

UGANDA / JUDGMENT

Babumba and Ors v SSali Babumba (Civil Suit No.78 of 2012) [2015] UGHCFD 31 (1 September 2015) [2015] UGHCFD 31

COURT

HC: Family Division (Uganda)

BEFORE

Tuhaise, J

CASE / FILE NUMBER

Civil Suit No.78 of 2012

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

FAMILY DIVISION

CIVIL SUIT NO.78 OF 2012

1. RICHARD BABUMBA
2. DR. FRED BABUMBA
3. WILLIAM TAMALE BABUMBA
4. MICHAEL KABUGO BABUMBA
5. MWEBAZE EDMUND BABUMBA
6. DENIS SEGAWA BABUMBA
7. KOBUSINGYE BRENDA BABUMBA
8. PATIENCE NABAKOOZA BABUMBA
9. FAITH BIRUNGI BABUMBA
10. EVELYN GRACE BABUMBA
11. SARAH NAMUDDU BABUMBA
12. AGATHA TIBETENDWA BABUMBA
13. MARGRET. I. N BABUMBA SEBUNYA

14. DIANA BABUMBA..... PLAINTIFFS

VERSUS

JAMES SSALI BABUMBA (Administrator of the estate of the late Dr. Eria Muwanga Babumba..... DEFENDANT

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

JUDGMENT

The plaintiffs brought this suit against the defendant for revocation of letters of administration issued to the defendant vide Administration Cause No. 495/1987; an order for the defendant to surrender to court the grant of letters of administration and all documents of title, property and or income from the estate of the late Dr. Eria Muwanga Babumba; an order for the defendant to submit to court a full true and updated inventory of all the assets and liabilities of the estate; an order for the defendant to submit an account of all the assets and liabilities of the estate and a report on his management of the affairs of the estate from the date of grant of letters of administration to the defendant to the date thereof; an order to appoint a new administrator in accordance with the will or consented to by the beneficiaries; a permanent injunction restraining the defendant from further wasting the estate of the late Dr. Eria Muwanga Babumba; an order for the Registrar of Titles to cancel the names of the defendant from the certificate of titles and land registered entries in his capacity as administrator of the estate of the late Dr. Eria Muwanga Babumba vide Administration Cause No. 495/1987; an order for the sale of the property comprised in ranch no. 4 in Lyantonde, Kabula, Kansagoma, and distribution of the proceeds among the beneficiaries to the estate of the late Dr. Eria Muwanga Babumba; an order for the sale of the property comprised in Kagando Mawogola, and distribution of the proceeds among the beneficiaries to the estate of the late Dr. Eria Muwanga Babumba; an order for the sale of the property comprised in Bwala House Plot No. 18 Joseph Isingiro Road, and distribution of the proceeds to the beneficiaries to the estate of the late Dr. Eria Muwanga Babumba; an order to grant the plaintiffs costs of the suit; and any other relief this honourable court shall deem fit.

The plaintiffs' case, as deduced from the pleadings and the joint scheduling memorandum, is that they are children and beneficiaries of the estate of the late Dr. Eria Muwanga Babumba who died testate in 1986. The deceased appointed four heirs in his will, namely John Wesley Mwerango Babumba, Charles Wesley Kafeero Babumba, James Young Ssali Babumba and Fredrick Lukwago, who would also act as executors of his will in succession. John Wesley Mwerango Babumba, the first heir, was granted probate in respect of the estate but he died within that same year. On 4th April 1989, the defendant was granted letters of administration to the estate vide Administration Cause No. 495/1987. The plaintiffs contend that the defendant was not the next in line to apply for letters of administration to the estate; that the next in line was supposed to be Charles Wesley Kafeero Babumba; that the defendant has failed to distribute the estate to the various devisees or legatees named in the will in breach of trust/ fiduciary duty as trustee of the estate; that contrary to his undertaking, for a period of twenty two years, the defendant has failed to furnish an inventory and to render a true account of the affairs of the estate to this Court; that he has

allowed the estate to waste; that he has failed to close the estate affairs but instead continues to hold onto the estate indefinitely without any colour of right or authority of court and without taking steps to ensure that the plaintiffs take their share of the estate.

The defendant's case, as deduced from the pleadings and the joint scheduling memorandum, is that he is among the executors of the will of the late Dr. Eria Muwanga Babumba. He was granted letters of administration with the will annexed to the estate to the estate vide Administration Cause No. 495/1987. Upon grant of the letters of administration, he distributed the properties of the deceased according to the will and all those entitled have already got their share; that he met the educational expenses of some of the beneficiaries who were still minors at the time of the deceased's death; that he has procured titles to some of the properties that were untitled like the ranch; that some of the properties were preserved for the entire Babumba family in accordance with the will; and that through his lawyers M/S Mulindwa & Co Advocates, he filed an inventory together with the income and expenditure statement clearly outlining the assets and liabilities of the estate and distribution of the same.

The plaintiffs were represented by learned counsel William Kasozi and Joanita Muganga. The defendant was represented by learned counsel Vicent Mugerwa and Anasta Kamahoro. The witnesses filed sworn witness statements upon which they were cross examined by the opposite counsel and re examined by their respective counsel. Counsel filed written submissions within time schedules set by this Court.

The parties filed a joint scheduling memorandum before the hearing where the following facts were agreed on:-

1. Plaintiffs 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 13 and 14 are children of the late Dr. Eria Muwanga
2. The late Dr. Eria Muwanga Babumba died testate in 1986. According to the deceased's will, he appointed four heirs who would also act as executors of his will. The heirs appointed were John Wesley Mwerango Babumba, Charles Wesley Kafeero Babumba, James Young Ssali Babumba and Fredrick Lukwago. It was the intention of the deceased that the four named heirs or successors would assume the duties of the office of executor of his will in succession to each other in the event of death and not to be appointed to act jointly.
3. The first heir and executor John Wesley Mwerango Babumba passed away in the same year of his appointment as executor and therefore was not able to administer the estate to its completion.
4. The deceased died testate.
5. The defendant was granted letters of administration vide Administration Cause No. 495/1987 on 4th April 1989.
6. The defendant undertook to make a full inventory to the Court within six months and to render a true account in twelve months from the time of grant.

7. The properties comprised in Bwala house Plot No. 18 Joseph Isingiro Road, Plot 33 Kampala Road, and land in Kagando Mawogola and Lyantonde Kabula Ranch No. 4A were not devised to anyone in the deceased's will.
8. Ranch No. 4A Lyantonde Kabula was restructured by Government under the Ranch Restructuring Scheme.

The following were the disagreed facts:-

1. The deceased failed to make a full inventory and account.
2. The deceased did not apply to court to grant him an extension of time in which to file and or exhibit an inventory.
3. The defendant has distributed the property of the estate to the various devisees or legatees as named in the will.
4. The defendant has failed to administer the estate and has allowed the estate to waste.
5. The plaintiffs have intermeddled with the estate property.
6. Edith Mary Babumba is the main beneficiary of the estate.
7. Properties not devised to anyone under the will were reserved as family property under the will.
8. The 6th and 12th plaintiffs are not children of the deceased.
9. The defendant has taken care of the well being of the beneficiaries.
10. The defendant has not conducted ranching activities on Ranch No. 4A Lyantonde Kabula as required by the will.

The matter was deliberated along the following agreed issues:-

1. Whether the defendant rendered to Court a full and true inventory and a true account of the property and credits of the deceased's estate as required by the grant.
2. Whether the defendant's administration of the estate is lawful.
3. Whether the defendant is in breach of his fiduciary duty to the plaintiffs as beneficiaries.
4. Whether the plaintiffs are entitled to a share in the properties not devised in the will.
5. Whether the plaintiffs are entitled to the prayers prayed for.

Issue i: Whether the defendant rendered to court a full and true inventory and a true account of the property and credits of the deceased's estate as required by the grant.

Section 278 of the Succession Act requires the executor or administrator to, within six months from the grant of probate or letters of administration, or within such further time as the same court may from time to time appoint, exhibit an inventory containing a true and full estimate of all the property in possession, and all credits and debts owing by any person to which the executor or administrator is entitled in that character, to the court which granted the probate or letters of administration. In the same manner, the executor or administrator shall, within one year or such other time as the court may from time to time appoint, exhibit an account of the estate, showing the assets which have come to his or her hands, and the manner in which they have been applied or disposed of. The said legal provisions are mandatory. Also see **Paulo Kavuma V Moses Sekakya & Another Civil Suit No. 473/1995**.

Section 101(1) of the Evidence Act provides that whoever desires court to give judgment to any legal right or liability depending on the existence of facts he/she asserts must prove that those facts exist. Section 101(2) of the same Act provides that the burden of proof lies on that person who is bound to prove the existence of any fact.

PW1 Agatha Tibitendwa Babumba, PW2 Fred Lukwago Babumba and PW3 Margret Babumba Sebunya testified that the defendant failed to render an inventory and an account of the estate of the late Dr. Babumba. They relied on exhibit P6 to confirm their sworn testimonies. The defendant's evidence however is that he made an inventory of the estate detailing all moveable and immovable assets which he gave to his attorney to file; and that with the help of a book keeper he produced financial statements detailing income and expenditure of the estate which he availed to court. In cross examination he stated he filed an inventory; that he did not file the inventory himself but drew up the inventory with instructions to his lawyer, M/S Mulindwa & Co Advocates, to file. He referred to exhibit D4 to support his sworn testimony.

Exhibit P6 is a copy of a letter written by the Registrar of this court addressed to the plaintiffs' counsel, M/S Mpanga & Co Advocates. It states that no inventory was filed in court. This corroborates the plaintiffs' evidence that the defendant filed no inventory. Exhibit D4 is the document the defendant states he filed in court as an inventory. It bears no court stamp to indicate it was ever received by this court. The lawyer whom the defendant purportedly instructed to file the document was never called as a witness to confirm the defendant's testimony that he filed the document, neither did the defendant submit in evidence a copy of the defendant's instructions to the said lawyer to file the document. The defendant did not call the book keeper as a witness to present to court the financial statements he is stated to have prepared on income and expenditure of the estate. The same were consequently not exhibited by court and are thus not part of the adduced evidence.

With respect, I am not persuaded by the submissions of learned counsel for the defendant that the record containing the inventory was intentionally removed from the court file to advance the plaintiffs' claim that no inventory was filed by the defendant, or that the Registrar erred by claiming that the inventory was not filed. The submissions are based on speculation rather than evidence. They tantamount to availing evidence from the Bar. The burden of proof that the defendant filed an inventory and account of the estate lies on the defendant since he asserted

that fact in his written statement of defence and in his sworn testimony. He did not discharge the burden to the satisfaction of this court. I find no evidence that such inventory or account was filed.

The defendant's Counsel also submitted that the failure to file was not willful or that he had reasonable cause not to file. This submission somehow retracts his earlier submissions that the defendant filed the inventory. There is a well known principle of equity that one cannot approbate and reprobate. The principle is based on the doctrine of election. It postulates that no party can accept and reject the same instrument; that a person cannot say at one time that a transaction is valid and then turn around and say it is void for the purpose of securing some other advantage. In **Stephen Seruwagi Kavuma V Barclays Bank (U) Ltd Miscellaneous Application No. 634/2010 Arising From Civil Suit No. 332/2008** it was held that after he obtained respite from investigations and possible criminal prosecution by signing the consent order and decree, the applicant could not now turn around and say that he did not owe the amount claimed in the suit whose order and decree he acquiesced in.

I thus find no evidence of the defendant having filed an inventory or a true account of the property and credits of the deceased's estate showing the assets which have come to his hands, or the manner in which they have been applied or disposed of. There is no evidence to show that there was reasonable cause for the defendant not to file an inventory, or that the court had extended the period within which to file the inventory and account of the estate, or that the defendant's omission to file the inventory and account was not willful.

In view of the adduced evidence and the foregoing legal provisions, I find that the defendant willfully and without reasonable cause omitted to exhibit an inventory or account of the assets and liabilities of the estate of the late Dr. Eria Muwanga Babumba within the required period. This was in breach of the provisions of section 278 of the Succession Act which are mandatory, as well as of the Administration Bond he signed, which bound him to administer the estate according to the law by filing true inventories and accounts pertaining to the estate.

Issue i is answered in the affirmative.

Issue ii: Whether the defendant's administration of the estate is lawful.

The plaintiffs contended that the defendant's administration of the estate is not lawful for three reasons, namely that the grant of letters of administration to the defendant was in violation of the order of succession as stated in the will; that the grant was obtained by concealing from the court material facts relevant to the application; and that the proceedings to obtain the grant were defective. The defendant on the other hand pleaded that he rightly applied for letters of administration to the estate of the late Eria Muwanga Babumba.

PW1, PW2, PW3 and PW4 Brenda Kobusingye Babumba stated that the will of their late father, exhibit P1, named four executors in order of succession, namely John Wesley Mwerango Babumba, Charles Wesley Kafeero Babumba, James Young Ssali Babumba and Fredrick Lukwago. It was the plaintiffs' evidence that John Wesley Babumba was granted probate as heir and

executor as revealed by exhibit P3. After the death of John Wesley Babumba the defendant was granted letters of administration, exhibit D2, on 4th April 1989. It is the plaintiffs' evidence that the defendant, who was the third in line, disregarded the specific provisions of the will, jumped the queue and applied for letters of administration to the estate yet the second in line was Wesley Kafeero Babumba. According to PW1, PW2, PW3, and PW4, the defendant was not entitled to administer the estate ahead of Wesley Kafeero Babumba; that he did not disclose the fact that he was only the third in line; and he did not seek the consent of Wesley Kafeero Babumba.

The defendant on the other hand stated that after the death of John Wesley Mwerango Babumba, a family meeting was held to find ways on how the estate was to be administered; that he was requested to take over the responsibility of administering the estate after the elders in the meeting excused themselves from assuming the responsibility of administering the estate. He stated in cross examination that he did not agree that there were four executors, that according to the will they were heirs not executors, and that an heir could become an executor.

Exhibit P1, the English translation, stated as follows:-

*"No. 4 My heir is my son JOHN WESLEY MWERANGO BABUMBA, the son of Mrs Edith Babumba, my official wife...."

*No. 5 The second heir (heir no.2) is Charles Wesley Kafeero Babumba, the son of Lillian Kajoina sister to Edith Mary Babumba...."

*No. 6 The third heir (heir no.3) is called JAMES YOUNG SSALI BABUMBA: son of Mrs Edith M Babumba...."

*No 6 (still) the fourth heir (heir no.4) is FREDRICK LUKWAGO: The son of Mrs Lovisa Katana Babumba – my second wife...."

*No 7. My successors who have been mentioned in No.6 are all not going to be my successors at the same time, but if death happens, their succession will proceed and follow as I have indicated in section no.6. The important fact is that whoever will become the successor, will have to take the same responsibility as given to the first heir (heir no.1) John Wesley...."

The will specifically named four people to be heirs. The vernacular words used in the luganda version of exhibit P1, which was the original will, were "omusika/abasika/obusika/okusika" an apparent equivalent of the words "heir/succession" used in the English translation, also exhibited as P1. The will referred to the heirs as successors of the deceased. According to the will, the successors in No. 6 were not going to be the deceased's successors at the same time, but if death happened, their succession would proceed and follow as indicated in section No. 6. Whoever would become the successor would have to take the same responsibility as given to the first heir John Wesley**

The will does not directly state that the heirs were to be the executors of the will. In fact, the word "executor" does not appear anywhere in exhibit P1. Section 183 of the Succession Act however states that the appointment of an executor may be express or by necessary implication.

In this case, the will stated that a successor will have to take the same responsibility as given to the first heir. The will goes on to request the heir and the children to exhibit numerous virtues, like to believe and trust in God, to love their parents and siblings, and “*to finish all that I have not finished.” (No.8(iii)).*

Besides, it was an agreed fact number ii) in the joint scheduling conference memorandum that:-

“The late Dr. Eria Muwanga Babumba died testate in 1986.* According to the deceased’s will, he appointed four heirs who would also act as executors of his will.* The heirs appointed were John Wesley Mwerango Babumba, Charles Wesley Kafeero Babumba, James Young Ssali Babumba and Fredrick Lukwago.* It was the intention of the deceased that the four* named heirs or successors would assume the duties of the office of executor of his will in succession to each other in the event of death and not to be appointed to act jointly.” (emphasis added).

The memorandum was signed by both counsel and filed in this court. That means the defendant’s counsel signed the memorandum on behalf of his client, just like the plaintiffs’ counsel did for his clients. I agree with the plaintiffs’ counsel’s submissions that the defendant’s counsel cannot argue that the heirs were not executors, after having signed the joint scheduling memorandum which states otherwise.

In that regard, I find that the heirs in the will were also to be the executors of the will.

Section 230 Succession Act Cap 162 (the equivalent of section 229 of the old Succession Act Cap 139) provides that in granting letters of administration of an estate not fully administered, the court shall be guided by the same provisions as apply to original grants, and shall grant letters of administration to those persons only to whom original grants might have been made. Section 194(1) of the Succession Act Cap 162 (the equivalent of section 193 of the old Succession Act Cap 139), provides that when a person appointed an executor has not renounced the executorship, letters of administration shall not be granted to any other person until a citation has been issued, calling upon the executor to accept or renounce his or her executorship.

The adduced evidence from both sides shows that no such citation was issued. The record itself does not contain any such renunciation by Charles Kafeero. The evidence of PW1, PW2, PW3, and PW4 that the defendant did not seek the consent of Wesley Kafeero Babumba was confirmed by the defendant who admitted during cross examination that he never contacted Charles Kafeero before applying for letters of administration, and that the said Charles Kafeero did not renounce his rights. His statement that he was requested to take over the responsibility during a family meeting was not convincing. He did not avail court with any minutes of the said meeting, or call any witness who attended such meeting to testify in his favour.

It was the evidence of PW1, PW2, PW3 and PW4 that when applying for letters of administration, the defendant did not disclose to court that Charles Kafeero was the second in line of succession, as stated in the will, who had the right to apply for the letters of administration to the estate after the death of John Wesley Mwerango Babumba; that he misled court by stating that John Wesley

Mwerango was the sole executor; that he withheld the fact that there were three other surviving executors including himself; that the defendant did not attach the will or codicil to the application; and that this mislead the court to issue him the letters of administration.

Exhibit P8, which is the defendant's petition for letters of administration to the estate of the late Dr. Eria Muwanga Babumba, is headed, among others, as "...*an application for substitution under section 228 of the Succession Act Cap 139..."*, and also as "...*an application for the grant of letters of administration with the will annexed in respect of the estate of the late Dr. Eria Babumba by James Ssali Babumba son of the deceased/brother of the original (sole) executor John Wesley Mwerango Babumba – Deceased.*" Clause 6 of the petition states that "the petitioner petitions under section 228 (supra) for appointment/substitution as a new representative for the purposes of administering the estate in which he has an interest...."

The grant consequently issued by court to the defendant (exhibit D2) was for letters of administration with the will annexed. It stated, in part, that:

"...letters of administration with a will annexed of the property and credits of the estate...were granted to James Ssali Babumba (son) of the deceased replacing the original (sole) executor John Wesley Mwerango Babumba – Deceased."

The defendant was "substituted" as an administrator of the estate of the deceased, replacing John Wesley Mwerango Babumba, the deceased administrator. This, in my opinion, could explain why the defendant did not have to attach the will since it was already part of the court record in AC 495/1986. The defendant filed the petition on 19th March 1989. The petition was apparently made under section 228 of the old Succession Act cap 139, its equivalent being section 229 of the Succession Act Cap 162. The said section provides that if an executor to whom probate has been granted has died, leaving part of the testator's estate unadministered, a new representative may be appointed for the purpose of administering such part of the estate.

The record of proceedings in AC 495/1987 (Exhibit P8) shows that Counsel Mulindwa introduced the defendant (petitioner). He requested the Registrar of the Court to substitute him as a new administrator in place of John Wesley Mwerango the "sole executor" who was then deceased. The Registrar stated that he had examined the petitioner and recommended him for a grant of letters of administration, since the one who had a grant of probate was dead.

This, in my opinion, as revealed by the face of the record, was substitution of an administrator in the place of a deceased executor. It is evident from the face of the record that the Judge substituted the defendant as a new administrator to replace a dead executor, having addressed the record of the previous grant and all the documents in that record which included the will of the late Dr. Eria Muwanga Babumba. The grant that was issued was for letters of administration with the will annexed.

This was apparently on basis of the information availed to Court by the defendant and his Counsel that the deceased executor was the sole executor. Court, in my opinion, issued the letters of administration without citation on the premise that the sole executor had died. This was

allowed under the proviso to section 193 of the old Succession Act Cap 139, the equivalent of section 194(2) of the Succession Act Cap 162. This provision is to the effect that in such circumstances where the surviving executor(s) have died, court may issue letters of administration to those who have not proved a will. In that respect, the court cannot be faulted for issuing the letters of administration without citation because it was based on the petitioner's information that the "sole executor" had died. It is already a finding of this court that there were four heirs/executors in order of succession. This information was not availed to court by the defendant. It is my opinion that if such information had been availed to court, it would have first issued a citation to identify the next executor or have him first renounce his executorship instead of merely substituting a deceased executor with the defendant.

There is a legal principle that **de bonis non administrates**, that a grant cannot be given if there is a surviving chain of executors that has not been broken. According to **Parry and Clark: The Law of Succession, 8th Edition, p.173**, an applicant for **de bonis non** must clear off all persons who have a prior right to a grant. This principle is embodied in sections 230, 203 and 194(1) of the Succession Act (and their equivalents in the old law) which have already been highlighted. Also see **John Kyeswa V Administrator General Miscellaneous Application No. 232/2009 Arising From Administration Cause No. 039/2008**, Mulyagonja J.

In this case where there were surviving executors, Charles Kafeero would have been the next in the line of executors. The grant of letters of administration under section 229 of the Succession Act on basis that there was a sole executor was not appropriate in the instant case where there were other surviving executors. I agree with the plaintiffs that the court was misled in issuing the grant to the defendant.

Exhibit P8 reveals that the listed documents that accompanied the Registrar's recommendation to the Judge were the notice of intention to apply, the petition dated 08/03/89, the declaration dated 08/03/89, a copy of the probate and administration and the death certificate of the sole executor. The Judge's order was that *"*letters of administration be granted to James Ssali Babumba (son) substituted in the place of the sole executor John Wesley Mwerango Babumba who is now dead.*"* The will or any other document connected to it was not among the listed documents. The explanation for this as already stated could be due to the fact that the court was simply substituting the defendant for the deceased sole executor on the basis of the petitioner's information to court. The will was already part of the court record in AC 495/1986.

It is the defendant's contention, through the submissions of his counsel, that by the time the defendant made the application in 1989, the law did not require the applicant to first acquire a certificate of no objection. This is not correct, considering that John Wesley Mwerango Babumba, the first executor who applied before the defendant had acquired a certificate of no objection, exhibit P7, before applying. Besides, at that time, section 6(1) of the Administrator Generals Act cap 140, required applicants for letters of administration to give notice of their intention to do so. These provisions are now in section 5(2) of Administrator Generals Act cap 157. There is nothing in the adduced evidence to show that the defendant complied with the said provisions.

The defendant's counsel referred to section 229 of the Succession Act cap 162 (formerly section 228 of the old Succession Act Cap 139), that if an executor to whom probate has died, leaving a part of the testator's estate unadministered, a new representative may be appointed for the purpose of administering that part of the estate. This however should be read with section 230 of the Succession Act Cap 162 (formerly section 229 Succession Act Cap 139) which provides that in granting letters of administration of an estate not fully administered, the court shall be guided by the same provisions as apply to original grants, and shall grant letters of administration to those persons only to whom original grants might have been made.

In view of the foregoing, I find that the grant of letters of administration to the defendant was in violation of the order of succession as stated in the will; and that the grant was obtained by concealing from the court material facts relevant to the application. However, I do not find that the proceedings to obtain the grant were defective since the Court issued the grant based on the information that was availed to it by the petitioner as highlighted above. It is my considered opinion that the defendant's administration of the estate is not lawful on grounds that defendant was in violation of the order of succession as stated in the will; and that the grant was obtained by concealing from the court material facts relevant to the application.

Issue iv is answered in the negative.

Issue iii: Whether the defendant is in breach of his fiduciary duty to the plaintiffs as beneficiaries.

The plaintiffs pleaded that the defendant failed to distribute the property of the estate to the various devisees named in the will and is unable to manage the estate allowing it to waste, giving the following particulars:-

1. *The failure and/or refusal of the defendant/administrator to furnish to the High Court an inventory for the affairs including the assets and liabilities of the estate.*
2. *The refusal of the defendant/administrator to distribute the assets of the estate to the beneficiaries in accordance with the will.*
3. *The failure by the defendant to sign respective transfer forms in respect of the properties that were devised in the will to the respective beneficiaries.*
4. *Continued neglect of his duties to maintain the assets of the estate and allowing it to go to waste.*
5. *Allowing the estate to go to waste.*

The aspect concerning failure to furnish an inventory and account of the estate to court was disposed of in the affirmative in the first issue.

This takes me to the plaintiffs' allegations that the defendant/administrator refused to distribute the assets of the estate to the beneficiaries in accordance with the will, and that he failed to sign respective transfer forms in respect of the properties devised in the will to the respective beneficiaries.

PW3 Margret Sebunya stated that the defendant refused to give her a share in property comprised in Kawempe Block 208 Plot 172 as devised in the will until she filed *High Court Civil Suit No. 112/2006*. The defendant stated in reply that the suit by PW3 was not filed against him; that the land in question had been mortgaged to the then Uganda Commercial Bank; that it was a lengthy process to retrieve the title and no one was assisting; and that boundaries had then to be re opened but PW3 eventually got her title.

There is evidence adduced from both sides that PW3 had indeed been devised a share in the said property together with her sisters Julia Ann Babumba, Joyce Babumba, Joanita Babumba, Margret Babumba and Suzan Babumba. This is confirmed by exhibit P1. There is evidence that PW3 got her share following a consent judgment (exhibit P4A) in *High Court Civil Suit No. 112/2006* (exhibit P4B) which she had filed against Julia Ann Babumba, a sibling who was not party to the instant suit. The defendant stated during cross examination that he delayed to give PW3 her share because he had to first retrieve the land title before transferring her share to her. He stated that other family members did not contribute to the retrieving or procuring of titles to the estate land. This was confirmed by the evidence of PW3 who during cross examination stated that she did not contribute to the procurement of the title to the land she got from the estate, or of the ranch. PW4 also confirmed this in her evidence that she never contributed anything to the ranch.

PW3 also testified that her mother, Lovinsa Katana Babumba, who has since passed on, was bequeathed property comprised in Block 328 Plot 7 land at Nakitokolo and land at Senyange, plus an eighth of cash accruing from the estate. She testified that the defendant only gave her the land at Senyange which was encroached by squatters, and that he did not give her the 5 acres of land comprised in Block 328 Plot 7 land at Nakitokolo. The defendant's evidence is that he gave Lovinsa the land at Senyange six months after he obtained the letters of administration. The defendant's evidence of having distributed the land at Senyange to Lovinsa Katana Babumba is supported by the evidence of PW6 Evelyn Mwasa Babumba who stated during cross examination that James Babumba was able to give Lovinsa her property within a year of his taking over administration of the estate.

Regarding the land at Nabitokolo Block 328 Plot 56, it was the defendant's evidence that it was not bequeathed to any particular person but was for all beneficiaries of the estate. He stated during cross examination that he initially provided accommodation for the mother of PW3 when she was in Masaka, but she eventually relocated to Mukono where he did not cater for her accommodation. He testified during cross examination that he did not find a family fund and could not construct a house for Lovinsa Katana as provided in the will because there was no money; and that if the 5 acres of land comprised in Block 328 Plot 7 land at Nakitokolo are the 12.5% bequeathed to her in the will he would support it.

Thus, I find that the share of the late Lovinsa Katana on the Nabitokolo land is yet to be distributed by the defendant though he is willing to distribute it.

The plaintiffs contend that Plot 33 Kampala Road Masaka is part of the estate to be distributed among the beneficiaries. It is their evidence that Plot 33 Kampala Road Masakawas a lease belonging to their father but the defendant renewed it in his personal names. The defendant's evidence is that by the time he took over administration of the estate the property was not part of the estate as its lease by Masaka Municipal Council had expired on 04/04/89; that he applied to have it extended on behalf of the estate but it was not extended; and that he eventually acquired the lease in his personal names.

It was held in **Boardman & Another V Phipps (1966) WLR 1009** that a person occupying a position of trust must not make a profit which he can acquire only by use of his fiduciary position or if he does he must account for the profit so made.

Plot 33 Kampala Road Masaka is mentioned in exhibits P1 and P2 to be part of the deceased's estate. In exhibit P2 the testator stated that, *"efforts should be made to build this plot – it can be an asset. Find out if I have applied for lease...if not do it quickly..."*

The defendant testified that he applied for and obtained the lease in respect of Plot 33 Kampala Road Masaka from Masaka Municipal Council; that he procured the lease in his personal names. The estate of the late Eria Babumba, to which he was administrator, were the sitting tenants by the time the lease expired. It is evident the defendant used the information he obtained from Masaka Municipal Council about the lease to acquire the lease in his personal names instead of acquiring it as part of the estate. As sitting tenants the estate had a right of first refusal upon expiry of the lease. See **Kampala District Land Board & Another V NHHS SCCA No 2/2004**.

An administrator stands in fiduciary position to the trust property and beneficiaries. Besides, courts have held that procuring registration of title in order to defeat an unregistered interest amounts to fraud. See **John Katarikawe V William Katwiremu & Another [1977] HCB 210**. In the circumstances of this case, even if it were to be believed that that the defendant acquired the lease in his personal names after his request to have it extended on behalf of the estate was rejected by Masaka Municipal Council, the least he could have done as the administrator of the estate was to account for his benefitting from the property that once formed part of the estate. There is no evidence that this was done.

On basis of the foregoing evidence and authorities, it is my finding that the defendant's procuring of the lease to Plot 33 Kampala Road Masaka, which was part of the estate he was administering, in his personal names, rather than in the names of the estate he was administering, and his not accounting for the profit so made, was a breach of his trust and fiduciary duty to the estate.

The plaintiffs also contend that the house on Plot 12, the Green House No 20, also known as Kizungu House, was supposed to be for family business under the will, but the defendant instead transferred it into his mother's names. The defendant's evidence is that he distributed the said property to Mrs. Edith Mary Babumba who is in occupation of the same, and that this was in

accordance with the will. The plaintiffs' contention however, is that the deceased left behind a codicil (exhibit P2) written on 30th April 1984, that the said codicil reviewed the distribution of the Kizungu house. This featured in the evidence of PW3, PW4 and PW6. The plaintiffs contend that the codicil should be taken as part of the will. The defendant disputes this, contending that what the plaintiffs refer to as a codicil were merely guidelines the deceased wrote down when he was going for treatment in Nairobi in 1986, on how his affairs were to be managed during his absence.

A codicil is defined in section 2(c) of the Succession Act as an instrument explaining, altering or adding to a will and which is considered as being part of the will. A codicil is a supplement or addition to a will, not necessarily disposing of the entire estate but modifying, explaining, or otherwise qualifying the will in some way. Each codicil must conform to the same legal requirements as the original will, such as the signature of the testator and, typically, two or three (depending on jurisdiction) disinterested witnesses. A codicil effectuates a change in an existing will without requiring that the will be re executed. The maker of the codicil identifies the will that is to be changed by the date of its execution. The codicil should state that the will is affirmed except for the changes contained therein. The same formalities necessary for the valid execution of a will must be observed when a codicil is executed. Failure to do so renders the codicil void. See **West's Encyclopedia of American Law edition 2. Copyright 2008 The Gate Group, Inc.**

Exhibit P2 is comprised of two "kasuku" exercise books (Book 1 and Book 2) containing handwritten notes by Dr. Eria Muwanga Babumba. It is titled **"Guidelines for the Family"*.^{*} The opening sentence in Book 1, written on 22/01/86 reads as follows:-

**"I Dr. Eria M Babumba. I am going for medical treatment. I do not know how long it will last. During my absence I have decided to record some guidelines for the management and administration of my affairs financial and otherwise....."*^{*}

The ending sentence in Book 2, written on 03/02/86, reads as follows:-

**"The legality of this document...is ascertained by my initials as seen on each page...Papers handed over to John Babumba...."*^{*}

**Addendum 1 In the absence of Mr John Babumba for any reason the next overall In Charge is Mr. James Ssali Babumba and he should have the full rights and dignity as is being accorded to the present overall In Charge. John Babumba Ssali must be involved in the administration of the funds in item no.16 for the good of the family...."*^{*}

**Addendum No 2 It must be clearly understood that any member of the family is entitled to have access to the reading of these documents, ie from item 1 to the end."*^{*}

In my opinion, exhibit P2 very clearly expresses that it is a guideline on how the financial and other affairs of Dr. Eria Babumba were to be managed during his absence. He appointed two persons, John Babumba and James Ssali Babumba, to be in charge while he was away. The document does not state anywhere that it is a codicil to the will earlier made by Dr. Eria Babumba. The document did not identify the will to be changed by the date of its execution. It

did not state that the will is affirmed except for the changes contained in it. It merely stated that any family member should have access to its reading. Thus, in my humble interpretation of the document, as at the time it was written or signed by Dr. Eria Muwanga Babumba, exhibit P2 was not a codicil.

The will (exhibit P1) shows however that on 06/06/87 Dr. Eria Muwanga Babumba added the following words on his will:-

“The whole will should be read alongside the document (GUIDELINES) I left with JOHN BABUMBA when I left for Nairobi in January 1986. It will serve to clarify the true picture.”

Section 51 of the Succession Act states that if a testator, in a will or codicil duly attested, refers to any other document then actually written, as expressing any part of his or her intentions, that document shall be considered as forming a part of the will or codicil in which it is referred to.

The said section provides for incorporation of papers by reference. It embodies the doctrine that allows documents that satisfy certain conditions to be regarded as part of a will even though the documents themselves are not executed. Such documents if incorporated into a will are admissible to probate as part of the will. For incorporation to be effective, the document must be in existence at the date the will is executed, referred to in the will as existent and clearly identified. See **Re Keen (1937) Ch.326**.

This, in my opinion, places the guidelines within the ambit of section 51 of the Succession Act, since the document (two kasuku books) containing the guidelines were in existence at the date the will is executed. The will indeed referred to them as existent in its last clause, and the document is clearly identified. It is my finding that though exhibit P1 was not initially a codicil, the subsequent reference to it by the testator in his will renders it part of the will “by reference” under section 51 of the Succession Act. It may not necessarily be a codicil as argued by the plaintiffs’ counsel, but it must be treated as a document which forms part of the will under section 51 by virtue of the testator having referred to it in his will. The two documents must be read together.

Paragraph x of the will (exhibit P1) stated as follows:-

“...I have given the Green House No. 20 to Edith Mary Babumba (my wife) together with the heir. Eventually when he (the heir) matures into adulthood and the time to live independently has come, he will have to build his own house on the same land and leave the available house to Edith...”

Item 3 of exhibit P2 states the following on the same Kizungu house:-

“This is known in the family as HIGH TIDE PROJECT. Registration of the title is pending....”

On the Bwala House exhibit P2 states as follows:-

“This house must be quickly finished...to get accommodation for the family because Kizungu is ...Business to get resources of income for the family.... Adyeri should know this because in another document still unrevealed the Kizungu house had been assigned to her. I am sure she should compromise with my new arrangements, ie, ***that she takes the Bwala and leaves the Kizungu Plan for Business...**”* (emphasis mine)

Thus, in my opinion, as stated in exhibit P2, already found by this court to be part of the will, the house that should have been distributed to Mrs. Edith Mary Babumba is the Bwala house and not the Kizungu house. According to the new arrangements made by the testator, the Kizungu house was to be converted into a family business and Mrs. Edith Mary Babumba was to take the Bwala house. Thus, the distribution of the Kizungu house to Mrs. Edith Mary Babumba was, in my opinion, not in accordance with the wishes of the deceased as expressed in the will and the guidelines which form part of the will. This however was to be subject to the quick completion of the Bwala house, which was evidently not done.

However, in their joint scheduling memorandum, the parties decided to agree as a fact that the Bwala House is among the properties not devised in the will. In their prayers to this court, they seek an order for the sale of the property comprised in Bwala House Plot No. 18 Joseph Isingiro Road, and distribution of the proceeds among the beneficiaries of the estate of the late Dr. Eria Muwanga Babumba. This was also reflected in the testimony of PW1 PW6 and it was not disputed by the defendant. To that extent, the Bwala House would be placed in a position of remaining part of the estate the beneficiaries are entitled to.

PW1, PW2, PW3, PW4 and PW5 also stated that the defendant failed to meet the school fees requirements of the school going beneficiaries of the estate. In cross examination PW4 Brenda Kobusingye Babumba stated that the defendant paid her fees up to senior four. Her evidence is that she benefitted from the estate in small portions or little bits of what she was entitled to; that she tried to raise income by doing some farming but she and the other beneficiaries were evicted from the ranch. PW1 also testified that she was not provided with education.

The defendant's evidence is that he provided for the beneficiaries' school fees. The youngest school going child was Simon Peter Babumba who finished school in 2005 with the defendant's support as an administrator. He submitted exhibits D19, D20, D21, D22, D23, D24, D25 and D26. It is also his evidence that the ranch was open to the family members who needed to utilize it to raise income but he was against those who were utilizing it for fraudulent purposes, like Joel Tusula who fraudulently sold off part of the land and those who rented it out. The defendant's evidence is that the ranch was not bequeathed to anyone; that it is open to any family member who wants to use it.

There is evidence from both sides revealing that there were 21 school going children the defendant had to pay fees for after the death of their father. PW6 stated that her father had about 50 children but she knew only 48. Exhibits D19, D20, D21, D22, D23, D24, D25 and D26 include school fees payment vouchers for the periods 1991 to 1998 with signatures of the recipients

acknowledging receipt of the same. These were not challenged or discredited by the plaintiffs. The defendant's evidence is to an extent confirmed by PW4 who stated during cross examination that she started to cultivate on the ranch to raise school fees. She also admitted she had been farming on the ranch to raise income; that she is in occupation of about 50 acres of the same though it was not given to her, and that she did not seek the defendant's permission. This evidence was also confirmed by PW3 who stated in cross examination that there were some siblings who were utilizing the ranch. PW1 stated during re examination that her fees were paid once or twice by the defendant.

On the issue of availing school fees for his siblings, in view of the adduced evidence, on the balance of probabilities, it is my opinion that the defendant did all he could within the available resources to cater for a very big and scattered family from an estate that was heavily burdened with numerous beneficiaries, mortgages, squatters, and a government restructuring programme.

It was also submitted for the plaintiffs that the defendant as administrator had a duty to preserve the estate property and in discharge of that duty to invest the assets of the estate. Exhibits **P1** and **P2** show that the testator had directed various investments which included re stocking the ranch, completing the High Tide Project for commercial purposes, setting up a trust fund, building up Plot 33 Kampala Road, Masaka, renovation of the Bwala house, and building a house for Lovinsa Katana, among others.

The plaintiff's witnesses reiterated the foregoing position in their various statements. The defendant also admitted that he did not invest. He testified that there was no estate fund on the various accounts of the deceased; that he used some of the money to pay fees as evidenced by exhibits **D19** to **D26** inclusive; that he redeemed some mortgaged properties of the estate; and that he acquired certificates of title for other properties like the ranch, properties comprised in Kawempe Block 208 Plot 172, and at Nabitokolo comprised in Block 328 Plot 37. This evidence was not seriously discredited by the plaintiffs. To an extent the plaintiffs' evidence also confirmed the defendant's evidence that the administrator redeemed some of the mortgaged properties of the estate, including paying some fees in respect of the school going beneficiaries; and acquiring titles in respect of untitled land.

The plaintiffs did not adduce supporting evidence that the fund mentioned by the testator had money, or that the money that was realized from the estate was enough to cater for the mentioned wide ranging obligations of the estate, including meeting each and every need of the many beneficiaries, while at the same time leaving a surplus for investment. All the projects for investment mentioned in exhibits **P1** and **P2** were very ambitious projects requiring huge amounts of funding.

In the circumstances of this case, as brought out by the adduced evidence, it is my opinion that the administrator could not work miracles of investing amid the numerous obligations and liabilities that burdened the vast estate.

Issue iii is partly answered in the affirmative and partly in the negative, in that the defendant distributed some of the properties in accordance with the will but failed to do the same in respect of other property; that on payment of school fees for his siblings, there is evidence that he put in some effort within the means the heavily encumbered estate could offer; and that his having failed to invest was attributable to the numerous demands and liabilities on the vast estate rather than his lack of business acumen.

Issue iv: Whether the plaintiffs are entitled to a share in the properties not devised in the will.

It was an agreed fact during scheduling of the case that the properties comprised in Bwala house Plot No. 18 Joseph Isingiro Road, Plot 33 Kampala Road, land in Kagando Mawogola Block 32 Plot 1, and Lyantonde Kabula Ranch No. 4A LRV 4203 Folio 21 were not devised to anyone in the deceased's will. This was also reflected in the testimony of PW1 and PW6. This was not disputed by the defendant, except for Plot 33 Kampala Road which he stated was no longer part of the estate as the lease for the same by Masaka Municipal Council.

It is a finding of this court however that Plot 33 Kampala Road was part of the estate. It is also a finding that though the Bwala house was to be assigned to Mrs. Edith Mary Babumba the widow, subject to its quick completion, following the reassignment of the Kizungu house to cater for family business, the parties agreed in the joint scheduling memorandum to treat the Bwala House as not devised, and prayed that this property should be sold and the proceeds be distributed among the beneficiaries.

It is evident from item numbers 8(xv) of exhibit P1 and item 12 of exhibit P2 that the ranch was to remain family property. This was confirmed by PW1 who stated in cross examination that the ranch was for the benefit of the Babumba family. It was also an agreed fact that Ranch No. 4A Lyantonde Kabula was restructured by Government under the Ranch Restructuring Scheme.

There is evidence from both sides that through the scheme the government alienated 3 of the 5 square miles of the ranch and allocated them to other people. The title to this land (exhibit D1) is currently registered in the defendant's names as administrator of the estate. There is also evidence from both sides, as already stated, that some of the family members, including some plaintiffs, are using the ranch to raise individual incomes. The defendant is not opposed to this as long as there is no fraud or alienation of the land.

The properties specifically mentioned in the plaintiffs' prayers are those comprised in Plot 33 Kampala Road Masaka Municipal Council, land in Kagando Mawogola Block 32 Plot 1, and Lyantonde Kabula Ranch No. 4A LRV 4203 Folio 21.

The defendant does not dispute the plaintiffs' averments regarding their entitlements to the part of the estate that was not devised. He agreed during cross examination and re examination that all the beneficiaries in the estate are entitled to a share that was not bequeathed by will, except the property comprised in Plot 33 Kampala Road Masaka Municipal Council. This court has however made a finding in favour of the plaintiffs regarding the said property.

Issue iv is answered in the affirmative.

Issue v: Whether the plaintiffs are entitled to the prayers prayed for.

Section 234 of the Succession Act Cap 162 provides that the grant of probate or letters of administration shall be revoked for just cause. Just cause is defined to mean that the proceedings to obtain the grant were defective in substance; the grant was obtained fraudulently by making a false suggestion or concealing from court something material to the case; the grant was obtained by means of an untrue allegation of a fact essential in a point of law to justify the grant though the allegation was made in ignorance or inadvertently; the grant has become useless and inoperative through circumstances; or the person to whom the grant was made has willfully and without reasonable cause omitted to exhibit an inventory or account under Part XXXIV of the Act, or has exhibited an inventory which is untrue in a material aspect.

The plaintiffs have proved their case against the defendant that the defendant has willfully and without reasonable cause omitted to exhibit an inventory or account under Part XXXIV of the Act. The defendant's conduct is in breach of the provisions of section 278 of the Succession Act which require him to administer the estate according to the law by filing true inventories and accounts pertaining to the estate. The plaintiffs have also proved their case against the defendant that the grant was obtained fraudulently by making a false suggestion or concealing from court something material to the case.

In that regard, based on the adduced evidence and authorities, it is my finding that there is just cause for the revocation of the grant of letters of administration to the defendant regarding the estate of the late Dr. Eria Muwanga Babumba. This is on the grounds that the defendant has willfully and without reasonable cause omitted to exhibit an inventory or account under Part XXXIV of the Act, and that the grant was obtained fraudulently by making a false suggestion or concealing from court something material to the case.

The plaintiffs prayed for an order for the appointment of a new administrator or administrators as consented on by the beneficiaries of the estate. During cross examination, the defendant did not mind other relatives co-administering the estate with him. He however objected to Michael Kabugo, Emmanuel Mwebaze and George Mwesigwa administering the estate. PW3 and PW4 mentioned other siblings who could be appointed administrators, or the need for a new team, but also indicated that the matter should be resolved in a family meeting.

The plaintiffs also prayed that the property which has not been devised should be sold and the proceeds shared among the beneficiaries. This came out in the testimonies of PW1, PW4, and PW6. The defendant's evidence however is that some beneficiaries are opposed to the idea of selling the properties. The defendant testified that a compromise had to be reached among the family members on how to divide the property that was not bequeathed.

This court is empowered under section 33 of the Judicature Act to grant such remedies, on such terms and conditions it thinks just, as any of the parties is entitled to in respect of any legal or equitable claim, so that matters in dispute may be completely or finally disposed of and multiplicities of legal proceedings are avoided. This is in addition to section 98 of the Civil Procedure Act which leaves this court with inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of court process.

Thus, on matters concerning appointment of administrators to the estate and whether or not to sell the properties that were not demised, it would, in my opinion, only be fair and just that all the interests of the beneficiaries to the estate be taken into account. This court did not have opportunity to hear all the beneficiaries on the said matters since all of them were not called as witnesses. Rather than issuing abstract orders on who is to be appointed administrator, or on whether to sell or not to sell any estate property, such matters would rather be resolved in a family meeting within court given time limits, since the conclusion of the administration of this estate is long overdue. This is especially so in view of the apparent mutual suspicions and differences of opinion among some beneficiaries, which were evident during the hearing, as deduced from their demeanour in court. This is to ensure that the wishes in the will of the deceased are finally implemented, the relevant inventories and accounts are filed, and the administration of the estate concluded within one year from the date of judgment.

All in all, I find that the plaintiffs are to a great extent, entitled to the orders sought against the defendant.

I therefore enter judgment for the plaintiffs against the defendant for the following orders and or declarations:-

1. The letters of administration issued to the defendant vide Administration Cause No. 495/1987 are revoked.
2. The defendant is to surrender to court the grant of letters of administration and all documents of title, property and or income from the estate of the late Dr. Eria Muwanga Babumba.
3. The defendant is to submit to court a full true and updated inventory of all the assets and liabilities of the estate.
4. The defendant is to submit to court an account of all the assets and liabilities of the estate and a report on his management of the affairs of the estate from the date of grant of letters of administration to the defendant to the date of this judgment.
5. At least two administrators consented to by all the beneficiaries to be appointed within three months from the date of this judgment. The consent should be promptly filed in this court upon which the Registrar will issue a court order appointing the administrators.
6. A permanent injunction restraining the defendant from wasting the estate of the late Dr. Eriya Muwanga Babumba.

7. The Registrar of Titles to cancel the names of the defendant from the certificate of titles and land registered entries in his capacity as administrator of the estate of the late Dr. Eria Muwanga Babumba Babumba vide Administration Cause No. 495/1987.
8. The beneficiaries of the estate, within three months from the date of this judgment, to agree on how to dispose of or manage the properties comprised in Ranch no. 4 in Lyantonde, Kabula, Kansagoma; Plot 33 Kampala Road Masaka Municipality; land in Kagando Mawogola Block 32 Plot 1, and Lyantonde Kabula Ranch No. 4A LRV 4203 Folio 21; and Bwala House Plot No. 18 Joseph Nsingiro Road.
9. Costs of the suit are awarded to the plaintiffs, recoverable from the estate.

I so order.

Dated at Kampala this 01st day of September 2015.

Percy Night Tuhaise

Judge.

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