THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT FORT PORTAL

CIVIL SUIT NO. DR. MFP 84/89

BEATRICE NYAKAANA K0BUSINGYE::::::::::::::::::::::::PLAINTIFF

-VERSUS –

GEORGE NYAKAANA::DEFENDANT

BEFORE*:* THE HONOURABLE MR. JUSTICE I. MUKANZA

JUDGMENT

The plaintiff in this case brought an action against the defendant for the annulment and removal of a Caveat lodged by the defendant against the grant of probate to the plaintiff and four others. She sought also relief for general damages and costs.

The facts of this case were briefly that One Ezira Binondo Nyakaana hereinafter referred to as the testator made a Will dated 10th day of May 1985 in which he appointed the plaintiff his daughter and others to be the executrix and executors of the said will respectively. Three years later the testator died and that was on 30th December, 198 and was buried on 2nd February, 1989. He was a reputable businessman in and around Fort Portal Municipality. His children numbered between 24 and 26.

At the time of his burial at his residence at Kaihura, the Will was not available to be read to the children and the relatives of the said testator. It was brought and read to the children on appointment by one Kagaba of Kagaba and *Co.* Advocates Fort Portal and that was on the 26th February, 1989 almost two months after the demise of the testator. After the ill had been read it generated a lot of opposition and protests by a cross section of the public and children generally on the pretext that the testator could not have made such a Will and that the time lag from the

date the testator was buried to the time when the Will as finally read was not convincingly explained to the children or for this matter the beneficiaries. That the Will was forged and changed in order with the wishes of the plaintiff and others.

The will was also opposed because it appointed two elderly women wives of the testator; it also appointed a minor and a man of unsound mind both being grandson and son of the testator respectively. An effort was made by the clan leader and others to reconcile the children but they failed to compromise and hence of course this action for grant of probate.

The issues were whether the will was valid. Secondly whether the applicants for grant were fit and proper persons for the grant of probate.

On the first issue whether the Will was valid, PW.1 an advocate from Kagaba & Co. Advocates testified that on express instructions from the testator drafted a Will and produced three copies, Exhibit P1 & P2 and a third copy. He received back exhibits P1 & P2 from the testator which he kept for custody. He signed and endorsed the date on the two exhibits. The third copy remained with the testator and the same was never brought to him for either his signature or in order to endorse the date on the same. He produced exhibited P1 and P2 and read the same to the public and children after having been contacted by PW.2.

P.W.2 a friend of the testator and of whose clan he was the clan leader happened to peruse the copy of the Will given to him by the testator. The said copy was consistent with the wishes of the testator. P.W.3 and P.W.4 were called upon by the testator to go and attest the Will. They were given the Will which they perused and after which the testators first signed and they also signed the same. They were 3 witnesses who witnessed the signing of the said Will i.e. PW.3, PW.4 and one Kalemera who never testified here because was dead but PW.3 and PW.4 were consistent that they saw Kalemera sign the copies of the will exhibit Pl, P2 and the third copy.

PW.5 (the plaintiff) testified that she had no say in drafting copies of the said Wills Ex. P1, P2 but only learnt that she was appointed an executrix together with four others after the Will had been read on 26th February, 1989 by PW.1.

DW1, DW2 and DW3 son and daughters of the testator respectively were positive that their father the testator could not have made such a Will on the day the testator vas buried PW.2 informed DW1 that the testator's will was in Kampala and that the same would be read by Tom Rubale. Whereas DW3 used to hold conversation with the testator and they used to talk about ills and the testator informed her DW3 as he had made a Will in 1988. DW1, DW2 & DW3 were not happy when the Will took too long to be read to the children and the fact that DW1 being the eldest son was not mentioned in the Will and he should have been made the heir. DW1 concluded a Will by Tom Rubale should have been produced and rend to the children. Also DW3 claimed that there must have been a Will of 1988. That the Will read to them was net the Will made by the testator.

Mr. Mugamba appearing for the plaintiff submitted that the plaintiff has produced witnesses to prove the Will. The learned counsel then ran through the evidence of P.W.1 to P.W.5. He continued that the defendant and Mrs. Mubiru DW2 simply said that the testator could not have made such a hill because George Nyakaana the defendant and eldest son of the testator was left out and that he should have been mentioned more prominently in the Will. Mr. Mugamba further submitted that a Will is a private wish by an individual and no matter what publicity dictates what he chooses to leave as his last wish constitutes his word barring extrinsic evidence factors like insanity and extra. He submitted further that Nyakaana was alive and well when he made the Will and the court should find that his wishes ought to be allowed to be implemented and that included the persons he cared to appoint as executors of his Will. He reiterated that the law of Succession is clear executors are appointed in the Will unless they are dead or unavailable at the tine of the death of the deceased or the Will materializes or at the time the will is found. They will not also be available as executors if they opt not to act as such. The court saw the executors and executrixes in court. They were alive and allegations of senility and being young were baseless.

The learned counsel representing the defendant on the other hand submitted that the Will was a forgery and that was and clear when PW.1 the author of the Will gave his evidence. The statement of Kagaba was an embarrassment to the profession and an abuse of the professional ethics that no prudent advocate could have purported to draw a document of that nature. In cross examination PW.1 could not differentiate the papers used in typing the Will. And he could not

even differentiate between the typewriter appearing on the original Will and the different typewriter appearing on the duplicate (copy) and that he could not even explain between the time lag when the deceased passed away and the time when the kill was read to the public. He even witnessed the Will after the testator had signed. He should have signed in the presence of the testator when the latter was signing the same. P.W.1 could not even explain the different colours used in the document. The ill on the part of it appeared forged. There were two conflicting dates one is dated 10th September, 1985 and another one dated 10th May, 1985.

Under Section 50 of the Succession Act Cap 139 for Wills of this nature unprivileged Wills the testator must execute his Will according to the following provision:-

> (a) The testator shall sign or shall fix his mark to the Will or it shall be signed by some other person in his presence and by his direction.
>
> (b) The signature or mark of the testator or the signature or mark of the testator or the signature of the person signing for him shall appear that it *was* intended thereby to give effect to the writing as a Will.
>
> (c) The Will shall be attested by two or more witnesses each of whom must have seen the testator sign or affix his mark to the Will or have seen some other person sign the Will in the presence and by the direction of the testator or have received from the testator a person acknowledgment of his signature or mark or of the signature of such other person one each of the witnesses must sign the Will in the presence of the testator but it shall not be necessary that more then one witnesses be present at the acme time, and no particular form of attestation shall be necessary. See also Halsbury's Laws of England 3 Edition Vol. 9 para 1324 Page 875.

In the present case PW.1 drafted the Will and the same was presented to the testator. It was of course in writing and was signed by the testator whose signature was made and acknowledge in the presence of PW.3, PW.4 and one Kalemera who also proceeded to sign the same. DW1 and DW3 testified that that could not possibly have been the last will left by their father the testator. DW1 was confident that the as a Will drafted by Tom Rubale and DW3 was also certain that the testator ought to have made an up to date bill of 1988. The claim by DW1 and DW3 that there

were other Wills made by Tom Rubale or that the testator ought to have made one in 1988 all that was not substantiated. The alleged hills were not produced in court and the only Will produced in court was the disputed will exhibits P1 and P2. I believed PW1, PW2, PW3, Pw4 and PW5. I am of the opinion that they told this court the truth.

With regard to the submission by the learned counsel for the defendant that the ill was a forgery because PW1 could not differentiate the papers used in Typing the Will and could not even differentiate the papers used between the Typewriter appearing on the original Will and the different typewriter appearing on the duplicate paper and the time lag the delay in reading the bill and that PW.1 was an embarrassment to the profession. To start with I am of the view that the learned counsel was demanding too much from PW1 if he expected an advocate who has a staff to do the typing to know the make or the types of paper used in typing a document as was in the instant case. He would be stooping too low to know all that.

An advocate employs a staff and perhaps who carry cut the purchases of the stationeries. He is not expected to know the inside cut of the details of oil the stationeries purchased (the papers) and what typewriter was used in tying such and such document. PW1 explained that he typed 3 documents/Will. The original Will Ex P1 a copy Ex. P2 and a third copy which was retained by the testator and which he never signed and never endorsed the dates. The learned counsel for the defendant submitted that the Wills were forged. Exp P1 and P2 were dated 10/5/85 and that date tallies with the testimony of whereas Ex. D1 was dated 10th September, 1985. I was opportuned to look at exhibit D1. It was a Photostat copy of Exp. P2. It was dated 10th September 1985 and was unsigned by PW1. The latter denied to have endorsed the date on Ex. D1 but the document bore the signatures of the testators and the three witnesses who witnessed the Will. It must be recalled that the third copy of the Will remained with the testator. The latter wrote names of people in ink on exhibit P1 and initialed. He did not write on Ex. D1. I am of the opinion and this is my finding that exhibit D1 was photostatted from the third copy of the Will which remained in the possession of the testator and the writing on Ex. P1 paper cover was not a forgery. Those names were mentioned in the Will as guardians. The defence did not explain to the court hew they came to possess exhibit D1. Therefore if there was any forgery of the Will at all that was committed by the defence which filled dates in the third copy retained by the testator. I say so

because the defence was affirming that the Will was forged the evidential burden therefore shifted on them to affirm their assertions. They apparently failed to discharge that burden.

PW1 was accused by the defence of being an embarrassment to the profession because of the role he played in drafting the Will. The defence contended that he was guilty of professional misconduct.

S. 82 of the Advocate Act 1970 (Act 22 of the 1970) defines professional misconduct as including disgraceful or dishonorable conduct not be fitting an advocate. In fact any complaint against an advocate for professional misconduct would be enquired into by the disciplinary Committee of the Law council See section 19 of the Advocates Act 1970. The fact that 1.W.1 did not witness the testator sign the Will plus PW3 and PW4 one Kalamera the omission to do so did not amount to professional misconduct. There was no requirement in law that PW.1 ought to have been present when the said Will was being attested and signed by the testator.

It was also suggested by the defence that the time lag i.e. from the time the deceased died up to the time of the reading of the Will, the latter was being manipulated so as to tally with the aspirations of the Plaintiff (PW.5). The latter denied knowledge of the Will till the moment the till was read to the children. I be1ieved her, she told this court the truth. PW.2 also explained to the children the relatives why the Will could not be read simply because .W.1 the author and custodian of the Will was not around on the date the testator was buried. According to T.W.2 a date was fixed for P.W.1 to go and read the will and that was done. The learned counsel representing the defendant submitted that the delay in the production of the Will to be read to the children was because PW1 was forging the same to fit in the aspirations of PW5 by appointing her executrix together with four incompetent executrixes end executors respectively. I do not agree with the learned counsel. The omission to produce the Will on the burial date was ably explained by P.W.2 whom I believed told this court the truth. Moreover, no evidence was led by the defence to show that PW.1 knew of the burial date of the testator or for this matter any knowledge about the death of the testator and deliberately stayed away. My finding is that the Will as never forged at all. There was no manipulation of the Will during the time lag as the defence wanted this court to believe. It is true that the testator used red ink in signing exhibit P1 and at the same time used blue ink in signing exhibit P2. There was no suggestion that the

testator‘s signature on Ex P1 & P2 were not similar. When questioned about the different types of pens used by the testator in signing P1 and Ex P2. PW.3 & PW.4 could not recall the type of pens the testator used in signing the 2 exhibits. I do not think that PW.3 and PW.4 were deliberately telling lies to the court but I am of the opinion they might have forgotten some details due to lapse of time.

It was almost five years ago when PW.3 and P.W.4 attested the said will.

About the claim by DW1 that he should have been mentioned in the will as heir and that he could have been prominently mentioned in the Will as the oldest son of the testator as per his testimony and those of DW2 and DW3. First of all his claim could act be supported by the evidence on record. The testator was free to choose him *as* his heir or not. Because of being the eldest son is not necessarily his best son. And according to the evidence available since the testator and DW1‘s mother had fallen out with each other and had separated long before his death that clearly showed that he very little affection fur DW1 See Asumani Kavula vs Y. Limina 1977 HCB P. 310. Moreover according to DW1 he was well provided for during the life time of the testator. The latter had given him a shop where he was running his retail business and was renting some roams on the shop building to some people. Probably one would that the shop premises were gift to DW1 Intervivos.

On the other hand I am of the view that the testator had definitely much affection for According to the latter she was recalled from Nairobi by the testator where she was employed and returned home to assist the testator in running the various businesses. And even after her marriage PW5 continued running the many businesses together with the testator and was awarded very many gifts at the time of her marriage. PW5 testified that she was given a car, house, cow and extra. And as if that was not enough PW5 and the testator were the only signatories to the Bank accounts. And even she held shares in the Tobacco Company. It was ap1arent PW*5* was very close to the *testator* in the business world. On the contrary DW2 got married away in Kampala. She was not involved in the business enterprises here in Fort Portal DW3 was also a Shop assistant of Savanah Enterprises in Entebbe. She had no hand in the running of the many business enterprises in and around Fort Portal. I very much doubt whether she ever discussed any matter with the testator concerning the making the alleged Will of 1988.

In the end I endorse the submission of Mr. Mugamba that the testator's will dated 10th May 1985 was a valid one and I so I hold. So the first issue is therefore answered to affirmatively.

And I now turn to the second issue whether the Plaintiff (PW.5) and four others were fit and proper persons for the grant of probate. According to DW1, DW2 and DW3, PW.5 could not properly look after the testator's estate simply because she was married woman. She was going to mix her marital affairs with those of the Estate. She was accused of not being able look after the widows and the children left behind by the deceased brothers. She was further accused of being un-cooperative with the rest of the children. They accused the second and third executors that is; Druscilla Nyakaana the first official wife of the testator and Katalina Nyakaana the mother of PW.5 of being senile and too aged to look after the estate. They were aged *75* and 70 years respectively.

The third executor appointed in the Will was Sam Kiiza was referred to by DW3, DW2 and DW1 as a person of unsound mind whereas Kahuma a Senior Six Student was referred to as a minor and could not. DW1, DW2 and DW3 suggested that the children could meet and choose among themselves who could be granted letters of Administrations to the Estate of the Late Nyakaana the testator. The case for the plaintiff was that she was assisting the children of her deceased brothers by paying their school fees maintaining them and that the rest of the executors were capable of looking after the estate together with her.

Under section 181 of the Succession Act Cap 139, Probate can be granted only to an executor appointed by the kill and under S. 183 of the same Act probate shall not be granted to any person who is a minor or is of unsound mind. And section 184 states, when several executors are appointed probate may be granted to them all simultaneously or at a different times.

Sir David Hughes Parry on the Law of Succession sixth edition Pages 43 titled 'who may be appointed executor had this to say,

> "Generally a person may appoint whom he likes to be his executor for example, he may appoint an alien, a married woman, bankrupt or the partners in a firm, and the person so appointed is capable of acting as executor arid may in due course prove the Will, if however he appoints a person suffering from mental disorder to

be his executor, such a person is incapable not only of carrying out the duties of the office but also of determining whether or not he will assume it." See also Williams and Mortumer on executors Administrations and Probate at Page 7.

Turning to the instant case the plaintiff P.W.5 though married woman is not precluded from being appointed as an executor to the estate of the late Nyakaana the testator, similarly both Druscilla Nyakaana and Katalina Nyakaana though they are apparently aged the law does not stop them from being appointed as executors to the Estate of the Late Nyakaana the deceased.

With regard to Sam Kiiza DW1, DW2, and DW3 all refer to him as a man of unsound mind, P.W.5 on the other hand testified in court here that the said Kiiza was normal person. He had a family and children and that they have been carrying on some business together. The learned counsel representing the defendant submitted that Kiiza was a mad man and that PW5 frustrated the efforts of the defence when they wanted to call in as a defence witness and test his normality. That Kiiza went outside the court building and was followed by PW.5 who stopped him from returning to court.

The learned counsel further submitted that the said P.W.5 further interfered with the witness summonses when they tried to summon him as a witness for the defence. The Court on its own motion recalled P.W.5 in order to clarify the allegations that she was not responsible for the disappearance of Kiiza on the date the defence want to call him as its witnesses. That it was coincident that Kiiza went out and she followed him and when she returned to the court Hall Kiiza also returned to the court and eventually went away on his own. She did not talk to him. On the allegations that she interfered with the witness summons PW5 clarified that she stays at Harukoto Village whereas Kiiza stayed at Mirongo a distance of about 30 miles apart however, the affidavit or Process Server was to the effect that the said Kiiza had been hospitalized at Kagadi and service could not be effected on him. From what p.W.5 clarified when recalled I was satisfied that she did not in any way stop Sam Kiiza from coming to testify in court and at the same time there was no evidence before me to on him.

From what PW5 clarified when recalled I was satisfied that she did not in any way stop Sam Kiiza from coming to testifying court and at the same time there was no evidence before me to

conclude that Kiiza was a man of unsound mind. As I said I believe PW5, she told this court the truth

So Kiiza could also he granted probate to the Estate of Late Nyakaana. Kahuma on the other hand was a minor and still he is and as such he is precluded from grant of probate by the law of this country. He is thereby barred from acting as executor to the estate of the testator the Late Ezira Binondo Nyakaana. He could not prove the probate.

In the end it is the considered opinion of the court that the plaintiff had proved her claim on a balance of probabilities. In the result the Caveat lodged by that defendant against the grant of probate to the plaintiff (PW5), Druscilla Nyakaana, Katalina Nyakaana and Sam Kiiza is thereby annulled and removed and the said, executors should proceed and be granted the probate.

The plaintiff prayed for general damages. These are the damages which the law treats as the natural consequences of the wrong done to the plaintiff and injury she thereby suffered. It is important that they are pleaded by the plaintiff but need not be proved specifically. The learned counsel appearing for the plaintiff did not address me on the question of general damages for his client. I am however aware that an award of general damages is at the discretion of court.

Consequently I will award the plaintiff general damages of Ug.Shs.20,000/= and interest at court rates. The plaintiff is also awarded costs of this suit.

I.MUKANZA

J U D G E

15/2/91