REPUBLIC OF UGANDA.

IN THE HIGH COURT OF UGANDA AT MBARARA

CIVIL SUIT NO 185 OF 2007

1. **NSAMBA HUSSEIN.**
2. **HAJJAT AFISA NSAMBA.**
3. **NABUKENYA ZAM.** **::PLAINTIFFS**
4. **MUWONGE ABDALLAH.**
5. **NTANDA MUHAMAD.**

VERSUS.

1. **HAWA KOBUSINGYE.**
2. **DR. REHEMA NAIGA.** **::DEFENDANTS**
3. **TWINE BERNARD**

BEFORE: THE HON. MR JUSTICE LAWRENCE GIDUDU

JUDGMENT

This suit arises out of a protracted dispute between some beneficiaries of the estate of the late Kassim Nsamba on one hand and the administrators and purchaser of property comprised in plot 21, Mbaguta street in Mbarara town on the other hand.

The plaintiffs are some of the beneficiaries while the 1st and 2nd defendants are co-administrators of the said estate. The 3rd defendant is the purchaser of the disputed property.

The undisputed facts of this case are that the late Kassim Nsamba died intestate in 1979.

He was survived by two widows (Plaintiff no. 2 and defendant no. 1) plus 21 children most of whom were minors at the time. The 1st, 2nd and one Edirisa Yiga (DW5) took out letters of administration which were granted on 12th February 1980 vide Administration cause 81 of 1979.

From 1996, when the beneficiaries had become of majority age, disputes naturally cropped up and the administrators were forced to distribute the property particularly plot 21 Mbaguta Street as per exhibit ‘’P 3’’.

This arrangement did not last and another distribution was done in 2007 as per exhibit "P 1" but again disagreements continued between the 1st Plaintiff and the administrators. Later in March 2007, the majority of the beneficiaries met and in agreement with the administrators, opted to sell plot 21 so that they share the proceeds to stop future wrangling.

The plaintiffs led by Hussein Nsamba (PW1) strongly opposed the idea of a sale and took out notices in the press and on the building warning intending buyers that they are opposed to the sale. The plaintiffs even put a caveat on the property forbidding any transactions until they have been notified.

Despite the plaintiffs' protestations, the 3rd defendant went ahead and paid for plot 21 Mbaguta Street. He was handed the title and the transfer forms duly signed by the administrators but his attempts to take full possession was resisted by the plaintiffs. As a result, the 3rd defendant only gets rent from tenants of those beneficiaries who consented to the sale and because of the caveat, the transfer pursuant to the sale has never been effected.

The plaintiffs filed this suit challenging the sale, while the buyer (3rd defendant) also filed civil suit 210/ 2007 against Edrisa Yiga (Co- Administrator and DW5) and the Commissioner Land registration for the removal of the caveat and refusal to register him respectively.

Apparently, DW5 who lives in UK kept shifting positions depending on what information he received from either the 1st plaintiff or the 2nd defendant.

I directed that under Order 11 rule 1 the present suit proceeds as C/S 210 of 2007 is stayed. Later during the hearing of this case, the 3rd defendant withdrew C/S 210 of 2007 on 23rd March 2009.

Attempts to conference this matter failed several times as the parties held very extreme and divergent views. I should add that the parties were very hostile to each other in open Court.

The following issues were framed before trial:

1. ***Whether or not the sale of plot 21 Mbaguta street was valid.***
2. ***Whether or not the Administrators of the estate had authority to sell.***
3. ***Whether or not the signatures of Pl. 2 and Pl.4 were forged in the minutes of the meeting of March 2007.***
4. ***Whether or not Yiga Edirisa (DW5) consented to the sale and transfer.***
5. ***What remedies are available to the parties?***

Issue no. 1

This is perhaps the main issue of contention in this case and has a bearing on all other issues. Was the said sale valid or not? If the sale was valid then the 3rd defendant is

entitled to vacant possession by the plaintiffs. If the sale was void, then the plaintiffs would be entitled to quiet enjoyment of their allocations.
Mr. Magoba, learned counsel for the plaintiffs submitted that the sale was invalid and gave four reasons in support.

Firstly, that the sale was tainted with illegalities committed by the administrators. He gave examples that the sale agreements of 16th July 2007 (exhibit D1) and that of 1st October 2007(exhibit D3) were signed among others by dead persons. He contended that any document purporting to be signed by a dead person is a forgery.
Further, that the signatures of PW6 (Mary Namatovu) and PW4 Hajjat Afisa Nsamba were forged on the agreement of 6th September, 2007(exhibit D2) while the signatures of PW6 and Sarah Ndagire(PW9) were also forged on exhibit D3. He argued that these forgeries rendered the sale agreements void.

Secondly, that on the evidence of DW10, Bernard Twine, he negotiated the purchase with DW1, Dr. Naiga Rehema and DW2, Hawa Kobusingye as individuals ignoring the other beneficiaries rendering the sale void against the rest.

Thirdly, that since other purported vendors like PW1 (Ntanda Muhamad), PW2 (Hussein Nsamba), PW3 (Nabukenya Zam) and PW6 (Mary Namatovu) did not receive consideration from the purported buyer, there was no valid contract of sale.
Fourthly, that due to misrepresentation by the administrators, the sale was invalid. He argued that PW6, PW9 and DW5 were led to believe that they were receiving rent arrears when in fact they were selling off their shares in plot 21. He contended that this rendered the transaction illegal.

In response Mr. Mugarura, learned counsel for the defendants argued that the sale was valid for the following reasons; firstly, that plot 21 was available for sale by administrators of the estate and defendant no. 3 accepted to buy it for a consideration of 320 million.

Secondly, all those who signed on behalf of the dead signed as beneficiaries.

Thirdly, that the 3rd defendant did not pose as a tenant but as a buyer and so there was no misrepresentation to the beneficiaries about rent arrears.

Fourthly, that for those who were not around, others signed for them per procuration (pp).
Fifthly, that once the administrators signed the transfer forms, then any defect was cured and the transfer of property became complete under section 95 of the RTA.
In reply, Mr. Magoba insisted that a person cannot sign for a dead person per procuration.

It is not in dispute that DW1, DW2 and DW5 were the administrators of the estate of the late Kassim Nsamba.

Under **section 270 of the Succession Act(cap 162),** administrators of an estate have powers to dispose of property of the deceased either wholly or in part as they deem fit subject to sec 26 and the second schedule regarding occupation of residential holdings. Under the law, the administrators had authority to sell and capacity to dispose of plot 21 to any purchaser if they deemed it fit.

However, the issue for consideration in this suit is whether the sale was valid. The power to sell is not in dispute but the dispute is whether the transaction passed the test of a valid sale.

It was submitted for the plaintiffs that the transaction was full of illegalities that rendered the sale null and void while the defence argued that the sale was valid and should be upheld.

It was PW2's evidence that when they became aware of the intended sale, he and others like Nabukenya Zam (PW3) and Ntanda Muhamad (PW1) protested because they did not approve of the decision to sell. They preferred to remain in their portions on the property as per distribution list (exhibit.1).

In June 2006, the 3rd defendant approached him desiring to purchase the building but he told him it was not for sale. He protested to the 2nd defendant who denied offering it for sale. Other buyers subsequently showed interest to buy but PW2 who was on the ground told them it was not for sale.

Later in March 2007 the 2nd defendant advertised plot 21 for sale at 550 million. PW2 informed the other beneficiaries about the advert in the **New vision** newspaper. They decided to put a caveat emptor in the **Monitor** and **New vision** newspapers of 27th and 28th March 2007 respectively (exhibits P4 and P5) warning intending buyers to be ware. They also put radio announcements on local radios and alerted local authorities about the dispute. The Administrator-General was also informed and responded by letter of 17th July 2007 (exhibit P6) advising that the consent of all beneficiaries be sought before the sale.

M/S Mwene-Kahima and Co Advocates, who acted on behalf of the defendants in the transaction, replied giving assurance on 20th July, 2007 (exhibitP7) that the interests of PW2 shall not be affected by the intended sale. This turned out to be a lie.

A complaint was also made to the Ministry of Lands and the Permanent Secretary responded by letter of 25th September, 2007, (exhibit P9) assuring that no registration to third parties would be made until the disputes in the family are resolved.
In the meantime the 3rd defendant was paying for the property in installments to the lawyers of the administrators. The first payment on 16th July, 2007 was for Shs. 100,000,000= as per exhibit D1. The second payment was for shs. 100,000,000= paid on 6th September, 2007 as per exhibit D2. The third payment was made on 1st October, 2007 for shs. 110,000,000= as per exhibit D3.
The agreements were drawn by two firms of advocates and they are quite confusing as to the final purchase price though it is not in dispute that the total payment was shs. 320 million.

My task is to resolve if this was a valid sale in view of the plaintiffs' protestations.
Firstly, under **section 270 of the Succession Act, Cap 162**, Administrators have power to dispose of property as they deem fit but in terms of the administration bond signed under section 259 of the Succession Act, administrators are required to file an inventory and render an account of the property and credits.
It was DW1's evidence that she distributed property comprised in plot 21 Mbaguta Street as per exhibit P3 of 1st October 1996. Later without leave of Court, DW1 again distributed the same property and filed an inventory in Court on 17th Feb 2005 vide exhibit P1.

The import of filing an Inventory in Court is that the property is disposed of and there is nothing available for further disposal without an order of Court. In my view, once the administrators filed an inventory, though belatedly, then they lost power to dispose of the same property without permission of Court.

It would require the administrators to move Court by Originating Summons seeking resolution of any issues which may have arisen after the distribution. This was not the case and what was done was without legal authority from the Court that had granted the Letters of Administration.

Perhaps I should add that the administration bond which administrators sign binds them to account to Court regularly and seek Court's guidance in the administration of estates and that is why a whole procedure in **Oder 37 CPR** is dedicated to cover this situation.

Secondly, it is conceded by the defence that when DW1 advertised the property for sale, PW2, in concert with other beneficiaries, put out notices on radio and print media warning potential buyers that the sale is contested. Even the eventual buyer (DW10) conceded that he was aware of protestations from PW2 and company but that his lawyer Mr. Mwene-Kahima asked him to ignore them and proceed to pay. Indeed Mr. Mwene-

Kahima who testified as DW11 had written exhibit P7 on 20th July 2007 assuring the Administrator-General that PW2 would not be affected by the sale. This situation when evaluated together with the caveat emptor which ran in the **New vision** and **Monitor** newspapers vide exhibits P4 and P5 respectively, clearly indicates that the buyer was fully aware of the protest to the sale by some of the beneficiaries.

Learned Counsel for the defendants asked court to note that from the meeting of 1st March 2007, the majority of the beneficiaries agreed to sale so the minority views are inconsequential.

Is it a question of numerical strength or is it a question of the legality of the transaction? With great respect to counsel, majorities may legalize an election but not a commercial transaction. In his testimony, Mr. Mwene-Kahima who was the main architect of the sale testified that they were trying to find a solution to a volatile solution and that the inventories which distributed the property were only temporary reliefs to a bigger problem. Further, it was his evidence that since the administrators had complained that PW2 and PW3 had got some money from another property on plot 37 then their interest in plot 21 was minimal and a sale could go ahead despite their protestations. This may sound well intentioned but as beneficiaries to an estate that had in fact been distributed and the inventory filed in Court, their protestations could not be ignored. The property had notices of buyer be aware and whoever went on to buy the property did so at his/her peril and cannot invoke equity to his aid because he was fully aware of all the risk.

Thirdly, the agreements of sale appear to reflect the suspicious circumstances under which the sale was executed. Exhibit D1 gives the sale price as 160 million for which 100 million was paid leaving a balance of 60 million to be paid upon transfer of the property. Exhibit D2 also puts the purchase price at 160 million with 100 paid and the balance of 60 million to be paid in April 2008.

I understand these agreements to mean that the property was being sold in bundles that is why exhibit D1 has plot 21A as the property being sold. Exhibit D3 was the final payment of 110 million as a balance. These agreements are signed by among others the beneficiaries of those who had died while DW5 had his signature signed per procuration.

Counsel for the plaintiffs criticized these signatures calling them illegal and thus tainting the sale agreements. Of course, the Law is that in order to sign for a living person, one needs a Power of Attorney while a dead person cannot be represented by a beneficiary because a dead person cannot get a share. The shares can only go to those living. They may be legal representatives of the dead but must hold valid Letters of administration in which case they would sign as vendors in their own right but not as representing dead parents. No power of attorney or letters of administration were adduced to prove the

capacities of those who signed for Yiga Edirisa, Muwonge Kassim, Hajat Afisa Nsamba, Elimia Nsamba , Naila Nsamba etc. The authenticity of the signatures of these people was not established leaving the agreements suspect.

Fourthly, the sale was challenged from the very beginning with correspondences being exchanged between the administrators and the offices of Administrator General and the Ministry of Lands vide exhibits P6,7&9. When these exhibits are evaluated together with the evidence of PW2 and PW3 which culminated in a caveat being lodged on the property vide exhibit P8, it becomes clear that the sale was illegal and this court is not persuaded to uphold such an illegality hiding under the so called majority. An illegality cannot be legitimized by majorities however convenient it may appear.

Once a caveat is lodged on a property as was the case here, no dealing in land should be made while it is in force. The person against whom it is made is supposed to cause the legal removal of a caveat in order to free the property to any deals. See section 139 of the RTA, cap 230 and the case of **Edward Musisi vrs. Grindlays Bank (u) Ltd. C.A. 5 of 1986 (Supreme Court).** No doubt DW10 has never been registered as a proprietor to date.

No notice was given to the caveators to remove the caveat and to-date, it stands rendering the agreements of sale made subsequent to the lodgment of the caveat invalid.
I would for reasons I have endeavored to give above, answer the first issue in the negative. There was no valid sale.

Issue two has been answered in my analysis above. Administrators of an estate have power to sale but in this case no power was available because an inventory was already in Court and if the administrators wanted to sale, they should have applied to court with sufficient reasons.

My holding on these two issues renders the rest of the issues redundant. The defendant no.3 (DW10) having failed to take due diligence to avoid buying a property he knew was in dispute cannot run to court and ask for remedies. He relied on DW11, who, in my view mis-advised him of the consequences of such reckless spending of colossal sums of money borrowed from the bank to invest in property which as I have found was not available for sale and even if it was available (which is not the case) the transaction was full of illegalities so as to render it a nullity.

In the result the plaintiffs' case against the defendants succeeds with the following orders.

1. The purported sale of plot 21 Mbaguta street was null and void.
2. The inventory filed in court vide exhibit P1 stands.

3. The 3rd defendant is free to negotiate the purchase of the individual interests of the beneficiaries on the willing buyer willing seller basis.
4. The parties hereto are basically children and widows of the late Kassim Nsamba. They are family members. Some of them have received money from defendant. No. 3 who already paid money rather recklessly. It would not serve the interests of justice to condemn family members into costs. It may aggravate the situation instead of healing wounds. I order the parties bear their own costs.

Lawrence Gidudu
Judge
27th January, 2012

Order.
Under Order 21 rule 2(3) CPR I direct the Assistant Registrar, Mbarara to deliver this Judgment on 30th January, 2012 since am no longer at Mbarara High Court.

Lawrence Gidudu
Judge
27th January, 2012