home in Kanyanya, which house, registered in the deceased's name in 1973, was still in his name at the time of his death.

[46] He conceded that there was no agreement made between him and his parents, showing that they had gifted the said house to him, neither was any family meeting held in which the deceased informed his children that he had given the said house to the defendant. It was also the defendant's statement that he was not in possession of the said house. That his deceased parents

constructed the disputed house. The plaintiff had been cohabiting with the deceased at her residence in Bukoto and only moved into the said house after the death of his mother. According to him, the relationship between the plaintiff and his mother was a bad one.

[47] He asserted that his late mother gave him the house as a gift *inter vivos*, an act that was approved by the deceased, who handed him a photocopy of the certificate of title for the said house, now alleged by the plaintiff to be matrimonial property. The witness further asserted that the deceased informed him that the duplicate certificate of title for the property was kept in his wardrobe. After his installation as customary heir upon the demise of the deceased, he asked the plaintiff in vain, to surrender all the vital documents of the house which were in her possession.

[48] The defendant insisted in his testimony, that no wedding took place between the plaintiff and the deceased, given the fact that James Stephen Mpango (PW4) had informed him before the alleged wedding celebration that the said function was merely a blessing of the couple by the church.

[49] He admitted that he had not opened up any criminal charge against the plaintiff for forging the marriage certificates in question.

[50] The defendant declared that the plaintiff was occupying property constructed by his mother and that the defendant was a notorious fraudster, having sneakily applied for letters of administration of the deceased's estate, contrary to the family agreement to engage the services of M/S Kulumba - Kiingi and Co. Advocates. That as a customary heir, he was entitled to participating in the process of obtaining a grant of letters of administration to his father's estate.

[51] He explained that his reason for lodging the caveat against the application for letters of administration by the plaintiff, is that his said step mother had applied for letters of administration, excluding him and yet he is one of the beneficiaries of the estate.

- [52] He conceded that his step siblings are equally entitled to the distribution his father's estate, but that they could only distribute the rest of the properties, namely: land in Bugembe, a plot in Kanyanya and land in Kityerera, but not the matrimonial home, which had been given to him by his parents in their lifetimes.
- [53] He declared that the plaintiff could not be the only administrator of the deceased's estate and proposed that three of the deceased's children should become administrators instead. He prayed that the house in Kanyanya be given to him, since it was gifted to him, the land in Bugembe be allotted to the plaintiff, the 50 acres at Kityerera be distributed among all family members and the empty plot at Kanyanya be given to Estella and Emma Bagenda. That James Mpango, had already been given land by the deceased in his life time. He declared that he did not have any interest in the rest of the estate properties apart from the Kanyanya house.
- [54] The defendant denied ever attending any meeting, in which the plaintiff was chosen by the family to apply for letters of administration of the deceased's estate. He testified further that the plaintiff has never surrendered the keys of the matrimonial home to him or the documents pertaining to the properties in her possession.
- [55] The witness said that he had initially wanted to build a house for the plaintiff, but on second thought, he formed the view that the plaintiff's own children were able bodied and capable of constructing a house for their mother. He was only willing to pay for the services of a caretaker, to look after the plaintiff for a period of only one year.
- [56] The following documents were tendered in evidence by the plaintiff and admitted as exhibits:

- 1) A marriage certificate issued to Theodore Daniel Muzito and Elizabeth Ida Namahe dated 31st August 2008, issued by St. John Church of Uganda Kanyanya, admitted as exhibit PE1;
- 2) The marriage certificate issued to Theodore Daniel Muzito and Elizabeth Ida Namahe dated 31st August 2008, issued by Namirembe Diocese, admitted as exhibit PE2;
- 3) Pictures of the marriage ceremony celebrated by the deceased and the plaintiff, admitted as PE3;
- 4) A notice of an application for letters of administration, a petition for letters of administration and declaration by Elizabeth Ida Kutosi Muzito, admitted as PE4;
- 5) A caveat lodged by David Muzito Bagenda forbidding a grant of letters of administration to Elizabeth Ida Kutosi Muzito, admitted as PE5;
- 6) A letter dated 12th July 2013, addressed to M/S Ambrose Tebyasa & Co. Advocates, by M/S Kulumba -Kiingi & Co. Advocates, admitted as PE6, which among other things demanded that the plaintiff and her children (referred to as a terrible woman and her gang of looters and property grabbers, to abandon the petition for letters of administration;
- 7) A letter dated 18th July 2013, addressed to M/S Ambrose Tebyasa & Co. Advocates, by M/S Kulumba -Kiingi & Co. Advocates, admitted as PE7, which was inter alia: contesting the solemnization of the marriage between the defendant and the deceased; demanding for photographs of the said marriage; and asking the plaintiff (referred to as a schemer, a manipulator and the most dishonest character of this century) to vacate the disputed home;
- 8) A letter dated 26th July 2013, addressed to M/S Ambrose Tebyasa & Co. Advocates, by M/S Kulumba -Kiingi & Co.

Advocates, admitted as PE8, warning M/S Ambrose Tebyasa and the plaintiff that having failed to respond to PE6 and PE7, a criminal case had been reported to Kanyanya Police for the investigation of Mr Tebyasa and his client for fraudulent registration of the disputed marriage;

9) A letter dated 25th September 2013, addressed to M/S Ambrose Tebyasa & Co. Advocates, by M/S Kulumba -Kiingi & Co. Advocates, admitted as PE9, warning the former from obstructing, insulting, chasing away a licenced process server; declaring that the purported marriage certificates are forgeries obtained by Mr. Tebyasa and the plaintiff and informing him that his apparent fraud together with the plaintiff, Reverend Kyambadde, Iblaimu Balaba Tamale and Irene Wadamba would be investigated by the Divisional Police Commander Kawempe Police station.

10) A letter dated 23rd January 2014, addressed to the Registrar, High Court Family Division, by M/S Kulumba -Kiingi & Co. Advocates admitted as PE10, complaining about the failure of the plaintiff's counsel to file a suit challenging the caveat and seeking directions from the court; and

11) A statutory declaration sworn by David Muzito Bagenda dated 19th July 2013, supporting his caveat admitted as PE11.

[57] The following documents were tendered in evidence by the defendant and admitted as exhibits:

1) A request for a laboratory report, addressed to the scientific Aids, Laboratory, Police headquarters, admitted as DE1;

2) A marriage certificate of Theodore Daniel Muzito and Elizabeth Ida Namahe issued by St. John Church of Uganda Kanyanya (which is the same as PE1), admitted as DE1A;

- 3) A marriage certificate of Theodore Daniel Muzito and Elizabeth Ida Namahe issued by Namirembe Diocese (which is the same as PE2), admitted as DE1B;
- 4) A laboratory report addressed to Erik - Kiingi & Co. Advocates dated 20th April 2016, admitted as DE1C;
- 5) A caveat by David Muzito Bagenda, forbidding the grant of letters of administration to Elizabeth Ida Kutosi Muzito and an additional affidavit sworn by Gideon N. Lusweswe, admitted as DE2;
- 6) A general power of attorney sworn by David Muzito Bagenda (Donor), admitted as DE3;
- 7) A statutory declaration dated 19th July 2013, sworn by David Muzito Bagenda (which is the same as PE11) supporting the caveat admitted as DE4;
- 8) A letter addressed to Mr. David Kulumba Kiingi of M/S Kulumba-Kiingi, and Co. Advocates by the defendant, dated 4th March 2013, retaining him as counsel to process letters of administration for the estate of the deceased on behalf of the family, admitted as DE5; and
- 9) A copy of the certificate of title registered to Theodore Daniel Muzito, admitted as DE6.

REPRESENTATION

[58] Mr. Ambrose Tebyasa represented the plaintiff, while Mr. Eric Kiingi represented the defendant. Both counsel addressed the court via written submissions.

SUBMISSIONS OF COUNSEL

Arguments of the plaintiff

[59] Mr. Tebyasa chose to argue issues 1 and 2 jointly and argued issues 3 and 4 separately.

[60] Regarding the first two issues, it was Mr. Tebyasa's submission that the plaintiff had proved that she was married to the deceased, as evidenced by the marriage certificate tendered and admitted in evidence as **PE1**. That PW1's evidence was corroborated by Rev. David Kyambadde, who presided over the wedding ceremony of the complainant and the deceased. Also, that the testimony of PW3, who was the matron of the plaintiff in the said wedding, further confirms the fact that there was a wedding celebrated between the plaintiff and the deceased.

[61] Mr. Tebyasa argued that despite the defendant's allegation that the said certificates were forged, he had failed to prove his claim, when the burden of proof lay on him to prove the alleged forgeries. Counsel stated that it is the position of the law that a mere denial cannot suffice to rebut a specific claim. He stated that the plaintiff had proved that she was indeed the wife of the deceased.

[62] Counsel contended that since the plaintiff was the widow of the deceased, she was entitled to administer his estate and that the law gave her first priority to do so. He submitted that because of that position of the law, the defendant had to demonstrate why the plaintiff, the widow of the deceased, should be disqualified from administering his estate when she had actually included the defendant as one of the beneficiaries of the estate, in her petition for letters of administration, contrary to his claims that she had not included him as the deceased's beneficiary.

[63] Mr. Tebyasa additionally submitted that the defendant's claim that the plaintiff was not a fit and proper person to administer the estate, since she was a notorious criminal, fraudster and gold digger was not validated by evidence.

[64] Concerning issue 3, Counsel submitted that the defendant was allocating to himself the matrimonial home, without obtaining letters of administration, by merely claiming that it was given to

him as a gift *inter vivos* by his late mother. It was counsel's argument that the defendant had failed to adduce documentary evidence such as deed of donation, a transfer form, certificate of title and or evidence of possession, to substantiate his claims. He referred this court to the defendant's testimony, where he admitted that the deceased had not informed his family members that the matrimonial home had been given to him.

[65] It was additionally submitted for the plaintiff that matters of distribution of a deceased person's estate, can only be addressed after a grant has been made pursuant to Sections 190 and 191 of the Succession Act. That it is settled law that all the deceased's children are entitled to an equal share in the deceased's estate, thus all the deceased's four children as well as his widow were entitled to all the property of his estate at Kanyanya.

[66] Mr. Tebyasa observed that no evidence had been adduced to prove that the plaintiff had wasted any part of the deceased's estate or that she had concealed any of the estate properties. Furthermore, counsel submitted that a certificate of no objection by the Administrator General was not a necessary requirement in this case, because the plaintiff was the widow of the deceased. To support his statement, he cited Section 5 (1) of the Administrator General's Act, which gives priority to a widow or a widower over the Administrator General. According to counsel, the defendant had failed to justify his caveat on the petition of letters of administration. He prayed that the court finds as such and that the plaintiff was entitled to letters of administration.

[67] About issue No. 4, counsel prayed that this court orders for the removal of the caveat, since the defendant had failed to justify why he had lodged it. It was counsel's further submission that the plaintiff is entitled to general and punitive damages amounting to thirty million shillings, because the defendant's allegations against

the plaintiff were defamatory and malicious, given the fact that he had maintained his allegations in his testimony to court and was not remorseful. It was therefore counsel's prayer that the plaintiff be awarded costs of the suit and interest on all awards, at the rate of 25% per annum, from the date of judgment, till payment in full.

Arguments for the Defendant.

[68] Mr. Kiingi stated that he too would argue issues 1 and 2 jointly, but that unlike his counterpart, he would argue issues 3 and 4 jointly as well.

[69] Concerning issues 1 and 2, counsel submitted that it was necessary to prove that there was a customary marriage before a Christian marriage was contracted. To support his argument, he cited the case of ***Bruno L. Kiuwa Versus Ivan Serunkuma & Anor [2007] HCB Vol. 1***, at page 116, where the Hon. Justice Remmy Kasule held that it is a custom of the Baganda that before a marriage is contracted, it is preceded by an introduction ceremony. According to counsel, the holding in that case extends to the Basoga as a tribe, because the customs and traditions of the two tribes are similar. That in the instant case, the plaintiff had admitted that there was no customary marriage celebrated between the deceased and herself.

[70] Furthermore, counsel pointed out that the plaintiff's testimony was contradicted by PW2, who stated that he had received a letter of proof of customary marriage from the couple before wedding them.

[71] It was contended for the defendant that the plaintiff never swore a deed poll, to show that she had renounced her maiden name. It was his view that the purported marriage was celebrated under a false name, contrary to Sections 47 and 48 of the Marriage Act Cap 25, because the plaintiff never used the said maiden name again after her marriage to the deceased.

[72] Mr Kiingi further submitted that the plaintiff had admitted the fact that no formal request was made by her or the deceased for them to be lawfully married at St. John Church of Uganda Kanyanya, as strictly mandated under Section 6 of the Marriage Act.

[73] It was also his submission that the plaintiff and PW3 had not signed the marriage notice book as required by law, neither did the plaintiff swear any affidavit affirming that she had not formerly celebrated a prior marriage, as mandated under Sections 9(1) and (2) and Section 10 (1) (b) of the Marriage Act Cap 25.

[74] Mr. Kiingi further submitted that the marriage bans of the couple were not seen, considering that they were not affixed on a conspicuous place as stipulated by Section 11 of the Marriage Act. He insisted that the plaintiff never signed the marriage register book, contrary to the provisions of Section 31 of the Marriage Act, while on the other hand, Rev. David Kyambadde (PW2) never signed the certificate that he issued on behalf of Namirembe Diocese, contrary to the provisions of Section 27 of the Marriage Act.

[75] It was his conclusion in that respect that the two marriage certificates issued to the couple were authored by two different persons, (because of the differing signatures or handwritings thereon) who separately celebrated the marriage between the plaintiff and the deceased at St. John Church of Uganda Kanyanya and at Namirembe Diocese respectively. Counsel pointed out that DW1, the handwriting expert, confirmed in his findings that the signatures in question were different. Counsel asserted that considering the said irregularities in the solemnization of the marriage in issue, it was thus null and void and the plaintiff's claim to the deceased's estate as a widow was impossible.

[76] Mr. Kiingi additionally submitted that the plaintiff could not distribute the estate evenly given that she and her children stood

to benefit more than the defendant who was the only child of his deceased parents.

[77] It was counsel's view that since the plaintiff had cohabited with the deceased, while his marriage to the late Florence Muzito Nabulo subsisted, her conduct was that of a person who at all material times, was scheming to cause the breakdown of that marriage, so as to benefit from the deceased's estate as a widow.

[78] Also, it was submitted for the defendant that the plaintiff never made any contribution to the matrimonial home. Counsel cited the case of ***Julius Rwabinumi versus Hope Bahimbisomwe SCCA No. 10 of 2009*** at page 20, as the authority for the proposition that a contributing spouse is entitled to matrimonial home.

[79] According to Mr. Kiingi, since the plaintiff had failed to prove that her marriage was valid and that she had contributed to the construction of the matrimonial home, she was neither entitled to a grant of letters of administration, nor was she a fit and proper person to administer the deceased's estate.

[80] Mr. Kiingi asserted that PW4's evidence should be disregarded since he had admitted that he had not attended the wedding, thus contradicting his earlier evidence that he had attended the said wedding.

[81] As far as issues 3 and 4, are concerned, Counsel Kiingi submitted inter alia, that although there was no agreement written or transfer form signed to prove that the deceased had gifted the disputed house to the defendant, the plaintiff had according to him, admitted that the said house had been given to the defendant. Counsel observed that since it was the defendant's mother and father who built the matrimonial home, the plaintiff was not entitled to administer it. He prayed that the court accordingly dismisses the suit with costs and judgment be entered on the counter claim in the defendant's/ counter plaintiff's favour with all prayers therein.

LAW APPLICABLE

[82] Section 5 (1) of the Administrator General’s Act Cap 157 provides:

No grant shall be made to any person, except an executor appointed by the will of the deceased or the widower or widow of the deceased, or his or her attorney duly authorised in writing, authorising that person to administer the estate of a deceased person, until the applicant has produced to the court proof that the Administrator General or his or her agent has declined to administer the estate or proof of having given to the Administrator General fourteen clear days’ definite notice in writing of his or her intention to apply for the grant.

[83] Section 10 (1) provides:

“The registrar, at any time after the expiration of twenty-one days and before the expiration of three months from the date of the notice, upon payment of the prescribed fee, shall thereupon issue his or her certificate in Form C in the First Schedule to this Act; except that he or she shall not issue the certificate until he or she has been satisfied by affidavit-

(a).....

(b).....

(c) that there is not any impediment of kindred or affinity, or any other lawful hindrance to the marriage;

(d) that neither of the parties to the intended marriage is married by customary law to any person other than the person with whom such marriage is proposed to be contracted”.

[84] Section 11 of the Marriage Act provides:

“If the marriage shall not take place within three months after the date of the notice, the notice and all proceedings

consequent on it shall be void; and fresh notice must be given before the parties can lawfully marry”.

[85] Section 27 of the Marriage Act, which provides:

“The registrar shall then fill out, and he or she and the parties and witnesses shall sign, the certificate of the marriage in duplicate, and the registrar shall then fill out and sign the counterfoil as prescribed in section 24 in the case of a marriage by a minister, and shall deliver one certificate to the parties and shall file the other in his or her office”.

[86] Section 31 (1) of the Marriage Act provides:

“The registrar of marriages in each district shall forthwith register in a book to be kept in his or her office for that purpose, and to be called “The Marriage Register Book”, every certificate of marriage which shall be filed in his or her office, according to Form F in the First Schedule to this Act; and every such entry shall be made in the order of date from the beginning to the end of the book, and every entry so made shall be dated on the day on which it is so entered, and shall be signed by the registrar, and the book shall be indexed in such manner as is best suited for easy reference to it”.

[87] Section 34(2) of the Marriage Act provides:

A marriage shall be null and void if both parties knowingly and wilfully acquiesce in its celebration—

- a) in any place other than the office of a registrar of marriages or a licensed place of worship, except where authorised by the Minister’s licence;*
- b) under a false name or names;*
- c) without the registrar’s certificate of notice or Minister’s licence duly issued; or*

d) *by a person not being a recognised minister of some religious denomination or body, or a registrar of marriages.*

[88] Section 34 (3) of the Marriage Act provides:

No marriage shall, after celebration, be deemed invalid by reason that any provision of this Act, other than the foregoing, has not been complied with.

DETERMINATION

[89] I have considered the pleadings and evidence in this suit, the submissions of counsel and the law applicable.

[90] The parties raised four issues for determination, which are reproduced below for ease of reference:

1. Whether the plaintiff is entitled to applying for letters of administration of the estate of the late Theodore Daniel Muzito;
2. Whether the plaintiff is a fit and proper person to be granted for letters of administration of the estate of the late Muzito;
3. Whether the defendant's caveat on the plaintiff's petition for letters of administration of the estate of the late Muzito is valid and justified under the circumstances; and
4. What remedies are available

[91] I will determine each issue independently.

Issue 1 - Whether the plaintiff is entitled to applying for letters of administration of the estate of the late Theodore Daniel Muzito

[92] Section 5 (1) of the Administrator General's Act is to the effect that an executor of a will, a widow or widower and person with powers of attorney of the deceased has the right to a grant of letters of administration. Any other person who intends to obtain a grant of

letters of administration is required to obtain a certificate of no objection from the Administrator General before acquiring a grant.

[93] It was Mr. Tebyasa's argument that the plaintiff is entitled to the grant of letters of administration of the deceased's estate, as per **Section 5 of the Administrator General's Act**, since she is his widow, while Mr. Kiingi's on the other hand argued that the plaintiff is not entitled to the grant, because she was not married to the deceased and was only his mistress. According to him, the marriage allegedly celebrated, was invalid. Both counsel do not dispute the position of the law that a widow has a superior right to a grant of letters of administration. Their bone of contention is whether the plaintiff is in fact the deceased's widow.

[94] The plaintiff adduced marriage certificates PE1 (which is the same document as DE1A) and PE2 (which is the same document as DE1B) to prove that she was married to the deceased and that the said marriage was solemnised by the Rev. David Kyambadde (PW2) at St. John Church of Uganda at Kanyanya and witnessed by I.B.B Tamale - the deceased's best man and Irene Wadamba (PW3) who was the plaintiff's matron among other people. The defendant contests the fact that the said marriage ceremony happened and led the evidence of a handwriting expert to establish that DE1B (PE2) issued on behalf of Namirembe Diocese as evidence of the marriage in issue, was forged.

[95] It is the law that parole evidence is inadmissible to vary the contents of a document (**See Dss Motors Ltd Versus Afri Tours and Travel Ltd HCCS 12/2013**). In the instant case, the alleged fraud if proved in respect of the marriage certificates above mentioned, would invalidate the said marriage. Section 92(a) of the Evidence Act provides:

"Any fact may be proved which would invalidate any document, or which would entitle any person to any

decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law”.

[96] Without a doubt, the onus was on the defendant to prove that there was no marriage celebrated between the deceased and the plaintiff or that if such a marriage was celebrated, it was invalid. See ***Sections 101,102 and 103 of the Evidence Act***. The contention of the defendant is that it was impossible for the plaintiff to have married in two different churches, namely: St John Church of Uganda Kanyanya and Namirembe Diocese on the same date, which was the 31st day of August 2008 and by the same priest. According to him, the existence of the said two certificates of marriage as proof of a marriage between the same couple is evidence of obvious forgery.

[97] On the other hand, the testimony of PW2, Rev. David Kyambadde, who conducted the wedding in dispute, is that it is the tradition in Namirembe Diocese, for two marriage certificates to be issued to a newly wedded couple, one from the church in which the marriage actually took place and the other on behalf of Namirembe Diocese, the parent Church. His evidence was that the first certificate was given to the couple for use in the registration of their marriage, while the purpose of the second one issued on behalf of the parent church, was ceremonially given for the couple to hang on a wall in their home if they so wished.

[98] His said evidence stands uncontested by the defendant. Courts of law have held that an omission or neglect to challenge the evidence in chief on a material or essential point during cross examination leads to the inference that the said evidence is accepted, subject to its being assailed for being inherently incredible or probably untrue (See ***James Sewabiri and another***

versus Uganda SCCR Criminal Appeal No.005 of 1990). From the record, there is no evidence adduced by the defendant to prove otherwise. It is therefore my considered view that the said allegation of forgery founded on the issuance of the two mentioned marriage certificates cannot stand, since the alleged anomaly has been ably explained in the testimony of PW2, who solemnised the said marriage.

[99] The argument by the defendant's counsel was that since the marriage certificate issued on behalf of Namirembe Diocese was not signed by PW2, the Rev. Kyambadde and the witnesses to the said marriage contrary to **Section 27 of the Marriage Act Cap 251**, such failure was proof of its being a forgery. Mr. Kiingi referred this court to the defendant's testimony, where he stated that the signatures on the two marriage certificates differed.

[100] In his laboratory report admitted as exhibit **DE1C**, DW1 the handwriting expert stated:

"The two Marriage Certificates are in respect of marriage between the same persons on the same date. The signatures in question are different to the extent that the questioned signature on exhibit A is highly individualised while on exhibit B is not. They are not representative of each other and therefore not comparable".

[101] DW1 testified that the purpose of the examination that he conducted was to establish whether the two certificates were written by the same author. That his conclusions were that the two documents were not comparable. Despite his opinion as shown above, he stated that the author of Exhibit A could have written exhibit B, because in his opinion, a person who writes in small letters can also write in capital letters.

[102] Upon my examination of the exhibit **DE1A, (PE1)** the marriage certificate that was issued to the plaintiff and deceased by PW2 at St. John Church of Uganda Kanyanya, the signature of PW2 is appended to it. However, on exhibit **DE1B (PE2)** which is the marriage certificate issued on behalf of Namirembe Diocese, PW2's name is written in capital letters in the normal alphabet. I thus think that DW1 was right to opine that the two writings given to him to examine could not be compared, being different in form. One sample (**DE1A**) is an individualised signature and the other (**DE1B**) is PW2's name written in normal alphabet.

[103] The evidence of PW2 while explaining the difference in his endorsement of the two documents was that he signed the first certificate and wrote his name on the second one, because the diocese categorically requires that a minister celebrating a marriage does not sign the second certificate. Taking this into account, it is my considered opinion that DW1's testimony indirectly supports PW2's evidence that he authored both marriage certificates. I have no reason to doubt the testimony of PW2 that he issued both certificates. The fact that he gave the couple an extra certificate in accordance with the tradition of the church, does not invalidate the said marriage. He acted in issuing the couple with **PE1 (DE1A)** in accordance with Section 27 of the Marriage Act supra, which provides inter alia for a registrar of a marriage and the parties and witnesses to sign, the certificate of the marriage and for the person presiding over the marriage ceremony to provide the parties with a certificate and file a copy of the same.

[104] It was Mr Kiingi's submissions that the marriage register book was not signed by the couple. However, there is the testimony of PW3 - Irene Wadamba who witnessed the marriage as matron of the plaintiff, stating that she signed the said marriage register and that the reverend who joined the couple in marriage, signed it as

well. Her testimony was corroborated by PW2 who stated that the marriage register existed and still exists at his former parish in Kanyanya. That evidence was not successfully challenged in cross-examination.

[105] A part from alleging that the marriage register book was not signed by the plaintiff and deceased, the defendant has failed to prove by evidence, the fact that PW2 did not comply with the requirements of the law in Section 31 of Marriage Act, while solemnizing the disputed marriage.

[106] Concerning counsel Kiingi's further submission that the plaintiff contracted the said marriage under a false name, contrary to Sections 47 and 48 of the Marriage Act, by giving her name as Elizabeth Ida Namahe, while the plaint shows that her name is Elizabeth Kutosi Ida Muzito, there is no proof that the name on the marriage certificate is a false name. The plaintiff's testimony was that the name Namahe is her maiden name. Her evidence in that respect is corroborated by PW2 who testified that the bride was Elizabeth Ida Namahe and that he wrote the name on the marriage certificate that was contained in the bride's baptism card. PW2's evidence is that he had known the couple (the plaintiff and the deceased), since 2004, when he was posted to Kanyanya parish of the Church of Uganda. This evidence stands uncontested. Clearly, he stated that the plaintiff is the same person he wedded to the deceased. There is no proof that the plaintiff had any other name before her marriage to the deceased apart from the name Elizabeth Ida Namahe. The plaintiff also explained that the name Kutosi is her official name that she used while still employed. The legality of her current names is not in contest in any case. What is contested is the fact that the names that appears on the marriage certificates above, are not the same exact names she now calls herself by.

[107] It is my thinking that the evidence adduced by the plaintiff is sufficient to show that she is the same person who wedded the deceased and that no false name was used by her then. It seems to me that the plaintiff adopted the deceased's name after their marriage, but never swore a deed poll as proof of change of name. That fact alone, should not invalidate the marriage that she celebrated using her maiden name.

[108] I am thus unable to find that the marriage celebrated between the plaintiff and the deceased is void on account of the difference between her name then and how she now calls herself in her pleadings and in her testimony in court.

[109] The other omission in the queried marriage ceremony raised by counsel for the defendant is that marital bans were not affixed within the church premises, which omission was contrary to Section 9 of the Marriage Act. Mr. Kiingi also noted that the couple never swore affidavit evidence to show that neither of them had entered into a marriage prior to the intended one, contrary to Section 10 of the Marriage Act.

[110] In his testimony, PW2 said that the couple in question, approached him informally to solemnize their marriage and that marital bans were read only in church. His evidence is that although the procedure for making a formal request to wed was not followed, generally, the church's policy was observed in that bans were read and the couple was married three weeks after the date on which the bans were first read. It is not contested that the marriage bans were not advertised on church notice boards. The bans were however read in church for three weeks, in line with Section 11 of the Marriage Act.

[111] PW2's further testimony is that he never found out if the couple in question had been married before. In my view, this omission on his part was not detrimental in this case, since bans were read in

church for three consecutive Sundays giving a chance to any one with objections against the intending couple's marriage to raise them and also, given the undisputed evidence on record that the late Muzito's first wife Florence Nabulo Muzito had passed away in 1992 and the plaintiff had been cohabiting with the deceased during the subsistence of his marriage to Florence Nabulo Muzito since 1972. There is nothing adduced on the record, to show that the plaintiff was in a marital relationship with someone else before the said wedding was celebrated. Had there been a semblance of a prior marriage by either the plaintiff or the deceased before their wedding to their marriage, the defendant would have not hesitated to produce evidence to that effect and the wedding would have been void from the beginning according to Section 34 (2) of the Marriage.

[112] The defendant's counsel referred this court to the inconsistencies in the plaintiff's evidence. Firstly, the contradiction between the testimony of PW2, (who testified that prior to the marriage between the deceased and the plaintiff, he received a letter showing that the two were married to each other customarily) and the plaintiff's earlier testimony that there was no customary marriage celebrated between the two of them; and secondly, the contradiction in the evidence of PW4 who initially stated that he attended the wedding, but subsequently said that he did not attend the church ceremony, since he was in charge of the reception and was busy transporting relatives.

[113] It is settled law that grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected. Minor ones unless they point to deliberate untruthfulness will be ignored (See ***Alfred Tajar v Uganda, EACA Cr. Appeal No. 167 of 1969***). Clearly, a contradiction does exist between the evidence of PW2

and the plaintiff, regarding whether a customary marriage was contracted between the deceased and the plaintiff, before their wedding. It is my considered view that the said contradiction is a minor one, because it doesn't affect the rest of the evidence on the main dispute at stake, which is whether the wedding actually happened and was lawfully solemnised. Also, the rest of the evidence of these two witnesses is harmonious. I cannot rule out the fact that due to time lapse from the date the wedding took place and the date of the testimony of the witnesses in court, one of the said witnesses could have forgotten what really happened, causing the inconsistency in their testimonies. Also, the contradiction concerns a matter that is not relevant in my view, since there's no legal requirement for one to have contracted a customary marriage before wedding in church.

[114] As for the inconsistencies in PW4's evidence, he testified:

"I attended the marriage ceremony personally where my late father and my mother (the plaintiff) exchanged marriage vows before the congregation in open church and where Balaba Tamale and Irene Wadamba were the best man and matron respectively. After the marriage was solemnized, we headed for the reception party at my father's residence at Lutunda Zone Kaynyaya, Kawempe Division in Kampala District".

[115] In his cross-examination, PW4 stated:

"I did not attend the church wedding. I was in charge of the reception and transportation of our relatives that is why I could not attend church".

[116] This contradiction appears grave to me, since the witness by denying that he was in church, totally backtracked on his evidence in chief, regarding his attendance of the church wedding of his

parents. The conflict in PW4's evidence points to the fact that he deliberately lied in his evidence in chief when he testified as someone who witnessed the wedding in church, although his testimony by and large, confirms the fact that a marriage between the plaintiff and the deceased was arranged at St John Church of Uganda in Kanyanya, after which, the couple hosted a reception at their home and that he was involved in transporting the guests. Even if I disregard the testimony of PW4 as prayed for by Mr. Kiingi, the plaintiff's testimony, which I believe to be true and which is supported by the evidence of PW2 and PW3, remains intact and is sufficient in my esteemed opinion to establish her claim.

[117] It was additionally contended for the defendant that it is the custom in Busoga just as it is in Buganda, for a customary marriage to precede a Christian marriage. This claim remains unsupported by evidence. **Section 10 (1) (d) of the Marriage Act** however, does not require that a customary marriage is celebrated before a church one. Instead, it requires a registrar not to issue a marriage certificate until he or she is satisfied by affidavit evidence that neither of the parties to the intended marriage is married by customary law to any person other than the person with whom such marriage is proposed to be contracted.

[118] Notably, despite the defendant's insistence that the marriage between the late Muzito and the plaintiff is invalid, he referred to her as the wife of the deceased and as one of the deceased's family members in his letter dated 4th March 2013, in which he retained the law firm of Kulumba - Kiingi & Co. Advocates. That said letter is admitted in evidence as DE5. He stated:

"The following are the members of the family of the deceased: Mrs. Ida Kutosi-Muzito (Wife), Mr. David Muzito - Bagenda (Son and Heir), Mr. James Mpango

(Son), Ms. Estella Muzito (Daughter) and Mr. Emmanuel Bagenda (Son)”.

[119] Clearly, in the said communication, he recognised the fact that the plaintiff was a beneficiary of the deceased, being his spouse. Also, the fact that a ceremony occurred on 31st August 2008 is not disputed. The defendant’s contention is that the couple was not wedded but only blessed by the church on that day.

[120] It is my view after considering the evidence in totality that the plaintiff has proved to the required standard that she was indeed wife to the deceased and is thus entitled to the grant of letters of administration as per **Section 5 of the Administrator General’s Act**. On the other hand, the defendant as discussed above, has failed to establish to the required standard that the plaintiff’s marriage certificates admitted into evidence as PE1 and PE2 (**DE1A & DE1B** respectively) are forgeries. Additionally, in light of the provisions of **Section 34 (2) and 34 (3) of the Marriage Act**, the defendant has failed to produce evidence that invalidates the said marriage.

[121] It is also worth mentioning here that the correspondences sent by the defendant’s counsel to the plaintiff’s counsel, admitted as PE7 and PE8, (informing them that the alleged forgeries of the marriage certificates had been reported to Kanyanya and Kawempe Police for investigations) were not challenged in evidence. Had the results of those investigations supported the defendant’s narrative of what happened, I think that the same would have been produced in evidence to buttress the defendant’s allegations of forgery.

Issue 2 - Whether the plaintiff is a fit and proper person to be granted for letters of administration of the estate of the late Muzito

[122] It was Mr. Kiingi’s submission that the plaintiff was barred by old age and illness from administering the estate of the deceased.

However, the defendant did not adduce evidence to support his claims that the plaintiff is not a fit or proper person to receive the grant. As already stated above, the plaintiff testified and attended court on all days in person. Apart from being of advanced age, I did not see in her, any signs that she was ill or of unsound mind. I have already resolved above that the plaintiff was the deceased's wife and is therefore entitled to a grant of letters of administration of his estate. Consequently, it is my opinion that the plaintiff is a fit and proper person to apply for letters of administration of the estate of the deceased Theodore Daniel Muzito.

Issue 3 - Whether the defendant's caveat on the plaintiff's petition for letters of administration of the estate of the late Muzito is valid and justified under the circumstances;

[123] Regarding Mr. Kiingi's contention that the marital home belongs to the defendant. During her testimony, the plaintiff conceded that the matrimonial home was constructed by the deceased and Mrs. Florence Nabulo Muzito. It is settled law that property a couple chooses to call a home will be considered joint matrimonial property. This together with property either spouse contributes to is what matrimonial property is. ***(See Katuramu versus Katuramu M.A 26/2017, Muwanga versus Kintu High Court Division Appeal No. 135 of 1997)***. Although the deceased was the registered proprietor of the land on which the matrimonial home was built, it was not in contest that he constructed the home with his late wife Mrs. Florence Nabulo Muzito and that they both lived there during the subsistence of their marriage.

[124] Consequently, it goes without saying that the late Florence Nabulo Muzito jointly owned the said home with the deceased. The law regarding joint property is that once one spouse dies, the surviving spouse becomes the sole owner of that property. In the

instant case, the impugned matrimonial property reverted back to the deceased once his wife Florence Nabulo Muzito passed on. That is why at the time the plaintiff married the deceased, the said home solely belonged to the deceased. Subsequently, upon the deceased marrying the plaintiff and deciding to live in those premises, the fact that they were originally cohabiting there notwithstanding, the said home became their matrimonial home, jointly owned by both the deceased and the plaintiff.

[125] The plaintiff 's admission that the said home was constructed by the deceased and his late wife does not remove the fact that she is entitled to the property as the surviving widow of the deceased.

[126] It is the defendant's claim that the disputed matrimonial home was given to him as a gift *inter vivos* by his late mother and the said gift was also acknowledged by the deceased, who gave him a photocopy of the certificate of title of the home.

[127] A gift *inter vivos* is defined in Black's Law Dictionary 8th edition at page 710 as, "... a gift of personal property made during the donor's lifetime and delivered to the donee with the intention of irrevocably surrendering control over the property".

[128] The essential elements of a gift *inter vivos* are:

- 1) The donor's clear intent to pass title/interest to the property to the recipient;
- 2) A surrender of all or some dominion and control by the donor allowing the donee to have possession; and
- 3) Acceptance by the donee, (See ***Sullivan Vs American Telephone and Telegraph Company, 230 So. 2d 18 (Fla. 4th DCA 1969)***).

[129] In the case before me, while the defendant claims that his late mother gave him the matrimonial home, a copy of the certificate of title admitted in evidence as **DE6** shows that the deceased is the sole proprietor of the premises. The defendant also testified that

the deceased had supported his mother's decision to gift the house to him. During his testimony in cross-examination, the defendant confessed that there was no family meeting held in which his parents announced that the matrimonial home was given to him as a gift *inter vivos*. He also testified that when the deceased visited him in Sweden, he informed him (defendant) that the duplicate certificate of title was in his wardrobe at the matrimonial home. He admitted that he was not in possession of the said property.

[130] It is obvious to me from those facts that the deceased never intended to gift the said property to the defendant. Not only did he not give the defendant the duplicate certificate of title of the said property, he remained in possession of it until his death. In the result, I find that the matrimonial home was not a gift *inter vivos* to the defendant and therefore the plaintiff was right to include the said home in her petition for letters of administration, as one of the properties that constitute the deceased's estate.

[131] Concerning Mr. Kiingi's submission that the defendant fears that he is at a disadvantage because the plaintiff and her children are many compared to him as the only child of his mother and therefore that there will be an unfair distribution of the estate, Section 191 of the Succession Act provides:

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.

[132] In light of the law, a defendant is only entitled to dispute an administrator's decisions about the estate after a grant of letters of administration and not before that, if he or she is convinced that the administrator is not doing a satisfactory job distributing the

estate. Until then, the defendant's views amount to speculation only. In any case, the defendant together with his step siblings are named as beneficiaries in the plaintiff's petition.

[133] It is my assessment thus, that the caveat lodged by the defendant was unjustified.

Issue 4 - What remedies are available

[134] Considering that I have found that the defendant's caveat was unjustified, I accordingly declare that the defendant's caveat on the plaintiff's petition for letters of administration lacks merit and justification and should therefore be removed.

[135] Mr. Tebyasa prayed that this court grants general damages and punitive damages amounting to thirty million shillings because the defendant's allegations against the plaintiff were defamatory and malicious and because he maintained his said allegations during his testimony and was not remorseful.

[136] Regarding general damages, it is well settled law that an award of general damages are the direct probable consequences of an act complained of. Such consequences may be loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering (See ***Kampala District Land Board & Another versus Venansio Babweyana Civil Appeal No. 2 of 2007***). My opinion from perusing PE6, PE7 and PE8 is that the communication that was coming from the defendant's side to the plaintiff through his counsel was abusive and toxic and capable of contaminating any reader. I am left wondering if the advocate who penned down those words was still acting in his professional capacity. PE6, which is one such uncouth letter from M/S Kulumba -Kiingi & Co. Advocates authored on 12th July 2013 and addressed to M/S Ambrose Tebyasa & Co. Advocates, refers to the plaintiff and her children as "a terrible woman and her gang of looters and property grabbers".

[137] In the statutory declaration admitted in evidence as **DE4**, sworn by the defendant in support of his caveat, he referred to the plaintiff as a concubine, a gold digger and a notorious fraudster. In his testimony, he maintained the insults and further questioned the paternity of the one of the plaintiff's sons, James Mpango (PW4).

[138] While I cannot regurgitate all the insulting contents of the above-mentioned letters addressed to the plaintiff by the defendant, there is no doubt in my mind that the plaintiff has suffered humiliation within the family's circles and particularly before her own children due to the allegations made against her person by the defendant in the said communications. To that end, a sum of 10,000,000/= is awarded to the plaintiff.

[139] Regarding punitive damages, they are awardable to punish, deter, express outrage of the court at the defendant's highhanded, malicious, vindictive, oppressive and malicious conduct. They focus on the defendant's misconduct. (**See EL Termewy v Awdi & 3 Ors Civil Suit 95/2012**). The defendant refused to withdraw the statements made by his lawyers who referred to the plaintiff and her children as a terrible woman and her gang of looters and property grabbers. It is in that regard that this court awards the plaintiff a sum of 5,000,000/=.

[140] Regarding the interest at 25%, this court finds the said rate to be quite excessive and therefore shall proceed to give an interest at court rate.

[141] The plaintiff prayed for costs of the suit. It is trite that when a notice of intention to sue is issued to the adverse party, costs are not awarded to the victorious party. I perused the record but have failed to find any such notice of intention to sue. It is in that regard, coupled with the desire to mend the family rift that each party shall bear their own costs.

[142] Since this suit has been successful, the counter claim consequently fails.

[143] In the result, this suit succeeds with the following orders:

- a) The defendant's caveat on the plaintiff's petition for letters of administration lacks merit and justification;
- b) The caveat lodged on Administration Cause No. 49/2013 shall be removed;
- c) The plaintiff is allowed to process letters of administration;
- d) The plaintiff is awarded general damages of 10,000,000/=;
- e) The plaintiff is awarded punitive damages of 5,000,000/=;
- f) Interest on (d) and (e) at the court rate from the date of judgment till payment in full; and
- g) Each party shall bear its own costs.

I so order.

Susan Okalany

JUDGE
10/05/2021