

UGANDA / JUDGMENT

Ssajabbi v Nabatanzi (Miscellaneous Cause 1 of 2020) [2022] UGHCFD 35 (1 April 2022)

[2022] UGHCFD 35

COURT

HC: Family Division (Uganda)

BEFORE

Komuhangi, J

CASE / FILE NUMBER

Miscellaneous Cause 1 of 2020

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA
(FAMILY DIVISION) MISCELLANEOUS CAUSE NO. 01 OF 2020 SSAJABBI BENNARD
..... APPLICANT VERSUS NABATANZI CATE
..... RESPONDENT

RULING

BEFORE: HON. LADY JUSTICE ALICE KOMUHANGI KHAUKHA

Introduction

This ruling is in respect of an application brought by way of Notice of Motion under Section 98 of the Civil Procedure Act, Cap. 71 and Order 52 Rules 1 and 2 of the Civil Procedure Rules S. I 71-1. The application seeks for orders among others, that an eviction Order doth issue against the respondent in respect to the 1st "kibanja", an Order against the respondent to move to the 2nd "kibanja" as per the WILL of YOWANA BUKENYA (deceased) and that the costs of the application be provided for.

Appearance and Representation.

When the application first came up for hearing the applicant was represented by Ms. Magoola Miriam from Mutumba & Co. Advocates while the respondent was represented by Mr. Lubega Fred from Tetrad Advocates.

The application

The application is supported by the affidavit of Ssajabbi Bennard (hereinafter referred to as "**the applicant**"). The respondent also filed an affidavit in reply to the application to which the applicant made a rejoinder. The applicant was also examined on oath while in court. Both counsel filed written submissions, citing authorities and the same have been considered in this ruling.

Facts

The facts as deduced from the pleadings, oral evidence, and written submissions by counsel are as follows:

The applicant is the heir and the Administrator of Bukenya Yowaana (hereinafter referred to as "**the deceased**") while the respondent is the widow of the deceased and a stepmother to the applicant. The deceased died testate and a copy of the WILL written in Luganda with its translation was attached to the application. The applicant contends that in the WILL, the deceased gave a particular piece of land (2nd kibanja) to the respondent where she should reside but she has since refused to go to that piece of land and instead insisted on remaining on the piece of land (1st kibanja) that was not given to her. The applicant further states that as the Administrator of the estate of the deceased, he has made efforts to have the respondent move to the 2nd "kibanja" but it has been in vain. On the other hand, the respondent insists that where she is currently staying (1st kibanja) is where the deceased left her and that is what was given to her in the WILL.

It is against this background that this application was brought to this honorable court for the determination of the issues raised in the said application.

The applicant raised the following two issues for determination:

- 1. *Whether the respondent is entitled to stay on the 1st "kibanja"; and*
- 2. *What are the remedies available?*

The applicant in his affidavit and in counsel's written submissions, it is contended that the deceased died testate and stated in the WILL that the respondent should live in the home on the 2nd "kibanja" but she has insisted and remained on the 1st "kibanja".

Counsel for the respondent on the other hand raised three preliminary objections and did not submit on the substance of the application. The following are the objections as raised by counsel for the respondent;

- (a) That the subject of the application is contentious in nature whose evidence cannot be properly brought by affidavit;
- (b) That the application is prematurely before the court for lack of consensus as required by the WILL and as such cannot be maintained;

- (c) That the applicant being the administrator/executor lacks locus standi to commence this suit in his individual capacity.

While arguing the first preliminary objection, counsel for the respondent relied on the case of *Zalwango Elvason and anor Versus Dorothy Walusimbi and another Originating Summons No. 03 of 2013* where Hon. Justice Godfrey Namundi while citing the case of *Kulusumbai Versus Abdul Hussein (1975) EA 708* observed thus,

"the procedure by originating summons was intended to enable simple matters to be settled by the court without the expense of bringing an action in the usual way, not to have court determine matters which involve a serious question".

Counsel argued that this was a contentious matter requiring a host of oral evidence and should have been brought by way of a Civil Suit.

On the other hand, counsel for the applicant argued that this was a family matter which is in the knowledge of both parties and there was no host of evidence required to be brought in court because the contention is on the interpretation of the WILL in relation to the wishes of the deceased.

I wish to observe that this matter was brought by way of Notice of Motion and not Originating Summons. Whereas this matter should have been brought under O. 37 of the Civil Procedure Rules (CPR), the same was brought under O.52 CPR. In my view, this does not go to the root of the substance of this matter and does not occasion any miscarriage of justice. The issue I have to determine is whether the matter before me could be disposed of by affidavit evidence or it is contentious to require a host of oral evidence.

Upon reading the pleadings in this matter, I formed my mind that this was a simple matter which the respective advocates would resolve with their clients. I find that the issue before me is for interpretation of some provisions of the WILL and I believed the advocates would assist the parties in explaining those provisions that seem to be unclear to the parties. I, therefore, gave parties time to have the WILL explained by the advocates but the discussions were not fruitful. Having said that, I find that matter before me is not contentious and does not require a host of oral evidence as argued by counsel for the respondent. The first objection therefore fails.

Regarding the second preliminary objection, it was argued on behalf of the respondent that this matter was prematurely brought to court because the WILL of the deceased required the consensus of all the family members before taking any action. According to the respondent, the applicant filed this application without seeking the consensus of all the family members. The applicant on the other hand in his affidavit in a rejoinder in paragraph 3 avers that the applicant has engaged several offices including the Resident District Commissioner, Mpigi, the LCI Chairman Kanyike Butega, and Police for meetings requesting the respondent to occupy the second "kibanja" but the respondent has vehemently refused to do so. That position was not contested by the respondent.

As already observed, I also gave the parties an opportunity to reach an amicable position on this matter and after a long period of time, the parties returned with no positive progress. It is, therefore, possible that getting the consensus of some family members has not been easy, especially the respondent and her biological children who were always accompanying her in court. Consequently, I find that this application was not brought prematurely and this objection also fails.

The last objection is that the applicant lacked locus standi to file this application. The respondent's counsel's contention is that though, the applicant is an administrator of the deceased's estate, he brought this application in his individual capacity. I did not understand this argument because it is not in dispute that the applicant is the lawfully appointed administrator of the estate of the deceased. A copy of the Letters of Administration (with WILL annexed) was attached to the application. As an Administrator, the applicant has a duty to execute the wishes of the deceased and in a case where it is alleged that there is defiance to the wishes of the deceased as contained in the WILL, it is the administrator's duty to seek remedy in furtherance to the execution of the WILL. I only find that the applicant did not indicate on the title to the Notice of Motion that he was acting in his capacity as the administrator. However, the content in the affidavit clearly describes the applicant as the administrator of the deceased's estate. This objection also fails.

Having overruled the respondent's preliminary objections, I will proceed to address the issues raised by the applicant as follows;

1. Whether the respondent is entitled to stay on the 1st "Kibanja"

Paragraph 6 of the deceased's WILL describes the wealth of the deceased as follows;

- 1. One usufruct at Kaboja
- 2. Two usufructs at Kanyike
- (a) The usufruct piece of land at our ancestral ground has one main house thereon and a four-roomed servant's quarter which are all roofed with red iron sheets.
- (b) In the second usufruct piece of land, I intend to construct thereon a house. I also confirm that the two usufruct pieces of land are registered in my name YOWAANA BUKENYA. No one including the heir should ever transfer ownership or obtain a share on these two pieces of land. My children and grandchildren shall enjoy the benefits that accrue from the property located on these pieces of land.

The deceased went ahead to bequeath the second usufruct piece of land at Kanyike to his seven children whom he named and further stated that the heir should take care of the said property in coordination with all his siblings.

Later in another item marked as 3, the WILL stated;

"The widow should remain in the second usufruct piece of land at Kanyike, taking care of the children. But she has no ownership over the home nor the property. No one should ever chase her away. Children are also allowed to stay at home, but they neither have ownership over the home nor the property in the home"

The contention in the case before me is that whereas in the WILL, the deceased stated that the widow (respondent) should stay in the home in the second usufruct piece of land (2nd Kibanja), the respondent lives on the first usufruct piece of land (first kibanja) and has refused to move to the second Kibanja contrary to the WILL and the wishes of the deceased. On the contrary, the respondent insists she was staying with the deceased on the first kibanja and he told her to remain in that same home.

I find that in the WILL, the deceased clearly described the two pieces of land at Kanyike. Although he does not specifically name the 1st one, he describes it by what it is and what it contains. He described it as the ancestral ground and states it has one main house and a four-roomed servant's quarter all roofed with red iron sheets.

The other piece of land is clearly described as the second usufruct piece of land where he intended to construct a house. He went ahead to bequeath that second piece of land to his seven children and later stated that the widow should remain in the home on the second piece of land and take care of the children on that land. He also stated that the widow had no ownership of the property nor the home but nobody should chase her away.

From the above, it is clear that the deceased did not specifically bequeath the first kibanja to anyone. This, in my considered opinion clearly indicates that the deceased wished the first kibanja which had a home and the servant's quarters to remain as ancestral grounds and for the benefit of all his children and grandchildren. This is because after describing the 1st and 2nd Kibanja, he stated "I also confirm that the two usufruct pieces of land are registered in my name YOWAANA BUKENYA. No one including the heir should ever transfer ownership or obtain a share on these two pieces of land. My children and grandchildren shall enjoy the benefits that accrue from the property located on these pieces of land"

The 1st Kibanja therefore, does not belong to the late Magadalene Balyowere as claimed by the applicant because from the evidence of the applicant, the said Balyowere had left the home for a long time and married elsewhere.

However, the deceased bequeathed the second kibanja to his seven children who are the biological sons and daughters of the respondent. It is not clear why the deceased bequeathed his properties the way he did but those were his wishes which are in my view are clear.

A WILL expresses the wishes of the deceased regarding the management of his or her affairs when he or she is dead. It becomes a paramount duty of the executor or the administrator to execute the wishes of the deceased.

It is also undisputed evidence that before the deceased died in 2013, he had built a house in the second kibanja. He had indicated in the WILL that he intended to build a house in the second kibanja. He could never have built a house in the second kibanja if he did not wish anyone to stay in that home. Currently, the home is unoccupied. Consequently, therefore, since the deceased wished the respondent to remain in the home on the second kibanja with her biological sons and daughters, it is only right and just that his wishes are respected by all. This application, therefore, is allowed on the following Orders;

- (a) The respondent Cate Nabatanzi shall vacate the home on the 1st kibanja within sixty days from the date of this Order and in any case not later than 1 st June 2022.
- (b) The respondent together with her biological sons and daughters shall move to the home in the second kibanja which was bequeathed to them by the deceased.
- (c) The home on the first kibanja does not belong to the late Magdalene Balyowere as claimed by the applicant. It shall remain a family home for YOWAANA BUKENYA for the benefit of ALL his children and grandchildren as per the wishes of the deceased under the management of the Administrator. This is because it also contains the ancestral grounds;
- (d) The applicant shall take care of the home on the 2nd kibanja, respondent and his brothers and sisters borne by the respondent as instructed by the deceased in the WILL.
- (e) Each party shall bear its own costs.

I so order.

Dated at Kampala this 1st day of April 2022.

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Alice Komuhangi Khaukha

JUDGE 1/04/2022

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