THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

HOLDEN AT KAMPALA

CORAM: HON. JUSTICE S.G.ENGWAU, JA.

HON. JUSTICE A. TWINOMUJUNI, JA

HON. JUSTICE A.S. NSHIMYE, JA.

CIVIL APPEAL NO.86 OF 2008

BETWEEN

JOHN NTANDA MASANYALAZE …….…… APPELLANT

AND

1. **RITA NANONO**
2. **PAUL BUYISI**
3. **DICK SERUWO**
4. **ISAAC KASIIBA**
5. **BERNARD KAYONDO…….…… RESPONDENTS**

[An appeal from the decision of the High Court of Uganda at Kampala (Mwangusha, J.) dated 20th June 2008 in Civil Suit No.784 of 2003, (arising out of Probate and Administration Cause No.164 of 2003)].

JUDGMENT OF ENGWAU, JA.

This is an appeal against the decision and orders of the High Court of Uganda at Kampala in H.C.C.S No.784 of 2003 arising out of (Probate and Administrative Cause No.164 of 2003). In that suit the appellant was the defendant. The appellant together with the respondents are children of the late Miriam Nampa. The said Miriam Nampa died on 23.09.2002 after a long illness. She was bed ridden for 6 years under the care of the appellant.

On the demise of Miriam Nampa, the appellant applied for Letters of Administration on the strength of a will purported to have been written and signed by the deceased in the presence of 3

witnesses who also attestated to the said will. The respondents disputed the validity of the said will and lodged a caveat.

The learned trial judge summarized his decree and orders thus:

"In conclusion judgment is entered as follows:-

1. ***The deceased died intestate.***
2. ***The identification of the Administrator or administrators of her estate will be done through a formal application for grant of Letters of administration.***
3. ***The identification of the property of the estate will follow after a grant of Letters of Administration has been issued.***
4. ***The legal fees of both counsel will be met by the estate while each party will meet his or her other costs incurred during the trial of this suit".***

In view of the above decision and orders, the appeal is premised on the following grounds:-

1. ***The learned trial judge erred in law and fact when he rejected the original written will as not properly attested to yet three persons attested to it.***
2. ***The learned trial judge failed to consider the evidence and circumstances under which the will was made, kept and read.***
3. ***The judge made no ruling on who was fit and proper to be granted letters of Probate/Administration.***

Subsequently, both counsel framed two issues for determination thus:-

1. ***Whether or not 2 attestators must see the attestator sign the will in order to pass the same as a valid will.***
2. ***Whether there were any major inconsistencies and/or omissions in the testimonies of the defence witnesses to nullify the will.***

Mr. Charles Dalton Opwonya, learned counsel for the appellant, argued the above issues separately. Mr. Lubega-Matovu representing the respondent followed the same pattern and I shall follow the same.

Issue No.1 Mr. Opwonya relied on the provisions of section 36 of the Succession Act which state that

"for a will to be valid, the testator must be of sound mind and the will should be attested to by two or more persons each of whom must have seen the testator sign or affix his mark or have seen some other person sign the will in the presence or direction of the testator and each of the witnesses must sign the will in the presence of the testator. But it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary".

Mr. Opwonya conceded that one Musoke Daniel, DW3, found the testator had already signed the will. Musoke further testified that he found his name and he also signed. The learned trial judge rejected the evidence of Musoke because he was not there when the testator signed the will. In counsel's view, the witness only attests to signature of the testator on the document.

Be that as it may, counsel Opwonya submitted that Miriam Nalumansi, DW4, testified that she signed the will together with Dr. Sekyana after the testator had thumb marked the same. In counsel's view, the presence and signatures of these two witnesses validated the will, although Dr. Sekyana never testified.

Regarding issue 1, Mr. Lubega submitted that the two attestators must be present when the testator is signing as envisaged by section 50(c) of the Succession Act. In the present case, Mr. Lubega pointed out that there were 3 attestators, namely Dr. Sekyana, Miriam Nalumansi, DW4 and Dan Musoke, DW3. According to counsel, Dr. Sekyana did not testify in court but Nalumansi testified saying she witnessed Dr. Sekyana signing. It is the contention of counsel that no witness identified the signature of Dr. Sekyana even the only attestator Nalumansi.

Learned counsel urged court to disregard the evidence of Dan Musoke, DW3. This witness did not see the testator sign the will. Further, the witness neither knew what he had signed nor did he read what he had signed. He was never told what he had signed. In the circumstances, Mr. Lubega submitted that Musoke is not an attestator at all within the law. His evidence should be discounted as an attestator.

In the absence of Dr. Sekyana and considering the evidence Dan Musoke, Mr. Lubega submitted that the trial judge was entitled to reject the will of Nampa as not having been attested to by two witnesses. In support of this argument, counsel relied on in the estate of ***Davies Resell vs. Delaney [1951] All E.L.R 920 and Wyatt and Berry V. Berry & Others [1893] P5.***

In reply, Mr. Opwonya referred us to pages 124-125 of the record of proceedings. He pointed out that Nalumansi, DW4 stated that Dr. Sekyana signed the original will first and she signed second. In court, Nalumansi identified her signature as number 2 on the will.

In the case of Wyatt and Berry (supra) counsel Opwonya pointed out that that case is distinguishable because the 1st attestator signed the will before the attestator signed the same. In the instant case, both Dr. Sekyana and Miriam Nalumansi signed the will after the attestator had signed the same. Further, according to law, counsel submitted that the attestators need not be present during the attestation. In support of that submission, counsel relied on the provisions of sections 36 and 50 of the Succession Act read together.

Considering the evidence of Dan Musoke, DW3, critically, I am enjoined to agree that the trial judge was right to reject his evidence. At page 115 of the record this witness stated that a document on Sunday after his prayers. At page 116 of the record, Musoke stated that the attestator argued him to sign a document and he obliged. He did not know it was a will. He came to know that it was a will when it was read during the last funeral rites of the deceased.

Musoke further stated that the document he had signed was hand written in an exercise book. He did not see the deceased signing. She did not tell him what he was signing. He signed the document without reading it. He found his name already written and he merely signed. He could not explain the cancellation after his signature. In those circumstances, I have no justification in faulting the trial judge when he rejected the evidence of this witness.

Dr. Sekyana did not testify in court. I find no evidence from appellant's witnesses who identified his signature. The only attestator in this case is Miriam Nalumansi, DW4. Reading sections 36

and 50 together, a valid will requires the signatures of two or more persons. The learned trial judge was right to reject Nampa's will for lack of two or more signatures/attestators. Accordingly, issue No.1 must fail.

Issue No.2. Whether there were any major inconsistencies and/or omissions in the testimonies of the defence witnesses to nullify the will.

Mr. Opwonya submitted that there were no major inconsistencies to nullify the will. Dan Musoke testified that he came from prayers before signing the will. However, the name "Dan Musoke "was erased but counsel maintained that the witness signed it. In conclusion, counsel prayed that we allow this appeal with costs here and in the court below.

In response to issue 2, Mr. Lubega pointed out that the so-called will was only identified but no will was actually exhibited. Counsel further pointed that one Lawrence Sempa who purportedly wrote the will did not testify. No evidence was brought up that he saw any attestator sign the will.

Dan Musoke purportedly signed the will after Sunday services on 18.11.2000. Going by diary of that year, 18.11.2000 was a Saturday. In counsel's view, this was a major inconsistency. Further, at page 117 of the record, it is not known who cancelled the name of Dan Musoke. Moreover, he did not know who wrote his name in the first place.

Learned Counsel further submitted that there were numerous wills regarding this estate. Rita Nanono, PW1 at page 39 of the record stated that there were 3 to 4 wills produced. Musoga Mulondo Bazaya, DW2, at page 95 of the record stated 4 wills were produced and read. Kanakulya, DW3 talks of 3 wills and the appellant himself also talks of 3 wills. In court, however, only 2 wills featured for identification, namely ID1 – original and ID2 – photo copy. Counsel pointed out that the authors of those wills are not known. In the circumstances, counsel Lubega submitted that the deceased, Nampa died intestate. He prayed for the dismissal of the appeal with costs.

The inconsistencies/discrepancies as mentioned by counsel Lubega are major. They go to the root of the said will warranting the same to be nullified. Issue 2 also fails.

In the end result, since Twinomujuni and Nshimye JJA also agree, I would dismiss this appeal with costs here and in the court below to the respondents.

Dated at Kampala this ……**25th** …..day of……**August**……..2010.

S.G. Engwau

JUSTICE OF APPEAL

JUDGMENT OF TWINOMUJUNI, JA

I have read the judgment, in draft, of his Lordship Justice S.G.Engwau, and I have nothing useful to add.

Dated at Kampala this …25th ….day of ……August……..2010

Hon Justice A.Twinomujuni
JUSTICE OF APPEAL