

**THE REPUBLIC OF UGANDA**  
**IN THE REPUBLIC OF UGANDA**  
**(FAMILY DIVISION)**  
**CIVIL SUIT NO. 148 OF 2022**

**HEATHER FLAVIA NANTONGO ::::::::::::::::::::::::::::::: PLAINTIFF**

**VERSUS**

**HENRY KONDE**  
**(ADMINISTRATOR OF THE ESTATE**  
**OF THE LATE E. L MUGALASI) :::::::::::::::::::::::::::::::DEFENDANT**

**BEFORE HON. LADY JUSTICE CELIA NAGAWA**

**JUDGEMENT**

**1.0 Introduction.**

1.1 The Plaintiff, Heather Flavia Nantongo instituted this suit against the defendant Henry Konde (Administrator of the Estate of the Late E.L Mugalasi) seeking the following;

- a) An Order that the defendant gives the Plaintiff 1 acre of land at Buloba comprised in Block 313 Plot 239 and Block 313 formerly Plot 16.
- b) A declaration that the plaintiff is entitled to a share of her father's share of the 1 acre in Mutungo.
- c) A declaration the Plaintiff is entitled to utilize the land in Singo.
- d) General damages.
- e) Costs of the Suit.



- f) Any other relief that the Honourable Court may deem fit.
- 1.2 The Defendant was served and he filed a Written Statement Defence on 11<sup>th</sup> October, 2019.
- 1.3 The Plaintiff was represented by Counsel Ofumbi Dan of M/S Katende, Serunjogi & Company Advocates, Kampala whereas the Defendant was represented by Counsel Ssebunyo Mafulu Douglas and Counsel Bukenya Kenneth Edmond of M/S CMS & Company Advocates (Formerly C. Mukiibi Sentamu & Company Advocates), Kampala.

## 2.0 **Background of the Suit.**

- 2.1 The Plaintiff is the only daughter and the only beneficiary of the Estate of the late Thomas Joshua Lule Mukasa, who was a son and beneficiary of the late Erasito Lubanga Mugalasi. The defendant is a son, beneficiary and Administrator of the deceased Erasito Lubanga Mugalasi. The late Erasito Lubanga Mugalasi died testate leaving a will in which he bequeathed to his son Thomas Joshua Lule Mukasa, 1 acre of land at Mutungo to his 3 sons, to be used jointly by them. 12 acres of land at Buloba. The deceased further distributed 900 acres of land at Singo to be used for farming and a house in Katwe.
- 2.2 The Plaintiff avers that out of the 4 acres of land at Buloba entitled to the late Thomas Lule Mukasa, the father of the plaintiff in the will, the defendant only gave her 3 acres. She also avers that the defendant sold off 1 acre of land at Mutungo meant to benefit the three sons of the deceased and never remitted any money to the late Thomas Joshua Lule Mukasa's



estate. The plaintiff further avers that the defendant has stopped her from accessing the land at Singo to manage, utilize and carry out farming activities yet it is part of the properties bequeathed to the plaintiff's father Thomas Joshua Mukasa.

2.3 On his part, the defendant contends that the Mutungo Property was sold by the administrators with the consent of the beneficiaries in 1992 and the plaintiff's father was sent his share.

2.4 He further averred that the land in Buloba was 11 acres and not 12 acres as stated in the Will and the Plaintiff received 3.44 acres and sold the same. The defendant also stated that many factors beyond his control reduced the acreage such as the mutations done to the road network, burial grounds, the widow's home and the customary heir's home.

2.5 The defendant also contended that he has never barred the Plaintiff from using the land in Singo since all other beneficiaries use it jointly for farming and ranching. He stated that the land could not be distributed since the Will provided for joint use.

### **3.0 Issues to be determined by the Court.**

1. Whether the Defendant lawfully or equitably distributed the property/estate of the late Erasto L. Mugalasi?
2. Whether the Plaintiff is entitled to the 1 acre from the land at Buloba?
3. Whether the Plaintiff is entitled to a share in the Property at Mutungo?



4. Whether the Plaintiff is entitled to an independent and exclusive share out of the Singo Property?

5. What Remedies are available to the parties?

4.0 **Burden of proof and standard of proof.**

4.1 In principle, a party has the obligation of proving facts which he or she needs to establish for success in his/ her case. When the issue of fact has to be proved in Courts of law, it is first necessary to consider the burden borne by the parties. **See Colin Tapper, Cross & Tapper on evidence, OUP Oxford 11<sup>th</sup> Ed. 129.**

4.2 The general rule is that he or she who asserts must prove. **See Section 101 of the Evidence Act, Cap. 6.** Certain issues are essential to the case of a party in Civil Proceedings in a sense that issues must be proved by that party if he or she is to succeed in the action.

4.3 The burden of proof in civil cases, therefore, lies on the person who would fail if no evidence at all was given on either side. *See Section 102 of the Evidence Act (supra).* The burden of proving a particular fact therefore lies on that person who wishes the Court to believe in its existence unless the law provides that the proof of that fact shall lie on any particular person. *See Section 103 of the Evidence Act (supra).*

4.4 The standard of proof required to be met by either party seeking to discharge the legal burden of proof is on a balance of probabilities. This in ordinary English means that the claimant must prove that it is more likely than not that his or her version of the facts is right. **In the case of Dr. Vincent Karuhanga T/A**



**Friends Polyclinic –VS- National Insurance Corporation and Uganda Revenue Authority [2008] HCB 151, It was held; that:**

4.5 *“In law a fact is said to be proved when Court is satisfied as to its truth. The evidence by which that result is produced is called the proof. The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. When the party adduces evidence sufficient to raise a presumption that what he or she asserts is true he or she is said to shift the burden of proof, that is his or her allegation is presumed to be true unless his or her opponent adduces evidence to rebut the presumption. The standard of proof is on a balance of probabilities.”*

**5.0 Submissions by Counsel.**

5.1 I have carefully perused the record and considered the submissions by both learned counsel. I have also read a number of authorities from this court and other jurisprudence on the issues at hand, particularly the ones cited by learned counsel for both parties. These written submissions by Counsel for each party shall offer me guidance when I am resolving this application. Further, I evaluated and examined both parties’ affidavit evidence and the documentary evidence, as required by law.

5.2 I now turn to resolve the Preliminary Objections that were brought to the attention of Court.



## **6.0 Preliminary Objections.**

### **Preliminary Objection 1: The defendant raised a preliminary objection that the suit does not disclose a Cause of Action.**

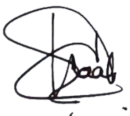
- 6.1 The defendant contended that Paragraphs 4, sub paragraphs (a), (b), (c), (d), (e) and (f) of the Plaintiff do not disclose any facts which show that the plaintiff enjoyed a right which the defendant is liable for violating. It was his contention that the question of whether a plaintiff discloses a cause of action must be determined upon the perusal of the plaintiff alone together with anything attached so as to form part of it. The defendant prayed that the plaintiff be struck out for failure to disclose a Cause of action.
- 6.2 On her part the plaintiff argued that the plaintiff indeed discloses a cause of action. She stated that under Paragraph 3 of the plaintiff, the claims against the defendant are well stipulated wherein she sought an order that the defendant gives her 1 acre of land at Buloba, an order that the plaintiff is entitled to her father's share in the 1 acre of land at Mutungo, an order that the plaintiff is entitled to utilize the land in Singo, general damages and costs of the suit. The plaintiff contended that Paragraph 4 of the plaintiff stated that she is the only daughter of the deceased Thomas Lule Mukasa who was a son and beneficiary of the late E.L. Mugalasi. The plaintiff stated that as

a daughter of the deceased, she is entitled to share in the estate of the deceased E.L Mugalasi who was her grandfather.

6.3 The plaint does not explicitly state the cause of Action, however from reading the paragraphs 3 and 4 of the plaint. The court can deduce what the Cause of Action is. The plaintiff clearly states that she brings her suit as a beneficiary of her deceased father against her uncle who is the administrator of the Estate of her grandfather. The plaintiff is suing to recover her father's share in the estate of her grandfather as her father's sole beneficiary. She avers she was not given the full share of her father's share in the estate of E.L Mugalasi by the defendant. In order to prove there is a cause of action, the party must show that they enjoyed a right; that the right has been violated; and that the defendant is liable. If the three elements are present, a cause of action is disclosed and any defect or omission can be put right by amendment. **See Tororo Cement Co Ltd V Frokina International Ltd Civil Appeal No. 2/2001.** To this effect, the court finds that the plaint discloses a cause of action.

**Preliminary Objection 2: The defendant raised a Preliminary Objection that the claim to recover the property in Mutungo is time barred.**

6.4 The Defendant contended that the property in Mutungo was sold after the consultation and consent of all the beneficiaries to the suit land who included the Plaintiff's father. The defendant contended that the land was sold at the request of



the plaintiff's father who was sick in London and needed the funds for medication and business. He stated that this happened in 1992 before the plaintiff was born and therefore the claim is barred under Section 5 of the Limitation Act Cap 80.

- 6.5 The plaintiff averred that only a portion of the land in Mutungo was sold. She submitted that the defendant did not exhibit a true account of how the remaining portion of the land in Mutungo was disposed of. She contended that the remaining portion is part of the estate and she is entitled to a share in it.
- 6.6 The Will of the deceased E.L Mugalasi states that the sons of the deceased were to use 1 acre of the land in Mutungo to construct a commercial building. The deceased then bequeathed the remainder of the land in Mutungo to his 3 sons including the deceased's father.
- 6.7 In his Written Statement of Defence under Paragraph 10, the defendant stated that the land in Mutungo was all sold, however under paragraph 10 of his Witness Statement, he stated that only a portion of the land was sold. During Re-examination, the defendant testified to this court that he sold the acre of land in Mutungo. This signifies that only the 1 acre of land meant for the commercial building is what was sold and the remainder of the land In Mutungo was not sold. The plaintiff would be barred by Limitation if all the land in Mutungo was sold as her action against the land sale transaction would be time barred, however, if a portion of it is still under the estate of the





deceased, then the plaintiff has a right to have the matter resolved in the main suit.

## 7.0 **Resolution of Issues.**

### **Issue 1. Whether the Defendant lawfully or equitably distributed the property/estate of the late Erasto L. Mugalasi?**

7.1 This court will deal with each contested piece of property and resolve the particular issue related to it to determine whether or not it was lawfully and equitably distributed and determine the plaintiff's rights.

#### **Buloba Property.**

7.2 The plaintiff averred that the defendant distributed 3 acres of the land at Buloba to her and the same was evidenced by a letter allocating the 3 acres marked "**PEX 3**". It is the plaintiff's contention that the land in Buloba was not distributed equitably and fairly by the defendant. The defendant, on his part contended that factors intervened with the distribution of the property in Buloba which included the access roads, the burial grounds, the house of the testator's wife and the house of the customary heir. He stated that the property to be distributed was less than what the testator envisioned in his Will and that he distributed the suit property according the actual size of the land in existence.

7.3 According to "**PEX 1**", which is the Will of the deceased E.L Mugalasi, he bequeathed the land at Buloba as follows. "I bequeath my land at Buloba to Mr. E.H Konde, Thomas Mukasa



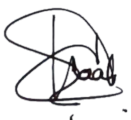
and E.L Mulinga, each to take 4 acres. E.H Konde to take 4.15 acres.” The land at Buloba was also subject to two prior bequests wherein the testator bequeathed the big house at Buloba to his heir, the defendant and another house that was being used as a shop to his wife Mangalita Mugalasi.

7.4 From the above, it can be deduced that the suit property was already less than what was bequeathed. The testator stated that each of his sons would take 4 acres, however, he went on to state that the defendant would take 4.15 acres which was 0.15 acres more than his brothers. The testator did not clarify whether or not this 4.15 acres included the already bequeathed big house on the Buloba land.

7.5 **Section 74 of the Succession Act, Cap. 162** (as amended) provides that the intention of the testator is not to be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible. In this case, the testator did not provide clarity of the houses distributed to the customary heir and his wife. He did not envision burial grounds or the construction of the Road. However, this court is enjoined to give effect to the wishes of the testator as far as it is possible.

7.6 From the Will of the deceased, the Survey Report, the pleadings and submissions of the parties, the following can be deduced in regard to the Buloba Property.

- i) The Buloba property had two plots including Block 313 formerly Plot 16 measuring approximately 5.06 acres, and Block 313 Plot 239 measuring approximately 7.0 acres.

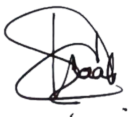


- ii) The total acreage to be distributed was 12.06 acres of land.
- iii) The deceased bequeathed the big house on the land to his heir, the defendant and stipulated that 4.15 acres would be given to him.
- iv) The deceased bequeathed a smaller house on the land to his wife Mangalita Mugalasi.
- v) The Burial grounds on the land take up 0.15 acres.
- vi) The house of the wife to the deceased takes up 0.15 acres.
- vii) The Road construction took up 0.16 acres of the suit land.
- viii) The plaintiff was given 3.44 acres of the suit land.

7.7 In consideration of the above, the total amount of land for distribution was 12.06 acres. From the 12.06 acres, a total of 4.61 acres of land is removed which is the total of the 4.15 acres distributed to the defendant, the 0.15 acres that take up burial grounds, the 0.15 acres of the wife's house and the 0.16 acres that was used for the Road. This left a total of 7.45 acres to be shared amongst the two remaining sons of the deceased which left 3.725 acres each per son. The plaintiff was already given 3.44 acres which means that the remainder of her entitlement is 0.285 acres of land and not 1 acre as she claims. The plaintiff is entitled to the remaining 0.285 acres of land. This in turn resolves Issue 2.

### **Land at Mutungo.**

7.8 In regard to the land at Mutungo. The testator distributed it as follows.



- a) “My sons, E.H Konde, Thomasi Mukasa and E.L Mulinga should form a company and put up a commercial building on one acre of my land at Mutungo”
- b) “I bequeath the remainder of my land at Mutungo to my 3 sons. E.H Konde, Thomasi Mukasa and E.L Mulinga.”

7.9 The 1 acre of the land in Mutungo that was intended for the commercial building was sold by the defendant as was resolved under Preliminary Objection 2. The land in dispute is therefore the remainder of the suit land in Mutungo that remained after the 1 acre.

7.10 It is necessary to distinguish the mode in which the property was bequeathed to the sons of the deceased. The testator did not distinguish the acres to be given to each son. He bequeathed the remainder of the land in Mutungo to his sons as a Unit. This means that the sons of the deceased became joint owners of the suit property in Mutungo. This distinction is necessary in determining the right of Survivorship in the property and whether or not the property passed to the plaintiff upon her father’s death.

7.11 *A gift of lands to two or more persons in joint ownership is such a gift as imparts to them with respect to all other persons than themselves, the properties of one single owner.* **Megarry’s Manual of the law of Real Property. Eighth Edition AJ Oakley.** For one to establish Joint Ownership of the Property, the four unities must exist.



- a) Unity of Possession: Each joint tenant is as much entitled to possession of any part of the land as the others. The testator did not distinguish and clearly establish what part of the land was owned by which of his sons. According to the Will, there was unity of possession.
- b) Unity of Interest: The interest of each owner is the same in extent, nature and duration for in theory of law, they hold but one estate. The interests of all the sons were the same in distribution.
- c) Unity of Title: The owners must claim title to the land under the same instrument or document. All the sons derived interest in the suit land from the same document which is the Will.
- d) Unity of Time: The interests of each joint owner must vest at the same time. In this case, all the sons derived their interests in the suit land at the same time upon the death of the deceased.

7.12 All four unities are satisfied meaning the sons of the deceased held the suit land as Joint owners. Under Joint ownership of land, the right of survivorship dictates ownership upon death of one owner. This means that at the death of the plaintiff's father, the right of survivorship dictated that the interest of the deceased Thomas Mukasa passed to the other joint owners who are his brothers. The defendant lawfully and equitably distributed the property at Mutungo.



7.13 It is therefore this court's considered finding that the plaintiff is not entitled to any share in the land at Mutungo. This in turn resolves Issue 2.

### **Land at Singo.**

7.14 In regard to this property, the deceased stated that the 415 acres of land at Singo, plus the 500 acres leased to him by government should not be apportioned but used for Farming purposes. The intention of the testator is very clear, this land was not to be distributed to the individual beneficiaries, but to be used by all of them. The plaintiff cannot seek to have the property distributed without the unanimous agreement of all the beneficiaries of the estate. The plaintiff is entitled to use the land for farming purposes as are all the beneficiaries of the deceased E.L Mugalasi. The plaintiff is therefore not entitled to an independent share in the property at Singo. This resolves Issue 4.

Issues 2, 3 and 4 are resolved under Issue 1 as each property is discussed and concluded.

### **8.0 Conclusion.**

In the final Result, the court orders as follows.

1. The defendant shall give the plaintiff the remaining 0.285 acres of her father's entitlement to the suit property in Buloba comprised in Block 313.
2. The plaintiff is not entitled to any share of the suit property comprised in Mutungo.



3. The plaintiff and all beneficiaries of the estate of the deceased E.L Mugalasi are entitled to utilize the suit land comprised in Singo.
4. Each party shall bear its own costs.

***Dated, Signed and Delivered by email this 15<sup>th</sup> day of June, 2023.***



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**CELIA NAGAWA  
AG.JUDGE**