THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL FOR UGANDA AT KAMPALA

[CORAM: Kakuru, Kiryabwire & Egonda-Ntende, JJA]

Civil Appeal No. 70 of 2014

[Arising from Civil Suit No. 133 of 2012 that arose out of Probate and Administration Cause No. 215 of 2012 in the Family Division of the High Court of Uganda]

BETWEEN

ELIZABETH NALUMANSI WAMALA ---------- APPELLANT

AND

1.JOLLY KASANDE
2.NABUKEERA ESTHER
3.RONNIE M. LUTAAYA
} ---------- RESPONDENTS

(*Appeal from the Judgment of the High Court [Masalu Musene, J.,] delivered on the 29th April 2014 at Nakawa*)

JUDGEMENT OF EGONDA-NTENDE, JA

Introduction

1. The appellant was the plaintiff in a probate action in the High Court seeking to obtain letters of administration to the Estate of the late Wilberforce Noah Wamala Sendeeba. The deceased died intestate. The plaintiff claimed to be a wife of the deceased. The defendants was claiming an interest in the estate of the deceased as a customary wife and children of the deceased. The High Court, on its own motion decided to appoint the Administrator General as the administrator of the estate of the deceased. The court also made a number of ancillary orders. The appellant being dissatisfied with that decision appeals to this court.

2. The appellant sets forth the following grounds of appeal.

> '1. The learned Trial Judge erred in law and fact when he wrongly granted letters of administration of the deceased's estate to the Administrator General.
> 2. The learned trial Judge erred in law and fact when he found that there was a customary marriage between the deceased and the 1st Respondent.
> 3. The Learned Trial Judge erred in law and fact when he wrongly or failed to evaluate the evidence on record.
> 4. The learned trial judge erred in law and fact when he distributed the estate property.
> 5.The learned Trial Judge erred in law and fact in holding that the 1st Respondent and her children occupy the Muyenga Property which is a commercial entity.'

3. The respondents opposed the appeal.

Submissions of Counsel for the Appellant

4. Mr Baingana, learned counsel for the appellant submitted, relation to ground no.1 that the learned trial judge erred in law in granting letters of administration without hearing from the Administrator General as is required by the relevant law. The learned trial judge did not summon the Administrator General or hear from him at all before deciding to make this grant. He referred this court to the case of Sharifa Muwonge & 4 others v Janet Namuyomba & 3 others HCCS No. 77 of 2004 [unreported]where the court properly applied the relevant law by inviting and hearing the Administrator General before making a grant. The position taken by court below on this matter had been pre determined prior to the hearing of the case when the judge all along suggested that the Administrator General would be the most appropriate person to administer this estate.

5. In relation to ground no.2 Mr Baingana submitted that the learned trial judge erred in law to find that the deceased had a subsisting customary marriage with the defendant no.3 when in fact the issue of marriage had been settled at the scheduling conference and among the agreed facts the

appellant had been acknowledged as the wife of the deceased. The issue of who was a widow had thus been settled and could not be reopened at trial to arrive at the finding that the trial court did. Mr Baingana referred us to the case of Administrator General v Bwanika James & 9 Others SC Civil Appeal No. 07 of 2003 [unreported] in which Tsekooko JSC dealt extensively with the import of scheduling and a scheduling memorandum or agreement by the parties.

6. Secondly the 2 and 3 respondents had conceded the fact that the appellant was a wife of the deceased in the form that they filled to report death of the deceased to the Administrator General. This form was admitted evidence. The learned trial judge there had no business re opening this issue of who was the widow and making the finding that he did.

7. Mr Baingana argued grounds 4 and 5 together. He submitted that the learned trial erred in law when he declared that the respondent and her children could stay in the Muyenga House / Property which could form then part of their share of the estate. Mr Baingana contended that this property was not a residential holding as defined under the Succession Act. Prior to the death of the deceased the respondent had not been living there. Evidence on record is clear that they Ire living in rented premises in Kituzi Lungujja. The Muyenga property was a commercial premise that was under construction at the time of the deceased's death.

8. Secondly the decision to let the respondent live in this property and for it to form part of their share in the estate of the deceased was in effect an order by the judge to distribute the estate of the deceased which was wrong in law. He referred this court to the case of Ndabahweje Pauline v Babirye Rosemary & 2 others C A Civil Appeal No. 95 of 2010 [unreported] in relation to what amounts to a residential holding.

9. Turning to the last ground which was no3 Mr Baingana submitted there was no evaluation of evidence on record by the trial judge. He basically considered only the evidence of one side to determine that the U K marriage of the appellant and deceased was not valid. He prayed that this appeal should be allowed and the appellant appointed administrator of the estate of the deceased.

Submissions of counsel for the respondent

10. Mr Nuwagaba, learned counsel for the respondents, submitted in relation to ground no.1 that the learned trial judge did not rely only on section 4(5) of the Administrator General 's Act to make the grant to the Administrator General. He called in aid section 98 of the Civil Procedure Act and section 33 of the Judicature Act which grants him wide powers to grant remedies. The trial judge was well within his powers to grant letters of administration to the Administrator General. Secondly section 4(5) of the Administrator General's Act did not make it mandatory for the court to hear the Administrator General before making the grant to the Administrator General.

11. Mr Nuwagaba in relation to ground no.2 of the appeal, submitted that the fact of whether or not there was a subsisting marriage was really a question of law which could not competently be resolved by the parties at scheduling conference. Even the parties and their lawyers had purported to reach an agreement on the issue, this was not sufficient. The issue of who was a widow was a matter of law that had to be resolved by the court. The learned judge provided about 5 reasons why he would not appoint the appellant an administrator of the estate of the deceased and it was not just a question of whether or not she was the widow.

12. Mr Nuwagaba declined to address us on ground no.3 stating that it was the duty of this court to review the evidence on record and arrive at its own findings.

13. Like his colleague, Mr Nuwagaba took grounds 4 and 5 together. Firstly he submitted that the trial had wide powers under section 33 of the Judicature Act to grant such remedies as it so fit to any legal or equitable claim. The learned judge ordered that the personal representative would deal with the question of residential holding as he was entitled to do. The court did not rule that the Muyenga property was not a commercial

property but only referred to the house. He prayed that this appeal should be dismissed.

Duty of first Appellate Court

14. It is the duty of a first appellate court to subject the case below to a re evaluation of the evidence adduced in the case so as to reach its own conclusions. This is in line with Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions, hereinafter referred to as the Rules of this Court. It provides,

> '1. On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may--
> (a) reappraise the evidence and draw inferences of fact;
> and '

15. This duty has been echoed in many previous decisions of the Supreme Court of which Fredrick Zaabwe v Orient Bank Ltd and others S C Civil Appeal No. of 2009 [unreported] is one of the more recent decisions. I shall begin by analysing the evidence adduced in the court below. In order to fully comprehend what is in issue in this matter one must the review with an examination of the pleadings in the court below.

The Case for the Plaintiff / Appellant

16. The plaintiff brought this action seeking the removal of caveats lodged by the five defendants against her application for grant of letters of administration to the estate of Wilberforce Noah Wamala Sendeeba hereinafter referred to as the deceased. She also sought a grant of letters of administration to the estate of the deceased. She contended that she was the wife and now widow of the deceased and therefore the proper person entitled to apply for letters of administration to the deceased's estate.

The case for the 3rd Defendant [now respondent no.1]

17. It was contended for respondent no1 in her written statement of defence, that

> '(a) The plaintiff is not the widow to the late Noah Wamala Sendeeba as the purported marriage / wedding on the 9th December 2010 was illegal, null and void.
> (b) the plaintiff does not live in Uganda and therefore cannot administer the Estate from the United Kingdom where she ordinarily resides.
> (c) The 3rd Defendant was customarily married to the late Noah Wamala Sendeebe on the 5th day of December 1998 and as such any subsequent monogamous marriage to the plaintiff under Marriage Act is null and void.
> (d) The plaintiff is only mother to one child and can not administer the Estate to the best interests of all the beneficiaries some of whom are still of minority age and children to the 3rd defendant.'

18. The 3rd Defendant therefore contended that the plaintiff was not a fit and proper person to administer the estate of the deceased.'

19. The rest of the defendants raised the same issues as the 3rd defendant, contesting the legality of the plaintiff's claim as widow and contending that she was not a fit and proper person to administer the estate of the deceased.

20. The parties filed a joint scheduling memorandum which stated in part,

> 'Agreed facts
> 1. The deceased was murdered on 03rd February 2012.
> 2. The deceased died intestate.
> 3. The Plaintiff is widow of the deceased.
> 4. the deceased is survived by eight children.
> 5. That when the plaintiff petitioned the grant of letter of Administration the defendants lodged caveat to the grant.
> Issues
> 1. Whether the plaintiff is entitled to jointly administer the estate of the late Nuwa Wilberforce Wamala.
> 2. Whether the caveats should be lifted.
> 3 Remedies available to the parties.'

21. The joint memorandum further set out a list of the plaintiff's documents and the 3rd defendant stated that she would rely on the plaintiff's documents. The memorandum was signed by counsel for all parties.

The Evidence in the Court below

22. The plaintiff appellant testified at the trial and that formed the evidence for the appellant. She stated that she was ordinarily resident in the United Kingdom where she was working as psychiatrist. She had returned to Uganda for purposes of this case. She married the deceased in the UK on 25th February 1992. However, the deceased was deported from the UK in 1993. The deceased returned to Uganda. There was one child as a result of their union. She subsequently entered into a relationship with another man and they had 2 children. She visited Uganda in 2006 and met the deceased who proposed to resume their relationship. She initially refused. However she eventually consented and this was done with the celebration of marriage vows at Namirembe Cathedral in December 2010.

23. She was aware that the deceased had a causal relationship with the 3rd Defendant and that they had 4 children. The deceased made provision for the third defendant by setting up a business for her and he continued to look after his children with her. The deceased had three other children who are older than the 3rd defendant's children.

24. The High Court appointed her with 2 other persons as interim administrators. The other 2 persons have not been active in carrying out this responsibility and she has suffered from interference and intermeddling from members of the deceased's clan. She prayed that she be appointed sole administrator of the estate of the deceased and she would look after the estate and the minor children of the deceased and distribute the estate.

The evidence for the defence

25. All the three remaining defendants testified in person and were the only witnesses for the defence. Jolly Kasande Wamala the 3rd defendant/ Respondent No.1 stated that she met the deceased in 1996 and was introduced to her parents in 1999. They lived together and had 5 children. One passed away and four are living. These are Nalwanga Deborah, Kagere Susan Winifred, Erick Guard Wamala and Naluyima Priscilla Leya. She is currently living at Muyenga in one of the deceased's houses with her children and she is taking care of the said children without receiving assistance from anyone running the estate. She denied claims that the deceased was not the father of her children and she was willing for DNA tests to be carried out.

26. After the death of the deceased the clan met and appointed a group of people to apply for letters of administration and administer the property of the deceased. These are Daniel Bakayana, Vincent Ssenyonjo, Haji Nasser Lubega, Haji Abas and the plaintiff. However the plaintiff, ignored those names and singly applied for letters of administration. The plaintiff also took a stand that the 4 children of the 3rd defendant Ire not children of the deceased. For those reasons she opposed the grant of letters of administration to the plaintiff.

27. She stated that at the time of the deceased's death they were living in a rented house in Kitunzi zone, Lungujja. She was authorised by the committe to go and live in Muyenga. She has faced harassment from the plaintiff seeking to have her evicted from the Muyenga house.

28. DW2 was Ronny Lutaya, who is a step brother to the deceased. He testified that the deceased had three wives, Rose, Betty Nalumansi and Jolly Kasande and eight children. After the burial of the deceased the family appointed a committee to administer the estate but the plaintiff applied for letters of administration singly. As a result he opposed the grant. Though the plaintiff was appointed an interim administrator she has not assisted the children and mother of the deceased. He prayed that the court appoints the Administrator General as administrator.

29. DW3 was Nabukera Esther, the deceased's eldest daughter. She stated that after the death of their father a committee was appointed to run the

estate which included the plaintiff, herself, Irene Namala, Vincent Ssenyonjo, Bakayana Daniel, and Haji Nasser Lubega. The house in Mutungo was handed to the plaintiff and the house in Muyenga was handed to Jolly Kasande to live in. She was surprised that the plaintiff singly applied for letters of administration. She opposed the grant with the filing of a caveat. Interim administrators Ire appointed by the court but there have been conflicts at the shops of the deceased and some workers have left. She collected some of the records left behind which inter alia show that substantial amounts of money Ire deposited on account of a firm of lawyers and she does not know why this was so.

30. The deceased's shops are now being run by the plaintiff and Irene Namala. The plaintiff stays in England and cannot run the estate. She prayed that the court revokes the plaintiff's interim powers to run the estate and grants letters of administration to the Administrator General.

Judgment of the High Court

31. The High Court considered the evidence in the case and submissions of counsel in its judgment and stated in part,

> 'I have considered the submissions on both sides as far as the first issue, which is the main bone of contention Whereas I shall dwell in details on the submission from the defendant's side that the marriage of the plaintiff and the deceased in 1992 in the United Kingdom was not valid, it is important to emphasise that the certificate of marriage that was issued should have been registered in Uganda. Furthermore, the copy that was produced should have been notorised. All the above were not done and that would definitely disqualify the 1992 marriage in the United Kingdom, particularly in light of section 2 of the Succession Act. However, I wish to add that it was saved by the renewal of marriage vows in 2010 at St. Paul's Cathedral, Namirembe, although plaintiff disappeared or went back to the United Kingdom and returned after the death of the deceased. It is therefore the finding and holding of this Court that the inconsistencies and breakups in the marriages of the plaintiff and the deceased do not

qualify to be a fit and proper person to administer the Estate of the deceased, particularly as a sole Administrator. The other consideration as submitted by counsel for the 3rd defendant is there was a subsisting customary marriage between the deceased and the 3rd defendant by the time of the renewal of the marriage vows. That would therefore become a big issue as to whether the plaintiff was "a wife" of the deceased under the law by the time of the death of the deceased but having produced a child with the deceased and since the concern of the Court now is not who was / is a legal wife because the man is dead, the concern is who is entitled to a share of the estate of the deceased. the plaintiff and her child, Abigail Angela Wamala. The same applies to the wife of the customary marriage, Jolly Kassande and her children, plus other children produced by the deceased with his earlier wife. They are all beneficiaries.'

32. The court further held that as the plaintiff could not work with the interim co administrators and given her lack of residency in Uganda she was unsuitable to administer the estate of the deceased. The court therefore made the grant to the Administrator General. The court rejected the plaintiff's prayer for paternity tests for all young children and the claim for general damages and costs. The caveats were vacated.

Analysis

Ground No.1

33. Under this ground the appellant is contending that the learned trial judge erred in law to grant letters of administration to the Administrator General. Section 4(5) of the Administrator General's Act is apposite here. It states,

' (5) Notwithstanding subsection (4)—
(a) when the peculiar circumstances of the case appear to the court so to require, for reasons recorded in its proceedings, the court may if it thinks fit, of its own motion or otherwise, after having heard the Administrator General, grant letters of administration to the Administrator General or to any other person even though there are persons who, in the ordinary course, would be

> legally entitled to administer or who have already been administering and for this purpose may call in and revoke any grant of probate or letters of administration previously made by the court;

34. It is clear from the foregoing provision that the High Court does have the power on its own motion, for reasons to be recorded in its order, to issue a grant of letter of administration to the Administrator General . Prior to doing so the court should hear the Administrator General. It is equally clear to us that the trial judge did not hear from the Administrator General before making the grant in this case. What are the consequences of the failure of the trial court from hearing the Administrator General in the matter? Is it, as contended by the appellants, that such grant is unlawful and should therefore be set aside? Or can it be left to stand?

35. Of course it is desirable that the trial courts should follow the letter of the law in all matters where the law lays down the procedure to be followed before the exercise of some power. Where a step has been missed it does not follow that in every case the failure to comply with the letter of the law will result in setting aside an order that was made. The approach ought to be, in order to ensure that litigation is not unnecessarily prolonged, that an appellate court will consider if the omission resulted in a miscarriage of justice, and if not, may allow the impugned order to stand.

36. However, I hasten to add that trial courts must strive at all times to comply with the letter and spirit of the law as indeed this is their duty.

37. In this particular case on the evidence available on record it is clear that there existed clear and cogent reasons when considered together that rendered the appellant unsuitable to administer the estate of the deceased in question. Given the location [over different locations in Uganda], significant and substantial nature of the estate, and nature of inventory of the estate, the multiplicity of beneficiaries, including minor children, of which the applicant was not the mother, the residence of the appellant in the United Kingdom, and her unavailability to deal with the day to day issues arising out of an administration of an estate of this nature it was clearly questionable whether the appellant was the suitable candidate for the grant of letters of administration. A more neutral person in the circumstances of this estate was called for to be able to make impartial decisions in the matters that would arise in the course of administration of this estate for the benefit of all beneficiaries.

38.I would dismiss ground no.1 of the appeal.

39. Notwithstanding the foregoing position, I wish to note that it was essential for the court to initially determine the contentious issues in the case. This revolved around the legal status of the appellant and defendant no. 3 / Respondent no.1*vis a vis* the deceased. This matter needed to be resolved as it appeared to arise time and again in spite of the inconsistent positions taken by the parties at different times. The appellants contend that the issue of whether or not the appellant was a spouse of the deceased, had been settled at the conferencing stage and should not have been inquired into at the trial. The response of the respondents is that whether or not the appellant was a wife was a question of law which could not be disposed of simply as a matter of fact.

40.Our attention was drawn by learned counsel for the appellant to the remarks of Tsekooko JSC in his concurring opinion in the case of the case of Administrator General v Bwanika James and 9 others where he stated,

> 'As I understand these provisions, their purpose is to enable parties to agree on non-contentious evidence such as facts and documents. The agreed facts and documents thereafter become part of the evidence on record so that they are evaluated along with the rest of the evidence before judgment is given. Indeed in as much as they are admitted without contest, the contents of such admitted documents can be treated as truth, unless those contents intrinsically point to the contrary, and if they are relevant to any issue, their admission disposes of that issue because the need for its proof or disproof would have been disposed of by the fact of admission.'

41.I accept those remarks express the law with regard to facts and documentary evidence agreed upon and received at a scheduling conference. However, I wish to state there are issues that would entirely depend on an appreciation of the applicable law which may not be resolved simply by agreement of the parties. Whether a person is married to another is both a matter of fact and law. One can assume a marriage which is not legally in existence. In such circumstances an agreement that one is a wife may not necessarily hold up to scrutiny against the applicable or relevant law. It may well be that even 2 people can assume that they are properly married and it turns out that in law there was no marriage at all.

42. I would hold that the issue of whether or not the appellant was a wife of the deceased was not a matter that could be resolved as an agreed fact. Secondly whether or not the appellant was entitled to a share in the estate of the deceased and therefore entitled to apply for letters of administration was dependent on whether she was in law a spouse of the deceased or not. This was ultimately a legal question which could only be resolved after establishment of the relevant facts. It appears unfortunately that the advocates in this case did not take care in drafting the scheduling memorandum to properly articulate what were the actual agreed facts and what was in contention given the pleadings of the parties in question. It is clear that on the pleadings of the 3rd defendant the legality of the union between the appellant and the deceased was called in question. This is a matter that could only be resolved by the court though the parties could abandon the issue obviating the need for a court decision.

43. From the conduct of the case for the parties it is clear that this is an issue though not quite formalised that remained in contention during the trial. Evidence was adduced in relation to it. Counsel addressed the matter in their written submissions. The trial court discussed the evidence and concluded that it was no longer an issue given the death of the deceased. The trial court erred in adopting that position. The inquiry into whether there was a subsisting marriage does not lose relevance because of the death of a party to it. To the contrary it is important to establish the legal relationship between the deceased and other people claiming a share in his estate as an entitlement, including the right to apply for and be granted letters of administration. The right to share in the estate of a deceased or to be granted letters of administration ordinarily depends on the legal relationship between those persons and the deceased.

44. In spite of the finding by the trial judge that the question of who was married to was not important the trial judge then went on to hold that both the appellant and the respondent no.1 were entitled to share in the estate of the deceased as were all the deceased's children. The trial judge in effect held that both the appellant and the respondent were spouses of the deceased who would be entitled to share in his estate.

Ground No.2

45. The appellant contends in ground No.2 that the finding that there a subsisting customary marriage between the deceased and the respondent was wrong both at law and in fact. The appellant contends that it was not open to the court to make a finding that the respondent no.1 was

customarily married to the deceased as the issue had been settled by the agreed fact in the scheduling memorandum that the appellant was the wife of the deceased and this had also been admitted in a form that the respondent's counsel had submitted to the Administrator General. Counsel for the respondent no.1 take the position that this was a matter of law on which an agreement by the parties would not bind the court or necessarily dispose of such matter.

46. I wish to repeat that it appears to me that neither counsel for the parties hereto nor the court below took sufficient care to formulate the issues that required a decision by the court as required by Order 15 of the Civil Procedure Rules. Of course ultimately this is a responsibility that lies with the court but the reason counsel are retained is to assist in this process and clarify what is in contention between the parties. This would then help in the calling of evidence and resolving the matters in issue.

47. The defendant no.3 had raised the fact of her own customary marriage to the deceased on 5 December 1998 which she contended rendered a subsequent monogamous marriage by the appellant null and void under the Marriage Act. An issue ought to have been formulated to cover this matter. No such issue was formulated.

48. Though there is a note on the file made on 24 January 2014 where the judge ordered the Deputy Registrar to hold a scheduling memorandum, there is no record that a scheduling hearing was held. When the matter came up on the 3 February 2014, apparently to hear an interlocutory application, the court decided to proceed with hearing of the main suit instead. Maybe the failure to hold a scheduling hearing where the parties and court would be expected to settle the issues for trial contributed to the unfortunate omissions in this case.

49. Notwithstanding the foregoing it is clear that issue was alive to the parties in this case during the trial. Evidence was called upon it. Counsel for the Appellant cross examined the respondent no.1 on it. The trial court was therefore in a position to pronounce itself on that matter. As the matter is both a mixed matter of fact and law and it was relevant to the proceedings it was incumbent on the trial court to make a finding on this matter. Neither the agreed facts on scheduling memorandum nor the admissions in the Report of death form to the Administrator General can be regarded as resolving the matter though both could be taken into account in resolving the issue.

50. The only evidence on the issue of customary marriage of the deceased and the respondent no.3 was adduced by the defence. The appellant stated that she was aware of the relationship between the respondent and the deceased but that it had broken up after the renewal of her marriage vows to the deceased in December 2010. The evidence of the break up is clearly hearsay as it was said to have been obtained from the deceased. The respondent herself states that there was some separation at some point but that they had made up and were living together as husband and wife at the time of the deceased's death. It is possible that the separation occurred at the time of the marriage ceremony at Namirembe between the appellant and the deceased.

51. The respondent no.1 testified that they went through a customary marriage ceremony with the deceased who was introduced to her parents. This is not seriously contested. In fact respondent no.2 mentions her as one of the wives of the deceased. They lived together from 1998 and had 5 children. There is no evidence that this marriage was registered under the Customary Marriages [Registration] Act, Chapter 248 of the Laws of Uganda. I need not explore the consequences of non-registration under the Act of the said marriage. It was not the subject of argument in this court and below.

52. On the evidence on record I am satisfied that there was a customary marriage subsisting between the deceased and the defendant no.3 / respondent no.1.

Ground No. 3

53. It was contended for the appellant that the learned trial judge erred in law and fact when he wrongly [evaluated] or failed to evaluate the evidence on record. It appears to me that it is not so much that the learned judge wrongly evaluated or failed to evaluate the evidence on the record. What the learned judge erred to do firstly was not to formulate the issues in controversy [whether of fact or law] upon which a decision was needed by the parties in accordance with order 15 of the Civil Procedure Rules which would have averted some of the problems encountered in this matter.

54. Secondly after the court failed to formulate the right issues the court dismissed the resolution of a key legal issue that was vital to resolving the matters in controversy between the parties. And this was the legal relationship between the appellant and respondent no.1 on the one hand

with the deceased on the other. The resolution of the nature of relationship that each of these persons enjoyed with the deceased was key to resolving the matters in controversy in this suit.

55. At some point the trial judge states that since the deceased was no longer alive it was immaterial to determine whether the appellant was married to him or not. However, in the same breath, the court concludes that she was a beneficiary of the estate of the deceased. This was untenable. The relationship had to be determined before determining whether or not she was a beneficiary or not; or whether was entitled to be granted letters of administration or not in respect of the estate of the deceased.

56. I note that the trial court to some extent reviewed the available evidence with regard to the legal relationship between the appellant and deceased. At some point it opined that the appellant's marriage to the deceased in UK had not been validly proved in the evidence. Nevertheless given the fact that there was a separation after that marriage in 1992 between the appellant and the deceased the appellant was precluded from any entitlement in the estate of the deceased in light of the provisions section 30 of the Succession Act. It states,

> **'30. Separation of husband and wife.**
> (1) No wife or husband of an intestate shall take any interest in the estate of an intestate if, at the death of the intestate, he or she was separated from the intestate as a member of the same household.
> (2) This section shall not apply where such wife or husband has been absent on an approved course of study in an educational institution.
> (3) Notwithstanding subsection (1), a court may, on application by or on behalf of such husband or wife, whether during the life or within six months after the death of the other party to the marriage, declare that subsection (1) shall not apply to the applicant.'

57. The learned trial judge held that the appellant's marriage had been saved by the ceremony of 2010 at Namirembe Cathedral. However, he refused to determine the possible consequences of section 13 of the Registration of Customary Marriages Act which voided any subsequent monogamous marriage after contracting a customary marriage, in light of his positive finding that there was a subsisting customary marriage between the deceased and the respondent no.1. Or the effect of section 30 of the Succession Act after the second marriage ceremony of 2010 between the appellant and the deceased given the acknowledged fact that the appellant

and the deceased were not living in the same household at the time of the deceased's death. Though these questions were argued before the court below, the said questions have not been seriously re-agitated before us.

Ground No.4 and 5

58. These grounds were argued together and are in effect two sides of the same coin. These grounds arise out of the following passage of the judgment of the court below.

> 'On the issue of Muyenga property being declared as part of the estate, the court hereby follows section 26(1), (2) and (3) of the Succession Act which would provides that issues dealing with the residential house and other residential holding shall be dealt with by the personal representative of the estate who in this case is the Administrator General. In any case, since the Court has held that the deceased had customarily married the 3rd Defendant, Jolly Kasande and she has four children of the deceased, then there is no harm for the Muyenga house to be occupied by the 3rd defendant, Jolly Kasande and her children as part of their share out of the estate. And it is so ordered.'

59. The High Court is seized with the authority, in appropriate cases, to order distribution of the estate of a deceased as the justice of the case may require and the personal representative of the estate would have to comply with such direction. The occupancy of the Muyenga property was brought into issue in the proceedings below and the High Court could have left it to the personal representative to determine as it initially intimated or with a view to bringing finality to disputes before the court give a direction that the personal representative would have to comply with in the course of the administration of the estate.

60. Even if the respondent no.1 was not to be entitled to share in the estate of the deceased, as the natural guardian of the four minor children of the deceased who was responsible for their necessaries it would be logical in order to provide necessaries of life to the minor children to allow her and the children accommodation out of the estate as this was a necessary of life for the minor children which could be counted as part of their share in the estate of the deceased. It is the duty of the personal representative to

make final distribution of the estate and any dissatisfied party would be free to contest the same in courts of law. The order of the trial court was subject to the final distribution by the personal representative.

61. I would therefore reject grounds no.4 and 5 of the appeal.

62. As I take leave of this matter I am satisfied that it is the duty of the personal representative of the deceased, now the Administrator General to administer the estate of the deceased, distribute the same in accordance with the law and make a final inventory to be filed in the court below, within a reasonable time. The Administrator General is obliged to administer and distribute the said estate in accordance with the law and should there be any dissatisfied party the courts are always available to resolve any dispute that may arise.

63. I would reject this appeal and order costs of the same to be borne out of the estate of the deceased.

Signed, dated and delivered at Kampala this 18th day of June 2015

FMS Egonda-Ntende
Justice of Appeal

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.....RESPONDENTS

JUDGMENT OF KENNETH KAKURU, JA

I have had the benefit of reading in draft the Judgment of my learned brother Hon. Mr. Justice FMS Egonda-Ntende, JA.

I agree with him that this appeal must fail for the reasons given in his Judgment.

I also agree with the order he has made in respect of costs.

As the Hon. Mr. Justice Geoffrey Kiryabwire, JA also agrees, it is so ordered.

Dated at **Kampala** this .....18.....day .....June.....2015.

.....

HON. KENNETH KAKURU
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[CORAM: Kakuru, Kiryabwire & Egonda –Ntende, JJA]

CIVIL APPEAL NO. 70 OF 2014

[Arising from the Civil Suit No .133 of 2012 that arose out of Probate and Administration Cause No 2015 of 2012 in the Family Division of the High Court of Uganda]

BETWEEN

ELIZABETH NALUMANSI WAMALA.....APPELLANT

AND

1. **JOLLY KSANDE**
2. **NABUKEERA ESTHER** }.....**RESPONDENTS**
3. **RONNIE M. LUTAAYA**

JUDGMENT OF GEOFFREY KIRAYBWIRE, JA

I have had the benefit of reading in draft the Judgment of my brother Hon. Justice Egonda- Ntende , JA

I agree with him and have nothing more useful to add.

Dated at **Kampala** this .....18th.....day.....June.....2015

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HON. GEOFFREY KIRAYBWIRE

JUSTICE OF APPEAL