THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA-MAKINDYE
(FAMILY DIVISION)
ORIGINATING SUMMONS NO. 07 OF 2019
(Arising from Administration Cause No. 149 of 2010)

1. SSERUNJOGI CHARLES MUSOKE
2. KATAMBA JOHN SSEMAKULA……. PLAINTIFFS
(Administrators of the estate of the Late John Sserunjogi Mukasa)

VERSUS

TONY NKUUBI ……..…….. DEFENDANT

RULING

BEFORE:HON. LADY JUSTICE KETRAH KITARIISIBWA KATUNGUKA

Introduction

[1] This suit is brought by Sserunjogi Charles Musoke and Katamba John Ssemakula, under **Order 37 rule 1(a), (b), and (g) and r.8 of the Civil Procedure Rules S.I. 71-1,** by way of Originating Summons, seeking declarations and/or orders that a paternity test be taken out by the defendant and Mulindwa Yusuf; that the bequest in the will of the Late John Sserunjogi Mukasa is void; that costs for this suit or incidental thereof be awarded to the applicants.

[2] The application is supported by the affidavit of Sserunjogi Charles Matovu and Mulindwa Yusuf, but the facts are that; the plaintiffs are the biological children of and administrators/executors of the will of the estate of the Late John Sserunjogi Mukasa; that the deceased bequeathed his property to his children with the belief that they were his biological children; that the plaintiffs upon obtaining grant of Letters of Administration vide Administration Cause No. 149 of 2010 distributed the estate according to the will of the deceased ; that before the administrators finished the distribution and execution of the deceased's will, Mulindwa Yusuf approached them and

the clan head claiming that the defendant Tony Nkuubi was his son and not a son of the deceased; that the plaintiffs requested the defendant to take out a paternity test with the said Mulindwa Yusuf but he declined to do so unless compelled by a court order; the plaintiffs are constrained to give the defendant his share of the estate without ascertaining his paternity; the plaintiffs now seek a paternity test to be carried out on the defendant and Mulindwa Yusuf.

[3] The application was opposed by the defendant who filed an affidavit in reply.

Representation

[4] The plaintiffs are represented by Counsel Nsereko Sauda of M/S Nsereko, Mukalazi & Co. Advocates while the defendant is represented by M/S Byarugaba & Co. Advocates.

The case.

[5]The gist of the application is that the applicants/plaintiffs are the biological children and beneficiaries to the estate of Late John Sserunjogi Mukasa, and now dispute the paternity of the defendant (who was included as the deceased's son in his will) after a one Mulindwa Yusuf approached them and the clan head claiming that the defendant Tony Nkuubi was his son and not a son of the deceased. The applicants in challenging the paternity of the defendant seek to have the bequest made to him void in the event that they determine that he is not the deceased's son.

[6] The issues for determination are;

i) ***Whether this Application is properly before court***

ii) ***Whether the application has merit***

Resolution of Issues

Whether this Application is properly before court.

[7] Counsel for the respondent raised a preliminary objection to the effect that the plaintiffs have no locus because the questions framed do not fall within those set out under O.37 r 1 (a), (b) and (g) and that the procedure is only available where there is a question arising directly from/ matters touching the proper administration of the estate. Counsel prayed that the suit be dismissed as it was illegally before court. Applicants' counsel in rejoinder argued that the point of law was not pleaded and neither does it arise by clear implication out of the pleadings and it is therefore diversionary. She relied on the case of Mukisa Biscuit Manufacturing Co Ltd v West End Distributors [1969] E.A 696.

Order 37 rule 1 a, b and g of the Civil Procedure Rules provides that the executors or administrators of a deceased person may take out an originating summons, for such relief of the nature or kind as specified in the summons or as the circumstances of the case may require, for the determination, without the administration of the estate or trust, of questions affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir; the ascertainment of any class of creditors, devisees, legatees, heirs, or others; and the determination of any question arising directly out of the administration of the estate or trust.

Decision of court.

[8] It is trite law that a preliminary objection can be raised any time before judgment. (See **Major General David Tinyefunza and the Attorney General Constitutional Appeal No. 1 of 1999 [Unreported].** It should also not be raised as an afterthought and should therefore be raised at the earliest point possible. I agree with the plaintiffs' counsel on the decision in the

Mukisa case (supra) that a preliminary objection is a point of law that should be pleaded or arise by clear implications from the pleadings.

[9] A look at the affidavit in reply shows the defendant pleaded under paragraph 7 that the plaintiffs have no locus as the questions they seek to determine are frivolous. I therefore disagree with counsel for the plaintiffs that the point of law was not pleaded.

Court shall now proceed to determine the preliminary objection.

It's counsel for the respondent's contention that the plaintiffs have no locus because the questions framed do not fall within those set out under O.37 r 1 (a), (b) and (g). This is opposed by the counsel for the plaintiffs who maintains that it is a matter properly brought by originating summons.

[10] The law on originating summons was discussed in the case of **Kulsumbai Gulamhussein Jaffer Ramji and another v Abdulhussein Jaffer Mohamed Rahim, Executor of Gulamhussein Jaffer Ramji, Secretary, Wakf Commissioners, Zanzibar and others** [1957] 1 EA 699 (HCZ) wherein court stated that "Such procedure is primarily designed for the summary and 'ad hoc' determination of points of law or construction or of certain questions of fact, or for the obtaining of specific directions, usually for the safeguarding or guidance of persons acting in a fiduciary capacity or acting under the general directions of the court, such as trustees, administrators, or (as here) the court's own execution officers . . . It was pointed out in In re Giles(2) (1890), 43 Ch. D. 391, that such procedure "was intended, so far as we can judge, to enable simple matters to be settled by the court without the expense of bringing an action in the usual way, not to enable the court to determine matters which involve a serious question."

O. 37 requires administrators seeking to ascertain certain questions such as the class of legatees (among others) and any question affecting the rights or interest of the person claiming to be a legatee, without the administration of the estate, to proceed by way of originating summons. A legatee is one who is named in a will to take personal property; one who has received a legacy or bequest. Loosely, one to whom a devise of real property is given (Black's Law Dictionary 8th ed. 2004). I find that this is the case before court since what seeks to be determined is whether the defendant is a beneficiary/legatee by virtue of his being or not being a child of the deceased and thus entitled to the property (land at Wattuba) gifted to him under the deceased's will.

[11] It is not disputed that the plaintiffs are the administrators of the deceased's estate who now seek the guidance of court in their fiduciary capacity as administrators to determine whether the defendant/respondent is a beneficiary entitled to the share of the estate granted to him in view of the circumstances and the claim that he is not a son to the deceased.

I find that the ascertaining of beneficiaries for the purpose of administration is a straight forward matter since the class of beneficiaries is already ascertained within the law and in the Will of late Serunjogi John Mukasa.

The application therefore is properly before court and the preliminary objection thus fails and is accordingly dismissed.

Whether the application has merit

[12] The applicants in their evidence state that the defendant was named in the will as a child of the deceased born to Noelina Namaganda and the deceased bequeathed property at Wattuba to the children of Noelina Namaganda. The second plaintiff and the clan head were then approached by Mulindwa Yusuf who claimed to be the father to the defendant and the defendant was then

requested to take a paternity test with the said Yusuf which the defendant refused to do in the absence of a court order.

In reply, the defendant/respondent states that he was born of the Late Sserunjogi and Noelina and that the applicants have no locus to challenge his paternity which his father settled under the will.

[13] Counsel for the plaintiffs/applicants argued that the construction of the term child in the will denotes lineal descendant in the first degree, and relied on Sections 86 (1)(a), 87 and 20 of the Succession Act for her argument. She argued that the defendant is not a child within the interpretation of the terms of the will and in light of the Succession Act and that therefore the defendant should be compelled to conduct a DNA test.

The defendant pleaded that the application is frivolous thus imputing that it was brought in bad faith and he states in his reply that the application is intended to frustrate the process of implementing the will. The plaintiffs in rejoinder stated that the defendant was given property according to the will before his paternity was questioned. The plaintiffs attached the Certificate of Title and sale agreement of land at Wattuba Block 29 Plot 838 wherein the defendant is registered as a joint proprietor with Katamba Ssemakula John, Ssemakula Ronald and Nakijuba Prossy. There is evidence to show that the administrators (plaintiffs) have already even distributed to the defendant a portion of the estate that was due to him under the will. I find no proof of bad faith on the part of the plaintiffs as alleged by the defendant.

[14] Courts have held that in exercising its discretionary power to grant or not to grant the relief (DNA testing), court should be convinced that the application is in good faith, and that it is not actuated or designed to economically exploit or embarrass or is otherwise an abuse of the process of court. (See MW v KC Kakamega High Court Misc. Application No. 105 of 2004).

[15] The plaintiffs seek to have a DNA test carried out on the defendant so as to determine his paternity. The defendant objects to having the paternity done as he avers that the deceased was his father. The affidavit of Yusuf Mulindwa states that he reported his claim that he is the defendant's father after the deceased's death and that he is willing to partake in a DNA test. The plaintiffs in their affidavit in rejoinder replied to the defendant's assertion that all children born in wedlock are legitimate and stated that Mutyaba Joseph and Nankinga Doreen who were born to Noelina Namaganda, while Noelina was married to the deceased were actually not children to the deceased. The deceased did not include within his will the said Mutyaba and Nankinga as his children born of Noelina and it can thus be imputed that his intention within his will is that any child not born of him should not benefit from his estate.

It would thus require conclusive proof that any child that is allegedly not one of the deceased should prove their paternity and settle the matter at once. In the case of Margaret Tumwine Tumushabe & 4 Ors v Brian Asiimwe, Consolidated MA 125 and 132 of 2014, Arising from Civil Suit No. 15 of 2013 the court held that DNA results are scientific proof of paternity and the court was more inclined to believe the DNA report about the respondent's paternity because it is scientific and not based on mere information.

[16] Counsel for the defendant argued that all children born in wedlock are presumed to be legitimate. Counsel for the plaintiffs relied on the case of Knowles v Knowles (1962) 1 All ER that this presumption is rebuttable and I agree (see also the case of Preston Jones v Preston Jones [1956] 1 All ER 124). In situations such as this and in view of changing scientific research and innovations, the smoke may be cleared where administrators want to ensure that they perform their fiduciary duty and identify the actual beneficiaries, by prudently carrying out a DNA test.

In the Kenyan case of MMM v ENW M.A No. 7 of 2016, the court cited with approval the Indian case of BPs v CS Civil Appeal No. 6222 – 6223 of 2010 wherein the court observed that ". . . the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA is eminently needed . . . DNA should not be directed by court as a matter of course or in a routine manner, whenever, such request is made, whether it is not possible for the court to reach the truth without use of such test. . ."

[17] It is evident from the above decisions that an application for a DNA test in the circumstances would enable the administrators to determine who the children of the deceased are and thereby be able to administer the estate.

Regarding the issue of the bequest to the defendant, the issue is whether the respondent is entitled under the will. The will is not being contested but rather the bequest to the defendant in the event that he is not the deceased's child and so it must be settled as to whether he is a child of the deceased since the deceased intended to bequeath his property to his children. The entitlement of the defendant can only be determined based on the DNA findings.

[18] In the event that the defendant is found not to be a child to the deceased, then the bequest will be void as it would be contrary to the wishes of the deceased since a will represents the wishes of the deceased and the testator's intention is to be effected as far as possible (Administrator General v Teddy Bukirwa & Anor (1992 – 1993) HCB 192). The law on void bequests is also that a bequest is deemed void where it is made to a non-existent party and therefore if the defendant was believed to be a child and is subsequently found not to be a child of the deceased, then it cannot be said that he suits the description of a son as intended by the deceased.

The application has merit and therefore succeeds.

I am therefore granting the application and I hereby make the following orders;

1. The application is granted;
2. A DNA/Paternity test shall be carried out on the defendant and Yusuf Mulindwa;
3. The costs of this application shall be borne by the estate.

Dated at Kampala this 18th Day of September 2019.

KETRAH KITARIISIBWA KATUNGUKA
JUDGE