

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
CIVIL APPEAL NO. 125 OF 2014

(Arising from Civil Suit No. 010 of 2012 of the Chief Magistrates Court of Iganga
at Mayuge)

MUKALAKASA MOSES **APPELLANT**

VERSUS

MUTESI FLORENCE **RESPONDENT**

BEFORE: THE HON MR. JUSTICE MICHAEL ELUBU

JUDGEMENT

This is an Appeal against the Judgment and orders of His Worship Matenga Dawa Francis of the Chief Magistrates Court of Iganga at Mayuge. The Appellant is **Mukalakasa Moses**, and the Respondent, **Mutesi Florence**.

Background

The Respondent, **Mutesi Florence**, was the plaintiff in the lower court and filed a claim against the Appellant, **Mukalakasa Moses**, who was the Defendant. Her suit was for the recovery of land, General Damages, a Permanent Injunction against the Appellant and Costs of the suit.

The Plaintiff's case was that the Appellant, is her elder brother and their father, Ngobi Eriazali, is deceased. That the appellant is a step brother whose mother is Bitu Naigaga. The plaintiff's mother is Edinansi Byaba and is the one living in the matrimonial home which sits on the suit land located at Wagona-Bute Waitambogwe in Mayuge.

The suit land had the following neighbours: Swaibu Igulu on the eastern side; to the west is John Koire; the Musita Magamaga road is to the north; and to the south is Kanga.

That their father died on the 9th of April 2010, leaving behind a will in which he distributed his land to his children. The will was read at their father's funeral rites and in it he bequeathed the home to his wife Edinansi Byaba and her daughters Lovisa, Joyce Bawaye, Nankula Jane, Mwende Monica and the respondent. The suit land is 4 acres and is where the home is located.

These witnesses stated that the defendant also bought land from the Katenvuma clan. The land is near his uncle called Erios and far from the suit land.

Eliazali Ngobi had given the appellant a different piece of land during his life time. But the appellant was also in physical possession of the suit land which he had held from the 1980s when their father allowed him to use it, up to his death. That the appellant leased the land to sugar cane growers. Even after their father stopped him from using the land, the appellant continued to hold onto and utilize it. In the will the appellant was directed to leave the land after the lease of the current tenants expired. All efforts to ask the appellant to leave the land proved futile.

The will in question was made on the 9th of October 2008 and drafted by Isabirye Godfrey, a friend of the deceased. One Fred Kawuzi appended his signature as a witness. It was Frederick Bula named as heir in the Will. The Respondent also applied for letters of administration which she holds.

The Appellant denied the Respondent's claim. His case was that the Respondent is his step sister. Eliazali Ngobi is their father but they have different mothers. His mother is Bitu Ngobi Naigaga and Edinansi is the Respondent's mother. It is Edinansi who lives in the matrimonial home.

The appellant stated that the Suitland was gifted to him by their father on the 10th of April 1978. Although no document was made there were witnesses at the event including Michael Kayalwe, Paulo Galukona and Akusa Mugala. The land was demarcated and boundary marks in form of backcloth and Mpango trees planted by the said Michael Kayalwe. Neither his mother nor any of his siblings were present. That his neighbours on the one side were Adam Waiswa and the land given to the widow Edinansi. The other side was next to John Masajage up to the swamp; and finally the path from Mukuta to Wagona. That the suit land has never been measured but the portion given to the respondent and her mother was bigger than his.

It was stated farther, that the appellant purchased the land allegedly bequeathed to him in the will, on the 11th of January 1993, from Christopher Bikaba. That his father and the following persons were present as witnesses: Alfred Kawuzi (PW 3) who drafted the purchase agreement, Kasenke, Mesulamu, Jowali, Maganda, Swaibu Musumba, and Mutwalibu Maganda. Alfred Kawuzi is a son of the seller.

The appellant contested the Will because it included this land, he bought on his own, alongside that given to him by his father, as part of the estate, and yet his father never bought any land in his lifetime. The land given to his siblings was therefore his land. He also disputed the Will because it made no provision for his mother, and yet, she was the wedded wife. Additionally, he disagrees with the allegation that his mother deserted the matrimonial home. Lastly it bore a signature that differed from his father's.

The appellant admitted being present when the Will was read at the funeral rites but stated that he had never challenged it in any court of law. That is was a forgery by

its author who was an LC III Chairman but because the appellant did not support him politically he had the motive to present a false will.

It was also the appellants evidence that he was the heir appointed by the Baise Muwoya clan on 10th April 2010

The learned Trial Magistrate determined the matter and gave Judgment and orders in favour of the Respondent.

The Appellant being dissatisfied with the judgment filed this Appeal with the following grounds:

1. The Learned Trial Magistrate erred in law and fact when he failed to properly evaluate the facts on record and thus arrived at a wrong decision.
2. The Learned Trial Magistrate erred in law and fact when he relied on an unproven will of the late Eriazali Ngobi to decree the suit land to the Respondent resulting in an injustice.
3. The Learned Trial Magistrate erred in law and fact when he disregarded and failed to take into account the Appellant's evidence when deciding the case hence occasioning a miscarriage of justice.

Submissions

The parties were granted leave to file written submissions and the same are on court record but will not be reproduced in their entirety.

This being a first appeal, the court must reconsider the evidence, evaluate it itself and draw its own conclusions bearing in mind that it has not had the opportunity to see the witnesses testify and should make due allowance in that respect. (See **Uganda Breweries Limited v Uganda Railways Corp SCCA No. 6 of 2001**).

In civil matters, the degree of proof (Standard) is on a balance of probabilities. (See **Miller v Miller of pensions [1947] 2 ALLER 372**).

The appellant chose to argue ground 2 first.

Ground Two.

That the Learned Trial Magistrate erred in law and fact when he relied on an unproven will of the late Eriazali Ngobi to decree the suit land to the Respondent resulting in an injustice.

The Appellant submitted that the Trial Magistrate based his judgment solely on the purported will, exhibited as **PEx 1**, which he concluded was the valid will of the late Eriazali Ngobi. That however was in contravention of S. 188 of the **Succession Act** which stipulates that no right as executor or legatee shall be established in any court of justice unless a court of competent jurisdiction within Uganda has granted probate of the will under which the right is claimed or has granted letters of administration under section 181. The Appellant cited **Dharamsy Morarji and Sons Ltd v Suman Naresh Kara SCCA No. 41 of 1995** in support of this proposition. There is no proof that the said will was proven in a court of competent jurisdiction.

Further, that the Respondent disclosed to Court that she obtained letters of Administration - **PEx 2**. However, there was no indication that the Letters of Administration were granted based on or against the will. There is no evidence to prove that the will was ever deposited in court.

That the validity of the will or whether it conformed to the relevant law namely S. 50 (c) of the **Succession Act** could only have been proved through the formal process of petitioning the appropriate court of law for probate. That mandatory requirement was not done before the Court relied on the will.

The Respondent opposed this ground and submitted that the learned Trial Magistrate arrived at the correct decision with regards to the Will of the late Eriazali Ngobi. That **PEx 1** met all legal requirements stipulated in Section 50 (c) of the **Succession Act**. That both PW 2 who drafted the will on the 9th of October 2008, and PW 3 who attested the will testified. The evidence is both supportive and corroborative of each other. The Respondent cited **Haji Sulaiti Habib Ijumba & Ors Vs Hajati Safarani Nyinakiza Sanyu HCCS 718 of 1995**.

Regarding the letters of administration, **PEx 2**, it was the contention that the Respondent was granted the letters of administration by a competent court of law and that the will was deposited in Court at the time the petition for letters of Administration was made. That it was the duty of the Court to advise the Respondent to apply for probate as opposed to letters of Administration. That the mistake of the Court cannot be visited on the Respondent. That pursuant to Art. 126 (2) (e) of the **Constitution of the Republic of Uganda 1995** substantive justice must be administered without undue regard to technicalities. It was argued that the decision of **Dharamsy Morarji and Sons Ltd v Suman Naresh Kara (supra)** was not applicable in this case.

Determination

It is true that Respondent's claim to the suit land was based on the provisions of the Will of the late Eriazali Ngobi - **PEx 1**.

The Appellant's Complaint is that there was no grant of probate as required by Section 188 of the **Succession Act**. The Section stipulates:

No right as executor or legatee shall be established in any court of justice, unless a court of competent jurisdiction within Uganda has granted probate of

the will under which the right is claimed, or has granted letters of administration under Section 181.

These provisions clearly make it mandatory that no part or provisions or rights that flow from the will can be implemented unless an executor is granted letters of Probate. Letters of Administration may be granted only where a copy of the Will is annexed.

This court has seen the Letters of Administration issued to PW 1, the Respondent, on the 10th of November 2011. They are granted 'with or without a will attached'.

I also note that Section 101 of **The Evidence Act** places the burden of proof on the party alleging a fact. As the party alleging the incompetence of the letters of administration, the appellant should have established that the application was made without the Will attached.

The circumstances here are that the specific question whether she had a will annexed was never canvassed in her evidence. If indeed the appellant wished to make the validity of the letters of administration an issue, then that should have been made an issue at the trial, the question investigated and resolved by the court. It has arisen for the first time here on appeal and yet the respondents entire case was based on her fathers Will.

It would visit a great injustice if this Court made a decision on a matter whose full facts are not before it. This is a point made in **Sugar Corporation of Uganda vs Lawsam Chemical (U) Ltd SCCA No. 5 of 2001** where the Court held,

A new point raised for the first time in a court of last resort ought not to be entertained unless the court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea. In the present case, I am far from satisfied that this court has before it all the facts bearing on the question of law now

raised for the first time, which might have been elicited in the lower court had the matter been there in issue. Had the matter been properly pleaded the possibility of the defendant being the administrator or not of her husband's estate would have been investigated

In the result, I see no reason to fault the learned Trial Magistrate on relying on the Will to arrive at his decision. At that stage, the legality of the will was never properly challenged as well.

Ground 2 is accordingly dismissed.

Grounds 1

The Learned Trial Magistrate erred in law and fact when he failed to properly evaluate the facts on record and thus arrived at a wrong decision.

Ground 3

The Learned Trial Magistrate erred in law and fact when he disregarded and failed to take into account the Appellant's evidence when deciding the case hence occasioning a miscarriage of justice.

It is submission of the Appellant that a proper evaluation of the matter would have showed that the Respondent failed, on a balance of probabilities, to prove her case. She relied solely on the purported will **P Ex 1** which had not been proved as required by law.

That the Appellant on the other hand produced sufficient evidence proving that the late Eriazali Ngobi had given the suit land to his mother and himself, as a gift *inter vivos*, in 1978 and he has utilised since.

That DW2, Kayalwe Michael, was one of the witnesses present at the gifting and was the one who dug the holes in which the boundary marks (Trees) were planted.

The Respondent challenged both grounds. Firstly, that the Will, **P Ex 1**, met all the legal requirements of the law as stipulated by Section 50 (c) of the **Succession Act**. Secondly, that the Appellant failed to prove that one part of the suit land was given to him by the late Eriazali Ngobi, as a gift inter vivos, or that he had purchased the other portion.

Determination

These two grounds of Appeal turn on the evaluation of the evidence. There are two aspects to the evidence here. The first is that the appellant states that he received a portion of the land in question from his father as a gift.

The Respondents relied on the Will. A copy of the translation of the Will is on one of the lower Court files on the record (98/2012). In the paragraph showing the apportioning of the land the testator states that he had already given the appellant land. He then mentions land on which there are tenants. It states,

‘the eldest child Mukalakasa was given his share. I bought for him land from the children of the late Yasoni and he got his share and there is no reason why I should give him more than others.

And that child I lent him some land which I have given the girls and its was mere lending, therefore the tenants should not extend their tenancy on that land when the girls have not agreed’.

The appellant, unlike his witnesses, does not dispute the will or that it was read at the funeral rights. He gave other reasons. For now, this court has found the Will, which has never been legally challenged, valid.

The appellant disputes this and states that he bought the land. He relies on an agreement allegedly drafted by Fred Kawuzi, PW 3. When this agreement was put to Kawuzi, PW 3, he disputed it. He also said that his clan sold the appellant land

but it was different from Ngobi's. The two pieces, the one belonging to Eliazali and the one owned by the appellant were not neighbours.

This court should also consider the evidence of the appellant in saying he was given land in 1978. He states that none of his clan members or siblings were present. DW 2, the witness he called to prove this issue, was never cross examined. There is no reason on record why he never returned for cross examination. This court cannot therefore rely on his untested evidence. Both DW 3, Godfrey Mulera and DW 4, Balidawa Toniso state they were not present when this gift was given. There is therefore no independent proof of this gift.

While the appellant described the land as having Adam Waiswa, Edinansi, John Masajage and the road to Mukuta as neighbours, his witness Balidawa said the neighbours were himself (Balidawa), Yairo Mwidu and the Swamp. They appeared to be speaking of two entirely different portions of land.

On a balance of probability therefore, the position is as it was stated in the will. The appellant was given his share during the life time of Ngobi. The land he was letting out to tenants was given to the girls including the respondent. The respondent has therefore no basis of claiming this land as his.

Because of the above I find that Grounds 1 and 3 cannot stand and must be dismissed.

In the result, this Appeal stands dismissed with costs to the Respondent.

The Judgment and Orders of the lower court are confirmed.



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Michael Elubu

Judge

1.4.2023