THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA, AT MBARARA

HIGH COURT ADMINISTRATION CAUSE MMB 50 OF 1997

I. JAMES RUTEETE
2. GREGORY RWEITARE)……. PLAINTIFFS

VS

1. FIONA MBABAZI
2. EMMANUEL BAHATI
3. RICHARD KARUHANGA)……. DEFENDANTS

BEFORE: THE HON. JUSTICE V. F. MUSOKE-KIBUUKA

JUDGMENT

The late Yosia Bamuhena (called the deceased) lived in Nyakisa village, Kizinga Parish, Ngoma sub-county, Rushenyi, in Ntungamo District. He died on 22nd December, 1 996. He was survived by two widows and some sixteen children. The three defendants are all children of the deceased.

On 22nd February, 1 997, the two plaintiffs to this suit lodged an application for the grant of probate of the will of the deceased. The 2nd and 3rd defendants, on 4th March, 1997, lodged, in this honourable court, a caveat stopping the grant of probate without notice being first given to them.

Earlier, on or about the 1 9th day of February, 1 997, the first defendant had applied for letters of administration in the Chief Magistrate's Court at Mbarara. She did so through administration Cause No. 45 of 1 997. She claimed that the deceased had died intestate.

However, the plaintiff who claim that they are executors named in the last will of the late Yosia Bamuhena, lodged a caveat against administration Cause No. 45 of 1997, in the Chief Magistrate's Court at Mbarara. Both administration cause No. 45 of 1997 and the suit have been consolidated.

On the 26th of August, 1 997, the plaintiffs instituted this suit against all the three defendants under section 65 of the Succession Act, Cap. 139.

The plaintiffs seek, through this suit, the following orders:
a) an order that the caveat lodged by the 2nd and 3rd defendants be removed;
b) an order that the application for the grant of letters of administration to the 1st defendant be dismissed;
c) an order that probate of the will of the late Yosia Bamuhena be granted to the Plaintiffs; and
d) an order that the defendants be condemned in costs to the plaintiffs.

The issues, which were agreed upon by the two learned counsel in this case, Mr. Katembeko, for the plaintiffs and Mr. Mwene-Kahima, at first, and later, Mr. Ngaruye Ruhindi, for the defendants, are:
a) whether the deceased left a valid will
b) whether the plaintiffs are entitled to the remedies which they seek in the plaint; and
c) whether letters of administration should be granted to Kedesi KorugyendoBamuhena and Fiona Mbabazi, the 1st defendant.

I will analyze the evidence in relation to issue number one first.
The validity of any will, has two aspects to it. The first is the testamentary capacity of the testator. The second is the execution of will itself. Testamentary capacity is governed by section 46 of the Succession Act, Cap. 1 39, while execution is regulated by section 50 of the same Act.

The gist of the legal requirements of sections 46(1) and section 50(2)(c) of the Succession Act, were very well summarized by C. Byamugisha, J., of this court in Administrator General vs Teddy Bukirwa And Ester Bukirwa (1 992- 1 993) HCB 192. The learned judge is reported to have stated (at page. 1 95):
"The making of wills is governed by the provisions of section 46 of the Succession Act which

states that every person of sound mind and who is not a minor may by will dispose of his property. A will, in ordinary sense, must be in writing and signed by the testator or some one in his presence and at his direction. The signature must be made by the testator in the presence of two witnesses or more who must be present together at the same time and should attest to the will in the presence of the testator. The witness(es) must see the testator affix his signature as required by section 50(2)(c) of the said Act. The test to be applied is whether the person in whose presence the signature is made could have seen the other signing had he wished to do so."

The plaintiffs in the instant case, produced, before this court, exhibit P 1, which they claim to be the last will of the deceased. PW 1, Girigori Rweitare, now aged 74, was a neighbour and close friend of the deceased. He is one of the two executors named in the will. His evidence was that on some date before the deceased was taken to hospital where he died, the deceased called PW1 to his house. He gave him two copies of Exhibit P 1. The deceased told PW I that he was handing him his last will which he asked him to keep for him and reveal it after his death. PW1 announced the existence of the will during the funeral and subsequently the will was read by the LC II Chairperson of the area before the members of the family of the deceased. PW 1 testified that when the deceased gave him the will, the deceased was in a good mental state although he was weak and sick. PW I confirmed that the deceased's sickness was not mental. The deceased died about five days after handing over the will to PW1.

The evidence of PW I to the effect that he announced the existence of the will at the funeral of the deceased is confirmed by PW2, James Ruteete, the second plaintiff. He testified that he learnt of the existence of the will for the first time when PW 1 announced its existence during the funeral of the deceased.

The plaintiffs have produced PW3, Eric Mugyera, and PW4, Robert Nyesiga. The two witnesses attested, exhibit P 1, the purported will of the deceased. The evidence of both witnesses talked to the smallest detail. They testified that on 3rd December, 1 996, the deceased, who was then at home, invited each one of them to accompany him to Mbarara town. The deceased hired a vehicle in which the three travelled. When they reached Mbarara, the deceased led the two witnesses to the chambers of a lawyer called Katembeko. The deceased dictated his will to the advocate who had it typed out. The advocate read the will to the deceased who confirmed the contents. The deceased then signed the will in the presence

of the advocate and the two witnesses. The two witnesses then each signed it. The deceased then took copies of the will with him back to his home.

Both witnesses testified that when the deceased dictated the will to the advocate on 3rd December 1996, he was in apparent good mental health. The deceased's health deteriorated on 1 8th December, 1996. He was taken to hospital on 2Oth December and died on 22nd December, 1996.

Each of the two witnesses identified his own signature on Exhibit P 1 as well as the signature of the deceased. Sections 66 and 67 of the Evidence Act, Cap. .43 deals with proof of a document which is required by law to be attested. The provision requires that a document which is required by law to be attested cannot be used in evidence until at least one of the attesting witnesses has been called to prove its execution. Also see Administrator General v. Mrs. Norah Nakiyanga & Others, H/C Administration Cause 554/90 (reported in (1 993) III KALR 1.) In the instant case, therefore, the production of both PW3 and PW4 proves the legality of the execution of exhibit P 1. Their evidence that exhibit P1 was dictated, signed by the deceased in their presence and attested by the two of them is not contested. To that extent, therefore, exhibit P1 would be proved as a valid will of the deceased.

The defendants contend that the will which PWI revealed to be in existence during the funeral of their father and which was subsequently read to the family members, was not the true last will of their father. They state that exhibit P 1 was produced by PW I and the attesting witnesses. Both DW2, Karuhanga Richard, and DW3, Fiona Mbabazi, testified that during the month of December, 1996, when exhibit P 1, is said to have been made by the deceased, the deceased was so sick that he could not walk, talk or even hear. Mr. Ngaruye Ruhindi, learned counsel for the defendants, has submitted that the evidence of DW1, DW2 and DW3, is sufficient to prove that by 3rd December, 1996, the deceased was critically sick and could not travel to Mbarara and be in position to dictate a will.

I have already referred to section 45 of the Succession Act. A person who lacks the capacity to understand the nature the testamentary action due to disorder of mind cannot be held to have made a valid will in law. Cockburn, C. J, in Banks vs. Goodfellow 1 870,5 QB.549, in rather exclusive terms, had the following to say on this important aspect of the law of Succession:

"It is essential that a testator shall under-stand the nature of the act and its effects; shall

understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections, prevent his sense of right, or prevent the exercise of his natural faculties - that no insane delusion shall influence his will in disposing of property and bring about a disposal of it which, if the mind had been sound would not have been made." (Emphasis added)

In the instant case, the witnesses of the defendants particularly DW2 and DW3, claim that on 3rd December, 1 996, the deceased was in a comma. He could not have made the will in question and if he did then he had no testamentary capacity and the will would be invalid as having been made contrary to law.

I have compared the evidence of the defence witnesses and that of the plaintiffs' witnesses especially PW1, PW4 and PW5. The contents of the plaintiffs' witnesses and their demeanour while in court lead me to believe them as truthful witnesses. PW1, PW2 and PW4, were disinterested witnesses. They had no reason to lie to court on the matter. On the other hand, I find the defence witnesses to be interested witnesses. They gave me the impression of being both greedy and ambitious. They were generally untruthful throughout their testimonies. I cannot believe them. Indeed, I readily agree with learned counsel, Mr. Katembeko, who referred to them in his final submissions as "rebel children" of the deceased.

The witnesses of the defendants pointed out several discrepancies in exhibit P1. These included:

- reference to the number of the children of the deceased - who were girls as being 6 and that of the boys as being
10 whereas the correct figures should have been 7 and 9,
respectively;
- referring to some children by nick names instead of their other well known names;
- referring to James Sunday, the named heir, as the oldest son whereas the oldest son was Nkabayita;
- referring to one child, Nkakiriho as a boy whereas she was a girl;
- spelling the name "Ryanyirinka" as Ryanyineka
- omitting to mention certain aspects of the estate of the deceased e.g. the bank account, the vehicle and the names of the cows.

The defendants on the basis of those discrepancies and perceived omissions asked this court to conclude that if the will, exhibit P 1, was made by the deceased, then he must have been lacking of the necessary testamentary capacity. With due respect, I am unable to reach that conclusion on the basis only of those discrepancies and omissions, and in the presence before me of the evidence of PW3 and PW4 who travelled with the deceased from home to Mbarara and who saw him dictate the will to and sign it before, the advocate and themselves. Besides, all the discrepancies and omissions which have been mentioned in the evidence of the defendants are of a curable nature. They are not fatal to the validity of the will.

I accordingly conclude that the deceased, the late Yosia Bamuhena left a valid will. He dictated it to an advocate' in Mbarara Municipality on 3rd December, 1996, when he was a person of sound mind. He executed it and it was properly attested by PW3 and PW4 in presence of the deceased. The will has, therefore, been proved to be valid and must be admitted to probate.

The second issue is whether the plaintiffs are entitled to the remedies which they seek in the plaint.

In view of the finding which I have made in respect of issue number one, I issue the following orders.

a) an order vacating the caveat lodged by the 2nd and 3rd defendants, in this court, on 4th March, 1997;

b) an order dismissing the application filed by the first defendant seeking a grant of letters of administration of the estate of the late Yosia Bamuhena vide Administration No. 45 of 1997;

c) an order grating probate of the will of the late Yosia Bamuhena to the executors named in that will, namely, G. Rweitare and J. Ruteete; and

d) an order requiring the two executors to defray the costs of this suit from the estate of the deceased.

In view of the conclusion I have reached with regard to the first issue and in view of the orders set out above, the third issue is rendered irrelevant and I will now not analyze it.

V. F. Musoke-Kibuuka

Judge

19/02/2001

ORDER:

The Deputy Registrar of this court to deliver this judgment on a date to be fixed by him.

V. F Musoke Kibuuka.

Judge

22/02/2001