

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

CIVIL SUIT NO. 417 OF 2021

5 **VITTA FAUSTINE WILOUJJA**

(Suing as the administrator of

the estate of the late Zolo Mambo).....PLAINTIFF

VERSUS

10

SERWA ATTWANETDEFENDANT

JUDGMENT:

Before: Lady Justice Alexandra Nkonge Rugadya

Introduction:

15 The defendant, Ms Serwa Attwanet claims to be a widow of the late Mambo Zoro who died intestate and who did not leave behind any known biological child or blood relatives.

Upon his demise, the plaintiff, Mr. Vitta Faustine Wiloujja was appointed the administrator of his estate. He filed this suit against the defendant seeking

20 among others:



a declaration that the land/property comprised in **Busiro Block 384 plot 367 land at Sekiunga** belongs to the estate of the late Mambo Zoro and not the defendant; a declaration that the defendant's action of meddling with the estate by trying to register the suit property into her names was unlawful; a permanent
5 injunction to restrain the defendant and/or any of her agents from carrying out any unauthorized activities on the suit land/property.

Background to the case:

By way of a brief background, the late Mambo Zoro acquired a *kibanja* at Ssekiyunga Busiro on 29th October, 2003 from one Kasana Christopher.

10 In 2013, the plaintiff who referred himself as the deceased's nephew was granted letters of administration to the deceased's estate. The *kibanja* in dispute was part of titled land registered under the names of Dr. Nganwa comprised in **Busiro block No. 394 plot 367**, land at Sekiyunga.

He filed a suit against the defendant who claimed to be the widow of the late Zoro
15 Mambo and also further claimed that the home of the deceased constituted their matrimonial property, which claims the plaintiff however refuted.

The defendant maintained on her part that the plaintiff had no relationship with the deceased and had fraudulently obtained letters of administration when he stated in his application that the deceased did not leave a widow.



That the plaintiff and his father distributed to themselves properties under the estate when they were fully aware that they were not entitled to benefit from the estate as they were not related to him.

At the scheduling, the only agreed fact was that on the 13th March, 2013 the plaintiff had been granted letters of administration in respect of the estate of the late Mambo Zoro.

Representation:

The plaintiff was represented by ***M/s Nuwagira Tusiime & Co. Advocates.*** The defendant was represented by ***M/s Kajeke, Maguru & Co. Advocates.***

10 **Issues:**

The following issues were identified for this court to address:

1. Whether the suit property belongs to the estate of the late Zoro Mambo;

15 ***2. Whether the defendant's actions of trying to register the suit property into her names amounted to intermeddling with the estate property.***

Issue No. 1: Whether the suit property belongs to the estate of the late Zoro Mambo

It is the plaintiff's claim that the suit land belongs to the estate of the late Mambo Zoro, having acquired it by way of purchase from Mr. Kasana Christopher on

 3

29th October, 2003 and therefore contended that it belonged to the estate of the late and subject for distribution.

Testifying as **Pw1**, he tendered in a purchase agreement: **PExh 8a/b** and informed court further that prior to his death Mambo Zoro had constructed his home on the suit property which the defendant now seeks to take over.

He disputed the defendant's right to own the suit property contending that there was no such proof of any marriage between her and the deceased. That the evidence which remained unchallenged was that prior to his demise the two had already separated.

Pw2, Bonganwa Charles who was the plaintiff's father was referred to by the plaintiff as a brother to the deceased. He confirmed in his evidence that he had been a witness to the purchase agreement. Further, that before the deceased entered his newly constructed house, he had given him the copy of the purchase agreement.

The defendant testified as **Dw1** and was the sole witness in her defence. She claimed to be the widow through her customary marriage to the deceased and therefore the sole beneficiary to his estate. She also confirmed having received **Ugx 12,000,000/=** as part of her share from his estate.

The defendant however denied the claim that **Pw1 and Pw2** were beneficiaries to deceased's estate since they had no blood relationship between them. She informed court that the plaintiff had through misrepresentation fraudulently acquired the letters of administration, an allegation which the plaintiff however



denied, claiming that no objection had been filed to challenge the grant of letters of administration, which he tendered in as **PExh 2**.

This court noted that the defendant had earlier on filed an application: **MA No. 133 of 2013**, seeking orders for the plaintiff/respondent to surrender the grant
5 to her.

The application was however withdrawn on 26th April, 2013 by consent of the family members. It was the defendant's claim that the consent had been a fraudulent scheme since she never appended her thumbprint to the said consent.

10 A perusal of the record indeed reveals that **DExh 2** (*consent to withdraw the application*) was signed by her former counsel from **M/s Musika, Mugisha & Co. Advocates**.

Analysis of the law:

At preliminary stages of the trial this court came to learn that both parties were
15 of Congolese origin. So was the deceased, the late Mambo Zoro.

Article 237 of the Constitution of Uganda spells it out clearly that land in Uganda belongs to the citizens of Uganda. Non-citizens may only acquire leases to land, in accordance with the laws as prescribed by Parliament.

For any contract to be legally enforceable there must be capacity to contract;
20 intention; consensus *ad idem* and valuable consideration. (**Greenboat**



Entertainment vs Kampala City Council, Civil Suit No. 0580 of 2003). (see also section 10(1) of the Contracts Act.)

It goes without saying therefore that the transaction between Kasana Christopher and a non-citizen for a *kibanja* portion was null and void since the
5 deceased being a non-Uganda did not acquire a lease over the land. As such therefore, he lacked the capacity to enter into a contract for the purchase of the *kibanja*.

But secondly, this court noted that there is no survey report to prove that the
10 said *kibanja* was actually part of the land owned by Dr. William Nganwa as claimed; or that he as the registered owner had been made aware of the purported transfer of the *kibanja*.

The requirement of consent is spelt out clearly in ***sections 34 and 35 of the Land Act, Cap.227*** which I will not reproduce here. Suffice to say that court
15 ought not to enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the court.

The illegality once brought to the attention of court overrides all questions of pleadings, including admissions thereon. ***(Makula International Ltd vs Cardinal Nsubuga Civil Appeal No. 4 of 1981).***

20 Where as in this instance the evidence led by the plaintiff proves an illegality, the court ought not to assist him/her. Following the death of Mambo Zoro, the said portion of the land therefore reverted to the registered owner.



That therefore sufficiently addresses **issue No. 1.**

Issue No. 2 : Whether the defendant's actions of trying to register the suit property into her names amounted to intermeddling with the estate property.

5 This is partly addressed.

The remaining interest in this issue that court needed to address under this issue therefore is what rights of occupation existed or were recognizable under the circumstances regarding the home left behind by the deceased on the land which he had irregularly acquired.

10 The plaintiff disputed the defendant's interest as a widow in the home left and contended that her acts of trying to obtain registration of the kibanja in her names amounted to intermeddling with the estate of the deceased.

PExh 7 was the memorandum of understanding signed by both parties in this suit by which it was agreed that the defendant would stay in the home of the
15 deceased until a later date when the same was to be distributed.

It is not in dispute that the plaintiff had obtained the deceased's gratuity from the Civil Aviation Authority (CAA) where the deceased used to work, which he had duly distributed. He thereafter filed an inventory which was tendered in as
DExh3.

20 In *clauses 1 and 6* thereof, the suit property was mentioned as part of the deceased's property. Counsel for the plaintiff in submission argued that the



defendant's claim of ownership; her continued stay in the suit property; masquerading as the true representative; threats to register the suit property in her names; and such other actions amounted to intermeddling with the estate, contrary to **section 268 of the Succession Act** and to the detriment of the
5 plaintiff.

The plaintiff while maintaining that the defendant and the deceased had lived together as man and wife, but later on separated, he acknowledged the fact that she had returned home to take care of the deceased while he was sick. The plaintiff nonetheless denied the existence of a valid customary marriage between
10 the two.

His point was that her care to the deceased prior to his death was duly appreciated by the payment made to her of **Ugx 22,000,000/=** (part of which was received by her lawyers) allowing her to stay in the house and use the land until the house and estate was distributed.

15 The plaintiff further relied on a letter from CAA, **PExh 4** which showed that the deceased never included her among his next of kin, which was confirmation that the defendant had no relationship with him. According to him she had no legal basis to retain the house as her personal property.

Through submissions by counsel, the defendant was also accused of frustrating
20 the distribution of the estate, a claim which she however refuted pointing out that upon filing the inventory in 2013 the plaintiff's role as the administrator had ceased.


8

Decision by court:

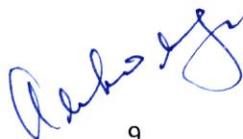
I have carefully perused the pleadings, evidence and submissions by both sides. The plaintiff's contention is that by a memorandum of understanding between him and the defendant, the defendant had agreed to vacate the property which she has since failed to do and in trying to get registered as owner thereof she was intermeddling with the estate of the deceased which he, the plaintiff is currently administering.

PExh 7, was tendered in as the memorandum of understanding, dated 18th April, 2013, which had been signed by the two parties.

10 In *paragraph 6* thereof, it was agreed as follows:

That the parties have by this memorandum agreed that no person including the second party shall have the right to disturb resettle or claim in any form of ownership of the family/matrimonial home as long as the first party [widow of the deceased] continues living and staying therein and free to cultivate on a plot of land located at Kiryammuli...belonging to the late until a later date when the same shall be distributed. (emphasis added)

In *paragraph 2* of the full inventory (**DExh3**), which the plaintiff filed upon distributing the estate, the defendant was listed as 'widow' and as one of the dependants. She received a share of **Ugx 12,000,000/=** and as per *Annexure D'* acknowledged receipt in her capacity as the widow.



In *paragraph 14* of his statement, the plaintiff maintained that the defendant was not legally married to the deceased and that he and other family members recognized her as someone who took care of the late Mambo Zoro prior to his death. Furthermore, in *paragraph 15* thereof, that she got her full share in the estate, in appreciation of the care she rendered to the deceased.

In disputing the relationship between the deceased and the defendant as that of a husband and wife, the plaintiff drew the attention of this court to a letter dated 19th July, 2012 by Civil Aviation Authority (CAA) which was addressed to the Administrator General.

In that communication, the names of the deceased's "family members" were listed and among these were the plaintiff (**Pw1**), Charles Bonganwa (**Pw2**); Angela N and one Rosemary Banura (as the deceased's wife).

The plaintiff however did not explain why it was the defendant and not Rosemary Banura who had benefitted from the estate. In her reaction to this issue, the defendant claimed that Banura was a sister to the plaintiff and died when the deceased was still alive.

This was an assertion which the plaintiff did not disown. It was fatal to the plaintiff's case since it implied that the deceased was husband to a woman whom he regarded as his 'daughter'.

The plaintiff as it were, in his petition for letters of administration over the estate claimed that the deceased left no widow, yet in the inventory **DExh 3** the defendant's name appeared as the widow and one of the dependants.

Indeed, if Rosemary Banura had been the wife/widow, assuming that she was still alive at the time, she and not the plaintiff ought to have applied for the grant. She would have been considered during the distribution of the estate, which had not been the case.

5 Regarding the perceived rights of the plaintiff in the estate, the plaintiff and his father seem to claim as *dependent* relatives to the deceased. It is not in dispute that they were not related to him by blood.

A dependant relative is defined under **section 2 (g)(i) of the Succession Act**, as *a wife/husband, son, daughter under 18 years or if above 18 years is wholly or*
10 *substantially dependent on the deceased.*

In **section 2(g)(ii)**, the expression includes *a parent, brother or sister ... who on the date of the deceased death was wholly or substantially dependent on the deceased for the provision of the ordinary necessities of life suitable to a person of his her station.*

15 In **section 2(v)** a son includes a step son, an illegitimate son and a son adopted in a manner recognized as lawful by the law in Uganda. The evidence led by the plaintiff shows clearly that none of these descriptions applied to him or his father as there was no evidence of such dependence or entitlement. The above show that the plaintiff was therefore not entirely truthful in his evidence.

20 By implication, counsel for the plaintiff sought to rely on the provisions of **section 30 of the Succession Act** which are applicable to a spouse. The section



provides that no spouse of an intestate shall take interest in the estate if at the death he or she was separated from the intestate.

The application of the above provisions and arguments as raised by the plaintiff were to say the least, self-defeating. The term separation ordinarily applies to a
5 married couple. It may be separation through an order of court or simply physical separation which implies staying apart.

On the one hand it was an acknowledged fact that both the memorandum of understanding and the inventory named the defendant as the widow. That the two had separated at some point was not a fact in issue.

10 Yet on the other hand, it was the claim by the plaintiff that the defendant had been home to take care of him, and that is why she received a share out of the deceased's estate.

I found the plaintiff's arguments rather difficult to reconcile. What however remained unchallenged was the fact that the defendant had lived with the
15 deceased and took care of him before he passed on. The administrator gave her part of the share and duly recognized as widow in the inventory which he filed.

Whereas therefore the defendant could not provide any proof that she was customarily or otherwise married to the deceased, there is no doubt that the two had lived together as man and wife.

20 The two even attempted to have a child between them. The deceased according to the plaintiff was incapable of having children (an allegation which however



could not be verified). In any case, it is rather immaterial that between them they had no child.

There is no dispute that she had left the home but later returned home to take care of him at his death bed. It would seem therefore that the plaintiff chose to
5 consider the defendant as a widow when it suited him, and disregard her as one when it came to the ownership of the matrimonial home.

The doctrine of approbate and reprobate serves as an estoppel and a rule in equity. Thus where a person knowingly accrues the benefits of an instrument, he/she is estopped from denying the validity or the binding effect of such
10 instrument.

The principle is based on the maxim *allegans contraria non est audiendus*, implying that when one utters statements contradictory to one another the same shall not be heard.

Secondly, the parole evidence rule is provided for under **section 92 of the**
15 **Evidence Act, Cap. 6**. From the said provision and decided cases, it is a well settled position of the law that oral evidence cannot be admitted or that even if admitted it cannot be used to contradict, vary or add to a written instrument.

The rule assumes that the formal writing reflects the parties' minds at a point of maximum resolution and hence, that duties and restrictions that do not appear
20 in the written document, even though apparently accepted at an earlier stage were not intended by the parties to survive. (**Akol vs Doka Civil Appeal No. 1**


13

of 2014.) The parties' intentions must be ascertained from the words they use in the instrument.

By virtue of **section 114 of the Evidence Act, Cap. 6** equity comes in, true to form, to mitigate the rigours of strict law. It will prevent a person from insisting
5 on his/her rights, whether arising out under a contract or on his title deeds or by statute, when it would be inequitable to do so having regard to the dealings which have taken place between the parties. (**Ibaga vs Tarakpe Civil Appeal No. 00 an04 of 2017**).

The above principles equally apply to the present case. The plaintiff having
10 agreed in **PExh 7** and **DExh 3** that the defendant was the widow of the deceased cannot by his oral testimony deny that she was not.

Was there intermeddling by the defendant?

Section 268 of the Succession Act makes it an offence for a person who does any act which belongs to the office of the administrator.

15 On the issue of whether the property was regarded as family/matrimonial property it is evident from the documents referred to above that the property in dispute which the defendant refused to vacate was duly acknowledged by both parties as residential/matrimonial property.

In clause 1 of the inventory (**DExh 3**), the administrator disclosed that the
20 deceased had left behind a piece of land at Kiryammuli village and a residential house.



In *clause 6*: it was stated thus:

The residential house mentioned in 1 above is occupied by Serwa Atwanette widow as well as the unregistered piece of plot is being used by the widow for cultivation.

5 Generally, the courts and the law have endeavoured to provide a definition of matrimonial home which is essentially a residential holding for purposes of intestate succession.

Section 26 of the Succession Act defines residential holding as a place normally occupied by a person dying intestate prior to his death as his principal
10 residence.

Counsel for the defendant referred to **section 1 of the Succession Act** which allows the surviving spouse to occupy a residential holding of an intestate. By virtue of **section 26** the residential holding is excluded from distribution. The term residential holding is often used interchangeably with family/matrimonial
15 home.

Under section 38 of the Land Act, Cap 227 family/matrimonial property connotes land on which is situated the ordinary residence of a family; and from which the family derives sustenance; and which is treated as family land according to the norms, culture, customs, traditions or religion of the family;

20 Ordinary residence means the place where a person resides *with some degree of continuity apart from accidental or temporary absences*. It is property where the


15

family may also derive sustenance or which the family treats as the principal place that provides the livelihood of the family.

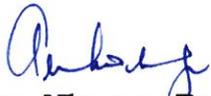
The property in dispute was a residential or family home where the defendant and the deceased resided at the time of death.

5 All in all, such inconsistencies and shifting of goal posts as identified in the plaintiff's evidence on whether or not the defendant was a widow and the extent of her entitlement to property; and the inconsistencies detected on the question as to whether or not the property in issue was matrimonial property, dented the credibility of the plaintiff's evidence in this suit.

10 Under those circumstances, the issue of intermeddling with the estate did not arise.

The plaintiff in summary, did not come to court with clean hands. For those reasons therefore as highlighted, his action against the defendant cannot succeed.

15 Costs awarded to the defendant.



Alexandra Nkonge Rugadya

Judge

12th June, 2023.

G 13/6/2023.