

GETRUDE ZAWEDDE ::::::::::::::::::::::::::::::::::::::: PLAINTIFF

1. BERNARD BUTYOKO LUBWAMA WALUSIMBI

3.SSALONGO KIGOZI CHARLES

JUDGMENT

5/11/21

The defendants averred that they are the Plaintiff has no cause of action against them as she has no interest in the suit land since they are the only three surviving children of the late Peter Namunene and are entitled to the estate of their father which was to revert back to them after the demise of the Late Victoria Namusisi. They also averred that they are now the registered proprietors of the suit land after legally obtaining letters of administration from the Court as Administrators of the Estate the late Peter Namunene Walusimbi. They prayed that the court dismisses this suit and deny the plaintiff all her reliefs sought.

Issues:

During Scheduling, the parties agreed to the following issued for determination by this Honorable Court;

1. Whether the late Veronica Namusisi had a beneficial interest in the estate of her late husband Peter Namunene Walusimbi.
2. Whether the Plaintiff has any interest in the suit land pursuant to the Will of the late Veronica Namusisi.
3. Whether the Defendants' letters of administration to the estate of the late Peter Namunene Walusimbi were obtained through fraud and illegalities.
4. Whether the Defendants' registration as proprietors of the suit land was lawful/whether the said registration was obtained through fraud.
5. What remedies are available to the parties?

At the hearing, the Plaintiff brought two witnesses, herself (PW1) and a one Rev. Father Musuubire Anthony Lubowa (PW2), the Defendants on the other hand led one witness Bernard Butyoko Lubwama Walusimbi (DW1).

Representation

The Plaintiff was represented M/s Lwere, Lwanyaga & Co. Advocates.
lladco@yahoo.com

The Defendant was represented by M/s Najjuma Nakalule @ Co. Advocates.

Resolution

Issue No.1: Whether the late Veronica Namusisi had a beneficial interest in the estate of her late husband Peter Namunene Walusimbi.

Counsel for the plaintiff submitted that Section 24 of the Succession Act Cap 162 provides that:

"a person dies intestate in respect of all property which has not been disposed of by a valid testamentary disposition. Section 25 thereof provides as thus:

"All property in an intestate estate devolves upon the personal representative of the deceased upon trust for those entitled to the property under this Act."

Counsel added that **Section 27 of the Succession Act** then goes ahead to provide for the various classes of persons entitled as beneficiaries of an intestate estate which includes a wife/wives. The evidence on record particularly **PExh 2** and **PExh 3** show that the late Veronica Namusisi was a legal wife of the late Peter Walusimbi Namunene. DW1 (Bernard Butyoko Lubwama Walusimbi) during cross examination confirmed that the late Peter Walusimbi Namunene died in 2007 and was survived among others by his wife now the late Veronica Namusisi who only passed away in 2014.

He submitted that since the late Veronica Namusisi was a legal wife of the late Peter Namunene Walusimbi and the former survived the latter. At law, the late Veronica

Namusisi had a legal entitlement in the estate of her late husband. In addition, the evidence of DW1 (Bernard Butyoko Lubwama Walusimbi) during cross examination clearly shows that the late Peter Walusimbi sold part of the suit land and raised funds to build a residence on the suit land where he stayed with his wife the late Veronica Namusisi and the Plaintiff.

The evidence also shows that even after the demise of Peter Namunene Walusimbi, the late Veronica continued to live and stay in the said residential house/matrimonial home on the suit land. In ***Julius Rwabinumi Vs Hope Bahimbosimwe S.C.C. A No.10 of 2009***, the Supreme Court adopted the formulae of Bbosa J. in ***Muwanga Vs Kintu H.C.Divorce Appeal No.135 of 1997*** while determining what constitutes matrimonial property; the court observed that:

"matrimonial property is understood differently by different people. There is always property which the couple chose to call home. (Emphasis ours). There may be property which may be acquired separately by each spouse before or after marriage. Then therein property which a husband may hold in trust for the clan. Each of these should in my view be considered differently. "The property to which each spouse should be entitled to is that property which the parties chose to call home and which they jointly contributed to."(Emphasis ours). See Authority marked as "A".

5/11/21 Counsel for the Defendants submitted that the late Veronica Namusisi had no interest in the suit property as she only enjoyed a right to stay in the family house as a wife of the late Peter Namunene Walusimbi. It is the undisputed evidence of DW1 in paragraph 10 of his witness statement that the "suit land was originally a kibanja purchased by our late grandfather Kostante Kisuule Muwereza who gave the same to our late father Peter Namunene Walusimbi in the 1930s".

Counsel added that the suit land was an individually held as separate property acquired before the subsistence of the marriage to which the late Veronica had made no contribution. That the late Veronica Namusisi lived 7 years after the death of the late Peter Namunene and as a legally recognized wife to her late husband made no attempt to acquire letters of Administration to her husband's Estate.

It is the evidence of DW1 that the late Veronica Namusisi was aware of the grant to the 3 defendants and made no request for a share in the Estate. Exhibit DE5 was presented in court and the same was never disputed by the Plaintiff as the document bears her signature. The late Veronica Namusisi while appearing before the Administrator General indicated to the defendants that her only interest in the suit land was occupying the matrimonial home to the time of her death a fact all parties respected to the time of her death. Had the late Veronica desired a share in the Estate of her husband she would have stated so at the said meeting as the subject of discussion was the Estate of the late Peter Namunene Walusimbi.

Counsel added that the above amounted to a waiver and an Estoppel. My lord, the issue of waiver was considered by court in the case of *Amratlal Purshottambhimji & Anor V Gian Singh Bhambra & 3ors Civil Suit No 239 Of 2009*, where His lordship Bashaija j, while citing with approval the decisions in *National Insurance Corporation Versus Span International [1997-2000] UCLR 100* and *Kammans Co. Ltd Zenith Investments (Torqrvoy) Ltd [1970] ALLER 871at 871* where court held that;

"if one party by his conduct leads another to believe that the strict rights under a contract will not be insisted on, intending that the other should act on

that belief, and he does act on it, the first party will not afterwards be allowed to insist on the strict legal rights."

The late Veronica Namusisi made the defendants who are the Administrators of her husband's Estate believe that she was not interested in a share in the Estate. She cannot therefore turn around and bequeath a share she never claimed during her life time to the Plaintiff.

Article 21(2) of the Constitution forbids discrimination on grounds of sex. Discrimination is defined under Article 21(3) as follows:

'To give different treatment to different persons attributable only or mainly to their description by sex....'

Section 2 of the Succession Act defines an **"administrator"** to mean a person appointed by a court to administer the estate of a deceased person when there is no executor. This presupposes that there can't be an administrator without a deceased and without an estate belonging to that deceased. The defendants in this case seem to goad letter of administration to an estate that is none existent since the estate which they claim to be administrators belongs to a different person from whom they believe to be administrators to.

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In ***Katuramu Vs Katuramu HCT – 01 – CV – MA NO. 026 OF 2017*** court stated that:

"The property a couple chooses to call a home will be considered joint matrimonial property. This together with the property either of the spouses contributes to is what is matrimonial property."

In the case of *Muwanga versus Kintu High Court Divorce Appeal No. 135 of 1997, (Unreported)*, Bbosa J noted that *matrimonial property to which each spouse should be entitled is that property which the parties chose to call home and which they jointly contribute to.*

Where a spouse makes a substantial contribution to the property, it will be considered matrimonial property. The contribution may be direct and monetary or indirect and non-monetary.

In *Muwanga v. Kintu, High Court Divorce Appeal No. 135 of 1997, (Unreported)*, Bbosa, J., adopted a wider view of non-monetary indirect contributions by following the approach of the Court of Appeal of Kenya in *Kivuitu versus Kivuitu, [1990 – 19994] E.A. 270*. In that case, Omolo JA found that the wife indirectly contributed towards payments for household expenses, preparation of food, purchase of children's clothing, organizing children for school and generally enhanced the welfare of the family and that this amounted to a substantial indirect contribution to the property.

Justice B Kainamura in the case of Basheijja V Basheijja & Anor D.C NO 12/2005(2013) classified property under five clusters and held that the home of the couple irrespective of when it came into existence amounts to matrimonial property.

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In the case of *Adong Simon and others Vs Opolot David Soroti Civil Appeal No. 46 of 2013* Court stated that that the widow had a right to dispose of the land she inherited from her deceased husband as surviving spouse in light of Article 31 (1) of the Constitution that confers on men and women equal rights at marriage, during marriage and at its dissolution. Therefore, as death leads to dissolution of marriage,

defendant as a surviving spouse has a right to inherit from her husband and she was entitled to benefit from her late husband's estate.

I therefore find Issue one in the affirmative.

Issue 2: Whether the Plaintiff has any interest in the suit land pursuant to the Will of the late Veronica Namusisi.

Counsel submitted that under *Section. 36(1) of the Succession Act Cap 162* provides that every person of sound mind and not a minor may by Will dispose of his or her property. Section 50 thereof provides the manner in which the testator should execute his/her Will by affixing his/her mark and attested by two or more witnesses who saw the testator sign or affix his/her mark on the Will.

Counsel added that the evidence on record shows that the late Veronica Namusisi left a Will dated 21st January 2014 (**P Exh 4**). The said Will as presented in court by PW2 (Rev. Fr. Musubire Anthony Lubowa) has the mark and name of the testator (Veronica Namusisi); the Will was witnessed by two persons to wit; Kimera Augustine and Rev. Fr. Musubire Anthony (PW2). The said PW2 testified in re-examination that whereas he was not present when the Will was drafted he was present when the testator (Veronica Namusisi) was affixing her mark on the same. Basing on the above. Counsel also submitted that the Will of the late Veronica Namusisi was a valid Will.

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Counsel for the Plaintiff submitted that in the Will (P Exhibit 4), the late Veronica Namusisi disposed of all her beneficial share as a wife of the late Peter Walusimbi Namunene to the Plaintiff herein. The late Veronica Namusisi stated in her Will that she had disposed of her interest to the Plaintiff because the Plaintiff looked after her

and treated her and her late husband Peter Walusimbi who also left her with the responsibility over the matrimonial house and the job of treating people with broken fractures. P Exh 5 (the purported undertaking to stay in the house) dated 09 January 2014, has no legal effect and this court cannot rely on the same for in no uncertain terms did the late Veronica Namusisi state that she had abandoned, relinquished or given up on her matrimonial property and her interest in her late husband's estate.

Counsel for the defendants submitted that at trial *PEIV* was adduced in evidence as the will of the late Veronica Namusisi. In the Will the late Veronica Namusisi bequeathed her "share from the marriage with Walusimbi Peter Namunene which she should take when I die (when I have left the world)" to the Plaintiff. The extent of this bequest is unknown even to the maker of the will as at the time of her death no share of the nature described in the will had been apportioned to her.

Counsel added that during trial, the Plaintiff went at length to demonstrate that the late Veronica Namusisi had a share in the matrimonial home but this is not reflected anywhere in the will of the late Veronica Namusisi. PW1 testified that the bequest named in the will was approximately 2 acres and the residential house thereon. My lord this is not true, as all evidence on record shows that the entire piece of land occupied by the Plaintiff, defendants and other beneficiaries is barely 3 acres. There is no way the late Veronica could have bequeathed what was even already gifted during lifetime by the late Peter Namunene Walusimbi.

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Furthermore, counsel submitted that Section 139 of the Succession Act cap 162 provides that if anything which has been specifically bequeathed does not belong to the testator at the time of his or her death, the legacy is deemed, that is, it cannot take effect by reason of the subject matter having been withdrawn from the operation of

the will. It is therefore our submission that the Plaintiff has no interest in the suit land pursuant to the will of the late Veronica Namusisi.

This court finds this issue in the affirmative since issue one was also concluded in the affirmative. By virtue of the marriage that existed between the late Veronica Namusisi and Walusimbi Peter Namunene, the late Veronica Namusisi was the; legal owner of the suit land and thus had the capacity to bequeath the same in her will which in this case was never not even challenged as to its legality.

Issue 3 and 4: Whether the Defendants' letters of administration to the estate of the late Peter Namunene Walusimbi and their registration as proprietors was obtained through fraud and illegalities.

In the case of Fredrick Zzabwe Vs Orient Bank & Others S.C.C.A No.4 of 2006, fraud was defined as thus;

"An intended perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable belonging to him or to surrender a legal right. A false representation of a matter of fact whether by word or by conduct by false or misleading allegations or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Anything calculated to deceive whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth or look or gesture. As distinguished from negligence, it is always positive, intentional, it comprises all acts, omissions and concealment involving a breach of a legal or equitable duty and resulting in damage to another. And includes anything calculated to deceive whether it be a single

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act or combination of circumstances whether the suppression of truth or the suggestion of what is false whether it is by direct falsehood or by innuendo, by speech or by silence, by word of mouth, or by look or gesture."

Counsel for the Plaintiff submitted that **Section 5 of the Administrator General's Act Cap 157** in a mandatory manner provides that no grant of letters of administration shall be made to any person except an executor under a Will or the widower or widow of the deceased until the Applicant thereof has produced to the court proof that the Administrator General or his agent had declined to administer the estate or proof of having given the Administrator General notice of 14 clear days. **Counsel also added that P Exhb 7 and P Exhb 8** are to the effect that there was no certificate of no objection issued by the Administrator General's Office to the Defendants in 2007 when applying for letters of administration to the estate of the late peter Namunene Walusimbi. The said **P Exhb 8**, a letter from the Administrator General clearly shows that the purported file **No.ME/AC/217/2007-Peter Namunene Walusimbi**, does not exist.

PW1 (the Plaintiff) testified that she learnt of the forgery of the Letter of No Objection by the defendants when Officials of CIID, Kibuli (land protection unit) informed her during the investigations concerning the continued conflict on the suit land; whereupon she further received a copy of a letter from the Administrator General's office (**P Exhb 8**).

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DW1 (the First Defendant) during cross examination confirmed that while they were applying for letters of administration to the estate of the late Peter Namunene Walusimbi they did not open up a file with the Administrator General nor did they

get the Administrator General letter of no objection and/or recommendation for them to apply for letters of administration that they currently hold.

In the case of *Administrator General Vs Akello Joyce Otti 1996 KLR at P 264* the court held that:

“the widow or widower can apply for letters of administration to their deceased's spouse estate without reference to the Administrator General; that all other persons must serve the Administrator General with the notice of their intention to apply for letters of administration within the prescribed time. See Authority marked as “B”.

The evidence was presented to court by both parties is to the effect that **P Exhb 5**(the letters of administration to the estate of the late Peter Namunene Walusimbi vide H.C. Admin. Cause No.50 of 2007) were obtained by the Defendants without a certificate of no objection from the Administrator General's office.

Counsel submitted that the failure to obtain and/or given notice to the Administrator General before acquiring the letters of administration was an illegality and fraud committed by the Defendants and since the Sec. 5 of the Administrator General's Act is couched in a mandatory manner failure to comply renders the letters of administrator void and illegal.

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P Exh 1 (the certificate of title to the suit land) indicates that the Defendant on the 16th day of May, 2008 registered themselves as administrators of the estate of the late Peter Namunene Walusimbi; on the 3rd July, 2015, the Defendant further transferred the said certificate of title from the office of administrators into their personal capacities as joint tenants to the exclusion of other interested persons.

The testimony of the Plaintiff (PW1) which was confirmed by DW1 (the First Defendant) is that the late Peter Namunene Walusimbi had by gift intervivos already given part of the suit land measuring 50ft by 100ft to her and that the deceased (Peter Walusimbi) had also given several portions to all his children (including the Defendants). The evidence also shows that while the said Defendants did not distribute the estate between the years 2007-2014 during the life time of the late Veronica and no inventory was ever filed in court the Defendants went ahead to deal with the only existing estate property (suit land) by transferring it into their personal names in total disregard of the Plaintiff's and other people's interest and in total disregard of the beneficial interest of the late Veronica Namusisi as widow.

Furthermore, counsel submitted that during the hearing, DW 1 when asked why they did not subdivide the portion of the suit land given to the Plaintiff by the late Peter Walusimbi he replied that because the Plaintiff was their daughter (meaning that they could decide for her as they wish). During cross examination, DW 1 also confirmed that the late Peter Namunene Walusimbi sold part of the suit land and the proceeds thereof constructed the matrimonial home where he lived with his wife Veronica Namusisi.

Counsel for the defendants submitted that it is an agreed fact that the 3 defendants are children of the late Peter Namunene Walusimbi and the Administrators of his Estate. The Plaintiff adduced in evidence PEV as letters of Administration to the Estate of the Late Peter Namunene Walusimbi. A certified Copy of the letters of Administration is also on record as a defendants' document.

According to **Section 201 of the Succession Act Cap 162**, those who are connected with the deceased either by marriage or consanguinity entitled to obtain letters of

administration to his or her Estate. Therefore, the defendants are within the group of persons allowed to apply and obtain letters of Administration. **Section 202** of the same Act provides that subject to **Section 4 of the Administrator General's Act**, administration shall be granted to the person entitled to the greatest proportion of the estate under **Section 27** of the Succession Act and **Section 27(1)(a) (iv) of the Succession Act Cap 162** the lineal descendants shall receive 75% of the whole of the property of the intestate thus making the Children of the deceased the most qualified to obtain letters of administration.

Counsel submitted that the evidence of DW1 stands unchallenged when he stated that he together with the 2nd and 3rd defendants applied to Nakawa High Court and were granted letters of Administration. That the defendants legally obtained the letters of Administration.

Counsel for the defendants submitted that **Order 6 rules 7 CPR**, is to the effect that No pleading shall, not being a petition or application, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading. *Inter freight Forwarders v East African Development Bank (1990- 1994) EA 117 page 125 SCU*, cited with approval in *DFCU Bank limited v Godfrey Muwanga Misc Application no 240 of 2018* court stated that a party will not be allowed to succeed in a case not set up by him and be allowed at the trial to change his case or set out a case inconsistent with what he alleged in his pleadings except by way of amendment of pleading.

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Order 6 rule 3, further makes it mandatory where the party relies on fraud to state the particulars and it states "In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default or undue influence, and in

all other cases in which particulars may be necessary, the particulars with dates shall be stated in the pleadings.

In the case *Kampala Bottlers Ltd versus Damanico (U) Ltd Civil Appeal No. 22 of 1992*, Hon. Justice Platt JSC held and I quote at page 5 of his judgment: "Fraud is very serious allegation to make; and it is; as always, wise to abide by the Civil Procedure Rules Order VI Rule 2 and plead fraud properly giving particulars of the fraud alleged. It must be proved and the burden heavier than on a balance of probabilities generally applied in civil matters."

In *Nagawa Agnes & Anor v Segawa Samuel & Anor Civil suit no 27 of 2017*, the Hon. Lady Justice Elizabeth Ibanda Nahamya held that it is a mandatory requirement that fraud has to be pleaded and particulars given for it to be proved. Failure to do that is fatal. The Plaint filed in this honorable court by the Plaintiff did not show the particulars of the alleged fraud against the defendants in their registration in the said certificate of title, Order 6 rule 3 of the Civil Procedure Rules is very clear, and its omission is fatal. The plaint cannot bring the said facts in their submission yet they omitted the same in their pleadings.

In the case of *Kampala Bottlers Limited v Damanico (U) Ltd (Civil Appeal No. 22 of 1992) [1993] UGSC 1*, Wambuzi C.J. while discussing fraud on page 5 stated among others that fraud '*... must be attributed to the transferee. ... it ... must be attributed either directly or by necessary implication ...*'

Counsel for the plaintiff managed to adduce evidence to prove that the defendants skipped the expected process of procuring letters of administration of the estate of the deceased which points this court to fraud. That the said evidence adduced by the

Plaintiff was not challenged at all by the Defendants. The record has no attached copies of minutes of family meetings in which administrators are appointed, no minutes of the Attorney from the administrator General's Chambers confirming the appointment of the same, no copy of the Certificate of no objection since they are neither the widows nor the widowers yet they only adduced the copy of the Letter of No Objection.

In response the Counsel for the defendants submitted that the above alleged fraudulent acts not pleaded by the Plaintiffs in the Plaint. Indeed, a careful review of the Plaint shows that these particulars were never pleaded. Order 6 rule 7 of the Civil Procedure Rules prohibits departure from pleadings by the parties and the court. I quote it below;

"No pleading shall, not being a petition or application, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading."

The position in the above provision was re-affirmed in the cases of **Jani Properties Ltd. vs. Dar es Salaam City Council [1966] EA 281**; and **Struggle Ltd vs. Pan African Insurance Co. Ltd. (1990) ALR 46 – 47**, that the parties in civil matters are bound by what they say in their pleadings which have the potential of forming the record and moreover, the court itself is also bound by what the parties have stated in their pleadings as to the facts relied on by them. No party can be allowed to depart from its pleadings.

In the case of **Interfreight Forwarders (U) Ltd. vs. East African Development Bank, SCCA No. 33 of 1992**, it was held that;

“The system of pleading is necessary in litigating. It operates to define and deliver clarity and precision of the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which court will be called upon to adjudicate between them. It thus serves the double purpose of informing each party what is the case of the opposite party and which will govern the interlocutory proceedings before the trial and what the court will have to determine at the trial”

Applying the above principle to the evidence of fraud as submitted by counsel for the plaintiff they cannot be considered to impeach the title of the defendants. It is a clear position of the law under section 175(c) of the Registration of Titles Act, that a registered proprietor of land is protected against an action of ejectment except on ground of fraud. As stated earlier, the particulars of fraud go to the root of the transfer of the suit land into the names of the defendants and they were never pleaded under the Plaint.

In light of all pleadings and the evidence in this case, it is clear that the plaintiff whose duty it is to prove the fraud he alleged against the defendants failed to discharge the burden as required.

Issue No.3 and 4 are answered in the negative.

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Issue 5: What remedies are available to the parties?

The Plaintiff prayed for the orders that the caveat lodged by the defendants on the plaintiff's application to the estate of the late Victoria Namusisi under Administration Cause No. 327 of 2015 be vacated, the letters of administration granted to the defendants under Administration Cause No. 51 of 2007 for the Estate

of the Late Peter Namunene Walusimbi be nullified, the defendants names be cancelled from the certificate of Titles for Block 214 Plot 3736 and those of the late Peter Namunene Walusimbi be re-instated, a declaration that the Plaintiff is entitled to ownership of the land and the house comprised in Block 214 Plot 2726 , general damages and costs of the suit.

Given the findings above, the only prayers of the plaintiff that succeed are that she has a beneficial interest in the suit land. Since the bequest to the Plaintiff from the late Veronica was never quantified, the only confirmed interest of the Plaintiff on the suit land that is not contested by the Defendants is the land of 100 ft by 50 ft and on which she has built four rental units. The Defendants are hereby ordered to mutate the existing certificate of title and sign the necessary transfers in order for the Plaintiff to have a certificate of title in her names. The rest of the prayers by the Plaintiff are denied.

In light of the outcome and nature of this family dispute, each party will bear their own costs.

It is so ordered



CORNELIA KAKOOZA SABIITI

JUDGE

Date: 5th November 2021