



**IN THE HIGH COURT OF UGANDA SITTING AT GULU**

Reportable  
Civil Appeal No. 011 of 2018

In the matter between

**OPIA THOMAS**

**APPELLANT**

And

**ODONGKARA MOSES**

**RESPONDENT**

**Heard: 28 August, 2019.**

**Delivered: 12 September, 2019.**

*Family Law — Revocation of letters of administration— The object of the power to revoke a grant is to ensure the due and proper administration of an estate and protection of the interests of those beneficially interested — Revocation of a grant typically involves one of two attacks, namely;- finding a material defect in the process leading up to the grant or submitting false, or fraudulent information to the court in support of the application — Failure to provide notice to a potential beneficiary too may constitute a just cause —The court has the discretion to make a grant De bonis Non to anyone else competent to administer the estate, provided it considers factors such as consanguinity, nature of interest, safety of estate and probability of proper administration and should grant letters of administration to those persons only to whom original grants might have been made — Pursuant to section 202 of The Succession Act, administration should be granted to the person entitled to the greatest proportion of the estate under section 27 of the Act — An administrator may be personally liable for costs for reckless and unreasonable behaviour that amounts to reprehensible conduct.*

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**JUDGMENT**

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**STEPHEN MUBIRU, J.**

Introduction:

- [1] The respondent sued the appellant seeking revocation for just cause, of a grant of letters of administration appointing the appellant as administrator of the estate of the late Lt. Col. Otto Valentino, a permanent injunction restraining him from further intervention in the affairs of the estate of the deceased, and order for an account of the assets, income and liabilities of the estate and the costs of the suit.
- [2] The respondent's case was that the late Lt. Col. Otto Valentino died from Khartoum during the year 1987 and was buried there. The appellant during the year 2013 applied for and was granted letters of administration to the estate of the late Yubu Obur on 31<sup>st</sup> May, 2013, by falsely declaring that un-surveyed land at Akworo Tee Chua village, Akworo Parish, Labongo-Amida sub-county, Chua West County in Kitgum District belonged to the estate of the late Yubu Obur, whereas it was the property of the late Lt. Col. Otto Valentino. The appellant subsequently during the year 2014, without the consent of the beneficiaries and family of the late Lt. Col. Otto Valentino, applied for and was granted letters of administration to that estate too on 1<sup>st</sup> April, 2014. The appellant thereafter put the property of the deceased to his personal use, to the exclusion of the beneficiaries of the estate. He claimed compensation for part of the estate of the deceased, acquired compulsorily by the Uganda National Roads Authority, without consulting the beneficiaries.
- [3] In his written statement of defence, the appellant denied having acquired the grant fraudulently. He attributed his inability to properly manage the estate and secure compensation for part of the estate of the deceased compulsorily acquired by the Uganda National Roads Authority, to the respondent's unjustified interference.

The respondent's evidence in the court below:

- [4] Testifying as P.W.1, the respondent, Odongkara Moses, stated that although he is a son of the deceased and the appellant his step-brother, he learnt of the grant only after the appellant claimed compensation for part of the estate of the deceased, that had been compulsorily acquired by the Uganda National Roads Authority at Akworo Tee Chua village.
- [5] P.W.2 Lam Cyril Baptist, the father-in-law of the deceased testified that before his death, Lt. Col. Otto Valentino and his wife Lanyero Hellen Otto had from the year 1983 lived at Akworo Tee Chua village, until they were displaced by the war in 1986. They had a permanent house on the land. The land was given to him by his late brother, Ismail Odida.
- [6] P.W.3 Acan Hellen testified that her late father, Ismail Odida, gave part of his land to the late Lt. Col. Otto Valentino when he married Lanyero Hellen Otto in 1983. They occupied the land and constructed thereon a five-roomed residential house while tilling the rest of the land.

The appellant's evidence in the court below:

- [7] Testifying in his defence as D.W.1, the appellant, Opia Thomas, stated that before the war he and his family were resident at Pagen Central village, Labongo Layam sub-county in Kitgum District. In the year 2008, they migrated to the land at Akworo Tee Chua village, Labongo-Amida sub-county, in Kitgum District. When applying for the grant in respect of the estate of the late Lt. Col. Otto Valentino, he published the public notification at Labongo Layam sub-county in Kitgum District instead of Labongo-Amida sub-county, in Kitgum District where the property of the deceased was situated.

- [8] D.W.2 Amone Lino testified that he is the appellant's paternal uncle. The late Lt. Col. Otto Valentino and his wife Lanyero Hellen Otto had in 1980 built a house and lived therein at Akworo Tee Chua village until they fled to Sudan in 1986 where he died in 1987. The appellant was brought to that home following the death of his mother Hellen Akwero at Paloga in 1989. Later as an adult, the appellant exhumed the remains of his mother from Paloga and reburied them on Lt. Col. Otto Valentino land at Akworo Tee Chua village. He then applied for and was granted letters of administration to the estate of the late Lt. Col. Otto Valentino. He claimed compensation from UNRA but the respondent blocked it.
- [9] D.W.3 Dolofino Abwor testified that she was ordinarily resident at Pagen Central village, Labongo Layam sub-county in Kitgum District. She migrated to Akworo Tee Chua village, Labongo-Amida sub-county, in Kitgum District twenty years ago. The late Lt. Col. Otto Valentino married Lanyero Hellen Otto in 1985. The respondent is the son of her co-wife, Lanyero Hellen Otto but the appellant is her son. D.W.4 Ajulina Abur testified that although borne of the same father, the appellant and the respondent are borne of different mothers. The appellant is older than the respondent and should be maintained as the administrator of the estate.
- [10] D.W.5 Acan Christine testified that the appellant is her biological brother. The respondent challenged the appellant for claiming compensation from UNRA for their late father's land at Akworo Tee Chua village without his knowledge. The appellant should be joined by some more relatives as administrators of the estate in order to resolve the dispute.
- [11] D.W.6 Bosco Olum Otto testified that the appellant is his biological brother and he is the elder brother to both parties. The dispute between the two step-brother springs from the decision to re-locate the remains of his mother and the claim for compensation from UNRA. He suggested that the two parties be appointed joint administrators of the estate.

Judgment of the court below:

[12] In his judgment, the trial Magistrate indicated that the two suits had been consolidated since they concerned the same estate. Both parties are children of the deceased Lt. Col. Otto Valentino and beneficiaries of his estate. The respondent became aware of the grant made to the appellant in respect of the estate of the late Lt. Col. Otto Valentino only when he applied for compensation for part of the estate of the deceased compulsorily acquired by the Uganda National Roads Authority (UNRA). The appellant did not obtain the consent of the rest of the beneficiaries. He advertised the fact of the application he made at Labongo Layam sub-county instead of Labongo Amida sub-county where the land is situated. The appellant listed the same property in respect of the estate of the late Yubu Obur in 2013 just as the ones he listed in respect of the estate of the late Lt. Col. Otto Valentino in 2014. He therefore obtained the grants unlawfully and both were accordingly revoked. Both the respondent and a one Bosco Olum Otto were granted letters of administration in respect of the estate of the late Lt. Col. Otto Valentino. D.W.3 Dolofino Abwor was ordinarily resident at Pagen Central village, Labongo Layam sub-county in Kitgum District and she moved to Akworo Tee Chua village, Labongo-Amida sub-county, in Kitgum District in 2008. The appellant was ordered to hand over vacant possession of the five roomed house formerly occupied by the late Lt. Col. Otto Valentino and his wife at Akworo Tee Chua village and the occupants directed to return to their homes in Pagen Central village, Labongo Layamo sub-county in Kitgum District. The costs of the suit were to be met by the estate of the late Lt. Col. Otto Valentino.

The grounds of appeal:

[13] The appellant was dissatisfied with the decision and appealed to this court on the following grounds, namely;

1. The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record and thus came to a wrong conclusion.
2. The learned trial Magistrate erred in law and fact when he decided that the respondent is the rightful owner of property situated at Akworo village, Akworo Parish, Labongo-Amida sub-county, Chua West County in Kitgum District, which issue was not in dispute in the suit.
3. The learned trial Magistrate erred in law and fact when he failed to appreciate the fact that the children of the late Otto Valentino are equal beneficiaries to the estate of the deceased.
4. The learned trial Magistrate erred in law and fact when he held that John Bosco Olum and the respondent be administrators to the estate of the late Otto Valentino without the family of the late Otto Valentino coming out with their own resolution on who should be administrators.

Arguments of Counsel for the appellant:

[14] In his submissions, counsel for the appellant, argued that there was no evidence to show that the appellant had committed any fraud and therefore it was wrong for the trial court to have cancelled both grants. It was wrong for the court to have declared the respondent owner of the property and to have appointed administrators of the estate in place of the appellant.

Arguments of Counsel for the respondent:

[15] In response, counsel for the respondent, submitted that the first ground of appeal is too general and ought to be struck out. The court came to the right conclusion since the appellant fraudulently attributed the same property at Akworo Tee Chua village first to the estate of the late Yubu Obur in 2013 and later to the estate of the late Lt. Col. Otto Valentino during the year 2014 two different administration causes. Whereas the property of the deceased was situated at Labongo-Amida

sub-county, in Kitgum District he instead placed the public notification at Labongo Layam sub-county in Kitgum District. He never sought the consent of the beneficiaries of the estate when he made the applications. The choice to revoke the grants and to instead appoint D.W.6 Bosco Olum Otto in his place was a proper exercise of discretion after consideration of all the available evidence. It was the evidence of P.W.2 Lam Cyril Baptist, the father-in-law of the deceased, and P.W.3 Acan Hellen, a daughter of the deceased, that before his death, Lt. Col. Otto Valentino had from the year 1983 lived at Akworo Tee Chua village exclusively with his wife Lanyero Hellen Otto and children borne of that wife. The court therefore made a correct decision that the land belonged to the respondent.

Duties of a first appellate court:

- [16] It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17 of 2000; [2004] KALR 236*). In a case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*).
- [17] The appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular, this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

The first ground of appeal is struck out for being too general:

[18] I find the first ground of appeal to be too general that it offends the provisions of Order 43 r (1) and (2) of *The Civil Procedure Rules* which require a memorandum of appeal to set forth concisely the grounds of the objection to the decision appealed against. Every memorandum of appeal is required to set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative, and the grounds should be numbered consecutively. Properly framed grounds of appeal should specifically point out errors observed in the course of the trial, including the decision, which the appellant believes occasioned a miscarriage of justice. Appellate courts frown upon the practice of advocates setting out general grounds of appeal that allow them to go on a general fishing expedition at the hearing of the appeal hoping to get something they themselves do not know. Such grounds have been struck out numerous times (*see for example Katumba Byaruhanga v. Edward Kyewalabye Musoke, C.A. Civil Appeal No. 2 of 1998; (1999) KALR 621; Attorney General v. Florence Baliraine, CA. Civil Appeal No. 79 of 2003*). The ground is accordingly struck out.

Validity of the two grants

[19] By the fourth ground of appeal, the trial court's finding regarding the validity of the two grants, the decision to revoke them and instead issue a grant in favour of the respondent and D.W.6 John Bosco Olum, are impugned. Section 234 (2) (b) and (c) of *The Succession Act*, permits courts to revoke letters of administration on grounds that the grant was obtained fraudulently by making a false suggestion, or by concealing from the court something material to the case, or alternatively that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though the allegation was made in ignorance or inadvertently.



[20] The object of the power to revoke a grant is to ensure the due and proper administration of an estate and protection of the interests of those beneficially interested. The principle was enunciated *In the goods of William Loveday [1900]* P 154 thus;

The real object which the court must always keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto; and I can see no good reason why the Court should not take fresh action in regard to the estate where it is made clear that the previous grant has turned out abortive or inefficient. If the court has in certain circumstances made a grant in the belief and hope that the person appointed will properly and fully administer the estate, and it turns out that the person so appointed will not or cannot administer, I do not see why court should not revoke an inoperative grant and make a fresh grant.

[21] The jurisdiction to revoke a grant of probate is quite broad, though it is exercised sparingly. Courts have jurisdiction to revoke grants of probate where evidence discloses that the grant ought not to have been issued. Revocation of a grant typically involves one of two attacks, namely;- finding a material defect in the process leading up to the grant or submitting false, or fraudulent information to the court in support of the application. Section 234 (2) of *The Succession Act*, makes it very clear as to what "just cause" means and includes obtaining it by means of an untrue allegation of a fact essential in point of law to justify the grant, though the allegation was made in ignorance or inadvertently.

[22] The court possesses and, when it becomes necessary, exercises the power of revoking or annulling for a just cause, any grant which it has made. Having perused the pleadings, the record of proceedings on this file and considered the submissions of both counsel, I am satisfied that the grant made in respect of the estate of the late Yubu Obur on 31<sup>st</sup> May, 2013 and that made in respect of the late Lt. Col. Otto Valentino, on 1<sup>st</sup> April, 2014 were properly revoked for just cause. This is because the evidence placed before the court established that the appellant had falsely stated in both applications that land situated at Akworo Tee Chua village, Akworo Parish, Labongo-Amida sub-county, Chua West County in

Kitgum District belonged to both estates, whereas not. Submitting false, or fraudulent information on a material fact to the court in support of the application forms a sound basis for annulment of a grant. That resulted in the unusual occurrence of court making a Grant to one applicant in respect of two estates with more or less the same property common to both estates.

- [23] It would appear that the grant of 1<sup>st</sup> April, 2014 made in respect of the estate of the late Lt. Col. Otto Valentino, specifically targeted compensation that was recoverable from the Uganda National Roads Authority in respect of part of the land situated at Akworo Tee Chua village, Akworo Parish, Labongo-Amida sub-county, Chua West County in Kitgum District. In that application, the appellant did not disclose to the court that the same property had been the subject of the earlier grant of 31<sup>st</sup> May, 2013 in the matter of the estate of the late Yubu Obur. The appellant obtained a Grant of Letters of Administration to the estate of the late Lt. Col. Otto Valentino based on a fraudulent assertion in the circumstances described above. The two grants were a fraud on the estate of the late Lt. Col. Otto Valentino. The court was justified in revoking both of them.
- [24] Failure to provide notice to a potential beneficiary too may constitute a just cause (*see the Canadian decisions of Shaw v. Reinhart 2004 BCSC 588 and Somodi v. Szabados 2007 BCSC 857*). It was the uncontroverted evidence of the respondent that he was never informed or notified of this process. The manner of publication of the notice of the application may have contributed to, or even designed, to achieve exactly that.
- [25] When the court revokes a grant, it only resumes into its own hands the powers which it parted with on false or inaccurate suggestions. In order to ensure the due and proper administration of the estate and protection of the interests of those beneficially interested, it issues in the place of the revoked grant, a grant of letters of administration *De bonis non administratis*, under section 229 of *The Succession Act*. This is a special type of grant which must be obtained when the

sole or last surviving personal representative of a deceased person's estate, dies after taking out the grant, but before completing the administration of the estate, or where a grant is revoked before completion of the administration of the estate. The estate of a deceased remaining un-administered after the revocation of a grant awaits the appointment of an administrator de bonis non to continue and complete the administration.

[26] Section of 230 of *The Succession Act* requires that in granting letters of administration of an estate not fully administered, the court should be guided by the same provisions as apply to original grants, and should grant letters of administration to those persons only to whom original grants might have been made. Pursuant to section 202 of the Act, administration should be granted to the person entitled to the greatest proportion of the estate under section 27 of the Act (see *Christine Male and another v. Sylvia Mary Namanda and another* [1982] HCB 140. However, in *Law Advocacy for Women in Uganda v. Attorney General, Constitutional Petitions Nos. 13 of 2005 and 05 of 2006*, it was held that section 27 of *The Succession Act* was discriminatory and contravenes Articles 21 (1), (2) and (3) 31, 33 (6) of *The Constitution of the Republic of Uganda, 1995* in as far as it does not provide for equal treatment in the division of property of intestate of male and female deceased. The unconstitutionality lay in failure to apply the provisions equally to both male and female intestacy, not as to the proportions of distribution.

[27] Under section 27 (1) (a) (iv) of *The Succession Act*, lineal descendants are entitled to 75 percent of the whole of the property of the intestate. Section 2 (b) of the Act defines "lineal descendant" as including legitimate, illegitimate and adopted children. Therefore, being biological children of the late Lt. Col. Otto Valentino, both John Bosco Olum and the respondent Odongkara Moses are his lineal descendants.

[28] When granting letters of Administration, the court is guided by considerations of factors such as consanguinity, nature of interest, safety of estate and probability of proper administration, which have to be taken into consideration (see *Ndugga Francis Ddiba v. Nansikombi Rita and others* [1980] HCB 79). The usual priority would be taken into consideration when the Court decides who is to receive the grant. According to section 204 of *The Succession Act*, if there are two or more persons who are entitled to the same proportion of the estate, those persons are equally entitled to administration, and a grant may be made to any one or some of them without any citation of the others. The court therefore has the discretion to make a grant *De bonis Non* to anyone else competent to administer the estate, provided those factors are taken into account. This ground of appeal accordingly fails.

#### Grounds two and three

[29] Under grounds 2 and 3 of appeal, the trial court's decision that the land at Akworo Tee Chua village vests in the respondent and failure of the court to determine that all beneficiaries are entitled to shares therein, is impugned. This was not one of the issues presented by the parties at the scheduling conference for the decision of the court. According to Order 15 rule 3 of *The Civil Procedure Rules*, the court may frame issues from all or any of the following materials;- (a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of the parties; (b) allegations made in the pleadings or in answers to interrogatories delivered in the suit; and (c) the contents of documents produced by either party.

[30] Although an issue may not have been formally raised at the scheduling conference or during the hearing, where both parties had a full and fair opportunity to litigate the issue, after a full contest in which both parties had a fair opportunity to prove their respective cases, it can actually be determined and necessarily decided by the court. Once an issue concerns the actual facts giving

rise to the claim, and it was in fact actually litigated and was necessary to a final judgment on the merits, the court is entitled to make a finding on it whether or not the parties raised it as one of the issues for the court's determination.

- [31] A judgment may be pronounced not only as to all matters that were in fact formally put in issue by the parties, but also on those matters that were offered and received to sustain or defeat the claim, where it is necessary to the court's judgment, in order to ensure the reliability, conclusiveness, completeness and fairness of a judgment. This principle serves mainly the public policy of reducing litigation. Unfairness and waste of judicial resources would otherwise flow from allowing repeated litigation of the same subject matter as long as plaintiff is able to locate new issues to be litigated.
- [32] Satisfaction of the full and fair opportunity test requires a comparison of the procedural and evidential opportunities that were available to the litigants during the hearing in question. In the instant case, both parties had a fair opportunity and indeed litigated the issue as to whether or not the land situated at Akworo Tee Chua village formed part of the estate of the late Lt. Col. Otto Valentino and whether or not at the time of his death it was occupied by his wife Lanyero Hellen or rather D.W.3 Dolofino Abwor. The evidence showed that the late Ismail Odida, gave part of his land to the late Lt. Col. Otto Valentino when he married Lanyero Hellen Otto in 1983. The two of them lived on the land until his death in Khartoum during the year 1987. It therefore forms part of his estate.
- [33] The trial court did not declare that land to be the property of the respondent but was right to have granted a declaration that the land situated at Akworo Tee Chua village, Akworo Parish, Labongo-Amida sub-county, Chua West County in Kitgum District remains vested in the estate of the late Lt. Col. Otto Valentino and awaits the decisions of the two Administrators John Bosco Olum and the respondent Odongkara Moses, to deal with it as part of the un-administered estate of the Deceased.

[34] The primary duty of an administrator is to preserve the assets of the estate, pay the debts and distribute the balance to the beneficiaries entitled under the rules of intestacy, or in accordance with any other order made by court. An administrator should not pick sides between the beneficiaries and use estate funds to finance litigation on their behalf. It is a matter of indifference to the administrator as to how the estate should be divided. He or she need only comply with the terms of the rules of intestacy or any variation made by the court.

[35] An administrator may be personally liable for costs for reckless and unreasonable behaviour that amounts to reprehensible conduct, e.g. for opposing plaintiff's action for no other reason than to frustrate the plaintiff's claim. An administrator may also be personally liable for costs where the litigation springs from his or her actions that involved a blatant violation of the law, or mismanagement of estate Assets, or a failure to protect the assets thereby obliging the opponent to incur costs of litigation. Such costs should not be visited on the estate. In the instant case, the appellant's acquisition of the grant involved reprehensible conduct for which he should be held personally liable for the costs.

Order :

[36] In the final result, the appeal lacks merit. It is accordingly dismissed. The costs of the appeal and of the trial are to be met by the appellant

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Stephen Mubiru  
Resident Judge, Gulu

Appearances

For the appellant : Mr. Moses Oyet

For the respondent : M/s Odongo and Co. Advocates