THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO.81 OF 2020

Coram
[Bamugemereire, Kibeedi, Gashirabake JJA]

DR DIANA KANZIRA :::::::::::::::::::::::::::::::: APPELLANT
VERSUS
1.HERBERT NATUKUNDA RWANCHWENDE
2.ROBERT TUKAMUHABWA RWANCHWENDE :::::::::::::::::::::::::::::::: RESPONDENT

(An appeal arising out of the Judgment and Orders of Joyce Kavuma J, in High Court Civil Suit No.61 of 2009 dated 11th September 2019 at Mbarara)

Land Law – validity of a land transaction/contract with someone who is allegedly mentally unsound.
Succession Law – undistributed estate; lack of inventory
Contract Law – conduct that validates a contract – specific performance –interest - costs.

JUDGMENT OF CATHERINE BAMUGEMEREIRE JA

Introduction

The 1st respondent, Herbert Rwanchwende instituted HCCS No.621 of 2007 in the Land Division of the High Court of Uganda, disputing a land transaction between the appellant and the 2nd respondent. This suit was later transferred to the High Court circuit of Mbarara where it was registered as High Court Civil Suit No.061 of 2009. The learned Justice of the High Court found in favour of the 1st respondent, hence this appeal.

Background

The 1st respondent, Herbert Rwanchwende is the administrator of the estate of the late Eric Rwanchwende while the 2nd respondent, Robert Rwanchwende is his brother and of the beneficiaries of the same estate. It is alleged that the 2nd respondent sold part of land comprised in FRV 41 Folio 10 Block 28 Plot 9 to Dr. Diana Kanzira, the appellant, without the consent of the 1st respondent who is registered on the land title as the administrator of the estate of the late Eric Kanchwende.

The 1st respondent's claim at the High Court was that the 2nd respondent Robert Rwanchwende had not been allocated his part of the share of his late father's estate and had no authority to sell any part of it. He further asserted that the 2nd respondent was suffering from a mental illness at that time and had no capacity to contract with the appellant.

In her defence, the appellant claimed to have validly bought the land. She included a counterclaim not only against the 1st respondent but also against the 2nd respondent seeking an order of specific performance to compel the 1st respondent to effect a transfer of title into her names. The appellant made an alternative prayer for a refund of the purchase price. At the hearing of the suit, judgment was entered in favour of the 1st respondent, the sale was rendered void, a permanent injunction was issued against the appellant and the 2nd respondent was ordered to refund the purchase price paid by

the appellant. The court also ordered the appellant to pay the 1st respondent the costs of the suit. No costs were awarded to the appellant in respect of the counterclaim against the 2nd respondent. Dissatisfied with the above decision, the appellant appealed on the following grounds;

1. The Learned trial Judge erred in law and fact in finding that the 1st respondent did not give his consent and or authorization to the sale between the appellant and the 2nd respondent.
2. The Learned trial Judge erred in law and fact when the appellant failed to carry out due diligence before entering into the sale transaction with the 2nd respondent.
3. The Learned trial Judge erred in law and fact when she found and held that the relief of specific performance was not available to the appellant in the circumstances of the case?
4. The Learned trial Judge erred in law and fact and/or exercised her discretion injudiciously in declining to order payment of interest on the amount of UGX 30,000,000 payable by the 2nd respondent to the appellant as money had and received ?
5. The Learned trial Judge erred in law and fact and/or exercised her discretion injudiciously in awarding the full costs of the suit to the 1st respondent?

Representation

The appellant was represented by Arthur Murangira; the 1st respondent was represented by Ngaruye Ruhindi appearing with Oscar Katusiima while the 2nd respondent was represented by Ingrid Assau. Counsel made written submissions which this court relied on to arrive at its judgment.

Submissions for the Appellant

Counsel for the appellant approached all grounds of appeal separately. On the 1st ground, regarding to the 1st respondent's consent to the sale between the appellant and the 2nd respondent. Counsel submitted that the learned trial judge contradicted herself when she first found that "all **defence witnesses admitted to the absence of consent by the plaintiff' and later contradicted this by holding that "apart** from the testimonies of DW1 and DW2 there is no other evidence of consent."

Counsel faulted the learned trial judge for not weighing the probative value of accounts rendered by both sides. Counsel submitted that the 1st respondent consented to the sale by his conduct. He relied on the unrebutted evidence of DW2 who had acted as the agent of the appellant throughout the sale transaction.

On the second ground, it was submitted for the appellant that the appellant acted through DW1 and DW2 who were her agents and whose actions were binding on the appellant. Counsel faulted the learned trial judge for treating the appellant as one who did not inquire whether the disputed land was registered in the name of the 1st respondent as Administrator of the estate of the late Ericsson Rwanchwende.

Counsel submitted that the appellant entered into the transaction based on good faith believing that the necessary formalities of sub-dividing the land to create a separate title and transfer for the portion sold to her would be carried out by the 1st respondent shortly after the negotiation and completion of the transaction between her and the 2nd respondent; a transaction which the 1st respondent later unjustifiably reneged on in, bad faith.

Counsel also submitted that the 2nd respondent held and passed on to the appellant his subsisting rights in the suit property pending transfer thereof by completion of the subdivision and creation of title in favour of the 2nd respondent and/or the appellant. Counsel contended that such a transaction was upheld by the Supreme Court in **Halling Manzoor v Serwan Singh Baram SCCA No.9 of 2001**.

The 3rd ground was that the relief of specific performance was not available to the appellant in the circumstances of the case.

Counsel for the appellant contended that the lower court failed to appreciate the conditions necessary for grant of the relief of specific performance which conditions were present in this case. Counsel also contended that the appellant had been induced to enter into a transaction by the respondents' own actions and representation and that they were therefore

estopped from denying the validity of the transaction which had been entered into with the appellant for a good and valuable consideration.

On the 4th ground, Counsel submitted that the learned trial judge erred in denying the appellant an award of interest on the sums ordered to be paid to her by the 2nd respondent. Counsel further contended that the lower court failed to appreciate that the 2nd respondent had received money for a commercial transaction and that the precedents set by the highest appellate court of the land disputes dictate that a commercial rate of interest ought to be awarded in such cases, counsel relied on of **Premchand Shenoi** and **Shivam M.K.P. Ltd v Maximo v Oleg Petrovich Supreme Court Civil Appeal No. 9 Of 2003**

The 5th ground of appeal, counsel faulted the learned trial judge for directing the appellant to settle full costs of the suit. Counsel argued that a more equitable approach would have been for the learned trial judge to order all parties to settle own costs. The appellant then sought orders that the appeal be allowed, and Judgment set aside; a declaratory order that the sale of the suit property between the appellant and the 2nd respondent be validated; and an order for specific performance of the contract of sale between the appellant and the 2nd respondent. In the alternative but

without prejudice to the relief sought above, an order that interest at a commercial rate of 18% be paid on the amount of UGX 30,000,000 payable as money had and received. Counsel also prayed for costs.

1st Respondent's Submissions

Regarding Ground No.1 counsel supported the findings of the learned trial judge that the 1st respondent, whose names appear on the certificate of title as administrator of the estate of the late Eric Rwanchwende, did not give consent to the sale transaction between the appellant and the 2nd respondent.

Counsel invited this court to find that the family members unanimously agreed that the family land should remain jointly owned and registered in the names of the 1st respondent as heir and administrator of the estate. Counsel submitted that when the 1st respondent heard that his brother was advertising the land for sale, he placed announcements on Radio West warning that the land in question was not for sale. The appellant stayed on the land amidst protests from the 1st respondent.

It was the submission for the respondent that the appellant's continuous stay on the land was hostile. It was the evidence of DW2 is that during her stay on the land she was under constant harassment from the 1st respondent. Counsel also submitted that the suit was barred by limitation.

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In regard to the second ground of appeal, counsel was in support of the finding of the learned trial judge that the appellant failed to exercise due diligence before purchasing the land. Counsel refuted as untrue, the appellant's allegation that she acted with the consent of the 1st respondent. He argued that by her own admission, the appellant confirmed that she did not deal with the 1st respondent. He submitted that the appellant was aware that the land was registered in the names of the 1st respondent but yet she did not get in touch with him before dealing with the 2nd respondent. Counsel was critical of the conduct of the appellant for not carrying out the necessary due diligence before dealing with the 2nd respondent who was not only mentally impaired but was also had no authority to sell the disputed land.

On the third ground, counsel contended that the learned trial judge was correct in finding that the relief of specific performance was not available since the purported sale between the appellant and the 2nd respondent was void in so far as the 2nd respondent had no authority and power to sell communal land.

Regarding the fourth ground, counsel for the respondent submitted that the learned trial judge correctly declined to order payment of interest on the UGX30,000,000 payable to the appellant as money had and received. Counsel argued

that the learned trial judge took into consideration the fact that the appellant had been in occupation of and using the suit land without paying any rent for it. Counsel further added that it was within the discretionary power of the learned whether or not to award interest.

As regards the 5th ground, counsel for the 1st respondent argued that the learned trial judge correctly found the appellant liable and imposed the full costs of the suit on the appellant.

2nd Respondent's Written Submissions

Counsel for the 2nd respondent submitted that the 1st ground of appeal did not concern the 2nd respondent since the appellant had the duty to seek consent from the 1st respondent which she did not obtain considering the fact that the 2nd respondent was at the time mentally unstable.

On the second ground, the 2nd respondent submitted that the land in issue was registered in the names of the 1st respondent and that the appellant ought to have done sufficient due diligence to ascertain the rightful ownership before entering the transaction.

On the 3rd ground, counsel for the 2nd respondent agreed that the learned trial judge was right not to award an order for specific performance against the 1st respondent who was a

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stranger to the appellant and against the 2nd respondent who was of unsound mind.

On the fourth ground, counsel argued that the court was correct not to award interest to the appellant since she acted fraudulently by purchasing land from a person who was not the registered proprietor and who suffered a mental illness. Counsel further argued that the learned trial judge took into consideration the fact that the appellant was in possession of the land for 15 years without paying any rent for it.

On the fifth ground, counsel argued that the appellant had not prayed for costs of the suit and that the appellant did not succeed in her counterclaim for specific performance which was denied and therefore could not base on this to claim to pray for award of costs. Counsel prayed that the entire appeal against the 2nd respondent be dismissed with costs.

Appellant's Submissions in Rejoinder

Counsel addressed the 1st and 2nd respondents' submissions jointly. In rejoinder, the appellant approached all grounds separately.

Regarding the 1st ground, the appellant contended that consent need not to be expressly oral but can be inferred from the conduct of the parties. The 1st respondent consented to the sale transaction between the appellant and the 2nd respondent as can be drawn from the evidence of DW1 and DW2.

Counsel also argued that exhibit P4 was not binding on the 2nd respondent since, although he attended the family meeting, he did not append his signature on the minutes. It was also submitted for the appellant, in rejoinder, that the **exhibit P4** was an illegality that was in contravention with section 278(1) of the Succession Act Cap.162 and is a criminal offence of intermeddling under section 278 (4).

Counsel contended that the law dictates that the estate of a deceased to which a grant of letters of administration applies must be collected, entered into the inventory and distributed (accounted for) among the beneficiaries thereof within a given time frame and an inventory returned to the court. Any act to the contrary of what is set out in **exhibit P1** (Letters of Administration) cannot be disregarded or departed from under guise of minutes of a family meeting.

Counsel for the appellant submitted that the 1st respondent's evidence on the issue of not giving consent to the transaction was made up and should be discounted. He argued that refusal of the appellant to sign the sale agreement did not mean that he had not consented earlier. The appellant averred that the consent of the 1st respondent can be inferred from a series of oral statements attributed to him as well as his conduct before, during and immediately after the sale transaction. Counsel argued that the 1st respondent was

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estopped from coming to court to claim otherwise. Counsel further contended that the appellant acted through DW1 and DW2 as her agents for the purchase of the disputed property.

It was the submission for the appellant, that the Learned trial judge either misapprehended or erroneously ignored the evidence of the appellant. Counsel further argued that the evidence of the 2nd respondent was an attempt to defeat the transaction. This, he argued, was a mere afterthought and could not stand when contrasted with the 2nd respondent's affidavit and a handwritten note he sent to court requesting that the court come to the aid of the appellant by upholding the transaction.

On the second ground, the appellant submitted that DW1 and DW2's evidence proves that the 1st respondent interacted with the appellant's agents and discussed the transaction with them and also gave his oral consent that he did not object to the transaction. The appellant was emphatic that carried out the requisite due diligence before entering into the transaction with the 2nd respondent.

Consideration of the Appeal

This appeal is premised on 5 grounds of appeal. I have had the privilege to study the file rigorously. I am thankful to all parties for their well-thought-out submissions. This being a first appeal, the law enjoins this court to review and re-

evaluate the evidence as a whole, closely scrutinize it, draw its own inferences, and come to its conclusion on matters of fact and law. This duty is recognized under rule 30 (1) (a) of the Court of Appeal Rules and Directions. It stipulates that:

> "30. Power to reappraise evidence and to take additional evidence.
>
> (1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—
>
> (a) reappraise the evidence and draw inferences of fact."

The same principle is pronounced in **Pandya v R [1957] EA 336**; and, in **The Executive Director of National Environmental Management Authority (NEMA) v Solid State Limited SCCA No.15 of 2015** (unreported) and Kifamunte Henry v Uganda SCCA No. 10 of 1997.

Ground No.1

The Learned trial judge erred in law and fact in finding that the 1st respondent did not give his consent and/or authorization to the sale between the appellant and the 2nd respondent.

It is the appellant's contention that the learned trial judge gave undue weight and importance to the lack of written consent on the part of the 1st respondent. In particular, counsel submitted that it was an error on the part of the learned trial judge not to take into consideration the evidence of DW1, Enock Rutsibika and DW2 Joy Twesheka Bujundira,

whose evidence established the involvement, knowledge, and consent of the 1st respondent before the transaction was entered.

At trial the evidence for the plaintiff, now respondent, was given by four witnesses.

PW1, Herbert Rwanchwende, the 1st respondent/plaintiff testified that together with Francis N. Rwanchende, they took over administration of their father's estate in 1997. When Francis passed on Herbert R remained the sole administrator. The land in question is comprised in Plot 9 Block 28, at Kashaari and measures 66.84 Hectares which is approximately 161.162 Acres. He stated that Robert Rwanchende, DW4, is his younger brother but not of sound mind. He added that his brother has had a mental illness since 1992. His testimony included facts canvassing, among others, the mental ailment of Robert until his sister had to take him to Butabika hospital in Kampala. He stated that it was fortuitous of Diana, DW3 to buy land from a person who had no mental capacity to sell. That sale was for about 30 acres out of 161.162 acres. It was his evidence that in 2007 Diana forcibly entered the land, brought armed-guards and occupied it. That the President of Uganda tried and failed to reconcile the two parties. He decided to sue Diana first, at the land tribunal and then in the High Court.

PW2 Charity Agaba testified that she is a maternal cousin of the Rwanchwende children. Her evidence was that she grew

up in that home and was aware of the mental illness that struck Robert. She was one of those who took him to Butabika Mental Hospital on more than one occasion. Her evidence was that each of the brothers has usage rights over their individual portions of the land. She stated that they had earlier agreed among themselves how to utilize their respective pieces.

PW3 Ruthra Agaba Kamukama is a sister to Robert and Herbert. She stated that when their brother Francis passed on they agreed to let Herbert become the sole administrator. Her evidence was that Robert does not own his own land. The land is family land. Her evidence was that on selling the land for UGX 30,000,000, Robert bought a vehicle for UGX 12,000,000 but eventually lost both the money and the vehicle.

PW4 was Simon Ndyamuba, the LC1 Chairman of Ruyonza cell, where the disputed land is found. He declined to sign as a witness to the sale agreement once he heard the Radio West announcement by Herbert Rwanchwende. His evidence was that Herbert Rwanchwende complained about Diana's presence on the land. He stated that he knew Robert as an individual with mental instability.

For the appellant who was the defendant in the lower court, evidence was led to show that DW1, Enock Rutsibika, was an

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uncle to the appellant. He was approached by Robert Rwanchwende about the possibility of buying the disputed piece of land. He then interested the mother of the appellant, who in turn, informed the appellant of the possibility of buying the land in question. It was he that introduced the appellant as a prospective purchaser. His evidence was that when the 1st respondent, Herbert Kamachwende, was consulted, and gave a nod to the transfer of land and that the respondents went to inspect the land went with Joy Bujundira, mother to the appellant.

He stated as follows:

- "I consulted Herbert Rwanchwende. Herbert was aware of what we were doing...I introduced the topic to Herbert that Robert wanted to sell part of his land which was close to me.
- Herbert told Robert that he has his own home, land, cows and he is a complete man who can sell his own land. Herbert had no objection.
- As a neighbour the defendant took possession immediately after 2004, when she first came, she introduced cows, goats and (the) ***sic*** structure we see here. And put a banana plantation.

DW2, Joy Twesheka Bujundira, is the appellant's mother. She testified that she had an opportunity to be taken around the land by the 1st respondent. She lived briefly on the said land before hostility by the 1st respondent drove her away.

During her short sojourn on the land, she was permitted to use the 1st respondents wells to water her cows. Counsel for the appellant argued that the evidence of DW1 and DW2 who acted as the agents of the appellant was largely ignored by the learned trial judge.

The 1st respondent denied meeting with DW1 and DW2. He denied visiting the land with them the land and consenting to any sale between the 2nd respondent and the appellant. He stated that when he heard rumours of the sale, he aired announcements on the radio stopping any intending purchaser.

The evidence of PW4 Simon Ndyamuba LC1 Chairman of Ruyonza cell was that Robert Rwanchwende (the 2nd respondent) brought him an agreement to sign but he declined to sign because there were radio announcements warning the public against the purchase of that land. At the time the hearing of this appeal took place, the appellant's agents were still occupying the land.

The evidence for the 2nd respondent was that the 2nd respondent could not have validly entered a contract with the appellant on account of being of unsound mind.

The 1st respondent testified that he became the sole administrator of his late father's estate when the second

administrator passed on. He stated that the land has never been distributed. He seemed not to have an idea what an inventory means. It was his evidence that the questioned piece of land was the one on which he often grazed his cattle. He stated that at all times material to this case, the 2nd appellant had been diagnosed with mental illness, but he also had lucid moments. He denied knowledge of the land sale that took place between appellant and the 2nd respondent.

The 1st respondent stated that the appellant should have done due diligence prior to purchase of the disputed land. And it was also his evidence that the appellant should never have dealt with the 2nd respondent since he had no authority on the land, was of unsound mind and was not a registered proprietor of the land.

PW3 Ruthra, sister of the 1st respondent testified that it was erroneous of the appellant to deal with a sick man whom she had often take to Butabika hospital. She stated, just like DW1 did that the President of Uganda had often tried to intervene in this matter. It was her evidence that the appellant did not deserve to be refunded the purchase price of UGX 30,000 back since she had dealt with the wrong people.

I have carefully considered the evidence that was adduced at trial by both sides. There are some agreed facts. It is a fact

that a land sale took place between the appellant and the 2nd respondent. There was no denial that DW2 moved onto the land after the sale.

The learned trial judge ought to have considered evidence beyond the testimony of the respondents. The appellant was aggrieved that the evidence of the respondents was blindsided by the trial Judge.

Regarding the question whether the learned trial judge erred in law and fact when she ruled that the appellant failed to carry out due diligence before entering into the sale transaction with the 2nd respondent brings up issues of the validity of the contract.

The question in this case is whether there is a valid contract between the appellant and the 2nd respondent? This question is two-pronged. The first leg is whether the 2nd respondent, being a person who was known to have a mental illness, had capacity to contract. The second leg is whether the 1st respondent, by conduct, acquiesced to the entering in of the contract.

Whether the 2nd respondent was of unsound mind.

The general rule is that any person is competent to bind himself to any contract he chooses to make, provided that it is not illegal or void for reasons of public policy. Capacity to contract means the human being or other juridical person you are contracting with has the legal ability to enter into a contractual relationship. The law recognises a person as

having legal capacity only when that person understands and appreciates the consequences of their actions. A person contracting is under obligation to prove that they understood that there was an offer, or they made the offer. There must be evidence that the offer was accepted. There must be proof that basing on that offer, valuable consideration passed. Where those three considerations exist, there will be a valid contract.

In this case the appellant's claim was that the 1st respondent in a bid to sell the disputed piece of land, approached Enock Rutsibika, a brother of Joy, which Joy is the mother of the appellant. Enock, the appellant's maternal uncle sent a message to Joy stating that she had learnt of land which might be on sell.

Acting on this offer the appellant entered into a written contract with Robert and after paying some instalments, she eventually paid the contract sum in full. The appellant testified that at the point of contracting with the appellant, he was of sound mind. This evidence was supported by the evidence of DW1 and DW2.

Both respondents agree that Robert has a chronic mental illness which besets him now and again. However, it was clear from the evidence that Robert is not completely "off the

rockers," so to speak. It was mentioned that he is mostly of sound mind.

Lucidity refers to a brief period during which an insane person regains sanity that is sufficient to regain the legal capacity to contract, make a will and to act on his/her own behalf. It is that period of time during which a person who is otherwise incompetent returns to a state of true, rational comprehension and may possess testamentary capacity and pass on property.

I therefore find that this is a good case to conclude that Robert, though said to be of unsound mind, there is no clear scientific or medical proof which was relied on to declare that the 2nd respondent is a certified mentally unstable person. From the look of things, he was of sound mind at the time of entering into the contract. He was of sound mind when he bought a motor vehicle and drove it around. At all those moments he was capable of understanding the contracts and of forming a rational judgment as to their effects upon his. I therefore find that the learned trial judge erred in concluding that Robert was a person of unsound mind and incapable of contracting. He entered this contract as a person of sound mind. He is a rational human being who has interest in disposing of part of his inheritance to meet his needs and should not be blocked from so doing.

The second leg of the argument is whether the 1st respondent, by conduct, acquiesced to the entering of the contract and should not renege on his promise.

DW1 also stated that the 1st appellant was present and positively allowed DW4 to sell the land and that he participated in walking them around the farm. He did not at that point bring out the incapacity of the 2nd respondent to contract by reason of unsound mind.

Based on those promises, the appellant accepted the contract and paid a substantial consideration. She later paid the full consideration of UGX 30,000,000. It was her evidence that the land was handed over to her and that, based on the promise, her mother, Joy, entered on the land and began grazing cattle for some months. Joy's evidence was that she often watered her animals in the waterpoint on the 1st respondent's side of the land. Somewhere along the way the 1st respondent withdrew his promise. He opted out. The conduct of the 1st respondent could be referred to as estoppel. Estoppel is a legal principle that prevents someone from asserting a right that contradicts what they previously said or agreed to by law. Put simply, estoppel prevents one person from contradicting an action or statement from the past. Promissory estoppel operates to ensure a party does not go back on their promise when another party has relied upon that promise. Within contract law, promissory estoppel

refers to the doctrine that a party may recover on the basis of a promise made when the party's reliance on that promise was reasonable, and the party attempting to recover detrimentally relied on the promise.

Clearly, consideration relates to the exchange of promises, therefore it becomes an extremely useful tool in providing a remedy for aggrieved parties. Promissory estoppel will have the effect of stopping the party who attempted to go back on their promise to do so. See **Earl of Plymouth v Rees Earl of Plymouth v. Rees [2021] EWHC 3180.**

- This principle of promissory estoppel may be seen to operate as a way in which the requirement of consideration is removed altogether and instead as long as there in reliance on a promise, the agreement can be binding. The doctrine is a shield and not a sword. While a cause of action may not be founded on an estoppel, one can succeed on a cause of action in which, without the estoppel, he will fail.

In **Amalgamated Investment v Texas Commerce, [1982] QB 84** Lord Denning MR held as follows:

'The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved

during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption—either of fact or of law—whether due to misrepresentation or mistake makes no difference—on which they have conducted the dealings between them—neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.'

However, there are restrictions to promissory estoppel; a legal relationship must exist between the parties; there must have been a detrimental reliance on the promise; promissory estoppel can only be used as a defence; it must be inequitable to allow the promisor to go back on the promise.

In the first place the 1st respondent, successfully, sued the appellant for recovery of land. The appellant's immediate

defence given through the evidence of her uncle, Enock and her mother, Joy, was that the 1st respondent actively participated in the parceling off of the land which was to be sold and allowed the appellant's agents to live on the land. There is evidence that before, at the point of sell and immediately after the sell, Herbert Rwanchwende did not object to the sale.

I find that the learned trial judge based her judgment on the latter behaviour of Respondent No. 1. Had the learned trial judge questioned the behavior of Respondent No. 1 prior to the sell, she would have found that he actively participated in the offer process, a conduct which the appellant detrimentally relied upon leading to not only loss of the money but also loss of the land. It is my considered view that by his conduct, Respondent No. 1 acquiesced to the sale.

I therefore find that the learned trial judge erred in fact and in law when she determined this matter based only on the evidence of respondents. I agree with learned counsel for the appellant that the learned trial judge erred by not weighing the probative value of accounts rendered by both sides. Ground No. 1 succeeds.

Ground No.2

The Learned trial judge erred in law and fact

when he found that the appellant failed to carryout due diligence before entering into the sale transaction with the 2nd respondent.

Firstly, I will address the issue of administration of the estate of the late Eric Rwanchwende. The appellant avers that the 2nd respondent sold the land in his capacity as a beneficiary of the estate of Eric. Rwanchwende. The land was administered by the Herbert, as the administrator.

The land in question was part of the sixty-five hectares of land which were not parceled out by the administrator. The family members had, in a meeting held on 5th September 2000, agreed that all land which formed part of the deceased's estate was to be held together and registered under the names of the Herbert Rwanchwende as the administrator of the estate as seen in exhibit P4. In his submissions, counsel for the appellant contended that **exhibit P4** was an illegality that was in contravention with section 278(1) of the Succession Act Cap 162 and is a criminal offence under section 278 (4) of the same law.

Counsel contended that the law dictates that the estate of a deceased to which a grant of letters of administration applies must have an inventory and be accounted for within a given time frame.

On the issue of administration, the learned trial judge found that,

"Herbert Rwanchwende claimed that he filed an inventory but no evidence of this was produced in court. In the Civil Suit No.45 of 2010 Robert Rwanchwende lodged a suit in court regarding the mismanagement of the estate by the plaintiff. He later withdrew the suit.

Although this court is dealing, primarily, with the validity of a land-sale agreement, issues of administration including failure to file an inventory have emerged. This court is concerned that the administrator of an estate over-reaches his mandate, bullies and takes advantage of vulnerable beneficiaries.

From the record, it is clear that the estate of the deceased, although it was not distributed, guaranteed each member clarity about what portion of the land belongs to them. Ruthra, a sister to the respondents, testified as much. It is trite that though section 180 of the Succession Act grants the administrator powers to manage the estate of a deceased person including authorising the beneficiaries thereof, it does make him a sole-owner. The administrator only holds the land in trust.

Section 180 of the Succession Act did not envisage that the administrator would act like a private proprietor of the deceased's estate and turn the said property into his own. He, at all times, acts on behalf of the beneficiaries. It is either out of sheer ignorance or lack of knowledge that family of the

late Eric Rwanchwende have allowed one person monopoly of power. Where a family has decided to apportion and allot each member a part of the whole estate, it is envisaged that the beneficiary, aware of their rights and interests, may deal with the land as he or she wishes. However, the high-handed methods by which the late Eric Rwanchende's estate is borders on illegality.

The legal proposition for the above assertion is as laid down in **Volume 48, Halsbury's Laws of England, 4th edition, Butterworths, London, 1984, page 349 – 350** thus:

> **"[paragraph] 626: Power of alienation**. A beneficiary under a trust possesses the same power of alienation or disposition with respect to his equitable estate or interest under the trust as a legal owner has over his legal estate or interest in the property, and he can exercise it by similar instruments and with similar formalities."

I am inclined to agree with counsel for the appellant that any act contrary to what is expected of the administrator under the letters of administration cannot be disregarded or departed from under guise of minutes of a family meeting. The majority cannot agree to oust the law.

Though like the learned trial judge, I find that although the appeal is mostly about the validity of a land transaction

rather than letters of administration, the issue of administration is at the core of this land transaction.

The facts present the 1st respondent as the administrator of the estate of the late Eric. Rwanchwende's. I have taken note of the finding in **John Kihika & Anor v Absolom Tinkamanyire, CACA No.86 of 2014** where this court ruled that without grant of letters of administration, no person has any right whatsoever to sell or otherwise deal with property of a deceased person.

Be that as it may, my understanding of the facts of this transaction is that they are distinguishable from **Kihika v Kamanyire** (supra) since the 2nd respondent was at all times abundantly aware that he was not the administrator of the estate. He was also aware that he had beneficial interest in the land. This is why he courteously sought the permission of the 1st Respondent to complete the sale. From the look of things, Herbert gave a nod to the transaction. The consent of the 1st Respondent was expected and hence he was added on the sale agreement. As it turned out, the latter gave and then withdrew his consent. I do find that Herbert gave and retracted his consent orally and by his conduct. The learned trial Judge appears to have been swayed by the thinking in **John Kihika & Kaidoli William Vs Absolom Tinkamanyire, Civil Appeal No. 0086 of 2014,** to conclude that "without a grant of letters of administration,

no person has any right whatsoever to sell or otherwise deal with property of a deceased person. It is trite law that property of a deceased person cannot be dealt with or otherwise transferred without the grant of letters of administration. We must note that according to Section 180 of the Succession Act, an administrator 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. Letters of administration entitle the administrator to all rights belonging to the intestates as effectually as if the administration has been granted at the moment after the death of the deceased, all that the grant does is give the administrator the legal power necessary to deal with the assets.

The above assertion is true but does not vitiate the rights of the beneficiaries of an estate.

And yet the learned trial Judge was of the view that the appellant erred when she did not get out of the transaction as soon as the administrator was not willing to transact. The learned trial Judge referred to it as doing due diligence. The trial judge arrived at the conclusion that the appellant did not do due diligence.

For the appellant, it was submitted that she acted through DW1 and DW2 who were her agents and whose actions were binding on the appellant. Counsel faulted the learned trial judge for treating the appellant as one who did not bother to make any query on whether the disputed land was

registered in the name of the 1st respondent as Administrator of the estate of the late Ericsson Rwanchwende. Counsel submitted that the appellant was abundantly aware that Herbert was the administrator in whose names the land was registered. He submitted that she entered into the transaction based on good faith; that the necessary formalities of sub-dividing the land to create a separate title and transfer for the portion sold to her would be carried out by the 1st respondent shortly after the negotiation and completion of the transaction between her and the 2nd respondent; a transaction which the 1st respondent later unjustifiably reneged on in, bad faith.

In his submissions, Counsel for the appellant contended that the Supreme Court upheld a transaction with facts similar to this case in **Halling Manzoor v Serwan Singh Baram SCCA No.9 of 2001.** Although the seller was not in actual possession of the property and both parties were residing in London; they entered into an agreement concerning the property. In the matter before us, the 2nd respondent(seller) was not the registered proprietor for the suit property and therefore had no interest to transfer from the onset. The Court reasoned that,

> "The Court of Appeal upheld these findings. The Learned trial judge's conclusion was premised on the legal principle that a person cannot pass title that he does not have. In the context of the law of contract, the premise would be that no consideration proceeded from the respondent. With due respect, however, that was an erroneous premise arising from misconstruing the

agreement to be a sale agreement rather than an agreement for sale subject to a condition precedent. As 1 have already stated, the respondent did not, by the agreement sell or transfer the property'. Nor did he purport to do so. He did not attempt to pass title which he did not have. He obviously agreed to sell but undertook to pass the title if and when he got it after repossession. That can be likened to the contract between a car dealer and a buyer who places an order, and pays the price in advance, for a car to be delivered in a month's time after it is imported. Conversely, it is comparable to a consumer taking groceries on credit and promising to pay for them at the end of the month, when he expects to receive his salary. The respondent's undertaking to assist the appellant to acquire the suit property' in the instant case, is in law, as good a consideration, as the car dealer's promise to deliver the car, and the consumer's promise to pay for the groceries in the examples I have given."

I am persuaded by the ruling in **Mansoor** that a party's undertaking to assist the client to acquire the land is in law, as good a consideration as the car-dealer's promise to deliver the car. The learned trial judge ruled that there was no contract entered. It was an erroneous premise arising from misconstruing the agreement to be a sale agreement rather than an agreement for sale subject to a condition precedent. In conclusion, the appellant was fully aware that the land title was in the names of the 1st respondent as a registered proprietor and that he had the last right to complete a transfer of the land. As noted earlier above, the appellant, who was working through her agents, seemed to honestly believe that the 1st respondent was on her side and working

in her interest. No amount of due diligence would have prepared them for a turnaround. I earlier found that the doctrine of estoppel applied. By his own conduct the 1st respondent could not claim that he was unaware of the sale.

The above sequence of events needs to be read together with the right of the 1st respondent to deal with his share of the estate as his beneficial interest. A beneficiary has legal capacity to validly dispose of his/her beneficial interest without the notice or prior consent or authorisation by the holder of letters of administration.

I agree with the appellant that she accepted to go ahead with this transaction in good faith based on the prevailing relationships on the land which gave her assurance. She entered into legal and enforceable contract.

Ground No.2 of this appeal succeeds.

Ground No.3

The Learned trial judge erred in law and fact when she found and held that the relief of specific performance was not available to the appellant in the circumstances of the case?

Ground No.4

The Learned trial judge erred in law and fact and/or exercised her discretion injudiciously in declining to order payment of interest on the

amount of UGX 30,000,000 payable by the 2nd respondent to the appellant as money had and received ?

Ground No.5

1. **The Learned trial judge erred in law and fact and/or exercised her discretion injudiciously in awarding the full costs of the suit to the 1st respondent.**

The basic rule is that specific performance will only be advised where a common law remedy is unavailable. Where damages adequately place the plaintiff in the position she would have been but for the breach, specific performance will not be advised. See **Manzoor v Baram [2003] 2 EA 580.** The law on specific performance was propositioned in the following terms:

> Specific performance is an equitable remedy grounded in the equitable maxim that *'Equity regards as done, that which ought to be done'*. As an equitable remedy, it is decreed at the discretion of the court. The basic rule is that specific performance will not be decreed where a common law remedy, such as damages would be adequate to put the plaintiff in the position he would have been but for the breach. In that regard, the courts have for long considered damages inadequate remedy for breach of a contract for the sale of land, and they more readily decree specific performance to

enforce such contract as a matter of course.

In the instant case the respondents allowed the appellant to move on to the land upon payment of the agreed amounts. Her family and cattle have been on that land for some time. Land is unique and, in this case, I see no other legal remedy available to put the appellant, who is the non-breaching party in the same position had the contract been performed. Being placed back on the land in question, rather than damages, better serves the ends of justice in the circumstances of this case.

In the same vein, an award of interest is discretionary; **Harbutt's Plasticine Ltd v Wyne Tank & Pump Co. Ltd, [1970] 1 Ch 447.**

This is a matter in which a witness, DW2, testified that she lived on the land. Indeed, the respondent's claim was that the appellant lived on the land for 15 years. She also testified that she experienced hostility from the 1st respondent. There was factual basis from the evidence of the respondents to prove that this part of the land was indeed set apart for the 2nd respondent.

I take judicial notice of the fact that the 1st respondent continues to hold out as an administrator without properly distributing or for that reason, causing an equitable management of the estate of his late father. This is a good

case for the 1st respondent to pass title in the disputed land to the appellant.

1st Respondent's Cross-Appeal.

The 1st respondent filed a cross appeal on two grounds only:

1. The Learned trial judge erred in law and fact when she declined to award the 1st respondent/cross appellant general damages and interest thereon which had been pleaded and proved in evidence.
2. The Learned trial judge erred not to order the removal of the caveat which the appellant had lodged against the certificate of title after finding that the sale was invalid and after directing that the purchase price be refunded to the appellant.

1st Respondent's Submissions on Cross-Appeal

On Ground No.1, Counsel faulted the learned trial Judge for not awarding to him general damages. He reasoned that the cross-appellant had proved and prayed for them. Counsel contended that it was unfair to the cross-appellants since the rest of the beneficiaries had suffered loss and damage having been deprived of the use of the suit land for 15 years. On the 2nd ground, Counsel also faulted the learned trial judge for failing to order for the removal of the caveat which the cross respondent had lodged against the certificate of title. Counsel prayed that the cross appeal be allowed.

Appellant's Submissions in Reply to the 1st Respondent's Cross-Appeal.

Counsel for the appellant approached both grounds of the cross-appeal separately. On the first ground, he argued that the general damages claimed by the 1st respondent were improperly pleaded as though they were special damages with particulars given which in his view was a defect in the pleadings. Counsel further argued that general damages are discretionary to the court and that an appellate court will not normally interfere with the lower court's findings on the issue of damages unless it can be shown that the lower court acted on a wrong principle and in the circumstances has not been shown that the lower court acted on a wrong principle. On the second ground, counsel argued that the 2nd cross-appeal ground was misconceived in law and ought to be dismissed since it wasn't adjudicated before the lower court.

Cross-Appellant's Rejoinder on Cross-Appeal.

In rejoinder, counsel insisted that the lower court erred in not granting general damages to the 1st cross appellant. On the second ground of the appeal, counsel argued that the court had the power to address the caveat at the lower court and since the caveat is still existent on the suit land, this court has power to order its removal under section 11 of the judicature act and rule 32 of the rules of this court.

Consideration of the 1st Respondents Cross-Appeal

On ground No.1 regarding general damages and interest, it is on record that the 1st respondent prayed for general damages worth UGX 200,000,000. The learned trial judge found the figure of UGX 200,000,000 speculative and disallowed it. The cross appeal failed to prove loss of business or any earnings on the suit land. There is no proof that the learned trial judge erred. On the contrary the cross-appellant failed to specifically set out the general damages. Ground No.1 of the 1st respondent's cross appeal fails.

On ground No.2 regarding the caveat, this court in **Rutungu properties Ltd v Linda Harriet Carrington & Harriet Kabagenyi, CACA No.61 of 2010** cited with approval **Boynes v Gather, [1969] EA 385** and found that "The primary objective of a caveat is to give the caveator temporary protection. It's not the intention of the law that the caveator should relax and sit back for eternity without taking steps to handle the controversy, so as to determine the thought of the parties affected by its existence".

I find that given the circumstances of this case, it is only equitable and appropriate that a caveat continues to be lodged on the title as a mode of preserving the rights of a party who would be prejudiced if it was removed. I have found that the 1st respondent in the main appeal has a duty to transfer title in the land in question to the appellant For as long as the 1st respondent has not transferred the rights

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in land to appellant a caveat shall remain in place to protect the caveator. Once land in dispute is transferred to the appellant, the caveat shall be removed. **Ground No.2 of the Cross appeal fails.**

On cross appeal, the cross appellant faulted the Learned trial judge for holding that there was no evidence on the court record of the cross appellant's mental illness. This issue has been exhaustively examined and concluded.

In conclusion, I find that the learned trial Judge erred in finding that there was no contract entered. I find that that the appellant has on the balance of probabilities, proved that she entered into a contract for sell of land with the 2nd and that the 1st Respondent. Indeed the 1st Respondent is estopped by his own conduct. No better legal remedy other than specific performance is available to put the appellant, who is the non-breaching party in the same position had the contract been performed. Being placed back on the land in question, rather than damages, better serves the ends of justice in the circumstances of this case.

Since both my brothers, Muzamiru Kibeedi and Christopher Bashirake: JA, agree, this appeal succeeds with the following orders.

1. This appeal is herewith allowed. The Judgment, Orders and Decrees in HCCS No. 61 of 2009 are hereby set aside.
2. The Cross-Appeal is hereby dismissed.
3. I declare that the appellant entered into a contract for sale of land with both Respondents and the contract is enforceable as against the Respondents.
4. I direct that within 60days of the 1st respondent receiving a copy of a decree extracted by the appellant from this Judgment, he shall sign and deliver to the appellant transfer forms and any other documents required to effect the subdivision of the land which forms the subject of this appeal from the whole in order to vest ownership in the appellant. The appellant shall obtain a certificate of title in her names. The costs of the subdivision and transfer shall be met by the appellant.
5. In order not to exacerbate further animosity on this land, the parties being neighbours, it is hereby ordered that each party shall bear its own costs.

Dated this 2nd day of November 2023.

Catherine Bamugemereire
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Catherine Bamugemereire, Muzamiru M. Kibeedi & Christopher Gashirabake, JJA)

CIVIL APPEAL NO.81 OF 2020

DR DIANA KANZIRA :: APPELLANT

VERSUS

1.HERBERT NATUKUNDA RWANCHWENDE]

2.ROBERT TUKAMUHABWA] :: RESPONDENTS

JUDGMENT OF MUZAMIRU MUTANGULA KIBEEDI, JA

Introduction

I have had the benefit of reading in draft the Lead Judgment prepared by my learned Sister, Hon. Lady Justice Catherine Bamugemereire, JA. I agree with the orders and remedies proposed for the resolution of this matter. However, I prefer to set out the reasons for my decision in my own words. Since the background facts to the appeal and the arguments of Counsel have been set out in detail in the Lead Judgment, I need not repeat the same in my judgment save in so far as it is absolutely necessary for purposes of advancing my analysis and resolution of the issues involved in this appeal.

The instant appeal raises a very important matter of public importance namely, the validity of a sale of land by a beneficiary who is not a holder of letters of administration.

From the evidence before the trial court, the respondents are siblings and, together with other siblings who are not party to this appeal, the beneficiaries of the estate of their father, the late Ericsson Rwanchwende (deceased). Part of the estate of the deceased included land comprised in FRV 41 Folio 10 Plot 9 Block 28 at Ruyonza, Kashari County, Ankole measuring approximately 66.8 hectares (**Main land**) which, at the times material to this appeal, was registered in the names of the 1st respondent as the administrator of the estate of the deceased.

On 18th June 2004, the 2nd respondent sold part of the said main land to the appellant for the consideration of Ugx. 30,000,000/= which was paid to him in instalments and fully cleared on 10th September 2004 as per the acknowledgment signed by him which was admitted in evidence as exhibit ***"DE5"***. In my judgment, the portion sold to the appellant by the 2nd respondent will be referred to as the ***"suit land"***.

The 1st respondent challenged the sale in the High Court for being invalid in so far as the seller (now 2nd respondent) neither had letters of administration to the estate of their deceased father, nor his consent to the sale as the holder of letters of administration to the deceased's estate and the registered proprietor of the main land. The 1st respondent also sought to nullify the sale on the additional ground that that the seller (2nd respondent) "*was suffering from mental illness and was of unsound mind*" and incapable of entering into a valid sale.

Findings of the High Court

The trial Judge entered judgment in favour of the 1st respondent holding that *"as long as the [1st respondent] held the letters of administration, [the 2nd respondent] had no legal right to engage in any dealings on the suit land without any authorization from the [1st respondent]"*.

With regard to the claim of mental illness on the part of the 2nd respondent, the trial Judge found that *"there [was] no evidence [adduced before the trial court] as to [the 2nd respondent's] mental status at the time of entering into the agreement…Therefore [the 2nd respondent] is bound by the agreement between him and the [appellant].*

The High Court issued an eviction order against the appellant and awarded the costs of the suit to the 1st respondent.

Lastly, the 2nd respondent was ordered to refund the sum of Ugx 30,000,000/= as money had and received from the appellant.

Grounds of Appeal

The appellant was dissatisfied with the decision of the High Court, and she appealed to this court on the basis of five grounds of appeal which were set out in the Memorandum of appeal as follows:-

1. *The Learned trial Judge erred in law and fact in finding that the 1st respondent did not give his consent and or authorization to the sale between the appellant and the 2nd respondent.*
2. *The Learned trial Judge erred in law and fact in finding that the appellant failed to carryout due diligence before entering into the sale transaction with the 2nd respondent.*
3. *The Learned trial Judge erred in law and fact when she found and held that the relief of specific performance was not available to the appellant in the circumstances of the case.*
4. *The Learned trial Judge erred in law and fact and/or exercised her discretion injudiciously in declining to order payment of interest on the amount of UGX 30,000,000 payable by the 2nd respondent to the appellant as money had and received.*
5. *The Learned trial Judge erred in law and fact and/or exercised her discretion injudiciously in awarding the full costs of the suit to the 1st respondent.*

Cross Appeal of the 1st respondent

The 1st respondent filed a Notice of Cross Appeal by which he contended that the decision of the High Court ought to be varied to the extent and in the manner set out therein on the following grounds:

1) *That the trial Judge erred in law and fact when she declined to award the 1st respondent/ cross appellant general damages and interest thereon which had been pleaded and prayed for and which had been proved in evidence.*
2) *The learned trial Judge erred when she did not order the removal of the caveat from the certificate of title after finding that there was no valid sale of the suit land to the appellant.*

The cross appellant sought orders that:

1) *The cross appeal be allowed, and the judgment of the lower court be varied to the extent that the appellant/ Cross respondent be ordered to pay general damages with interest thereon as had been prayed for in the submissions of the 1st respondent/ cross appellant.*

2) *The caveat that had been lodged on the 1st respondent/ Cross appellant's Certificate of title and which was disclosed during the hearing of the suit be removed.*

3) *The appellant/ Cross respondent be ordered to pay the costs of this cross appeal to the 1st respondent/ Cross appellant.*

Analysis

In my view, resolution of the grounds of dissatisfaction as set out in the Memorandum of Appeal and the 1st respondent's Cross-appeal revolves around the question of validity of the sale of the suit land by the beneficiary without the consent or authorization of the holder of letters of administration to the deceased's estate.

This court *(Geoffrey Kiryabwire, Ezekiel Muhanguzi & Christopher Madrama, JJA)* had occasion to consider the above issue in the case of ***John Kihika & Kaidoli William Vs Absolom Tinkamanyire, Civil Appeal No. 0086 of 2014,*** and held that "*without a grant of letters of administration, no person has any right whatsoever to sell or otherwise deal with property of a deceased person*".

Justice Ezekiel Muhanguzi, *JA* (as he then was) who wrote the Lead Judgment in the said appeal elaborated the legal position thus:

> *"It is trite law that property of a deceased person cannot be dealt with or otherwise transferred without the grant of letters of administration. We must note that according to Section 180 of the Succession Act, an administrator 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. Letters of administration entitle the administrator to all rights belonging to the intestates as effectually as if the administration has been granted at the moment after the death of the deceased, all that the grant does is give the administrator the legal power necessary to deal with the assets.*

Therefore, ***without a grant of letters of administration, no person has any right whatsoever to sell or otherwise deal with property of a deceased person***". [Emphasis added]

Section 180 of the Succession Act, Cap. 162 which was relied upon by the court in the above matter is couched as follows:

> *"**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."*

The application of the above provision of the law by this court in the case of ***John Kihika & Kaidoli William Vs Absolom Tinkamanyire*** (*op cit*) should be understood in the context of the particular facts that were before the court in the matter, including the finding therein that there was no evidence adduced of the existence of letters of administration. In the instant case, there is uncontested evidence that was adduced before the trial court to the effect that at the time of the sale of the suit land by the 2nd respondent to the appellant, the 1st respondent was the holder of letters of administration of the estate of the deceased, and that his name was already registered on the certificate of title to the main land as such administrator. In the circumstances, an appreciation of the rights and limitations of the different stakeholders or interests in the suit land dictates that the court extends its consideration beyond Section 180 of the Succession Act and also considers the other provisions of the law relevant to the subject. Of particular significance is Section 25 of the Succession Act which provides as follows:

> ***"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."* [Empasis added]

The import of the underlined words is that the distinguishing feature of the title conferred upon a holder of letters of administration is that of a "***trustee***" while the beneficiaries of the estate of the deceased are conferred the title "***beneficiaries***". As such, when Section 180 of the Succession Act is read alongside Section 25 of the Succession Act, it becomes apparent that two distinct titles or interests were simultaneously created in the same land upon the grant of the letters of

administration to the deceased's estate to the 1st respondent. The first title is the legal title to the property which was vested in the 1st respondent in trust for the beneficiaries of the deceased's estate. The second title is an equitable title termed as *"beneficial interest or estate"* in favour of the beneficiaries of the estate of the deceased in whose trust the 1st respondent holds the land. The two interests are distinct and recognized by the law of trusts and administrators.

This leads to the next question, can a beneficiary sell or otherwise assign his or her beneficial interest without the consent or authorisation of the trustee or the holder of letters of administration?

The Succession Act does not set out the detailed rights and restrictions arising from the trust relationship created between the administrator of the deceased's estate and the beneficiaries by section 25 of the Succession Act. As such, resort must be made to the English common Law and principles of equity.

The legal position is stated in ***Volume 48, Halsbury's Laws of England, 4th edition, Butterworths, London, 1984, page 349 – 350*** thus:

> ***"[paragraph] 626. Power of alienation****. A beneficiary under a trust possesses the same power of alienation or disposition with respect to his equitable estate or interest under the trust as a legal owner has over his legal estate or interest in the property, and he can exercise it by similar instruments and with similar formalities"*
>
> ***[Paragraph] 627. Notice to the trustee.*** *Although notice to the trustee of a disposition of an equitable estate or interest is not essential to the validity of the disposition, such notice has, as regards an equitable interest in pure personality or in the proceeds of sale of land held upon trust for sale, for many years regulated the priority of competing claimants to that interest, and, since 1925, has regulated also the priority of equitable interests in land (even though not held upon trust for sale) and in capital money arising under the Settled Land Act 1925 and the Acts superseded by that Act. Under this doctrine of priority by notice, as modified by statute, where two or more persons claim to be assignees of an equitable interest in property they are entitled as between themselves to priority in the order of time in which effective notice in writing is received or deemed to have been received."*

Said differently, a beneficiary has legal capacity to validly dispose of his/her beneficial interest without the notice or prior consent or authorisation by the holder of letters of administration. In a family setting, for the beneficiary to first seek the consent or authorization from the administrator

before disposing of or otherwise dealing with his interest is simply a mirror of mutual respect and courtesy on the part of the family or individuals involved. Unfortunately, in law, the failure on the part of the beneficiary to behave courteously and respectfully towards the administrator does not *ipso facto* render invalid the disposition.

In the matter before us, the evidence before the trial court indicated that the deceased was survived by more than one beneficiary. According to PW1 Herbert Natukunda Rwachwende, the deceased was survived by five children, namely: himself (Herbert Natukunda Rwachwende), Francis Nuwagaba (now deceased), Ruthra Agaba Kamukama (PW3), Rosebell Kyomuhendo Rwanchwende and Robert Rwanchwende. In such a situation, it is incumbent upon this court to establish, as a matter of fact, whether the portion of land which the appellant bought from the 2nd respondent (suit land) was indeed part of his inheritance or share in his father's estate. And this, in turn, boils down to whether by the time the sale took place, the deceased's land had been distributed to each beneficiary, with the consequence that the portion sold by the 2nd respondent to the appellant was part of the 2nd respondent's share in the estate of his father.

The appellant's evidence before the trial court was that the portion of land which she bought (suit land) was out of the portion given to the 2nd respondent as his share in his father's estate. This was contained in the evidence of DW1 Enoch Rutsibika and the appellant's mother, DW2 Joy Bujundira Twesheka. DW1 was the immediate neighbour to the portion sold to the appellant. He had known the Rwanchwende family and the 2nd respondent since 1990. He knew the 2nd respondent's share in his father's land (main land) as having been separated by barbed wire and boundary plants known in the local dialect as "*oruyenje*" and that the 2nd respondent was rearing cows and growing crops on it. DW1 is the one to whom the 2nd respondent first approached with a request to assist him look for a buyer for part of his land. The reason for the intended sale was that the 2nd respondent had got a new wife and wanted to start a business in Mbarara town as he could no longer survive on rearing cattle and crop farming. DW1 is the one who communicated the offer to his cousin (DW2) who, in turn, brought her daughter (the appellant) on board. DW1 and DW2 did inspect the portion to be purchased, were satisfied, and left the

finalisation of the purchase to the appellant. The Purchase agreement (exhibit DE1) described the land purchased as lying between Silver Kishunju and Enock Rutsibika. DW1 also signed as witness to the purchase agreement.

The appellant's other evidence consisted of the Affidavit of the 2nd respondent which he swore on 29th September 2004 in support of the caveat which was lodged by the appellant on the main land. The Affidavit was exhibited in evidence as "***DE9***". In the said Affidavit, the 2nd respondent stated that he was one of the beneficiaries of his late father's estate. That he occupies a portion of the main land which he got as his share after the death of his father - the same way his other brother [1st respondent] did – and he was living on it. That he had been attempting to obtain his separate title to his portion and the process of demarcation by the surveyor was complete. He then confirmed having sold a portion of his land to the appellant and receipt of the sale price of Ugx 30,000,000/=.

The last evidence of the appellant is exhibit DE10 which is a handwritten note of the 2nd respondent ostensibly addressed to court around the 16th November 2016 confirming that he sold his land to the appellant and requesting that he "*be removed from [the] case of Herbert and Dr. Dianah*". He further appealed to court that the title to the land be given to the appellant.

The 2nd respondent gave oral evidence in support of the 1st respondent's defence against the counter claim filed against them by the appellant. In the oral evidence he stated that he could not remember having sold the land to the appellant. Neither could he remember having signed the sale and purchase agreement nor the Affidavit in support of the appellant's caveat. He also stated that he did not know the properties left behind by his late father and could not recall owning land in 2004. He attributed all the aforesaid memory loss to the health problems he was experiencing. However, he stated that he was aware that the 1st respondent was the administrator of the deceased's estate. That the estate was never distributed. That it is communal land and all of them use it for cultivation and rearing animals to get an income from it. That the 1st respondent was the one using his [2nd respondent's] land and getting him money out

of it. He further stated that the price paid by the appellant was below the market price for the land purchased.

In the face of the contradiction between the oral evidence of the 1st respondent on the one hand and, on the other hand, the documents previously authored by same person in respect of the same subject, namely the Affidavit of the 2nd respondent (Exhibit DE9) and exhibit DE10, this court is enjoined to attach greater weight to the documentary evidence than the oral testimony. ***Volume 1, Sarkar's Law of Evidence in India, Pakistan, Bangladesh, Burma & Ceylon, 14th edition 1993, reprint 1997, page 924*** states the position thus:

> *"In the contradiction of oral testimony which occurs almost in every case, the documentary evidence must be looked to in order to see on which side the truth lies…Much greater credence is to be given to men's acts than to their alleged words, which are so easily mistaken or misrepresented…"*

The 1st respondent's case was that the deceased's land has never been distributed to the respective beneficiaries. In his testimony, PW1 Herbert Natukunda Rwachwende stated that he was registered on the Certificate of title of the main land in 1986. That he had not yet distributed the land and was keeping it as a family land. However, the evidence of PW1 during cross examination appeared to contradict his earlier evidence when he stated:

> *"I have my grazing land and plantation exclusively for my household. The same is true for Robert [2nd respondent]. The land is demarcated and each grazes from separate [paddocks] for each of the four children [of the deceased]… Dr. Diana is occupying part of that portion that had been given to Robert to use for his survival."*

During re-examination PW1 confirmed that the 2nd respondent indeed brought a surveyor to demarcate his land. But that this was without the 1st respondent's authority.

PW1 also relied on Exhibit PE4 – Minutes of the Family Meeting held in 2000 in support of his case. In the said minutes it is stated that it was resolved during the said family meeting thus:

> *"that for purposes of keeping family property together, and the benefit of all family members, land should remain registered under the names of Herbert Rwachwende (administrator) but it should remain jointly owned by all the beneficiaries under the supervision of the same heir and administrator."*

I have reviewed the list of the members who attended the meeting at which the above resolution was passed. The 2nd respondent's name and signature is not on the said attendance list. As such, resolutions passed at the meeting cannot bind him.

Needless to add, the resolution contravened the rule against perpetuity of administration of the estates of deceased persons which is contained in sections 101 and 278(1) of the Succession Act. The office of administrator is transitory and intended to enable the legal title transition from the deceased to the beneficiaries after temporarily residing in the administrator for a period not exceeding one year, unless extended by court under section 278 of the Succession Act.

The other evidence in support of the 1st respondent's case was contained in the testimony of PW2 Charity Agaba. She is a maternal cousin of the respondents and grew up with them as part of the Rwachwende family. She testified that the respondents have different homes but stay in the same homestead. That their houses are separated by a few metres. That when it comes to usage of the main land, everyone has their separate portions where they respectively graze cattle and plant crops. She confirmed that the different portions were created by agreement amongst themselves.

The last evidence in support of the 1st respondent's case consisted of the oral testimony of PW3 Ruthra Agaba Kamukama. She stated that she is one of the children of the deceased. She attended the family meeting of 05th September 2000 in which they agreed to leave the 1st respondent as the sole administrator of the deceased's estate, and to have the main land owned by the family jointly. She stated that the 2nd respondent does not own land on his own. That in July 2004 the 2nd respondent told her when he visited her in Kampala, that he had sold family land and bought a car which was later stolen from him.

After a close review of the evidence on both sides, I am satisfied, on a balance of probabilities, that at the time of sale of the suit land to the appellant by the 2nd respondent, his share out of the main land had already been defined through mutual agreement within the family, given to him and he was using it exclusively. The same applies to the 1st respondent. The different portions were definite and separate on the ground and the 2nd respondent had taken a step further by

engaging a surveyor to sub divide his portion from the rest of the main land in order to pave the way for him to obtain a separate title. The land sold by the 2nd respondent to the appellant was out of his designated share. The 2nd respondent was entitled to sell his land as a beneficiary thereof. He exercised that right in favour of the appellant. This was to the chagrin of the 1st respondent and his sister, PW3 Ruthra. They appear not to have come to terms with the reality that even if the 2nd respondent was their younger brother and depended on them in several aspects, the law still respected his decisions with regard to his beneficial interest in their father's estate. Matters appear to have been made worse by the events that unfolded after the sale. After losing the land through its sale to the appellant at a price which his siblings thought was below the market price, the 2nd respondent appears to have lost both the money and vehicle he got from the sale. Instead of the 2nd respondent's siblings allowing him to take responsibility for the adverse consequences of his decision, they sought to enlist court in their scheme. This cannot be allowed by this court. Accordingly, the appeal succeeds.

Remedies

I would allow the appeal in the terms set out in the Lead Judgment. However, I desire to make some additional remarks about the remedies of specific performance and costs in the context of this case.

Order of specific performance

I note that since the suit land is part of the main land whose certificate of title is still registered in the name of the 1st respondent, then the appropriate person to execute the actions and deeds needed to achieve the purpose of the court order of specific performance is the 1st respondent. Such actions and deeds include signing mutation forms and transfer forms in the appellant's favour and delivering the same to the appellant, together with the Certificate of Title, to enable the appellant to acquire a separate title to the land she purchased from the 2nd respondent (suit land). The 1st respondent as the registered proprietor of the main land and administrator/trustee owes this duty to the appellant as an assignee of the beneficiary following the purchase of the

suit land from the 2nd respondent. This duty is summarised in ***Volume 48, Halsbury's Laws of England, 4th edition, Butterworths, London, 1984, page 350 thus:***

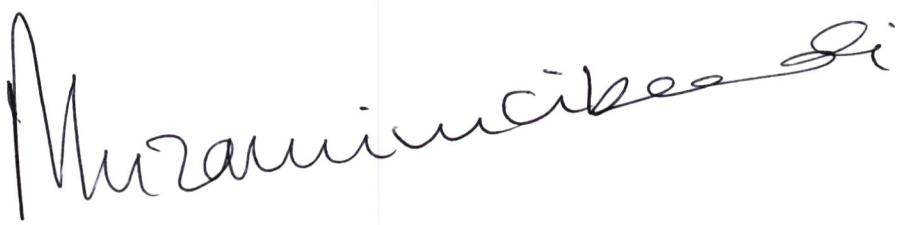
> ***"[Paragraph] 628. Trustee's duty towards assigns and incumbrances.*** A trustee stands in the same fiduciary relation and has the same duties towards the assigns of a beneficiary or towards persons in whose favour a beneficiary has given a charge on the same property as towards the beneficiary himself."

It is in that context that I agree that this is a fit and proper case for this court to grant the order of specific performance in the terms set out in the Lead Judgment.

Costs of the appeal and cross-appeal

The evidence before the court is that the parties to this appeal and cross-appeal are neighbours. The animosity and hostility generated by the litigation involving these neighbours is the very antithesis of what neighbourhood entails. As such, awarding costs in such a situation would inevitably exacerbate the hostility between the neighbours. The order as to costs as proposed in the Lead Judgment becomes appropriate in the circumstances so as to assist the neighbours bury the rather ugly history between them and embark on the healing journey.

Delivered and dated at Kampala this ...2nd.....day of .....November....., 2023.



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MUZAMIRU MUTANGULA KIBEEDI
Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Bamugemereire, Kibeedi and Gashirabake, JJA)

CIVIL APPEAL NO. 81 OF 2020

DR. DIANA KANZIRA:: APPELLANT

VERSUS

1. HERBERT NATUKUNDA RWANCHWENDE

2. ROBERT TUKUMUHABWA RWANCHWENDE::RESPONDENTS

JUDGMENT OF CHRISTOPHER GASHIRABAKE, JA.

I have had the benefit of reading in draft the judgment of Hon. Lady Justice Catherine Bamugemereire, JA.

I concur with the judgment and the orders proposed and I have nothing useful to add.

Dated at Kampala the ..2nd.... day of ..November.....2023.

Christopher Gashirabake

JUSTICE OF APPEAL.