

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO. 629 OF 1992

1 • JOYCE K. BYABAZAIRE :::::::::::::::::::::::::::::::::::::::PLAINTIFFS  
2. JONATHAN BWANGO )

VERSUS

FRANCES KYOMU KATATUMBA :::::::::::::::::::: DEFENDANT  
BEFORE THE HON. MR. JUSTICE G.M. OKELLO

JUDGMENT

This suit was brought under section 265 of the succession Act following the leading of a caveat against the grant of probate in Administration cause No. 454/92. The issue to be determined in the suit in whether or not the caveat should be removed and the Plaintiffs granted the probate.

When she was served with summons to Enter appearance with a copy of the plaint attached, the defendant did not enter the necessary appearance or filed in a Written Statement of Defence. Affidavit of service to that effect was sworn by Muwanga Jackson of P. O. Box 11442 Kampala on 29/10/92 and filed on the court record. Consequently the suit was set down for hearing.

At the hearing, the defendant did not appear and the Plaintiffs were allowed to present their case ex-parte. Evidence for the Plaintiff was given by the 1st Plaintiff Joyce Kaakyo Byabazaire. She is aged 28 and works as Dental Assistant with Kampala City council. She testified that she is the widow of the deceased David Byabazaire having solemnised their marriage at All Saints Cathedral in Kampala on **2/9/89**. A certificate of Marriage to that effect dated 2/9/89 was received in evidence in support of that claim and was marked Exh. P1. That they have one issue of that marriage in the name of Linda Kagusuru now aged 3 a n d a h a l f years old.

She further testified that her husband fell sick and finally died in Mulago Hospital on 31/7/92. A certificate of death to that effect was received in evidence and marked Exh. P2. The witness further testified that prior to his death, the deceased made a will which was duly attested on 28/7/92. The original copy of the document to that effect was received in evidence and marked Exh. P4. The first Plaintiff went on to testify that in the will, the deceased appointed her and his brother Jonathan Bwango, the 2nd Plaintiff, were the executors of his will. That following their said appointment as executors of the will of the deceased, she and Jonathan Bwango jointly applied to this court under Administration cause No. 454/92 for grant of the probate. That the grant of the probate was blocked when the defendant lodged a caveat against it. Following this caveat, they filed this suit. The witness further testified that in her affidavit sworn in support of the caveat, the caveators/ defendant claimed to have had a child by the deceased and that the deceased used to maintain that child. That the defendant now claims that the child is entitled to maintenance from the deceased's Estate.

The Witness denied earlier knowledge of the defendant and her child.

« She however admitted that she first learnt of and saw the defendant and that child at the funeral of the deceased when the relatives of the deceased announced the presence of the child whereupon both the child and its mother were introduced. The 1st Plaintiff denied knowledge that the deceased fathered that child or that he ever maintained it because he never informed her about it. She finally prayed that the suit be allowed with cost. She also complained of anguish following the lodging of the caveat by the defendant thereby delaying the grant of the probate. Consequently she prayed for General damages.

In his address to me, Mr. Mwesigwa Rukutana for the Plaintiffs submitted, and I agree with him that the defendant has no caveatable interest in the Estate of the deceased. It is trite law that for a caveat to be valid, the caveator must prima facie have a protectable interest legal or equitable in the subject matter. I had held the same view in HC Miscellaneous Cause No.77/92 Mrs. Catherine Serwadda and Anor. Vs. Michael Nsereko and Anor. In that cause respondents claimed interest in the Estate of Late Luti Bwango Nsereko as beneficiaries thereof. The Estate was administered by the Administrator General. In the course of the Administration, the Administrator-General distributed the Estate giving out a piece of land in which the Respondents were interested to the daughter of the deceased. The first Respondent was the grandson of the deceased, while the 2nd was the administrator of the Estate of the heir of the late Luti Bwango Nsereko.

It was held that when the administrator General in his distribution of the Estate gave the suit plot to other beneficiaries leaving out the Respondents the latter's interest in the property ceased at the distribution. They no longer had protectable interest in the property which was given to other beneficiaries as their share of the Estate of their deceased relatives.

In the instant case, the defendant claims that she was a girl friend of the deceased and that following that relationship she got a child by him. Clearly a girl friend is by no means entitled to a share in the Estate of her late deceased boyfriend merely on account of the relationship. It is immaterial that she got a child by him. This is because she is not a dependant relative of her deceased boyfriend within the meaning of section 3 (1) of the succession Act as amended by Decree 22/72. She can only be entitled to a portion of such an Estate if a specific bequest is made to her by the deceased in his will.

This was not the case here. Since the defendant has no protectable interest in the estate of the deceased the caveat is not valid. It was misconceived and wrongly lodged.

In her affidavit sworn in support of the caveat, the defendant contended that the child whom she begot by the deceased is entitled to maintenance from the Estate of the deceased. An Illegitimate child is entitled to a share in the Estate of his father.

Mr. Rukutana submitted that if the caveat was intended to be on behalf of the said child, it ought to have been done so by the mother as the next friend of her infant child. But that in the instant case, the caveat was lodged by the defendant in her capacity as the girlfriend of the deceased and mother of his child. Counsel submitted that this rendered the caveat invalid.

With respect, I share that view. If the defendant intended to lodge the caveat on behalf of her child whom she claims has a protectable interest in the Estate of the deceased, she ought to have lodged the caveat as the next friend of the child. This was not so in this case. She merely lodged the caveat as a person having legitimate interest in the deceased's Estate. The defendant clearly has no protectable interest in the deceased's Estate. Procedurally the caveat was wrongly lodged if it was intended to be on behalf of the child. For that reason it is invalid.

The defendant is in effect claiming maintenance of her child from the Estate of the deceased because she claims that the deceased fathered the child.

It is trite law of this country that Legitimate and illegitimate children of a deceased are equally entitled to a share in the Estate of their deceased father. In the instant case, the deceased did not provide for this child in his will. He left it out and never even mentioned it in the will. Besides, there is even no sufficient evidence to trace the paternity of the child to the deceased.

Be that as it may, if the defendant feels strongly that her child was wrongly left out by the deceased in his will, she can apply on behalf of that child under sections 46A and 46B of the succession Act for maintenance. In that case the issue paternity the child will have to be resolved As it is, there is no justification at all for leaving the caveat which was wrongly lodged to continue to hinder the grant of the probate to the Applicants/Plaintiffs.

For the reasons reasons here above, the suit is allowed with cost. In the result the caveat is ordered to be removed. The Plaintiffs are given nominal General damages of shs. 1000/= for their anguish following the lodgment of the caveat. Probate is granted to the Plaintiffs jointly.

**G.M. OKELLO JUDGE.**

22/2/93.

Judgment read out in Chamber in the presence of Mr. Mwesigwa Rukutana for the Plaintiffs and Kamukama Court Clerk.

G.M. OKELLO JUDGE.

22/2/93

Court; Exh.P2 - Marriage Certificate and

Exh P4 - Will are returned to the Plaintiff's Lawyer.

G.M.OKELLO

JUDGE.

22/2/93-