

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA HOLDEN AT FORT PORTAL**

**CIVIL SUIT NO. MFP 12/1985**

**JOSEPH BAGUMA:.....PLAINTIFF**

**VERSUS**

**SEFUROZA MATENDE:.....DEFENDANT**

**BEFORE: THE HONOURABLE MR. JUSTICE I. MUKANZA**

**JUDGMENT**

The plaintiff in this case is known as Joseph Baguma. He is the eldest son of Eridade Matende the intestate. He is suing the defendant Sefuroza Matende as the grantee of letters of Administration under Administration Case No. Dr. MFP 2 of 1985. He is seeking for orders that the letters of administration granted to the defendant be revoked and that the same be granted to the plaintiff his brothers or brothers in the order of the ages or to Mrs. Molly Matende. He also prayed for an order to restrain the defendant from dealing or meddling in the estate of the intestate and finally sought for an order that the defendant makes an account of or returns any property forming the estate of the late Matende to the Plaintiff. He also requested for an order for the costs of this suit.

The facts of this case are simply that the late Eridadi Matende died at Mulago Hospital on the 16<sup>th</sup> December, 1984. He had his residence at Kijura, Hakibale, Burahya County in Kabarole District. He was lawfully married in church to Molly Matende mother of the plaintiff at Rukungiri on 23<sup>rd</sup> March, 1957. The late Matende had Land and a house at the material time at Rukungiri where Molly Matende lived.

The said Flavia Molly Matende produced with the late Elidadi Matende four children namely:

1. The plaintiff aged 27 years.

2. Edison Magezi 25 years.
3. Betty Kasingwire 23 years.
4. Milton Mworozzi 21 years.

Subsequently Elidadi Matende emigrated from Rukungiri and came to Kijura in Kabarole District in the late 60's. He took on the defendant as a wife and cohabited with her from 1966 to 1984 till his death. They were blessed with the following issues namely:-

1. Israel Nahabwa aged 23 years.
2. Margret Tusiime aged 20 years.
3. Yerokamu Mutanda aged, Flaviour Molly Matende remained in Rukungiri but her children joined their father at Kijura where they continued with their studies.

In his plaint the plaintiff claimed that the late Elidadi Masende left an estate comprising of the properties whose particulars appear on the distribution list marked "B" and the short list "C". That the defendant should not have obtained letters of administration as there are the adult children of the deceased who include the plaintiff. That the defendant wrongly presented herself as a wife of the late Elidadi Matende when the legal wife Flaviour Molly Matende the proper person to apply and obtain letters of administration was alive. The defendant concealed the material and correct information about the estate having regard to facts contained in the attached lists "B" & "C".

That the proceedings to obtain letters of administration were defective and the grant was obtained fraudulently by making a false representation or by concealing from the court something material to the case.

That the grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant though such allegation was made in ignorance or inadvertently.

That the person to whom the grant was made has willfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Part XXXIV of the Act or has exhibited under that Act an inventory or account which is untrue in a material respect. The plaintiff continued to show that the defendant is estopped from denying the distribution of the

estate as per list “B” which she signed as evidence of her privity and consent to the transaction and distribution of the estate.

In her written statement of defence the defendant contended that the said Flaviour Molly Matende was not a wife of the deceased for the purpose of the administration of the estate of the late Eldadi Matende and lawfully and faithfully administered part of the said estate situate in Kabarole District but did not administer the part of the estate that was left in Kabale and or Rukungiri District. She further contended that distribution referred to by the plaintiff in the plaint did not in any manner revoke or prejudices her powers and duties as administrator of the estate of the deceased.

At the commencement of the trial of thin case the following issues were framed:

1. The first issue was whether the defendant was the wife of the deceased as solemnly declared.
2. The second issue was whether Molly Matende was married to the deceased at the time of his death.
3. The third issue was whether the defendant was proper person to apply for letters of administration.
4. The fourth issue was whether the defendant administered the estate properly.
5. The fifth issue was whether the letters of administration granted to the defendants should not be revoked and the
6. Sixth issue and last issue was whether Mally Matende was entitled to any part of the estate or at all.

With regard to the first issue whether the defendant was the wife of the late Elidadi Matende evidence on record from P.W.4, P.W.3 P.W.2 and even the defendant as DW1 show that the latter ad been staying together with the late Matende as husband and wife from at least 1966 up to 1984 when the intestate Elidadi Matende passed away. There was evidence from DW1 that the

late Matende gave dowries of 2 goats and 5,000/= shillings to the parents of D.W.1 the defendant. Whereas PW.4 & PW.3, who testified that they were close friends of the deceased and relatives of the defendant contended that no such dowries were ever paid. This is how a question of credibility. Whom do I believe the defendant or both PW.3 & PW.4. The learned counsel representing the plaintiff submitted that under the laws of Uganda marriage could be contracted under the marriage Act and under various statutes like Moslem marriage Act.

There is also provision for contracting customary marriage but even then there is the legal requirement that such customary marriage ought to be registered. There is no known marriage between the deceased and the defendant so all that the defendant told the Honourable court was that her dead parents were aware that certain customary rites were contracted in order to give the relationship the semblance of a customary marriage but that was disputed by even her relatives. He finally submitted that the defendant was not a woman who could be referred to as a wife of the deceased but was a mere girl friend.

Mr. Musana the learned counsel appearing for the defendant submitted that there was a customary marriage between the defendant and the plaintiff. He referred me to section 11 of the Customary marriage Registration decree (Decree 16/73) which states:—

*“Notwithstanding the provisions of section 37 of the marriage Act where a person was married under the marriage Act or under any other law relating to marriage and subsequently contracted a customary marriage during the subsistence of the previous monogamous marriage but before the coming into force of this decree such subsequent customary marriage shall be deemed to be a valid marriage”. Decree 16/73 came into force on 1/10/1973. See statutory instrument 1973 No. 110 (The customary marriage Registration order 1973).”*

He contended that there existed a customary marriage between the defendant and the late Elidadi Matende the latter having paid the bride price to the parents of the defendant.

It is pertinent at this stage and for the sake of clarity to reproduce the provision of section 37 of the marriage Act Cap 211 referred to in the above law, It says:—

*“Any person who is married under this Act or whose marriages is declared by this act to be valid shall be incapable during the continuance of such marriage of contracting a valid marriage under customary law but save as aforesaid nothing in this Act contained shall affect the validity of an marriage contracted under or in accordance with any customary or in way manner applied to marriages so contracted.”*

In the instant case there was unchallenged evidence from PW.2 to show that the latter got married to Elidadi on 23<sup>rd</sup> March, 1957 and that the same was celebrated at St. Peter’s Church Nyakatare, Kinkizi in Rukungiri in conformity with section 21 of the marriage Act Cap 211. That was a monogamous marriage and at the time of the death of the Elidadi Matende there appear to be no dispute about the subsistence of that marriage. Matende took on Sefuroza Matende as a wife. I believe the defendant when she testified that Matende gave the bride price to her parents in the form of 2 goats and 5,000/=. I reject the stories of PW.3 and PW.4 that no such dowries were paid simply because the two witnesses were merely relatives of the defendant and friends to Matende. They were not close enough to know what took place of what transpired between the defendant and the late Matende all the time. The defendant impressed me as a truthful witness. Therefore on payment of the dowries to the parents of the defendant who are now dead there existed a subsisting customary marriage between the late Matende and the defendant at the time of the formers death despite the fact that a monogamous marriage did exist between the said intestate and Molly Matende it being immaterial that the marriage had never been registered under decree 16/73. That was not necessary. I do not therefore agree with the submissions of the learned counsel representing the plaintiff that the defendant Sefuroza was a mere girl friend of the late Elidadi Matende. I do disagree with him that such marriage should have been registered by then. The first issue therefore is answered to affirmatively that the defendant was a wife of the intestate at the latter’s death having married her under the customary law See Rex v Ouma s/o Ahad (1910 – 20) 2 ULR 152 quoted with approval. Uganda .V. Kato & 3 others (1976) HCB 261, See also S. 119 (1) of the evidence Act as amended by Decree No. 25 of 1971. And as what amounts to .civil customary law See S. 242 of the Magistrates Court Act 1970.

As to the second issue, whether Molly Matende was married to the deceased at the time of his death. This issue was covered when considering the first issue and there appears to be no evidence to challenge the marriage between Molly Matende and the intestate. It is a fact that this

marriage was celebrated at Rukungiri and the same was still subsisting at the time Eldadi Matende passed away. What is in dispute however was whether Molly Matende was wife of the intestate for the purposes of the administration of the estate of the late Matende.

In her evidence the defendant testified that P.W.2 Molly Matende had separated with the deceased when she gave birth to other children not belonging to the said Eldadi Matende. The five other children were mentioned as Allan Kesumye, Godfrey Mwesigwa, Peace Ampaire, Nora Kamuhangi and Rodgers Alinaitwe. In her testimony Molly Matende categorically refuted any suggestion that she got other children with other men other than Molly Matende but there was a material contradiction in her testimony when the plaintiff her son gave his evidence. The plaintiff made it clear that the late Matende produced only 4 children with his mother. That was himself, Magesi, Murozi and Moses who is dead. He denied any knowledge of the rest of his mothers children. This contradiction confirms the defendant's story that Molly Matende separated with the deceased because of the five children she got from other men. This fact of separation is further supported by PW.2 who testified that she (PW.2) had never been to Kijura from 1973 till the death of her husband in 1984. PW.4 also testified to the same thing. He further testified that when he PW.4 went to Kabale the deceased was refusing to accept Kesimye as his child and Mweigwa. These were the children born after the first four and a meeting was convened to resolve the issue. PW.4 made it clear that he did not know the paternity of the rest of children of Molly Matende.

I seem to accept the submission of the learned counsel appearing for the defence that the late Eldadi Matende immigrated from Rukuigiri to Hakibale Kijura Kabarole District to start a new life.

I don't agree with the plaintiff's counsel that the deceased used to visit Molly at Rukungiri vice verses

However under section 31 of the Succession Act as amended by Decree 22 of 1972 which states:

—

*"No wife or husband of an intestate shall take any interest in the estate of intestate if, at the death of the intestate he or she was separated from the intestates as a member of the same*

*household. Provided that this section shall not apply where such wife or husband has been absent on an approved course of study in an educational institution.”*

Since Molly Matende was at the time of the death of the intestate separated from the latter living at Rukungiri and not staying together with the intestate at Kijura in the same household under the Succession Act Molly Matende does not qualify to take any interest in the estate of the late Matende.

As regards the third issue, whether the defendant was the proper person to be granted letters of administration. The intestate died living a house at Kitumba/Kijura and three plots of land at different places near Kitumba. The facts concerning the estate were contained in annexures “B” accompanying the plaint. There was evidence from PW.4 and PW.3 to show that immediately after the death of Eldadi Matende the friends of the deceased at a clans meeting made a document whereby they distributed the estate of the deceased. That the defendant and Molly Matende were signatories to this document exhibit P1, PW.4, PW.1 and PW.3 were not happy when the defendant went around and obtained letters of administration. Their evidence further showed that during their stay i.e. the defendant and the intestate a house was constructed at Kitumba in which the intestate and the defendant used to cohabit. It was the plaintiff’s case that the defendant never contributed any money towards the construction of that house. PW.3 & PW.4 were adamant that it was PW.3 who advanced a loan to the intestate and the latter bought 25 Iron sheets for roofing the house. PW.3 even went further and testified that the house at Kitumba was built jointly by the intestate and his son the plaintiff. The latter was silent about this matter. The defence case on the other hand was that the deceased came as a casual labour but she together with the defendant first lived in a rented house. Later on acquired land of their own and afterwards built a house. By the time the deceased passed away they had acquired three plots of land at Kyakudupa, Kabenda and Kitemba. The deceased and the defendant used to engage in different trades. The defendant used to sell waragi and had a retail shop whereas the deceased was a tailor and did some fishing and out of these proceeds they built the estate now in dispute. There was evidence that the deceased had another estate at Rukungiri and after his death the estate was sold by PW.1 and PW.2 and out of the proceeds of the sale PW.1 has now built himself

a permanent house at Hakibale just a few miles away from Kitumba Kijura where PW.1 is staying with his mother PW.2 together with his brothers and sisters.

The learned counsel representing the plaintiff submitted that the defendant was not the proper person to apply for letters of administration. In her application she mentioned herself as a wife and she excluded Molly Matende and then mentioned the four children of Molly but never mentioned their mothers. She was liable to be punished under Section 249 of the Succession Act. She should have stated that Matende was survived by a lady called Molly Matende. He continued that the District Registrar who signed her letters of administration referred to himself as a Chief Magistrate instead of District Registrar/Delegate. Therefore the defendant never got letters of administration. That the estate of the late Matende remained improperly administered. The children of Molly Matende were living from hand to mouth and this suit was brought to show that the defendant hijacked the estate of the intestate leaving other dependants of the Estate unprovided for. That Molly Matende should be included in any future grant.

The learned Counsel representing the defendant submitted that the defendant was the proper person to be granted letters of Administration and referred me to a number of authorities.

In Farzia Rwobuganda .V. Donato Banemuka (1978) HCB P.244 The plaintiff as a widow of the deceased applied for letters of administration of the deceased's Estate. The defendant who lived in Kampala and had a personal house at Najjanakumbi opposed the grant of letters of administration to plaintiff. The position was that the deceased in 1964 married in church one Frediana but they separated in 1965 but never legally divorced. Frediana never returned to the home of the deceased until his death, subsequent to the separation the deceased took on the plaintiff in 1967 and dowry was paid in 1970. She contended that she was lawfully married under the customary law.

At the hearing a will dated 10th August 1966 in which the deceased appointed the defendant his executor was produced and was not challenged. It was held that the plaintiff was married under customary law marriage. The marriage would have been invalid if after the customary marriages Registration Decree (Decree 16/73).



That at the time of the deceased's death there was a valid customary marriage between the deceased and the plaintiff.

In terms of section 56 (1) of the Succession Act every will is revoked by the marriage of the maker. The will therefore stood revoked when the deceased married plaintiff in 1970. Deceased would be regarded as having died intestate.

In terms of section 31 (1) of the Succession Act as amended by decree 22 of 1972 no spouse of an intestate shall take an interest in the estate of an intestate if at the death of the spouse was separated from the intestate as a member of the same household. Deceased's first wife had separated since 1965 up to the time of the deceased death she would therefore take no interest in the estate of the deceased.

The court further held that the plaintiff was an industrious woman fit and proper person to be granted letters of administration. There was no objection from the Administrator General and letters of administration were granted. It is the considered opinion of this court that the authority in *Rwabaganda's* case is applicable to the instant case as already found the defendant was the wife of the deceased at the time of his death having got married to he deceased under the customary law. The marriage would have been invalid if it was celebrated after customary marriage registration Decree (Decree 16/73). Molly Matende PW.2 and first wife of the deceased though had not been divorced at the time of the death of Eldadi Matende for the purpose of section 31 of the Succession Act as amended by decree 22 of 1972 was separated from the deceased as a member of the same household and as such could not take interest in the estate. And for all intent and purposes the defendant was a very hardworking woman. She was very industrious. She jointly worked with the deceased to make up the estate under dispute. That is the house at Kitumba Kijura, Plots of land at Kyakudupa, Kabende and Kitumba. It would be very unfair if she was not accorded the opportunity to administer the estate she had so tirelessly established jointly with the deceased.

PW.1 and PW.2 had land and house at Rukungiri. According to PW.1 the late Matende had a grass thatched house at Rukungiri and the lands there did not belong to Matende. Whereas his mother Molly Matende testified that they had an Iron roofed house but the portions of land where the said house was built did not belong to them. According to the defendant the deceased had

corrugated Iron roofed house and pieces of land at Murohonde and another one at Kyabakazi. There was evidence to the effect that immediately the deceased passed away the corrugated Iron roofed house at Rukungiri was pulled down pieces of land were sold off as per the testimony of the defendant whom I believed told this court the truth. Thereafter PW.1 & PW.2 bought another land in Kijura Kabarole District and at the same time wanted to administer the estate of the deceased at Kijura. That would be unfair to the defendant. In Rimmer vs Rimmer [1952] 2 AER P.863 the husband and wife bought a house together and the house registered in the names of the husband and later they separated and the husband sold off the house. The wife sought the shares of the proceeds of the sale. It was held that the shares would be divided equally. In the instant case though the house at Kitumba had never been sold and the defendant was not after the proceeds of the sale as was in Rimmers case but the latter case was an authority to the effect that it would be unjust to appoint another person as an administrator for the estate contributed jointly by the defendant and the deceased more so especially where the defendant was very enterprising.

The document exhibit P1 drawn by friends of the deceased distributing the estate of the deceased to various people of which the defendant PW.2 plus PW.4 and PW.3 were signatories. I am of the view that it was lawfully repudiated by the defendant since it was intermeddling with the estate of the deceased as per section 268 of the Succession Act. This is so because the document was not drawn for the purpose of preserving the estate of preserving the estate of the deceased or providing for his funeral or for the immediate necessities of the deceased's own family and extra and the document was not authorizing any one to apply for letters of administration.

I further find that there was no miscarriage of Justice occasioned to Molly Matende when, the defendant did not include her in the list of beneficiaries because Molly Matende had separated from the deceased the accused for the purposes of section 31 of the Succession Act, as amended by Decree 22 of 1972 and because of this separation the matrimonial relationship, between the deceased and Molly Matende had ceased to exist. She was therefore disentitled for the grant of letters of Administration. See Nyendohwa Lucy v. Nyendohwa Robert and Anor CS No. 1068/83 reported, 1989 KALR P.108 Besides the estate at Kijura the deceased had another estate at Rukungiri where Molly Matende was staying and she had been properly provided for.

As to the submission by the learned counsel representing the plaintiff that the Chief Magistrate signed the letters of administration as Chief Magistrate instead of signing as a District Delegate and that there were no letters of administration granted to the defendant. I am of the view that that was an irregularity which did not in anyway nullify the grant. The duties and powers of a Registrar are laid down in order 44 and 46 of the Civil Procedure Rules. Also See S.235 & 234 Succession Act Cap 139 as amended by Decree 22 of 1972. I do not need to reproduce those provisions of the law here. All along it was common knowledge that the defendant had applied for letters of Administration and the Chief Magistrate as district delegate proceeded to grant the same I am of the opinion that the letters of administration were properly granted to the defendant.

In the plaint the plaintiff wanted the letters of administration to be granted to him, his brothers or to Mrs. Molly Matende. I have already found that Mrs. Molly Matende was disentitled to the grant of letters of administration because of the reasons given above.

Under section 201 of the Succession Act Cap 139 as amended by the Succession Amendment Decree (Decree 22 of 1972) the defendant as opposed to the plaintiff was entitled to the grant of letters of administration because she was entitled to a big share in the distribution of the assets of the intestate than then the plaintiff who was a mare customary heir. In the end Issue No.3 is answer to the affirmative

The fourth issue is whether the defendant administered the estate properly. The plaintiff's case was that the defendant omitted to exhibit an inventory or account in accordance with the laid down provision of the law or had exhibited an account which was untrue in material particular.

The defendant on the other hand contended that after obtaining the letters of administration she lawfully and faithfully administered the part of the deceased's estate which was in Kabarole District but did not administer the estate that was in Rukungiri in Kabarole District. S. 280 of the Succession Act Cap 139 states:-

*“As executor or administrator shall within six months from the grant of probate or letters of administration or within such further time as the court which granted the probate or letters of administration may from time to time appoint, exhibit in that court an inventory containing a full*

*and true estimate of' all the property in possession and all the credits and also all the debts owing by any person which the executor or administrator is entitled in the character and shall in like manner within one year from the grant or within such further time as the said court may from time to time appoint exhibit an account the estate showing the assets which have come to his hands and the manner in which they have been applied or dispose of."*

The defendant was granted letters of administration on 24/4/1985 as already found by the District Delegate. By virtue of exhibit D2 dated 21/2/1987 the defendant made out an inventory showing how she disposed of the estate of the intestate. There is no copy of exhibit D2 in the file MFP 21/85 granting letters of administration to the defendant.

The learned counsel appearing for the plaintiff challenged the existence of such a document. I believed the defendant that such inventory was made on 21/2/1987 several months after the statutory period of six months. It appears to be mandatory that the inventory must be made within six months after the grant of letters of administration. However the instant case was filed against the defendant on 20/5/1985 just less than one month after the grant of letters of administration.

Nonetheless in the said inventory exhibit D2 the first inventory showed that the land at Kyakudupa was given to the plaintiff whereas the second inventory read that the land at Kibedi went to Betty Kasingwire. Another piece of land was given to Magezi and other properties were given to her own issues and herself.

From the inventory it is shown that Baguma the plaintiff, Betty Kaswingwire & Magezi Edison are all children of Molly Matende. I am of the view that they were provided for. So it is not true when the learned counsel appearing for the plaintiff submitted that, the defendant did not administer the estate properly I seem to agree with the submission of the learned counsel for the defendant that if there was any part of the estate which was not well looked after it was because of the Civil suit that was instituted against the defendant.

The fifth issue is whether the letters of administration granted to the defendant should not be revoked. Section 233 1 (e) of the Succession Act confers on a court the discretion to revoke a grant of probate or letters of administration if the grantee thereof has willfully and without

reasonable cause not exhibited an inventory or account of the estate as required under section 280 of the Succession Act, the provision of which section are mandatory and that is that the inventory must be exhibited within six months and the account within such period as the court may from time to time appoint.

For the plaintiff to succeed he had to show that the failure to exhibit an inventory and account was willful and without reasonable cause and the Word “Willfully” as used in section 233 6f the Succession Act means deliberate or intentional. See Francis Ddiba Nduga vs Rita Nansikombi and others (1980) HCB 1980.

I have already found that the defendant made an inventory of the estate of the deceased several months after the date of the grant. In case I am wrong in so finding there was no evidence to show that the defendant’s failure to exhibit an inventory and account was deliberate or intentional. I therefore see no good cause for revoking the letters of administration granted to the defendant.

The sixth and last issue was whether Molly Matende was entitled to any part of the estate or at all. This issue was a bit touched when considering whether Molly Matende was married to the deceased. It was found that Molly Matende was the first wife of the deceased but at the time of the latter’s death they had separated and was not a wife for the purpose of section 31 of the Succession Act as amended by Decree 22 of 1972. She was not a member of the same household with the intestate at the time of the latter’s death and could not take interest in the estate of Eldadi Matende.

I believed the defendant that Molly Matende had land and house at Rukungiri which she together with the plaintiff hurriedly disposed of and came to Kijura/Kabarole where they proceeded to purchase land and construct a house in which the plaintiff together with PW.2, brothers and sisters are staying. The plaintiff was now pressing for the revocation of the letters of administration granted to the defendant so that he administers the estate of the intestate here at Kijura in Kabarole District. Because of what has been stated above he could not do that.

I am of the view that I was not sufficiently addressed to the above issues by the learned counsels appearing for the parties and as such did not find it necessary to reproduce their submissions but

suffice to say that the defendant legally and lawfully obtained letters of administration to the estate of the late Eldadi Matende. She also lawfully and successfully administered the estate. I further found that the distribution of the estate carried out by her was fairly done. All the issues of Molly Matende who used to reside at Kijura with the defendant and the intestate at the time of the latter's death as hitherto found by the court were well provided for. Each child got some shares of the estate after the distribution. It is the considered opinion of this court that the defendant should continue to administer the estate of the late Molly Matende. The sixth issue is therefore answered to negatively.

From what has transpired above this court is of the view that the plaintiff has failed to prove his claim on a balance of probabilities and in the end result the suit is dismissed with costs.

**I. MUKANZA**

**JUDGE**

**4/11/1991**