THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CV-CA-0027-2009
(FROM MBALE CIVIL SUIT NO. 0033 OF 2008)

1. **SOLO DAVID**
2. **MUTOTO MOSES..…..……..APPELLANTS**

VERSUS

1. **PAGALI ABDU**
2. **TUKEI ANTHONY…….……..……RESPONDENTS**

BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN

JUDGMENT

This appeal arises out of a ruling and orders of the Magistrate Grade I Mbale on a preliminary objection challenging the *locus standi* of the plaintiffs in the lower court to institute a suit concerning the residue of the estate of an intestate before being granted letters of administration.

The appellants Solo David and Mutoto Moses represented by M/s Mbale Law Chambers filed this appeal against the respondents Pagali Abu and Tukei Anthony represented by Madaba Madoi & Co. Advocates. The background to this appeal is that the appellants filed CS. 33 of 2008 in the lower court for;

(1) a declaration that the disputed plot of land situate at Bwikombwa Cell, Nyanza Parish, Kamonkoli sub-county in Budaka belongs to the 2nd appellant.

(2) A permanent injunction restraining both defendants/respondents from interfering with the use of the plot in issue.
(3) General damages.
(4) Mesne profits.
(5) Interest of 25% from date of judgment till payment in full.
(6) Any other relief that court may deem fit.

The 1st Appellant Solo David is a paternal uncle to the 2nd appellant Mutoto Moses. The 2nd appellant is son to the late Christopher Takya who was killed in 1987 during the Lakwena insurgency. The first appellant is brother to the late. The late Takya was survived by a widow and 8 children and the 2nd appellant aged 25 at the time of the suit is the eldest. The late Takya left several pieces of land including a plot of land at Nyanza Cell, Nyanza parish in Kamonkoli sub-county, Budaka District. This plot neighbours one captain Mutono on one side, Sylivia Tereka on another side, Pagali Abdu on the 3rd side and the Mbale-Tirinyi highway on the 4th side.

The first appellant Solo David was appointed by the clan of the late Takya as customary heir and caretaker of the children, family, land and all properties of the estate of the late Takya. The first appellant distributed different pieces to each child of the late Takya. The plot described above was given to the 2nd appellant. At unknown time the 2nd respondent Tukei Anthony sold the said piece of land to the 1st respondent Pagali Abdu without consulting or seeking the consent of the appellants. The appellant contended that the 2nd respondent had no authority to sell the said plot without approval of the appellants hence the lower court suit.

When the case came up for scheduling conference in the lower court learned counsel for the respondents raised a preliminary point of law that the appellants had no *locus standi* to sue since none had got letters of administration to the estate of the late. Learned counsel for the respondents contended that the appellants did not sue on property in the estate basing on trespass but that the late Takya left an estate which was being administered under Bugwere custom by the 1st appellant as customary heir who held the property in trust for the beneficiaries amongst whom are the 2nd appellant and 2nd respondent. In any case the 2nd appellant processed letters of administration which were granted to him on 21.10.2008 thus getting the requisite *locus standi*. The learned trial Magistrate held that the appellants had no *locus standi* to file the suit in the first place because letters of administrations were granted after the suit was filed.

The preliminary objection was upheld and the suit was dismissed with costs hence this appeal.

In the memorandum of appeal two complaints were raised that:

(1) The learned Magistrate erred in fact and law in holding that the appellants could not sue for any rights in the land without first obtaining letters of administration.

(2) The learned Magistrate erred in law in ordering that the appellants pay costs of the respondents.

The appellants prayed that:

(i) The dismissal order be set aside.

(ii) Costs be awarded to the appellants; and

(iii) Any other order court deems fit be awarded.

Court allowed respective counsel to file written submissions. The submissions are on record and I have not found it necessary to reproduce the same in this judgment. I have however studied the respective submissions. I have studied the lower court record. I will start by dealing with the preliminary point raised by counsel for the respondents that learned counsel for the appellants did not file submissions according to the schedule given by court before judgment was reserved. That this was irregular because counsel for the appellant did not seek leave to extend time within which to file submissions as provided under O.51 r.6 CPR. That the said submissions be disregarded.

When I looked at the court record of 22.6.2010, Mr. Angura who then appeared for the appellants told court that they had never received proceedings of the lower court. He sought for adjournment to secure the record. Learned counsel for the respondent told court that the cause list showed the case was for hearing. He sought leave to file written submissions which court granted.
As the record shows, I granted a long time to the parties to file written submissions mindful of the fact that the appellants had not secured the record yet. This was intended to allow the appellants secure the record and be in time to file their submissions. However, as learned counsel for the appellants has revealed, they as new advocates did not get the record on time. They had to send a reminder for the record to the Registrar on 27.9.2010.

Since the appellant had not got the record on time as anticipated they can take advantage of S.79(3) of the Civil Procedure Act which enacts that:

> "*In computing the period of limitation prescribed by this section, the time taken by the court or the Registrar in making a copy of the decree or order appealed against and*

of the proceedings upon which it is founded shall be excluded."

I will take into account the time it took the appellants to get the record and find that the court's scheduled was dependant on the appellants' securing the record. There was no need to seek extension of time.

Reverting the grounds of appeal I am inclined to uphold the submission by learned counsel for the appellants that the ruling by the learned trial Magistrate was in error. A beneficiary of the estate of an intestate has *locus* to sue in his own name and protect the estate of the intestate for his own benefit without first having to obtain letters of administration. This was held in the Supreme Court Appeal of ***ISRAEL KABWA V. MARTIN BANOBA MUSIGA SCCA NO.52 OF 1995 [1996] KALR 109***.

It is true that under S.191 of the Succession Act no right to any part of the property of a person who has died intestate shall be established in any court of justice unless letters of administration have been granted by a court of competent jurisdiction. And according to S.192 of the Succession Act, Letters of Administration entitle the administrator all rights belonging to the intestate as effectually as if the administration has been granted at the moment after his or her death. Once court approves one as administrator of an estate in accordance with the law, it validates all legal acts prior to the grant. It is imperative that a person who has an interest in an estate takes steps to protect the said interest from vandalism even before getting letters of administration for the good of the estate. ***Israeal Kabwa*** (supra).

Once the letters of administration are granted it validates all intermediate actions relating to the estate including filing of a suit. It is not true that the lower court suit

was not on behalf of the estate, it was. The appellants had interest in the intestate's estate. The first appellant was a customary heir and the second appellant was a beneficiary.

The 1st appellant was heir under what he pleads was a Bagwere Custom. He claimed that he held the property in trust for the beneficiaries. No comment was made by the learned trial Magistrate on this important pleading. This custom ought to have been probed to make a finding if it exists and is not repugnant to acceptable values and norms and whether it is in conformity with the law. The Constitution provides that cultural and customary values which are consistent with fundamental rights and freedoms and human dignity must be respected and developed.

Ground 2

Since the lower court suit was in the interest of the estate, costs arising there from should be charged on the estate.

For the reasons I have given above, I will allow this appeal. I will set aside the lower court's dismissal order and re-instate the suit for trial before a competent court. Costs will abide the retrial.

Musota Stephen

JUDGE

21.12.2010

21.12.2010

Appellants in court.

1st Respondent in Court.

Mbale Law Chambers not represented.

Obedo on brief for Madaba.

Kimono Interpreter

Court: Judgment delivered.

Musota Stephen

JUDGE

21.12.2010