

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CIVIL SUIT NO. DR. MFP 26/90

(From Administration Cause No. DR. MFP 7/90)

PELAGIA KAKULIREMU:.....PLAINTIFF

-VERSUS-

PAULINI MANYINDO:.....DEFENDANT

BEFORE: - THE HONOURABLE MR. JUSTICE I. MUKANZA

JUDGMENT

The plaintiff in this case, Pelagia Kakuliremu brought this action against the defendant seeking for orders from the court that the Caveat the latter filed when the plaintiff applied for letters of administration to the estate of one Yoseph Kaijabohore be struck out. She also sought for an order for costs.

The plaintiff's case was that the deceased Kaijabohore left a cow land (Kibanja) and a house situated at Kito village, Mirambi Parish Kyarusozi Mwenge Kabarole District. All the property is valued at shillings one million. The deceased Kaijabohore produced and left the plaintiff as his only child, and an aged motherless widow called Kwebiiha her stepmother. Both the plaintiff and Kwebiiha live on the land and house left by the deceased at Kitome village and the plaintiff solely maintains and caters for all the material requirements of her step mother.

On the date Kaijabohore was buried the defendant in collaboration with her step mother Kwebiiha locked up the house which was part of the estate and stopped the customary Kitoro last funeral rites of the deceased to be performed in the homestead, the assumed ownership of the estate of the deceased. The plaintiff and the relatives of the deceased had to perform the last funeral rites of the deceased elsewhere on her land given to her by her uncle which is adjacent to

that of her deceased father. The defendant is not a child, grand child or relative of the late Kaijabohore in any degree. He is a Musengya by clan whereas the deceased and the plaintiff are Babiito by clan. The defendant was not given the Kibanja by the deceased. He has his own land (Kibanja) and house on a separate village of Kisenyi village Kyarusenzi Mwenge. The defendant never looked after the widow and the deceased and if he gave any assistance the same was not given as a price or consideration for taking away the property of the deceased Kaijabohore at the time of his death. The defendant had therefore no locus standi in the estate and the purported bequest was void and or voidable. That his father was a sick man at the time of his death. He had boils and was mentally unstable.

The case for the defendant was that his land (Kibanja.) was adjacent to that of the late Kaijabohore the deceased. He is a cattle trader. The deceased used to sell him his animals and sometimes the former used to sell him the animals on credit. The deceased used to graze his animals on his land and used to provide the deceased with some boozes (native drinks), so the two became very friendly. Some time in the 1980's the deceased and his wife Kwebiiha the widow were attacked by thieves, who stole a number of their personal effects and even beat up the couple seriously. He together with other people assisted the couple in replacing some of their stolen properties personal effects like clothing plates and extra. At the same time the deceased became weak and developed pneumonia. The couple were weak and elderly. He looked after the couple. He gave treatment to the deceased who was sickly and provided them with necessaries for their lives like food and even used to get water for them. The plaintiff and the deceased were arch enemies. The former never assisted her father at all. Because of the services he rendered the couple, the deceased out of his free will gave him his land and an agreement exhibit D1 dated 23/8/88 was made to confirm that. The couple used to rear some cattle. Most of the animals died and there remained only one cow. On one occasion she strayed and damaged a neighbour's garden. The deceased was fined. He paid the fine. The widow was too old. She could not manage the cow. The same was sold to him and he transferred it to & friend. There was a letter of transfer Ex. D3. Eventually the deceased invited him to join him in the homestead. He moved with his family to the deceased's land the land that was given to the defendant during the life time of the deceased Kaijabohore and that the cow was sold to the defendant and the house in the Kibanja was left to the widow Kwebiiha.

The learned counsel appearing for the plaintiff submitted that the case involved the law of Succession gift *inter vivos*. Joseph Kaijabohore was a sick man and was some time mentally unstable and therefore a man of unsound mind he could not give a gift. The gift was void or voidable. That the defendant blackmailed the deceased in the course of his difficulties. Hospitality became an inducement with an axe to grind. Ex. D1 contravened section 30 of the law of Evidence. It was not properly before the court. Ex. D2 was written after the death of Kaijabohore. The *bataka* had no mandate to speak for a man who was dead. They were meddling in the estate of the deceased. Ex. D3 transfer of cattle. That document was not in the language of the court and the author was never called as a witness.

Exhibit D4 was written on 11th March, 1991 after the death of Kaijabohore. It bears signature of several RC's (Resistance council) Chairman. It was a useless document. It was in Lutoro language and was written long after the death of the deceased and the author was not called as a witness and the *Bataka* had no right to confer on the defendant estate of the deceased.

Exhibit D5 conveyed the same meaning as exhibit D1. The plaintiff being the lineal descendant of Joseph Kaijabohore was entitled to administer the estate of her deceased father. The learned counsel referred me to a number of authorities.

Mr. Mugamba the learned counsel appearing for the defendant submitted that the plaintiff who was the sole daughter of the deceased is not in a position to cater for the widow. She was given a piece of land in addition to one she already had. He continued he had seen friends sell off their properties to good booze and there is no need to consult the children. To say otherwise would mean no one owns property in his life. The deceased was firm mentally till his death. Even the plaintiff did not contradict this. It is not an act of insane person to call villagers and make a solemn declaration tending to alienation of ones land. Whereas a madman and drunken person would have just awarded land to the defendant and that would be the end but the deceased gathered very many signatures on the document because people could not have taken him seriously. There was no indication of immediate death to the deceased. The learned counsel also referred me to some authorities.

At the commencement of the trial of the case the following issues were framed.

- (i) Whether the plaintiff is the blood child of Joseph Kaijabohore the deceased and in that capacity whether she is the lawful person to obtain letters of administration to the estate of the deceased.
- (ii) Whether the defendant is a legitimate person to administer or obtain the administration of the estate of the deceased.
- (iii) Whether the late Kaijabohore disposed of his estate by way of gift or otherwise to Manyindo.
- (iv) Whether the letters of administration which were granted to the plaintiff under administration cause No. 7 of 1990 whether they were validly granted and if not whether the same should not be revoked.

Now turning to the first issue according to the evidence on record from both the plaintiff side and the defence the plaintiff is the only sole surviving child of the late Joseph Kaijabohore. Under section 28 (1)(a)IV of the Succession Amendment Decree 22 of 1972 on the distribution of the estate of her father who died intestate as a lineal descent was entitled to receive 75 percent of the whole of the property of the Intestate.

In addition under Statutory instrument 1972 No. 104 rule 9 (1) the persons entitled to grant of letters of administration shall be determined in accordance with the following order of priority:-

- (a) The children of the deceased.
- (b) The surviving spouse
- (c) The father or mother of the deceased.
- (d) Brother & sisters of the whole blood etc.
- (e) Issue of any such child of the deceased.

From what has transpired above the plaintiff as the sole child of the intestate takes priority when considering who should be granted letters of administration to the estate of her father the late Joseph Kaijabohore. In the result the first issue is in the affirmative.

On the second issue, whether the defendant was the legitimate person to obtain letters of Administration to the estate of the late Kaijabohore. The defendant adduced in evidence documents to show that the late Kaijabohore gave him his Kibanja during his life time because all the good things he did for them the late Kaijabohore and the widow Kwebiiha. The defendant (DWI) put in evidence exhibit D1 a document dated 23rd August 1988. This was an agreement between Kaijabohore and Paulo Manyindo indicating that the former had given his land voluntarily to the latter and the document clearly showed that the land shared boundary with that of the deceased's daughter the plaintiff. It was witnessed among very many others Chairman DW3 and DW4.

There was yet another document Ex D5 written on 22/8/89 still confirming that the deceased Kaijabohore gave his Kibanja as a gift during his life time to the defendant. It was thumb printed by both the deceased and Kwebiiha the widow DW2. The writer of the document Byabasaija Andrea was never called as a witness but Kwebiiha as DW2 came out strongly in support of both exhibit D2 & Exh. D5.

Exhibit D3 was a letter from Vice Chairman Alex Kabare authorising the defendant to transfer away his cow which the said Kaijabohore had sold to him. The Chairman the author of the letter was never called as a witness but there was evidence from DW2 whom I believed told this court the truth that infact the deceased had sold the cow in question to the defendant during his life time

Ex. D2 was a document from the residents of Kitomi (Nyakitovu Mirambi) confirming that the late Kaijabohore had given his Kibanja (land) to the defendant. The document is dated 23/1/90 and was signed by several residents of the area. It was written long after the said Kaijabohore had passed away and of course the residents could not confer title on the defendant and to crown it all they did not give evidence in court. Ex D2 was of no evidential value.

The crux of the matter was whether the late Kaijabohore gave away his Kibanja (land) to the defendant as a gift *intervivos*. The learned counsel appearing for the plaintiff submitted that the deceased was a sick man and was somehow mentally unstable and therefore as a man of unsound mind he could not give a valid gift. The defendant blackmailed the deceased in the course of his difficulties and that the gift was void and or voidable.

Mr. Mugamba counsel for the defendant submitted that the sole daughter of the deceased was given piece of land in addition to the one she already had. She was not in a position to cater, for the deceased and the widow and there was no need for the former to consult her since he had seen friends sell off their properties to good booze and there being no need to consult the children.

Turning to the issue, **Halsbury's laws of England 3rd Edition Vol. 18 Para 692** states gift *intervivos* is defined shortly.

“As the transfer of any property from one person to another gratuitously while the donor is alive and not in expectation of death. It is an act whereby something is voluntarily transferred from the true possessor to another person with the full intention that the thing shall not be return to the donor and with full intention on the part the receiver to retain the thing entirely as his own without restoring it to the giver.”

Prima facie every one who is *sui juris* can dispose by way of gift any property or any estate or interest therein to which he is absolutely entitled. It is on legal and equitable principles clear that *sui juris* acting freely, fairly and with sufficient knowledge ought to have and has the power to make in binding and effectual manner a voluntary gift of any property whether capable or incapable of manual delivery, whether in possession or reversion and however circumstanced. See **Kekewich v Manning 1851 IDEGM, & G. 176 at Page 187 & 188 per Knight Bruce LJ, See also Hall v Hall 1873 8 Cr. App. 430 at P. 437.**

However gifts whether realty or personality made by infants are voidable by them and gifts by idiots and persons of unsound mind whether of realty or personality are absolutely void and even though made during lucid interval a gift *intervivos* by a person of unsound mind so found before a supersedes of the inquisition has been obtained, is

void See Beverages case (1603) 4 CO RP 123 b at P.126 Elliot vs. Inçe 1857 DEGM MR G. 475.
Re Walker [1905] 1 Ch 160 CA.

Applying the above principles to the instant case, the late Kaijabohore was sui juris he was a man of sound mind according to the testimonies of DW2, DW1 and DW3. PW.1 testified that the deceased was sickly man used to suffer for boils stomach was mentally instable from around 1987. Whereas DW4 testified that the deceased used to suffer from boils and stomach and was mentally normal. My finding is that the deceased was a man of sound mind when he gave his land to the defendant. That was when he wrote or caused to write exhibits D1 and D5 and the same were never written in expectation of death. Ex D1 was written on 23/8/88, whereas exhibit D5 was written on 22/8/89 before the deceased passed away on 10/12/1989. D2 testified positively to this court that she witnessed the deceased hand over his land to the defendant and also testified positively that the cow which used to belong to the estate was sold to the defendant. I watched this old lady aged about 90 years she impressed me as a very truthful witness. The deceased voluntarily gave away his Kibanja to the defendant and apparently the couple had, no love for the plaintiff. According to her never assisted them even during those difficult days when the deceased was bed ridden.

The deceased indeed truly gave away his land voluntarily to the defendant with full intention that the land shall not be returned to him. Ex. D1 and Ex D5 plus the testimonies of DW2, DW3 & DW4 confirmed the deceased's intentions. I do not therefore agree with the submission of the learned counsel for the plaintiff that the deceased was a man of unsound mind when he wrote or caused the writing of Exhibit D1 and Ex. D5, and that gave away his land when he expected death. The deceased led the residents of the area more particularly DW3 and DW4 and showed them the land he had given to the defendant and boundary marks were demarcated to separate the plaintiff's land from that of the defendant. That was not an act of a madman. And there was evidence that the plaintiff was given another piece of land in addition to one she already had. She was well provided for. I do not believe both PW.1 & PW.4 that the land on which she was living on belonged to Bulasio Kiiza PW.4. The two did not impress me as being truthful witnesses.

The learned counsel for the plaintiff submitted that the exhibits were in Lutoro which was not the official language used in our courts. The submission was that the exhibits were in Lutoro. But they were translated to the court by the Court Interpreter in English and immediately thereafter they were admitted as exhibits in evidence. The learned counsel never raised a finger in protest almost soon. As for now there was a translation of all documents in English and the English translation is attached on each exhibited document. I do not perceive any irregularity here. In the result I would answer the second issue affirmatively.

Infact the last issue should have been whether the Caveat entered against the application for letters of administration be removed. According to the evidence adduced it was not necessary to make an order for the removal of the Caveat. The position therefore is that the plaintiff is not the proper person to be granted letters of administration to the estate of the late Kaijabohore and I so find.

In the end the suit stands dismissed with costs to the defendant.

I. MUKANZA

J U D G E

7/7/91