

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
CIVIL SUIT NO.330 OF 2016

5 **DR. FRANCIS E. B. MAYANJA:.....PLAINTIFF**

VERSUS

10 1. **ISAAC KALULE**
2. **ALICE NAMAYANJA**
3. **BABIRYE MARGARET**
4. **NAGINGO FLORENCE**
5. **NAMUKASA JOY**
6. **NAKIBIRIGE RACHAEL:.....DEFENDANTS**

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Before: Hon. Justice Alexandra Nkonge Rugadya.

JUDGEMENT.

Introduction:

20 The plaintiff brought this suit jointly and severally against the defendants seeking, among others,
a declaration that the defendants are trespassers on land comprised in **Nakawa Division block**
195, plot No.1588 at Kyanja (hereinafter referred to as the "suit land") forming part of the
plaintiff's beneficial interest/share in respect of land formerly comprised in **Block 195 plot 65**
land at Kyanja belonging to the estate of the late Yosiya Kiwanuka Mayanja; an order for
25 demolition of the illegal perimeter wall and any structure erected by the defendants on the suit
land; a permanent injunction restraining the defendants from trespassing on the suit land; general
damages; an order for *mesne* profits; punitive damages; as well as interest and costs of the suit.

Brief Facts.

The plaintiff's case:

30 It is the plaintiff's claim that the late Yosiya Kiwanuka Mayanja was at all times the registered
proprietor of land comprised in **Ssabaddu Block 195, Plots 254 & 258, land at Kyanja.**

That by his will dated 14th December, 1987, the deceased appointed the plaintiff as the executor
of his will and also gave him 3 acres and his house on the above described land.



Further that after the death of Yosiya Kiwanuka Mayanja, the plaintiff obtained the grant to the deceased's estate on 18th April, 1994 from the Chief Magistrates Court of Mengo Court, vide **Administration Cause No.43 of 1994**; and that between 1994 and 2007, he embarked on the subdivision of the said land. That the resulting plots of land were distributed amongst all the 16 children of the deceased including the defendants.

It is also the plaintiff's contention that out of the deceased's estate, he received the land in Mukono, and 3 acres of land on the residual title now described as **Kyadondo Block 195, Plot 1588 in Kyanja**, the suit land which has a graveyard, and is still undergoing subdivisions for purposes of cutting out the Ntinda-Kyanja road as well as the Kyanja-Komamboga road after which, the plaintiff's share will be **Plot 4807 and 4806**.

That upon distributing the estate of the deceased, some beneficiaries including the 1st, 3rd, 4th, 5th and 6th defendants sold their respective shares and that around 1995, he embarked on developing his share whereon he set up houses and boys quarters which are occupied by his son.

The plaintiff alleged that sometime in February, 2016, the defendants trespassed on 1.5 acres of the suit land, demolished his perimeter wall and further erected a perimeter wall, enclosing about 31 decimals of the plaintiff's share of the land thereby delineating the plaintiff's compound, and confiscating the plaintiff's main gate.

That the defendants have interfered with the plaintiff's quiet possession of the suit land and have jointly resisted and frustrated his efforts to develop and establish a nursery school by chasing and beating up the plaintiff's workers whenever they are deployed.

The defendants case:

The defendants on their part denied the allegations against them and in their defence but admitted the fact that after the death of the late Yosiya Kiwanuka Mayanja, the plaintiff was appointed as the administrator of the estate by the other family members.

That the 2nd defendant is a representative by power of attorney of one Rose Mayanja, one of the direct beneficiaries of the deceased's estate who left for the United States in 1990s and that she was bequeathed half an acre of the family land by the deceased, which she entrusted with the 1st defendant but the plaintiff stubbornly refused to clearly demarcate and subdivide the same from the mother title.

That the plaintiff transferred the family land into his names as an administrator of the estate of the late Yosiya Kiwanuka and subdivided and distributed the same without the knowledge or consent of the other beneficiaries.

Further, that the plaintiff illegally and fraudulently sold off some of the land leaving out some of the beneficiaries and that in 2015, he attempted to sell off part of the land reserved for burial grounds.



That following a meeting with the Resident District Commissioner held on 28th May, 2015, a boundary opening exercise was conducted and it was established that the land for Rose Namayanja, one of the beneficiaries on ground was measuring only approximately 0.19 acres.

That it was also agreed that the plaintiff would secure for Ms Namayanja the 31 decimals from the upper side and 19 decimals from the lower side, to make half an acre that she was entitled to.

However, instead of the plaintiff handing over transfer forms to Rose Namayanja as agreed, he started threatening to sell the burial grounds and demolishing the perimeter wall constructed by Rose Namayanja with the intention of selling off the remaining family land; demolished the family house that was left behind by their father; and is fraudulently claiming the house built by their brother Buwembo John.

The defendants maintained that the plaintiff fraudulently sub divided the land without the consent of other beneficiaries and that the processing of titles and purported division of family land was carried out based on a will altered to suit his interests forged will and on which he relied to claim ownership of the family land.

The defendants denied ever trespassing on the suit land claiming that Rose Namayanja is the owner of land measuring 0.31 decimals on which she has a perimeter wall and 0.19 decimals where she has concrete poles; and that there is need to formally distribute the estate of the late Yosia Kiwanuka.

The defendants also filed a counter claim against the plaintiff for a declaration that they are the lawful owners of the suit land and beneficiaries of the estate of the late Yosia Kiwanuka Mayanja; cancellation of certificates of title created out of the family land formerly comprised in **Block 195 plot 254 & 258 land at Kyanja**; an order for the reinstatement of the name of the late Yosia Kiwanuka; an order for distribution of the estate of the deceased; an order for inventory of accounts of the estate of the Late Yosia Kiwanuka Mayanja as well as an order to surrender to this court the original copy of letters off administration for revocation and the same be granted to Joy Mukasa Nakibirige and John Buwembo.

The counter defendant never provided any accountability of how he managed the estate, having fraudulently subdivided the family land and purportedly distributed some plots without the consent of the beneficiaries.

In reply, the plaintiff/counter defendant stated that the 2nd defendant/counter plaintiff does not possess any valid powers of attorney and that she did not act as an agent of Rose Namayanja since the alleged powers of attorney were not registered.

That he was appointed a competent administrator of the deceased's estate of the deceased and not the counter claimants, and that he was acting on the instructions of the will to distribute the estate of the deceased to all the beneficiaries including Rose Namayanja.



Namayanja according to him was bequeathed half an acre which he opted to Isaac Kalule, the 1st defendant/Counter claimant who in turn sold it to third parties with the full knowledge of Rose Namayanja.

In addition, the 1st defendant left out some land which is now comprised in **Block 159 Plot 2440 at Kyanja** in respect of which Rose Namayanja is registered as the proprietor and that in case of any claim, the 1st defendant/counter claimant must only seek the balance.

Further, that the subdivisions by the plaintiff were made in his capacity as the administrator and in the full knowledge of the counter claimants and that the arrangements arising out of the meeting with the RCC of Nakawa were made under a mutual mistake since the land that was being claimed by Namayanja was in the possession of the 1st defendant.

Further still, the plaintiff/counter claimant maintained that the perimeter wall erected by the counter claimants was illegally constructed and that he has never sought to sell the burial grounds of the family.

The plaintiff led evidence of one witness, while the defendants led evidence of three (3) witnesses in support of their case.

Representation.

The plaintiff was represented by **M/s ASB Advocates** while the defendants were represented **M/s Tumusiime Irumba & Co. Advocates.**

During the scheduling conference, the following issues were agreed upon for determination by court.

1. ***Whether the defendants' actions amount to trespass;***
2. ***Whether the plaintiff is the lawful owner of the suit land;***
3. ***Whether the plaintiff is entitled to the reliefs sought***

I have perused the pleadings, submissions and considered all the evidence availed to court.

Under **Order 15 rule 5 (1) of the Civil Procedure Rules S.I 71-1** court may at any time before passing a decree amend the issues or frame additional ones, on such terms as it thinks fit, and necessary for determining the matters in controversy between the parties (**see also Kahwa Z. and Bikorwenda v. Uganda Transport Company Ltd [1978] HCB 318**).

The following were the issues as framed by this court:

1. ***Whether the late Yosia Kiwanuka Mayanja left a valid will;***
2. ***Whether the plaintiff was justified to administer and to distribute the suit property;***
3. ***Whether the plaintiff is entitled to the suit property***
4. ***Whether the defendants' actions amount to trespass***
5. ***Remedies.***



Consideration of the issues:

Issue 1: Whether the late Yosia Kiwanuka Mayanja left a valid will.

By virtue of **section 101 (1) of Evidence Act, Cap. 6**, whoever desires court to give judgment to any legal right or liability depending on the existence of any facts he/she asserts must prove that those facts exist. **(George William Kakoma v Attorney General [2010] HCB 1 at page 78).**

The burden of proof lies therefore with the plaintiff who has the duty to furnish evidence whose level of probity is such that a reasonable man, might hold more probable the conclusion which the plaintiff contend, on a balance of probabilities. **(Sebuliba vs Cooperative Bank Ltd. [1982] HCB 130; Oketha vs Attorney General Civil Suit No. 0069 of 2004.**

- 10 It is also trite law that in order to administer any property of a deceased person, one must be either an executor appointed under the will of the deceased person, equipped with Probate obtained from court or obtain letters of administration to enable him/her to administer the estate.

Validity of the will:

- 15 The counter claimants/defendants believed that their father had left a will, which they claimed had been read out at the funeral rites. In *paragraph 6 (xv)* of their written statement of defence and *paragraph 2 (xv)* of the counter claim alluded to the fact that the plaintiff had fraudulently altered the original will, and secured letters of administration.

- 20 The plaintiff when applying for the grant in 1994 letters of administration however did not annex the will onto his application for the grant, but nevertheless attached a copy which had been certified by the same court which granted him the authority to administer the estate of his father, which copy was tendered in court as **PExh 1(a)**, with **PExh 1(b)** as the translated version.

- 25 The witnesses to the will were however not called in as witnesses. The said document dated 14th December, 1987 mentions 14 acres of land at Kyanja. It did not however mention any other details concerning the plot number(s) or block number. It divided up the estate, allocating to each child a share 50 decimals for each child, among others who were entitled to various shares.

- For a will to be valid, the provisions of **Section 50 of the Succession Act** must apply. Thus it must be in writing, dated and signed by the testator. A will must also be witnessed by two or more attesting witnesses who must see the testator write, sign or affix his mark. **(Estate of James Ngengi Muigai (deceased), Nairobi High Court Succession Cause No. 523/1996), Koine J.**

- 30 An allegation of forgery of a will is so grave; it amounts to an act of fraud. Fraud must not only be specifically pleaded, it must be proved by the party who alleges that it was committed.

The burden of proof in relation to this issue therefore shifted to the defendants. Other than allegations in the pleadings and oral unsubstantiated evidence, court had no concrete basis to rely on to support the defendants' assertions.



The defendants who claimed that the will had been altered ought to have presented the genuine copy, or at least present to court as witnesses, those who had attested the will so as to prove their claim. None of this had been done.

5 The will which was tendered and admitted in evidence as **PExh.1 (a)** was duly signed, dated and attested and accordingly passed the test of a valid will.

Besides was the fact that in their joint written statement of defence and counter claim, the defendants while disputing the will and refuting the claim that the plaintiff was entitled to the three acres (as per that will), sought at the same time to secure for themselves the 50 decimals to which each child was entitled under that same will.

10 The principle of approbation and reprobation prevents a party that has taken benefit out of a course of conduct which one pursued and with which his present conduct is inconsistent. **See Lord Evershed MR in Banque des Marchands de Moscou (Koupetschesky) v Kindersley [1951] 1 Ch 112,**

15 Going by that principle, the plaintiffs cannot therefore be seen to accept the document when it suited them, and even act on, or derive benefit out of, some of the clauses and reject those that did not seem favourable to them. The defendants failed to present the will which they believed to have been genuine, the one that had been read out as claimed during the last funeral rites.

20 Also by virtue of **section 90 of the Evidence Act, Cap. 6**, when any document purporting to be thirty years old (or more) is produced from custody which the court considers proper, court may presume that the signature and every other part of that document which purports to be in the handwriting of any particular person is in that person's handwriting; and in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested. The will in this case is dated 14th December, 1987 and in my view the section as cited is applicable in those circumstances.

25 Finally on that point, within the context of **sections 91 and 92 of the Evidence Act, Cap. 6**, the rule against parol evidence bars admission of any oral statement aimed at contradicting or varying the terms of a document which has been reduced to the form of a document.

In the result, I find that the defendants did not provide sufficient proof to sustain their claim that that the plaintiff used an altered or forged will to distribute the estate.

30 **Issue No.1** therefore is answered in the affirmative.

Issue No.2: Whether the plaintiff was justified to administer and distribute the suit property;

35 **Section 191 of the Succession Act, Cap. 162** provides that no right to any part of property of a person who has died intestate shall be established in any court of justice, unless letters of administration have first been granted by a court of competent jurisdiction: (**Magbwi Erikulano vs MTN U Ltd & Anor HCCA No. 0027 OF 2012**).


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Section 180 of the Succession Act stipulates that the executor or administrator, as the case may be, of a deceased person is his or her legal representative for all purposes, and all the property of the deceased person vests in him or her as such. Furthermore, **section 270 of the Succession Act** stipulates generally that an executor or administrator has power to dispose of property of the deceased as he or she may think fit.

In the instant case, it was an agreed fact that the plaintiff is the administrator of the deceased's estate, having obtained the letters of administration in respect of the late Yosiya Mayanja with the family's approval.

It is also not in dispute that the late Yosiya Mayanja was the original owner of the land comprised in **Kyadondo block 195, plots 254 and 258, land at Kyanja**. As per **DExh 2**, the deceased got registered on the land on 28th July, 1952.

Upon his demise, the plaintiff, Dr. Mayanja one of the 16 children and heir to the deceased on 18th August, 1994, obtained letters of administration vide **AC No 43/ 94, (PExh 2)**; and became registered on the title as administrator of the estate on 21st August, 2007.

Under the law, the administrator's fiduciary duties are primarily owed to the beneficiaries of the estate. It is the duty of an administrator to gather in the assets of the deceased; and pay all outstanding liabilities that may be due.

Once this is complete, it is the duty of the administrator to divide the assets of the estate in accordance with the law. (**See: Hellen Okello v Akello Jennifer Civil Appeal No.84 of 2019**), and where the deceased leaves a will, in accordance with his/her wishes.

Such relationship is based on trust that such person who is not only appointed heir, but also nominated by family, and appointed by court to administer the estate would deal with the estate fairly, and with transparency; and in a manner which is not detrimental but beneficial to both the trust property and *cestui qui trust*.

The plaintiff in the present case upon obtaining a grant of letters of administration in respect of the estate of the Late Yosiya Mayanja caused various subdivisions as demonstrated under the sketch and list of beneficiaries. (**PExh 3 and 4**).

Several plots and titles were created, processed and distributed to some beneficiaries, some of whom even took possession and/or sold their shares. Through the evidence of the 1st defendant, testifying as **Dw1** each of the children of the late Yosia Mayanja was to get a share of 50 decimals as his/her bequest out of the estate.

For all that period however from 1994, when he took over administration of the estate, till around the time when the distribution was made none of the beneficiaries had questioned or challenged the plaintiff's powers/authority or right to deal with the estate or even seek court's intervention to revoke that authority.



In light of the above, and in response to **issue No. 2**, I find therefore that the plaintiff had been duly granted the authority to administer the estate and therefore had the legal mandate to distribute the entire estate of his late father.

Issue 3: Whether the plaintiff is entitled to the suit property

5 **And**

Issue 4: Whether the defendants' actions amount to trespass

I will deal with these two issues jointly.

Trespass to land, according to **Salmon & Huston on the Law of Torts 19th edition**, occurs when a person directly enters upon land in possession of another without permission and remains upon the land, places or projects any object upon the land.

In the case of **Justine E.M.N Lutaaya vs Starling Civil Engineering Co. S.C.C.A No. 11 of 2002** trespass is premised upon interference with the possession of land. Needless to say, the tort is committed not against the land but against the person who is in actual or constructive possession of the land.

15 A claim in trespass to land, such as the plaintiff's is a claim made in spatial terms, with rights asserted by reference to a boundary across or beyond which outsiders may not move without permission.

A fair response to the two issues as highlighted above would require this court to examine in detail the manner in which the distribution of the estate was conducted by the plaintiff based on the survey report on **plots 254 and 258**, tendered in as **DExh 5**, and also determine whether the process was completed and in accordance with the wishes of the testator.

In both his plaint and evidence in chief, the plaintiff alluded to the fact that by virtue of the will of the late Yosiya Mayanja **PExh. 1 (a) & (b)**, the total area was 14 acres out of which he was entitled to three (3) acres and to the family house on the suit land comprised in **Ssabaddu Block 195 plot 254, land at Kyanja**, (prior to subdivision), part of which was covered by the burial ground and that only 12.5 acres were available for distribution. **Plot 254** had been created out of original **plot 74 of Block 195** as reflected in a certificate of title, **PExh 5**.

He presented a proposed map **PExh 3**, which showed the purported distribution of the estate. The residual title from which he claimed three (3) acres of land according to him was **Kyadondo Block 195 plot 1588 at Kyanja**. He also attached an area schedule: **PExh 6**, which however did not reflect any plot number.

In his evidence as **Pw1**, it was his claim that although he was entitled to 3 acres he was only able to get 2.5 acres. The truthfulness of that claim could not however be readily ascertained since going by the contents of the survey report, (**Table 2**), the sizes of each plot given out to the beneficiaries were all indicated, save for **plots 1260, 1262, 1263, and 1264** created from another

plot 258, which had been issued in the plaintiff's names. The titles deeds for those plots as well as that for **Plot 258** were not exhibited in evidence.

Another **plot No. 4806** created from **plot 254** was registered in the plaintiff's names, but only as administrator of the estate. It is not known where this plot was physically located or what developments had been made thereon. But gaging from the report, it covered an area of 1.013 acres.

Plots 4807 also created from **plot 254** had been left for family/grave yard. From the report, it is not clear in whose names it had been registered. But from what court was able to establish as per

PEXh 8, a certificate of incorporation bore the names of *Green Cottage Infant and Day Care Ltd.* From the particulars of directors form annexed thereto, as at 6th January, 2016, the names of the persons connected to the plaintiff appeared on the form as directors, with the company address and location therefore, indicated as **plot No. 4807**.

The plaintiff also relied on **PEXh 9**, a deed print endorsed by the Commissioner of Surveys and Mapping, dated 26th May, 2016. It reflected two **plots 2672 and 5027** but because these two were not indicated in the survey report, it was not possible to know from which plots they had been created. Information about these two could not be traced anywhere from his own records, not even from his questioned area schedule dated 1st June, 2016. (**PEXh 6**).

The confusion in subdivisions, plotting and titling became even more prominent when **Pw1** pleaded that the defendants had trespassed on part of the 3 acres of his land comprised in **Nakawa division Block 195 plot 1588 land at Kyanja**, which he believed was a residual plot, but which from the report had an area of only 50 decimals belonging to Nakato Justine. He himself had already allocated it to her.

This created serious doubt in the mind of court as to whether therefore the alleged demolition by the defendants of his perimeter wall (and building a wall fence) had taken place on Justine Nakato's land or the family land.

Whichever way one would choose to look at it, trespass could not have been committed on land which the plaintiff would have preferred to call as his own, exclusive of the rest of the members of his family, so as to justify his refusal to allow them access.

It is the finding therefore of this court that if the plaintiff had been entirely truthful in his claims, he could have presented to court an updated area schedule which could have aired out some of the distribution issues, instead of relying on one that had been made 5 years earlier, before the distribution was effected and before third party interests came in.

A visit by court to the *locus in quo* could not iron out all the intricacies of this case. But what became clear is that part of the land adjacent to that the family land, home and grave yard were in an enclosure, the same portion that the defendants had allegedly trespassed on.

For a case of trespass to succeed against the defendants/counterclaimants under those circumstances, it had to be on land that the plaintiff exclusively claimed, which in this case was:

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plots 1260, 1262, 1263 and 1264, but not what was held in trust by the plaintiff or held in the names of another person.

An act in trespass on land was provable only if the survey was done, boundaries fully ascertained and distribution completed. It was therefore incumbent upon the plaintiff to prove that all this had been done and in accordance with the wishes of the deceased.

Exclusive property rights cannot be asserted and defended where there is uncertainty in the location of a *de jure* boundary whether by custom or agreement. The assertion of possessory property rights in land presupposes the existence of clearly defined boundaries of the land parcel.

What was really required was the determination of the true nature of the common boundary and where it was located. The burden of proving the location of the common boundary lies on he or she who claims trespass has occurred onto his or her land.

Determination of land boundaries is ultimately a matter for judgement and the parties' role is the discovery of all evidence relevant to the location of the boundary. (See: **Okot and Ors v Lamoo Civil Appeal-2018 of 26**).

The unsettled bequests:

The defendants in their written statement of defence and counter claim maintained that the 1st defendant and Rose Namayanja had not been duly catered for in the distribution and relied on three witnesses to prove that contention.

Mr. Isaac Kalule the 1st defendant testified as **Dw1**, while Ms Alice Namayanja, the 2nd defendant, as appointed Attorney for Ms Rose Namayanja testified as **Dw2**. Both refuted the suggestion made by the plaintiff that Rose Namayanja had received a title, reflecting her share of 50 decimals as a bequest from her father's will.

Dw3 Francis Tukundane, a surveyor confirmed that a survey was conducted for both **plots 254 and 258** upon request by office of the Resident City Commissioner (RCC), Nakawa, and supplied in his report, **DExh 5**, a list of what each beneficiary was entitled to, which was not in contention.

It was also their claim that the plaintiff had reached the extent of selling off a portion of the land that had been reserved for burial grounds, as well as a portion of the land measuring 0.50 acres which had been bequeathed to Rose Namayanja, who had resisted the same.

That through a meeting convened by the office of the RCC intended for the beneficiaries of the deceased's estate, it had been resolved that the boundaries of **plot 254** be reopened and that is when it was discovered that only 19 decimals were given to Namayanja out of the 50 decimals which had been bequeathed to her.

It is not in dispute that it was subsequently agreed that the plaintiff would add 31 decimals more to Rose Namayanja to make up the 50 decimals, a claim which the plaintiff did not deny. Thus as per **DExh 6**, the final Meditation meeting for the family, it was agreed as follows:

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That Dr. Mayanja (administrator of the estate of the late Yosia Mayanja) agrees to give Rose Namayanja the remaining 0.31 acres from **plot 4807** on the land belonging to Dr. Mayanja as the administrator of the estate on the following conditions:

5 The area mutated from **plot 4807** is done in such a way that the family house, court yard (lugya) and the grave yard are left free.

The resulting plot is fenced off from the family residual land by 9 by 9 concrete block wall with appropriate finishing so as rendering (sic!) the residual land decent.

Should at any one time Rose Namayanja opt to sell or pass on ownership of the resulting plot, first priority be given to the administration of the estate of the late Yosiya Mayanja.

10 All this above has been agreed on this 13th day of August, 2015.

The mediation presided over by the office of the Deputy RCC Nakawa was attended by the plaintiff who was reported as having agreed with the proposal. Although the report of the meeting had his name listed it did not bear his signature. Among other beneficiaries present were the 1st and the 2nd defendants, (**Dw1 and Dw2**).

15 Consequently however and arising out of that meeting a memorandum of Understanding, (MOU), tendered in as **DExh 7**, was entered between the plaintiff and Rose Namayanja, in the presence of their counsel, confirmation that the parties were willing and in fact did attempt to settle the dispute between them in the following terms:

.....

20 WHEREAS:

- a. The parties herein desire to settle a dispute regarding the estate of the late Yosia Mayanja.

AND WHEREAS

Having read the survey report with various recommendations, herein agree as follows:

25 NOW THEREFORE.....

1. That ROSE'S lawyer accepts that he has seen the title plot 2440 although its being disputed by his client.
2. Thatupon the registered proprietor of the estate, shall nullify the instrument by way of applying for cancellation of the title pursuant to this agreement or shall apply for re-mutation.
- 30 3. That the balance of money owned on the title plot 2440 Ugx 500,000/= be paid by ROSE to the surveyor so that the title can be released and be used in the process of cancellation.
4. That the payment of the cancellation and survey be borne by ROSE.
5. That the costs of the survey, mutation and transfer of portion acquired from plot 4807 (family land) be borne by ROSE NAMAYANJA.


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6. That upon placement of markstones demarcating the 0.31 acres a perimeter wall be constructed with concrete by 9 by 9 blocks...by ROSE.
7. Thatupon signing this MOU, Dr. Mayanja shall sign the mutation and transfer forms in due course and surrender them to the mediator who will release these documents following the sequence of implementation of the above conditions.
8. That should ROSE NAMAYANJA ever wish to sell the property mutated from 4807, first priority is given to DR. Mayanja the administrator of the estate to purchase..
9. That the above sequence shall be strictly followed and counsel for both sides will see to that and sign a completion certificate and hand it to Dr. Mayanja.

THE PARTIES FURTHER AGREE:

1. Payment of balance to Mr. Kizito of Ugx 500,000/= and release title on **plot 2440** shall follow.
2. An application to the Registrar of Titles for remutation of title of **plot 2440** to read 19 decimals but the rest remain the same.
3. Handing over mutation form of 25 decimals to Kalule and the said Kalule shall pay the surveyors.
4. Having executed the above, the surveyor will mutate the 31 decimals in a regular shape and proceed with transfer of the said 31 decimals into the name of the second party herein.
5. The pace will have dependent (sic!) on the payment of the appropriate costs survey government taxes and transfer fees upfront.

The above consents which in my view were freely entered by the parties in the presence of their respective counsel were binding to the two parties. The short of it was that a survey had to be conducted, the mark stones had to be placed around the 31 decimals; an application was to be made to the Registrar of Titles for re-mutation of title of **plot 2440** to read 19 decimals; a perimeter wall be constructed with concrete by 9 by 9 blocks by Namayanja; and that upon signing this MOU, the plaintiff, Dr. Mayanja was to sign the mutation and transfer forms and surrender them to the mediator who would release these documents following the sequence of implementation of the above conditions. The evidence however does not indicate if all of this had been fulfilled.

On her part Namayanja who later disputed the title for **plot 2440** had to meet costs of the survey for a plot of land promised to her, but which was never handed over to her. It does not come out clearly from the evidence whether or not such refusal was because she had failed to fulfill some of the obligations: meet the surveyor's fees and present therefore the certificate of completion. Whatever the case, **plot 2440** was never released in fulfilment of those commitments.

Pw1, the plaintiff as a fact, while maintaining that Namayanja's share did exist under **plot 2440** seemed to have admitted that Namayanja had not yet received all that she had been entitled to.

It was within the spirit of settlement that the balance had to be carved out of **plot 4807**, which was family land, he had therefore been bound, just like Namayanja to comply with the terms of that undertaking, implying that any part of the perimeter wall erected by her which exceeded the 31 decimals (to which she was entitled) would be in contravention of that MOU.

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But that evidence had to be supplied by the plaintiff, who had to satisfy court that the boundaries had been clearly marked and were easily identifiable, leaving no room for error. If the land was still there for her to take upon fulfilling her obligations under the MOU, then the questions one would poise are: what could have happened to it; and whether or not it had been distributed to another person or disposed of, and if so by who and to whom- so as to justify an action in trespass.

A further allegation was also made by the plaintiff that by their actions, the defendants had frustrated the plaintiff's efforts to develop and establish the nursery school under the company: *M/s Green Cottage Infant & Day Care School Ltd.*

The plaintiff had to do more to satisfy court that in challenging the said actions, he was seeking to protect lawfully acquired interests. His own evidence (**PExh 8**) as a matter of fact lent credence to the defendants' fears as expressed that the plaintiff harbored intentions of selling off the family land.

Would those actions therefore amount to trespass? I would think not, given the fact that **plot 4807** constituted part of the family land/ grave yard. Nowhere in the plaintiff's evidence had it been shown that the land exclusively belonged to the plaintiff, and was not part of what Namayanja would have expected to derive her share from.

In my view, the arguments raised by the plaintiff were to say the least self-defeating and contradictory, with the plaintiff seemingly trying to renege on his expressed commitment made between him and Namayanja.

The surveyor, **Dw3** gave his evidence on oath at the *locus* visit; and as duly noted by this court, and also as indicated in **DExh 6**, the recommendations which were made on 13th August, 2015 and adopted had apparently emanated from the survey report findings which the plaintiff did not contend with as far as Namayanja was concerned.

The surveyor **Dw3**'s report was damning to the plaintiff's case and all the plaintiff needed to have done if he had been genuine in his claims would have been to avail to court with an up to date survey report, to disprove the surveyor's findings and recommendations.

The original distribution as initially proposed by the plaintiff was laid out on *page 8, under table 1*, in the surveyor's report but what came out finally following the survey was indicated in *table 2, page 9*. It could only imply that the plaintiff had distributed the estate before ascertaining or opening up the boundaries for both plots, to establish the actual measurements.

Dw1 just like the rest of the defendants perhaps held the belief that both **plots 254 and 258** added up to 14 acres prior to their father's death. (*ref: paragraph 6 of the witness statement*). The surveyor's record however fell short in one key area.

Whether by design or genuine error he did not indicate the total area for each **plot, 254 and 258** and did not provide an explanation as to why such information, so crucial to the case was not included.

Just like **plot 254, plot 258** was registered in the names of Yosiya Mayanja on 8th July, 1952 and upon his death transferred into the administrator's names. A perusal of the certificate of title **DExh 3** shows that the area for **plot 254** alone (without adding **plot 258**), was 10 hectares, about **24.7 acres**.

5 As noted, no certified title or details were availed to court in respect of **plot 258**, but a perusal of the record indicates that **plot 258** had about **5.9 acres** out of which several titles were made. I can also add that none of the titles as processed out of the two titles had been availed to court for inspection and verification.

10 Thus the correctness of what was available for distribution and what was actually distributed specifically for **plot 258** could not be verified since the title for **plot 258** was neither certified nor admitted as part of the evidence.

15 Gathered from all the above, it could not be ruled out therefore that there was a lot more land that was yet to be distributed under the estate and in fulfilment of the late Mayanja's wishes. One can also add that about only 50% of the estate (or less) had been distributed. It is also quite possible that some of the land owned by the deceased had been left out under the will.

Several errors were detected in the subdivisions which would require verification. **Table 2** showed clearly that for a majority of plots carved out of **plots 254 and 258**, titles had already been processed, save for **plots 4801** retained for Jingo William which had an excess of 12 decimals.

20 Secondly, **plot 2440** was meant for Rose Namayanja. Under the MOU it had been anticipated that it would have 19 decimals. 25 decimals, (half of what she was entitled to under the will) were however on paper. From his report on **page 4, plots 2440 and 2885** which had been highly subdivided were not reflected on the attachment number which was the first subdivision.

25 The surveyor had even recommended cancellation of **plot 2440** since the whereabouts of the title were unknown. The plot as noted by the survey findings was encroached upon by the church building in **plot 2885**, by about 13 sq.metres, as well as an access road to Nanfuka Harriet's **plot 1447**.

30 **Plot 2885** had been sold by the 1st defendant, Isaac Kalule but had an area of only 25 decimals, not the 50 decimals which had been bequeathed to him. The allegation by the plaintiff in **paragraph 16** of his witness statement was that Rose Namayanja, out of her love and affection had given half an acre to Isaac Kalule.

However, in a handwritten letter signed by Namayanja addressed to the plaintiff tendered in as **PExh 7** it was evident that though Isaac Kalule had dealt with the land belonging to Namayanja, that was in respect of the 19 decimals. The balance still had to be accounted for by the plaintiff as the administrator of the estate.

35 The dealings between Namayanja and Kalule were a matter that the plaintiff had not been privy to, and therefore had to be resolved between those two. It could not have absolved him however

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from fulfilling his obligations as the administrator or under the MOU or bar him from mutating the land and make the transfer of the 31 decimals to Namayanja.

The findings from the survey were sufficient proof therefore that contrary to what was initially thought, Rose Namayanja had neither the land nor the title. What appeared to be the 'recent' subdivision was on attachment number 3 reflecting new **plots 4801** (which had an excess of 12 decimals; **4807, 1975 and 4802**).

The circumstances under which other plots had been created when there were already existing subdivisions were not known and in my view such errors could have been avoided if a prior survey had been conducted before the distribution and subdivisions were made by the plaintiff.

Furthermore, the titles for **plot No. 4806 (1.013 acres)** registered under the names of the plaintiff in his capacity as the administrator; as well as **plot 4802 (0.516 acres)** for Kawoya Rauben were by 2015 all under process. The status of each of those plots after 2016 prior to this suit was not given.

Similarly, the status of **plot 4804** measuring **0.568 acres** encroached on by the Ntinda-Kyanja road was not indicated. It is not established whether that was all that had been encroached by the roads. The plaintiff when put to task about the compensation to which the affected parties were entitled told court that they were yet to receive the same.

All in all, the plaintiff had a duty to fulfill under the law: to administer the estate with transparency; to file an account and an inventory in court as required under **section 278 of the Succession Act**, as proof that he had fulfilled his mandate as a trustee of the estate by distributing it to all who were entitled as beneficiaries under the estate.

The nature of the authority, roles and tasks entrusted to an administrator were not designed to keep him/her permanently on the job. That explains why within only six months from the grant or within further time as court may grant, the administrator is required to exhibit in court an inventory containing a full and true estimate of all the property in possession and all credits, debts owing; and within only one year from the grant to exhibit an account of the estate. (**section 278 of the Succession Act**).

In the circumstances of this case it had taken the plaintiff decades, and even then, the tasks were yet to be accomplished since part of the estate remained undistributed. It is my considered view therefore that if he had adhered to the terms of the MOU and dealt with the estate in a more transparent manner (and as per stated in the will), filed an inventory/account of the estate property as required by law, all that which had ensued could have been avoided.

As it so happened, he subdivided the estate without caring to find out the total area that constituted the Kyanja estate, which created the discrepancies in sizes resulting in unnecessary disputes.


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In those circumstances and based on the weak evidence adduced by him as highlighted, I find that the issue of trespass did not arise and that the dispute rather rotated around the manner in which he himself had distributed his father's estate.

5 I therefore also fail to appreciate why the plaintiff had instituted the action against the defendants to the extent of considering them as trespassers on what constituted part of the trust property. Yet he himself had granted to himself 4 plots of land which were not the subject of dispute in this suit.

10 **Section 234(2) of the Succession Act, Cap. 162** empowers this court to revoke the letters of administration for just cause. The object of such power is to ensure the due and proper administration of an estate and the interests of the parties beneficially entitled thereto.

This principle was enunciated in: ***In the goods of William Loveday [1900] P 154***, cited in: ***In the matter of an application for revocation of letters of administration and grant instead to Piwa Clare and Biwaga Joan, MA No. 53 of 2016.***

15 The defendants' quest for court's intervention however only came by way of their counterclaim after this suit had been filed. The prayer was made for the plaintiff to surrender to court the original copy of letters of administration for revocation and for the same to be granted to Ms Joy Mukasa Nakibirige and John Buwembo.

20 This prayer however could not be upheld since the two persons who were proposed were neither parties nor witnesses in this suit. This could only imply that they were not aware of any such proposal, or their consent to take over the administration of the estate had not been sought, or both.

Besides was the fact that the 2nd defendant was not a beneficiary under the estate. She only held powers of attorney for Rose Namayanja and neither she nor the 1st defendant had the authority to represent the family regarding the revocation of the letters of administration and issuance of a fresh grant to another person.

25 Such action must therefore fail, as the plaintiff did not himself come to court with clean hands.

Issues No. 3 and 4 are therefore conclusively addressed.

In the final result:

The defendants/counterclaimants sought the following orders/ reliefs:

- 30 a) a declaration that they are the lawful owners of the suit land and beneficiaries of the estate of the late Yosia Kiwanuka;
- b) cancellation of certificates of title created out of the family land formerly comprised in **Block 195 plot 254 & 258 land at Kyanja;**
- 35 c) an order for the reinstatement of the name of the late Yosia Kiwanuka;

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- d) an order for distribution of the estate of the deceased;
- e) an order for inventory of accounts of the estate of the Late Yosia Kiwanuka Mayanja;
- 5 f) an order to surrender to this court the original copy of letters off administration for revocation and the same be granted to Joy Mukasa Nakibirige and John Buwembo.

The counterclaim succeeds in part, and as per the following orders/declarations, that:

- 10 1. **The children of the late Yosiya Mayanja are each entitled to 50 decimals as bequests from their father's estate; and an order for final distribution of the estate of the deceased therefore issues to ensure that every beneficiary obtains what they were each entitled to.**
- 15 2. **A re-opening of the boundaries is to be done by an independent surveyor appointed by court (or as agreed upon by the family) for the original plots 254 and 258, to establish the actual size and measurements of each plot before and after the subdivisions; shares apportioned for each beneficiary, (including the deceased children of the late Yosiya Mayanja).**
- 20 3. **The boundary opening exercise shall be conducted in the presence of the defendants, the beneficiaries/their counsel/representatives, local area leaders, the neighbours and the police.**
- 25 4. **The final distribution shall be conducted by the administrator based on the boundary opening recommendations as contained in the report and in accordance with the terms of the will of the late Yosiya Mayanja.**
- 30 5. **The contents of the boundary opening report and will, read together with the orders issued hereunder, shall be binding in guiding the distribution; and shall take into account the following:**
- 35 i. **the land encroached on by the roads;**
- ii. **the areas already distributed, allocated, acquired, occupied, sold or transferred by each beneficiary, with specific reference to that of Isaac Kalule's comprised in plot 2885, disposed of by him to the church and which together with the portion of land, occupied by him and his son shall all be taken into consideration in computing his entitlement.**
- 40 6. **The title for plot 4807 shall remain in the names of the administrator of the estate and its measurements are to be rectified after curving off 31 decimals which rightly belong to Rose Namayanja as part of her bequest.**



7. The remaining 19 decimals owed to Rose Namayanja shall be a private matter to be resolved between her and Isaac Kalule, and ironed out during the boundary opening exercise.

8. The residue of plot 4807 after Namayanja's share has been deducted shall be reserved as part of the family land/grave yard and accessible to family members as property held in trust by the administrator of the estate.

9. The boundary opening exercise shall be completed within 30 days after delivery of this judgment.

10. The administrator of the estate shall embark on the distribution of the estate within a period of 45 days from the date of receiving the report on the opening of the boundaries.

11. The administrator shall sign the instruments of transfer into the names of Rose Namayanja and for that matter, the names of any other beneficiaries yet to receive their shares.

12. Upon completion of the distribution, the administrator of the estate shall file in court an inventory of accounts of the estate of the Late Yosia Kiwanuka Mayanja within 30 days after completing the distribution.

13. The additional area to be created out of the family land and grave yard for the benefit of Rose Namayanja shall be done in such a way as not to affect the existing home and graveyard, which properties shall remain under the administrator of the estate.

14. Plot No. 2440 which was originally issued to Rose Namayanja is to be cancelled as it does not exist on the ground and any costs arising out of such cancellation shall be borne by Rose Namayanja, as per the MOU.

15. The surveyor and administrator of the estate shall work together to ensure fairness in distribution and also to ensure that before issuance of the title deed for plot 4801 (measuring 62 decimals) allocated to Jjingo William as his bequest, the extra 12 decimals are deducted/ relinquished by him.

16. As conveyed through the surveyor's report, the suit land was encroached upon by the Ntinda- Kyanja road which was given a separate title: plot No. 4804, measuring 0.568 acres; as such therefore, any compensation paid out and received for such encroachment constituted property of the estate, out of which any beneficiary affected by the encroachment is to be compensated and the balance shared out to the rest.



As for the plaintiff/administrator:

1. He is entitled to the 3 acres as his individual share as per the will of his late father.

2. His claim that the defendants had jointly trespassed on part of his land comprised in Nakawa division Block 195 plot 1588 land at Kyanja which formed part of his beneficial share from the estate of the deceased did not tally with the findings from the surveyor's report, as this was reflected as land belonging to Justine Nakato's estate, and not a residual plot.

3. Plot 4806 (measuring 1.013 acres) is registered in the names of Dr. Francis Mayanja as the administrator of the estate and he shall remain holding it in trust for the family.

4. Where it is established however that what was distributed to him was less than the 3 acres as entitled to him under the will, the remaining portion is to be deducted from plot 4806 which shall be corrected to reflect any adjustments in size.

5. Accordingly, the actual sizes for plots 1260, 1262, 1263 and 1264 (each registered in the names of the plaintiff) are to be ascertained through the boundary opening exercise in order to achieve the objectives as stated above.

6. Upon taking care of each respective outstanding interest from both plots 4807 and 4806, the residue shall remain part of the estate of the late Yosiya Mayanja together with any undistributed land which may be discovered afterwards; the titles for each shall be processed after rectification and such residue is to be held in trust for the beneficiaries

7. The residue for plot 4806 nor plot 4807 or such other plot, is not to be sold without the consent of the family.

8. The costs of the boundary opening exercise as well as this suit and counterclaim shall be met from the estate funds.

9. The costs of transferring titles to individual owners shall be borne by each respective owners.

10. Any failure by the administrator to comply with the above directives within the given period shall entitle the family to appoint other administrators for the estate.

Alexandra Nkonge Rugadya

Judge

21st November, 2021.

Delivered by email:

Alexandra Nkonge Rugadya
24/11/2021