

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CIVIL SUIT NO. 0028 OF 2021

1. MUSABE EDWIN

2. MUGABI EDGAR :::::::::::::::::::::::::::::::::::::: PLAINTIFFS

VERSUS

KETI KABANYO :::::::::::::::::::::::::::::::::::::: DEFENDANT

(EXECUTRIX OF THE ESTATE OF THE LATE YOWERI RWAKAIKARA)

BEFORE HON JUSTICE VINCENT WAGONA

RULING

Background:

The plaintiff brought this suit against the defendant for a declaration that the inventory filed by the defendant does not reflect the testator's interests as far as possible; a declaration that the defendant's inventory violates section 278 of the Succession Act; An order for redistribution of the estate to all the beneficiaries; an order for general damages and costs of the suit.

The allegations were denied by the defendant who indicated in her Written Statement of Defense that she was to raise a preliminary objection based on a point of law when the suit comes up for hearing contending that the suit by the plaintiff is frivolous and vexatious and asked court to reject the plaint and consequently dismiss the suit with costs.

11/11/2020

When the suit came up for hearing on 1st September 2022, Counsel Muhumuza Joseph Kaahwa for the defendant indicated for the record that he had preliminary objections based on points of law to raise which had the effect of disposing of the suit without going through a trial. Court gave parties a schedule to file written submissions in support and opposition of the points of law.

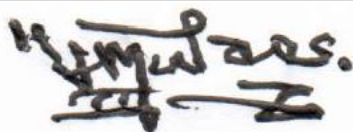
Representation:

Mr. Enock Barata of M/s Birungi, Barata & Associates appeared for the plaintiffs while Mr. Muhumuza Joseph Kaahwa of M/s Kaahwa, Kafuuzi, Bwiruka & Co. **Advocates** appeared for the defendant. Both parties filed written submissions which I have considered.

Submissions of the Defendant:

Mr. Kaahwa for the defendant submitted that this suit is an abuse of court process and unnecessary. That the suit is being used to revenge against the defendant and intended to prevent the defendant from implementing and executing the orders of court granted against the plaintiffs in HCT- 01 – CV – OS – 052 of 2019. That the suit at hand is prohibited under Order 6 rule 30(1) of the Civil Procedure Rules.

Learned Counsel submitted that a suit is said to be frivolous if it is lacking a legal basis or legal merit, not serious and not reasonably purposeful, while on the other hand a suit is regarded vexatious if it is without reasonable or probable cause or excuse harassing and annoying. It was submitted that that in the case of **Harman Ssemuju Vs. Attorney General, Court of Appeal Constitution Petition No. 1 of 1998**, a frivolous and vexatious action was defined as one which the plaintiff



cannot prove and which is without any solid basis which court may strike out under its inherent jurisdiction to protect itself from abuse.

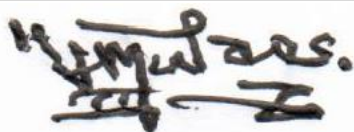
Learned counsel contended that the current suit is intended to circumvent the orders in HCT – 01 – CV – OS – 052 of 2019 which restrained the plaintiffs from interfering with the estate of the deceased. He referred court to the orders in **HCT-01-CV-OS-052-2019** that it was contended the plaintiffs want to avoid by filing the suit at hand and thus asked court to reject the plaint and consequently dismiss the suit with costs.

Submissions of the Plaintiffs:

In response Mr. Barata, for the plaintiffs submitted that Order 6 rule 30 of the Civil Procedure Rules provides for rejection of a plaint where a suit is frivolous and vexatious. That whether a suit is frivolous or not, reference must be made to the pleadings. The plaintiffs denied the contention by the defendant's Counsel that the current suit was filed to circumvent the earlier orders issued by court.

It was contended that the plaintiffs suit seek to challenge the inventory filed by the defendant on account of being contrary to the will of the deceased and thus illegal. That the plaintiffs challenge the decision of the defendant giving 2 acres of land to one Christopher Kasumba whereas in the will, he was allocated one acre.

It was contended that the other contention is in relation to failure to give a share of land at Kibitto to the estate of the late Solomon Nyakairu yet the same was bequeathed to him under the will.



It was furthermore contended that the defendant distributed the estate and filed an inventory meaning the orders in **HCT-01-CV-OS-052-2019** were effectively and conclusively implemented and therefore there is no order that the current suit circumvents.

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It was also contended that the suit also challenges the actions of the defendant to sell estate property without proper account in the guise of raising litigation costs in **HCT-01-CV-OS-052-2019**. That whereas the Succession Act allows an administrator to sell estate property, such power does not include arbitrary sell.

10 That the caveat lodged on land comprised in LRV 334 Folio 7, Block 43 plot 14 was justified since the forests that the defendant sold fall within the said land.

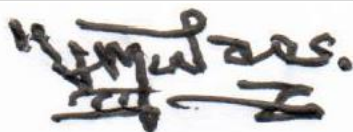
Learned counsel thus asked court to overrule the objection.

15 **Rejoinder of the defendant:**

In rejoinder Mr. Muhumuza reiterated his earlier submissions and contended that matters raised in the current suit were effectively determined by this court in **HCT-01-CV-OS-052-2019**. That the complaints raised herein would be resolved by a mere complaint to court as provided for under Order 8 of the O.S No. 52 of 2019.

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It was submitted that the sale of the land at Kibiito by the defendant was within her powers as provided for under section 270 of the Succession Act and details of the sale can be provided to the plaintiffs. That the land sold was not allocated to the late Solomon Nyakairu under the will and thus Counsel invited court to find that
25 there are no fresh issues raised in the current suit.



That lodging a caveat was contrary to Order 4,7 and 8 of the judgment of court. That this land was not allocated to the plaintiff's late father and thus Counsel asked court to find that the caveat was lodged illegally.

- 5 It was contended that giving additional one acre to Kasumba was authorized by the family and done with their consent. It was submitted that the distribution of the estate was done in accordance with the will of the late Yoweri Rwakaikara. Counsel maintained that the preliminary objection on point of law should be upheld and consequently the suit dismissed with costs.

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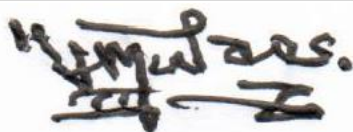
CONSIDERATION BY COURT:

Order 6 rule 30 provides thus:

- 15 *The court may, upon application, order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer and, in any such case, or in case of the suit or defence being shown by the pleadings to be frivolous or vexatious, may order the suit to be stayed or dismissed or judgment to be entered accordingly, as may be just.*

- 20 The above order empowers court on application by a party to a suit to strike out any pleading that does not disclose a cause of action or which is frivolous or vexatious.

- 25 The Civil Procedure Rules and the Act do not define what constitutes frivolous and vexatious. In the America cases of **Ervin v. Lowery, 64 N. C. 321; Strong v.**

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Sproul, 53 N. Y. 499; Gray v. Gidiere, 4 Strob. (S. C.) 442 the term “frivolous” was described thus:

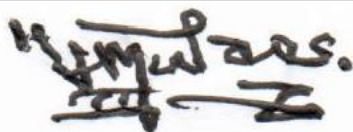
5 *“An answer or plea is called “frivolous” when it is clearly insufficient on its face, and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purposes of delay or to embarrass the plaintiff”.*

Further, Cole, J. in Cottrill v. Cramer, 40 Wis. 555 (Wis. 1876), stated that:

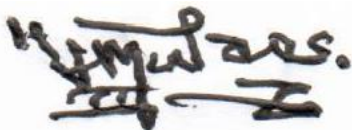
10 *“A frivolous demurrer has been defined to be one which, is so clearly untenable, or its insufficiency so manifest upon a bare inspection of the pleadings, that its character may be determined without argument or research, Farmers’ & Millers’ Bank v. Sawyer, 7 Wis., 379; Walton v. Goodnow, 13 id., 661; Ferguson v. Troop, 16 id., 572; Sage v. McLean, 37 id., 357.”*

15 On the other hand, a proceeding is said to be vexatious when the party bringing it is not acting bona fide, and merely wishes to annoy or embarrass his opponent, or when it is not calculated to lead to any practical result. The term vexatious literally means without reasonable or probable cause or excuse or proceedings instituted
20 maliciously and without probable cause. (*Black’s Law Dictionary, 4th Edition*).

The objection by the defendant’s Counsel is hinged on the orders in Originating Summons No. 52 of 2019 which he says the current suit is targeted against the implementation of the same. I will state those orders verbatim for emphasis thus:



1. The defendants cease in interfering in the estate of the deceased. Any further action amounts to intermeddling which is an offense.
2. The authority of the defendants is limited to share of their father in the estate that was distributed to him before his death. The power to distribute any remaining property vests in the existing executrix, the plaintiff.
3. This Court finds that there was no final inventory filed since the distribution of the land was not complete. The mechanisms on how the beneficiaries will jointly own the said lands was never filed in court.
4. The plaintiff should complete the distribution of the estate and file a final account so that this succession matter is complete. The distribution of property has taken very long which is the cause of family disputes. Administration of an estate is not a permanent function. It has a timeline of one year. The inventory should be filed within 6 months from the date of this judgment.
5. Clause six of the will appoints a deputy heir Samuel Agaba who should take on the benefits and responsibility previously under the late Solomon Nyakairu. The deceased's house should be handed over to Samuel Agaba if he is still alive and should be accessible to all the beneficiaries. The defendants have no claim over the said house and should vacate it.
6. The 4th defendant was appointed as heir to his father and not to his grandfather who had specified/appointed Samuel Agaba as deputy heir. This does not give the 4th defendant power over the estate especially the land. I note that Yoweri's will never provide that Agaba would not be a



full heir and only deputy of Solomon Nyakairu. As a compromise, the parties may consider that the 4th defendant can act as Agaba Gilbert's deputy.

5 7. Since joint tenancy arrangement is unworkable, the Kibiito and Kicucu land distribution should be sorted out by the executor the plaintiff to ensure that all beneficiaries are given their share. This also includes the defendants as beneficiaries of their father Solomon Nyakairu. The defendants are entitled to their father's share on the said land. The wishes of the deceased Yoweri as expressed in the will should also be
10 respected as regards other relatives.

8. The executor shall sign all necessary documents to ensure each beneficiary gets their share of the land and facilitate the registration process. Any lack of cooperation on her part should be reported to court so that court orders are issued to compel her to finalise the
15 distribution of the land.

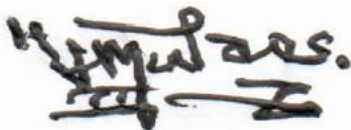
9. In case the plaintiff is incapable of performing her duties as an executor, the beneficiaries may petition the Court for orders that her letters of probate be cancelled and fresh letters issued to other persons.

10. In case family members fail to agree on suitable persons to apply for
20 letters of probate, then the Administrator General can administer the remaining estate and distribute the land.

11. The defendants should cooperate with the executor and other family members in the interests of family harmony.

12. The defendants pay the costs of the suit.

25 13. I make no orders as to general damages since this is a family matter.

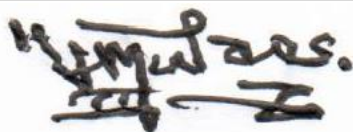


The orders of court in **HCT-01-CV-OS-052-2019** required the defendant to distribute the estate and file an inventory. The same orders allowed the beneficiaries to come back to court if the defendant failed to perform her duties.

5 In the plaint filed by the plaintiffs, they challenge the inventory filed in court on the ground that it does not reflect the intention and interests of the testator as expressed in the will. They also challenge the distribution of land to Kasumba Christopher being an additional one acre of land and seven acres to Henry Kahigwa and Nathan Kahigwa on the basis that the testator had expressly given
10 them one acre and user rights respectively and finally they challenge the sale of land at Kibiito by the defendant arguing that the same was illegally conducted. In effect the plaintiffs are saying that the defendant did not perform her duties well within the permitted parameters of the will.

15 The defendant denied these allegations and contended inter-alia, that the one acre added to Kasumba Christopher was pursuant to a resolution by the family on 22nd March 2009. That the seven (7) acres distributed to Henry Kahigwa and Nathan Kahigwa as lawfully done upon the good co-operation and the consent of the immediate primary beneficiaries following the survey establishing that the seven
20 acres was land under their actual use and possession. The defendant contends that the provisions of the will under the bequest were not violated. That the defendant lawfully sold the property at Kibiito to meet costs of litigation prior and during the pendency of HCCS No. 52 of 2019 and the action is permissible under section 270 of the Succession Act.

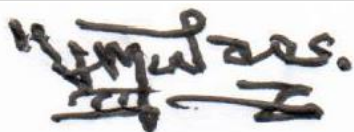
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I have perused the orders in **HCT-01-CV-OS-052-2019**, the plaint together with the defense and the will dated 29th August 2005. In the orders issued in **HCT-01-CV-OS-052-2019**, the defendant was ordered to distribute the estate of the late Yoweri Rwakaikara per the will and as further guided by court and file an inventory in court. The defendant did that and filed an inventory in court on 10th January 2021 dated 18th January 2021. The plaintiffs in the current suit are challenging the manner of distribution of the estate and legality and propriety of the inventory filed in court.

I find that the plaintiffs in challenging the inventory and actions of the defendant as an executrix do not amount to circumventing the orders in **HCT-01-CV-OS-052-2019**. There is nothing in the orders of court therein to preclude the beneficiaries from challenging the distribution and the legality thereof. As to whether the plaintiffs could have merely presented a complaint to court, the current plaint in itself may amount to a complaint.

It is settled law that a beneficiary has a right to challenge the legality of the actions of the administrator which includes a right to challenge the inventory filed in court. The Hon. Nkonge J in **Nuridin Katende Vs. Yunus Kabugo & 4 others**, Civil Suit No. 364 of 2012 observed thus: *“All this therefore creates a duty on the executor or administrator to account for any proceeds of the trust property (See Anecho Hamis Vs. Twalib Noah & 2 others, HCCS No. 09 of 2008. The role is accomplished through filing an inventory or an account of the proceeds as required under section 278 of the Succession Act which the beneficiaries are always free to challenge.”*

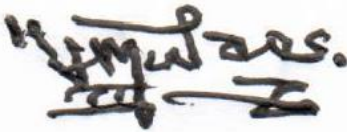


I therefore find the preliminary objection on a point of law put forward by the defendant to be untenable and it is hereby overruled with costs in the cause.

It is so ordered.

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Dated at High Court Fort-portal this 8th day of June 2023

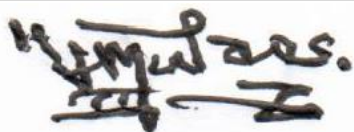
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Vincent Wagana

High Court Judge

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FORT-PORTAL

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