

5 **THE REPUBLIC OF UGANDA**

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: C. Bamugemereire, M.M. Kibeedi & C. Gashirabake, JJA]

CIVIL APPEAL NO. 18 OF 2012

10 **1. JOHN SSINABULYA**

2. DEZIRANTA NANNONO

3. IVONA NANZIRI..... APPELLANTS

VERSUS

15 **1. JOHN LUBEGA**

2. ANNENT NAMPUNTARESPONDENTS

20 **JUDGMENT OF THE COURT**

Introduction

25 1] This appeal has had a checkered history. This is the third time it has been heard. On 13.06.2013, S.B.K. Kavuma JA, Nshimye JA, and Remmy Kasule JA heard this appeal. However, Justice Nshimye was elevated to the Supreme Court before the Judgment was delivered. Subsequently, on 05. 12.2017, the appeal was again heard. However, before the Judgment could be signed Remmy Kasule JA retired from service as a Justice of the Court of Appeal. However, the judgment on record, Civil Appeal No. 18 of 2012 and dated 25th March 2019, was signed by Kenneth Kakuru JA and Geoffrey Kiryabwire JA and delivered by the Registrar of the Court of Appeal.

30 2] The present Respondent was dissatisfied with the decision of the Court and appealed to the Supreme Court on several grounds but among them was the

5 fact that the Coram was not complete when only two justices signed the judgment.

3] The Supreme Court heard the appeal and made its determination on the issue of the Coram of the Court of Appeal. The Supreme Court found that the Coram was not complete and set aside the decision of the Court of Appeal in Civil
10 Appeal No. 18 of 2012. The Supreme Court ordered that the appeal be heard afresh by this Court, hence this appeal.

4] On the 25th of November 2022, the current panel was constituted. The appeal was reheard and counsel for the Appellant adopted their submissions made on 13th June 2013 whereas the Respondent's counsel filed fresh submissions to
15 which the Appellant Counsel rejoined. It is based on those submissions that this Judgement has been written

Background facts

5] The dispute in this appeal concerns Mailo Land at Buye, Ntinda in Kampala comprised of Kyadondo Block 216 Plots 1218, 3960, and 3961 (hereinafter
20 called "the suit land"). The suit land was previously owned by and registered in the name of the late Yozefu Bukonya who had no children and died intestate on 13 November 2007. In High Court Administration Cause No. 2072 of 2007, Petolalina Nabulya, widow of the deceased, was appointed sole administrator and in that capacity, she was registered under Section 134 of the
25 Registration of Title Act.

6] On 9th September 2008, the said Petolalina Nabulya died testate at Rubaga hospital. The Appellants as executors named in her will, applied and were granted probate to her estate by the High Court on 29th October 2008. Thereafter, the Appellants caused themselves to be registered as proprietors
30 of the suit property under Section 134 of the Registration of Titles Act.

- 5 7] The Respondents resisted the occupation of the suit property by the late
Petolalina Nabulya and the Appellants. In January 2008, the Respondents and
another entered the land and forcefully started collecting rent which as of
March 2009 stood at Shs. 78, 525, 000/=. This prompted the Appellants to file
H.C.C.S No. 78 of 2009 seeking the eviction of the Respondents and another
10 from the suit land, a permanent injunction, general damages for trespass, and
interest thereon at the rate of 25%p. a from the date of Judgment till payment
in full and costs of the suit.
- 15 8] At the trial, the Respondents and the late Namputa (defendant at the trial) filed
a defence and counterclaim seeking cancellation of the Appellants' (plaintiffs
at the trial) registration on grounds of fraud.
- 20 9] The facts of the counterclaim were that John Lubega (the Respondent) is the
son of Benedicto Yiga who is a paternal nephew to Yozefu Bukunya (hereafter
called "the deceased") of the Ngabi (Bushbuck) clan being the son of the late
Joseph Wamala, a brother to the deceased. Namputa is a sister to the deceased.
The deceased was the customary heir to their father, the late Yozefu Mivule
Mitawana whose residence became the family home of his lineal descendants
located on the suit land at Bbuye estate, L.C.1 Bukunya zone, Bukoto II parish
Nakawa division in Kampala District. It was alleged that the deceased was not
married to Petolalina Nabulya and never produced a child with any woman
25 throughout his life due to impotence and because of the said disability
occupied the said family home with the late Petolalina Nabulya as his
housemaid until his death. The Appellants (defendants in the counterclaim)
denied any cause of action against them by the Respondent and the late
Namputa (plaintiff in the counterclaim).
- 30 10] The High Court found that the first and second Respondents were not
trespassers since there were relatives of the late Yozefu Bukunya. The trial

5 Judge also found that the late Petolalina Nabulya was married to the late
Yozefu Bukenya for 57 years. He however found that it was not proper for
Petolalina Nabulya to have the estate of the late Yosefu Bukenya registered in
her names alone when he had surviving relatives.

11] Dissatisfied with the Judgment and orders of the trial Court the
10 Respondents appealed to this court on the following grounds;

1) *The learned trial Judge erred in fact and law when he held that since the
Respondents, according to evidence on Court record, were relatives of
the late Yosefu Bukenya, they were not trespassers on the suit property
that belonged to their late relative.*

15 2) *The learned trial Judge erred in fact and law in holding that since the
Respondents were blood relatives to the late Yosefu Bukenya, they were
not strangers to his estate.*

3) *The learned trial Judge erred in fact and law to hold that the late
Petolalina Nabulya as administrator of the estate of the late Yosefu
20 Bukenya distributed the entire estate to herself when it was evident that
some of the estate was never distributed.*

4) *The learned trial Judge erred in law to hold that the Respondents who
were among blood relatives of the late Yosefu Bukenya were entitled to
a share of his estate.*

25 5) *The learned trial Judge erred in law and in fact in holding that Petolalina
Nabulya's Will giving the suit properties to the Appellants was null and
void and that the subsequent rights arising out of that Will to the
Appellants are also null and void.*

6) *The learned trial Judge erred in law in holding that the Appellants'
30 registration on the certificate of Title of the suit properties was
fraudulent.*

7) *The learned trial Judge erred in law and fact in holding that the late
Petolalina Nabulya sold part of the estate to one Gideon Akangasira at
Shs. 42,000,000/= and that if that was so, as a widow and beneficiary of*

5 *the estate of the late Yosefu Bukenya, that was her only share from the estate.*

8) *The learned trial Judge erred in law in dismissing the Appellants' suit with costs.*

10 *9) The learned trial Judge erred in law in entering judgment for the Respondents on the Counterclaim and granting the various orders as detailed in the Judgment in favour of the Respondents.*

It is proposed to ask this Honorable Court for Orders that:

15 *a) The judgment and orders of the High Court, save the finding that the late Petolalina Nabulya was a widow of the late Yosefu Bukenya, be set aside.*

b) This appeal be allowed with costs in this Court and the High Court.

c) The Appellants be awarded the following reliefs:

20 *i. Payment of Shs. 78, 525,000/= with interest thereon at the rate of 25% p.a computed from March 2009 until payment in full.*

ii. Eviction of the Respondents from the suit land.

25 *iii. A permanent injunction restraining the Respondent whether by themselves, their agents, or workmen from trespassing on the suit property, collecting rent therefore, or otherwise interfering with the Appellants' tenants and possession of the suit land.*

30 *iv. An order that within 15 days from the date of judgment, the Respondents furnish the Court, with a copy to the Appellants, with a comprehensive account inclusive of tenancy agreements and receipts of all rent collected from the suit properties since the Respondents started collecting rent to enable Court to determine the full rental amount due to the Appellants and make consequential orders of payment of the outstanding balance.*

- 5 3) *The learned trial Judge erred in fact and law in believing John Ssinabulya (PW3) evidence that the persons he named in his witness statement accompanied Yozefu Bukenya at the alleged introduction and marriage ceremonies but failed to call them to appear in Court as witnesses for cross-examination in support of the allegations.*
- 10 4) *The learned trial Judge erred in fact and law to believe John Ssinabulya's (PW3) evidence concerning the four (4) letters allegedly written by Yozefu Bukenya to Petolalina Nabulya's parents but failed to produce the same in Court as exhibits for cross-examination, which omission breached the cardinal rule against "hearsay evidence."*
- 15 5) *The learned trial Judge erred in failing to find, as he should have that as none of Yozefu Bukenya's blood brothers and sisters including the 2nd Respondent who is still alive, attended the alleged memorable introduction and marriage ceremonies as witnesses to grace the two (2) historical occasions following the native law, custom, culture and tradition of the*
- 20 *Ganda tribe their none attendance strongly suggests that the introduction and marriage ceremonies never took place as alleged.*
- 6) *The learned trial Judge erred in law and fact to hold, as he did that Petolalina Nabulya was Yozefu Bukenya's wife on the basis of an unregistered power of Attorney dated 21.5.1996 (EXH.P1) which S.L. Lutakome Advocates (PW4) told Court was personally instructed by*
- 25 *Yozefu Bukenya to prepare citing Petolalina Nabulya as his " Wife" whereas in her affidavit –in reply dated 8.2.2008 PARA 20 on P. 105 of the record of appeal Petolalina Nabulya told the family division of the lower Court that Yozefu Bukenya was sick for more than twenty (20) years and could not move out from the House unaided, which fact shows that due*
- 30 *to his disability, Yozefu Bukenya never visited S.L Lutakoome's chambers in 1996 to give personal instructions to the Advocate as alleged.*
- 7) *The learned trial Judge erred in law and fact when he failed to believe the evidence of an independent witness and a man of God, Edward Ssekabanja (DW1) at PP.125 -130 of the record of appeal who testified to*
- 35

5 *the effect that Yozefu Bukenya told him that he could not be married to*
Petolalina Nabulya due to his impotence which evidence was corroborated
by the evidence contained in paragraph 3,4,5 and 6 of the 1st Respondent's
affidavit in rejoinder dated 14.2.2008 (EXH.P.8) at PP. 177-178 of the
10 *record of appeal, that Yozefu Bukenya was married in church at Nsambya*
Catholic Parish in 1943 but the wife died in 1990. Hence, if he had been
sexually active since 1990 upon the death of his wife, he could have
converted the alleged customary marriage, with Petolalina Nabulya into
a valid Church Marriage, but did not (Even on his death bed) due to his
15 *impotence, which evidence is further confirmed by Francis Ssenkindu*
(DW4) in paragraph 5,7 and 8 of his affidavit – in reply dated 17.9.2010
at PP1-4 of memorandum of the cross- appeal.

8) *The learned trial Judge erred in law and fact in relying upon a letter dated*
4.12.2007 containing false information as P.90 of record of appeal
obtained from the Chairman LC1 Ssempagala Zone, Bukoto II Parish,
20 *Nakawa Division where Yozefu Bukenya ever resided introducing*
Petolalina Nabulya to the register family Court division as the "widow"
of Yozefu Bukenya, instead of obtaining the letter from the Chairman
Francis Ssenkindu (DW4) L.C.1 Bukenya Zone, Bukoto II Parish, Nakawa
Division where Yozefu Bukenya was a resident throughout his life.

25 **Representation**

13] When the appeal came up for hearing on the 23rd November 2022, the
Appellants were represented by Mr. Peter Mukidi Walubiri. The Respondents
were represented by Mr. Erick Kiyingi and Mr. John Bosco Mudde.

Submissions by Counsel for the Appellants

30 14] We shall consider the submissions on all the grounds jointly.

15] Counsel submitted that under Succession Act, Cap 162 which was the
law in force at the time of Yosefu Bukenya's death on 13.11.2007 and at the
time Petolalina Nabulya transferred some of the suit properties to herself as
the sole administrate, that is 15.1.2008 and later as beneficiary 16.6.2008, the

Respondent was not a lineal descendant, dependent relative legal heir or customary heir of the late Yosefu Bukenya to be entitled to a share in the estate.

16] Counsel argued that the claim by Respondent Namputa that she is the descendant of Mr. Yosefu Bukenya is not credible in law. He argued that the Respondent was a descendant of Yosefu Mivule Mitawana. The estate in dispute is for Yosefu Bukenya.

17] Counsel further submitted that the Respondent did not plead that he was a dependent relative of the late Yosefu Bukenya nor did he lead any evidence to that effect, as he cannot lay a claim in this direction.

18] Additionally, counsel submitted that the Respondent had no known interest in the suit property. He prayed that this Court finds the Respondents trespassers on the suit land. He cited the case of **Justine EMN Lutaaya Vs. Stirling Civil Engineering Company Ltd., Civil Appeal No.11 of 2002.**

19] As regards distribution of the Yozefu Bukenya's estate, counsel submitted that Petolalina Nabulya as the sole beneficiary of the husband's estate had only distributed three properties while the rest still remained in the names of Yozefu Bukenya.

20] As regards whether Petolalina Nabulya fraudulently acquired the property of Yosefu Bukenya, counsel argued that this was not founded by evidence. He submitted that Petolalina Nabulya as a customary wife cannot be held to have acquired the property fraudulently. This also applies to the Appellants who acquired good title from their predecessor.

21] Counsel submitted concerning the sale, that there was no proof that there was a sale by the Late Petolalina Nabulya.

22] Regarding the cross appeal, counsel submitted that the trial Judge properly held that Petolalina Nabulya was the wife of the late Yozefu

5 Bukunya. He prayed that the cross appeal should be dismissed for lack of merit.

Submissions by Counsel for the Respondent

23] Counsel submitted that the trial Judge was right in finding that the
10 Respondents were related to the late Yozefu Bukunya and hence Collateral descendants with the right to a share in his estate within the lines or degrees of consanguinity as provided under section 21 (1) and (2) of the Succession Act.

24] Counsel submitted for the Respondent that the evidence pertaining to
15 his relationship with the late Yozefu was unchallenged by the Appellant. Counsel further argued that the law for distribution of an estate in case of death of an intestate is section 27 of the Succession Act as amended. Counsel submitted that the late Petolalina Nabulya does not meet the legal requirements of a widow under the Ugandan law as such she was not entitled
20 to the share in the estate of the late Yosefu Bukunya.

25] Counsel also submitted that it was erroneous for Petolalina Nabulya to will away the entire property to her own relatives in total disregard of the Yozefu Bukunya's relatives.

26] As regards fraud, counsel submitted that the actions of the late
25 Petolalina Nabulya registering herself on the certificate of title in the presence of a caveat were not innocent acts and they are indicative of fraud and illegality.

27] In response to ground seven, counsel submitted that there was proof of sale of land to Gideon Akangasira. Counsel argued that what Petolalina sold
30 was her share in the suit property and has no claim as a beneficiary to the estate.

28] Regarding the cross appeal counsel submitted that there was no subsisting marriage between the late Petolalina Nabulya and the late Yozefu Nabulya.

Submissions in rejoinder.

29] In response counsel submitted that there was clear evidence that the late Petolalina Nabulya was married to the late Yosefu Bukenya in the late 50s and at that time the Respondents were not yet born.

30] Counsel argued that according to the definition of who a lineal descendent is, under section 20(1) and (2) it does not include sister, nephew, or nephew's son, the relationship the Respondents claimed to have with the late Yozefu Bukenya.

31] Counsel argued that the claim by the respondent that he was a collateral descendant or collateral consanguinity under section 21 of the Succession Act Cap 162 and a Customary heir is a departure from the pleadings. Counsel cited the case of **Interfreight Forwarders (U) Ltd Vs. East African Development Bank, S.C.C.A No. 33 of 1992**

32] Additionally, it was argued that the Appellant a collateral descendant can only be entitled to a share in the estate under section 27 of the Succession Act Cap 162 if the deceased is not survived by a wife. In this case, counsel argued that the Yosefu Bukenya was survived by a wife Petolalina Nabulya.

33] Furthermore, counsel argued that if the first respondent is found to be a customary heir of the late heir Yozefu Bukenya, then he would be only entitled to 1% of the estate.

34] On fraud counsel argued that there was no evidence led at the trial by the Respondents to prove fraud against the Appellants herein or late Petolalina Nabulya.

Consideration by Court

35] It is the duty of a first appellate Court to review and re-evaluate the evidence before the trial Court and reach its own conclusions, taking into account of course that the appellate Court did not have the opportunity to hear and see the witnesses testify. See **Rule 30(1) (a) of the Court of Appeal Rules and Pandya vs R [1957] EA 336; Ruwala vs. Re [1957 EA 570; Bogere Moses vs Uganda Cr. App No. 1/97(SC); Okethi Okale vs Republic [1965] EA 555; Mbazira Siragi and Anor v Uganda Cr App No. 7/2004(SC)**. I shall do so accordingly.

15 36] Grounds 1,2,3,4,5 and 6 of the appeal can be determined by resolving the issue as to whether or not the Respondents were beneficiaries to the estate of the late Yozefu Bukenya of Bbuye-Ntinda.

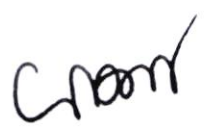
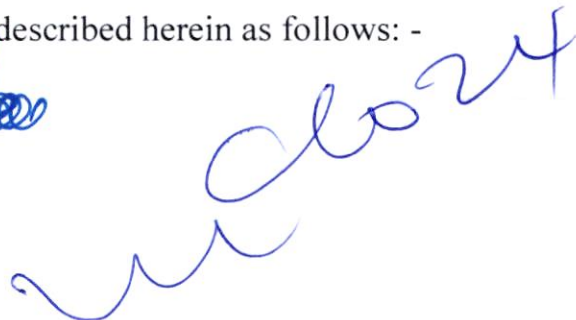
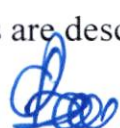
37] We will therefore first consider whether or not the Respondents were beneficiaries of the estate of the late Yozefu Bukenya.

20 38] The Plaintiffs' exhibit P.8 is a petition for letters of administration of the estate of the late Yozefu Bukenya of Bbuye – Ntinda by Anent Nampunta, the 2nd Respondent herein, (deceased) Lubega John the 1st Respondent herein and one Iga Benefasio.

25 39] In that petition which was dated 2nd February 2009 and was received at the land division of the High Court on the same day describes the Respondents herein in relation to the late Yozefu Bukenya as follows: -

"that your petitioner is the sister of the deceased, that your second and third petitioner are the sons of the deceased's nephews and the deceased's nephews respectively."

30 40] The above important factor was not pleaded in the written submissions of the defence. Under paragraph 5 subsection A of the written Statement of defence, the Respondents are described herein as follows: -



5 *"The defendants are some of the surviving lineal descendants of the late Yozefu Mivule Mitawana (called the grandfather) the father of Yozefu Bukenya (called the deceased) of 'NGO' (Leopard) clan"*

41] It appears from the judgment that the trial Judge appears to have accepted the evidence adduced in Court in respect of the Respondent's relationship with the deceased, although the same had not been specifically pleaded. The written Statement of defence in our view ought to have specified the exact relationship between the Respondents and the deceased Yozefu Bukenya in line with the provisions of section 27 of the Succession Act, showing thereby, that both or any one of them was entitled under the above law to a share in the deceased's estate. Without bringing themselves within the ambit of Section 27 of the Succession Act, the Respondent's counter would be unsustainable for lack of locus standi.

42] We therefore have to ascertain whether or not the Respondent or anyone of them is a beneficiary of the estate of the late Yozefu Bukenya under Section 27 of the Succession Act.

27. Distribution on the death of a male intestate

(1) Subject to sections 29 and 30, the estate of a person dying intestate, excepting his principal residential holding, shall be divided among the following classes in the following manner—

(a) where the intestate is survived by a customary heir, a wife, a lineal descendant, and a dependent relative—

(i) The customary heir shall receive 1 percent;

(ii) the wives shall receive 15 percent;

(iii) the dependent relative shall receive 9 percent;

(iv) the lineal descendants shall receive 75 percent of the whole of the property of the intestate, but where the intestate leaves no person surviving him capable of taking a proportion of his property under paragraph (a)(ii) or (iii) of this paragraph, that proportion shall go to the lineal descendants;

5 (b)where the intestate is survived by a customary heir, a wife and a dependent relative but no lineal descendant—

(i) The customary heir shall receive 1 percent;

(ii)the wife shall receive 50 percent; and

10 (iii)the dependent relative shall receive 49 percent, of the whole of the property of the intestate;

(c)where the intestate is survived by a customary heir, a wife or a dependent relative but no lineal descendant—

(i) The customary heir shall receive 1 percent; and

15 (ii)the wife or the dependent relative, as the case may be, shall receive 99 percent, of the whole of the property of the intestate;

(d)where the intestate leaves no person surviving him, other than a customary heir, capable of taking a proportion of his property under paragraph (a), (b) or (c) of this subsection, the estate shall be divided equally between those relatives in the nearest degree of kinship to the intestate;

20 (e)if no person takes any proportion of the property of the intestate under paragraph (a), (b), (c) or (d) of this subsection, the whole of the property shall belong to the customary heir;

(f)where there is no customary heir of an intestate, the customary heir's share shall belong to the legal heir.

25 (2)Nothing in this section shall prevent the customary heir from taking a further share in the capacity of a lineal descendant if entitled to it in that capacity.

(3)Nothing in this or any other section of this Act shall prevent the dependent relatives from making any other arrangement relating to the distribution or preservation of the property of the intestate provided that the arrangement is sanctioned by the court.

30 43] The Respondents in their written submission of defence contended that they are the deceased's lineal descendants. Lineal consanguinity is defined under Section 20 of the Succession Act as follows: -

20. Lineal consanguinity

35 (1)Lineal consanguinity is that which subsists between two persons, one of whom is descended in a direct line from the other as between a man and his father, grandfather,

5 *great-grandfather and so upwards in the direct ascending line, or between a man, his
son, grandson, great-grandson and so downwards in the direct descending line.*

*(2) Every generation constitutes a degree, either ascending or descending; a man's father
is related to him in the first degree, and so likewise is his son; his grandfather and
10 grandson in the second degree; his great-grandfather and great-grandson in the third.*

44] It appears from this Section that a sister is not considered a lineal
descendant of her own brother as she does not descend from him. A son of a
deceased nephew or deceased's nephew is not a lineal descendant, under
section 20 of the Succession Act. The holding by the learned trial Judge on
15 page 7 of his judgment that: "*since the first and second defendants are according to
the evidence on Court record relatives of late Yozefu Bukenya, they cannot be taken as
trespassers on the suit property that belonged to their relative, the late Yozefu Bukenya,*"
had no basis at law.

45] In his submissions on Appeal the Respondent introduced a new claim
20 that he had a collateral relationship with the Late Yozefu Bukenya. A
Collateral relationship is defined in Section 21 of the Succession Act as
follows: -

21. Collateral consanguinity

*(1) Collateral consanguinity is that which subsists between two persons who are
25 descended from the same stock or ancestor, but neither of whom is descended in a
direct line from the other.*

*(2) For the purpose of ascertaining in what degree of kindred any collateral relative
stands to a person deceased, it is proper to reckon upwards from the person
deceased, to the common stock, and then downwards to the collateral relative,
30 allowing a degree for each person, both ascending and descending.*

46] This was neither pleaded in the Respondent's Written Statement of
defence nor was it raised in the Memorandum of appeal. This offends **Rule**

5 **102 (1) of the Judicature (Court of Appeal Rules) Directions SI 13- 10,**
which provides thus: -

At the hearing of an appeal in the court—

*(a) no party shall, without the leave of the court, argue that the decision of the High Court should be reversed or varied except on a ground specified in the memorandum of
10 appeal or in a notice of cross-appeal, or support the decision of the High Court on any ground not relied on by that court or specified in a notice given under rule 93 of these Rules;*

47] The above position of the law has been canvassed in several cases before this court, including the case of **Sukuto Ali Vs. Augustine Kapkwanyango and two others Civil Appeal No 117 of 2012**, the Court
15 held that;

*“the record of appeal shows that the issue of the 3rd Appellant’s Counter Claim was not a ground of appeal before the first appellate Court or this Court. Similarly, the appellate claim to adverse possession of the suit land were not raised at the trial
20 Court neither was it a ground of appeal to the first appellate Court or this Court as a second appellate Court. This offends rule 102(a) of the Rules of this Court, which prohibits the raising of new grounds or arguments on appeal save with leave of the Court.”*

48] The respondent did not seek leave of Court to argue his claim as a
25 collateral descendant. It is settled law that obtaining leave of court is not merely a procedural matter but an essential step as was held in the case of **Dr. Sheikh Ahamed Mohamed Kisuule Vs. Green Land Bank (In Liquidation) SCCA No, 11/2010**. For this reason, we see no reason of considering the fresh arguments raised by the respondent that he is a collateral descendant.
30

49] That notwithstanding, it has to be noted that not every relative of the deceased person is entitled to a share of his or her estate, this is because those entitled are only those set out in the law. The learned trial Judge concluded

5 the late Yozefu Bukenya had relatives having reproduced an excerpt from the late Petolalina Nabulya's application for letters of administration of the late Yozefu Bukenya in which she stated that the said Bukenya had no children but is survived by the following relatives.

1. Petolalina Nabulya - widow
- 10 2. John Lubwama - aged 30 years of age
3. Charles Namitindi Sajjabi - male aged 30 years.

50] The above statement does not prove in any way that the Respondents are lineal descendants of the deceased. The relationship between the deceased and the two male relatives named in the petition above is not indicated, and as
15 such it could not be assumed. Even if the relationship had been set out in the petition that in itself would not be proof that indeed the named persons are lineal descendants of the deceased unless the relationship was such that it fell under the persons described in Section 20 of the Succession Act as lineal descendants.

20 51] The assumption that any of the relatives of a deceased person who dies intestate leaving no child are entitled to a share of his estate has no basis at law. Section 27 of the Succession Act sets out clearly which of the deceased relatives are entitled to a share of his estate and as such those who are not set out in the law are not entitled.

25 52] In this regard therefore we find that the Respondents had no *locus standi* to bring the counter claim as they were not beneficiaries to the estate of the late Yozefu Bukenya, except that the first Respondent would be entitled to share of the estate upon proof that he was indeed his customary heir.

53] The Respondents could only have qualified as beneficiaries to the estate
30 of the late Bukenya, had they in their defence and counterclaim pleaded that they were dependent relatives, within the meaning of the Succession Act.

5 They did not. No evidence was adduced to prove that they were dependant
relatives. In their own petition for letters of administration of the said estate,
they did not contend that they were dependent relatives of the late Yozefu
Bukunya. The relevant parts of the said petition have already been reproduced
above. Neither did they nor in their Written Statement of Defence did any one
10 of the Respondents contend let alone show that he or she was a customary
heir. Furthermore, none of the Respondents claimed in their application for
letters of administration of late Yozefu Bukunya to be his customary heir.

54] The learned trial Judge did not make a finding that the 1st Respondent
was the deceased's customary heir. In any event, that fact was not pleaded in
15 the written statement of defence or counterclaim, as such could not have been
proved. There was not even any attempt to prove this fact by evidence the
deficiency in pleading notwithstanding.

55] Even if it had been proved by evidence that the first Respondent was a
customary heir to the deceased Yozefu Bukunya that in itself would have had
20 little significance in the determination of the suit, as the land belonged to the
estate of the late Petolalina Nabulya as registered proprietor and not the estate
of the Yozefu Bukunya.

56] The evidence was that Petolalina Nabulya was married to Yosefu
Bukunya. However, Yosefu Bukunya passed on before Petolalina Nabulya.
25 During their 57 years of marriage, they did not have a child. Upon the death
of Yosefu Bukunya, Petolalina Nabulya applied to the High Court for letters
of Administration of her late husband's estate, and on 09/01/2008 in the High
Court Administration Cause No 2074 of 2007, she was appointed adminstratix
of her late husband's estate.

57] As the adminstratix of the late Yosefu Bukunya's estate, Petolalina
Nabulya applied and was registered as adminstratix of Yosefu Bukunya's land

including Kyadondo Block 216 Plots 1218, 3960, and 3961. She then held the land as representative in trust of all the beneficiaries according to section 25 of the Succession Act.

58] When she was granted the Letters of administration, no one objected or challenged them in Court. Later, Petolalina Nabulya as administrator of her late husband's estate transferred the said land in her names as sole beneficiary and owner. There were no allegations of fraud and no one objected this registration. She acquired good title protected under section 59 of the Registration of titles Act. The Land was no longer part of the estate of the late Bukenya. This meant that she acquired a title that was absolute and indefeasible.

59] Section 59 of the Registration of Titles Act Cap 230 is to the effect that a certificate of title is conclusive evidence of ownership. Section 176 of the Registration of Titles Act stipulates that a registered proprietor of land is protected against an action for ejectment except for fraud. In the case of **John Katarikawe Vs. William Katwiremu [1977] HCB 187**, it was held that provisions of Section 61 (now 59) of the RTA are clear that once a person is registered as a proprietor of land, his title is indefeasible except for fraud. The fact that, the Appellants were registered proprietors under the RTA vested with the absolute and indefeasible ownership of the land in issue and that alone would be sufficient to support the action of trespass against the Respondents. See: the case of **Justine E.M.N Lutaaya Vs. Stirling Civil Engineering Company, Supreme Court Civil Appeal No. 11 of 2002**.

60] In that regard, the beneficiaries of the estate of the late Yozefu Bukenya would have had no claim whatsoever over the suit land, the fact that the suit land could have previously formed part of the estate of the late Yozefu Bukenya notwithstanding. Therefore, an action in trespass brought against

5 them by the registered proprietors was sustainable and the Court ought to have found so.

61] Indeed, had the late Petolalina Nabulya sold or otherwise transferred the suit land to a third party the Respondents would have had no right to occupy that land without first successfully challenging the title holder. As the
10 registered proprietor she had every right to deal with the land befitting to her, even when it meant to sell.

62] In the case of **Justine E.M.N Lutaaya Vs. Stirling Civil Engineering Company, Supreme Court Civil Appeal No11 of 2002**, it was held thus;

15 *"trespass to land occurs when a person makes an unauthorized entry upon land, and thereby interfere, or portends to interfere, with another person's lawful possession of that land. Needless to say, the tort is in actual or constructive possession of the land. At common law, the cardinal rule is that only a person in possession of the land has the capacity to sue in trespass."*

63] We find in this case that the Respondents having entered upon the suit
20 land and having collected rent from the suit properties on that and when it was still registered in the name of the estate of late Petolalina Nabulya, were trespassers at that time. The learned trial Judge erred when he did not find so.

64] The correct procedure in our considered view should have been for the Respondents or any other claimants to first challenge the Appellant's title to
25 the land successfully, it is only then that they would enter the land lawfully. The judgment of the High Court with all due respect legalized a wrong.

65] Be that as it may, having found that the late Petolalina Nabulya was a widow of the Late Yozefu Bukenya the trial Court ought to have ascertained her share of the estate as against what it is called "*blood relatives*". It did not.
30 Had it done so, it would have probably found that the whole estate had not been distributed and that the late Petolalina Nabulya as widow was entitled to

5 the largest share of the estate and that the suit property ought to have constituted part of her entitlement.

66] It is trite law that fraud under the Registration of Titles Act Cap 230 must be attributed to the transferee. It is not in dispute that the late Petolalina Nabulya died testate and in her will she named the first Appellant as executor.
10 Based on that Will, the Appellants obtained probate upon which they became registered proprietors of the suit land.

67] The allegations of fraud had to be strictly proved. In the case of **Kampala Bottlers Ltd Vs. Damanico (U) Ltd, Supreme Court Civil Appeal No. 22 of 1992**, the Supreme Court found that even if fraud is proved,
15 it must be attributed directly or by implication, to the transferee. Wambuzi, CJ stated on page 7 of his judgment as follows;

"Fraud must be attributable to the transferee. I must add here that it must be attributable either directly or by necessary implication. By this I mean the transferee must be guilty of some fraudulent act and must have known of such act by someone else and taken advantage of such act."
20

The learned Chief Justice goes further to state:

"Further, I think it is generally accepted that fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters"

68] We have found no basis upon which fraud in this case could be founded.

25 69] While coming to the finding that Appellant's registration as proprietors of the suit land was founded on fraud, the trial Judge stated as follows at page 13-14 of his Judgement: -

"so the plaintiffs' counsel's arguments that the defendants are strangers to the estate of late Yozefu Bukenya cannot be true."

30 *I have considered submissions by both counsel for the parties and it is not disputed that the plaintiffs are the current registered proprietors of the suit properties. What is in issue is whether the plaintiffs were lawfully registered on the suit properties. The answers to this*

5 *problem are not hard to get. According to the application for letters of administration of the estate of the late Yozefu Bukenya by the late Petolalina Nabulya, it is clear that the late Yozefu Bukenya left survivors, some of whom are named therein. Petolalina Nabulya according to the grant of letters of administration she obtained on the 09th day of January 2008 was to distribute the estate of the late Yozefu Bukenya to the beneficiaries (survivors)*
10 *of late Yozefu Bukenya. Amazingly, the late Petolalina Nabulya failed or refused or under illegal advice from her friends neglected to distribute the suit properties to the rightful beneficiaries of her husband's estate of whom she was among. What she did, the late Petolalina distributed the entire estate to herself, which was wrong. PW2, Mary Nalubega in cross examination said that the late Yozefu Bukenya's estate is not yet distributed. And*
15 *the other evidence on record confirms the aforesaid evidence. Had the late Petolalina Nabulya distributed the estate of late Yozefu Bukenya, the defendants who are among the blood relatives of late Yozefu Bukenya would have been given a share from the said estate. From the above analysis of evidence, the late Petolalina Nabulya wrongly acquired the entire eat of her late husband alone. She was being dishonest. Consequently, there is no*
20 *way she could bequeath such an estate with survivors to the plaintiffs. The said properties did not belong to her alone, thus the Will she wrote giving the suit properties to the plaintiff is null and void. And "the subsequent rights arising out of that will to the plaintiffs are too, null and void."*

70] The facts narrated above were disputed by the Appellants. However,
25 even if they were correct, they could in no way be a basis for a finding that the suit land had been transferred to the Appellant by fraud.

71] Nabulya did not transfer the said land to the Appellants. It was transferred after her death, by a grant of probate issued by the High Court, which at the time was unchallenged.

30 72] We also found that the learned trial Judge erred when he found that the entire estate of the late Yozefu had been distributed by his widow Nabulya. the evidence on record is that, indeed some of the properties remained undistributed, those properties are set out in a memorandum of appeal

reproduced earlier in this Judgment. The evidence that the said properties were not distributed was unchallenged and no specific finding to the contrary was made by the learned trial Judge in this regard.

73] We find that Nabulya was the sole beneficiary of the estate of the late Yozefu Bukenya and the entire estate vested in him upon death. In addition, there are several Court decisions to the effect that a widow is a proper person to administer the estate of her deceased spouse. See: the case of **ReKibiego [1972] EA 179 and Sarah Sebowa & 5 others VS. Peter Sebowa [1991] HCB 95.**

74] Her letters of administration were never challenged and as such there is no basis upon which fraud could be sustained in respect of the transfer of the suit land from herself as administrator to herself as a beneficiary. We find that it was within her right to transfer all the properties into her own name and to distribute them to others following her Will. We find merit in all the grounds of appeal which we are hereby allow.

75] We find no merit in the cross appeal as we satisfied that the late was indeed married to the late Yozefu Bukenya under Kiganda customary law. there was also independent evidence of the late Yozefu's lawyer, who produced an affidavit deposed by him indicating therein that Nabulya was his widow. There was also a letter from the Local Council 1 indicating that Nabulya was Bukenya's widow. The claim that Bukenya was impotent was unimpressive, as no medical report was produced or expert evidence on the issue, on the contrary, the Respondents' witnesses testified that Bukenya had at one time married another person in church and that they sired no children. Not bearing children (fertility) is not synonymous with impotence. Even if he was at the time of death, no evidence was adduced to prove the marriage was

not consummated before he became impotent. We find no merit in the cross-appeal, which is hereby dismissed.

76] It appears to us that, the learned trial Judge was persuaded to hold that 'blood relatives' have a claim to a deceased's estate under *Kiganda* customary law. But this has no basis in law, since there is written law on succession regardless of custom, see Section 15 of the Judicature Act (Cap 13).

77] The whole Judgment and order of the High Court are hereby set aside and substituted with the Judgement of this Court. The Respondent shall bear the costs here and the High Court.

78] We make the following Orders and declarations: -

- 1) *The appeal is hereby allowed and the Judgment of the High Court is hereby set aside and substituted with this judgment.*
- 2) *That late Petolalina Nabulya was the sole surviving beneficiary of the estate of the Late Yozefu Bukenya.*
- 3) *That the Appellants have the power and the right to deal with all property comprised in the estate of the late Petolalina Nabulya including all the properties formally belonging to the estate of the Late Yozefu Bukenya.*
- 4) *That the Respondents are not beneficiaries of the estate of the Late Bukenya under the Succession Act, and as such had no claim on his estate.*
- 5) *That the Respondents have at all material times been trespassers on the suit land.*
- 6) *An order of eviction is hereby issued against the Respondents in favour of the Appellants in respect of the suit property.*
- 7) *The Respondents are ordered to file a return at the High Court Family Division, on the file of late Nabulya accounting for all the monies/property received and held during the time they were in possession of the suit property and pay any monies due to the estate in High Court within 90 (ninety) days from date of this Judgement.*
- 8) *The Commissioner for Land Registration is ordered to cancel and reverse all entries made on the properties of the Late Yozefu Bukenya and Petolalina Nabulya made in compliance with the High Court Judgment and order from which this*

5

appeal arises or otherwise made after the 12th day of 2012 the date the said Judgment was delivered and registered thereon the Appellants as Administrators of the estate of the Late Petolalina Nabulya.

- 9) *The Respondent shall jointly or severally pay the costs of this appeal and those at the High Court.*

10

Dated at Kampala this..... day of 2024.

.....
Catherine Bamugemereire

JUSTICE OF APPEAL

15

.....
Muzamiru Kibeedi Mutangula

JUSTICE OF APPEAL

.....
Christopher Gashirabake

20

JUSTICE OF APPEAL