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**THE REPUBLIC OF UGANDA,  
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA  
(CORAM: CHEBORION, MUSOTA AND MADRAMA, JJA)**

**CIVIL APPEAL NO 289 OF 2019**

**HENRY MUGANWA KAJURA} .....APPELLANT**

10

**VERSUS**

**1. JOSEPH SSEMPEBWA}**

**2. PRINCE KASSIM KAKUNGULU}**

**3. PRINCES NAMUKAABYA NFAMBA} .....RESPONDENTS**

*(Executors of the Estate of the late*

15

*George William Mawanda)*

**4. PRINCE DAVID NAMUGALA MAWANDA}**

**JUDGMENT OF CHRISTOPHER MADRAMA, JA**

This appeal arises from the decision of the High Court of Uganda at Kampala partially allowing the plaintiffs action.

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The background to the suit is that the appellant filed a suit against Prince G. W Mawanda who subsequently died (hereinafter referred to as the deceased) and was substituted by the executors of the estate and his heir who is the fourth appellant to this appeal. The appellants claim against the defendant (the deceased) was for delivery of a piece of land similar to or

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equivalent to or equal to that comprised in Kyadondo Block 255 Plot to 227 in Kampala district. Alternatively, the plaintiff who is the appellant claimed payment of a sum of money being equivalent to the market value of the suit property as well as general damages for breach of contract. The brief facts

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were that the appellant claimed that he bought the property comprising Kyadondo block 255 plot 227 situated at Munyonyo, Kyadondo, Kampala district from the deceased for a consideration of 80,000/= Uganda shillings paid on 20<sup>th</sup> July, 1977 and which the deceased received on his account with

5 Barclays bank (U) Ltd. On 20<sup>th</sup> April, 1986 the defendant executed a transfer deed of the said property to the appellant. The appellants suit was that the deceased having sold the property to the plaintiff and executed a transfer deed in his favour, in breach of the contract of sale when he subsequently sold and transferred the very same piece of property to another person. The  
10 appellant learnt about the transfer on 10<sup>th</sup> of July 1988. In paragraph 9 of the plaint, the plaintiff/appellant averred that by reason of the nature of the claim, the action is not time barred.

The defendant denied the claims. The suit had been filed in 1993. The plaintiff subsequently amended the plaint and included the executors of the estate  
15 of the deceased who are now the first up to the third the respondents as well as the heir of the deceased Prince David Namugala Mawanda as the 4<sup>th</sup> respondent.

Hon. Lady Justice Alexandra Nkonge Rugadya in a judgment dated 22<sup>nd</sup> August, 2019 partially allowed the plaintiffs suit and awarded two acres of  
20 land or the equivalent in value thereof in the sum of Uganda shillings 500,000,000/= per acre in lieu thereof. She further awarded general damages of Uganda shillings 50,000,000/= with interest at 8% from the date of judgment till payment in full and costs of the suit.

The plaintiff was aggrieved by the judgment appealed to this court on 4  
25 grounds of appeal namely:

1. The learned trial judge erred in law and in fact when she failed to consider specific performance as was prayed.
2. The learned trial judge misdirected herself when she failed to find the administrators of the estate of the Prince George William Mawanda  
30 liable to the plaintiff as was prayed.
3. The learned trial judge erred when she held that the amount of compensation payable to the plaintiff cannot be based on the present market value of each acre and ignored the valuers evidence before awarding only Uganda shillings 1,000,000,000/=.

5 4. The learned trial judge misdirected herself when she failed to award interest on the award of shillings 1,000,000,000/= for 2 acres.

The appellant prays that the judgment and decision of the High Court in HCCS No 914 of 1993 be set aside in part. Secondly, that all the defendants be held liable to compensate the plaintiff jointly and severally. Thirdly, that  
10 the amount of compensation should be increased in tandem with the evidence adduced by the valuation surveyor. Fourthly, that the interest to be awarded and increased to 25% per annum on the amounts awarded. Lastly, the appellant prays for costs of the appeal and the High Court with interest from the date of judgment in the High Court.

15 Similarly, the respondent was aggrieved by the judgment of the High Court and filed a notice of cross appeal on the following grounds:

1. The learned trial judge erred in law and fact when she held that:
  - a. The plaint in HCCS 914 of 1993 disclosed a cause of action against the 5<sup>th</sup> respondent/defendant;
  - 20 b. The suit against the 5<sup>th</sup> respondent was not filed out of time or was not barred by time;
  - c. The suit as a whole was not defeated by latches on the part of the appellant/plaintiff.
2. The learned trial judge erred in law when she granted reliefs based  
25 on unpleaded causes of action.
3. The learned trial judge erred in law and fact when she held without evidence that the 5<sup>th</sup> respondent took the suit land under the Will of the late George William Mawanda.
4. The learned trial judge erred in law in awarding  
30 damages/compensation that had not been pleaded or proved by the appellant.
5. In the alternative to ground 1 (c) above, the learned trial judge erred in law when she reinstated the suit for trial or hearing in 2014.

35 The cross appellant prays that the cross appeal is allowed and the High Court suit dismissed.

5 When the appeal came for hearing, the respondent was represented by learned counsel Mr Joseph Luswata of S & L Advocates and the appellants counsel was absent. With leave of court, the court was addressed in written submissions and judgment was reserved on notice. The appellant is represented by Mugabi & company advocates.

## 10 **The appellant's submissions**

The appellant's counsel submitted that the facts giving rise to the appeal are straightforward. Prince George William Mawanda was the owner of the land described as Kyadondo Block 255 Plot 227 located at Munyonyo village near Kampala next to Lake Victoria in July 1997 (1977) he decided to sell this  
15 land to the appellant at an agreed price of Uganda shillings 80,000/=. The appellant duly paid the sale price to the seller on 20<sup>th</sup> of April 1986 and the seller executed a transfer deed in favour of the appellant. On 10<sup>th</sup> of July 1988 the appellant was shocked to discover that Prince George William Mawanda had breached the sale agreement and fraudulently sold and  
20 transferred the same piece of land to another person. Thereafter the appellant sued the seller in the High Court for specific performance of the sale contract, general damages and special damages.

Prince George William Mawanda died in the year 2000 and the respondents were substituted as the defendants. The 5<sup>th</sup> respondent is the heir of the  
25 deceased. Probate of the will of the deceased was granted to the respondents. The executors of the will transferred most of the property of the estate of the deceased to the 5<sup>th</sup> respondent Prince David Mawanda.

Counsel for the appellant abandoned ground 1 of the appeal. He submitted that when the appellant filed the suit, specific performance was possible.  
30 But when the seller transferred the suit property to one Barbara Mulwana on 17<sup>th</sup> March, 1994, it became impossible. He submitted that this was deliberate fraud on the part of the deceased who had plenty of time to execute the contract between him and the appellant but did not do so.

## **Ground 2**

5 The appellant's counsel submitted that the learned trial judge misdirected herself when she failed to find that the respondents were also liable to pay the decreed sum to the appellant. He submitted that they are the legal representatives of the deceased. The successor of the deceased was joined because he was the heir and had received almost  $\frac{3}{4}$  of the estate of the  
10 deceased. Further the executors never renounced the office of executor in accordance with the section 196 of the Succession Act. Because the heir was the majority beneficiary, he was sued by virtue of section 286 of the Succession Act. He submitted that the law does not allow him to take all the property of the deceased when the creditors like the appellant were unpaid.  
15 He submitted that sections 322 and 323 of the Succession Act enable the heir to be liable to pay the appellant's debt. Further the appellants testified that at some time he was forced to go into exile due to the conditions obtaining in Uganda and only pursued the suit after his return. The court file was many times mysteriously missing.

20 This the appellant's counsel further contended that there were mysterious dismissals of the suit and that is why the court deemed fit to reinstate the suit for justice to be done. No appeal was preferred against the reinstatement and there were no latches.

### **Ground 3 of appeal**

25 The appellant's counsel submitted that the quantum of compensation in law is based on the values existing at the time of hearing. He submitted that there was a serious misdirection on the part of the learned trial judge. The valuation surveyor had testified that the value of each acre of land in the area where the suit property was situated was between 1,000,000,000/= Uganda shillings and 1,400,000,000/= Uganda shillings. The appellants  
30 counsel contends that the learned trial judge gave no valid reason to depart from the expert evidence. There is no evidence that the valuation surveyor included developments on the land. The conclusion of the suit after a long time cannot be pleaded by a fraudster to reduce the quantum of damages.  
35 He contended that this was a dirty fraud by a person in a high position and

5 punitive damages ought to have been awarded against the deceased had he been alive. Further the learned trial judge gave no reason for not awarding interest on the value of the land. He prayed that interest be allowed at 25% per annum and the award of general damages should carry interest.

10 Further the appellant's counsel submitted that the learned trial judge ought to have made the award against the administrators jointly with Prince David Mawanda who was the principal beneficiary. He submitted that the law requires all debts known and unknown to be paid from the estate.

15 The appellant's counsel further submitted that the appellant was not informed by the respondent that the late Prince George Mawanda had a debt. The debt was not advertised in the Uganda Gazette for constructive knowledge to be imputed by law. He contended that Prince David Mawanda who is the successor is legally and customary in possession of most of the estate of the deceased. That the appellant knew this is a fact and sued him knowing that tracing the estate property was to be done. He was a fit and proper person to be sued for being in actual possession of the estate property.

20 Counsel further submitted that the appellant discovered the connection of Prince David Mawanda to the deceased in 2014 and that is when he decided to sue him. Further, that the 12 years' limitation period does not cover fraud and lawsuits for specific performance. The cause of action arose when the appellant discovered the nexus between Prince David Mawanda and his father (the deceased) in 2014. Further the way of the deceased named Prince David Mawanda as an heir and trustee for some property. Further that Prince David Mawanda should not be left out when the debts of the estate remain unpaid. Though the deceased knew that there was a suit pending against him, he made no express mention of it in the will. Further the testator identified properties to deal with emergencies after his demise but the executors of the will transferred it to Prince David Mawanda even though the testator expressly prohibited giving the listed property to any of

5 his children. Counsel prayed that the appeal is allowed with the orders prayed for in the memorandum of appeal.

### **Reply of the respondent to the appellant's written submissions**

10 The respondent's counsel submitted that the respondent and particularly the fourth respondent Prince David Mawanda maintains that the suit against him is time barred. In elaboration he referred to the cross appellant's written submissions which are handled subsequently.

15 The respondents counsel submitted that the respondents argue that the cause of action pleaded against them in paragraph 12 of the plaint, namely of distributing the estate without making provision for the appellant's claim is time barred. The respondent also refers to the written submissions in the cross appeal for this assertion. The respondents counsel further pointed out that the appellant tried to explain the limitation point away from the bar by submitting that the appellant was not informed by the respondent that Prince George William Mawanda had died.

20 The respondent's counsel contends that this submission is not borne out by the evidence and was only made from the bar. Secondly the submission contradicts the appellant's pleadings and the evidence tendered by him in court. In the plaint, he had averred that the 6<sup>th</sup> defendant is the heir of the late Prince George Mawanda by his will. That he and the rest of the  
25 defendants are sued as legal representatives of the original defendant, the said Prince George William Mawanda who died sometime during 2000. This was also the appellants evidence in his written witness statement. Further PW3 testified that he told the plaintiff about the death of the deceased around 2004. Further the respondents pleaded limitation in the written  
30 statement of defence in that they averred that the suit against him is time barred since the will of the late George William Mawanda was proved in court in the year 2000 and there was no denial of that averment by way of a reply. The appellant did not plead any facts but only averred that the suit was not time barred.

5 In the premises, the respondent's counsel submitted that the submissions  
of the appellant's counsel on this point is dishonest. Further, the appellant  
was aware of the death of George William Mawanda and had pursued the  
fourth respondent by lodging a caveat on his land in Block 255 plot 882,  
based on which the fourth cross appellant testified that it was from the  
10 caveat that he learnt about the claim the appellant made, the subject matter  
of the suit. A letter from the lawyers of the appellant Messrs Matovu and  
Kimanje advocates dated 10<sup>th</sup> of March 2004 showed that the appellant was  
trying to recover land from the fourth cross respondent. The letter is written  
in 2004 and there was no other transaction between the two. The appellant's  
15 submission that the fourth respondent was given three quarters of the  
estate that he transferred land in trust or land at Mengo were unacceptable  
submissions from the bar.

Counsel submitted that the appellant had all the time to confirm these facts  
or to plead them so that they are responded to. However, no evidence was  
20 led to show that the fourth respondent took three quarters of the estate.  
Further it may not be the No but the value of the property that matters.

### **On the question of interest on damages**

The respondents counsel submitted that section 324 of the Succession Act  
is the basis of this claim. Interest in such claims is barred by section 328 of  
25 the Succession Act which provides that the refunding shall in all cases be  
without interest.

Further claims of interest at commercial rates since 1977 is the most  
unreasonable claim given the appellants lacklustre manner with which he  
pursued his case. He never followed up this case and his advocate thinks  
30 that the files of cases which are dismissed by the court would still be in the  
registry instead of in the archives. The advocate could have obtained copies  
of the files from the former advocates or from the defendants filed a  
separate suit against the estate or the fourth cross appellant.



5 The respondent's counsel submitted that the appellant's cause of action transformed to one of a creditor to the estate of the deceased and a prudent claimant would have been able to file a new suit.

### **Cross appeal**

10 Counsel for the cross appellant submitted that in 1977 the appellant and the late George William Mawanda (referred to as the deceased) executed a contract for the purchase of land comprised in Block 255 Block 227 at Munyonyo. It is alleged in the plaint that in 1998, the deceased having sold the property to the appellant, fraudulently sold the same to Barbara Mulwana. In 1993, the suit from which the cross appeal arises was filed as  
15 High Court Civil Suit No 914 of 1993 against the deceased for an order to compel him to deliver to the appellant another piece of land similar to or equivalent to the suit property or the market value of the suit property.

The suit was not prosecuted for 7 years until 2000 when George William Mawanda died. The executors of the estate of the late George William  
20 Mawanda were appointed by the court in 2001 pursuant to his will written in 1994. In 2003, the suit was dismissed for want of prosecution. Nothing happened in between the dismissal and 2010 when Civil Application No 315 of 2010 was filed by the appellant seeking to reinstate the suit. The same application was also dismissed in the same year. In 2014, Civil Application  
25 315 of 2010 was reinstated, heard and allowed thereby reinstating Civil Suit No 914 of 1993 after 11 years from its first dismissal.

Counsel submitted that in September 2014, the appellant filed an amended  
30 plaint in the suit replacing the deceased with the executors of the estate of the deceased and adding the fourth cross appellant as a party. 3 of the respondents passed away. Prince David Mawanda assumed the position No 4 in the appeal and in the cross appeal is referred in the submissions as the fourth respondent or fourth cross appellant.

**Whether the suit to disclosed a cause of action against the fourth cross appellant/fourth respondent.**

5 **Whether the suit against the fourth cross appellant/respondent was not time barred.**

10 On the 2 issues the respondent/cross appellant's counsel submitted on the question whether a cause of action was disclosed in the plaint that this is done by perusal of the plaint and Annexure thereto (see **Uganda Telecom Ltd v ZTE Corporation, Civil Appeal No 3 of 2017** (Supreme Court) and **Wycliffe Kiggundu v Attorney General; Civil Appeal No 27 of our 1992** (Supreme Court)).

15 The cross appellant's counsel submitted that the plaint is silent on the actions by the fourth cross appellant that entitles the appellant to complain against him. But there is no averment in the plaint itself or in any attachment to the plaint that the fourth cross appellant is said to have done that violated the appellant's rights. Such a plaint discloses no cause of action against the fourth cross appellant. Further the cross appellant's counsel submitted that the learned trial judge found that there were 2 causes of action disclosed  
20 against the fourth cross appellant in that she stated that the first cause of action arose in 1987 when the deceased went back on his word. Secondly, that the second cause of action arose against the son of the late George William Mawanda following the death of his father and the distribution of the estate and which he received the suit land as his bequest. In coming to this conclusion, the learned trial judge relied on the evidence to determine  
25 if a cause of action had been established against the fourth cross appellant which was in error as in such cases, only the plaint and its Annexure can be examined. Last but not least, on the first cause of action, there is no evidence of the involvement of the fourth cross appellant in the transaction  
30 in 1987.

35 Counsel submitted that no relief can be granted based on a cause of action which is not pleaded (see **East African Development Bank v Interfreight Forwarders Ltd** in which leave is granted under the common carrier cause of action when what was pleaded was an action for negligence were reversed by the Supreme Court). Counsel submitted that the conclusion of

5 the learned trial judge that an implied trust was created thereafter when the 6<sup>th</sup> defendant received the suit land as part of his bequest when this was not pleaded is an error in law.

Further, the cross appellant's counsel submitted that the finding that the suit land was part of the will of the deceased made in 1994 and that the  
10 fourth cross appellant received the suit land as his bequest, were findings of fact that erroneous as they contradict the plaint and the evidence of the appellant which shows that the suit land was sold in 1988 to another person one Barbara Mulwana. Further, the learned trial judge wrongly concluded that the appellant lodged a caveat on the suit land which the fourth cross  
15 appellant tried to vacate. However, the evidence shows that the caveat was lodged on Block 255 Plot 882, which land was purchased by the fourth cross appellant from Uganda Commercial Bank and is separate from the suit land.

In conclusion, the plaint to the extent that it made no material allegations of omissions or commissions by the fourth cross appellant entitling the  
20 appellant to sue and succeed, disclosed no cause of action against the fourth cross appellant. It was an error to find a cause of action on the basis of evidence rather than restricting the findings on the basis of the plaint and Annexure and lastly the grant of remedies based on a cause of action which were not pleaded was erroneous in fact and in law.

25 **Issues (c), (d) and (e)**

**Whether the suit against the fourth cross appellant/respondent is not time barred?**

**Whether the suit is not defeated by laches; and**

30 **Whether the learned trial judge erred to reinstate a suit eleven years after it was dismissed.**

The cross appellant's counsel submitted that the remedies sought against the fourth cross appellant were not separately stated and the prayers in the plaint were against the defendants jointly and severally in that they were

5 liable to deliver another piece of land of the same value or paid the equivalent market value of the suit land to the appellant.

It can be concluded that the relief sought against the fourth cross appellant respondent is for specific performance or equitable compensation. Counsel further submitted that the judgment on the remedy of compensation granted the same to the appellant on the basis of sections 286, 323 and 324 of the Succession Act.

Counsel submitted that any remedy for compensation as against the fourth cross appellant under sections 286, 323 and 324 of the Success Act, is time barred. The suit was instituted for the first time against the fourth cross appellant/respondent to the appeal in September 2014 following an amendment to the plaint to add him as a party. Under Order 1 rule 10 (5) of the Civil Procedure Rules, it is provided that: "For purposes of limitation, the proceeding against any person added or substituted as defendant shall be deemed to have begun only on the service of the summons on him or her."

20 The cross appellant's counsel submitted that in **Seabridge and others vs. H Cox and Sons (Plant Hire Limited) (1968) QB 46**, the question was whether the addition of India tires limited as defendant to an existing suit was time barred. Lord Denning stated that:

"The old rule, Order 16 rule 11, say that when a party is added, the proceedings against such party should be "deemed to have begun only on the service of such writ ".if that rule had been the rule in existence today, I feel that the words would have compelled the court to order that, against India tyres limited, the proceedings only begun on September 21, 1967, that is, more than three years after the date of the accident and they would be entitled to the benefit of the statute of limitation.

The appellant's counsel submitted that in this case, the exact date when the summons to file a defense was served upon the fourth cross appellant, if any is not part of the record of appeal. However, it is obvious that the service of summons to file a defense and therefore the beginning of proceedings in the case against the fourth cross appellant occurred after

5 the 3<sup>rd</sup> day of September, 2014, the date the amended plaintiff was filed in court.

The appellant's counsel submitted that the cause of action in the suit generally arose in 1988 when the suit property claimed by the appellant was sold to another person. As against the fourth cross appellant, any cause of  
10 action against him could only have arisen in the year 2000 upon the death of his father when the will stated that he received property of his father through bequest. Evidence demonstrates that the fourth cross appellant received property from the estate of the deceased in 2001. Secondly, the appellant learnt about the death of George William Mawanda in the year  
15 2000. The cross appellant's counsel submitted that by the year 2003, the appellant was not only aware that George William Mawanda was deceased, but he was already asserting a claim on the basis of his 1977 transaction with the deceased against the fourth cross appellant by lodging a caveat on his land known as Block 255 plot 882 at Munyonyo. Further correspondence  
20 on the record shows that the caveat was lodged on the basis of Civil Suit 14 of 1993 and that the appellant had focused on recovering land from the fourth cross appellant. Counsel relied on **Central Electricity Board v Halifax Corporation (1963) AC 785** for the scope of section 3 (1) (d) of the Limitation Act, cap 80 discussed by Lord Guest at page 806 of the judgment that:

25 "the date when a cause of action accrues may be said to be the date on which the plaintiff would be able to issue a statement of claim capable of stating every existing fact which, if traversed it would be necessary for the plaintiff to prove in order to support his right to judgment.... The appellants conceded that in the events which have happened, the sum of US\$34,500 vested in them on April 1,  
30 1948 by virtue of the provisions of the Electricity Acts....

The cross appellant's counsel submitted that the appellants cause of action against the fourth cross appellant in the case is for recovery of unpaid debts as a creditor from a legatee under section 324 of the Succession Act as found by the learned trial judge and therefore his cause of action based on  
35 an enactment is time barred. The same having been instituted against the legatee more than 6 years after the cause of action arose.

5 Counsel submitted that the appellant knew about the death of the deceased  
in the year 2000 and immediately became a creditor of the estate of G.W  
Mawanda. In the year 2003, the appellant lodged a caveat on the land  
belonging to the fourth cross appellant claiming to be a creditor to the  
estate of G.W Mawanda. The appellants caveat was vacated with notice to  
10 him in 2005. Earlier, in March 2004, the appellants advocate had forwarded  
a copy of the certificate of title for land at Munyonyo to the respondents  
advocates which they said belonged to the fourth respondent.

The cross appellant's counsel submitted that the evidence on record  
supported the appellants claim against the fourth respondent based on  
15 section 324 of the Succession Act which existed and were known by the  
appellant by the year 2000 upon the death of the deceased or by 2003 when  
he lodged a caveat on the fourth cross appellant's property. Counsel relied  
on section 3 (1) (d) of the Limitation Act which provides that actions to  
recover any sum recoverable by virtue of any enactment, and then a penalty  
20 of forfeiture or a sum by way of a penalty or for forfeiture shall not be  
brought after the expiration of 6 years from the date on which the cause of  
action arose. Counsel relied on **Central Electricity Board v Halifax  
Corporation** (supra) for the proposition that the cause of action is by virtue  
of an enactment under section 324 of the Succession Act which allows a  
25 creditor to call upon a legatee who received payment of his or her legacy to  
refund the debt. It is an action to recover any sum recoverable by virtue of  
an enactment and therefore should be dismissed for being time barred.

Counsel submitted that the same authority suffices to defeat the appellant's  
new cause of action against the executors pleaded in paragraph 12 of the  
30 plaint of distributing the estate without making provision for the appellants  
claim which appeared for the first time against the executors in the year  
2014, 13 years after the executors had done their work. Counsel submitted  
that the appellants claim in paragraph 12 of the plaint is an action for  
recovery of sums recoverable by virtue of any enactment. The respondent's  
35 counsel relies on Order 7 rule 6 of the Civil Procedure Rules for the  
proposition that where the suit is instituted after the expiration of the period

5 prescribed by the law of limitation, the plaintiff shall show the grounds upon which exemption from the law is claimed. Last but not least a plaintiff shall be rejected under Order 7 rule 11 (D) where it appears from the statement in the plaintiff to be barred by any law (see **Iga versus Makerere University (1972) EA 65.**)

10 Counsel submitted that the plaintiff against the fourth cross appellant filed in 2014 to recover sums recoverable by virtue of an enactment or for specific performance or equitable compensation being a cause of action that arose in 2000 upon the death of the original defendant ought to have been filed by 2006. Secondly the death of the original defendant is averred to have  
15 occurred in 2000. On the face of the plaintiff, the action in 2014 against the fourth cross appellant is time barred.

For the plaintiff not to be rejected, the appellant had to plead the facts bringing him out of the apparent limitation in terms of Order 7 rule 6 of the CPR but did not. The above submission also applies to the cause of action pleaded  
20 against the executors in paragraph 12 of the plaintiff where it is stated that the executors distributed the estate of G.W Mawanda who died in the year 2000 without making provision for the claims in the suit. The cause of action arose in the year 2000 and was challenged for the first time by suit in 2014 and on the face of the pleadings alone, it is time barred. The appellant did  
25 not plead any exempting facts, from the law of limitation.

The cross appellant's counsel submitted that the action for specific performance/equitable compensation is also time barred. Firstly, the action for specific performance cannot endure against the fourth cross appellant because he had no contract with the appellant. In any case an action against  
30 the fourth cross appellant if sustainable, is barred by limitation. Section 3 of the Limitation Act bars the enforcement of actions founded on contract 6 years after the cause of action arises. Counsel submitted that there cannot be an equitable claim for specific performance unless there has been a legal right in breach of contract first on the authority of **Knox v Gye (1872)**  
35 **LR5 HL**. The plaintiff's action in the plaintiff is in the alternative to the action

5 for specific performance. What is prayed for in the alternative of the equivalent of the current market value of the same piece of land is an alternative equitable claim for compensation. It cannot be brought or enforced 6 years after the cause of action arose and falls under the category of other equitable reliefs and section 3 (6) of the Limitation Act.

10 Last but not least, counsel submitted on the doctrine of laches. I will consider the issue of laches and whether remedies that are not pleaded can be awarded after consideration of the issue of limitation which is a bar to the action. If the defence of limitation succeeds, then there is no need to consider the rest of the grounds of appeal/cross appeal.

### 15 **Resolution of the appeal/cross appeal**

I have carefully considered the appellants appeal as well as the cross appeal. As a first appellate court, our duty is to reappraise the evidence on record and reconsider the case afresh on the basis of that (see rule 30 of the Rules of this court). This duty of the Court is spelt out in **Peters v Sunday Post Limited [1958] 1 EA 424** by the then East African Court of Appeal at page 429 which held that the duty of a first appellate is:

20 ...to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion...

25 The cross appeal of the respondents raises two points of law. Firstly, whether the plaintiff's plaint in the High Court discloses a cause of action against the executors of the estate of G. W Mawanda (deceased) who passed away in the year 2000. Secondly, whether the suit is barred by limitation. 30 The cross appellant's counsel further invited the court to peruse the plaint to arrive at its findings.

The two issues therefore have the potential to dispose of the appeal and the cross appeal without the need to consider the grounds of the appeal or other grounds of the cross appeal and will be handled first.



5 On whether the plaint discloses a causes of action, the law and procedure is straight forward.

An objection can be made to a plaint pursuant to Order 7 rule 11 (a) of the Civil Procedure Rules on the ground that a plaint shall be rejected for “(a) disclosing no cause of action”. Secondly, an objection can be raised under  
10 Order 7 rules 11 (d) on the ground that the plaint shall be rejected “where the suit appears from the statement in the plaint to be barred by any law”. This may include the objection that the suit is time barred. Where a plaint is barred by law, no cause of action is disclosed.

In **Auto Garage versus Motokov (1971) EA 514** the East African Court of  
15 Appeal held that the provision that a plaint be rejected for disclosing no cause of action is mandatory. Secondly, a plaint which discloses no cause of action is a nullity and cannot be amended. An amendment will not be allowed where the cause of action is barred by the law of limitation. In **Opio v Attorney General (1990 – 1991) 1 KALR 66** it was held that a suit barred by  
20 statute must be rejected. This follows the East Africa Court of Appeal decision in **Iga v Makerere University [1972] EA 65** where it was held that a plaint barred by the statute of limitation is barred by law and must be rejected. This is in line with the express provisions of Order 7 rule 11 (d) of the Civil Procedure Rules.

25 In **Attorney General v Tinyefunza Constitutional Appeal No. 1 of 1997** Wambuzi, C. J (as he then was) held that the facts disclosing a cause of action shall be alleged in the plaint and any annexure forming part of the plaint.

See also **Attorney General v Oluoch 1972 EA 392** and **Sullivan V Ali Mohamed Osman (1959) EA 239** that the facts constituting the relevant cause of action  
30 shall be disclosed in the plaint. In **Jeraj Shariff v Fancy Stores [1960] 1 EA 374**, the East African Court of Appeal per Windham JA held that:

The question whether a plaint disclose a cause of action must be determined upon a perusal of the plaint alone, together with anything attached so as to form part

5 of it, and upon the assumption that any express or implied allegations of fact in it are true.

10 The appellants suit was originally filed in the year 1993 and the plaint discloses on the face of it that it could have been filed towards the end of the year 1993. The date of receipt of the plaint cannot however be discerned from the record. The suit is HCCS No 914 of 1993 and the defence thereto is dated 17<sup>th</sup> of January 1994. The reply to the written statement of defence is dated 20<sup>th</sup> of January 1994. The plaint avers in paragraph 3 that the plaintiffs claim against the defendant Prince G.W. Mawanda (the deceased) is for delivery of a piece of land similar and/or equivalent and/or equal to that  
15 comprised in Kyadondo Block 255 Plot 227 in Kampala district. In the alternative, the plaintiff claimed payment by the defendant of a sum of money being the current market value of a similar piece of land at the location of Munyonyo, Kyadondo, Kampala district. The plaintiff also claimed general damages for breach of contract.

20 The second important fact is that the defendant was substituted in an amended plaint filed on court record on the third September 2014. By the amended plaint, the executors of the estate of the late J.W Mawanda were substituted as the defendants. Secondly, Prince David Mawanda was substituted as a 5<sup>th</sup> defendant and is stated to be the heir of Prince George  
25 William Mawanda. Paragraph 4 of the amended plaint states that the plaintiffs claim is for delivery of a piece of land similar to or equivalent to that comprised in Kyadondo Block 255 plot 227 in Kampala district. In the alternative for payment from the defendants a sum of money being the current market value of a similar piece of land at Munyonyo, Kampala  
30 district. The plaintiff also claimed general damages for breach of contract. In paragraph 5 it is averred as follows:

6. At all material times Prince George William Mawanda (deceased) was the registered proprietor of the land comprised in Kyadondo Block 255 situated at Munyonyo, Kyadondo, Kampala district."

35 Subsequent facts averred indicate that the defendant in consideration of a sum of Uganda shillings 80,000/= and paid to him by the plaintiff sold the

5 suit land to the plaintiff. Further on 20<sup>th</sup> April 1986 the deceased having sold  
the land executed a transfer of it in favour of the plaintiff/appellant. Further  
it is averred in paragraph 8 that the deceased having sold the land to the  
plaintiff/appellant and in breach of contract subsequently sold and  
transferred the very same land to another person other than the plaintiff.  
10 That on 10<sup>th</sup> July 1988 the plaintiff learnt of George William Mawanda's  
subsequent fraudulent transfer of the land to another person whereupon  
he cross checked with the Kampala Mailo land registry and confirmed the  
fraud. It is averred that the subsequent conveyance of the suit land was  
unknown to the plaintiff until about 10<sup>th</sup> of July 1988 when the plaintiff  
15 discovered the fraud. In other words, from the plaint, the cause of action  
arose around 10<sup>th</sup> July 1988. Subsequently, the plaint was filed at the end of  
1993 which is about 5 years later. Paragraph 11 of the plaint avers as follows:

11. The plaintiff further contends that the Defendants have a legal duty to perform  
the late George William Mawanda's part of the contract by delivering to him a  
20 piece of land similar and/or equivalent and/or equal in value to the said land  
comprised in Kyadondo Block 255 plot 227, land at Munyonyo Kampala district. In  
the alternative the plaintiff claims from the defendants a sum of money that can  
purchase the same piece of land at Munyonyo at the current market value.

Most importantly as far as the cause of action against the defendants are  
25 concerned after the amendment of the plaint, paragraph 12 avers as follows:

12. The plaintiff would contend that the defendant perpetrated the late George  
William Mawanda's fraud when they proceeded to distribute his property without  
making provision for the plaintiff's claim. The defendants were fully aware of the  
plaintiff's pending case against the deceased's estate. They hurriedly transferred  
30 the land at Munyonyo where the plaintiff had claims to the heir David Namugala  
to defeat his claim.

In addition, they ignored the deceased's instruction in his will to sell land at Mengo  
to pay all claims threatening his land at Munyonyo Palace.

In a nutshell, the subsequent cause of action averred in paragraph 12 of the  
35 plaint is the distribution of the property without making provision for the  
plaintiff's claim. The date of distribution of the property is not stated.

5 On the face of the plaint, the action against the deceased was commenced within 5 years from the time of breach of contract in 1988. Secondly, it is averred that the breach was of the sale agreement in which the plaintiff had paid consideration for the land on 20<sup>th</sup> of July 1977 and the land is the subject matter of the suit. In other words, the plaintiff expected transfer and the  
10 deceased on 20<sup>th</sup> of April 1986 executed a transfer of the land in favour of the plaintiff. Clearly, the plaintiff did not register the transfer. Instead the record shows that on 28<sup>th</sup> of April 1987 Prince G.W Mawanda wrote to the Uganda land commission enclosing a certificate of title for block 255 plot 137 to make 2 plots namely block 255 plots 227 and 228 in his names. It is  
15 averred that the property was subsequently transferred to another person and the plaintiff learnt of the same on 10<sup>th</sup> of July 1988.

On the face of it, the plaint shows that the plaintiff enjoyed a right, the right was violated when the piece of property bought by him was transferred to another person and the late Prince G.W. Mawanda was liable. Prince George  
20 William Mawanda was substituted in the suit by the executors of his estate by amendment in 2014. However, the cause of action against the estate is deemed to have survived and the executors were merely substituted in place of the deceased.

I would find that the plaint discloses a cause of action against the estate of  
25 the deceased as vested in the executors of the will. It has been held that a distinction should be made between a plaint not disclosing a cause of action and a point of law that the suit is not maintainable against the defendants. This distinction appears in the decision of Mulenga JSC in **Ismail Serugo vs Kampala City Council & the Attorney General; Constitutional Appeal No. 2 of**  
30 **1998** that there is a distinction between Order 7 rule 11 of the Civil Procedure Rules and Order 6 rule 29 in that Order 7 rule 11 deals with striking out the plaint based on perusal of the plaint while Order 6 rule 29 is for consideration of a point of law of whether a suit is maintainable. Mulenga JSC cited with approval the decision of the East African Court of Appeal in  
35 **Nurdin Ali Dewji & others v G.M.M Meghji & Co. and Others (1953) 20 EACA 132**. In that decision the East African Court of Appeal held that the learned

5 trial judge erred to reject the plaint when there was an objection to the suit on a point of law and the final result was that the learned judge rejected the plaint not on the ground of an inherent defect in the plaint but because he thought that the suit was unmaintainable.

10 Where a suit is not maintainable, it may be on a point of law but not necessarily discernible on the face of the pleadings. Such a point can be determined when it becomes apparent from the evidence. The cause of action in the plaint is against the estate of the deceased and not against the executors of the estate. Sections 188 and 189 of the Succession Act cap 162  
15 established in any court of justice unless a court of competent jurisdiction within Uganda has granted probate of the will or letters of administration. The effect of the grant of probate is that the authority of the executors relates back to the date of death of the deceased. This suit could not have proceeded after the death of the deceased and therefore the deceased had  
20 to be substituted with the executors. Evidence shows that the executors were granted probate of the will of the deceased/testator on 11<sup>th</sup> of January 2001. They were only substituted for the deceased in 2014. For ease of reference sections 188 and 189 of the Succession Act provides as follows:

188. Right as executor or legatee, when established.

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.

189. Effect of probate.

30 Probate of a will when granted establishes the will from the death of the testator, and renders valid all intermediate acts of the executor, as such.

The learned trial judge at page 4 of her judgment indicated that the executors as well as Prince David Mawanda were substituted on third  
35 September 2014 as the new defendants in the amended plaint filed on the same day by the plaintiff. It was not until 15<sup>th</sup> of January 2018 that the

5 defendants filed a reply. The learned trial judge considered the first two  
issues of whether (1) the plaint discloses a cause of action against the 6<sup>th</sup>  
defendant (Prince David Mawanda) and (2) whether the claim against the 6<sup>th</sup>  
defendant is not time barred. The learned trial judge opted to resolve this  
first issues only after addressing her mind to the evidence. Granted this  
10 was against the principles for determination of whether a plaint discloses  
a cause of action. Secondly, the issue whether an action is time barred could  
be determined preliminarily so as not to waste the time of the court if it is  
apparent from the pleadings. It was therefore erroneous to proceed to  
consider the evidence. However, having found that the plaint on its own  
15 disclosed a cause of action, then the only question would be whether this  
suit is maintainable after considering the materials before the court.

The learned trial judge found that actions founded on contract cannot be  
brought after the expiration of 6 years from the date the cause of action  
arose (see section 3 (1) (a) of the Limitation Act, Cap 80 laws of Uganda).

20 The learned trial judge found *inter alia* that the will of the deceased was  
made in 1994 and proved in court in the year 2000. Further that an inventory  
filed by the executors showed that the executors on 26<sup>th</sup> February 2001  
distributed the properties inclusive of the disputed land to the beneficiaries.  
The disputed land had been handed over to the 6<sup>th</sup> defendant. This is an  
25 erroneous finding in light of the fact that the pleadings clearly indicate that  
the land which was sold to the appellant had been “fraudulently” sold again  
to a third party and transferred to a third party. What was in dispute and  
disclosed in the plaint is not a piece of land in the contract but breach of  
contract and alleged fraud and the seeking of a remedy of an alternative  
30 piece of land. Particularly, it should be emphasised that the remedy sought  
by the plaintiff/appellant in the plaint was an order to obtain an equivalent  
piece of land in the same area. This was not contractual but a prayer to the  
court for a desired remedy for the breach of contract or alleged fraud.

The learned trial judge found that the deceased had died 7 years after the  
35 suit against him had been instituted. Secondly, that the distribution of his

5 estate was completed in 2001 while the suit was pending in court. Lastly the  
will was made in 1994 and included the suit property. She found that during  
the time the appellant had lodged a caveat on the suit property that the  
fourth respondent to this appeal had tried to vacate. The learned trial judge  
found that the bequest made under the will for the benefit of the son of the  
10 deceased could not have been valid. Again this is an erroneous finding on  
the ground that the subject matter of the agreement between the appellant  
and the deceased was clearly pleaded as having been sold to a third party.  
The appellant prayed for alternative land from the court and not from the  
deceased. Alternative land could not have been the suit property which had  
15 been sold.

Finally, the learned trial judge found that the plaintiff's interest ought to  
have been restricted to his claim as a creditor to the estate of the deceased  
but the will had been executed. This is what she stated:

20 "In my opinion, the plaintiffs interest ought to have been restricted to his claim as  
a creditor under the estate but not how they will had been executed. He was not  
a beneficiary under the will. That element was not pertinent to issues to be  
addressed by this court since the court was not being asked to revoke the  
probate."

She found that there was no evidence that the executors paid all the debts  
25 they knew of in terms of section 283 of the Succession Act. The plaintiff was  
not barred from bringing to the attention of the executors the interest he  
had in the estate after the demise of the estate owner. She found that an  
administrator of an estate becomes *functus officio* after the distribution of  
the estate is done.

30 The learned trial judge held that the second cause of action arose against  
the son and heir of the deceased following the demise of his father and the  
distribution of the estate which he received as his bequest. She found that  
he received the suit land as his bequest. She found that with full notice of  
the unresolved interest of the plaintiff who had lodged a caveat on 7  
35 November 2003, the 6<sup>th</sup> defendant received the property that did not  
rightfully belong to him as it had long ceased to be part of the estate.

5 For emphasis the 6<sup>th</sup> Defendant did not transfer the property to himself and he is merely a beneficiary. For that reason, his notice is immaterial and this was an erroneous finding on the part of the learned trial judge.

10 I have further carefully considered the above holding and it is my considered judgment that it was erroneous because the action of the appellant was against the estate of the deceased. Secondly, the action of the appellant was for an alternative to the property that had been sold to him but subsequently transferred to a third party. He therefore sought a remedy of another property from the estate of the deceased or the value of the property that had been sold at prevailing market rates. He was not  
15 entitled to specific performance since their agreement had been frustrated by the breach of the deceased transferring the property to a third party. In the premises, the estate having been distributed, the possible remedy of the appellant was to sue the executors for breach of trust or sue the beneficiaries as a creditor who had not been paid. The suit against a legatee  
20 is enabled by statute. This was not pleaded in the plaint and no amendment was made or a fresh suit filed for breach of the duties of executor or for tracing the property in the hands of a legatee who has received it before satisfaction of the creditors.

25 Sections 323 and 324 of the Succession Act are applicable to an action after the distribution of the estate and provide as follows:

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 he or she knows of, and shall not be liable for the assets so distributed to any 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  
35 claimant to follow the assets, or any part of them, in the hands of the persons who may have received them.



5 324. Creditor may call upon legatee to refund.

A creditor who has not received payment of his or her debt may call upon a legatee who has received payment of his or her legacy to refund, whether the assets of the testator's estate were or were not sufficient at the time of the testator's death to pay both debts and legacies, and whether the payment of the legacy by the executor was voluntary or not.

Clearly, having found that the estate had been distributed and the executors were functus officio, the remedy of the appellant was to follow the assets into the hands of the persons who may have received them. This is not borne out by the plaint which is against the estate of the deceased. No fresh summons was taken to file an action against Prince David Mawanda pursuant to the distribution of the estate. Though it was desirable in the interest of justice for the matter to be resolved, it could not be resolved without the necessary pleading.

The appellant's action was clearly an action for breach of contract which action has to be brought within 6 years from the date the cause of action arose. This action survived was against the estate of the deceased. The estate of the deceased was distributed in the year 2001. Subsequently, and by amended plaint through substitution of parties dated third September 2014, the respondents were brought on board as defendants. This was after a period of more than 12 years. The subsequent cause of action arose in the year 2001 when the estate was distributed. This was not pleaded in the amended plaint. I have carefully considered paragraph 12 of the amended plaint which is the only paragraph affecting the respondents/cross appellant's which states *inter alia* as follows:

12. The plaintiff would contend that the defendant perpetrated the late Prince George William Mawanda's fraud when they proceeded to distribute his estate without making provision for the plaintiff's claim. They hurriedly transferred the land at Munyonyo where the plaintiff had claims to David Namugala to defeat his claim.

In addition, they ignored the deceased instruction in this will to sell land at Mengo to pay all claims threatening his land at Munyonyo Palace."

5 In the pleadings, there is no mention of the Prince David Mawanda as having  
breached any right of the plaintiff. Instead the executors are blamed for  
having hurriedly transferred in the property to him. In paragraph 14, one of  
the prayers in the alternative is that the defendants therefore do pay to the  
10 plaintiff the sum of money to be assessed by the court equivalent to the  
current market value of the same piece of land. This order is sought directly  
against the beneficiary. Presumably this is an action against the legatee.  
The action was however filed by way of amendment and it is not a fresh suit  
and cannot stand. The appellant ought to have filed a fresh suit or obtained  
15 an order from the court from which he would seek to trace the assets from  
which to recover his money. Further by the time of this action, the right to  
the estate of the deceased had not yet accrued by way of a judgment. What  
if the suit was subsequently dismissed? An action against a legatee has to  
be based on a proven claim. The action was not for breach of contract  
covered by section 3 of the Limitation Act which provides that:

20 3. Limitation of actions of contract and tort and certain other actions.

(1) The following actions shall not be brought after the expiration of six years from  
the date on which the cause of action arose—

(a) actions founded on contract or on tort;

(b) actions to enforce a recognisance;

25 (c) actions to enforce an award;

(d) actions to recover any sum recoverable by virtue of any enactment, other than  
a penalty or forfeiture or sum by way of penalty or forfeiture, except that in the  
case of actions for damages for negligence, nuisance or breach of duty (whether  
the duty exists by virtue of a contract or of provision made by or under an  
30 enactment or independently of any such contract or any such provision) where  
the damages claimed by the plaintiff for the negligence, nuisance or breach of  
duty consist of or include damages in respect of personal injuries to any person,  
this subsection shall have effect as if for the reference to six years there were  
substituted a reference to three years.

5 The action that could have survived was against the legatee by way of tracing the assets of the deceased and is enabled by section 324 of the Succession Act and is therefore an action enabled by an enactment whose limitation period is six months under section 3 (1) (d) of the Limitation Act. However, the cause of action against the beneficiary could only have  
10 accrued after the court makes a finding in the original suit that the estate of the deceased is liable but the property of the estate has been distributed to the legatees.

The conclusion of the matter is that the action in the original suit could only survive against the personal representatives of the deceased who were  
15 appointed executors of his will. Furthermore, the cause of action, can only be a cause of action that survives under section 11 of the **Law Reform (Miscellaneous Provisions) Act, cap 79 laws of Uganda**. Section 11 of the Law Reform (Miscellaneous Provisions), Act provides for the causes of action that maintainable against the estate of a deceased person.

20 11. Effect of death on certain causes of action.

(1) Subject to this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him or her shall survive against, or, as the case may be, for the benefit of his or her estate; except that this subsection shall not apply to causes of action for defamation or  
25 seduction or for inducing one spouse to leave or remain apart from the other or to claims under section 21 of the Divorce Act for damages on the ground of adultery.

(2) Where a cause of action survives under subsection (1) for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the  
30 estate of that person—

(a) shall not include any exemplary damages;

(b) in the case of a breach of promise to marry, shall be limited to such damage, if any, to the estate of that person as flows from the breach of promise to marry; and

35 (c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss

5 or gain to his or her estate consequent on his or her death, except that a sum in respect of funeral expenses may be included.

(3) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person unless either—

10 (a) proceedings against the deceased person in respect of that action were pending at the date of his or her death; or

(b) the cause of action arose not earlier than six months before his or her death and proceedings are taken in respect of it not later than six months after his or her personal representative took out representation.

15 (4) Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this Act, to have been subsisting against the person before his or her death such cause of action in respect of that act or  
20 omission as would have subsisted if he or she had died after the damage was suffered.

(5) The rights conferred by this Part of this Act for the benefit of the estate of deceased persons shall be in addition to and not in derogation of any rights conferred on the members of the family of deceased persons by Part II of this Act,  
25 and so much of this Part of this Act as relates to a cause of action against the estates of deceased persons shall apply in relation to causes of action under Part II as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1).

30 (6) If an estate against which proceedings are maintainable by virtue of this section is insolvent, any liability in respect of the cause of action in relation to which the proceedings are maintainable shall be deemed to be a debt provable in the administration of the estate, notwithstanding that it is a demand in the nature of unliquidated damages arising otherwise than by a contract, promise or breach of trust.

35 (7) Subject to this Act, the personal representative of a deceased person shall have the right to prosecute or defend any cause of action which has by virtue of this section survived for the benefits of or against the estate of the deceased person.

5 The section is abundantly clear that under section 11 (1), all causes of action  
subsisting against or vesting in the deceased shall survive against or as the  
case may be, for the benefit of his estate. This was a pending suit by the  
time the deceased died and the suit survived against the estate of the  
deceased. Further section 11 (6) provides that any liability in respect of the  
10 cause of action in relation to which the proceedings are maintainable shall  
be deemed to be a debt provable in the administration of the estate,  
notwithstanding that it is a demand in the nature of unliquidated damages  
arising otherwise than by a contract, promise or breach of trust. Clearly,  
the action against the deceased was for breach of contract and not for  
15 enforcement of contract. Particularly, the suit property is stated to have  
been sold to a third party and the third-party is not a party to the action. The  
suit property is therefore out of reach of the court and an order for specific  
performance cannot be made. Any other order, is an order of compensation  
or damages for the breach of contract or for the alleged fraud or any other  
20 appropriate remedy. Last but not least, such an action, if it succeeds is  
deemed to be a debt provable in the administration of the estate. Section 11  
(7) of the Law Reform (Miscellaneous Provisions) Act is clear that the  
personal representative of a deceased person shall have the right to  
prosecute or defend any cause of action which has survived for the benefit  
25 of or against the estate of the deceased. The procedure for substitution is  
Order 24 of the Civil Procedure Rules which provides in rule 1 that the death  
of the plaintiff or defendant shall not cause the suit to abate if the cause of  
action survives or continues. Further Order 24 rule for provides for the  
procedure in the case of death of one defendant. It stipulates that where the  
30 cause of action survives, the court on application made for that purpose,  
shall cause the legal representative of the deceased defendant to be made  
a party and shall proceed with the suit. It further provides in Order 24 rule  
4 (3) as follows:

35 (3) Where within the time limited by law no application is made under  
sub rule (1) of this rule, the suit shall abate as against the deceased  
defendant.

5 Clearly an application for substitution of the deceased pursuant to his  
demise has to be made in a timely manner. It should not be made after the  
period of limitation. Suits for breach of trust in terms of limitation are  
governed by section 19 of the Limitation Act cap 82 laws of Uganda. It  
stipulates under section 19 (1) that no period of limitation prescribed by the  
10 limitation act shall apply to an action by beneficiary under a trust if it is an  
action in respect of any fraud or fraudulent breach of trust to which the  
trustee was a party or privy or to recover from the trustee trust property  
or the proceeds of the trust property in the position of the trustee or  
previously received by the trustee and converted to his or her own use.  
15 Section 19 (1) of the Limitation Act is inapplicable to the appellant's case  
because there is no suit in respect of any fraud or fraudulent breach of trust  
to which the trustee was a party or privy or a suit to recover trust property  
converted by the trustee to his or her own use. The executors were trustees  
whole transferred the property under the will of the deceased to the  
20 beneficiaries. In any case there is no averment of any breach of fraudulent  
breach of trust against the executors of the will of the deceased.

Finally, section 19 (2) of the Limitation Act expressly provides that an action  
by beneficiary to recover trust property or in respect of any breach of trust,  
not being an action for which a period of limitation is prescribed shall be  
25 brought within 6 years from the time the cause of action accrued. It provides  
as follows:

19 (2) Subject to subsection (1), an action by a beneficiary to recover trust property  
or in respect of any breach of trust, not being an action for which a period of  
limitation is prescribed by any other provision of this Act, shall not be brought  
30 after the expiration of six years from the date on which the right of action accrued;  
but the right of action shall not be deemed to have accrued to any beneficiary  
entitled to a future interest in the trust property until the interest fell into  
possession.

It can be argued that the interest as a creditor of the appellant was  
35 indeterminate until after the court pronounced itself. However, the word  
"beneficiary" can be restricted to a beneficiary under the will.

5 Further any decree can only affect the estate of the deceased and not the  
defendants personally. Section 37 of the Civil Procedure Act Cap 71 provides  
that:

37. Legal representative.

10 (1) Where a judgment debtor dies before the decree has been fully satisfied, the  
holder of the decree may apply to the court which passed it to execute the decree  
against the legal representative of the deceased, or against any person who has  
intermeddled with the estate of the deceased.

15 (2) Where the decree is executed against the legal representative, or against any  
person specified in subsection (1), he or she shall be liable only to the extent of  
the property of the deceased which has come to his or her hands and has not  
been duly disposed of; and, for the purpose of ascertaining that liability, the court  
executing the decree may, of its own motion or on the application of the decree  
holder, compel the legal representative to produce such accounts as it thinks fit.

20 Further section 39 of the Civil Procedure Act is also relevant. It provides  
that:

39. Enforcement of decree against legal representative.

25 (1) Where a decree is passed against a party as the legal representative of a  
deceased person, and the decree is for the payment of money out of the property  
of the deceased, it may be executed by the attachment and sale of any such  
property.

30 (2) Where no such property remains in the possession of the judgment debtor,  
and he or she fails to satisfy the court that he or she has duly applied such  
property of the deceased as is proved to have come into his or her possession,  
the decree may be executed against the judgment debtor to the extent of the  
property in respect of which he or she has failed so to satisfy the court in the  
same manner as if the decree had been against him or her personally.

35 When the defendants were added as the defendants by virtue of being the  
executors of the will of the deceased, they had a right to defend the suit  
which otherwise was a suit against the deceased. It cannot be assumed that  
the suit would succeed. Until the debt is proven against the estate, it is not  
provable against the estate and also cannot be proved against the

5 beneficiary. There is no cause of action against the beneficiary until the debt  
is proven against the estate. Where the debt is proven against the estate of  
the deceased, sections 37 and 39 of the Civil Procedure Act demonstrate  
that it must first be enforced against the estate of the deceased. In case  
there is no property remaining of the estate of the deceased against which  
10 to proceed, then it is enforceable against the intermeddler or any person  
who has received the property save for a bona fide purchaser without notice  
of any defect in title.

Before taking leave of the matter, the right to follow trust property in the  
hands of persons who received the same from the estate of the deceased  
15 is a recognised right. The general principle has a statutory basis. Creditors  
are entitled to priority in the payment of the debts of the deceased. It is only  
after creditors have been paid that the balance of the estate may be  
distributed to the lawful beneficiaries. Where the beneficiaries are paid or  
property distributed to the beneficiaries before the creditors are satisfied,  
20 the creditors are entitled to follow the assets into the hands of the  
beneficiaries who have received the same. Similarly, where money is  
wrongly paid into the hands of another, the proper beneficiary may follow  
up the assets into the hands of the person wrongly paid. (See **Ministry of  
Health and Simpson and others [1951] AC 251** House of Lords where Lord  
25 Simonds traces the equitable remedy against the legatee or person who  
received the property before satisfaction of the actual beneficiaries with  
priority being given to creditors. This doctrine has expression in sections  
323 and 324 of the Succession Act. These section demonstrate that the  
creditors or claimants to the estate must first be satisfied after notice for  
30 claimants to lodge their claims. After satisfaction of genuine and proved  
claims, the executor or the administrator of the estate as the case may be,  
is at liberty to distribute the residue of the assets to the beneficiaries of the  
deceased's estate under the will or the law of intestacy. The question of  
whether the appellant had notice to lodge his claims and the time within to  
35 lodge such claims could be a defence to an action against the legatee to



5 refund monies paid or for property in a bequest conveyed before satisfaction of claims against the estate.

In the premises, the plaint discloses no cause of action as against the fourth respondent/cross appellant. For that reason, the judgment of the learned trial judge as against the fourth Respondent to this appeal is set aside and the suit against Prince David Mawanda stands dismissed with no order as to costs.

That leaves the action against the executors surviving. The action against the executors is an action against the estate of the deceased. It is not an action against the executors personally for any breach or fraudulent breach of trust. Paragraph 12 of the amended plaint is inoperative in that it is contended that the defendants perpetrated the fraud of the deceased when they proceeded to distribute his property without making provision for the plaintiffs' claims. It is nowhere indicated that the defendants never gave notice to creditors before distribution of the estate. It was not an action for breach of trust for which particulars of breach have to be given in terms of Order 6 rule 3 of the Civil Procedure Rules. Which stipulates that:

“In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all other cases in which particulars may be necessary, the particulars with dates shall be stated in the pleadings.”

Moreover, it was the plaintiff who sued the deceased and it was up to the plaintiff to seek an order to substitute the deceased with the defendants. The deceased passed away in the year 2000 and no application was made to have the deceased substituted with a legal representative. A belated substitution was made by way of an amended plaint in 2014 about 14 years later and after reinstatement of the suit which had been dismissed.

In the premises, this suit against the defendants personally is not maintainable. I would dismiss it. What had survived on the face of the pleading is the suit against the estate of the deceased. And the cause of action against the deceased survived. There was only a substitution of the

5 executors of the will. The substitution of the executors of the will was delayed beyond the period of limitation and is time barred.

The cross appellant's counsel submitted that the learned trial judge focused on the fourth cross appellant only in her Judgment. Having found that there was no suit properly filed against the fourth cross appellant, there is no  
10 need to consider the question of limitation of the action against him. The cross appeal by the cross appellant substantially succeeds. What remains is to consider whether the learned trial judge erred in law to reinstate a suit "11 years" after it was dismissed. If this ground of appeal succeeds, it would dispose of the cross appeal as well as the main appeal of the appellants.

15 **Whether the learned trial judge erred in law to reinstate a suit 11 years after it was dismissed.**

HCCS No 914 of 1993 came up for hearing on 24<sup>th</sup> of April 2003 before the Deputy Registrar and upon application by counsel for the defendant it was ordered that it is dismissed under Order 15 rule 6 of the Civil Procedure  
20 Rules. The Order was extracted on 13<sup>th</sup> January, 2005. The relevant order under the revised rules is Order 17 rule 6 of the Civil Procedure Rules. Order 15 rule 6 of the revised rules is inapplicable because it deals with questions of law or fact which may by agreement be stated in the form of issues. Order 17 rule 6 of the Civil Procedure Rules provides that in any case not otherwise  
25 provided for, in which no application is made or step taken for a period of 2 years by either party with a view to proceeding with the suit, the court may order the suit to be dismissed. In such a case, the plaintiff may subject to the law of limitation bring a fresh suit.

In other words, where a suit is dismissed under Order 17 rule 6 of the Civil  
30 Procedure Rules, it cannot be reinstated. The remedy provided in the rule is to file a fresh suit subject to the law of limitation. The basis for dismissal of the suit is there being no application or step taken for a period of 2 years by either party with a view to proceeding with the suit.

5 The record also shows that an application for reinstatement of the suit was  
filed as Miscellaneous Application No 315 of 2010 (arising out of Civil Suit No  
914 of 1993) by the appellant. This application is in the supplementary record  
of appeal. It was for an order that the dismissal of Civil Suit No 914 of 1993  
10 be set aside and for the suit to be reinstated. The grounds of the application  
were that the matter had previously been fixed for hearing on various dates  
but never proceeded. It is stated by the applicant *inter alia* that the suit was  
dismissed for want of prosecution. Secondly, the applicant believed that  
counsel failed to follow up the case in spite of numerous reminders by him.  
15 That the applicant should not be punished because of the inadvertent errors  
on the part of his former counsel.

The record of proceedings, have the background facts showing that the suit  
was filed on 13<sup>th</sup> of December 1993. On 6<sup>th</sup> March 1998, the learned trial judge  
Kagaba J noted that the last entry on the suit is dated the 7<sup>th</sup> of June 1996  
and requested the registrar to issue a notice to show cause why the suit  
20 should not be dismissed. However, it is not clear whether the suit was  
dismissed for want of prosecution under order 17 rule 2 of the CPR which  
provides that where a suit is adjourned generally and no party applies to fix  
it for a period of 12 months, the suit shall be dismissed. The record shows  
that on 13<sup>th</sup> of January 2005, about 7 years later, and upon application of the  
25 defendant, the suit was dismissed for want of prosecution. Subsequently, a  
duplicate file was opened on 18<sup>th</sup> June 2013 following a complaint to the  
Principal Judge by the plaintiff. By order of court on 30<sup>th</sup> of April 2014, the  
suit was reinstated.

30 Between the dismissal and the reinstatement is a period of 9 years. The  
application for reinstatement was delayed. The suit had been filed in  
December 1993 for a cause of action that arose in 1988. By the time the suit  
was reinstated, the deceased had passed away and the executors who had  
distributed the estate were substituted in September 2014. Evidence shows  
that the estate had been distributed in the year 2001.

5 A dismissal of the suit under Order 17 rule 6 of the Civil Procedure Rules  
can only be remedied by filing a fresh suit subject to the law of limitation. In  
the premises, the reinstatement of the suit was erroneous in law and  
procedure. That being the case, the action against the executors was time-  
barred. The original cause of action arose on 10<sup>th</sup> July 1988 when the  
10 property that the appellant had bought had been transferred. The suit was  
reinstated subsequently on 30<sup>th</sup> of April 2014. This was about 26 years later.  
In the premises, the reinstatement was contrary to procedure and the clear  
intention of the rules. It also defeated a defence of limitation in an Act of  
Parliament. The only basis for setting aside such an order of dismissal could  
15 have been to demonstrate that an application or proceedings had been  
taken with a view to proceed with the suit within 2 years before the  
dismissal as stipulated in Order 17 rule 6 of the CPR. That can only be done  
by an application for review of the order of dismissal. Miscellaneous  
Application No 315 of 2010 for reinstatement of the suit was filed 5 years  
20 after the dismissal. It was not an application for review of the decision but  
for setting aside the dismissal on nonspecific grounds relevant to review. It  
was averred that the matter had on numerous occasions been set for  
hearing but it never proceeded for reasons beyond the control of the  
applicant. No facts were given that the suit had in the 2 years immediately  
25 before the dismissal been set for hearing or an application made with a view  
to proceeding with the suit. There was therefore no ground upon which an  
order could be granted reviewing the order of dismissal.

In the premises, I find that the suit was erroneously reinstated. The  
appellant could have had recourse against his counsel for negligence, if any.  
30 In the premises, the decision of the High Court which proceeded upon the  
erroneous reinstatement cannot stand since it was time barred. I would set  
aside the judgment of the learned trial judge and further set aside the order  
reinstating the suit.

In the circumstances, the cross appeal succeeds and the suit of the  
35 appellant in the High Court is struck out having set aside the judgment with  
each party to bear its own costs. The cross appeal having succeeded on

5 preliminary points of law, there is no basis for proceeding with the appellant's appeal. The appellants appeal stands dismissed with no order as to costs in light of the possible injustice suffered by the appellant in the way his suit was handled.

Dated at Kampala the 13<sup>th</sup> day of Sept 2021

10



**Christopher Madrama**

**Justice of Appeal**

**THE REPUBLIC OF UGANDA  
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**CIVIL APPEAL NO. 289 OF 2019**

**CORAM: (Cheborion Barishaki, Stephen Musota, Christopher Madrama, JJA.)**

**HENRY MUGANWA KAJURA:.....APPELLANT**

**VERSUS**

- 1. JOSEPH SSEMPEBWA**
- 2. PRINCE KASSIM KAKUNGULU**
- 3. PRINCESS NAMUKAABYA NFAMBA (Executors of the Estate of the Late George William Mawanda)**
- 4. PRINCE DAVID NAMUGALA**

**MAWANDA:.....RESPONDENT**

**JUDGMENT OF CHEBORION BARISHAKI, JA**

I have had the benefit of reading in draft the judgment of my brother Hon. Justice Christopher Madrama JA and I agree with the conclusions and orders he has proposed.

Since Musota JA also agrees, the cross appeal succeeds and the appellant's appeal stands dismissed. Each party is to bear its own costs both in this court and the court below.

It is so ordered.

Dated at Kampala this.....13<sup>th</sup>.....day of.....Sept.....2021



Cheborion Barishaki

**Justice of Appeal**

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**CIVIL APPEAL NO. 289 OF 2019**

**HENRY MUGANWA KAJURA :::::::::::::::::::: APPELLANT**

**VERSUS**

- |   |   |                          |
|---|---|--------------------------|
| <b>1. JOSEPH SSEMPEBWA</b>  | } | <b>::::: RESPONDENTS</b> |
| <b>2. PRINCE KASSIM KAKUNGULU</b>   |   |                          |
| <b>3. PRINCESS NAMUKAABYA NFAMBA</b><br><i>(Executors of the Estate of the<br/>late George William Mawanda)</i> |   |                          |
| <b>4. PRINCE DAVID NAMUGALA MAWANDA</b>   |   |                          |


**CORAM: HON. JUSTICE CHEBORION BARISHAKI, JA**  
**HON. JUSTICE STEPHEN MUSOTA, JA**  
**HON. JUSTICE CHRISTOPHER MADRAMA, JA**

**JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA**

I have had the benefit of reading in draft the judgment of my brother Hon. Justice Christopher Madrama, JA.

I agree with his analysis, conclusions and orders he has proposed.

Dated this 13<sup>th</sup> day of Sept 2021

  
\_\_\_\_\_

**Stephen Musota**  
**JUSTICE OF APPEAL**