

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

**ORIGINATING SUMMONS NO. 0005 OF 2021**

**IN THE MATTER OF THE ESTATE OF THE LATE ODONG LAKIDI**  
**UNDER LETTERS OF PROBATE GRANTED TO JAMES OKULLO VIDE**  
**ADMINISTRATION CAUSE NO.957 OF 2014**

**AND**

**IN THE MATTER OF AN APPLICATION BY ORIGINATING SUMMONS**  
**FOR THE ENFORCEMENT OF THE LATE ODONG LAKIDI'S WILL**  
**DATED 5<sup>TH</sup> FEBRUARY 1996**

**BETWEEN**

- 1. LAKIDI PAMELA ACHAN**
- 2. OJOK DERRICK**
- 3. LABONG KENNETH**
- 4. AJOK GLORIA**
- 5. LAKIDI GEORGE**
- 6. LATIGI BETTY**
- 7. AKELLO BRENDA ..... PLAINTIFFS**

**AND**

- 1. JAMES OKULLO (The Executor of the Estate of the late Odong Lakidi)**
- 2. THE COMMISSIONER FOR LAND REGISTRATION..... DEFENDANTS**

**RULING**

**BEFORE: HON. LADY JUSTICE ALICE KOMUHANGI KHAUKHA**

## **Introduction**

This ruling is in respect of an application brought by way of Originating summons under Section 33 of the Judicature Act, Section 98 of the Civil Procedure Act, Order 37 Rules 1 and 8 of the Civil Procedure Rules. The application seeks for determination of the following questions;

- (a) whether James Okullo, the Executor of the estate of the late Odong Lakidi be ordered to transfer land comprised in Block 216 Plot 1270 situate at Buye into the names of the Children of the late Odong Lakidi in accordance with the Will of the late Odong Lakidi;
- (b) whether James Okullo, executor of the estate of the late Odong Lakidi be ordered to deliver up in court the Special Certificate of Title for the land comprised in Block 216 Plot 1270 land at Buye; signed transfer forms, passport photos and identification documents, for purposes of transfer of the said land;
- (c) in the alternative, whether the 2<sup>nd</sup> Defendant be ordered to issue a Certificate of Title into the names of the beneficiaries of the estate of the late Odong Lakidi onto the land register and a certificate of title be issued to them in accordance with the testamentary wishes of the late Odong Lakidi; and
- (d) costs.

## **Appearance and Representation.**

When the application first came up for hearing on **3<sup>rd</sup> November 2021**, the plaintiffs were in court and represented by Counsel Nuunu Martha holding brief for Counsel Kimara Arnold of Kimara Advocates & Consultants. The 1<sup>st</sup> defendant was also present in court and represented by Counsel Ssemutumba Pius of WOK Land Services while the 2<sup>nd</sup> defendant was not represented. The 1<sup>st</sup> defendant on **8<sup>th</sup>**

**November 2021** instructed Joshua Musinguzi Associated Advocates to represent him in this matter.

### **The application**

The application is supported by the affidavit of the 1<sup>st</sup> plaintiff, a one Lakidi Pamela. The 1<sup>st</sup> defendant, James Okullo filed an affidavit in reply while the 2<sup>nd</sup> plaintiff, Ojok Derrick filed an affidavit in rejoinder. Counsel for the plaintiffs and the 1<sup>st</sup> defendant filed written submissions, citing authorities and the same have been considered in this ruling.

### **Facts**

The facts as deduced from the pleadings and written submissions by counsel are as follows:

Lakidi Pamela Achan, Ojok Derrick, Labong Kenneth, Ajok Gloria, Lakidi George, Latigi Betty and Akello Brenda (hereinafter referred to as **the plaintiffs**) are some the beneficiaries to the estate of their late father, Odong Lakidi (hereinafter referred to as **the deceased**). The deceased left a WILL that bequeathed his entire estate to all his children for their sole benefit. The estate includes land comprised in **Block 216, Plot 1270** land at Buye (herein after referred to as **the suit land**). He appointed his brother Okullo James (hereinafter referred to as **the 1st defendant**) as the executor of his WILL. The 1<sup>st</sup> defendant was granted Probate on 3<sup>rd</sup> July 2015 but he is said to have mismanaged the estate and failed to administer it as per the testamentary wishes of the deceased. The plaintiffs allege that the 1<sup>st</sup> defendant has to date failed, neglected and/or refused to register the names of all the plaintiffs on the suit land. It is against this background that this application was brought to this honorable court for determination of the questions raised in the said application.

Counsel for the parties raised the following issues in their written submissions for determination;

- 1) *whether the application is properly before court;*
- 2) *whether James Okullo, the Executor of the estate of the late Odong Lakidi be ordered to transfer land comprised in Block 216 Plot 1270 situate at Buye into the names of the Children of the late Odong Lakidi in accordance with the Will of the late Odong Lakidi;*
- 3) *whether James Okullo, executor of the estate of the late Odong Lakidi be ordered to deliver up in court the Special Certificate of Title for the land comprised in Block 216 Plot 1270 land at Buye; signed transfer forms, passport photos and identification documents, for purposes of transfer of the said land;*
- 4) *in the alternative, whether the 2<sup>nd</sup> Defendant be ordered to issue a Certificate of Title into the names of the beneficiaries of the estate of the late Odong Lakidi onto the land register and a certificate of title be issued to them in accordance with the testamentary wishes of the late Odong Lakidi; and*
- 5) *costs.*

## **The Law**

The laws cited and relied upon by all parties in their pleadings are section 33 of the Judicature Act, Cap. 13; sections 27 and 98 of the Civil Procedure Act (CPA); Order 37 rules 1 and 8 of the CPR; section 177 (1) of the Registration of Titles Act, Cap. 230 (RTA); sections 180, 265 and 270 of the Succession Act, Cap. 162 and case law to wit; *Sserunjogi Charles Musoke and Katamba John Ssemakula Versus Tony Nkuumbi O.S No. 007 of 2019; Kulumbai Gulam Hussein Jaffer Ramji and Another Versus Abdul Hussein Jaffer Mohamed Rahim, Executor of Gulam Hussein Jaffer Ramji, Secretary, Wakf Commissioners, Zanzibar and others [1957] 1 EA 699*

(HCZ); Joyce Carol Nsubuga, Daniel Lwanga Nsubuga, Darell Emmanuel Nsubuga (A minor suing through next friend Magdalene Nassuuna) Versus Christine Nsubuga O.S No. 7 of 2014; Re Giles (2) (1890), 43 Ch. D. 391; Gulaballi Ushitlani Versus Kampala Pharmaceuticals Ltd HCCS No. 6 of 1998 which were all considered by this honorable court while resolving the issues/questions raised in the application.

**Order 37 Rule 1** of the CPR provides that,

“The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a deceased, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course an originating summons, returnable before a judge sitting in chambers, for such relief of the nature or kind following, as may by the summons be specified, and the circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions-

- (a) any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir, or *cestui que trust*;
- (b) the ascertainment of any class of creditors, devisees, legatees, heir, or others;
- (c) the furnishing of any particular accounts by the executors, administrators or trustees, and the vouching, when necessary, of such accounts;
- (d) the payment into court of any money in the hands of the executors, administrators or trustees;
- (e) directing the executors, administrators or trustees to do, or abstain from doing, any particular act in their character as executors, administrators or trustees;

- (f) the approval of a sale, purchase, compromise, or other transaction; or
- (g) the determination of any question arising directly out of the administration of the estate or trust.”

**Order 37 Rule 8** provides for the practice upon application for summons and provides as follows:

- (1) An originating summons shall be in Form 13 of Appendix B to these Rules, and shall specify the relief sought.
- (2) The person entitled to apply shall present it ex parte to a judge sitting in chambers with an affidavit setting forth concisely the facts upon which the right to the relief sought by summons is founded, and the judge, if satisfied that the facts as alleged are sufficient and the case is a proper one to be dealt with on an originating summons, shall sign the summons and give such directions for service upon the persons or classes of persons and upon other matters as may then appear necessary.

**Section 33 of the Judicature Act, Cap. 13** is a general provision as to remedies and provides as follows:

“The High Court shall, in the exercise of the jurisdiction vested in it by the Constitution, this act or any written law, 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.”

**Section 98 of the Civil Procedure Act** is about saving of inherent powers of court and provides as follows:

“Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or prevent abuse of the process of court.”

**Section 177 of the RTA** provides for the powers of High Court to direct cancellation of certificate or entry in certain cases and states the following:

“Upon recovery of any land, estate or interest by any proceeding from the person registered as proprietor thereof, the High Court may in any case in which the proceeding is not herein expressly barred, direct the registrar to cancel any certificate of title or instrument, or any entry or memorial in the Register Book relating to the land, estate or interest, and to substitute such certificate of title or entry as the circumstances of the case require; and the registrar shall give effect to that order.”

**Section 180 of the Succession Act** provides for the character and property of executor or administrator and states as follows:

“The executor or administrator, as the case may be, of a deceased person is his or her legal representative for all purposes, and all the property of the deceased person vests in him or her as such.”

**Section 265 of the Succession Act** provides for the procedure in contentious matters and is to the effect that, “In any case before the High Court in which there is contention , the proceedings shall take, as nearly as may be, the form of a regular suit according to the provisions of the law relating to civil procedure, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who may have appeared to oppose the grant shall be the defendant.”

**Section 270 of the Succession Act** is about disposal of property and provides that, “An executor or administrator has power to dispose of the property of the deceased, either wholly or in part, in such manner as he or she thinks fit, subject to section 26 and the Second Schedule.”

In the case of **Sserunjogi Charles Musoke and Another Versus Tony Nkuumbi O.S No. 7 of 2019**, in resolving the question as to whether the suit is properly before court, court held that Order 37 requires administrators seeking to ascertain certain questions...to proceed by way of Originating Summons...that ascertaining the beneficiaries for the purpose of administration is straight forward...the application therefore is properly before court.

In the case of **Kulumbai Gulam Hussein Jaffer Ramji and Another Versus Abdul Hussein Jaffer Mohamed Rahim, Executor of Gulam Hussein Jaffer Ramji, Secretary, Wakf Commissioners, Zanzibar and others [1957] 1 EA 699 (HCZ)**, court stated that, “...*such procedure is primarily designated for summary and ‘ad hoc’ determination of points of law or construction of certain questions of fact, or for the obtaining of specific directions, usually for the safeguarding or guidance of persons acting in fiduciary capacity or acting under the general directions of the court, such as trustees, administrators...*”

**In Re Giles (2) (1890), 43 Ch. D. 391**, it was held that such procedure (under Order 37) was intended, so far as we can judge, to enable simple matters be settled by court without the expense of bringing an action in the usual way, not to enable the court to determine matters which involve a serious question.

In the case of **Joyce Carol Nsubuga and 2 others Versus Christine Nsubuga O.S 007 of 2014**, court while resolving the issues before it then, held that Order 37 Rule



1 gives Court wide discretion on whether to grant the Orders sought...or not dependent on a case-to-case basis.

## **Resolution of the issues**

### **Issue 1: Whether the application is properly before court.**

The application was brought by way of Originating Summons under section 33 of the Judicature Act, section 98 of the Civil Procedure Act, Order 37 Rules 1 and 8 of the Civil Procedure Rules (CPR).

It is the 1<sup>st</sup> Defendant's submission that the instant application is contentious and the questions framed do not fall under the ambit of Order 37 rules 1 (a), (b) and (g) of the CPR. The submissions further point out paragraph 6, 7 and 8 of the Plaintiffs' Affidavit in support of the application to have raised allegations that the Plaintiffs need to prove and therefore, the mode of action preferred by the plaintiffs is not the most suitable since the assertions made therein require wide evidence. Also, the cases of **Kulumbai Gulam Hussein Jaffer Ramji and Another Versus Abdul Hussein Jaffer Mohamed Rahim and Others [1957] 1 EA 699 (HCZ) and In Re Giles (1890), 43 Ch. D.** were relied upon in the 1<sup>st</sup> Defendant's submission which cases explain when a suit can be brought by way of Originating Summons.

In rejoinder, the plaintiffs rejected the notion that the application presented any issues of contention because the said paragraphs 6, 7 and 8 of the affidavit in support of the application that the 1<sup>st</sup> defendant cites as contentious are not raised as questions for determination, the 1<sup>st</sup> defendant has already conceded to the issues raised in the said paragraphs and that the 1<sup>st</sup> defendant has misquoted section 265 of the Succession Act in as far as it applies where there is a dispute over the grant of Probate and does not apply where a party is obliged to honor the testamentary wishes in a will.

I have considered the circumstances of the case before me in light of the law under which this application has been brought. I have also considered the court decisions relied on by counsel for the 1<sup>st</sup> defendant in a bid to determine which matters can be brought by way of Originating Summons and I find that this application is one of those that can proceed by way of Originating Summons. This is because I do not find the questions raised for determination by the plaintiffs contentious.

The questions to be determined by this honorable Court are simple and very straight forward to wit; “can the 1<sup>st</sup> defendant be ordered to transfer the suit land into the names of all the plaintiffs or be ordered to deliver up in court the Special Certificate of Title or order the 2<sup>nd</sup> defendant to issue a certificate of title in the name of all the plaintiffs in accordance with the testamentary wishes of the deceased?” I do not find anything contentious about these questions.

I also do not find paragraph 6, 7 and 8 of the plaintiffs’ affidavit in support of the application to raise issues that need to be proved by the plaintiffs as that would most likely be a different suit all together. The gist of the said application before court in simple terms is to compel the 1<sup>st</sup> defendant to execute the testamentary wishes of the deceased as concerning the suit land as the executor of the deceased’s Will and holder of Probate and nothing else.

I find that the 1<sup>st</sup> defendant is trying to create a contention where it does not exist. The 1<sup>st</sup> defendant was in court when the said application was called for hearing on 3<sup>rd</sup> November 2021. Upon examination, he agreed to the fact that there was a WILL left by the deceased, that he was named as the executor of the deceased. He also confirmed that the deceased in his WILL bequeathed the suit land to all his children for their benefit and that he has never executed the deceased’s testamentary wishes concerning the suit land.

Since the application before this court concerns performance of the duties of an executor under the WILL of the deceased which are not contested by both parties, I find that the suit is properly brought before court. I agree with the learned Judges in the cases cited above contained in the 1<sup>st</sup> defendant's written submissions that the procedure in Order 37 was to enable simple matters to be settled by court without the expense of bringing an action the usual way. As earlier stated, I find this to be a very simple and non-contentious matter that can be settled by court without the expense of bringing an action the usual way.

From the foregoing, I find that this application is properly before court and issue 1 is resolved in the affirmative.

I will therefore proceed to resolve issues 2, 3 and 4 together since they all seek for the same remedy which is the delivery, transfer of the certificate of title into the names of all the plaintiffs and registration of all the plaintiffs' names onto the said certificate of title.

Having resolved issued 1 in the affirmative that the suit is properly before court and having cited reasons for the finding above, issue 2 and 3 are also resolved in the affirmative. This is because the two issues relate to administration of the estate of a deceased person and it is the 1<sup>st</sup> defendant who has since 3<sup>rd</sup> July 2015 failed to administer the entire estate of the deceased especially the suit land. The plaintiffs, now being of age are seeking that the 1<sup>st</sup> defendant is ordered to execute the said estate as per the testamentary wishes of the deceased. The 1<sup>st</sup> defendant has not furnished this court with any reason as to why he is refusing to transfer and register the suit land in all the names of the deceased's children. This contravenes Clause 3 of the deceased's WILL which clearly provided how the suit property should be administered.

Clause 3 of the said Will states as follows:

*“I GIVE, DEVISE AND BEQUEATH*

*To all my children that piece of land and developments thereon situate at Ntinda and described as private Mailo Block 216 Plot 1270 measuring approximately 0.099 hectares and I declare that the same shall not be sold by whosoever has the management, be it the Trustees mentioned in the will, children or grand-children but may be used to generate income for the educational maintenance and other welfare of my children or matters incidental thereto.”*

I take note of the 1<sup>st</sup> defendant’s averment in paragraph 5 of his affidavit in reply to the Originating Summons to the effect that the deceased left nine (9) children, two (2) of whom are not biological siblings of the plaintiffs. According to him, he is suspicious that the plaintiffs might not equitably share in the suit land with the other two (2) children who are from different mothers. It is because of this that the 1<sup>st</sup> defendant attached a proposed sharing plan on his affidavit in reply to the Originating Summons dated 29/10/2021. I have also read the provisions of sections 180 and 270 of the Succession Act that vest the executor with all the property of the deceased and the power to dispose of the same wholly or in part as the executor deems fit.

However, I would like to point out and disallow the proposed sharing plan that the 1<sup>st</sup> defendant is introducing because the deceased’s Will is very clear on how the suit land is to be administered. The wording of the said Will is clear and it did not mention anything like sharing the suit property in the portions the 1<sup>st</sup> defendant indicates in his proposed sharing plan. The said proposed sharing plan is therefore illegal and would go against the wishes of the deceased if the suit land is shared amongst his children by whosoever has management of the suit land, be it the trustees mentioned in the Will of which the 1<sup>st</sup> defendant is the sole executor and

trustee. As per the wording of the WILL, I believe that the deceased had at all times wished and wanted the suit land to remain intact and be used for the benefit of all his children equally without ever selling it or dividing the same. I also do not think that sections 180 and 270 intended to empower an executor to do as he/she pleases with the deceased's estate in terms of distribution of the same especially where there is a WILL and its contents are clear as to how the property should be treated or distributed.

I have also taken note of the fact that when the matter first came up for hearing on 3<sup>rd</sup> November 2021, the plaintiffs present in court were not opposed to the inclusion of the other two (2) children who are not their biological siblings on the certificate of title. They seemed to me not to have a problem using the suit land with them though they stated that they had never seen them. However, since they were mentioned in the WILL of their deceased father, they would willingly share with them the suit property. It was also my observation that the 1<sup>st</sup> defendant has clearly misunderstood his role as the executor and trustee of the deceased's estate. He tended to think that he is the owner and could distribute the said estate, in particular, the suit land the way he wanted or thought to be the best way to distribute/administer it, even if it meant going against the testamentary wishes of the deceased.

As earlier stated, I do not find reason enough as to why the 1<sup>st</sup> defendant is refusing to administer the suit land as per the testamentary wishes of the deceased. I therefore, once again resolve issues 2 and 3 in the affirmative stating that the 1<sup>st</sup> defendant should transfer the suit land into ALL the names of the deceased's children according to the testamentary wishes of the deceased. He should also deliver in court the special certificate of title that is within his possession to court together with signed transfer forms, passport photos, his identification documents for the purpose of transfer and

registration of the names of all the deceased's children onto the same since they are of age and capable of managing their own affairs.

I decline to order the 2<sup>nd</sup> Defendant to issue a Certificate of Title into the names of all the deceased's children and to register their names thereon as prayed by the plaintiffs. This is because there is already a Special Certificate of Title in the possession of the 1<sup>st</sup> defendant. The first defendant has a duty to execute the wishes of the deceased as per the WILL and comply with the Orders of this court

In the premises, issue 4 is hereby ignored unless exceptional circumstances can be proved to order the 2<sup>nd</sup> defendant to issue a special certificate of title registered in the names of the plaintiffs/ all the children of the deceased.

Issue 5 regards the costs of this suit. It is trite that costs follow the suit and as per section 27 of the Civil Procedure Act, I will award the same to the applicants.

Having found that the questions or issues to be determined by court are non-contentious and that the 1<sup>st</sup> defendant concedes to the fact that he has never executed the WILL of the deceased in respect to the suit land, the questions raised are answered as follows:

- a) the 1<sup>st</sup> defendant, James Okullo is ordered to transfer the suit land comprised in Block 216 Plot 1270 land at Buye into ALL the names of the children of the deceased, the late Odong Lakidi as per his testamentary wishes under clause 3 of the WILL. For avoidance of doubt, the children of the deceased are; **Pamela Acan, Latigi Betty, Ajok Gloria, Lakidi George, Ojok Derrick, Akello Brenda, James Okullu (Junior), Atim, Labongo Kenneth.**
- b) the 1<sup>st</sup> defendant, James Okullo is ordered to deliver up the Special Certificate of Title for the suit land in court on the **7<sup>th</sup> day of December 2021** together

with signed transfer forms, passport photos and identification documents for purposes of transfer of the suit land;

- c) the Grant of Probate issued by this Honorable court vide Administration Cause No. 957 of 2014 on 3<sup>rd</sup> July 2015 will be rendered inoperative upon transfer of the suit land into the names of the beneficiaries named in (a) above
- d) The 1<sup>st</sup> defendant is directed to trace **Atim** and **Labongo Kenneth** the other beneficiaries who are unknown to the plaintiffs for purposes of completing the process of registration of the suit property into the names of all the beneficiaries. The 1<sup>st</sup> defendant informed court that he knew their whereabouts.
- e) the 1<sup>st</sup> defendant is ordered to hand over to all the children of the deceased any other remaining property not yet properly disposed of since they are now of age and capable of managing their own affairs;
- f) the 1<sup>st</sup> defendant is barred from interfering in anyway with the suit land and any other the remaining property of the deceased that was left for the benefit of all the children of the deceased;
- g) the costs of this suit shall be borne by the 1<sup>st</sup> defendant.

**Dated at Kampala this 30<sup>th</sup> day of November 2021.**

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**Alice Komuhangi Khaukha**

**Judge.**

**30<sup>th</sup> November 2021.**