THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO.6/97

[CORAM]: C.M. KATO, J.A.; A.E. MPAGI-BAHIGEINE, JA; S.G. ENGWAU, JA

THE ADMINISTRATOR GENERAL…….. APPELLANT

VERSUS

GEORGE MWESIGE SHARP……. RESPONDENT

(Arising from the judgment and orders of Berko, J (as he then was) in HC.C.S. No.208/95 dated 31/5/96)

JUDGMENT OF A.E. MPAGI-BAHIGEINE,J.A.

This appeal arises from the judgment and orders of the High Court dated 31-5-96 whereby Berko, J (as he then was) entered judgment for the plaintiff/respondent.

The facts are as follows: One late Erifazi Buchekenyu a Mutooro of Buchaki clan died intestate in 1962 leaving a big estate, a lawful widow but no surviving children by this marriage, their only issue Leo Toogo Sharp having predeceased Erifazi in 1959. There were, however, about nine other children by extra marital unions (Abana Baheru) surviving.

Leo Toogo Sharp himself was survived by children of whom the first male was Charles Sharp Ochaki. Before his death Erifazi had appointed Charles Sharp Ochaki to be his heir, in accordance with Batooro customs. As he was still an infant, a committee of clan elders was constituted to distribute the property. However, the other brothers (Abana Baheru) were

disgruntled and applied to the Administrator General, who obtained letters of Administration vide Toro Administrator's General's Cause No.563 of 1972, Administration Cause No.182 of 1985 dated 31-7-86 and Administration Cause No.326 of 1985 dated 16-7-85 and proceeded to redistribute the property already distributed by the clan elders in 1962.

On the death of Charles Sharp Ochaki in June 1992, letters of Administration were granted to his brother George Mwesigye Sharp, the present respondent/plaintiff who filed suit challenging the afore-mentioned grants of Letters of Administration, the subsequent redistribution of the property already distributed by the clan elders, and the appointment of another heir George Ochaki Kabude (DW1).

The learned judge ruled in favor of the respondent/plaintiff and made the following orders;

(a) that the property of late Erifazi Buchekenyu Ochaki was properly distributed in accordance with the law;

(b) that the letters of Administration granted to the appellant/defendant and the disposition of the property of late Erifazi Buchekenyu Ochaki were null and void and were accordingly revoked and;

(c) that the respondent/plaintiff was entitled to the principal residential house of the late Erifazi Buchekenyu Ochaki together with the 295 acres of land situate at Ibonde, Bukuku, Burahya, and Kabarole District.

The appellant advanced ten (10) grounds, but the pivotal issue in the entire appeal was whether succession to late Erifazi Buchekenyu Ochaki and the distribution of his estate were in accordance with the law.

1. The learned trial judge erred in law and fact when he held that the administration of the estate of the late Erifazi Buchekenyu Ochaki had gone out of the hands of the Administrator General when the elders distributed the estate of late Erifazi Buchekenyu Ochaki in accordance with Toro custom as there was no evidence on record that distribution by the elders had been completed and effected in law.

2. The learned trial judge erred in law and fact when he revoked the grant of Letters of Administration of the Estate of the late Erifazi Buchekenyu Ochaki to the Administrator General and nullified the distribution of that estate by the Administrator General when there was no

evidence before the trial judge to the effect that the Administrator General's distribution conflicted with the distribution by the elders to justify the annulment of the Administrator General's distribution.

3. The learned trial judge erred in law and fact when he held that the respondent be vested with the estate of the deceased contrary to the provisions of the Succession (Amendment) Decree, 1972, thereby rendering the distribution a nullity.
4. The learned trial judge failed to distinguish between a customary heir and a legal heir both under the Succession Act as amended by the Succession (Amendment) Decree, 1972 and Toro customary law.
5. The learned trial judge erred in law when he signed his Order on 30.5.96 giving the deceased's land comprised in Burahya Block 60 Plot 14, Burahya Block 44 Plot 3 and Burahya Block 64 Plot 33 to the respondent when the respondent had not asked for the same in his plaint and in his evidence and in the premises the said Order and the Decree were a nullity.

6. That by giving the deceased's land comprised in Burahya Block Plot 14, Burahya Block 44 Plot 3 and Burahya Block 64 Plot to the respondent alone, the judgment of the learned trial judge has in effect disinherited all the beneficiaries of the estate of the late Erifazi Buchekenyu Ochaki and thus caused grave miscarriage of justice to all other beneficiaries who had benefited from either the distribution of the elders or the Administrator General's distribution.
7. That having accepted the defence evidence that under Toro customary law an heir is always installed by paternal uncles, the learned trial judge erred when he mistook one Byabachwezi to be a paternal uncle whereas on the evidence before him he was a great paternal uncle to the heir and a clan leader; and moreover the learned trial judge failed to note that contrary to the said Toro custom it was your brothers of tender years of Charles Sharp Ochaki who appointed him heir according to the evidence of the respondent, which rendered the appointment null and void.
8. The learned trial judge erred on facts in accepting Silvano Katama's evidence (PW2) to the effect that a natural heir would succeed to all his father's property with unfitted discretion to distribute or not to distribute the estate to other beneficiaries which per se would disinherit other beneficiaries to the estate of the deceased which in law would be inequitable and repugnant to natural justice.
9. Since the appellant had obtained Letters of Administration to the estate of late Erifazi

Buchekenyu Ochaki, the respondent was wrong in challenging the appellant's Letters of Administration by filing a suit in the High Court was contrary to the established practice which requires that the Letters of Administration to the appellant should have been challenged in the Court that granted them.

10. The learned trial judge erred in law and fact when in his judgment he revoked the grant of Letters of Administration to the appellant in respect of Erifazi Buchekenyu Ochaki's estate and allowed the respondent to administer the estate of Erifazi Buchekenyu Ochaki whereas the respondent had obtained letters of Administration in respect of the estate of his brother Charles Sharp Ochaki.

Written submissions were filed under Rule 97 of the Rules of this Court.

Ground I averred that the learned trial judge erred in law and fact when he held that the Administration of the estate of late Erifazi Buchekenyu Ochaki had gone out of the hands of the Administrator General when the elders distributed it in accordance with Toro custom as there was no evidence on record that the distribution by the elders had been completed and effected in law.

For the appellant, Professor Kakooza argued that at the time of the grant of letters of Administration to the Administrator General the elders had not completed the distribution of all the estate of the deceased and that therefore the learned judge was wrong to hold that the matter had passed out of the hands of the Administrator General when the clan elders distributed the estate in 1962. He submitted that all defence witnesses were emphatic that not all the lands had been distributed.

For the respondent, Mr. Kanyunyuzi contended that the evidence regarding distribution of the property made by the elders was never challenged. He referred to the evidence of Mr. Kabuzi (PW3), the surviving uncle to PW1, DW1, DW2 and DW3. Mr. Kanyunyuzi pointed out that PW3 was physically present at the installation of the infant heir and distribution of the property; he was the only eye witness, and nobody challenged his evidence. He submitted that the beneficiaries were dissatisfied because some were given bigger shares than others.

The learned judge found as follows:

”With regard to the intervention of the Administrator General, I would observe that the matter passed out his hands when the clan elders distributed the estate in 1962. It had not been shown that what they did violated Toro custom. On the contrary the choice of DW1 as the heir by the Administrator General violated their custom”

It is necessary therefore to consider the legal position regarding inheritance at the time of Erifazi’s death in June 1962. It is clear as the learned judge correctly pointed out that by reason of S.2 (1) of the Succession Act (Exemption) Order, Statutory Instrument 139-3 made under the provisions of Section 334 of the Succession Act, all Africans of Uganda were exempted from the operation of the Act.

The meaning of this was therefore to have recourse to the native customary law, as the learned judge observed:

“We therefore have to fall back in the first place on S.8(1) Judicature Act which provides that native customary law shall apply which is not repugnant to natural justice, equity and good conscience and not incompatible either directly or by necessary implication with written law.”

There is no doubt therefore it was the Toro customary law governing Erifazi’s estate at his death. That being the position, it is so well settled that the onus of establishing custom is on the party relying on it. It may be proved by evidence or expert opinion. Under the Evidence Act, S.46:-

“When the court has to form an opinion as to the existence of any general custom or right, the opinion as to the existence of such custom or right of persons who would be likely to know of its existence if it existed, are relevant.”

Pursuant to the foregoing, the learned judge relied on the evidence of an elder PW2, Mr. Silvano Katama, 70 year old civil engineer by profession, and an advisor to the Prime Minister of the Kingdom of Toro on the culture of the people of Toro. This witness carefully narrated the Toro customary practices on intestacy as follows:

“.... if a man dies and is survived by children, his first male child is the natural heir, four days after the death of the person the heir would sit on the chair of his father and hold the spear to signify that he had taken over his father’s estate. This ceremony is performed in the home of the deceased in the presence of clan elders, uncles and aunts. The heir would then go to the King and drink milk with him. Thereafter the heir would be regarded as a successor of the dead. If there is a will it will be read and the properties distributed in accordance with the provisions in the will.

If the person died intestate, then all his properties will go to the heir. The elders of the clan can advise the heir (if he is an adult) how to manage and distribute the estate to ensure fairness. But the heir is not bound to accept the advice of the elders and he can distribute the estate as he thinks fit. If the man died intestate and the natural heir is a minor, the elders will appoint what is called “Omukuza” to manage and distribute the property. If the natural heir (i.e. the first son) predeceased his father, then a committee of clan elders will select one of his surviving sons as the heir. But if the first son is survived by a son, then that son will be heir to his grand-father.”

The learned judge found as follows:

“This evidence was not seriously challenged. The defendant did not produce any person who was knowledgeable in Toro custom. They themselves did not impress me as people who knew the custom of Toro. I feel that I should want very strong and cogent reason indeed before I could arrive at the conclusion that this statement of customary law by PW2 is wrong. No such reasons have been brought to my notice.”

The record indicates that PW2’s evidence was never challenged or destroyed. I form the view that he was the right person to testify as to this custom. He was supported by PW3, Mr. Jothy Kabuzi, 78 year old retired civil servant who was one of the seven guardians of the infant heir. Only two of them were still surviving at the hearing, the other one being Yosam Rubombora. Mr. Kabuzi testified:

“Four days after his death we installed his heir; before he died he directed that one of his grand-sons should succeed him. The grand-son was called Charles Ochaki. His Deputy was George Ochaki, the plaintiff here. We installed Charles Ochaki and he succeeded to his grand father. Few days later all the family met and we distributed among his children and grand children as he had told us before he died” (sic).

Under cross-examination he said he could not remember all the children of Erifazi - because he had many children with two or three wives. Later he heard Kabude George (DW1) had started selling some land belonging to the estate though he had been given part of the estate.

The position at law was indisputable therefore. The respondent/plaintiff having established the custom, it was incumbent upon the appellant/defendants to challenge it by a competent person.

Instead, however, they gave contradictory and inconsistent statements. DW1, George Ochaki Kabude, testified:

"According to our custom the heir is installed by uncles. I was present at the installation. I do not remember those who installed the heir."
Under cross-examination DW1 continues: "I do not remember any of those who were present when the heir was installed in 1962. I was not interested in what was going on."
DW2 Kato Ochaki had this to say: -
"I did not see DW1 on the day the heir was installed. Byabachwezi was the only person who did the installation. By custom the heir is put on the stool, one person. I just heard that Charles Ochaki had been installed as heir."
DW3, Eric Sabiiti Kagoro Ochaki acknowledged: "I admit I am not very well conversant with the custom."
From the foregoing it is clear there was no evidence on record strong enough to test or override the accuracy of the custom as established by the testimonies of PW1, PW2 and PW3. The squabbles as evidenced in the testimonies of DW1, DW2 and DW3 are the usual ones where there is a big estate with many claimants/beneficiaries. In the instant case the heir or guardians had absolute power. As rightly pointed out by Mr. Kanyunyuzi, it is plain that the root cause of their dissatisfaction was being given unequal shares as DW1 significantly points out:
"Then in 19... (Indecipherable) a group of people went to the area and started distributing the land to my father's children and his grand-children.... the people gave bigger portions to the grand-children. I was given a bigger portion than my brothers."

Under the Toro custom it was stated that the heir or guardians could distribute property in any way they deemed fit. They had absolute powers. It could not therefore be competently claimed that this appeal is in respect of undistributed estate as provided by Decree 22 Succession (Amendment) Decree, S.2 (1):
"2(1) The amendments affected to the Act by this Decree,
(a) shall not affect the law of Succession to the estate of any person dying before the coming into force of this Decree, the administration of which has been completed.
(b) may, by leave of the court, be applied to the administration of such part of the estate of any

person dying before the coming into force of this Decree as remains to be administered, on the date of the coming into force of this Decree" (1st September 1972)

It is true that so far as the record goes there are two other grants of letters of Administration to the estate of Erifazi Buchekenyu Ochaki of Ibonde Toro - Nos. 326 of 1985 & 193 of 1986 dated 16th July 1985 and 31st July 1986 respectively. Apart from Professor Kakooza failing to state clearly which property remained undistributed, assuming the Toro custom allowed restriction in the ambit of the powers vested in the heir and Bakuza (guardians), he did not explain why two other grants had to be taken out one after the other within a year in between. It is therefore plain that this trend of events, coupled with the appointment of DW1 as heir to late Erifazi, contrary to Toro custom, makes it considerably difficult for me to draw any other conclusion than that of malafides ides. The evidence on record enjoins me to agree with the learned judge's finding that the entire estate passed into the hands of the heir and guardians at the time of the last funeral rites and installation of the heir in 1962, in accordance with the Toro custom. It seems to me this ground alone disposes of this appeal.

I find it unnecessary to endeavor to deal with the other grounds. I would dismiss this appeal with costs to the respondent.

Dated at Kampala this 20th day of November 1998

A.E.Mpagi –Bahigeine

JUSTICE OF APPEAL

JUDGMENT OF C. M . KATO, J. A.

I have had the advantage of reading the judgment of Mpagi Bahigeine, J.A. in draft and I agree

with it. It was proper for the trial judge to hold that the estate of the deceased was correctly distributed in accordance with the existing customary law in Toro in 1962 and the Administrator General could not disburn what had been done.

Since Engwau, J.A. also agrees this appeal is dismissed with costs to the respondent here and in the court below.

C.M.KATO

JUSTICE OF APPEAL

JUDGEMENT OF ENGWAU.J.A

I have had the benefit of reading the judgment of Mpagi Bahigeine, J.A. in draft and I entirely agree with it. In the premises I would dismiss this appeal with costs to the respondent.

Dated at Kampala this 20th day of November 1998

S.G.ENGWAU

JUSTICE OF APPEAL