

THE REPUBLIC OF UGANDA
EQUAL OPPORTUNITIES COMMISSION

EOC REF. NO. EOC/LS/076/2014

IN THE MATTER OF A COMPLAINT BY LUGEMWA STEPHEN

LUGEMWA STEPHEN ::: COMPLAINANT

-VERSUS-

BUSUULWA LAWRENCE ::: RESPONDENT

BEFORE THE HONORABLE MEMBERS OF THE COMMISSION OF THE EQUAL
OPPORTUNITIES COMMISSION SITTING AT MASAKA

DECISION OF THE COMMISSION

This is a decision arising from a complaint brought under Section 23 of The Equal Opportunities Commission Act, 2007 for orders that;

- a) The Respondent gives vacant possession of the land belonging to the Complainant and his siblings.
- b) The Commission awards General damages

The Complainant is a resident of Kasambya Kinoni, Kiseka in Lwengo District and one of the children of late Nalule Mary. The Respondent is a maternal uncle of the Complainant.

The gist of the Complainant's case is that the Respondent did not afford him and his other siblings an opportunity to inherit their late mother's land upon her passing, on the ground that according to their custom, no person is allowed to inherit property from the maternal side. To the Complainant, the Respondent's action amounted to discrimination, and violation of their rights to own property contrary to Article 26 of the Constitution of the Republic of Uganda, 1995.

By the time of hearing the complaint on 21st June 2016, at Masaka District Headquarters-Lukiiko Hall, the Respondent had not filed a reply to this complaint as required under Regulation 9(2) of the E.O.C. Regulations, 2014. He also did not attend the Commission hearing despite being validly served with summons. The Respondent when contacted on phone by the Commission's Investigation Officer, Mr. Savio Kakooza, stated that he was not attending the hearing as it did not mean anything to him.

Under Section 30 of the Equal Opportunities Commission Act, the Commission may resort to rules applicable in civil or criminal proceedings in a court of law where the rules of procedure of the Commission do not provide for a particular matter. Under Order 9 Rule 11(2) of the Civil Procedure Rules SI-71-1, a plaintiff is allowed to set down the suit for hearing *ex parte*, where the defendant fails to file his or her defence within the time required. In this case, the Respondent failed to file his reply to the complaint within 15 days from date when he was served with the complaint and neither is there any application on record for extension of time within which to file the same. Mr. Henry Mwebe, Commission Counsel prayed that the Commission proceeds with the hearing of the matter *ex parte*.

In the case of *Proline Soccer Academy v Lawrence Mulindwa & Others [HCMA NO. 459/2009]*, his Lordship Justice Yorokamu Bamwine observed that in serving summons, what is important is achieving the purpose, which is informing the Respondent of the allegations against him. Therefore, since the Respondent learnt of the summons from his Manager and was also contacted by phone, and having made it clear that he would not come for the Commission hearing, he willfully ignored the summons and deliberately refused to appear on the day fixed for the hearing. Consequently, the Commission proceeded and heard the case *ex parte* under Regulation 17 of the E.O.C. Regulations and Order 9 Rules 10 & 11 of the Civil Procedure Rules (CPR).

The Complainant testified on oath and also relied on the testimony of three witnesses to prove his case. He testified that he is one of the five children of the late Nalule Mary who was a daughter of the late Busulwa Edward. He informed the Commission that the late Busulwa Edward died leaving a will, bequeathing approximately 2½ acres of land located at Kinoni, Kasambya village, Nakalombe parish, Kisekka sub-county in Lwengo district to the late Complainant's mother and her sister Nambooze Gertrude. He stated that the late respondent's father, one Kiwalabye Richard, who was a brother to their maternal grandfather, became the caretaker of the disputed land.

The Complainant stated further that he once attended a meeting at which the late Respondent's father decided to bequeath the disputed land to his son, the Respondent herein and not to the Complainant and his siblings as was expected. It was declared at the meeting that the Complainant and his siblings could not be entitled to the inheritance of their late mother because they belonged to a different clan.

The Complainant further stated in his testimony that despite repeated demands to the Respondent to hand over the disputed land to him and his siblings, he has since refused to do so claiming that they were not entitled to inherit any land from their maternal side as they were not members of the same clan. The land is currently in possession of the Respondent and it is upon this basis that the Complainant lodged a claim of discrimination against him by the Respondent in as far as he denied him and his siblings from inheriting the estate of their deceased mother.

The Complainant's witness, Nalule Jane, testified that she is the Complainant's maternal aunt, and confirmed that after the passing of the Complainant's grandfather, Kiwalabye was appointed by the clan as caretaker for the estate of the late Nalule and Nambooze. She also stated that Nalule

Mary died first followed by Nambozze and all their orphans were entrusted to the care of the Respondent's late father. She testified that she was appointed heir to her deceased sisters when she was still young and later the orphans approached her claiming for a share in their deceased mothers' estate. She further testified that she was advised to consult Kiwalabye, who called a meeting and that is how she discovered that the disputed land belonged to the late complainant's mother and her sister, the late Nambozze. In concluding her testimony, the witness confirmed that the disputed land rightly belongs to the complainant and his siblings by way of inheritance.

The Complainant's other witness, one Ssekamate John Mary, testified at the hearing that he is the brother of the Complainant and that their late grandfather entrusted the land to their late mother and her sister Nambozze. He told the Commission that Kiwalabye Richard, brother to their late grandfather took over the said land after the demise of their mother and assured the Complainant and his siblings that they cannot inherit the said land because they belong to a different clan. Kiwalabye died in 2014, having passed on the disputed land to his son, the Respondent in this matter. The witness further corroborated the testimony of the complainant that the disputed land is for their benefit and their siblings.

Another witness, Shakira Nalukenge, the complainants' sister testified that the disputed land belonged to their mother and confirmed that the land is currently occupied by the Respondent, who is their maternal Uncle, and that the Respondent refused to surrender it to the Complainant and his siblings. The witness strongly averred that the land in dispute was for their late mother and prayed for its surrender to the rightful claimants, namely the children of the late Nalule and Nambooze.

We have considered the Complainant's testimony and that of his witnesses together with the law and authorities relied upon. Regulation 22 of the E.O.C. Regulations empowers this Commission to make a decision based on the evidence adduced before it.

Before we deal with the question of the validity of the custom, we need to point out that the right to property is enshrined in Article 26 of the Constitution. That right includes the freedom to dispose of property in any lawful manner as its owner deems fit. A person who owns property can dispose of property by way of a will under Section 36 of the Succession Act. This is exactly what Busulwa Edward did. He passed on his property to his two daughters by will. Upon the death of the said daughters, Kiwalabye Richard, Busulwa Edward's step brother, continued looking after the land since the deceased were survived by very young children including the complainant. It is therefore very strange that Kiwalabye Richard went ahead and purported to pass on the land to his own children Busulwa Lawrence (the respondent) and Kawuma Mary. He could not pass on good title in the land, because he did not have it. We note that both Nalule and Gertrude died intestate. This being their property, the provisions on intestate succession under the Succession Act ought to have been evoked. We are also mindful that many provisions of the Succession Act, Cap 162 were declared unconstitutional and therefore null and void (Law Advocacy for Women in Uganda v Attorney General - Constitutional Petitions Nos. 13 /05 /& 05 /06. This was mainly because the impugned provisions were discriminatory in nature. It is very unfortunate that since 2007, Parliament has not made amendments to the Succession Act to reflect the decision of the Court. This Commission recommends that the process of amending the Succession Act is expedited. Be that as it may, the land in question should have passed on to the children of its lawful owners. We find that Kiwalabye Richard was a stranger. In fact, he simply stole the land and dealt in it without any title to it. He intermeddled and continues to intermeddle in the property of the deceased contrary to Section 11 of the Administrator General's Act, Cap 157.

We now return to the question of the custom. From the evidence adduced before this Commission, the reason why Kiwalabye Richard illegally passed on the land to his own children was because according to custom, children cannot inherit property from the matrilineal side. The issue therefore becomes whether a woman, married to a man from a different clan can legally pass on property to her children.

It should be noted that the Constitution is the supreme law of Uganda, and any law or custom which is inconsistent with its provisions shall be void to the extent of its inconsistency. (Article 2, Constitution of Uganda, 1995)

The same Constitution under Article 21(2) guarantees equal treatment of all persons in all spheres of political, economic, social and cultural life. Discrimination of any person on ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability is prohibited.

Under the same Article, discrimination is defined to mean giving different treatment to different persons attributable only or mainly to their respective descriptions as outlined. Section 1 of the E.O.C. Act equally defines discrimination to mean among other things any act or practice which has the effect of nullifying or impairing equal opportunities or resulting in unequal treatment of persons in the enjoyment of rights and freedoms. In the case of *Best Kemigisha vs Mable*

Komuntale & Another [HCCS No.5/1998] it was held that custom which is discriminative is repugnant to the principles of natural justice and good conscience and therefore null. It is also prudent to note that laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by the Constitution. (Article 33(6))

In the instant case, it is submitted by the Complainant that the Respondent refused to hand over to him and his siblings land which their deceased mother left because as a woman, married in another clan, she could not pass on property to her children. The evidence of the complainant and his witnesses were precise and not opposed by the Respondent, who had refused to attend hearing of the complaint before the Commission.

It is our holding that any custom which denies women opportunity to pass on property to their children on account of being married in another clan is not only discriminatory but also unconstitutional and cannot be allowed to stand. That custom presupposes that women, once married to a different clan, cannot pass on property because property flows through the 'male blood-line.' This is clearly discriminatory and the custom is null and void.

In the Nigerian case of *Ukeje v Ukeje (2014) 234 LRCN 1*, the respondent, as plaintiff, filed a suit in the High Court of Anambra State of Nigeria stating that she was a daughter of the late Lazarus Ukeje and that her paternity was acknowledged by the deceased in his life time. She further contended that in her capacity as a daughter of the deceased, she was entitled to the estate or one of the persons entitled to the estate of the deceased. At the lower court, the appellant relied on the male primogeniture custom in Igbo-land which would disentitle the respondent to a share of the deceased estate, even if recognized as his daughter. The respondent succeeded in both the High Court and in the Court of Appeal with both courts declaring the custom void. On further appeal to the Supreme Court, the apex court unanimously upheld the decisions of the two previous courts. Citing the nondiscrimination clause in the Nigerian Constitution, the court declared that (per, Rhodes-Vivour, JSC, who delivered the lead judgment) "No matter the circumstances of the birth of a female child, such a child is entitled to an inheritance from her late father's estate. Consequently the Igbo customary law which disentitles a female child from partaking in the sharing of her deceased father's estate is in breach of section 42(1) and (2) of the Constitution, a fundamental rights provision guaranteed to every Nigerian. The said discriminatory customary law is void as it conflicts with section 42(1) and (2) of the Constitution. On his part, Okoro, JSC also made the following remark: "I also agree that by virtue of section 42(1) of the 1999 Constitution of the Federal Republic of Nigeria (then section 39(1) of the 1979 Constitution) any customary law which says or tends to suggest that a female child cannot inherit the property of her father is not only unconstitutional but also null and void."

In another case of *Anekwe v. Nweke (2014) 234 LRCN 34*, the Appellant relied on the custom of Awka people also in Igbo-land which excluded female children from inheritance to their deceased father's estate. The respondent's case was that her late husband was a beneficiary of family property and that upon his demise she and her children for the deceased (all female) were entitled

to the deceased share of the family property. The Supreme Court upheld the decision of the lower court and declared the said custom of Awka people null and void as “to perpetuate such a practice as claimed in this matter will appear anachronistic, discriminatory and un-progressive. It offends the rule of natural justice, equity and good conscience”.

We find these decisions relevant to this case and definitely of persuasive value.

Further, the custom in question would also have the effect of violating Uganda’s international obligations. In particular Uganda has ratified the Convention on the Elimination of All Forms of Discrimination Against Women. Article 5(a) of the CEDAW requires States Parties to take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. Article 16(1) (h) of the CEDAW requires states-parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular to ensure the same rights for both men and women in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

It follows from the above that;

1. The land in question belongs to the Complainant’s late mother and the Complainant and his siblings therefore have a right to inherit it regardless of any repugnant or unconstitutional custom or practice.
2. The custom which prevents women who are married in a clan other than their own, from passing on property to their children is discriminatory and we hereby prohibit the same.

In the circumstances, this Commission is duty bound to grant the relief prayed for by the Complainant and it is accordingly granted in the following terms;


1. That the Respondent immediately surrender vacant possession of the land in dispute to the Complainant and his siblings for their inheritance, ownership, and utilization as they deem appropriate.
2. General damages of Ug. Shs. 1,000,000/- (One Million Uganda Shillings Only) be paid by the Respondent to the Complainant for the mental anguish, denial and inconvenience caused to the Complainant and his siblings.
3. The amount in (2) above shall attract interest of 8% per annum from the date of this judgment until payment in full.
4. No order as to costs.

We so order.

The Respondent has the right of appeal to the High Court against this decision within 30 days from the date of this decision in accordance with section 29(1) of the Equal Opportunities Commission Act.

Dated, Signed and Sealed this 9th day of AUGUST 2017

BY THE SAID MEMBERS OF THE COMMISSION OF THE EQUAL OPPORTUNITIES COMMISSION;



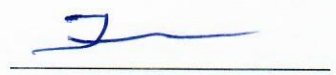
JOEL COX OJUKO
MEMBER

I concur with the decision



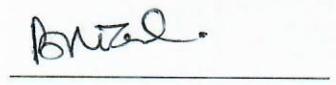
SILVYA MUWEBWA NTAMBI
CHAIRPERSON

I concur with the decision



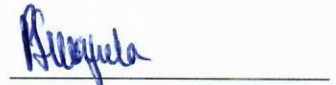
NDUHURA DENIS
VICE CHAIRPERSON

I concur with the decision



ZAMINAH MALOLE
MEMBER

I concur with the decision



WAFULA PATROBAS
MEMBER