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THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 78 OF 2016
(ARISING FROM HIGH COURT CIVIL SUIT NO. 064 OF 2008)
(CORAM: MADRAMA, MULYAGONJA, MUGENYI, JJA)

10 **1. LEONARD MUBIRU}**

2. JULIAN NAMUBIRU}

3. LYDIA NAMUTEBI}

4. JOAN NANSUBUGA} .... APPELLANTS

VERSUS

15 **1. ISRAEL LWANGA}**

2. LEONARD KIZITO} .... RESPONDENTS

JUDGMENT OF CHRISTOPHER MADRAMA, JA

This appeal arises from the Judgment of Her Lordship Justice Damalie N.
20 Lwanga in High Court Civil Suit No. 64 of 2008 delivered on 9th December 2015.

The background to the appeal is contained in the decision of the learned trial Judge and is that the Appellants are children of the late Emmanuel Mubiru who died testate in 1987 (hereinafter referred to as the deceased).
25 The deceased was the registered proprietor of the suit land comprised in Block 396 Plot 37 at Bweya, Busiro. The 2nd Respondent is the brother of the deceased and a paternal uncle of the Appellants. In his will, the deceased bequeathed the suit land to the 2nd, 3rd and 4th Appellants who were minors at the time of his death. Upon attaining majority age, the 2nd, 3rd and 4th
30 appellants attempted to register the suit land in their names in 2005 but found that the 2nd Respondent had registered himself as proprietor of the suit land in 1990 and had subsequently transferred it to the 1st Respondent. They lodged a caveat on the suit land and instituted High Court Civil Suit No. 64 of 2008 against the Respondents for a declaration that the transfer of

the suit land from the 2nd to the 1st respondent was fraudulent, a declaration that the 2nd Respondent unlawfully obtained a grant of Letters of Administration for the estate of the late Emmanuel Mubiru, cancelation of the entries in the Register of Titles, and general damages, among other orders.

The learned trial Judge found in favour of the 1st Respondent. She held that despite the 1st Respondent's laxity in the purchase transaction evident in his failure to carry out a valuation or survey of the land, consult the LC1 Chairman and conduct a search in the land registry, there were no competing claims of ownership or encumbrances or occupation of the suit land for which notice would have been provided by a search in the land registry or consultation of the neighbours. Secondly, the 1st Respondent purchased the suit land from the 2nd Respondent who had power to sell by virtue of being the Administrator of the estate of the deceased. Thirdly, she held that fraud had not been proved against the 1st Respondent to the required standard, and therefore, the 1st Respondent was a bona fide purchaser for value without notice of any defect in title.

With regard to the second issue, whether the 2nd Respondent acquired the suit land fraudulently, the learned trial Judge held that whereas the 2nd Respondent had power to dispose of the deceased's estate by virtue of a grant of Letters of Administration, that power had to be exercised in the interest of the estate and for the benefit of the beneficiaries for whom the Administrator holds the deceased's property in trust. Secondly, she held that the 2nd Respondent took advantage of the Appellant's tender age to illegally dispose of the suit property and deprive the Appellants of their share of the estate. The trial Judge concluded that the 2nd Respondent obtained Letters of Administration fraudulently and mismanaged the estate. Accordingly, the learned trial Judge cancelled the 2nd Respondent's Letters of Administration and ordered him to compensate the 2nd, 3rd, & 4th Appellants for the suit land at the current market value. The learned trial judge also awarded general damages of UGX 10,000,000 and costs of the suit to the 2nd, 3rd, & 4th Appellants. With regard to the 1st Appellant's claim,

the learned trial Judge held that while the 1st Appellant donated special Powers of Attorney to the 2nd, 3rd, & 4th Appellants to prosecute the suit on his behalf as the Administrator of the deceased's estate and claimed no interest in the suit land, he did not prove his capacity as Administrator of the estate as his purported Letters of Administration were never tendered in evidence. Accordingly, the learned trial Judge held that the 1st Appellant did not have a cause of action and dismissed his suit with costs to the Respondents.

The Appellants being dissatisfied with the Judgment and orders of the learned trial Judge appealed to this court on the following grounds:

1. The learned trial Judge erred in law and in fact when she failed to properly evaluate the evidence on record and thus came to a wrong conclusion occasioning a miscarriage of justice to the Appellants.

2. The learned trial Judge erred in law and in fact when she held that the 1st Respondent lawfully and without fraud obtained the land in dispute despite the overwhelming evidence on record that negatives that finding.

3. The learned trial Judge erred in law and in fact when she found that the 1st Respondent was a bonafide purchaser for value without notice.

4. The learned trial Judge erred in law when she expunged the evidence of the 2nd & 3rd Appellants basing on a wrong premise that they had given evidence as donees of a power of attorney yet they testified both as attorneys and in their own right and in total disregard of Article 126(2)(e) of the Constitution.

5. The learned trial Judge erred in law and in fact when she dismissed the 1st Plaintiff's case with costs without proof as required by law that his Letters of Administration were forged and without recourse to the fact that he had an interest in the suit land which interest could be espoused with or without having Letters of Administration.

The Appellants seek for orders that the appeal be allowed with costs of the appeal and of the lower court and that the Judgment and orders of the learned trial Judge be set aside.

The Appellants abandoned ground 6 of the appeal in their written submissions.

Representation

At the hearing of the appeal, the Appellants were represented by learned counsel Mr. David Ssempala and learned counsel Mr. Kigenyi Emmanuel while the 1st Respondent was represented by learned counsel Mr. Andrew Kabombo, learned counsel Mr. Mutyaba Bernard and leaned counsel Mr. Ssozi Stephen Galabuzi. The 2nd Respondent was not represented.

Submissions of the Appellant's counsel

The Appellant's counsel argued grounds 1, 2 & 3 jointly. He submitted that the learned trial Judge erred in law and fact when she held that the 1st Respondent was a bonafide purchaser for value without notice of fraud. Counsel contended that the 1st Respondent fraudulently acquired the suit land without conducting any due diligence to ascertain whether there was any encumbrance or third-party interest in the suit land. He relied on the testimonies of the 1st and 2nd Respondents and the Appellants' witnesses. He submitted that the 1st Respondent upon receiving a special Certificate of Title in the names of the late Emmanuel Mubiru ought to have inquired about the original Certificate of Title and the circumstances under which the 2nd Respondent acquired Letters of Administration to the estate of the deceased.

Learned counsel for the Appellants submitted that to advance the defence of a bonafide purchaser for value without notice of fraud, the 1st Respondent ought to have conducted due diligence including a search in the land registry and consultations with the neighbours about the ownership of the suit land. He relied on **Sir John Bageire v Ausi Matovu, CACA No. 07 of 1996,** at page 8, where G.M Okello, JA observed that lands are not vegetables which are bought from unknown sellers. They are valuable properties and

5 buyers are expected to make thorough investigations not only of the land, but also of the owner before purchase. Secondly, counsel referred to the testimony of PW5 at page 425 paragraph 1245 of the record of appeal for the submission that the 1st Respondent inquired and was informed that the land belonged to the Appellants, but refrained from conducting further 10 independent investigations for fear of confirming the true ownership of the suit land. He relied on **David Sajjaka Nalima v Rebecca Musoke CACA No. 12 of 1985 at page 29**, paragraph 1 & 2 in which it was held that if it be shown that the purchaser's suspicions were aroused and he abstained from making inquiries for fear of learning the truth, fraud may be properly 15 ascribed to him. Thirdly, counsel referred to the testimony of PW5 and the testimony of PW4 which showed that DW1 who represented the 2nd Respondent lived 1 kilometre away from the family of the late Emmanuel Mubiru and knew about the interests of the Appellants in the suit land. Counsel contended that the fraudulent acts of DW1 as an agent of the 1st 20 Respondent bound the 1st Respondent. He relied on **David Sajjaka Nalima v Rebecca Musoke** (supra at page 27) and **Real Property 3rd Edition at page 129,** by **Megarry and Wade**, for the proposition that if a purchaser employs an agent such as a solicitor, any actual or constructive notice imputed on the agent is also imputed on the purchaser.

25 The Appellants' counsel submitted that the transaction between the 1st and 2nd Respondent was illegal since it was not documented by way of a sale agreement. He referred to the testimony of DW1 to this effect. Secondly, counsel submitted that the 1st Respondent whose name was entered on the Certificate of Title did not sign any transfer forms. Counsel contended that 30 the transfer forms were signed by DW1, as the transferee, on behalf of the 1st Respondent without any Power of Attorney contrary to section 146 of the Registration of Titles Act. He relied on **F.J.K Zaabwe v Orient Bank & 5 others, SCCA No. 4 of 2006** for the holding that the conduct of a party calculated to deceive, whether by a single act or combination of acts or by 35 suppression of truth is dishonest and amounts to fraud.

Further, counsel submitted that the learned trial Judge having observed

5 that the 1st Respondent ought to have exercised due diligence prior to the transaction, should have found in favour of the Appellants since it was clear that the 1st Respondent was at his own risk having purchased the suit land without exercising due diligence. In the premises, counsel prayed that this court cancels the transfer of the suit land to the 1st Respondent pursuant to 10 section 77 of the Registration of Titles Act.

On ground 4, the Appellants' counsel submitted that the learned trial Judge's decision to expunge the evidence of the 2nd and 3rd Appellants from the record on the ground that they testified as Attorneys of the 1st Appellant before they were made parties to the suit, and never came back to testify in 15 respect of their own claim, was erroneous. Counsel contended that the 2nd and 3rd Appellants testified as PW1 and PW3, respectively, under a valid Power of Attorney as representatives of the 1st Appellant, and as beneficiaries of the suit land. He noted that the suit under which the 2nd and 3rd Appellants testified was never withdrawn but amended to join them as 20 parties. In the premises, counsel submitted that the evidence of and exhibits tendered through the 2nd and 3rd Appellants remained intact and was used by the court in delivering judgment. Secondly, counsel submitted that there is no law which permits a trial court to expunge from the record, the evidence of a witness who becomes a party to a suit. Counsel submitted 25 that the decision of the trial court was premised on a technicality contrary to the maxim that equity will not permit justice to be withheld on a technicality and contrary to Article 126(2)(e) of the Constitution which provides that substantive justice shall be administered without undue regard to technicalities. In the premises, counsel invited this court to uphold 30 this ground of appeal.

On ground 5, the Appellants' counsel submitted that the learned trial Judge erred in law and fact when she dismissed the 1st Appellant's suit with costs to the Respondents. He contended that the trial court's finding that the 2nd Respondent's application for Letters of Administration was fraudulent, was 35 adequate to prove that the 1st Appellant was the genuine Administrator of the estate of the late Emmanuel Mubiru, and had a valid cause of action

against the Respondents. Further, counsel submitted that the 1st Appellant being the Administrator appointed by the will of the deceased had rights over the suit land and capacity to sue or be sued. He relied on section 25 of the Succession Act which provides that all property in an intestate devolves upon the personal representative of the deceased, in trust for those persons entitled to the property under the Act.

In conclusion, counsel reiterated the Appellants' prayers that the appeal be allowed with costs of the appeal and of the lower court, secondly, that the judgment and orders of the learned trial Judge be set aside, thirdly, for a declaration that the 1st Respondent fraudulently acquired the suit land and his name be cancelled from the Certificate of Title, and lastly, an order that the 2nd, 3rd and 4th Appellants be registered as proprietors of the suit land.

Submissions of the Respondent's counsel

In reply the 1st Respondent's counsel argued grounds 1, 2 & 3 jointly. He submitted that the trial Judge properly evaluated the evidence on record and came to the right conclusion that the 1st Respondent was a bonafide purchaser for value without notice of fraud. Counsel reiterated the trial Judge's findings with respect to the evidence referred to by the Appellants in their written submissions. Secondly, counsel submitted that the Appellants failed to discharge the standard of proof required in cases of fraud. He relied on **Kampala Bottlers Limited v Damanico (U) Ltd, SCCA No. 22 of 1992**, where it was held that fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters. Thirdly, counsel submitted that the 2nd Respondent having obtained a grant of Letters of Administration for the estate of the deceased who was the registered proprietor at the time of sale, had all the rights and capacity to sell the suit land to the 1st Respondent. For this submission, counsel referred to section 180, 192 and 270 of the Succession Act and section 134 of the Registration of Titles Act which provide for the powers and rights of an Administrator. Further, counsel contended that since the suit land was bushy and vacant at the time of sale, the 1st Respondent had no one to consult about any possible claims on the suit land. He submitted that the 1st

5 Respondent could not have sought for the consent of the Appellants before purchasing the suit land since they were minors at the time of sale and did not have capacity to give valid consent. Counsel contended that the 2nd Respondent, being the Administrator of the estate of the Appellants' father, was the only person with capacity to give consent on behalf of the minors. 10 In the premises, counsel submitted that the 1st Respondent qualified as a bonafide purchaser for value without notice of fraud.

With regard to the Appellant's submissions that the act of DW1 signing the transfer forms for the 1st Respondent imputed fraud, the Respondent's counsel submitted that DW1 signed the transfer forms on behalf of three 15 people, including the 1st Respondent, two of whom were aboard. He contended that this act did not amount to a dishonest dealing. Secondly, counsel submitted that the Appellants were precluded from submitting about the purchase price for the suit land indicated in the transfer forms on grounds that the same was not pleaded. He relied on **Kampala Bottlers** 20 **Limited v Damanico (U) Ltd, SCCA No. 22 of 1992**, and **Lubega v Barclays Bank [1990-1994] EA 284** where it was held that the requirement to plead particulars of fraud is mandatory. In the alternative, counsel submitted that the impugned transfer instruments were executed by the 2nd Respondent who handled the transfer process and neither the 1st Respondent nor his 25 agent, DW1, were involved, and as such, were not privy to any fraud attendant to the transfer process. He relied on **Robert Luswenswe v G.W Kasule & another HCCS No. 1010 of 1983**.

With regard to ground 4 & 5 of the appeal, learned counsel for the Respondent submitted that the trial Judge did not make any finding that the 30 1st Appellant's letters of Administration was forged. He supported the finding of the trial Judge that the 1st Appellant did not prove his role as Administrator of the estate of the deceased by tendering his purported Letters of Administration. In the premises, counsel submitted that the 1st Appellant did not have a cause of action and the trial Judge rightly 35 dismissed his suit with costs to the Respondents. Secondly, counsel submitted that the trial Judge did not expunge the evidence of PW1 and PW3

5 in its entirety but only to the extent that the same was sought to be relied on to prove the 1st Appellant's claim. Further, counsel submitted that the evidence of PW1 and PW3 was given before any amendments to the plaint and in the capacity of the witnesses as attorneys for the 1st Appellant. In the circumstances, counsel submitted that their evidence was inadmissible and 10 the trial Judge rightly expunged it from the record.

Lastly, counsel submitted that the appeal was moot and academic since the Appellants did not lose the case in the lower court as they received what they had sued and prayed for. Counsel pointed out that the Appellants prayed for an order of compensation for the suit land at the current market 15 value and the same was granted by the trial court. Counsel submitted that the courts have a duty to adjudicate on disputes which actually exist between litigants and not academic ones. He relied on **Uganda Corporation Creameries Ltd & another v Reamaton Ltd Civil Reference No. 11 of 1999**. Counsel further submitted that the Appellants cannot have compensation 20 for the suit land as was ordered by the trial court and at the same time, have the suit land. He relied on **Foskett v Mckeown [2000], [2001] 1 AC 102** for this submission. Secondly, counsel pointed out that the Appellants ought to have taken steps, since 9th December 2015 when judgment was delivered, to realise the compensation given to them by the trial court against the 2nd 25 Respondent.

In conclusion, counsel invited this court to find that this appeal is moot and an abuse of court process. He prayed that the appeal be dismissed with costs to the Respondents.

Resolution of the Appeal

30 I have carefully considered the written submissions of counsel for the Appellants and Respondents respectively, the record of appeal and the law and authorities relied upon by either side.

The duty of this court as a first appellate court is to reappraise the evidence on record and draw its own inferences of fact. This duty is stipulated in Rule 35 30(1)(a) of the Judicature (Court of Appeal Rules) Directions, S.I No. 13-10.

5 In **Peters v Sunday Post Limited [1958] 1 EA 424** the East African Court of Appeal held that the duty of a first appellate court is to review the evidence in order to determine whether the conclusions drawn by the trial court should stand. In reappraisal of evidence, the first appellate court should caution itself regarding the shortcoming of not having had the advantage of 10 seeing and hearing the witnesses testify. Further in **Fr. Narsensio Begumisa & 3 others v Eric Tibebaga SCCA No. 17 of 2002**, Mulenga JSC, held that on a first appeal, the parties are entitled to obtain from the appellate court its own decision on issues of fact as well as of law.

I have carefully considered the grounds of appeal and will first analyse 15 them before considering each of them as may be necessary. For purposes of analysis, I will set out the grounds of appeal. Ground 6 of the appeal was abandoned and will not be dealt with. The grounds of appeal are:

1. The learned trial Judge erred in law and in fact when she failed to properly evaluate the evidence on record and thus came to a wrong 20 conclusion occasioning a miscarriage of justice to the Appellants.

2. The learned trial Judge erred in law and in fact when she held that the 1st Respondent lawfully and without fraud obtained the land in dispute despite the overwhelming evidence on record that negatives that 25 finding.

3. The learned trial Judge erred in law and in fact when she found that the 1st Respondent was a bonafide purchaser for value without notice.

30 4. The learned trial Judge erred in law when she expunged the evidence of the 2nd & 3rd Appellants basing on a wrong premise that they had given evidence as donees of a power of attorney yet they testified both as attorneys and in their own right and in total disregard of Article 126(2)(e) of the Constitution.

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5. The learned trial Judge erred in law and in fact when she dismissed the 1st Plaintiff's case with costs without proof as required by law that

5 his Letters of Administration were forged and without recourse to the fact that he had an interest in the suit land which interest could be espoused with or without having Letters of Administration.

Ground one of the appeal is a general ground of appeal that affects all the other grounds of appeal and is therefore superfluous. Secondly it does not 10 specify the points of law or fact or mixed law and fact that had been wrongly decided in breach of rule 86 (1) of the Rules of this court. In any case, it is the duty of this court to reappraise the evidence on record whenever there is any factual controversy (See **Peters v Sunday Post Limited [1958] 1 EA 424).** I would in the circumstances strike out ground one of the appeal for 15 being vague and superfluous since the court is under a duty to evaluate the evidence on record anyway.

Secondly, grounds two and three of the appeal are intertwined in that in ground two, the issue is whether it was erroneous for the learned trial judge to find that the first respondent obtained the land without fraud. On the other 20 hand, ground three deals with the question of whether it was erroneous for the learned trial judge to find that the first respondent was a bona fide purchaser for value without notice. The facts relating to the two grounds of appeal would be the same and I would handle them jointly.

As far as the ground 4 of the appeal is concerned, it concerns an issue of a 25 preliminary nature as to whether the learned trial judge erred in law when she expunged the evidence of the second and third appellants from the record. This ground has to be handled preliminarily as it would affect the question of whether that evidence has to be considered in the evaluation of evidence in relation to the other grounds of appeal. Ground 4 of the appeal 30 will therefore be handled first. Secondly, ground 5 of the appeal deals with the dismissal of the first plaintiff's case with costs on the ground that his letters of administration were forged. Again, the question of whether the dismissal was proper or not ought to be handled before consideration of grounds 2 and 3 of the appeal which are on the merits. The question of 35 whether somebody is a proper party to a suit is of a preliminary nature and ground 5 of the appeal will be handled after ground 4.

5 Ground 4:

The learned trial Judge erred in law when she expunged the evidence of the 2nd & 3rd Appellants basing on a wrong premise that they had given evidence as donees of a power of attorney yet they testified both as attorneys and in their own right and in total disregard of Article
10 **126(2)(e) of the Constitution.**

On this issue, the learned trial judge found that the first plaintiff had donated special powers of attorney to the second, third and fourth plaintiffs to prosecute the suit on his behalf as administrator of the estate of the deceased. He had no interest as a beneficiary. However, his role as
15 administrator of the estate was not proved. Having found that he had no interest in the suit property and his right as administrator had not been proved, his suit was dismissed with costs to the defendants. Following the dismissal, the learned trial judge held as follows:

> PW1 and PW3 had testified as attorneys of the first plaintiff before they were
> 20 added as plaintiffs in their own right. They never came back to testify in respect of their own claim as plaintiffs. The evidence which they gave in respect to the first plaintiff's claim in the suit is accordingly expunged, to that extent only.

Clearly, the learned trial judge expunged the evidence in relation to the right of the first plaintiff as an administrator of the estate on account of dismissal
25 of the suit. The appellant's counsel maintained that expunging the evidence of PW1 and PW3 was erroneous as they could testify in their own right. The wording of the judgement however is that the evidence they adduced in respect of the first plaintiff's claims in the suit is expunged. That meant that the evidence they gave in the character of administrator of the estate of the
30 deceased was the only evidence that was expunged.

Proceedings commenced whereupon PW1 Julian Namubiru resident of Paris in France and a university lecturer at the University of Versailles in France testified that she is the daughter of the deceased and the brother of Leonard Mubiru who had obtained letters of administration and the donee
35 of the special power of attorney. She testified that the letters were granted to him at Mengo on 5th October 1987 in Administration Cause No 113 of 1987.

The special powers of attorney were granted to her, her sister Lydia Namutebi and Joan Nansubuga on 7th February 2008. Counsel prayed to tender in a copy of the letters of administration and it was objected to. The court ruled that the letters of administration would be marked for identification purposes and directed the registrar of the court to write to the Chief Magistrates Court of Mango to verify whether the two letters of administration were authentic in that another letter of Administration had been issued to the 2nd defendant.

It is therefore clear that at this stage at which the issue was raised, PW1 had not testified about the merits of the case but had only introduced her capacity as a donee of powers of attorney given by her brother Leonard who was the administrator of the estate of the deceased by virtue of letters of administration which she described and a copy of which she had in her possession. Thereafter another issue was introduced as to whether Leonard Mubiru had the capacity on 7th February 2008 to issue powers of attorney to the attorneys whose authority was being challenged in court.

Before the issue could be resolved, PW1 continued to testify in her own capacity and on the basis of her own knowledge. Her testimony relates to the merits of the suit and I do not need to repeat it here. Certain exhibits were admitted particularly exhibit P2 which she obtained from the land office being a copy of the title for block 396 plot number 37, the subject matter of the suit. She also testified that at the funeral rites of the deceased, the will of the deceased was read out. She confirmed that the will bore her father's signature and the same was tendered in for identification. Further the original title of the suit property was admitted in evidence as exhibit P3. A certified copy of the transfer signed on 31st July 1990 was tendered in as evidence transferring the land from Leonard Kizito, the second defendant to Israel Lwanga the first defendant and it was admitted as exhibit P4. Further, through the testimony of PW1, the affidavit of Paul Musisi filed in support of a temporary injunction was admitted in evidence. It was filed on 5 May 2009 and commissioned on 4th May 2009 and was tendered in as exhibit P5. Further there was a consent to transfer land which was tendered

5 in evidence as exhibit P6. The witness testified about her witnessing Mr Leonard as administrator, apologising for having sold the land and agreed to compensate the three girls with another piece of property before the Administrator General in a meeting held on 24th of February 1999. The witness was then cross-examined.

10 Thereafter Namutebi Lydia testified as PW3. She testified from her own knowledge and I do not need to repeat the contents of the testimony for now for purposes of resolving ground 4 of the appeal.

At this stage, it was brought to the attention of the court that an application had been filed to add parties. The matter was postponed pending cross 15 examination of PW1 who had travelled from France. This was on 19th May 2014. Subsequently on 11th September 2014 the court was informed that the matter of the application in Miscellaneous Application Number 415 of 2014 was resolved. The matter was further adjourned to 1st December 2014 for further hearing. Thereafter PW4 Joan Nansubuga testified. It is apparent 20 that at this stage, the attorneys had been included as parties. The record shows that the ruling allowing the applicants to be joined as parties was issued on 8th September 2014 joining Julian Namubiru, Lydia Namutebi and Joan Nansubuga. The amended plaint was filed on 11th September 2014. PW4 therefore testified after she was added as a party.

25 Subsequently PW5 Norah Talutambudde Namyenya, a neighbour of the deceased also testified. The matter was adjourned for further hearing to call the last witness of the plaintiffs. The last witness is a forensic expert and superintendent of police PW6 Mr. Sebuwufu Erisa whose report was tendered in evidence. Thereafter the plaintiff's counsel closed the case of 30 the plaintiffs.

From the above, it is clear that the question of locus standi was not handled preliminarily. It was handled in the judgement after the hearing and closure of the case of the parties. Secondly, the original plaint was filed by Mr Leonard Mubiru through his lawful attorneys Julian Namubiru, Lydia 35 Namutebi and Joan Nansubuga. A copy of the power of attorney was attached as annexure "A". An examination of annexure "A" shows that it is a

special power of attorney dated 7th February 2008 wherein Leonard Mubiru nominated, ordained and authorised Julian Namubiru, Lydia Namutebi and Joan Nansubuga to file a suit for recovery of land or compensation for the loss of land and to inter alia participate in all matters pertaining to the suit. It indicates inter alia that the suit was brought on his behalf. He says that they were to do all things in respect of any suit in pursuance of the land comprised in Busiro block 398 plot 36 formally registered in the names of Emmanuel Mubiru in respect of whose estate he is the administrator. The special power of attorney does not indicate the letters of administration by which the donor is the administrator of the estate of the deceased. The power of attorney is registered. The power of attorney is not expressly issued by virtue of letters of administration.

As far as the body of the plaint is concerned, it was averred in paragraph 4 (c) of the plaint that pursuant to the death of the deceased, Leonard Mubiru applied for and was granted letters of administration for the estate a copy of which would be produced during the scheduling of the case. Particularly in paragraph 4 (d) it was averred as follows:

> Since Julian Namubiru, Lydia Namutebi and Joan Nansubuga were minors then, they and the executors of the deceased's Will left their land to fallow but were in effective possession thereof.

Subsequently, an attempt by the plaintiff's counsel to have the letters of administration admitted in evidence did not yield expected results. There is no evidence as to whether the registrar who was directed to verify the authenticity of the letters of administration carried out her task. There was laxity on the part of the trial court in not following up the directives of the court to verify whether the letters of administration which were admitted for identification were authentic. The above notwithstanding, there is clearly a problem of drafting in the special powers of attorney. From the drafting thereof, it can be concluded that Leonard Mubiru granted the power of attorney in his personal capacity not necessarily by virtue of letters of administration as this is not expressly stated therein nor is it discernible.

I have further considered the evidence; the learned trial judge admitted the

5 last will and testament of the deceased in evidence. The relevant property, the subject matter of the suit is mentioned in the translated copy of the will which was admitted in evidence as exhibit P7 as land at Bweya Busiro on Entebbe road measuring approximately 6 acres which is bequeathed to the three daughters of the deceased namely Juliet Namubiru (2 acres), 10 Namutebi Lydia (2 acres), Nansubuga (2 acres). The testator in the Will states *inter alia* that his customary heir is Mubiru Leonard, his eldest son. It is further material to notice that the suit concerns the property bequeathed in the Last Will and testament of the deceased which had been devised to the three plaintiffs who were added to the suit.

15 The rules of procedure Order 7 Rule 4 of the Civil Procedure Rules require that where a suit is brought in a representative capacity, the plaint shall specify it:

> Where the plaintiff sues in a representative character, the plaint shall show not only that he or she has an actual existing interest in the subject matter but that 20 he or she has taken the steps, if any, necessary to enable him or her to institute a suit concerning it.

When the suit of the first plaintiff was dismissed, it left the suit of the three plaintiffs who remained namely, Julian Namubiru, Lydia Namutebi and Joan Nansubuga. The suit had been brought on their behalf because they are the 25 actual beneficiaries named in the will of the testator as far as the suit property is concerned. Further, they were named in the original plaint as plaintiffs only by virtue of having been given a special power of attorney by Leonard Mubiru. Because the suit dealt with their interest in the property, I do not see how the defendants were prejudiced. Secondly, the three 30 surviving plaintiffs testified as witnesses. Granted, the difficulty that the learned trial judge laboured with is to be appreciated because having found that there was no locus standi of Leonard Mubiru, she felt it incumbent upon her to strike out anything associated with the representation of Leonard Mubiru. Because Leonard Mubiru could sue in his own right, the fact that he 35 claimed to be the administrator which was not specifically proved in the special power of attorney, is a technicality. It follows that as a child of the

5 deceased, he had locus standi to commence an action against the respondent/the defendants for recovery of anything that belonged to the estate as a beneficiary. However, he was not a beneficiary and the actual beneficiaries were the persons he purported to authorise to sue on his behalf. Because the actual beneficiaries, sued albeit under an authority of 10 the first plaintiff who was not beneficially interested in the property, the special power of attorney can be ignored and at best it was a misnomer in entitlement of the plaint as it purports to bring the action in the names of Leonard Mubiru when the actual beneficiaries who were adults could sue and be sued and they are actually named as attorneys who sued. The High 15 Court had powers to regularise the suit because all the parties were before the High Court and the High Court had jurisdiction in the matter.

Apart from the technicality, there would be no change in substance to the suit by adding the three plaintiffs who are the beneficiaries to the suit under the last will and testament of the deceased and whose names were already 20 in the plaint originally as attorneys. In **Boyes v Gathure [1969] EA 385** the East African Court of Appeal dealt with the situation where an application was made under the Registration of Titles Act to remove the caveat lodged by the appellant. The respondent moved the High Court of Kenya by chamber summons which was an interlocutory summons to extend the life of the 25 caveat. Upon the order being issued, the appellant was aggrieved and lodged an appeal on the ground that the application was incompetent. The East African Court of Appeal found that the word "summons" under section 57 of the Registration of Titles Act means an originating summons if there was no suit in existence or an interlocutory summons if there is a suit in 30 existence. In the circumstances there was no suit in existence. The considered the question of whether the adoption of the wrong procedure invalidated the proceedings. Spry, J.A. stated at page 387 that:

> So far as this appeal is concerned, however, the position is that the learned judge made an order which he certainly had jurisdiction to make on a proper application, 35 and I do not think that the fact that the application was in an incorrect form meant that he lacked jurisdiction. If, as I think, he had jurisdiction, the error of procedure is not a ground for interfering with his decision, since no prejudice whatsoever

5 was caused to the appellant.

I find that in the circumstances of this appeal, the beneficiaries sued under the purported authority of a special power of attorney issued by Leonard Mubiru, the heir to the deceased but not a specific beneficiary to the suit property which had been bequeathed to the second, third and fourth 10 plaintiffs in the High Court. I would find that the original suit was not a nullity. To find otherwise, a nullity cannot be amended by adding any party to it and the decision of the trial judge adding the additional plaintiffs would be nullified. To add the three plaintiffs to a nullity would mean that summons would be issued afresh. The court proceeded with the suit thereby validating 15 the original suit. Because the original suit is not a nullity, the testimonies of the first, third and fourth plaintiffs' witnesses were valid testimonies. Further, I would find that the plaintiffs were parties even though wrongly entitled and commencing the suit as attorneys. Secondly the plaintiffs had an interest in that the suit was brought on their behalf as beneficiaries who 20 had been deprived of their share in the estate of the deceased. They were the proper principals entitled to sue for their beneficial interest in the suit property. The suit was properly brought against the defendants on the merits. The defendants had been served with the pleadings showing clearly that the property had been bequeathed to the remaining plaintiffs who are 25 beneficiaries. For emphasis, paragraph 4 (b) of the plaint averred that:

> That in the year 1987, the late Emanuel Mubiru died testate and he in his will bequeathed the disputed land to Julian Namubiru, Lydia Namutebi and Joan Nansubuga, the donees of powers of attorney herein. A copy of the will is attached hereto and marked as annexure "C".

30 The respondents were on notice that the disputed property had been bequeathed to the three plaintiffs mentioned in paragraph 4 (b) of the Plaint. The only anomaly was that the three plaintiffs approached court by virtue of the powers of attorney granted to them by Leonard Mubiru, the heir to the deceased. No prejudice was occasioned in the circumstances to the 35 defendants who are now the respondents. In the premises, it was erroneous to strike out or expunge from the record the testimony of PW1, PW3 and PW4. Whereas it could have been proper to expunge anything in relation to

the special powers of attorney, the rest of the testimony as concerns the merits of the suit which was in the personal knowledge of PW1, PW3 and PW4 as witnesses were valid. A critical reading of the judgement also shows that not all the testimony was struck out and this could lead to a conflict in conclusion as to which part was actually struck out. The above notwithstanding, the power of attorney was not necessarily proved to be issued by virtue of letters of administration. The conclusion is that the power of attorney could stand as a power of attorney issued by Leonard Mubiru in his own individual capacity and in his own understanding as his role in the affairs of the deceased as an heir. Further, because he had no beneficial interest in the suit property under the will which he generously attached, his suit could only stand as a member of the family before distribution of the estate who is interested in the proper distribution of the estate. In the premises, ground 4 of the appeal has merit and is hereby allowed.

Ground five:

> **That the learned trial judge erred in law and in fact when she dismissed the first appellant's case with costs without proof as required by law that his letters of administration were forged and without recourse to the fact that he had an interest in the suit land which interest could be espoused with or without having letters of administration.**

From the resolution of ground 4 of the appeal, it was apparent that the question of whether the letters of administration was authentic was referred to the registrar to establish from Mengo court. This was specifically ordered by the learned trial judge and the plaintiffs closed their case without having obtained that verification. On this matter the learned trial judge held as follows:

> I agree with the submissions of counsel for the first defendant on the status of the first plaintiff. He had donated special powers of attorney to the second, third and fourth plaintiffs to prosecute the suit on his behalf as administrator of the deceased's estate. He claims no interest in the suit land; he had brought the suit

5 on behalf of the estate. However, his role of administrator of the estate was not proved as his purported letters of administration were never tendered in evidence, and he never appeared in court to tender them and prove his position of administrator of the estate. His attorneys applied to be added as plaintiffs in their own right for their claim as beneficiaries of the suit land on grounds that the 10 first plaintiff had lost interest in the suit, and they were allowed.

While the learned trial judge could be faulted for not having addressed the question of the report of the registrar under her direction to verify whether the letters of administration issued to the first plaintiff was valid or not, it would be hard to fault her on the second limb of the judgment that the 15 plaintiff had no interest in the suit land in his own capacity. He only had interest as an administrator of the estate and his interest as administrator was not proved. The plaintiff's counsel can be faulted for closing the suit of the plaintiff without bringing the evidence on record. The burden of proving that the first plaintiff was an administrator of the estate of the deceased lay 20 on the plaintiffs and particularly on the first plaintiff. I would agree with the learned trial judge that the title of the first plaintiff as administrator of the estate of the deceased was not proved and the plaintiffs' counsel closed the case of the plaintiffs prematurely without adducing that proof or satisfying the court about the authenticity of the letters of administration which had 25 been tendered on record for identification purposes only. In the premises, ground five of the appeal has no merit and is disallowed.

I would now address grounds two and three of the appeal.

The learned trial Judge erred in law and in fact when she held that the 1st Respondent lawfully and without fraud obtained the land in dispute 30 despite the overwhelming evidence on record that negatives that finding.

The learned trial Judge erred in law and in fact when she found that the 1st Respondent was a bonafide purchaser for value without notice.

I first note that there was no cross appeal by the respondents appealing 35 against the decision of the learned trial judge. There is only one memorandum of appeal disclosing the appeal of the appellants. The learned

trial judge found for the plaintiffs as far as the second defendant is concerned. Accordingly, she issued the following orders:

1. The suit of the first plaintiff is dismissed with costs to the defendants.

2. A declaration that the registration and transfer of land comprised in Busiro Block 396 Plot 37 at Bweya from the names of Emmanuel Mubiru to the second defendant was done fraudulently.

3. A declaration that the second defendant fraudulently obtained letters of administration for the estate of the late Emmanuel Mubiru.

4. The letters of administration obtained by the second defendant in respect of the late Emmanuel Mubiru's estate are hereby cancelled.

5. The second defendant shall compensate the second, third and fourth plaintiffs for the suit land at the current market value.

6. The second defendant shall pay general damages of 10,000,000 (Uganda shillings ten million) to the second, third and fourth plaintiffs for the anguish and inconvenience suffered.

7. The second defendant shall pay the second, third and fourth plaintiffs costs of this suit.

The plaintiff supported the findings of the learned trial judge as far as the second defendant is concerned but disagreed with her finding with regard to the first defendant. On the first issue of whether the first defendant acquired the suit land fraudulently, the learned trial judge extensively reviewed the evidence and submissions of counsel. She found that there were no competing claims of ownership or encumbrances or occupation of the suit land for which notice could have been provided by a search in the land registry or consultation with the neighbours or occupants. The first defendant purchased the land from the second defendant who had the power to sell. This was by virtue of being registered as the administrator of

5 the estate of all the property of the deceased (Emmanuel Mubiru). The evidence and finding of the learned trial judge were that:

> DW1 admitted that he never carried out a search in the land registry; he never inquired from the only visible neighbour to the suit land; he never carried out any independent investigations but entirely relied on what the second defendant told
> 10 him that Emmanuel Mubiru was dead and he was the administrator of his estate. He denied ever having consulted the LC 1 chairman of the area before purchasing the suit land as testified by PW5. But learned counsel for the plaintiffs implored court to believe the testimony of PW5 as true while counsel for the first defendant argued that it was lies. It is clear on record that DW 1 handled the entire purchase
> 15 transaction in such a casual manner that he never even executed a sale agreement but simply trusted the second defendant to transfer the certificate of title into the name of the first defendant. He told Court that he never carried out any investigations, he did not carry out a valuation or survey the land; he only dealt with the second defendant. With that kind of laxity on the part of DW 1 in the
> 20 transaction, I am inclined to believe his evidence that he never consulted the LC 1 Chairman. Non consultation of the LC 1 Chairman is more consistent with his lax conduct in the transaction.
>
> It must be noted however, that despite the laxity of DW 1 in the purchase transaction there are no competing claims of ownership or encumbrances of
> 25 occupation on the suit land for which notice would have been provided by a search in the land registry, or consultation of the neighbours/occupants. He purchased the land from the second defendant who had power to sell. By virtue of being the administrator of the estate or the property of the late Emmanuel Mubiru vested in him. Section 180 of the Succession Act provides:
>
> 30 *The executor or administrator, as the case may be, of a deceased person is his/her legal representative for all purposes and all the property of the deceased invest in him or her as such.*
>
> Under section 270 of the Succession Act the second defendant was legally empowered to sell property of the deceased wholly or in part in such manner as
> 35 he may deem fit, by virtue of being the administrator of the estate. DW 1 Told Ct that he was satisfied by the letters of administration that the second defendant had, and his assurance that he had power to sell and would effect the transfer after the sale.
>
> In the case of David Sejjaaka Nalima v Rebecca Musoke, Court of Appeal Civil
> 40 Appeal Number 12 of 1985...

5 In this case where the second defendant had power to sell, I have not found sufficient evidence that the suspicions of DW 1 were aroused and the abstain from making relevant enquiries. The second defendant would of course be held liable for any fraud committed in abuse of his authority as administrator of the estate. However, as regards the first defendant I am not satisfied that fraud has been 10 proved against his agent to the required standard in the circumstances of this case. I accordingly find that the first defendant a bona fide purchaser for value without notice.

There are two clear findings the learned trial judge made. The first is that DW 1 did not make any enquiries or carry out any search of the suit property. 15 Secondly, fraud had not been proved against DW 1 the agent of the first defendant/1st respondent to this appeal. In between it was found that the second defendant who was the administrator of the estate was guilty of fraud. The learned trial judge found that the fraud could not be imputed on DW 1 who was an agent of the purchaser who is also the first respondent to 20 this appeal.

I have carefully reviewed the evidence. There are two testimonies considered. The first is the testimony of PW5 and secondly, this is tested against the testimony of DW 1. PW5 Norah Namyenya testified that she was a neighbour of the late Emmanuel Mubiru. She knew the suit property but 25 does not know the first defendant. She also does not know Leonard Kizito. Her husband used to be the LC 1 chairperson though he died in 2007. In the early nineteen nineties there was a gentleman who asked her husband in her presence whether the suit land was on sale whereupon her husband informed him that it belongs to the deceased. Later on, she saw the land 30 being graded but did not know who acquired it. The next time she saw the gentleman, the land was being graded and she heard that someone called Mpale Short had bought the land. This was the gentleman who had come to ask her late husband whether the land was for sale. She identified him in court. The purchaser chased away some boys who were extracting sand 35 from the land. She did not know whether the children of the deceased consented to the sale of the land. She was cross-examined in this testimony and nothing different was elicited from her.

On the other hand, DW 1 Banalya Paul Musisi testified that he knows the first defendant who is also the first respondent as his brother and he was resident in London, UK. He testified that Leonard Kizito was introduced to him and took him to the land which was being used for dumping garbage. There were pits where people were digging for sand and it was a swampy area. Leonard showed him the certificate of title and they decided to buy the land. The land was registered in the names of the first defendant because he was the one financing it from abroad. They never signed an agreement of sale but they signed the transfer form. He only signed on behalf of the first defendant. They graded the land with a bulldozer and later abandoned it after they had fenced it. He does not know the family of the deceased. However, he testified that the name was on the certificate of title (the names Emmanuel Mubiru). He got to know about the family of the deceased when the suit came up. He never carried out a search before purchasing the land. After purchasing the land, it was surveyed and boundaries opened when he was fencing it. After he signed the transfer, Leonard Kizito is the one who handled the transfer process. He also testified that the first defendant never complained about him signing the documents of transfer on his behalf. In cross examination he testified that he never bothered to find out whether Emmanuel Mubiru had children or wives. He never did any independent investigation concerning the land apart from what Leonard Kizito told him. The money used for purchasing the property came from the first defendant who is the registered proprietor. He further testified that although Leonard Kizito was not the registered proprietor, he bought land from him because he was satisfied that he had powers to sell. This is because he had documents of letters of administration. He also admitted in cross examination that by the time he signed the transfer form, he had no powers of attorney from Israel Lwanga (the first defendant). Leonard Kizito was registered on the title on 2nd August 1990. Israel Lwanga was registered on title on 10th August 1990. By the time he signed the transfer form, the land was not in the names of the seller Leonard Kizito. He denied that he ever approached the husband of PW5 (the LC 1 Chairperson). He paid Uganda shillings 8,000,000/= for the suit property.

From the above evidence, it is clear that the property was purchased on behalf of the first defendant Mr Israel Lwanga and two others by DW 1. Mr Israel Lwanga was not in the country. What is material is that DW 1 considered the letters of administration of Leonard Kizito before the property was registered in the names of the said administrator. He admitted that the property was in the names of Emmanuel Mubiru at the time of the transaction. He also signed transfers before the property was registered in the names of the administrator. He was only satisfied by the authority. It is not in dispute or controversial that the knowledge of DW 1 is the material knowledge that may be imputed to the principal Mr Israel Lwanga. However, that is not all because it DW 1 clearly testified that the property was for a project and he was part of the project while Mr Israel Lwanga funded the project. That is the reason why it was registered in the names of Israel Lwanga. DW 1 did not have any powers of attorney. The registration of the property into the names of Israel Lwanga was done by agreement between DW 1 and Kizito Lwanga. There was no written agreement regarding the sale agreement. There was an oral sale agreement.

I have further analysed the documents on record. Exhibit P1 is the certificate of title for Busiro Block 396 plot 57 comprising of approximately 2.52 ha registered in the names of Emmanuel Mubiru on 25 September 1975. Further the transfer document dated 31st July 1990 seems to have been filed on record on 10th August 1990 by Leonard Kizito. The affidavit of Banalya George Musisi also referred to as DW 1 was admitted in evidence as exhibit P5 indicated inter alia that the first respondent in miscellaneous application number 064 of 2008 (the first respondent being Israel Lwanga) was in possession of the land which he took over way back in 1985. This is inconsistent with the testimony of DW 1 in the main suit that the transaction happened in 1990. It suggests that the letters of administration were obtained after the land transaction. Letters of administration were granted in Administration Cause No 113 of 1987 by the Chief Magistrates Court of Mengo on 15th October 1987 to Leonard Kizito, brother of the deceased Emmanuel Mubiru.

From the testimonies and documents, some conclusions can be made. The first is that Leonard Kizito was not the registered proprietor of the suit property by the time of their transaction leading to the transfer of the property to Israel Lwanga. Evidence on record shows that Leonard Kizito was registered on 2nd August 1990 as administrator of the estate of the late Emmanuel Mubiru by virtue of letters of administration granted in Administration Cause No 113 of 1987. Israel Lwanga was registered on 10th August 1990. Clearly, the registration was meant for purposes of transferring the property to Israel Lwanga as this would be consistent with the affidavit evidence of DW 1 that the transaction happened way back in 1985. Even if the transaction happened later contrary to the affidavit of DW 1 in exhibit P5 referred to above, it is clear that it happened before registration of Leonard Kizito on the title as administrator of the estate of the deceased. In fact, DW 1 did not know about the estate of the deceased or the family of the deceased. He was aware that the property was registered in the names of Emmanuel Mubiru (deceased) at the time he engaged Leonard Kizito. He did not care whether Leonard Kizito was a beneficiary or a trustee. He did not enquire about the family of the deceased. From his testimony, all he cared about was whether Leonard Kizito had authority to sell and the entire case of the defence rested on the authority of letters of administration. That is the problem with the transaction. Is it sufficient to flush letters of administration for purposes of satisfaction that the holder of the letters of administration had all the necessary authority to sell? Moreover, though there were other properties, it was only the property of the 3 lady plaintiffs which the 2nd Defendant transferred into his names.

The first valid conclusion is that the property was registered in the names of Emmanuel Mubiru and not in the names of Leonard Kizito. In other words, DW 1 was only satisfied by the letters of administration that Leonard Kizito had to execute the agreement purchasing the property for his own purposes and that of his brother Israel Lwanga. In other words, he took the letters of administration as sufficient authority. If we take his affidavit evidence as truthful, DW1 stated that the property was acquired way back in 1985 and this was before even letters of administration has been issued to Leonard

Kizito. This is a grave contradiction and there are no sufficient materials to explain the anomaly which casts serious doubt on the entire transaction of DW1. While the statutory law is clear, we need to set out the relevant provisions for proper context. Before doing that, the letters of administration have a clear notice to the whole world that the holder thereof undertook as follows:

> I, C.B. Twesiima Chief Magistrate of Mengo magisterial area hereby make known that on this 15th day of October 1987 letters of administration of the property and credits of Emmanuel Mubiru late of Kajjansi deceased, are hereby granted to Leonard Kizito brother of the deceased Emmanuel Mubiru he having undertaken to administer the same, and make a full and true inventory of the said property and credits to this court within six months from the date of this grant or within such further time as the court may from time to time appoint, and also render to this court a true account of the said property and credits within one year from the same date or within such further time as the court may from time to time appoint.

Clearly, the letters of administration indicated that the administrator had undertaken to administer the estate of the deceased and make a full and true inventory of the said property and credits to the court. So, the property was subject to a trust and the law of succession. It was subject to the directions of the court which held the administrator accountable. It is also clear from letters of administration that the property belonged to the estate of Emmanuel Mubiru. DW 1 was therefore on notice that the property belonged to the estate of Emmanuel Mubiru in whose name the registered proprietorship was. The property was not in the names of a trustee described as an administrator of the estate.

The law is that the letters of administration vest all the property of the deceased in the administrator of the estate in terms of section 180 of the Succession Act Cap 162 which provides that:

> 180. Character and property of executor or administrator.
>
> The executor or administrator, as the case may be, of a deceased person is his or her legal representative for all purposes, and all the property of the deceased person vests in him or her as such.

All the property of the deceased vested in the Administrator upon being

5 granted letters of administration to the estate of the deceased. Under section 192 of the Succession Act, the property is deemed to have vested immediately after the death of the deceased. Further the administrator holds the property in trust for the beneficiaries as provided for under section 25 of the Succession Act which provides that:

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 Administrator became a trustee and those entitled to the distribution of the estate under the law of intestacy became beneficiaries under that trust. 15 These were the plaintiffs as children of the deceased. Having established that there was a trust relationship, we can put the law of registration in context. The Registration of Titles Act cap 130 provides that trusts need not be registered. Under section 50 of the RTA it provides that:

50. No notice of trusts to be entered in Register Book.

> 20 The registrar shall not enter in the Register Book notice of any trust whether express, implied or constructive; but trusts may be declared by any document, and a duplicate or an attested copy of the document may be deposited with the registrar for safe custody and reference; and the registrar, should it appear to him or her expedient to do so, may protect in any way he or she deems advisable 25 the rights of the persons for the time being beneficially interested thereunder or thereby required to give any consent; but the rights incident to any proprietorship or any instrument dealing or matter registered under this Act shall not be affected in any manner by the deposit of the duplicate or copy nor shall the duplicate or copy be registered.

30 The law is clear that the registrar shall not enter in the register book notice of any trust whether express, implied or constructive. However, trusts which are declared in any document as prescribed may be deposited with the registrar and the registrar may protect the trusts in any way, he or she deems advisable. On the other hand, it is expressly provided that a person 35 who has letters of administration or probate may apply to be registered as proprietor under the law. Section 134 of the RTA provides that:

134. Succession on death.

5 (1) Upon the receipt of an office copy of the probate of any will or of any letters of administration or of any order by which it appears that any person has been appointed the executor or administrator of any deceased person, the registrar shall, on an application of the executor or administrator to be registered as proprietor in respect of any land, lease or mortgage therein described, enter in

10 the Register Book and on the duplicate instrument, if any, when produced for any purpose, a memorandum notifying the appointment of the executor or administrator and the day of the death of the proprietor when the day can be ascertained, and upon that entry being made that executor or administrator shall become the transferee and be deemed to be the proprietor of such land, lease or

15 mortgage, or of such part of it as then remains unadministered, and shall hold it subject to the equities upon which the deceased held it, but for the purpose of any dealings therewith the executor or administrator shall be deemed to be the absolute proprietor thereof.

(2) The title of every executor or administrator becoming a transferee under this

20 section shall upon such entry being made relate back to and be deemed to have arisen upon the death of the proprietor of any land, lease or mortgage as if there had been no interval of time between such death and entry.

(3) If in any case probate or administration is granted to more persons than one, all of them for the time being shall join and concur in every instrument, surrender

25 or discharge relating to the land, lease or mortgage.

(4) No fee in respect of the assurance of title under this Act shall be payable on the registration of such executor or administrator.

The law provides in mandatory terms that the administrator upon application shall be entered on the title as the proprietor. However, the title

30 of the administrator or executor only relates back to the date of death of the deceased upon registration. In other words, section 180 of the Succession Act has to be read in harmony with section 134 of the Registration of Titles Act. It is only upon registration that the holder of probate or letters of administration is recognised in law as the proprietor

35 of registered Land. In other words, if such a person is not registered, the notice to the world remains that the property belongs to the deceased by the names registered in the register of titles. The conclusion therefore is that it was not sufficient assurance of title to deal with an administrator of the estate of the deceased on the ground that it is the name of the deceased

40 which is registered. Administration is subject to trusts and possibly

5 creditors may be interested in the same property. The registration of Israel Lwanga subsequent to having purchased the property much earlier on the strength of letters of administration cannot enjoy the same protection as that of a registered administrator of the estate. By the time DW 1 purchased the property, he was aware that the names on the title deed were those of 10 a deceased person. He became part and parcel of the fraud of the second defendant/respondent to register himself as an administrator for purposes of transferring the property into the names of Israel Lwanga.

There is no evidence that DW 1 satisfied himself that there were no creditors or beneficiaries interested in the same property. The evidence is that he 15 was relaxed and he was satisfied with mere letters of administration. He never carried out a search of the title to ascertain whether there were encumbrances. We find that the duty to carry out due diligence before purchase of property was on the defendant. The fact that there could have been no caveat is not material. In any case, having only had notice of letters 20 of administration, he needed to satisfy himself that they were no other claims to the property he intended to purchase.

As it turned out, the grant was voidable because there was a will devising the property to the three plaintiffs. According to **Halsbury's Laws of England fourth edition volume 17 paragraph 1059**:

25 Where a will has been discovered after a grant of letters of administration or a later will after a grant of probate, or where the grant has been made pending a caveat, the original grant may be revoked.

The discovery of a will is sufficient for revocation of letters of administration. Had it been letters of administration with the will annexed, 30 there would be notice of the will. The letters of administration of the 2nd respondent do not disclose whether it is with the will annexed or bare letters of administration. The document itself prima facie reads that it is (with the will annexed) though it is unclear whether it is with the will annexed or not. Generally, beneficiaries are entitled to follow their property 35 into the hands of third parties who received it without any entitlement except for bona fide purchasers without notice of these interests under specific circumstances stipulated in the law. The law includes the Limitation Act, Cap 80. Section 19 of the Limitation Act, Cap 80 provides that:

5 19. Limitation of actions in respect of trust property.

(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

10 (b) to recover from the trustee trust property or the proceeds of the trust property in the possession of the trustee, or previously received by the trustee and converted to his or her use.

This case falls in the category of or is in respect of *"any fraud or fraudulent breach of trust to which the trustee was a party or privy"*. The question is 15 whether the suit can be filed against a third party. The wording of section 19 (1) (a) of the Limitation Act saves an action by a beneficiary under a trust for the fraud or fraudulent breach of trust to which the trustee was a party or privy and may proceed against a purchaser except a purchaser for value without notice of the fraud.

20 In **G.L. Baker Ltd v Medway Building and Supplies, Ltd [1958] 2 All E.R. 532** it was held that a suit can be filed against a third party in terms of section 19 (1) of the Limitation Act and the period of limitation would not run. Danckwerts J also noted that the Court of Appeal decision was reflected in a precise form in the case of **Nelson v Larholt [1947] 2 All E.R.** at page 752 25 per Denning J that:

A man's money is property which is protected by law. It may exist in various forms, such as coins, Treasury notes, cash at bank, cheques, or bills of exchange, but, whatever its form, it is protected according to one uniform principle. If it is taken from the rightful owner, or, indeed, from the beneficial owner, without his 30 authority, he can recover the amount from any person into whose hands it can be traced unless and until it reaches one who receives it in good faith and for value without notice of the want of authority

The judgment of the High Court the subject matter of this appeal clearly shows that there was fraud and fraudulent breach of trust in that the 35 learned trial judge found that the trustee, the second defendant, was dishonest when she held that:

My analysis shows that the actions of the second defendant as administrator of Emmanuel Mubiru's estate in respect to the suit land were tainted with dishonesty

5 and intended more for his own benefit than for the benefit of the second, third and fourth plaintiffs or the interest of the estate. His conduct before, during and after transfer of the suit land into the name of the first defendant testify to this.

...

It was noted that among all the property of the deceased it is only the suit land
10 that the second defendant transferred into his name. He had to process a special certificate of title for the suit land on grounds that the original title was lost, in order to sell it to the first defendant. He hastily sold and signed the transfer on 31/7/90 before he was even registered on the certificate of title yet there was no pressing need for money by the estate. The second, third, and fourth plaintiffs
15 were vulnerable children hence the need for protection of their property rights, particularly by ensuring that all decisions taken in respect of the suit land were in their best interest as beneficiaries thereof. At the time of the sale they were aged 12, 7 and 5 years respectively. The seller (second defendant) was the administrator of their father's estate who told Court that he was aware of their
20 bequest in the will, and that it was intended for them to construct their houses on the suit land when they grow up.

Putting the above passage in perspective, and having reference to the evidence I have described above, DW 1 in collaboration with the second defendant signed transfer forms before the second defendant was even
25 registered on the title deed. Moreover, the question remained whether the letters of administration were with the will annexed of which DW1 is deemed to have notice. The title deed was in the names of the deceased. He had constructive notice that the property belonged to the estate of the deceased and that the second defendant was only the administrator thereof (with a
30 will involved). The subsequent actions of the second defendant were also the actions of DW 1 who was buying the property for the interest of three people inclusive of the registered proprietor thereof Mr Israel Lwanga. Further it is not the knowledge of Israel Lwanga which is material but that of DW 1 who was also a joint owner of the suit property. In the premises, I
35 would find that the first respondent Mr Israel Lwanga who was registered by virtue of the actions of DW 1 was not a bona fide purchaser for value without notice. The actions of the second defendant to transfer the property were also the actions of the purchasers. I would answer ground three of

5 the appeal in the affirmative and find that the first respondent was not a bona fide purchaser for value without notice of defect in title. There was a defect in title because it was registered in the names of the deceased.

Further, it is unnecessary to consider ground two of the appeal which is covered by ground three upon finding that the actions of the second 10 defendant were the actions of the purchasers. This situation would have been different if the purchasers had bought the property from the registered proprietor. However, the registered proprietor at the time of the transaction which could have been as far back as 1980s according to exhibit P5 was Emmanuel Mubiru, a deceased person. Subsequently the letters of 15 administration were used as a vehicle by the second respondent to register the first respondent through the collusion of DW 1 who also had a joint interest in the suit property.

In the premises, I would allow the appeal on grounds 2, 3, and 4. As my learned sisters Hon. Lady Justice Irene Mulyagonja, JA and Hon. Lady 20 Justice Monica K. Mugenyi, JA agree, the following orders issue.

The judgment of the trial judge is hereby set aside save for the orders stated hereunder.

Exercising the powers of this court under section 11 of the Judicature Act, the orders of the trial judge are substituted with the following orders:

25
1. An order issues dismissing the suit of the first plaintiff Mr. Leonard Mubiru.

2. A declaration issues that the registration and transfer of land comprised in Busiro Block 396 Plot 37 at Bweya from the names of 30 Emmanuel Mubiru to the second defendant was done fraudulently.

3. A declaration issues that the second defendant fraudulently obtained letters of administration for the estate of the late Emmanuel Mubiru.

35
4. An order issues that the letters of administration obtained by the

5 second defendant in respect of the late Emmanuel Mubiru's estate are hereby cancelled.

5. The first and second defendant shall pay general damages of 20,000,000 (Uganda shillings twenty million) to the second, third and
10 fourth plaintiffs for the anguish and inconvenience they suffered.

6. The names of Israel Lwanga shall be cancelled from Busiro Block 396, Plots 37, land at Bweya.

15 7. The names of Julian Namubiru, Lydia Namutebi and Joan Nansubuga shall be substituted as tenants in common with each proprietor holding 2 acres or 1/3rd of the entire title each.

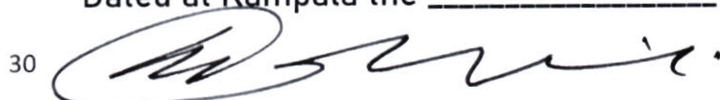
8. The registered proprietors may consent to have their titles mutated
20 so that each proprietor has a separate title after survey and agreement between them.

9. The defendants shall pay the second, third and fourth plaintiff's costs of the appeal in this court and the High Court.

25

10. This judgment shall be served on the Commissioner for Land Registration

Dated at Kampala the 5th day of Aug 2022

30 

Christopher Madrama

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 78 OF 2016

(ARISING FROM HIGH COURT CIVIL SUIT NO. 064 OF 2008)

(Coram: Madrama, Mulyagonja, Mugenyi, JJA)

1. LEONARD MUBIRU
2. JULIAN NAMUBIRU
3. LYDIA NAMUTEBI **::::::::::::::::::::::::::::::::::::::APPELLANTS**
4. JOAN NANSUBUGA

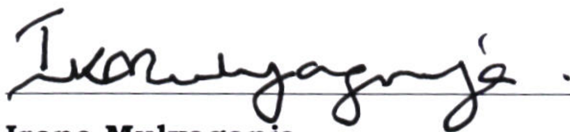
VERSUS

1. ISRAEL LWANGA
2. LEONARD KIZITO ::RESPONDENTS

JUDGEMENT OF IRENE MULYAGONJA

I have had the benefit of reading in draft the judgment of my learned brother, Christopher Madrama, JA. I agree with his decision that the appeal succeeds and with the final orders that he has proposed.

Dated at Kampala this 5th day of AUG 2022.



Irene Mulyagonja
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT KAMPALA

CORAM: MADRAMA, MULYAGONJA AND MUGENYI, JJA

CIVIL APPEAL NO. 78 OF 2016

(Arising from Civil Suit No. 64 of 2008)

1. **LEONARD MUBIRU**
2. **JULIAN NAMUBIRU**
3. **LYDIA NAMUTEBI**
4. **JOAN NANSUBUGA .... APPELLANTS**

VERSUS

1. **ISRAEL LWANGA**
2. **LEONARD KIZITO .... RESPONDENTS**

(Appeal from the Judgment of the High Court of Uganda (Lwanga, J) in Civil Suit No. 64 of 2008)

Muly.

JUDGMENT OF MONICA K. MUGENYI, JA

I have had the benefit of reading in draft the lead Judgment of my brother Hon. Justice Christopher Madrama, JA in this Civil Appeal. I agree with the decision arrived at, the reasons therefor and the orders proposed, and have nothing useful to add.

Dated and delivered at Kampala this 5th **Day of** Aug, **2022.**

Monica K. Mugenyi

Monica K. Mugenyi

Justice of Appeal