

THE REPUBLIC OF UGANDA,
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO 77 OF 2012
(CORAM: KAKURU, MUSOTA, MADRAMA, JJA)

10
 1. **HARRIET BABIRYE KYEYUNE**
 2. **GORETTI NAMITALA**
 3. **ENITER NALONGO NAMPALA**
 4. **ELLY KAGGWA DAMULIRA** }**APPELLANTS**

VERSUS

PASCAL MBAZIRA}.....RESPONDENT

15 **JUDGMENT OF CHRISTOPHER MADRAMA IZAMA, JA**

The appellant appealed against the decision of the High Court on appeal from the judgment of the Chief Magistrate’s Court of Nabweru in Civil Suit No. 111 of 2008 delivered by Her Worship Joy K. Bahinguza on 26th November 2009. The Chief Magistrates Court allowed a suit of the respondent against the appellant and held *inter*
 20 *alia* that the respondent was a *bona fide* purchaser of the property of the estate of a deceased person having validly purchased the land on 12th December 2006 from the children of the deceased the late Nalongo Nagawa who died on 13th November 1996. The appellants being aggrieved with the judgment appealed to the High Court of Uganda at Nakawa in Civil Appeal No 10 of 2009 and the High Court upheld the
 25 judgment of the Chief Magistrates court. This is a second appeal from that decision.

The subject of the appeal is land situated at Maganjo B LC zone in Kawempe Division, Kampala District measuring approximately 100 by 45ft which land was part of the estate of Nalongo Esukanensi Nagawa (hereafter referred to as the deceased) and had been sold by 5 of the deceased’s children, who are also the brothers and sisters of the
 30 Appellants at a consideration of Shillings 18,500,000/= on 12th December, 2006. The sale agreement of the suit property was signed by several of the beneficiaries namely; Jimmy Kato Nyombi, Mable Nakamya, Goretti Namitala, Babirye Florence and Siza Lemu. The sale agreement was witnesses by the LC1 Chairperson of the area.



5 The record or proceedings of the trial magistrate shows that it was alleged on one hand that the deceased died intestate but a document described as a will was presented by one Mr. Katumba. The alleged will was neither considered nor contested. The family of the deceased convened at the home of Jimmy Kato after the burial and distributed the property as follows:

- 10 1. Plot in Kagoma was given to the surviving boys i.e. Jimmy Kato and Kaggwa Eli.
2. The land at Mpwedde Nakaseke was given to Nalongo Nampala Enita and part of the house in Naguru.
3. The stall at Nakasero market was given to Babirye Harriet and part of the said Naguru house.
- 15 4. The land in Maganjo was given to the rest of the girls i.e. Sarah Nakku (Now deceased and was represented by Jimmy Kato in the sale of land transaction), Babirye Florence, Namitala Goretti (she denied being part of the sale transaction), Mable Nakamya and Siza Lemu.

20 The appellant's on the other hand alleged that the deceased left a will and the sale of the land at Maganjo to the respondent was illegal. At the trial, the Plaintiff presented 3 witnesses while the Defence presented 4 witnesses. The record of appeal in this court does not have any pleadings of the parties before the trial Magistrate.

At a Scheduling Conference conducted by the Chief Magistrate, the respondent in this appeal was the plaintiff and the appellants were the defendants whereat the parties
25 agreed on the following issues for resolution of the suit:-

1. Whether the deceased died intestate?
2. Whether the deceased's properties were distributed amongst the beneficiaries?
3. Whether the plaintiff lawfully bought the suit land?
4. Whether the defendants destroyed the properties at the suit property?
- 30 5. Remedies available to the parties.

On whether the deceased died intestate, the trial court found that the deceased died intestate since the original will was not tendered as an exhibit. Regarding issue 3, the trial Magistrate relied on **Suleman Lule v Zamu Nalumansi Nalongo & Anor, KLR [1990-91], 49** and held that allegations of fraud must be strictly proved. The learned
35 trial magistrate held that the respondent Mr. Mbazira is a *bona fide* purchaser for value and no fraud was proved against him to the requisite standard. The trial Magistrate granted the plaintiffs prayers and issued a permanent injunction against the defendants who are the appellants to this appeal and issued an order for vacant possession of the



5 suit property against the appellants herein. The appellants being dissatisfied lodged an appeal in the High Court on the following grounds:-

- 10 1. The learned trial magistrate erred in law and in fact when she held that the respondent had validly purchased the suit land on December 12, 2006 from Mable Nakamya, Florence Babirye and Ceaser Lemu who did not have letters of administration to the estate of their mother, Nalongo Esukanensi who died on November 13, 1996.
- 15 2. That the learned trial Chief Magistrate erred in law and fact when she decided that the defendants who are the children of the deceased had no valid claim to the suit land.
3. That the learned trial magistrate did not properly evaluate the evidence and therefore came to the wrong conclusion.
- 20 4. That the learned trial magistrate erred in law when she held that the respondent was a bona fide purchaser.

25 The learned trial Magistrate held that the application for grant of letters of administration to the estate of the deceased had been overtaken by events and in any case would serve no useful purpose since there was nothing to administer (The property having been distributed by the family).

30 The High Court in the judgment of Hon. Lady Justice Faith Mwendha, the first appellate court Judge as she then was upheld the judgment of the lower court *inter alia* on the ground that no evidence of fraud on the part of the respondent had been proved and further upheld the decision of the trial court. The appellants being aggrieved lodged a further appeal to this court on the following grounds:

- 35 1. The learned Justice of Appeal erred in law and misconceived the law by holding that the respondent validly purchased the suit land, yet, from persons who did not have letters of administration and/or legal title to transact, sell or otherwise dispose of the land comprised in the estate of the late Nalongo Nagawa Esukunensi
2. The learned Justice of Appeal erred in law and misdirected herself when she held that the respondent was a bona fide purchaser for value without notice.



- 5 3. The learned Justice of Appeal erred in law and fact by holding that the appellants, who are biological children of the late Nalongo Nagawa Esukanensi, had no claim and/or interest in the suit land.
- 10 4. That the learned Justice of Appeal erred in law and fact by relying solely and heavily on prosecution witnesses' evidence at trial and holding that their evidence was consistent in as far as the family had agreed and distributed the properties comprised in the estate of the late Nalongo Nagawa without proof of any consent document or evidence of distribution of properties submitted on record.
- 15 5. The learned Justice of Appeal erred in law and in fact when she failed to re-evaluate the evidence on record so as to come to her own finding of law and fact regarding the sale/purchase and ownership of the suit land and hence coming to a wrong conclusion.
- 20 6. The learned Justice of Appeal erred in law misdirecting herself by relying heavily on evidence.

25 At the hearing of the appeal learned Counsel Ms Geraldine Nakazibwe holding brief for learned Counsel Ms Diana Namulondo appeared for the respondent. The respondent was served through counsel but did not appear. Having satisfied itself that the respondent had been duly served with the hearing notice at the address on court record, the court allowed the appellant to proceed in the absence of the respondent under Rule 100 (3) of the Rules of this court. The appellant's counsel with leave of court addressed the court by way of written submissions that were already on court record.

30 The appellant's counsel abandoned grounds 4 and 6 of the appeal and argued grounds 1, 2, 3 and 5 of the appeal. Learned counsel submitted that on a second appeal, the Court of Appeal is precluded from questioning the findings of fact of the trial court, provided that there was evidence to support those findings, though it may think it possible, or even probable, that it would not have itself come to the same conclusion; it can only interfere where it considers that there was no evidence to support the findings of fact, this being a question of law (see **R v Hassan Bin Said (1942) 9 EACA 62**). She submitted that whenever the question arises as to whether a judgment can be supported on facts as found by the trial court and the first appellate court, such question may be resolved by the second appellate court purely as a question of law.



5 **Grounds 1 and 5 of the appeal**

10 The appellant's counsel submitted that the first appellate court Judge erred in law upon re-evaluating the evidence before her when she held that all the children except two agreed to distribute the property by mutual agreement and as such the application for letters of administration had been overtaken by events. Further, the learned first appellate court Judge erred in law and fact when she failed to re-evaluate the evidence on court record so as to come to her own findings of law and fact regarding the sale/purchase and ownership of the suit property. She relied on section 25 of the Succession Act; Cap 162, for the proposition that all property of an intestate devolves upon the personal representatives of the deceased upon trust for those persons entitled to it under the said Act. She further relied on section 191 of the Succession Act for the proposition that no right to any part of the property of a person who has died intestate shall be established in a court of justice unless letters of administration have first been granted by a court of competent jurisdiction. Further that, the provisions as held in several judicial precedents referred to in the submission lead to the conclusion that dealing in a deceased person's property without grant of letters of administration or probate renders the transaction illegal and contrary to law. She referred to **Makula International Ltd vs His Eminence Cardinal Nsubuga and another Civil Appeal No 4 of 1981 [1982] HCB 11**, in which it was held that, a court of law should not sanction what is illegal and illegality once brought to the attention of the court overrides all questions of pleading, including any admissions made therein. The learned appellate court Judge was aware that the deceased had died intestate and no letters of administration was sought for and thus in holding that the deceased's children could distribute their mother's estate without letters of administration or probate, contravened the Succession Act which was tantamount to condoning an illegality.

30 **Ground 2**

35 The appellant's counsel submitted that the learned first appellate court Judge erred in law upon re-evaluation of evidence when she held that the respondent is a bona fide purchaser for value without notice. The learned first appellate court Judge had sufficient evidence before her to prove that the suit land was a kibanja. The principle of *bona fide* purchaser for value does not apply to kibanja land or land which is not registered. Therefore there is no such thing as a *bona fide purchaser for value without notice* of an unregistered land. In holding that the respondent was a bona fide purchaser for value, the learned first appellate court Judge erred in law since the doctrine of bona fide



5 purchaser can only be applied under the Registration of Titles Act Cap 230 and not to unregistered land.

Ground 3

10 The appellant's counsel submitted that the learned first appellate court Judge erred in law and fact when she evaluated the evidence before her and held that the appellants, who are the biological children of the deceased, had no claim of right to the suit property. The appellant's counsel contended that the appellants are beneficiaries of the estate of the deceased who died intestate and as beneficiaries of the deceased estates, had an interest in the suit property. This interest arises from section 27 (1) of the Succession Act; Cap 162, which provides that where a deceased person dies intestate, 15 the estate shall be distributed among certain classes of persons which include the lineal descendants. A lineal descendant is defined under section 2 of the Succession Act to include legitimate, illegitimate and adopted children. The appellants are legitimate children of the deceased entitled to receive a portion from their mother's estate and as such had an interest in the property. Such a beneficiary has *locus standi* to institute legal 20 proceedings for purposes of protection of the deceased's estate (see **Israel Kabwa v Martin Musiga SCCA No 5 2 of 1995**).

As far as costs are concerned, the appellant's counsel prayed that costs should follow the event unless the court for good cause orders otherwise and therefore costs of the appeal should follow the allowing of the appeal as prayed for.

25 **Resolution of appeal**

I have carefully considered the appeal and as a second appellate court, the jurisdiction of the Court of Appeal is limited to determining questions of law and is governed by section 72 of the Civil Procedure Act, Cap 71 which provides that:

"72. Second appeal.

30 (1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely that—

(a) the decision is contrary to law or to some usage having the force of law;



5 (b) the decision has failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, has occurred which may possibly have produced error or defect in the decision of the case upon the merits. ..."

10 The section is clear and gives limited jurisdiction to this court to determine an appeal only where; the decision is contrary to law or to some usage having the force of law; the decision has failed to determine some material issue of law or usage having the force of law and where a substantial error or defect in the procedure provided by the Civil
15 Procedure Act or by any other law in force, has occurred which may possibly have produced error or defect in the decision of the case upon the merits. Furthermore, **Rule 32 (2)** Rules of this Court allows us to appraise inferences of fact drawn by the trial court. In this appeal we are no dealing with factual controversy or controversies but decisions based on facts where there are alleged errors of law. We may also deal with conclusions made contrary to the facts on record.

20 The appellant chose to argue grounds 1 and 5 together. These grounds deal with questions of fact as to whether the children agreed to distribute the estate. I have carefully considered the arguments of counsel and they are not phrased in accordance with the specific grounds. Ground 1 is that the learned Justice of Appeal erred in law and misconceived the law by holding that the respondent validly purchased the suit
25 land, from persons who did not have letters of administration or legal title to transact, sell or otherwise dispose of the land which formed part of the estate of the deceased. It is a pure question of law that the learned first appellate court Judge upheld the decision of the trial magistrate and agreed that the sale of the suit property was valid because the property was sold by some children except the appellants. Behind the ground is the
30 principle of law as to whether any transaction involving the estate of a deceased person can be executed by a beneficiary without letters of administration or devolution of the property to the beneficiary. Ground 5 on the other hand it seems to import a question of fact by averring that the first appellate court Judge failed to evaluate the evidence on record so as to come to her own findings of law and fact regarding the sale/purchase
35 and ownership of the suit land and hence coming to a wrong conclusion. Ground 5 is superfluous and unnecessary because ground one is based on those facts which are not in dispute. The fact that the property was sold to the respondent by the children or



5 some of the children of the deceased is not in controversy. The question therefore is whether in those circumstances, the sale of the property is valid.

The learned first appellate court Judge held at pages 4 and 5 of her judgment as follows:

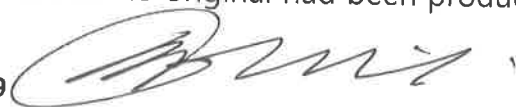
10 "The evidence of both the plaintiff and the defence was that the mother of these children died in 1996 and since then, no letters of administration were sought for. The defence witnesses stated that the death was reported to the Administrator General but the date or period of report was not mentioned. It was clear from the evidence that even at the time this case was being heard, no letters of administration had been granted.

15 The purpose of letters of administration is to have an administrator of an estate and or legal representative of a deceased person who dies intestate. The Succession Act Cap 162 laws of Uganda 2000 constitute the law which is applicable to all cases of an intestate or testamentary succession. This meant that when all the children except the two agreed to distribute the property, this distribution was by mutual agreement. And it was very clear that even those who did not sign, either had gotten their share earlier or they were beneficiaries by the distribution PW1 and PW2 testified to."

20 On the other hand the learned trial magistrate also dealt with questions of fact and held that the deceased died intestate because the original will was not tendered in court as a defence exhibit. So the original will was non-existent and this is what she stated at page 25 5 of her judgment:

30 "In the premises, I have no choice but to declare the plaintiff as a bona fide purchaser for value. Much as the defendants are saying that the sellers had no letters of administration but even the defendants have no letters of administration to sue and be sued on behalf of the estate of Nagawa. DW1 and DW IV told court that the said suit (land) was bequeathed to Robert Kiyemba and Godfrey Lutwama. These two people were not part of the suit. They were not the immediate beneficiaries of the deceased. If they were beneficiaries of the estate of the deceased, they should have come to court themselves to defend their interests."

35 It is clear from the finding of the trial magistrate that there was a will. The learned trial Magistrate disregarded the will only on the ground that no original had been produced



5 in court. Secondly, it cannot be determined at this stage whether they will was valid or
not. There is no complete record of the will on the court record. The fact that the
deceased died intestate cannot be proved by the fact that the will that was produced
was a photocopy instead of the original. A photocopy of any document can be adduced
10 in evidence if the original cannot be found. When it is a will, it is mandatory and
absolutely necessary to establish whether it was the will of the testator duly attested or a
document that does not fulfil the formal requirements of a valid will irrespective of
whether the original cannot be found. It is also evident from the above findings that
both courts concluded that the deceased died intestate. I do not see any basis for such a
15 conclusion. The above notwithstanding, what was in issue was the sale of property
without the grant of letters of administration or probate. Can property of an intestate or
property of a deceased who died testate be distributed and sold by the beneficiaries as
indicated above without authority of court?

The first point of law is based on section 11 of the Administrator General's Act Cap 157
laws of Uganda. It provides that:

20 "11. Intermeddling with property of deceased.

(1) When a person dies, whether within or without Uganda, living property within
Uganda, any person who, without being duly authorised by law or without the
authority of the Administrator General or an agent, takes possession of, causes to
be moved or otherwise intermeddles with any such property, except in so far as
25 may be urgently necessary for the preservation of the property, or unlawfully
refuses or neglects to deliver any such property to the Administrator General or
his or her agent when called upon so to do, commits an offence; and any person
taking any action in regard to any such property for the preservation of the
property shall forthwith report particulars of the property and of the steps taken
30 to the agent, and if that person fails so to report he or she commits an offence.

(2) Any person who commits an offence under this section is liable on conviction
to imprisonment for a period not exceeding three months or to a fine not
exceeding two hundred shillings or to both, but without prejudice to any civil
liabilities which he or she may have incurred."

35 Under the above provision, the right of the beneficiaries is to take action to preserve the
property and not to distribute it without authority. It is an offence to intermeddle with
the property without authority. To transfer property of the intestate or testate without

5 authority except to act in preservation thereof would be an illegality. The law ensures
that the property is distributed in accordance with the law and under the authority of a
court of law for the grant of probate or letters of administration. In the facts of this case,
the property was sold after a distribution without the consent of other beneficiaries who
10 claimed that the deceased had left a will. The will was not proved and no probate was
sought or granted. There is evidence on the record that the Administrator General was
involved and had applied for letters of administration. In fact, the record is clear that
death was reported to the Administrator General and a file was indeed opened at the
office of the Administrator General under Mengo Administrator General's Cause No
2857/07. There is on record evidence of a plaint in High Court Civil Suit No 52 of 2008
15 between the Administrator General as plaintiff and Florence Babirye as defendant. It was
a suit for the removal of a caveat. This suit had been lodged in the High Court on 2nd
April, 2008 after the sale of the suit property. It only proves that there was an application
for letters of administration by the Administrator General which had been caveated by
the defendant. The contents of the plaint also show that there was a dispute about the
20 distribution of the property in the family of the deceased. Apparently the record
indicates that an application for letters of administration had been lodged in the High
Court in Administration Cause Number 2051 of 2007 by one Charity Nazziwa.

Furthermore, the record of the trial magistrate with regard to the will is very telling of
the silence of the court about it. DW1 Harriet Babirye Kyeyune, the first appellant
25 testified as follows:

"The clan leader in the names of Katumba went with the will. When we came back
from the funeral rites, we sat at our mums place Maganjo after Kawempe
division....

30 The land is located in Maganjo. The land is part of the land indicated in the will.
The suit land was given to Robert Kiyemba and Geoffrey Lutwama. I learnt that
the land was sold to one Pascal Mbazira. I saw the sale agreement.

... We reported the death of our mother to the Administrator General. We are
now praying for letters of administration. People who sold to the plaintiff lodged
a caveat."

35 DW III Mr. Kaggwa testified as follows:



5 "The land in dispute according to the will was given to Godfrey Lutwama and
Kiyimba Robert. These people mentioned in the will are not the ones in the sale
agreement. Goretti Namitala is on the sale agreement but she did not participate
in the selling. There is another case where we are suing Pascal Mazira, it is a
10 criminal case. We have never lodged a caveat. It is now being occupied by
Solome Kuliva and Muhammed Medi. I was not part of the sale agreement.
Mbazira had never taken possession of the land."

This is what the learned trial Chief Magistrate said about the will at page 4 of her
judgment:

15 "A photocopy of the will was tendered in court as IDE1. However, the original will
was not availed to this court. Katumba who was alleged to be in custody of the
said will was not produced in court as witness. Therefore the evidence of DW1
remained hearsay. The late Nagawa died intestate. I am saying this because the
original will was not tendered in court as defence exhibit. So the original will was
not existent."

20 The record is silent on whether Katumba was summoned or not. As far as the law is
concerned, the above are gross misdirection as to what to do with the estate of a
person who has died intestate or intestate. Section 188 of the Succession Act Cap 162
laws of Uganda 2000 provides as follows:

25 "No right as executor or legatee shall be established in any court of justice, unless
a court of competent jurisdiction within Uganda has granted probate of the will
under which the right is claimed, or has granted letters of administration under
section 181."

In case anyone proceeds from the assumption that there was no will and the deceased
died intestate, section 191 of the Succession Act provides as follows:

30 "Except as hereinafter provided, but subject to section 4 of the Administrator
General's Act, no right to any part of the property of a person who has died
intestate shall be established in any court of justice, unless letters of
administration have first been granted by a court of competent jurisdiction".

35 The law ensures that the legal title of the estate passes on to the administrator who
becomes a trustee to distribute the estate to the lawful beneficiaries. The administrator
or executor of the estate of a deceased person is a trustee who holds property in trust



5 for those entitled under the Law of Succession or the will. These are the creditors as well as the beneficiaries under a will or the law of intestacy. The beneficiaries to an estate are entitled to their share in accordance with the law starting with the creditors. Section 25 of the Succession Act specifies that the administrator holds the property in trust for the beneficiaries. It provides as follows:

10 "25. Devolution of property of a deceased dying intestate.

All property in an intestate estate devolves upon the personal representative of the deceased upon trust for those persons entitled to the property under this Act."

The law requires the administrator or executor to settle all the debts of the testator or
15 intestate as the case may be and distribute the residue of the estate to those entitled under the will or the law as the case may be. The first duty is to collect the property of the intestate and make an inventory thereof. Section 279 of the Succession Act provides that:

"279. Property of deceased.

20 An executor or administrator shall collect, with reasonable diligence, the property of the deceased, and the debts that were due to him or her at the time of his or her death."

The priority of persons entitled to be paid is provided for by sections 280, 281, 282 and
25 283 of the Succession Act. They include funeral expenses, expenses for obtaining letters of administration, wages and other debts, and thereafter all other debts to be paid equally and rateably inter se. After payment of creditors of the estate, the residue of the estate is to be distributed to the beneficiaries. This is further emphasised by section 323 of the Succession Act Cap 162 which provides for the distribution of assets:

"323. Distribution of assets.

30 Where an executor or administrator has given such notices as would have been given by the High Court in an administration suit for creditors and others to send into him or her their claims against the estate of the deceased, he or she shall, at the expiration of the time named in the notices for sending in claims, be at liberty to distribute the assets, or any part of them, in discharge of such lawful claims as
35 he or she knows of, and shall not be liable for the assets so distributed to any



5 person of whose claim he or she shall not have had notice at the time of the distribution; but nothing in this section shall prejudice the right of any creditor or claimant to follow the assets, or any part of them, in the hands of the persons who may have received them."

10 The duty of the administrator is to account to court by way of filing an inventory of the property after having diligently collected the same and he may include the payment of debts and distribution of assets.

"278. Inventory and account.

15 (1) An executor or administrator shall, within six months from the grant of probate or letters of administration, or within such further time as the court which granted the probate or letters may from time to time appoint, exhibit in that court an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character; and shall in like manner within one year from the grant, or within such further time as the court
20 may from time to time appoint, exhibit an account of the estate, showing the assets which have come to his or her hands, and the manner in which they have been applied or disposed of.

25 (2) On the completion of the administration of an estate, other than an estate administered under the Administration of Estates (Small Estates) (Special Provisions) Act, an executor or an administrator shall file in court the final accounts relating to the estate verified by an affidavit two copies of which shall be transmitted by the court to the Administrator General.

(3) The Chief Justice may from time to time prescribe the form in which an inventory or account under this section is to be exhibited.

30 (4) If an executor or administrator, on being required by the court to exhibit an inventory or account under this section, intentionally omits to comply with the requisition, he or she shall be deemed to have committed an offence under section 116 of the Penal Code Act.

35 (5) The exhibition by an executor or administrator of an intentionally false inventory or account under this section shall be deemed to be an offence under section 94 of the Penal Code Act."



5 The purpose of the law would be subverted if the requirement for grant of letters of administration or probate is ignored by court. Had the respondent not come to court by suing the appellants, the matter could pass without application of the law. We are however required by law to uphold the law.

10 This suit was instituted by a purchaser of property from the estate of the deceased. He purportedly purchased it from some of the beneficiaries. Were the beneficiaries who sold entitled to the portion which they sold? There was a dispute as to whether there was a will devising the same property to some other people. Sections 188 and 199 forbid anybody from establishing the rights to the property of the deceased person without the grant of letters of administration. The plaintiff as the purchaser could not
15 establish any right to that property unless he proved that there were letters of administration which had been granted and it was the administrator who sold the property to him. The statutory provision operates as a bar to a suit in a court of law or a court of justice. It is not surprising that the learned Chief Magistrate commented about this aspect of the law. She held at page 5 of her judgment as follows:

20 "In the premises, I have no choice but to declare the plaintiff as a bona fide purchaser for value. Much as the defendants are saying that the sellers had no letters of administration but even the defendants have no letters of administration to sue and be sued on behalf of the estate of Nagawa...."

25 Presumably the learned Chief Magistrate had in mind the provisions of Order 7 rule 4 of the Civil Procedure Rules which provides that:

"Where the plaintiff sues in a representative character, the plaintiff shall show not only that he or she has an actual existing interest in the subject matter but that he or she has taken the steps, if any, necessary to enable him or her to institute a suit concerning it."

30 First of all, the appellants were sued by the person who claimed to be a bona fide purchaser and so they had a right to defend themselves. There are no pleadings on record to conclude that the appellants, who were the defendants in the trial court, had lodged any counterclaim against the respondent to this appeal. Even if Order 7 rule 4 is not applicable, one may rely on the provisions of Order 7 rule 9 (2) of the Civil
35 Procedure Rules which supplements it and provides that:



5 "(2) Where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, the statement shall show in what capacity the plaintiff or defendant sues or is sued."

The Civil Procedure Rules served a useful purpose of indicating whether this suit is in a representative character or the person who is sued is sued in a representative character. Neither the plaintiff nor the defendants in the trial court sued or were sued in a representative character. In either case, the property in issue belonged to a person who had died and the rights to the property could not be established in any court of law or a court of justice without the grant of probate or letters of administration. The sale could not be proved. Grounds 1 and 5 of the appeal are allowed. It was an error of law to ignore the fact that the deceased could have died testate or that no letters of administration had been granted as held by the learned first appellate court Judge.

Ground 2

Appellant's counsel submitted that the Honourable Lady Justice Faith Mwendha, the learned first appellate court Judge erred in law upon re-evaluation of the evidence before her and held that the respondent is a bona fide purchaser for value without notice.

Learned counsel predicated his submissions on the provisions of the Registration of Titles Act (RTA) for the proposition that a bona fide purchaser can only be in respect of land which is registered. The issue of being a bona fide purchaser cannot be restricted to the provisions of the RTA on the premises that one can do a search in the land office to establish whether the vendor is the registered owner or not. Granted, the vendors of the suit property purportedly sold a customary holding which is known as a kibanja. In such cases, the bona fides of the purchaser can be established if he or she carries out a diligent investigation of who the true owner of the property is by talking to the local authorities, the neighbours etc. Notwithstanding the above observations, the evidence is quite clear that the respondent was aware that he was dealing in the property of a deceased person that he had purportedly bought from a beneficiary and as a matter of law he had not established the lawful authority of the seller. On the first ground, if the will is valid, the beneficiary mentioned in the will is not precluded from claiming the property at the hands of any purchaser except a person who buys bona fide for value without notice of adverse claims. Similarly, a minor beneficiary who comes of age after his property has been sold can still claim it back. The property has to vest in accordance



5 with the will if there is a will because that is the only way it can be transmitted to the
lawful beneficiary. Regarding the notice of the purchaser, it was incumbent upon the
purchaser to investigate the authority of the people who sold the property to him. The
respondent who is the purchaser and the plaintiff in the trial court testified as PWII. In
10 his examination in chief at page 9 of the typed record of the trial court and page 87 of
the record of appeal he states as follows:

"I fully investigated before I bought the land in contention that the land
belonged to their mother. That they inherited it from their deceased mother.
They told me that those who sold to me had brothers. I was satisfied that indeed
the plot I bought belonged to the sellers."

15 In cross examination the respondent testified as follows at page 10 of the typed record
of proceedings of the trial court and page 88 of the record in this court:

"LC1 confirmed that those were children of the deceased that other children had
died. I do not know why they are suing me now. The children who are suing me I
did not know them before. Even my lawyer did not tell me. It is true Nakku was
20 dead by the time I bought the property. I saw one child of Nakku. I am a
businessman dealing in clothing. This was not my first time to buy land. I had
bought land before I bought this one in this case. I did not know that for one to
sell land of the deceased, he/she must be in possession of letters of
administration. I was satisfied of Jimmy Kato being the seller."

25 The respondent knew that he was dealing in property which had been inherited or
allegedly inherited. He was on notice as a matter of law to establish whether anyone had
letters of administration or authority to transfer the property or sell it to him. In the
premises, having established that the property belonged to a deceased person, he was
not a *bona fide* purchaser for value because he was not diligent enough to establish the
30 authority of the person who sold the property or that he or she was the actual
beneficiary in the will which can be ratified after appropriate authority has been
obtained. The above notwithstanding, the Court of Appeal in **Ndimwibo & 3 Others v
Ampaire; Civil Appeal No 65 of 2011 reported as [2014] UGCA 46** (10 October 2014)
held that:

35 "It appears clear to us that the doctrine of *bona fide purchaser for value without
notice* is a statutory defence available only to the person registered as proprietor
under the RTA. It is not an equitable remedy although its history stems from the



5 common law. It would not even qualify as a remedy for it is only a defence, by a person registered as proprietor under the RTA.

We do not agree with counsel for the respondent that the High Court cases cited to support his proposition, *Mpagenzihe* and *Baryabishumbamu versus Nchunsi* (supra) held that the doctrine applied to unregistered land. The term innocent purchaser was used in a different context in that case. Be that as it may, that authority is not binding on this court."

I would however not restrict the use of the *bona fide purchaser* to the RTA only as it can be used in other contexts. It is a question of terminology. Adding the word "purchaser", does not change the meaning of the word "bona fide" which means in good faith. According to **Black's Law Dictionary Eighth Edition** the word: "*bonae fidei*" is Latin for "of good faith"; "*in good faith*". Similarly the term "*bona fide*" means:

"... "In good faith". (1) "Made in good faith; without fraud or deceit". (2) ."Sincere; genuine."

One who buys property innocently may in some cases be protected and the words *bona fide for value* can be used. For instance buying a vehicle from a market where it is sold as second hand (market overt) may be an exception to the general rule of ***nemo dat quod non habet*** (no one can give what he has not got or no one can give a better title than he has got). The particular defence under the RTA relates to registered property and can be considered as a defence in its own right under statutory law that as held above is unavailable to unregistered land. The use of the term "**bona fide**" or the phrases like *done in good faith innocently* or *without any fraud or deceit*, may be used in other contexts.

Under the case law for instance beneficiaries of trust property, whose property is transferred to third parties, have a right to trace the assets in the hands of third parties who are not entitled to it and who received the property. According to **Halsbury's Laws of England Fourth Edition Reissue Volume 48 Paragraph 950**:

"Trust money or property which has been wrongfully alienated or converted in breach of trust, or the money or property into which it has been converted, can be followed and recovered so long and so far as it is capable of being identified or disentangled, unless the money or property has come into the hands of a purchaser for valuable consideration without notice of the trust."



5 A purchaser for valuable consideration without notice of trust can be protected. The
decision in **Ndimwibo & 3 Others v Ampaire; Civil Appeal No 65 of 2011 reported**
as [2014] UGCA 46 applies to registered land under the RTA and I understand it to
10 mean that a person who buys from a registered proprietor has constructive notice of the
proprietorship in the register. However, Ugandan courts require more diligence than
bare registration because the registered title might be encumbered for instance by
adverse kibanja or customary holdings recognised by law. The person in occupation may
15 have an adverse claim against what appears in the register and the potential; buyer is
put to inquiry as to other adverse interests. It follows that unregistered land calls for
more diligence because there is no element of registration and constructive notice as a
consequence of that.

In this case the appellant had notice that the property belonged to the deceased's
estate and was sold by a son called Jimmy Kato. He had notice of the trust in terms of
the property being that of the estate of a deceased person. It is the
20 defendant/respondent who purportedly purchased the property who filed a suit in the
first place. The court cannot lend its process to an illegality because no right to the
estate of the deceased person had been established through the grant of probate or
letters of administration and no legal representative of the deceased passed the title.
Ground 2 of the appeal is allowed.

Ground 3:

25 On this ground the learned counsel for the appellant argued that the learned first
appellate court Judge erred in law and fact when she re - evaluated the evidence before
her and held that the appellants who are the biological children of the late Nalongo
Nagawa Esukanensi had no claim of right to the suit property.

I do not have to determine this point. In my opinion, the issue of whether the will was
30 valid or not has to first be resolved. It is a point of law that the property could not have
been validly sold. The question of locus standi cannot arise in this appeal because it is
the Respondent who sued the appellants. They had the right to defend themselves.
There is no evidence that the appellants also filed a counterclaim against the
respondent. The judgment of the trial court does not deal with any counterclaim. I do
35 not have the benefit of the pleadings before the Honourable Chief Magistrate and
would let the matter rest there.



5 Lastly, the appellant's counsel prayed that the costs of the appeal should abide the outcome of the appeal or should follow the event. The appellant having substantially succeeded in this appeal, I would make the following orders:

1. This appeal is allowed and the judgment and orders of the High Court and the Chief Magistrates' Court are hereby set aside.
- 10 2. I would further make an order that the plaintiff's suit in the trial court is dismissed.
- 15 3. The beneficiaries of the deceased should proceed to pursue grant of probate or letters of administration upon which the estate of the deceased shall be legally distributed.
- 20 4. The appellant prayed for a permanent injunction and because under the circumstances, the true beneficiary of the property is yet to be ascertained through the process of administration of the estate and I would decline to order a permanent injunction against the respondent and state that the respondent is entitled in the circumstances to pursue his remedy against those who sold the suit land in question to him.
- 25 5. I would issue a declaration that the respondent is not entitled to the suit property and the sale thereof to him is null and void.
- 30 6. I would further award the costs of this appeal and in the courts below to the appellants.

Dated at Kampala the ___ day of May 2019


Christopher Madrama Izama

Justice of Appeal

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
CIVIL APPEAL NO.77 OF 2012**

5 **1. HARRIET BABIRYE KYEYUNE
2. GORETTI NAMITALA NAMUSOKE
3. ENITER NALONGO NAMPALA
4. ELLY KAGGWA DAMULIRA:::::::::::::::::::::::::::::::::APPELLANT**

VERSUS

10 **PASCAL MBAZIRA:::::::::::::::::::::::::::::::::RESPONDENT**

**CORAM: HON JUSTICE KENNETH KAKURU, JA
HON. JUSTICE STEPHEN MUSOTA, JA
HON. JUSTICE CHRISTOPHER MADRAMA, JA**

15

JUDGMENT OF JUSTICE STEPHEN MUSOTA, JA

The respondent, Pascal Mbaziira instituted a suit against the appellants in the Chief Magistrates Court at Nabweru for a declaration that the suit property belonged to him, a permanent injunction restraining the appellants or their agents from demolishing any developments on the suit land, general damages and costs of the suit. The Chief Magistrate found in favor of the respondent. The appellants were dissatisfied with that decision and filed an appeal to the High Court which was also dismissed. Being also dissatisfied with this decision, they filed this second appeal.

25

Background

The facts giving rise to this appeal as accepted by the trial court are that;

5 The respondent purchased the suit land in 2006. The land is located in Maganjo "B" Local Council Kawempe Division. The sale agreement was executed on 12/12/2006. Upon signing the sale agreement, he paid fully the purchase price to the sellers; JIMMY KATO, NAKAMYA MABLE, NAMITALA GORRETTI, and SIZA LEMU. The purchase price was shs. 18,500,000=.

10 The above mentioned sellers were biological sisters and brothers of the appellants. The sale agreement dated 12/12/2006 was executed in presence JIMMY KATO NYOMBI, MABLE NAKAMYA, BABIRYE FLORENCE, GORRETTI NAMITALA, SIZA LEMU and the entire executive of LC 1"B" Maganjo including the LC1 chairman himself HAJJI JABERI MUSOKE.

15 After the purchase of the suit land and payment of the full price to the sellers, the respondent started developing the land and utilizing it. However, during his absence in South Africa where he was working, the 1st and 4th appellants in the names BABIRYE HARRIET KYEYUNE and KAGGWA ELLY evicted his tenants. They destroyed
20 his properties and prevented him from utilizing the land he had purchased. The respondent had been assured by the LCs of the area that the land belonged to the sellers having inherited it from their deceased mother NAGAWA NALONGO ESUKANENSI. As already stated above, the two lower courts found for the respondent hence
25 this appeal.

Grounds of appeal

The grounds of appeal are set out as follows:

1. The Learned (High Court) Justice of Appeal erred in Law and misconceived the law by holding that the Respondent validly
30 purchased the suit land, yet, from persons who did not have letters of administration and/or legal title to transact, sell or

otherwise dispose of the land comprised in the Estate of the Late Nalongo Nagawa Esukanensi.

2. The Learned (High Court) Justice of Appeal erred in Law and misdirected herself when she held that the Respondent was a bonafide purchaser for value.
3. The Learned (High Court) Justice of Appeal erred in Law and fact by holding that the Appellants, who are biological children of the Late Nalongo Nagawa Esukanensi, had no claim and/or interest in the suit land.
4. The Learned (High Court) Justice of Appeal erred in Law and fact by relying solely and heavily on prosecution witness' evidence at trial and holding that their evidence was consistent in as far as the family had agreed and distributed the properties comprised in the estate of the late Nalongo Nagawa Esukanensi without proof of any consent document or evidence of distribution of properties submitted in record.
5. The Learned (High Court) Justice of Appeal erred in Law and fact when she failed to re-evaluate the evidence on record so as to come to her own finding of law and fact regarding the sale/purchase and ownership of the suit land and hence coming to a wrong conclusion.
6. The Learned (High Court) Justice of Appeal erred in Law misdirected herself by relying heavily on evidence.

Grounds 4 and 6 of the appeal were abandoned.

It should be noted from the outset that whereas the respondent's counsel was duly served, he was unrepresented

and did not file any submissions in this appeal. The appellant also intimated to court that she had lost contact with her client and applied to withdraw from the conduct of the appeal but court declined to grant her leave to withdraw from the appeal.

5 **Representation**

At the hearing of the appeal, Ms. Nakazibwe Geraldine appeared holding brief for Diana Namulondo Mugenyi while the respondent was unrepresented.

Submissions of the appellant.

10

Counsel submitted that under section 25 of the Succession Act, all property in an intestate estate devolves upon the personal representative of the deceased in trust for those persons entitled to the property under the Act. Counsel also relied on section 191 of the
15 Succession Act on the principle that there is no right to any part of property of a person who has died intestate that shall be established in any court of justice unless letters of administration have been granted by court. That the above sections not only emphasize that upon death, the property of the deceased is vested in the personal
20 representative of the deceased but also emphasize that no person can establish a right to an intestate deceased without grant of letters of administration that give the person authority to deal with the estate of the deceased person.

In regard to ground 2, counsel submitted that it was an error for the
25 trial Judge to hold that the respondent was a bonafide purchaser for value without notice. That there was sufficient evidence to prove that the suit land was a kibanja and for kibanja holders, there had to be payment of Busulu and a kanzu on introduction to the mutaka of the area since they do not have certificates of title. In addition, the
30 principle of bonafide purchaser for value without notice does not apply to kibanja land. The principle is that a purchaser must derive

title from registered land otherwise there is no such thing as bonafide purchaser on unregistered land.

The trial Judge's finding that the respondent was a bonafide purchaser for value is contrary to the law since it only applies to land brought under the Registration of Titles Act.

On ground 3, the appellant's counsel argued that it was an error for the trial Judge to hold that the appellants, who are biological children of the Late Nalongo Naggawa Esukanensi had no claim or right on the suit land. The appellants are beneficiaries of the estate of the Late Nalongo Naggawa Esukanensi who died intestate and as beneficiaries to the deceased's estate, the appellants had a claim of right on the suit land. The appellants relied on section 27 (1) of the Succession Act which provides for the manner in which property of an intestate deceased ought to be divided and section 2 of the same Act defines a lineal descendant to include legitimate, illegitimate and adopted children. Counsel relied on the case of **Israel Kabwa Vs. Martin Banoba Musinga S.C.C.A No. 52 of 1995** on the principle that a beneficiary of the estate of an intestate has locus to institute legal proceedings to protect the estate for his own benefit without first obtaining letters of administration.

Consideration of the appeal.

This is a second appeal and the duty of a second appellate court is to determine whether the 1st appellate court properly re-evaluated the evidence before the trial court by subjecting it to fresh scrutiny before coming to its own independent conclusion. The role of this court as a second appellate court is laid down under **Rule 32(2) of the Judicature (Court of Appeal Rules) Directions** which provides that;

“On any second appeal from a decision of the High Court acting in exercise of its appellate jurisdiction, the court shall have power to appraise the inferences of fact drawn by the trial court, but shall not have discretion to hear additional evidence.”

I am therefore obliged to appraise the inferences of fact drawn by the trial court.

It is settled law that it is only in the clearest of cases when the 1st appellate court has not satisfactorily re-evaluated the evidence that
5 a 2nd appellate court would interfere with the decision of the 1st appellate court. (See: **Kifamunte Henry vs. Uganda Criminal Appeal No. 10 of 1997** and **Pandya vs. R [1957] EA 336** It can only interfere when it considers that there was no evidence to support a finding of fact: (See: **R. vs. Hassan Bin Said [1942] 9 EACA 62**).

10 I have carefully read the judgment of the High Court and I have studied the Record of Appeal and considered the submissions of the appellant.

Grounds 1 and 5

The appellant's argument is that no person can establish a right to
15 an intestate deceased without grant of letters of administration that give the person authority to deal with the estate of the deceased person. From the evidence on record, the witnesses of the respondent were sisters and brothers to the appellants. PW1 and PW2 testified that the property of their deceased mother was distributed among all
20 the children at the last funeral rites of the deceased. PW1 stated that he called his siblings and they agreed to share the properties. They agreed that the girls take the Maganjo property including Sarah Nakku, Babirye Florence, Namitala Gorett and Mable Nakamya. The 1st appellant, Harriet Babirye, had already taken her share which
25 included the stall in Nakasero market and the house in Naguru. The 3rd appellant, Nalongo Eniter Nampala, had taken her share in Mpwedde. The boys, Jimmy and Nyombi, took the property in Kagoma.

30 The deceased died in 1996 and since then, no one sought for letters of administration of the estate of the deceased. The purpose for grant of letters of administration is to have an administrator or a legal

representative of an estate of a deceased person who dies intestate and this is provided for under part IV of the Succession Act. At the trial, defence witnesses stated that the death of their mother was reported to the Administrator General but there was no evidence adduced to prove this. What is clear from the record is that the children of the deceased distributed the property amongst themselves by mutual agreement. All the children except two signed the agreement. The two that did not sign had either got their shares earlier or were beneficiaries by the distribution which PW1 and PW2 testified to. The property was distributed in its entirety and grant of letters of administration would be in vain since there was nothing to administer. I therefore do not agree with the appellant's argument that the distribution of the property which led to the sale to the respondent was illegal for lack of letters of administration. All the children mutually distributed the property and therefore, grant of letters of administration had been overtaken by events. I find that the learned High Court appellate Judge properly re-evaluated the evidence on record and came to a correct finding that the property had been mutually distributed and the respondent had validly purchased the land from Babirye Florence, Musoke Nakamya, Siza Lemu, Goretti Namitala and Sarah Nakku. Grounds 1 and 5 of the appeal accordingly fail.

Grounds 2 and 3

I reiterate my earlier findings that the property of the deceased was mutually distributed among the children of the deceased. The children that received the suit land by virtue of the distribution are the ones that sold to the respondent.

The learned trial Judge held that;

“After careful consideration of the above, I concur with the judgment and decision of the lower court. The plaintiff was a bonafide purchaser for value and there is nowhere, where fraud was imputed. I find the submissions of the appellants not

sustainable. Instead of the defendants frustrating the plaintiff a bonafide purchaser, they ought to have reported their own who had sold to him criminally for obtaining money by false pretenses for the plaintiffs.”

5 From the above, it was rightly found that the respondent was a bonafide purchaser for value. The appellants, who are biological children of the late Nalongo Naggawa Esukanensi, had no right to claim for the suit land. As already noted above, the property had been distributed amongst the children and the appellants had also
10 received their share of the late mother’s property. Grounds 2 and 3 of the appeal also fail.

I therefore find no merit in this appeal. The appeal is accordingly dismissed with costs.

15 Dated at Kampala this 30th day of May, 2019



Hon. Justice Stephen Musota

**THE REPUBLIC OF UGANDA,
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO 77 OF 2012**

**1. HARRIET BABIRYE KYEYUNE
2. GORETTI NAMITALA
3. ENITER NALONGO NAMPALA
4. ELLY KAGGWA DAMULIRAAPPELLANTS**

VERSUS
PASCAL MBAZIRA..... RESPONDENT

**CORAM: Hon. Mr. Justice Kenneth Kakuru, JA
Hon. Mr. Justice Stephen Musota, JA
Hon. Mr. Justice Christopher Madrama, JA**

JUDGMENT OF JUSTICE KENNETH KAKURU, JA

I have had the benefit of reading in draft the Judgment of my learned brother Hon. Mr. Justice Christopher Madrama. I agree with him that this appeal succeeds for the reason he has given.

I also agree with the orders he has set out in his Judgment.

By majority decision this appeal is allowed. The Judgment of the High Court is hereby set aside and substituted with the majority decision of this Court as contained in the Judgment of Madrama JA.

It is so ordered.

Dated at Kampala this30th.....day ofMay....., 2019.


.....
**Kenneth Kakuru
JUSTICE OF APPEAL**