THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: CHEBORION, MADRAMA AND MULYAGONJA, JJA)

CIVIL APPEAL NO 111 OF 2019

1. NAKAYIMA JOYCE}
2. NANGENDO ROSEMARY}
3. KIBUUKA ROBERT}
4. PARADISE PROPERTY CONSULTANTS} ..... APPELLANT

VERSUS

1. NALUMANSI KALULE}
2. SENGENDO WASHINGTON}
3. KADDU EDWARD} .....RESPONDENT

(*Appeal from the Judgment of the High Court of Uganda at Kampala (Land Division) in Civil Suit No. 2531 of 2016 by Keitirima J dated 7th March 2019*)

JUDGMENT OF CHRISTOPHER MADRAMA, JA

This appeal arises from the Judgment of the High Court in a suit filed by the respondents to this appeal in which the respondents jointly and severally as children and beneficiaries of the estate of the late Stanley Kizza (hereinafter referred to as the deceased) sued the current appellants who were the defendants. The respondents sued the appellants for orders of protection of land comprised in Kyadondo Mailo Registry Volume 369 Folio 23 at Nakyessanja Estate (hereinafter referred to as the suit property or the estate of the deceased). The plaintiffs in the High Court who are now the respondents averred that the late Festo Sempa was the former owner of the suit property and had five children inclusive of the deceased. Upon the death of Festo Sempa, Stanley Kizza, the deceased, was appointed and installed as customary heir and the land was registered in his names. The first and second plaintiffs are biological children of the deceased and the suit property is still registered in the names of the deceased as proprietor.

Upon the death of the registered proprietor, his son Edward Nvule was appointed customary heir but took no steps to transfer the property into his names and the suit property remained a burial ground for the lineal descendants of Festo Sempa. The grievance of the plaintiffs was that the first, second and third defendants who are now the appellants had without letters of administration or any colour of right illegally sold 5 acres of the suit property to the fourth and fifth defendants without consent or approval of the beneficiaries. Thereafter the fourth and fifth defendants started erecting illegal permanent structures on the suit property well knowing that it belonged to the estate of the deceased. The plaintiffs contended that the suit property was at the material time of the sale, land reserved as a burial ground for the family. They further stated that the sale of the suit property to the fourth and fifth defendants was fraudulent, illegal, irregular and ought to be set aside.

The plaintiffs sought a declaration that the suit property still belongs to the estate of the deceased and ought to be preserved for the estate to be administered by an administrator in trust for the beneficiaries. Secondly a permanent injunction should be issued restraining the defendants by themselves or through their authorised servants or agents from intermeddling, evicting or in any other manner interfering with the plaintiff's ownership, possession, use and occupation or enjoyment of the suit property. Thirdly for declaration that the purported sale of the property by first, second, third and fourth defendants is unlawful, illegal, null and void and ought to be set aside. The plaintiffs also sought a declaration that the fourth and fifth defendants interest in the suit property was acquired fraudulently and was therefore null and void. They sought remedies of general damages, costs as well as interest. The first and second defendants namely Nakayima Joyce and Nangendo Rosemary filed a joint defence denying the claim in the plaint and asserted that the plaintiffs suffered no loss or damage were not entitled to general damages.

Further, the fourth and fifth defendants also filed a joint defence and inter alia averred that the first plaintiff and the first and second defendants who

were beneficiaries of the deceased approached the fourth defendant for the purchase of the suit property. They perused copies of minutes of the family of the deceased who had consented therein to the transaction of sale. The fourth defendant bought the suit property in good faith and ought not to be deprived of his interest because of the division in the family of the deceased. In any case the sellers were authorised to sell the suit property. He denied the allegations in the plaint. The fifth defendant on the other hand averred that she is not a party to any sale transaction with the plaintiff's and does not know them and would object to the suit for disclosing no cause of action against her.

The learned trial judge allowed the suit and issued the following orders:

1. The suit property belongs to the estate of the deceased and is to be administered by the Administrator General in trust for the beneficiaries.

2. A permanent injunction was issued restraining the defendants by themselves or their agents from intermeddling, evicting or in any other way interfering with the plaintiff's possession and use of the suit land.

3. A declaration was issued that the purported sale of the suit property by the first and second defendants to the third defendant is illegal and therefore null and void.

4. An award of Uganda shillings 50,000,000/= was made in favour of the plaintiffs as general damages.

5. The award 50,000,000 was to attract interest at 20% per annum from the date of the judgment till payment in full.

6. Last but not least, the suit was allowed with costs to the plaintiffs.

The defendants were aggrieved and lodged an appeal in this court on seven grounds namely:

1. The learned trial judge erred in law and fact when he held that the third and fourth appellants were trespassers on the suit land.

2. The learned trial judge erred in law and fact when he failed to establish that the respondents had no cause of action against the fourth appellant.

3. The learned trial judge erred in law and fact when he failed and ignored to visit the locus in quo.

4. The learned trial judge erred in law and fact when he awarded the respondents Uganda shillings 50,000,000/= as general damages.

5. The trial judge erred in law and fact when he awarded an interest of 20% per annum on general damages.

6. The trial judge erred in law and fact when he ordered that the suit property be administered by the Administrator General in trust for the beneficiaries.

7. The learned trial judge erred in law and fact when he issued a permanent injunction restraining the first and second appellants from interfering with the respondent's possession and use of the suit land.

The appellants pray that the appeal be allowed and the Judgment of the High Court be set aside with costs in the Court of Appeal and in the High Court.

When the appeal came for hearing learned counsel Mr. Faisal Umar Mularila appearing jointly with learned counsel Ms Stella Namiiro represented the respondent. On the other hand, learned Counsel Mr. Jolly Mutumba represented the appellants. The second respondent died but the appeal

subsists against the others and concerns the same property. With leave of court, the court was addressed in written submissions.

Ground 1.

The trial judge erred in law and fact when he held that the third and fourth appellants were trespassers on the suit land.

The appellants counsel submitted that the third and fourth appellants were not trespassers on the suit land. Secondly, that the point to determine is whether the third and fourth appellant trespassed on the suit property as decided by the learned trial judge. He relied on the definition of trespass in **Nyanzi Evaristo and 2 Others Vs Mukasa Silver; Civil Appeal Number 55 of 2014** where the court quoted Mulenga JSC in **Justine E.M Lutaaya Vs Stirling (Civil Engineering Company Ltd); Civil Appeal Number 11 2002** that "trespass to land occurs when a person makes an unauthorised entry upon the land and thereby interferes or pretends to interfere with another person's lawful possession of that land." He further quoted Manyindo V-P in **Sheikh Mohammed Lubowa Vs Kitara Enterprises; Civil Appeal Number 4 of 1987** for the passage that: "in order to prove the alleged trespass, it was incumbent on the appellant to prove that the disputed land belonged to him. That the respondent had entered upon the land and that entry was unlawful in that it was made without his permission and that the respondent had no claim of right or interest in the land."

The appellant's counsel submitted that as far as the action against the third appellant is concerned, he had a claim on the suit property which he bought from the first and second appellants and this entry was authorised by the vendors. The appellant's counsel submitted that the defence of justification, once available to the defendant, absolves him or her of liability. Trespass consists of unjustified entry of the land of another and therefore there is no trespass where the entry is authorised. Counsel further submitted that trespass was the fourth agreed issue in the joint scheduling memorandum which was whether the third and fourth defendants are bona fide purchasers for value without notice or trespassers on the suit land.

The trial judge found that the doctrine of bona fide purchaser for value without notice applies to a party holding a certificate of title of which the third defendant and the fourth defendant had none in their names. The defence of being bona fide purchasers is therefore not available to them. He found that the defendant knowingly dealt with the first and second defendants who had no letters of administration to the estate of the deceased and therefore had no title to pass. He concluded that they were trespassers on the suit land.

The appellant submitted that the appellant's right to enter the suit property was premised on the fact that he bought the suit property from the first and second appellant and evidence of the second appellant who testified as DW1 was to the effect that she was residing on the suit property and was not challenged during cross examination. The appellant's counsel further submitted that the issues of trespass and a bona fide purchaser for value without notice had to be dealt with separately by the learned trial judge. This is because his conclusion that the third appellant was a trespasser was not backed or supported by law and evidence. Insofar as they concede that the third appellant was not a bona fide purchaser for value without notice, the appellant's counsel does not agree that the third appellant was a trespasser on the suit property.

Further the appellants counsel submitted that the fourth appellant was not a trespasser on the suit property and the learned trial judge erred to hold so. Counsel submitted that first and foremost, the joint written statement of defence of the third and fourth appellant shows that the fourth appellant pleaded that she was not a party to the sale transaction with the first and second appellant and she did not know them. Secondly the fourth appellant also notified the court that she would object to the suit on the ground that the plaint discloses no cause of action against her. The appellant's counsel contends that pursuant to the pleading, the point of law had to be disposed of by the court regardless of whether counsel for the fourth appellant submitted on it or not. He contended that the respondent's counsel who

generated the joint scheduling memorandum dodged to frame the issue and raise the point of law as one of the issues framed out of the pleadings.

He submitted that the question of law is whether the court on appeal can entertain the said point of law. He relied on **Uganda Railways Corporation versus Ekwaru D.O and 5104 others; Court of Appeal Civil Appeal Number 185 of 2007** for the holding that an appellate court will not allow an illegality that escaped the scrutiny of the trial court to cause undesirable consequences. A trial judge has a duty to use the judicial microscope to see what is indicated that may not have been seen by the other eyes of the parties. The appellant's counsel submitted that on the issue of whether the plaint discloses a cause of action against the fourth appellant, had the learned trial judge considered it, he would not have concluded that the fourth appellant was a trespasser because there is no proof of her involvement in the contract of sale; that there was no proof of her entry upon the suit land apart from the fact that the third defendant is a director in the said company.

The appellant's counsel submitted that had the learned trial judge properly evaluated the evidence on record as well as the pleadings, he would not have held that the fourth appellant was a trespasser on the suit land since she committed none. No act of the fourth appellant was proved by the respondents. He prayed that the court allows ground one of the appeal.

In reply, the respondent's counsel submitted that the appellant's counsel conceded that the third appellant was not a bona fide purchaser for value without notice though he was not a trespasser. He submitted that the time has come for the Court of Appeal to hold accountable advocates who misadvise litigants and cause unnecessary backlog. Further, lawyers were causing unnecessary appeals that overwhelmed the court system in respect of clear facts. He invited the court to treat the present case as one befitting for condemning of the appellant's counsel to costs.

Secondly, the respondent's counsel submitted that there was overwhelming evidence to support the decision of the learned trial judge when he rightly

found that the fourth appellant was a trespasser on the suit land. It was an agreed fact in the joint scheduling memorandum that after illegally purchasing the suit property in his personal names, the third appellant used the fourth appellant as a company in which he holds 80% majority shareholding and as a director to sell, to market, subdivide, broker and offer for sale the suit property to 3rd parties in a calculated move to cheat the estate of its property and cheat the government of its revenues. Further, the respondents counsel submitted that the intention of the appellant was to use the fourth appellant company to create third parties who claim to be bona fide purchasers for value having bought from a third party. The intention was to defeat the claim of the estate and the trial judge was right to find that the third and fourth appellants were trespassers on the suit property. The suit property was sold without letters of administration and the property belonged to the estate of the deceased.

Further the respondents counsel submitted that the purported sale was conceded to by counsel for the appellant as an illegality because it was a contract contrary to the statute and no one can deal in or transact in the estate of an intestate without grant of letters of administration according to sections 25 and 191 of the Succession Act. It is to the effect that no right to an intestate's estate can be established in any court of law without grant of letters of administration. He submitted that upon the collapse of the purported sale agreement in which the third and fourth applicants found themselves, they automatically became trespassers on the suit land according to the provisions of section 268 of the Succession Act.

Counsel further submitted that the transaction was illegal for intermeddling with the estate of the deceased without authority and it was a penal offence to do so. An agreement entered into in contravention of the law is a nullity and unenforceable. The respondents counsel further relied on **Kisugu Quarries Ltd Vs Administrator General; SCCA Number 10 of 1998** for the proposition that court should not condone or enforce an illegality. He invited the court to find that no court would be allowed to offer any credence of the

slightest right to parties that knowingly enter into contracts to commit a crime, tort or fraud on third parties.

Last but not least the respondent's counsel submitted that the authorities on trespass relied on by the appellant's counsel were distinguishable on the facts. In the current matter, the transaction was an illegality which is unenforceable. He prayed that the court dismisses ground one of the appeal and maintains the holding of the learned trial judge.

In rejoinder on the question of whether the court should hold accountable advocates who misadvise their clients, cause unnecessary litigation, backlog et cetera. He contended that the submission lacks any legal sense and is not backed up by the law. The respondent's counsel was expressing his personal feelings in the case. The appellant's counsel submitted that courts should always try as much as possible to remind advocates to avoid getting personal or personally involved in cases handled on behalf of their clients. Further on the ground addressed by the respondent's counsel on whether the third and fourth appellants were trespassers, the appellants counsel reiterated earlier submissions. He reiterated that the entry of the third appellant was justified and authorised by the first and second appellants who were in actual possession of the land. Further, the tort of trespass is committed against the person in possession of the land. What is material being that the third respondent was permitted to enter the suit property by vendors who were in possession thereof.

With regard to the fact which was agreed that the third appellant was using the fourth appellant company to market the suit land, counsel conceded that an agreed fact need not be proved. Further, the fact has to be evaluated with the rest of the evidence on record. The third appellant testified that he is the one who bought the suit property from the first and second appellant and that the fourth appellant was no longer operational. He contended that this evidence was not challenged by the respondent. In the premises there was no proof of entry by the fourth appellant and if any was proved, the same was based upon the third appellant's purchase and was therefore permitted

by the first and second appellants. Counsel prayed that the court allows ground one of the appeal on the basis of the earlier submissions.

Ground 2.

The learned trial judge erred in law and in fact when he failed to establish that the respondents had no cause of action against the fourth appellant.

The appellants counsel abandoned ground two of the appeal.

In reply, the respondents counsel submitted that the abandonment was tactful but the respondent nonetheless made submissions on this ground which have no basis since the ground had been abandoned.

Ground 3.

The learned trial judge erred in law and fact when he failed and ignored to visit the locus in quo.

In his submissions, the appellants counsel relied on the Practice Direction Number 1 of 2007 and guideline 3 thereof which provides that during the hearing of land disputes, the court should interest itself in visiting the locus in quo. In **Bongole and four others Vs Agnes Nakiwala; Civil Appeal Number 0076 of 2015**, the court in that; "while the visit to the locus in quo is not a mandatory requirement, where the court deems it deserving, then it is bound to carry it out property. The purpose is to find out whether the testimony given in respect of the impugned property is in tandem with what pertains physically on the ground."

The appellant maintains that visiting the locus in quo was necessary because the parties in the testimonies testified that the suit land measured 10 acres while the first and second appellants sold 5 acres to the third appellant. Further that the suit had burial grounds and food crops belonging to them that were destroyed during the time when the third appellant was clearing the suit land. On the other hand, the second respondent testified that she was the one staying on the suit property and cultivating crops thereon. He submitted that the visit to the site was necessary to determine

those factors and extent of the trespass or encroachment. He further found it unfortunate that the learned trial judge not only did not visit the locus in quo but also ordered the appellants to pay the respondents Uganda shillings 50,000,000/= as general damages. He submitted that visiting the locus in quo enables the learned trial judge to make an assessment of the quantum of damages to be awarded and this would have been a lesser amount. He noted that the learned trial judge found that there was no valuation of the damage to crops to guide the court in assessing the quantum of damages to be awarded.

On the basis of the above, he contended that the learned trial judge erred in law and fact when he did not conduct a locus in quo visit before writing the Judgment and the failure occasioned a miscarriage of justice to the appellant. He prayed that the court allows ground three of the appeal.

In reply to ground three of the appeal, the respondents counsel submitted that it was a common practice for courts to visit the locus in quo in land matters but not in every case is it a requirement. Further that the crux of the case was not a matter of trespass by adjourning neighbours or upon a dispute but the question of determination was whether the purported sale between the first, second, and that appellants was legally tenable. The case revolved on the legality of the sale agreement by persons without letters of administration or authority to deal in the estate of an intestate and creating third party interests.

The respondent's counsel submitted that the criticism levelled at the learned trial judge was baseless, unfounded and not supported by the facts and proceedings. The court proceeded on the basis of evidence available which left no doubt that the suit property belonged to the estate of the deceased and the 1st and 2nd appellants sold it without legal authority as required by the laws of Uganda.

In rejoinder to the reply of the respondent on ground three of the appeal, the appellant's counsel submitted that the crux of the case was not trespass to the land by adjourning neighbours to determine a boundary dispute but

rather to determine whether the purported sale between the first and second appellant and the third appellant was legally tenable. Further he reiterated earlier submissions that the respondents claim was one of protection of the suit land that belonged to the estate of the deceased and the purported sale was just one of the issues that were framed for determination by the court.

The appellant's counsel submitted that the parties exhibited several photos which were annexed to the witness statements to prove physical features that were on the suit land. The learned trial judge therefore ought to have taken interest in visiting the locus in quo in order to inspect the site features of the land which would have assisted him to assess the quantum of damages.

I note that grounds 4, 5, 6 and 7 are against the remedies granted by the trial judge and I will consider them after determination of grounds of 1 and 3 of the appeal.

Consideration of the appeal.

I have carefully considered the record of appeal, the grounds of appeal together with the written submissions of counsel for the Appellants and the Respondent and the law and authorities cited by the advocates of the parties. The duty of this court as a first appellate includes the duty where necessary to reappraise the evidence on record and to draw its own inferences of fact (See rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions). 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 seeing and hearing the witnesses testify and should defer to the observations of the trial judge where issues of credibility of witnesses arises.

Ground 1 of the appeal deals with a question of doctrine on issue of whether the learned trial judge erred in law and fact when the 3rd and 4th appellants were held to be trespassers on the suit land. However, in the written submissions, it is clear that the question of whether the third and fourth appellants were trespassers on the suit land depended in the main finding of the learned trial judge that they bought the suit property from persons who do not have the requisite authority to sell the property of an intestate. Secondly, in considering the question of whether the appellants were trespassers on the suit property, it was a question of procedure whether it was necessary for the trial judge in the circumstances, to visit the locus in quo. In the premises, this question also relates to ground 3 which is the averment that the learned trial judge erred in law when he failed and ignored to visit the locus in quo. Because both grounds deal with the issue of trespass, I will consider them together.

I have carefully considered the record. As far as pleadings are concerned, there is no averment in the plaint about the trespass of the defendants who are now the appellants. In paragraph 5 the plaintiffs averred that:

> "The plaintiffs bring this suit jointly and severally as children and beneficiaries of the late Stanley Kizza for the protection of land comprised in Kyadondo Mailo Registry 369 folio 23 at Nakyessanja estate which belonged to the estate of the deceased."

Thereafter, the plaint gave the facts constituting the cause of action and also alleged particulars of fraud of the fourth and fifth defendants. The particulars of fraud are the fact that the appellants namely the first, second and third defendants in the High Court sold the property to the fourth and fifth defendants without any legal capacity to do so.

In the prayers, there is clearly a suit for declaration that the suit property belongs to the estate of the deceased persons and ought to be preserved for the estate to be administered by an administrator in trust for the beneficiaries. Secondly for a permanent injunction to restrain the defendants from intermeddling, evicting or in any other way interfering with

the ownership, possession and use and occupation or enjoyment of the suit property by the plaintiffs. Thirdly there is a prayer for a declaration that the purported sale of the suit property to the first, second, third and fourth defendants is unlawful, illegal, null and void and ought to be set aside. Further that the acquisition of the interest title in the suit property was through fraud and is null and void. Pursuant to the declaration sought, the plaintiffs prayed for general damages, costs, interest on the awards and any other relief as the court may deem fit to grant.

In the joint scheduling memorandum endorsed by counsel the parties, the following are agreed facts namely:

a) The first plaintiff, the first and second defendants are children of the late Stanley Kizza while the second and third beneficiaries of the suit land.

b) The late Stanley Kizza is still registered as the proprietor of the suit land.

c) The first and second defendants sold of five (5) acres from the ten (10) acres of the suit land to the defendant.

d) The third defendant was using his real estate Money being the first defendant to market, sale and dispose of the disputed land.

Paragraph 1 of the agreed facts it is clear enough. The problem is that the latter part of the paragraph does not indicate who the second and third beneficiaries.

The above notwithstanding, there is not much factual controversy about the fact of sale of the suit property. The facts which are accepted by the learned trial judge were that the family of the deceased held several meetings to settle estate issues. Before the issues could be resolved and without letters of administration, the first and second defendants as intending administrators of the estate of the deceased, sold off 5 acres out of 10 acres to the third defendant. The third defendant thereafter took possession and used the 5 acres. The plaintiffs then filed a suit contesting the sale of the suit property.

The trial judge found that the suit property was part of the estate of the late Stanley Kizza (the deceased) and answer the first issue in the affirmative.

The second issue was whether the first and second defendants legally sold the 5 acres of the suit land to the third defendant. He found that it was an agreed fact that the first and second defendants, are both children and beneficiaries of the estate of the late Stanley Kizza and they sold 5 acres of the suit land to the defendant without having acquired letters of administration to the estate of their late father. The third defendant bought the suit property from the first and second defendants while knowing that they had no letters of administration but were intending administrators according to the sale agreement dated 3 January 2013 and paragraph 5 thereof. I have considered paragraph 5 of the agreement between the first appellant and Rose Nangendo Nalongo one Kibuuka Robert. Paragraph 5 of the sale agreement which is dated 3 January 2013 according to the dating by the advocate who witnessed the agreement provides that:

> (a) shillings 10,000,000/= (ten million shillings only) as paid by the purchaser to the Vendors in cash today the 3rd day of January 2013 to cater for the processing of Letters of Administration leaving a balance of Uganda shillings 50,000,000/= (fifty million, shillings) shall be paid as and when the need and demand from the sellers arises. The sellers undertake to use part of the money for construction of the family house at Nakyesanja.

The court considered the issues and that there was a meeting of the family which was conceded to in that the family did not have money to apply for letters of registration. In dealing with the controversy on the legality of the sale, the court considered sections 191 of the Succession Act and section 25 of the Succession Act and found that the provisions preclude any dealings in an intestate's property without letters of administration granted by a competent court. The learned trial judge came to the conclusion that the intending administrators of the estate of Stanley Kizza were not yet administrators of the estate of the deceased and it was speculative to assume that there would be as that is determined by a court seized with competent jurisdiction. He found that it was like speculating the outcome of

the Judgment which has not yet been read. He held that an agreement cannot be based on speculation that one would be granted letters of administration. He further considered section 130 of the Registration of Titles Act which allows an executor or administrator appointed by court to be registered as proprietor in that capacity. In the premises, the learned trial judge found that the evidence on record revealed that the first and second defendants had not been registered on the title of the suit property as administrators because they had never obtained letters of administration and as such the transaction could not bind the estate of the deceased. Following that finding, the learned trial judge held that no one can legally deal in the estate of a deceased person without letters of administration and transactions without such letters are null and void. He found that the sale of the suit property by the first and second defendants to the third defendant was illegal.

On the third issue the learned trial judge considered the issue of whether the agreement for sale/purchase between the first, second and third defendants can be enforced against the estate of the late Stanley Kizza. He found that the issue had been resolved in the second issue that the court cannot sanction an illegality according to the authorities cited and therefore an illegal transaction cannot be enforced against the estate of the deceased.

Further, the learned trial judge dealt with the fourth issue of whether the third and fourth defendants are bona fide purchasers for value without notice or are trespassers on the suit land.

The learned trial judge found that the doctrine of bona fide purchaser applies to a defendant who holds a certificate of title in his names and the fourth defendants did not have title in its names and the defence was not available to them in the circumstances. Further that the third defendant knowingly dealt with the first and second defendants who not have letters of administration to the estate of the deceased and had no title to the suit land and so cannot plead being bona fide purchasers for value without notice. In a short paragraph he found that they are therefore trespassers on the suit land.

I have carefully considered the short sentence in which the learned trial judge held that *"they are therefore trespassers on the suit land"*.

There was no issue of whether the defendants were trespassers on the suit land pleadings. The observations of the learned trial judge were consequential to the main finding that the transaction was illegal and the 3rd and 4th defendants were in possession of the suit property. It was not a decision on a controversy arising from pleadings for resolution of the suit. It did not arise from the pleadings because there was no cause of action alleging trespass.

The trial judge only dealt with the issue of whether the transactions was a legal transaction and secondly whether the impugned sale agreement was enforceable against the estate of the deceased. He inter alia relied on paragraph 5 of the sale agreement that I have quoted above.

It follows that ground one of the appeal has no basis in law. The observations of the learned trial judge were not a ruling in terms of Order 21 rule 4 of the Civil Procedure Rules which provides that:

> Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision in the case and the reasons for the decision.

Further, in Order 21 rule 5 the Civil Procedure Rules it is provided as follows:

> 5 Court to state its decision on each issue.
>
> In suits in which issues have been framed, the court shall state its finding or decision, with the reasons for the finding or decision, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit.

The above rules supplement Order 15 the Civil Procedure Rules which deals with the framing of issues and provides inter alia that issues are framed when a material proposition of law or fact is affirmed by one party and denied by the other. Particularly in Order 15 rule 1 (5) of the CPR it is provided that at the hearing of the suit, the court shall,

> after reading the pleadings, if any, and after such examination of the parties or their advocates as may appear necessary, ascertain upon what material

> proposition of law or fact the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

The learned trial judge proceeded as stipulated in the rules and framed the issues which were agreed upon in the joint scheduling memorandum. The issue as to whether the third and fourth defendants were trespassers on the suit property was framed as a consequence of finding that the sale or purchase of the suit property was a nullity.

In addition, the court framed issue 5 which is:

> Whether the third and fourth defendant's actions of destroying the plaintiff's crops, cutting down the trees, uprooting of bananas and coffee plantations in a portion of the property sold to the Defendant was lawful.

The court relied on the evidence of the plaintiffs that the defendant destroyed family plantations, gardens and trees. Found that the 3rd and 4th defendants had been shown by way of documentary evidence and oral testimony to have destroyed and razed down plantations the plaintiffs and trees. There was uncontested photographic evidence admitted by both parties. The third and fourth defendants erected and constructed various routes in the suit land with some connecting to the burial grounds of the plaintiffs. No valuation of the damaged crops was adduced in evidence. The learned trial judge proceeded to enter judgment and awarded Uganda shillings 50,000,000/= as general damages on the basis of the evidence before the court.

It as much as there was evidence to prove that the defendants had entered the suit property as purchasers, the issue framed to determine whether they were trespassers was framed as a consequential issue and following the finding of illegality since the fact of possession was not disputed. For emphasis the issue framed in the joint scheduling memorandum by counsel of the parties was: *(d) Whether the 3rd and 4th Defendant is a bonafide purchaser for value without notice or a trespasser on the suit land.* Further what was determined was that they had destroyed some property of the

plaintiffs. Moreover, it is uncontested by the defendants that they were in possession of the property and therefore the question before the court is whether the obtained the property lawfully and whether the plaintiffs suffered damage if the court answered the issue in the negative.

Thirdly, the question of trespass is related to the ground three of the appeal trial judge erred in law and fact not to visit the locus in quo. I find no merit on this ground of appeal because all parties described the land as registered property which was not in dispute and the issue of whether there were buildings on the land after the defendants took possession of it, was proved by oral and photographic evidence. As agreed by both counsel, the visiting of the locus in quo is not a mandatory requirement but at the discretion of the trial judge. In any case, the suit revolved on the question of legality of the transaction since the fact that the defendant's possession of 5 acres is not in dispute and there was no need to prove it. In any case, the appellant's appeal seems to revolve on the question of quantum of damages and orders issued by the learned trial judge which may be taken as consequential orders.

For the above reasons, trespass was a consequential issue which followed determination by the court of the question of whether the transaction was a nullity or void for illegality. The learned trial judge accordingly only made a passing reference to trespass in answer to the issue as framed. The question was answered in resolving the question of whether the sale of the suit property without authority of letters of administration to the third and fourth defendants was illegal and a nullity. The trial judge in determination of the issue found that the defendants were not entitled to take possession of the suit property. This court cannot sanction a right to possession based on what has been declared an illegality and which has not been appealed. I would disallow grounds one and three of the appeal.

Ground 4 and 5 of the appeal deal with the award of damages in that the learned trial judge awarded Uganda shillings 50,000,000/= as general damages which is the subject matter of ground 4 of the appeal. On the other hand, ground 5 of the appeal is the award of 20% interest on general

damages awarded by the court from the date of judgment till payment in full.

The appellant's counsel submitted that the award of general damages was erroneous and excessive in the circumstances. He submitted that the court ought to have considered the evidence, the nature of the harm, the value of the subject matter and economic inconvenience of the injured party. He submitted that this court can interfere with the award which was inordinately high.

Most importantly, the appellant's counsel submitted that after nullification of the sale, the suit land reverted back to the estate of the deceased for the benefit of the beneficiaries which include the respondents as well as the first and second appellants who are also beneficiaries. In any case, the court did not take into account factors such as the fact that the first and second appellants evidence was that the proceeds of the sale was supposed to be put to the construction of a new family house which enhanced to the value of the suit land and the 5 acres do not comprise burial grounds. He submitted that in the circumstances, sum of Uganda shillings 50,000,000/= awarded as general damages appear to be a punishment of the appellant and not compensation which is based on *restitutio in integrum*.

In the ground that 5, the appellant's counsel submitted that the award of interest of 20% per annum was unreasonable given the circumstances of the particular case. Firstly, the learned trial judge had already awarded the sum of Uganda shillings 50,000,000/= to the respondents as general damages. He submitted that the respondent's suit was granted on the ground of trespass on the suit property which was a tort the court ought to have awarded reasonable interest is held in **ECTA (U) Ltd Vs Geraldine S. Namirimu; Civil Appeal No 29 of 1994** where the court made a distinction between awards of interest in commercial or business transactions which attract higher awards and awards which are mainly compensatory. He proposed that the interest be reduced to 8% per annum.

In reply, the respondent's counsel supported the Judgment of the learned trial judge and the reasons for the awards in that the third defendant through the estate company, namely the fourth defendant destroyed family plantations, erased gardens and trees and this was proved through documentary evidence. They erected and constructed various roads in the suit land leading up to the graveyard. In the premises counsel submitted that there was an illegal transaction which caused untold suffering, emotional distress and inconvenience to the family of the deceased.

As far as ground five of the appeal is concerned, the respondent's counsel submitted that the interest of 20% was informed by the pleading of the parties and the court was reasonable in the award following the lengthy, tedious, exhaustive and long protracted legal suit. It was founded not on a tort but on the illegal commercial transaction by way of the illegal sale set aside by the court.

I have carefully considered the issue of breach of statutory law which forbids dealing in an estate property without authority. The illegality is not in dispute and I do not have to dwell on it since there was no appeal against the finding of the learned trial judge that the impugned sale agreement was illegal, null and void. The learned trial judge found that the transaction breached sections 191 of the Succession Act, section 25 of the Succession Act and section 4 of the Administrator General Act. The sum total of these sections amount to the proposition that estate property of the estate of an intestate cannot be sold without authority of letters of administration. Letters of administration are granted by the courts seized with jurisdiction and are preceded by advertisements which allow creditors of the deceased to put in their claims or any interested party who wishes to object to any particular applicant for letters of Administration from obtaining letters of Administration to have the matter of objection resolved in a suit between the objector and the applicant. It follows that, the due process cannot be circumvented by selling off the property and not giving a chance to claimants such as creditors or other people claiming the right to the estate

from being heard before the grant is made and before the distribution of the estate.

The trite law is that what is done in contravention of a provisions of an Act of Parliament such as acts under a contract prohibited by statute is illegal (See **Phoenix General Insurance Co of Greece SA v Administratia Asigurarilor de Stat [1987] 2 All ER 152** where the Court of Appeal of England per Kerr LJ held that any contract prohibited by statute, either expressly or by implication is illegal and void. In **Mistry Amar Singh v. Serwano Wofunira Kulubya [1963] E.A** 408 at pg. 414, the Privy Council applied the doctrine in **Scott v. Brown, Doering, McNab & Co (3) [1892] 2 Q.B. 724** at 728 that:

> No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the legality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the legality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him.

In this case the trial judge found that the actions of the first and second appellants of selling the property to the third and fourth defendants was illegal because it was done without authority of letters of administration. The purchaser who is the 3rd appellant was privy to the illegality because they expressly stated that the vendors were merely applicants to letters of administration thereby admitting that they had no authority. Secondly, the suit was not an action by the sellers of the property seeking to revoke the sale for illegality but an action by other beneficiaries of the estate of the deceased. The transaction is not enforceable against the estate of the deceased which is entitled to recover the property. The only question is whether it was just to award general damages in the circumstances and whether the award of 50,000,000/= was excessive.

Under section 54 of the Contracts Act 2010 of Uganda obligations under a void contract can be considered by court in that it provides that:

"54. Obligation of person who receives advantage under a void agreement or a contract that becomes void.

(1) Where an agreement is found to be void or when a contract becomes void, a person who received any advantage under that agreement or contract is bound to restore it or to pay compensation for it, to the person from whom he or she received the advantage.

(2) Where a party to a contract incurs expenses for the purposes of performance of the contract, which becomes void after performance under section 25(2), the court may if it considers it just to do so in all the circumstances—

(a) allow the other party to retain the whole or any part of any advantage received by him or her;

(b) discharge the other party, wholly or in part, from making compensation for the expenses incurred; or

(c) make an order that the party recovers the whole or any part of any payments, discharge or other advantages not greater in value than the expenses incurred."

The circumstances of this appeal were that the agreement was found to be void ab initio but no evidence was led as to the advantages the respondents were gaining by the respondents taking back possession of the land. There was no counterclaim for compensation for developments such as buildings erected on the land by the 3rd defendant and the 4th defendant. The learned trial judge relied on the evidence of destruction by appellants without any evidence of the quantum of the destruction. Was the value of the property enhanced? Clearly the case of the plaintiffs who are now respondents in this appeal in the pleadings is that the land is supposed to be a burial ground and therefore it was not for sale. That notwithstanding they pleaded that they were beneficiaries.

The trial judge on the other had considered the fact that the land was being used for plantations in the meantime and some crops were destroyed by the third and fourth defendant developers.

The plaintiffs who are now the respondents were not in *pari delicto* with the persons who entered into the illegal transaction. Because the site was

meant for burial grounds, its value cannot be ascertained without further evidence about the benefits of construction and without a counterclaim for compensation under section 54 of the Contracts Act (supra) The purpose of the property according to the plaintiffs was for cultural use. It cannot be quantified.

The rationale for the award of general damages was stated by the East African Court of Appeal in **Dharamshi vs. Karsan [1974] 1 EA 41** as being to fulfil the common law remedy of *restitutio in integrum.* This remedy is that the Plaintiff is to be restored as nearly as possible to a position he or she would have been had the injury complained of not occurred.

According to **Halsbury's Laws of England Fourth Edition Reissue Volume 12** (1) paragraph 812 general damages are those losses, usually but not exclusively non-pecuniary, which are not capable of precise quantification in monetary terms. They are presumed to be the natural or probable consequence of the wrong complained of with the result that the Plaintiff is required only to assert that such damage has been suffered. To establish quantum is easy where loss of money can be established for instance in **Johnson and another v Agnew [1979] 1 All ER 883** Lord Wilberforce held that the award of general damages is compensatory and to place the innocent party so far as money can do so, in the same position as if the contract had been performed. The plaintiffs in the circumstances of this appeal put themselves in the position where they cannot assert any loss for failure to develop the area as an income generating land. They proceeded on the premises that the land was meant to be for burial grounds for their generation and for future generations. I can only see inconvenience suffered by the plaintiffs and the destruction of crops which was not quantified.

In the premises I would allow ground 4 of the appeal because the award of Uganda shillings 50,000,000/= was not given a clear rationale basis. I would set it aside and exercising the powers of this court under section 11 of the Judicature Act, I would substitute the award with an award of general

damages for inconvenience and the destruction of crops amounting to Uganda shillings 20,000,000/= only.

Further, the award of interest as stipulated in the ground 5 of 20% per annum can be contested because it is an award on general damages. General damages are awarded for the inconvenience and damages suffered up to the date of judgment. It is not based on contract where a stipulated interest rate may be awarded. It is not based on a business transaction as alleged by the respondent's counsel. Instead, the plaintiff suffered inconvenience and loss of some crops whose value was not quantified and cannot be guessed. However, the primary purpose of the land was a site for customary use as a burial ground. In the premises, commercial interest of 20% per annum on the general damages is excessive. I would set it aside and find that award of 20% interest per annum is unreasonable on general damages.

Section 26 (2) of the Civil Procedure Act provides that:

> "Where the decree is for the payment of money, the court may in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."

The award of interest is to compensate the plaintiff for the time after the judgment before he or she receives the general damage from the defendant. This should cater for inflation or depreciation of the currency and for opportunity costs of not getting the sum earlier. The land reverts to the estate of the deceased and so the interest awarded caters for any inflationary trends and delays. According to Forbes J in **Tate & Lyle Food and Distribution Ltd Vs Greater London Council and another [1981] 3 All ER 716** interest is not a punitive measure but compensation. In his persuasive judgment he said that in awarding interest:

> One looks, therefore, not at the profit which the Defendant wrongfully made out of the money he withheld (this would indeed involve a scrutiny of the Defendant's financial position) but at the cost to the Plaintiff of being deprived of the money which he should have had. I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the Plaintiff would have had to borrow money to supply the place of that which was withheld.

As noted above, this was not a commercial transaction but one in which there could be some delay in payment of general damages. The court considers the time from the date judgment is delivered awarding general damages to the time in the future which cannot be established when the plaintiffs would have realised payment. In such circumstances, money accrued at the time of Judgment and the court can presume that the rate which can be fair could be a rate of about 10% per annum. If the defendants delay in the payment of the damages, it is reasonable to expect the money to depreciate and in any case, the plaintiffs would not have had the use of the money earlier when they could have put the money to good use after judgment. I would set aside the award of 20% interest as being a commercial interest which is unreasonable in the circumstances and substitute it with a reasonable rate of 10% per annum on the general damages. Having said that, I would allow ground five of the appeal with the above orders.

I have carefully considered ground six of the appeal which is to the effect that the learned trial judge erred in law and fact when he ordered that the suit property be administered by the Administrator General in trust for the beneficiaries.

The appellant's counsel dwelt on the fact that the deceased was survived by several children namely adult children being the first respondent, the first appellant and the second appellant. There was evidence of a family meeting in which some persons were chosen to apply for letters of administration.

I do not need to consider in detail the submissions of counsel because the clear principle is that the grant of letters of administration follows due process as I have held above. In granting letters of administration to the

Administrator General by implication, the learned trial judge erred in law. The matter should be handled by the family division of the High Court which allows for notice to the public as well as the possibility of caveats or disputes among the entitled person as to who should administer being determined by court or even an agreement on that. I would allow ground 6 of the appeal without much ado and following that I would declare that the matter can be handled by the family division of the High Court after the parties who are interested inclusive of the Administrator General have filed the appropriate papers for grant of letters of administration.

In ground 7 of the appeal, the appellant complained that the learned trial judge erred in law and fact when he issued a permanent injunction restraining the first and second appellants from interfering with the respondent's possession and use of the suit property.

I would allow ground 7 of the appeal without much ado because it is an agreed fact that the first and second appellants are also beneficiaries and therefore they are entitled to the estate of the deceased as is enabled by the law of succession. Let a chance be given to the administrator of the estate to be, to administer the estate in accordance with the succession laws. A permanent injunction would have the effect of depriving any interest that the first and second appellants would have to possession and use of the suit property under any law of intestacy that is relevant. I would find that the best course would be to leave the matter to the process of the laws of succession and not the civil suit that gave rise to the appeal. I would allow ground 7 of the appeal. The court deal with illegality of sale of estate property and not entitlement to letters of administration.

The sum total of the above is that I would allow ground 4 of the appeal by setting aside the award of Uganda shillings 50,000,000/= and substituting it with an award of Uganda shillings 20,000,000/=.

Secondly, I would allow ground 5 of the appeal by setting it aside and substituting it with an award of interest of 10% per annum on the general damages.

Thirdly I would allow ground 6 of the appeal with an order that the matter be referred for handling by the family division after the appropriate person has filed a petition for grant of letters of administration.

Lastly I would allow ground 7 of the appeal only to the extent that the first and second appellants who are beneficiaries of the estate of the deceased should not to shut out from the possibility of benefiting from the 5 acres, the subject matter of the suit, based purely on the laws of succession as administered by the person to be lawfully appointed legal representative of the intestate through grant to him or her of letters of administration.

The above notwithstanding, the appeal only partially succeeds. I would make an order that in the circumstances, the appellants pay half the costs of the appeal to the respondents. The costs in the court below shall be paid by the Appellants.

Dated at Kampala the 28th day of Sept 2022

Christopher Madrama

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Cheborion, Madrama and Mulyagonja, JJA)

CIVIL APPEAL NO. 111 OF 2019

1. NAKAYIMA JOYCE
2. NANGENDO ROSEMARY
3. KIBUUKA ROBERT
4. PARADISE PROPERTY CONSULTANTS **::::APPELLANTS**

VERSUS

1. NALUMANSI KALULE
2. SENGENDO WASHINGTON
3. KADDU EDWARD **::::::::::::RESPONDENTS**

(Appeal from the Judgment of Keitirima J, dated 7th March 2019 in Kampala High Court (Land Division) Civil Suit No. 2531 of 2016)

JUDGMENT OF CHEBORION BARISHAKI JA,

I have had the benefit of reading in draft the judgment of my brother, Christopher Madrama, JA and I agree with him that this appeal should succeed only in part. I also agree with the orders he has proposed.

As Mulyagonja JA also agrees, the appeal succeeds only in part along the lines proposed by Madrama JA. The appellants shall pay half of the costs of the appeal and the costs in court below to the respondents.

Dated at Kampala the..28th.....day of .....Sept.....2022

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Cheborion Barishaki

Justice of Appeal

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(*Coram: Cheborion, Madrama and Mulyagonja*, JJA)

CIVIL APPEAL NO 111 OF 2019

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(Appeal from the Judgment of Keitirima J., dated 7th March 2019 in Kampala High Court (Land Division) Civil Suit No. 2531 of 2016)

JUDGMENT OF IRENE MULYAGONJA, JA

I have had the benefit of reading in draft the judgment of my learned brother, Christopher Madrama, JA. I agree that the appeal partially succeeds and with the orders that he has proposed and have nothing useful to add.

Dated at Kampala this 28th day of September 2022.

Irene Mulyagonja

JUSTICE OF APPEAL