

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
CIVIL SUIT NO. 280 OF 2006

1. VIOLET NAKIWALA
2. SONDOLO JAMES ::::::::::::::::::::::::::::::::::::::: PLAINTIFFS
3. RWAKIBWENDE FRANCIS

VERSUS

1. EZEKIEL RWEKIBIRA
2. JOYCE KAIHAGWE RWEKIBIRA ::::::::::::::::::::::::::::::: DEFENDANTS

BEFORE: HON.MR. JUSTICE BASHAIJA K. ANDREW

JUDGMENT

VIOLET NAKIWALA, SONDOLO JAMES, and RWAKIBWENDE FRANCIS (herein after referred to as the “Plaintiffs”) the Administrators of the estate of the late Eriya Kakoro also known as Rwakakoro brought this suit against **EZEKIEL RWEKIBIRA** and **JOYCE KAIHAGWE RWEKIBIRA** (herein after referred to as the “Defendants”) jointly and severally. The Plaintiffs’ cause of action against the Defendants is for fraudulent conversion and ultimate registration of the suit land to comprised in **LRV 1895 Folio 7 Singo Block 426 Plot 9**(herein after referred to as the “suit land”) into the Defendants’ names, and illegal deprivation of the Plaintiffs of their rightful share to the suit land.

Background.

The facts are fairly straight forward. The Defendants and the late Eriya Kakoro, were the registered joint tenants of the suit land since 1985. The 1st Defendant and the late Eriya Kakoro were brothers and occupied the suit land with their respective families grazing their cattle thereon. Eriya Kakoro died in 1998, and his family with which he had moved to another location in Kyasansuwa in search of fresh pasture for their cattle wanted to go back to the suit land. However, the 1st Defendant informed them that the deceased before his death surrendered his interest in the suit land to the Defendants, and that as such the children and wife of the deceased no longer had any interest to claim in the suit land.

The 1st Defendant showed the Plaintiffs a Memorandum of Surrender document dated 25/07/1997 stating that the deceased had surrendered his interest. Upon scrutiny of the document said to have been made by the deceased, the Plaintiffs state that they discovered it to be an outright forgery because by the time it was said to have been made, the deceased was terminally sick and could not have been a party to the said document. The Plaintiff also questioned the authenticity of the document because the deceased could not have done it without the express consent of his children and wife. The Plaintiffs further cast a lot of suspicion on the document since it was written in English and yet the deceased was illiterate, and therefore that the deceased's purported thumb print may be an outright forgery.

The Memorandum of Surrender document was also said to have been made at the chambers of a lawyer at Mityana town, but the Plaintiffs refuted that allegation because the deceased whom they said was terminally ill at the time could not have been able to go to Mityana town without the knowledge of his family members, especially his wife and children. The Plaintiffs totally rejected the alleged

surrender because it was based on the reimbursement of money which the deceased allegedly owed the 1st Defendant in legal fees and costs for a suit which, according to the Plaintiffs, was nonexistent and thus an outright fabrication.

For their part the Defendants contended that the late Rwakakoro and all his family gave vacant possession of the suit land to the Defendants in 1994, and that the Plaintiffs have never returned or attempted to return to the land to date. That although the late Eriya Rwakakoro was registered as a joint owner of the suit land, the truth is that all the *bibanja* constituting the suit land were bought and paid for by the 1st Defendant alone, and that Rwakakoro was registered as co-owner simply because he was an elder brother to the 1st Defendant. The Defendants aver that the Memorandum of Surrender is not a forgery and that the deceased executed it when he was not terminally ill.

In their joint Scheduling Memorandum, the parties agreed on the following two issues for determination;

- 1. Whether the subsequent registration by the defendants into their names was lawful.***
- 2. What remedies are available to the parties?***

Resolution.

Issue No.1: Whether the subsequent registration (of the suit land) by the defendants into their names was lawful.

The case is primarily centered on two main documents - the Power of Attorney and Memorandum of Surrender, both of which the Defendants maintain were made by the deceased. In the Power of Attorney, the deceased granted the 1st Defendant

authority to manage the deceased's share in the suit land and to institute or defend the deceased's suit affecting the suit land during the time the deceased would be absent from the suit land at the time the deceased was still living. In the Memorandum of Surrender document the Plaintiff is said to have surrendered his share in the suit land to the Defendants, in lieu of money the deceased owed to the 1st Defendant on account of fees and costs the 1st Defendant had incurred pursuing a suit affecting the suit land.

The two documents raise important legal issues, and as such, it would be proper to have them determined first before others pursuant to **Order 15 r2 CPR** which provides as follows;

“Where issues both of law and fact arise in the same suit, and the court is of the opinion that the case or any part of it may be disposed of on issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.”

The Power of Attorney shows that the deceased “Eriya Rwakakolo” gave authority to the 1st Defendant “Rwekibira Ezekeri” to manage the donor's share in the suit land where they were joint tenants. I reproduce it fully below for ease of following.

THE REPUBLIC OF UGANDA
MITYANA SUB-DISTRICT

SINGO BLOCK 426
PLOT 9 KAGAGA/KASANDA

POWER OF ATTORNEY

I, ERIA RWAKAKOLO of Kagaga, Manyogaseka, Gombolola Kiganda being one of the registered proprietor of the above lands authorize my fellow registered proprietor RWEKIBIRA EZEKERI of the same to be my ATTORNEY and to manage my share of the said land and to defend or institute my suit affecting the said land, during my absence from the above land.

I propose to move to Kyasansuwa and I undertake to refund in any money that he will spend on account of my said share of the land.

DATED THIS 19th DAY OF APRIL 1994 AT MITYANA.

(Thumb mark)

.....
ERIA RWAKAKOLO

(signature)

.....
NSHIMYE AUGUSTINE

IN THE PRESENCE OF:-

DRAWN BY:-

M/S NSHIMYE & CO. ADVOCATES

PLOT 32 MARKET SQUARE-MITYANA

P.O. BOX 16535

KAMPALA.

The Memorandum of Surrender dated 25/07/1997 is also reproduced here below for ease of following.

THE REPUBLIC OF UGANDA
REGISTRATION OF TITLES ACT (CAP 205)

LAND AT KAGAGA KASSANDA

SINGO BLOCK 426 PLOT 9 339.43 HECTARES

- 1. EZEKYERI RWEKIBIRA**
- 2. JOYISI KAIHANGWE**
- 3. ERIYA KAKORO**

MEMORANDUM OF SURRENDER

1, ERIYA KAKORO of Rwemitongole, Lutunku, Kiganda being the 3rd tenant in common in equal shares on the above land, having failed to reimburse my fellow tenant RWEKIBIRA of my share of shs.7,911,865 when he acted as my ATTORNEY as per power attorney dated 19th April 1994, hereby surrender and relinquish my claim of the said share in the above land and vest it in the two remaining tenants i.e. MR. & MRS RWEKIBIRA.

I have signed a transfer in their favour and Rwekibira has no further claim against me whatsoever in respect of that land.

GIVEN under my thumb this 25th day of July 1997.

(Thumb mark)

.....
R.T.M OF ERIA KAKORO

(signature)

.....
EZEKYERI RWEKIBIRA

IN THE PRESENCE OF:-

(signature)

.....
**A.S. NSHIMYE ESQ
ADVOCATE**

DRAWN BY:-
M/S NSHIMYE & CO. ADVOCATES
PLOT 32 MARKET SQUARE
P.O. BOX 366
MITYANA.

Mr. Mukasa - Lugalambi of *M/s/ Mukasa – Lugalambi Advocates & Solicitors*, Counsel for the Plaintiff submitted that the Power of Attorney allegedly executed by the deceased in favour of the 1st Defendant is defective, illegal and of no value. That it was purportedly written by a donor being “Eriya Rwakakoro” and not “Eriya Kakoro” the registered proprietor. That the draftsman and also a witness DW3, Hon. Justice A.Nshimye, the Advocate then, only knew the donee but never knew the donor, and that it is possible that the deceased had never gone to Mityana to seek legal advice or see any lawyer during his life time. Further that the address of Eriya Rwakakoro is different from the address of Eriya Rwakakoro on these documents.

Counsel also submitted that the duty is on the Defendant to prove that the alleged Power of Attorney was executed by the late Eriya Kakoro and no other person. Counsel relied on **Section 66 Evidence Act, (Cap. 6)** to back his submissions. For ease of reference I fully quote it below.

If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the

document as is alleged to be in that person's handwriting must be proved to be in his or her handwriting."

Counsel contended that the late Erya Rwakokoro did not know how to read and write, but that the Power of Attorney is in English and was never translated in a language the donor understood. Further, that if the draftsman, DW3 Hon. Justice A.S Nshimye, the Advocate then, did indeed translated it as he testified, he never put a certificate of translation to that effect; which is a mandatory statutory requirement under **Section 3** of the ***Illiterates Protection Act (Cap 78)*** and thus that the document was null and void. To back this proposition, Counsel cited the cases of ***Kasaala Growers Co-operative Society v. Kakooza and another, S.C.C.A No. 19 of 2010*** and ***Ngoma Ngime v. Electoral Commission & Hon. Winnie Byanyima, Election Petition No. 11 of 2002.***

Regarding the Memorandum of Surrender dated 25/01/ 1997, Counsel submitted that it was premised on the above stated defective Power of Attorney and was made just less than three years after the Power of Attorney was allegedly secured from the deceased. Counsel contended that it also offends the provisions of **Section 3** of the ***Illiterates Protection Act (supra)*** and is fatally defective and cannot be relied upon and should be rejected. That since the Defendants procured their own registration excluding the deceased using the same documents; the registration was illegal, null and void.

In reply, Mr. Deus Nsengiyunva of ***M/s Ayigihugu & Co. Advocates***, Counsel for the Defendants contended that the documents cannot be impeached on the ground that they are illegal and that lack credibility. That the documents were made by the parties and the language is very clear, and that any confusion is a result from the

misinterpretation by Counsel for the Plaintiffs and an afterthought by the 1st Plaintiff.

Counsel further submitted that DW3 Hon. Justice AS Nshimye, a lawyer then, testified that he authored both documents and read them to the parties. That most importantly the intention of the parties had already been formal in the document they wrote in *Kinyankole* language, which Counsel argued, was surprisingly not being subjected to interpretation by the Plaintiffs. Further, that the said documents are protected under **Section 91 and 92** of the **Evidence Act (supra)**.

A look at **Section 91 and 92(supra)** shows that they deal with exclusion of evidence of oral agreement to prove any terms of a written contract, and exclusion of evidence to explain or amend ambiguous documents respectively. To that extent they are not relevant to the issues at hand, and I am not quite sure as to why Counsel for the Defendants had to cite them at all.

Counsel for the Defendants also submitted that DW3 the author of the two documents stated that he knew both the 1st Defendant and the late Rwakakoro, but conceded that the only fault was lack of a certificate of translation on the documents, which DW3 the draftsman also stated in his evidence that it was a mistake on his part. Counsel argued that the said mistake notwithstanding, the spirit of the documents is intact, and that mistake of counsel cannot be visited on the client, and that this would be a mere technicality that is curable under **Article 126(e)** of the **Constitution**.

In resolving the issues arising, I have noted that none of the contested documents were exhibited in evidence. They were only agreed upon during the Scheduling Conference by Counsel for both sides. The Memorandum of Surrender is

Annexure “C” to the plaint while the Power of Attorney is *Annexure “Y”* to the joint Written Statement of Defence.

It is also the undisputed evidence of both the 1st Plaintiffs and 1st Defendant that late Eriya Rwakakoro was illiterate. PW1 the 1st Plaintiff widow to the deceased testified that her late husband was illiterate. DW1 the 1st Defendant also stated that his brother late Eriya Rwakakoro never knew how to read and write. That being the case, the late Eriya Rwakakoro would be legally categorized as illiterate. This court took a similar position in similar circumstances in ***Mukiibi Joseph v. Elitek Technologies International Ltd, H.C. C. S. No. 227 of 2010.***

The term “illiterate” is defined under ***Section 1(b)*** of the ***Illiterates Protection Act (supra)*** to mean, in relation to any document, a person who is unable to read and understand the script or language in which the document is written and printed. ***Section 2*** thereof provides for verification of the illiterate’s mark on any document, and that prior to the illiterate appending his or her mark on the document it must be read over and explained to him or her. ***Section 3*** thereof requires that the document written at the request on behalf or in the name of any illiterate must bear certification that it fully and correctly represents his or her instructions and was read over and explained to him or her.

The purpose and effect of the above provisions have been considered in various cases and settled. In ***Tikens Francis & Another v. The Electoral Commission & 2 Others, H.C Election Petition No.1 of 2012*** it was held that;

“There is a clear intention in the above enactments that a person who writes the document of the illiterate must append at the end of such a document a kind of ‘certificate’ consisting of that person’s full names and full address and certifying that person was the writer of the document; that

he wrote the document on the instructions of the illiterate and in fact, that he read the document over to the illiterate or that he explained to the illiterate the contents of the document and that, in fact, the illiterate as a result of the explanation understood the contents of the document...the import of S.3 of the Act is to ensure that documents which are purportedly written for and on instructions of illiterate persons are understood by such persons if they are to be bound by their content...these stringent requirements were intended to protect illiterate persons from manipulation or any oppressive acts of literate persons.”

The Supreme Court in of *Kasaala Growers Co-operative Society v. Kakooza & Another (supra)* citing with approval the case of *Ngoma Ngime v. Electoral Commission & Hon. Winnie Byanyima (supra)* held that;

Section 3 of the Illiterate Protection Act (supra), enjoins any person who writes a document for or at the request or on behalf of an illiterate person to write in the jurat of the said document his/her true and full address. That this shall imply that he/she was instructed to write the document by the person for whom it purports to have been written and it fully and correctly represents his/her instructions and to state therein that it was read over and explained to him or her who appeared to have understood it.”

The Supreme Court went on to hold that the illiterate person cannot own the contents of the documents when it is not shown that they were explained to him or her and that he understood them. Further, that the Act was intended to protect illiterate persons and the provision is couched in mandatory terms, and failure to

comply with the requirement renders the document inadmissible. See also: *Lotay v. Starlip Insurance Brokers Ltd. [2003] EA 551; Dawo & Others v. Nairobi City Council [2001] 1EA 69.*

DW3 Hon. Justice A.S.Nshimye, who was the lawyer then and author of both documents on instructions of the 1st Defendant, confirmed in his evidence that he discovered at the time of execution of the Memorandum of Surrender that the person who had been introduced to him as Rwakakoro by the 1st Defendant did not know English, even though the document DW3 authored was in English. DW3 further confirmed that he did not include the certificate of translation, which he admitted was an error on his part. DW3 was also shown the Power of Attorney, which he admitted to have authored in English, but which similarly lacks the certificate of translation.

Going by the settled position of the law on the matter as above stated, the mandatory provisions of the *Illiterates Protection Act (supra)* would apply with full force to the two documents. They cannot be relied upon in any litigation by any party seeking to enforce a right. It is also the established law that the provisions are requirements of substantive law and cannot be regarded as technicalities that could be ignored or cured under *Article 126(2) (e)* of the *Constitution*. This finding is buttressed by the case of *Tikens Francis & Another v. The Electoral Commission & 2 others (supra)* where the court held, *inter alia*, that;

“The requirements of the Illiterates Protection Act are legal requirements and not procedural requirements. That law cannot therefore be bent under Article 126 (2) (e) of the Constitution.”

It would follow that the subsequent registration of the Defendants as the sole owners of the suit land to the exclusion of the late Eriya Rwakakoro is legally untenable. It was unlawfully done and therefore null and void. The estate of late Eriya Rwakakoro still has subsisting equitable interest in the suit land proportional to the share the late Eriya Rwakakoro had therein, and the Plaintiffs are the beneficial owners of the same. The resolution of these legal issues effectively disposes of the entire suit and renders consideration of the factual issues purely of academic value.

Issue No.2: What remedies are available to the parties?

No evidence proving general damages as prayed by the Plaintiffs was adduced, and therefore I have no basis to award the same. It is declared and ordered as follows;

- 1. The Plaintiffs have an equitable interest in the suit land comprised in LRV 1895 Folio 7 Singo Block 426 Plot 9.***
- 2. The “Memorandum of Surrender” dated 25/07/1997 purportedly made by late Eriya Rwakakoro is null and void.***
- 3. The Registrar of Titles is ordered to cancel the registration made on 24/02/1999 of the Defendants as joint tenants on the Certificate of Title for land comprised in LRV 1895 Folio 7 Singo Block 426 Plot 9.***
- 4. The Plaintiffs as Administrators of the estate of late Eriya Kakoro be substituted for Eriya Kakoro as joint tenants with the Defendants.***
- 5. The Plaintiffs are awarded costs of the suit.***

BASHAIJA K. ANDREW

JUDGE

26/05/2014