

UGANDA / JUDGMENT

**Musinguzi & Another v Mwamba & 2
Others (HCT-01-CV-CS 41 of 2021)
[2024] UGHC 938 (30 September 2024)
[2024] UGHC 938**

COURT
High Court of Uganda

BEFORE
Mugabo, J

CASE / FILE NUMBER
HCT-01-CV-CS 41 of 2021

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT-01-CV-CS-041 OF 2021

1. MUSINGUZI CHRISTOPHER

2. KATO PAUL :::::::::::::::::::::::::::::::::::::: PLAINTIFFS

VERSUS

1. MWAMBA DAVID

2. RASHID MZEE A. K. A BAMZEE

(Executors of the Will of the late Rwahoima Clovis)

3. GERTRUDE RWAHOIMA ::::::::::::::::::::::::::::::::::::::DEFENDANTS

BEFORE: HON. JUSTICE VINCENT EMMY MUGABO

JUDGMENT

The Plaintiffs brought this suit against the defendants for an order for revocation of the Will of the late Clovis Rwahoima dated 13th July 2018, a declaration that the late Clovis Rwahoima died intestate, a permanent injunction, an order for payment of reparations and costs of the suit.

In their plaint, the plaintiffs contend that the late Clovis Rwahoima died intestate on the 9th of October 2018 and was survived by 20 children and 3 widows. He also left several properties which they name in the plaint. Four days after his death, the 1st defendant and one Atanasio Kalenzi brought the alleged Will of the late Clovis Rwahoima which named the 1st and 2nd Defendants as executors, who then applied for Letters of Probate. The said Will included property that did not belong to the estate of the late Clovis Rwahoima which includes a building on Plot 3/3A Ruhandika Street Fort Portal and land in Buzinda Bwera and Buzinda Bweragura, the latter being bequeathed to the 3rd defendant.

The plaintiffs further aver that the 3rd defendant has gone ahead to intermeddle with the estate of the deceased by collecting rent from the estate houses at Harukooto and letting out the land at Buzinda to miners of Pozzolana without the consent of the beneficiaries. The plaintiffs contend that the said will is a forgery and tainted with fraud.

In their joint written statement of defence, the 1st and 3rd defendants state that the late Clovis Rwahoima died testate on 9th October 2018, leaving a Will dated 13th July 2018 and was survived by 20 children and 3 widows. The 3rd defendant is one of the widows. Four days after his death, David Baguma read the said will to the family members and the heir was placed on his late father's chair. The 1st and 2nd defendants then applied for letters of probate but a caveat was lodged to stop the grant of the same.

The defendants further contend that the late Clovis Rwahoima and the 3rd defendant had formed Mawenu Growers Co-operative Society Ltd and transferred some of their properties to the same entity for several purposes including bidding for government contracts. Before the death of the late Clovis Rwahoima, Mawenu Growers had passed a resolution to sell some of its assets and 21 acres of the land at Saaka as well as LRV 1782 Folio 13 Plot 3/3A Ruhandika Street were sold to the said Clovis Rwahoima and the 3rd defendant jointly.

It is also the defendants' contention that it is the plaintiffs instead who have intermeddled with the estate of the late Clovis Rwahoima when they broke into the house at Harukooto and keep distressing tenants. They also witnessed the sale of the land at Bulyanyenje on top of doing several other acts against the estate. They pray for the dismissal of the suit with costs.

Representation and hearing

The plaintiffs are represented by M/S Mukiibi & Kyeyune Advocates. The defendants were initially represented by M/S Jingo Ssempijja & Co. Advocates and later by M/S Marlin Advocates. The hearing was by way of witness statements and cross examination. All parties filed written submissions.

At scheduling, the following issues were raised for determination by court:-

- *1. Whether the suit discloses a cause of action against the 1st defendant*
- *2. Whether the suit offends the doctrine of approbation and reprobation*

- *3. Whether the late Clovis Rwahoima left a valid will*
- *4. Whether some of the property mentioned and bequeathed in the alleged will form part of the estate of the late Clovis Rwahoima*
- *5. Whether any of the parties and/or beneficiaries intermeddled in the estate of the late Clovis Rwahoima*
- 6. *What remedies are available to the parties*

Issues 1, 2 and 6 will be handled separately while issues 3, 4 and 5 will be handled together.

Burden and Standard of proof

The burden of proof is upon the Plaintiff to prove his case on a balance of probabilities. **Section 101, 102 and 103 of the Evidence Act** provide that he who asserts a fact must prove it. Whoever desires any court to give the judgment as to any legal rights or liability dependent on the existence of the fact which he or she asserts must prove that fact exists.

The court has to be satisfied that the Plaintiff has furnished evidence whose level of probity is such that a reasonable man might hold that, the more probable conclusion is that for which the Plaintiff contends, since the standards of proof is on the balance of probabilities /preponderance of evidence (see *Lancaster Vs Blackwell Colliery Co. Ltd 1982 WC Rep 345* and *Sebuliba Vs Cooperative Bank Ltd (1982) HCB130*)

Court's determination

The evidence

The 1st plaintiff testified as **PW1**. He is a son and beneficiary of the late Clovis Rwahoima who died in October 2018. He stated in his witness statement that the late Clovis Rwahoima died intestate but four days after his death, the 1st defendant brought a document (**Pexh6**) claiming that it was the will of the late Clovis Rwahoima and the same was read by David Baguma. He further stated that in the purported will, the names of some of the children of the late Clovis Rwahoima were misspelled and the will distributed property that did not belong to the estate of the late Clovis Rwahoima. Such properties include a commercial house at Ruhandika Street Fort Portal and land comprised in LRV 1625 Folio 2 measuring 25.47 hectares at Buzinda Bwera and Bwiragura. The said properties belong to Mawenu Growers Cooperative Society Ltd. He referred to the respective certificates of title **Pexh1** and **Pexh2**. That the 3rd defendant fraudulently converted the said properties to her personal names by using forged resolutions.

PW1 further testified that the 3rd defendant has been intermeddling in the estate of the late Clovis Rwahoima by renting out estate land for the mining of pozzolana and does not keep the records of rent collections from houses. That the purported will of the late Clovis Rwahoima is a forgery as it purports to have been signed by the said Clovis Rwahoima who did not sign the same and the alleged witnesses signed on every page which was not the case with the purported testator.

In cross examination, **PW1** stated that he was in possession of the Sahara Pick-up which forms part of the estate. He also admitted to have requested for some money from the 3rd defendant to cater for school fees for his children but did not know that the UGX 1,000,000/= was proceeds from the sale of a cow which is also part of the estate of the late Clovis Rwahoima. He also noted that he did not have a report of the handwriting expert.

The evidence of Kato Paul (**PW2**) and Tusiime Joyce (**PW3**) is materially similar to that of **PW1**. Kato Paul is also a son of the late Clovis Rwahoima and Tusiime Joyce is one of the widows. In cross examination, Kato Paul also admitted to have obtained UGX 2,400,000/= from the 3rd defendant to cater for medical bills did not know that the money was proceeds from the sale of a cows which were also part of the estate of the late Clovis Rwahoima. **PW3** stated that she knew the signature of the late Clovis Rwahoima making reference to the deceased's passport which she said she had handed over to the 3rd defendant to take the deceased for treatment abroad. That was the only document she could refer to in respect to the deceased's signature because the deceased never used to write.

PW3 testified in re-examination that the names of some of her children like Dan Irumba, Nsungwa Lydia, Aheebwa Patrick, Masiko Joseph were missing in the alleged will.

For the defence, Mwamba David testified as **DW1** that he was a very close friend of the late Clovis Rwahoima who died on 9th October 2018 and left a will which was presented to the family, relatives and friends. He discovered that the said will named him and Mzee Rashid as executors. They applied for letters of probate as required by law but the process was halted by a caveat lodged by some of the beneficiaries of the estate. He is not aware of any foul play, forgery or any fraud on his part.

In cross-examination, **DW1** stated that he followed what was in the will to include properties in their petition for letters of probate.

Gertrude Rwahoima testified as **DW2** that she is the widow of the late Clovis Rwahoima who died testate on 9th October 2018. In the said will, of the late Clovis Rwahoima bequeathed some of his properties to his beneficiaries. For instance, the Sahara Pick-up Reg. No. UAG 989C was bequeathed to the 1st plaintiff, the Isuzu lorry was given to Jack Rwahoima and the maize grinding mill was given to Peter Kazooba. That she and the late Clovis Rwahoima were the founding members of Mawenu Growers Co-operative Society Ltd. When the said society encountered some financial hardships, they resolved to sell off some of the Society properties and the land in Buzinda, the land Ruhandika Street Fort Portal as well as the land at Saaka were sold by the Society. As such, these properties do not form part of the estate of the late Clovis

Rwahoima. DW2 denied participation in any form of fraud against the properties of the late Clovis Rwahoima.

Muhumuza Amos (DW3) testified that he was a very close friend of the late Clovis Rwahoima. DW3 introduced the said Rwahoima to a Lawyer called Rashid Kibuuka for purposes of making a will for the former. Three days after introducing him, DW3 was called to the said lawyer's chambers at London Chambers Kampala to witness Clovis Rwahoima's will which he did after seeing the said Rwahoima sign the will. A few days after the death of Clovis Rwahoima, the will was brought by Mwamba David (DW1) to be read and it was read to the relatives, family and friends and an heir installed.

In cross examination, DW3 stated that he signed on all pages of the will but Clovis Rwahoima only signed the last page. DW3 said that he saw the said Clovis sign the will.

Rugumayo Richard (DW4) testified that he was a nephew of the late Clovis Rwahoima. Sometime in 2018, he received a call from Rashid Kibuuka calling him to the said Rashid's office. On reaching the office, he was informed that Clovis Rwahoima had made a will and DW4 was requested to witness it. DW4 saw Clovis sign the will and he also signed. A few days after the death of Clovis Rwahoima, the will was brought by Mwamba David (DW1) to be read and it was read to the relatives, family and friends and an heir installed.

Kasaija Venonsio (DW5) testified to the fact that when the plaintiffs requested for some money from the 3rd defendant to cater for school fees for their children and medical bills respectively, the 3rd defendant authorised the sale of some cows that belonged to the estate of the late Clovis Rwahoima and the proceeds were given to the plaintiffs.

Issue 1: Cause of action against the 1st defendant

The parties chose to abandon this issue and I see no reason to delve into its resolution.

Issue 2: Offence to the doctrine of approbation and reprobation

Counsel for the defendants argued that the doctrine of approbation and reprobation is a principle where a person cannot both approve and reject an instrument. Counsel referred to the Court of Appeal case of **Energro (U) Ltd Vs Geoffrey Rubaramira & Anor CACA No. 183 of 2013** to buttress his argument. Counsel argued that a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn around and say it is void for the purpose of obtaining some other advantage. That is to approbate and reprobate the transaction.

Based on the said legal description of the principle, counsel for the defendants argued that the possession of the 1st plaintiff of the pick-up with exclusion benefit at the expense of other beneficiaries is a clear indication that the 1st plaintiff took benefit as bequeathed to him in the will. It is therefore inconceivable that the same person appears in court to challenge the validity of the will. This is a classic example of "blowing hot and cold". Further that the 2nd plaintiff took

UGX 2,400,000/= from the 3rd defendant to cater for some medical bills, which sums were proceeds of the sale of some cattle left by the late Rwahoima Clovis. Counsel noted that the suit offends this doctrine and prayed for dismissal of the suit.

Counsel for the plaintiffs on the other hand argued that it would be improper for a plaintiff to have two inconsistent claims. A plaintiff who elects to abandon one and pursue the other may not in general afterwards choose to return to the former claim. Counsel relied on the case of **Evans Vs Bartlam [1973] AC 473** to state as follows;

... **the doctrine of approbation and reprobation requires for its foundation inconsistency of conduct as where a man has accepted a benefit given to him by a judgment cannot allege the invalidity of the judgment which conferred the benefit**"

From the above background, counsel for the plaintiffs argued that there is no judgment that gave the plaintiffs a benefit and they turned against it. Counsel submitted that the 1st plaintiff has never registered the pickup in his names and is not currently using it. Also that the cows that were sold were not sold by the plaintiffs but rather Kasaija Venensio on the orders of the 3rd defendant. It has nothing to do with approbation and reprobation and that the suit does not offend the said principle.

Both counsel have exhibited extensive understanding of the principle of approbation and reprobation. The application of this principle is quite interesting. It is meant to trim the desire of overzealous claimants. A person cannot approve an instrument so as to get a benefit therefrom and at the same time disapprove the same instrument so as to get another benefit therefrom. This is what Musota J. A, as he was then, calls "blowing hot and cold" in the case of **Energro (U) Ltd Vs Geoffrey Rubaramira & Anor CACA No. 183 of 2013.** It may relate to any instrument from which a person can derive benefit and not necessarily a judgment as counsel for the plaintiffs seems to suggest.

The principle of approbation and reprobation is based on the doctrine of election, which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then, turn around and say it is void for the purpose of securing some other advantage." See **Elim Pentecostal Church Ltd Vs Muwayi Luke Jamine and others HCCS 320 of 2021.**

Turning to the case before court, there are two instances pointed out by the defendants as offensive to the principle of approbation and reprobation. In the will that is sought to be revoked, the 1st plaintiff was bequeathed the Sahara Pick-up No. UAG 989C. In his evidence, the 1st plaintiff admitted that he parked the said pick-up at his home. The second instance is the admission by the plaintiffs to have obtained monetary assistance from the 3rd defendant for school fees and medical expenses. The defendants state the said financial assistance was proceeds from the sale of cattle belonging to the estate of the late Clovis Rwahoima. The defendants argue that these are benefits that the plaintiffs have gotten and they cannot turn around to contest the validity of the will of the late Clovis Rwahoima.

I have looked at and I am persuaded by the recent UK High Court decision in **MPB Vs LGK [2020] EWHC 90** where the conditions for the application of the principle of approbation and reprobation are set. They include;

- **a. The approbating party must have elected, that is made his choice, clearly and unequivocally;**
- **b. It is usual but not necessary for the electing party to have taken a benefit from his election such as where he has taken a benefit under an instrument such as a will;**
- **c. The electing party's subsequent conduct must be inconsistent with his earlier election or approbation.* (underlining for emphasis)*

For the principle to apply, these conditions must be present. The question now is whether the plaintiffs clearly and unequivocally elected to take the shares as bequeathed to them in the will whose revocation they seek. I think this does not extend to the monies they received from the 3rd defendant as the same was not among the items bequeathed to them in the will so as to say they elected to take the money. With respect to the Sahara pick-up, I also find that the circumstances under which it got into the possession of the 1st plaintiff are not clear. I need to emphasise that the election must be clear and unequivocal.

A distinction needs to be drawn between a beneficiary who is in possession of estate property and one who has clearly and unequivocally elected to take the estate property in clear implementation of the contents of a testamentary disposition. I don't think the present suit offends the principle of approbation and reprobation. This issue is answered in the negative.

Issue 3. Validity of the will

In his written submissions, counsel for the plaintiffs argued that the will of the late Clovis Rwahoima that the 1st and 2nd defendants sought to execute was forged for reasons that the late Clovis Rwahoima did not sign on all pages of the will and yet the purported witnesses signed on all the pages. Further that some of the children of the late Clovis Rwahoima like Dan Irumba, Nsungwa Lydia, Aheebwa Patrick, Masiko Joseph were missing in the alleged will. Counsel argues that there could have been a will made by the late Clovis Rwahoima but was tampered with by removing pages and inserting pages where the late Clovis Rwahoima and his lawyer did not sign.

In response, counsel for the defendants relied on **Section 50(1) of the Succession Act then Cap 162** to laid down the criteria for determining how wills should be executed. Counsel argued that the will of the late Rwahoima Clovis was properly executed as testified by DW3 and DW4 who witnessed the same.

I note that the Succession Act Cap 162 was amended in 2022 and the amendment introduced the requirement of the testator signing on every page of the will (see section 47(1)(c) of the Succession Act Cap 268). However, the will in this suit was made allegedly in 2018 and the law that applies to it is the Succession Act Cap 162 before the 2022 amendment. For this instant will to be

valid, the provisions of Section 50 of the Succession Act Cap 162 must have been conformed to. The instant will must be in writing, dated and signed by the testator, and it must be witnessed by two or more attesting witnesses who must see the testator write, sign or affix his mark. By its nature, the will must establish the testator's wish and only take effect upon his death.

From the evidence of the defendants, DW1 testified that the Will was presented and read to the family, relatives and friends four days after the late Rwahoima's death. DW3 and DW4 witnessed the will and they testified that they went to the office of Kibuuka Rashid, a lawyer and witnessed the will after seeing the late Rwahoima sign. I have also looked at the impugned Will (**Pexh6**) and the same is purportedly signed by the late Rwahoima Clovis, witnessed by Muhumuza Amos, Rugumayo Richard and the Advocate Kibuuka Rashid.

The fact the witnesses went ahead and signed on every page of the Will which was not done by the testator does not in itself invalidate an already well executed Will. The validity of a Will could be determined on the grounds that it does not fall within the parameters set by law. For instance if the testator is not mentally sound, if it is not in writing, if it is not signed by the testator or properly witnessed and so on. This is not the case in the present suit.

There is the concern that some of the children of the late Clovis Rwahoima like Aheebwa Patrick, Dan Irumba, Nsungwa Lydia, Masiko Joseph, Musinguzi Gibson are missing from the will of their late father. However, the evidence of PW2 in paragraph 9 of his witness statement is that the names of the said children were misspelled rather than missing. I note that all the parties to this suit agree the late Clovis Rwahoima was survived by 20 children. I have examined the impugned Will and the same includes a list of 20 children. There is no allegation from any of the parties that any of the children included in that list is not a child of the late Clovis Rwahoima. I am more inclined to agree with the 2nd defendant's evidence that the names might have been misspelled, which alone would not invalidate the Will.

The plaintiffs did not also adduce sufficient evidence to prove that the signature of the late Rwahoima Clovis contained in the impugned Will was actually not his. It is my considered opinion that the Will of the late Clovis Rwahoima dated 13th July 2018 is valid and the same should be executed in accordance with its terms. This issue is answered in the affirmative.

Issue 4: *Whether some of the property mentioned and bequeathed in the alleged will form part of the estate of the late Clovis Rwahoima.*

Counsel for the plaintiffs argued that some of the properties contained in the Will do not belong to the estate of the late Clovis Rwahoima. Counsel relied on **Section 36 of the Succession Act Cap 162** and the case of **Fredrick Mawejje Vs Moses Makumbi Banalya Yawe & Anor HCCS No. 299 of 2014** to argue that a testator cannot dispose of in a Will, property that does not belong to him at the time of his death. Counsel stated that the commercial house at Ruhandika Street Fort Portal and land comprised in LRV 1625 Folio 2 measuring 25.47 hectares at Buzinda Bwera and Bwiragura belong to Mawenu Growers Co-operative Society Ltd.

Counsel for the defendants argued that DW2 ably testified that the said properties were sold by Mawenu Growers Co-operative Society Ltd.

I have looked at the certificates of title for the impugned properties. For the plot on Ruhandika Street Fort Portal (Pexh1) and land comprised in LRV 1625 Folio 2 measuring 25.47 hectares at Buzinda Bwera and Bwiragura (Pexh2). The former is said to be registered in the names of Mawenu Growers Co-operative Society Ltd. The latter in the names of the 3rd defendant. There have been several allegations of fraud labeled against the 3rd defendant by the plaintiffs in as far as dealings in the said properties are concerned.

I however note that Mawenu Growers Co-operative Society Ltd also commenced Civil Suit No. 033 of 2021 in this court in which these properties are a subject. It would be unfair to determine the fate of these properties in the present suit without the involvement of Mawenu Growers Co-operative Society Ltd. Should the result be against its interest, it would amount to condemning it unheard. Besides, the plaintiffs have not sufficiently disclosed the capacity in which they would have a right to claim for the properties belonging to Mawenu Growers Co-operative Society Ltd.

Should these properties be later found in Civil Suit No. 033 of 2021 to belong to Mawenu Growers Co-operative Society Ltd, then the executors of the Will of the late Clovis Rwahoima have remedies available to them at law.

This issue is differed for determination in Civil Suit No. 033 of 2021

Issue 5: Intermeddling

A person is said to intermeddle with the estate of a deceased person if he or she takes possession or disposes of the property of the deceased or does any act that ought to have ordinarily been done by the personal representative of the deceased (See **Section 265(2) Succession Act Cap. 268**)

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Any act done that is detrimental to the estate may be looked at as an act of intermeddling. It is the submission of counsel for the plaintiffs that the 3rd defendant forged the Will of the late Clovis Rwahoima and this amounts to intermeddling.

Counsel for the defendants argued that the plaintiffs did not prove forgery against the 3rd defendant and that the 3rd defendant has never assumed the powers of the executor.

I think the question of intermeddling should be looked at differently in so far as beneficiaries to an estate are concerned. This is in relation to the mere fact of possession amounting to intermeddling. It is always proper for the estate of a deceased to be preserved in good condition after the demise especially by the beneficiaries as they go through the process of acquiring letters of administration to the estate. I think to them, intermeddling should only stretch to acts that are detrimental to the estate. The question to be asked is if the beneficiaries should let the estate waste away as they wait for the grant of letters of administration or of probate. I don't think this was the intention of the law.

It was the testimony of PW1 that he is in possession of the Sahara Pickup which forms part of the estate of the late Clovis Rwahoima. Should this also be considered as intermeddling? I think not. The plaintiffs have not also presented sufficient evidence of the forgery of the Will or any other acts that may be considered as intermeddling.

This issue is answered in the negative.

Issue 6: Remedies

Consequent to the discussion of all the issues above, the plaintiffs' suit fails and I make the following orders;

- a. This suit is dismissed with costs to the defendants.
- b. Consequent to the findings of the court on the validity of the Will of the late Clovis Rwahoima, the 1st and 2nd defendants herein shall proceed to obtain letters of probate in accordance with the law.

It is so ordered

Dated at Fort Portal this 30th day of September 2024.

Vincent Emmy Mugabo Judge

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