THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA.

[CORAM: TUMWESIGYE; KISAAKYE; ARACH-AMOKO; MWANGUSYA; MWONDHA; JJ.S.C]

CIVIL APPLICATION NO.07 OF 2015

BETWEEN

1.SOPHATIA BEITHI
2.NGOBI FRED
3.MUTAKA TOM
4.JOSEPHINE KAIRU **::::::::::::APPLICANTS**

AND

1.NANGOBI JANE
2.NANGOBI ROSE
3.IRENE WAMBI **:::::::RESPONDENTS**

[Application for leave to appeal against the decision of the Court of Appeal (Nshimye, Buteera and Kakuru, JJA)in Court of Appeal Civil Appeal No.97 of 2011.]

RULING OF THE COURT

The applicants brought this application by notice of motion for leave to file a third appeal to this court and for an order of stay of execution. The application was brought under Section 6(2) of the Judicature Act and Rules 39(1) and 42(1) of the Supreme Court Rules.

Background

The dispute which gave rise to the application arosefrom the sale of a piece of land measuring 60 feet by 198 feetsituated at Magamaga Trading Centre, in Mayuge District by the 1st applicant to the 4th applicant. The respondents who are the daughters of the 1st applicant claimed that their father had donated to them the suit land by a document that he executed on the 15/12/2000. They stated that on the same day, their fatherhad executed a similar document by which hedonated another piece of land measuring 260 feet by 600 to his sons, the second and third applicants. They stated further that the first and second respondents took possession of their share and constructed houses thereon. That they left their sister, Irene Wambi, the third respondent in occupation and as caretaker of the building. The sons on the other hand sold their share.The respondents alleged that in 2005, the 1st applicant instigated the second and third applicants and they sold off the suit land to Josephine Kairu the 4th applicant. The respondentssuccessfully challenged the sale vide Civil Suit No. 27 of 2005 in theChief Magistrates Court at Iganga. The Principal Magistrate Grade One who handled the suit gave judgment in favour of the respondents and ordered:

"(i)That suit land is the property of the plaintiffs.

(ii) The defendants or their workers and agents be restrained permanently from trespassing onto the suit land.

(iii) That general and special damages plus costs of the suit are awarded to the respondents.

(iv) That the 4th defendant is entitled to a refund of the purchase price of the suit property from her co-defendants."

The applicants' appeal to the High Court at Jinja succeeded partially and the learned Judge set aside the trial Magistrate's orders and replaced them with the following orders:

"(a) The 1st and 2nd respondent's buildings on the land shall be valued by a competent registered valuer;

(b) The 4th appellant shall pay to the 1st and 2nd respondents the value of the buildings so assessed.

(c) The parties shall each bear their advocates costs."

The respondents then successfully appealed to the Court of Appeal on the grounds that:

"1. The learned judge on appeal erred in law and in fact in finding that the giving of the suit land by the first respondent to the appellants was a bequest and not a gift inter vivos, thereby coming to a wrong conclusion.

2. The learned judge on appeal erred in law and fact when she held that the suit land is not held under customary tenure and that the appellants were therefore not protected by the Constitution and section 27 of the Land Act."

The main contest before the Court of Appeal was thus whether the 1st applicant had donated the suit land to the 1st and 2ndrespondents by way of a bequest or a gift *inter vivos*.

Counsel Rukanyangira Joseph who represented the appellants submitted that the 1st applicant gave his land to his daughters as a gift among the living, that is, *inter vivos*. It was not a bequest. He cannot therefore withdraw it.

Counsel Okalany Robert who represented the respondents before that court on the other hand, submitted that the 1stapplicantwas sick.He called his children and made a will bequeathing the land to his daughters. It was therefore a bequest and not a gift *inter vivos*.He further submitted that a person who makes a bequest can, within his lifetime, withdraw it. The daughters' developments on the land should be compensated according to the order by the High Court.

The Court of Appeal held that the High Court had not properly re-evaluated the evidence as a first appellate court. The Court of Appeal re-evaluated the evidence, and found that:

"...the gift of landwas a gift inter vivos to both the daughters and sons ...The first respondent gave his land to his children whom he clearly put in immediate possession of the land he offered to them. This having been a gift inter vivos, he had no power to revoke it. The property in the land had passed on to both the boys and the girls. He had no more power to take over the land. He could not therefore sell the land that no longer belonged to him to anybody.

The sale to the respondents was therefore null and void. They bought no land from the first respondent since he was no longer the owner of the land. They acquired no title from that sale. The fourth respondent may recover the money paid for the land from the first respondent sincehe received no consideration for it."

The Court of Appeal decided the appeal on this finding alone and allowed the appeal, set aside the orders of the High Court and made the following orders:

"(1) The suit land belongs to the first and second appellants and they should be put into possession of the suit land.

(2) The respondents shall bear the cost of this appeal and those in the lower courts."

The applicants intend to appeal to this Court against that decision and have duly lodged a Notice of Appeal. Being a third appeal, they also applied to the Court of Appeal for a certificate that the appeal concerns matters of law of great public or general importance. They applied for an order for stay of execution as well.

The specific questions the applicants intend the Supreme Court to pronounce itself on were set out in that Notice of Motion as follows:

"1. The intended appeal touches on matters of public importance and important points of law, i.e. whether there are specific circumstances under which a

testator can make a will, whether the circumstances override what the testator has written as a will.

2. Whether the express words of a will can be varied so as to turn a bequest into a gift inter vivos.

3. Whether there is a specific language for making wills in Uganda."

The Court of Appeal found that all the above questions do not raise any issues of law which were either of great public importance or of general importance as the law required. They are concerned with issues of fact. The Court of Appeal dismissed the application with costs to the respondents.

The applicants have now applied to this court seekingfor orders that:

a) The intended third appeal to the Supreme Court concerns matters of law of great public importance.

b) The Supreme Court shall hear the 3rd appeal in its overall duty to see that justice is done.

c) Execution of the judgment and orders of the Court of Appeal is stayed.

d) Costs of the suit (sic) be provided for.

Grounds

The grounds of the application are that:

1. ***The appeal concerns matters of law of great or general importance on whether there are specific circumstances under which a testator can make a will and whether such circumstances override what the testator has written.***

2. ***Whether the express words of a will can be varied to turn a bequest into a gift inter vivos.***

3. ***Whether there is a specific language for making wills in Uganda.***

4. ***The Court of Appeal dismissed the application for a certificate of importance without considering the importance of wills in our society but dealt on the merits of the intended appeal.***

5. ***The Notice of Appeal is duly filed and the appeal has a high likelihood of success.***

6. ***There is a threat of execution yet the 4th applicant is in occupation and is running a school.***

7. ***The 4th Applicant will suffer irreparable damage.***

8. ***The balance of convenience favours the 4th applicant.***

9. ***It is in the interest of justice that a third appeal is entertained as matters of making wills is of great public importance (the grounds are the same).***

Affidavits

The application is supported by the affidavits sworn by the 1st and 4th applicants on the 23rdMarch, 2015, setting out the background and the grounds thereof.

The respondents opposed the application and relied on the affidavit in reply sworn by Nangobi Rose, the2ndrespondent on the 31st, October 2016.

There are also two affidavits in rejoinder sworn by the 1st and 4th applicants on the 7th, November, 2016.

Representation

Mr. Okalang Robert represented the applicants while Mr.Rukanyangira Josephappeared for the respondents. They adopted their written submissions.

Submissions by Counsel for the applicants

Mr. Okalany submitted that it is in the interest of justice and a matter of general or great public importance for this Court to grant leave to the applicants to appeal so that the court can:

Firstly,pronounce itself on whether the express words of a will can be varied or construed in such a way as to turn a bequest into a gift *inter vivos.*

Secondly,determine whether there are circumstances where a testator's will should be upheld as a will or as a gift *inter vivos.* Counsel's contention is that matters to do with wills are of great public importance and could potentially affect any or all members

of society and unfortunately they may not be around to clarify on the intention behind the document executed.

Thirdly, ascertain whether a bequest or a donation of real/ immovable property in the contemplation of death can be a gift *inter vivos.* Counsel's contention is that under the common law, a gift *inter vivos* is a gift made between living persons while the donor is alive and not in expectation of death. (See:**Halsburys Laws of England 5th Edn. Volume 52**). The bequest/donation of the suit by the 1st applicant was made in contemplation of death and even the Court of Appeal acknowledged the same at page 2 of its judgment. Section 179 of the Succession Act also excludes immovable property from the ambit of *donation mortis causa.* Therefore in law, the donation could only be a bequest.

Lastly, ascertain and pronounce itself on what a donation of immovable property in contemplation of death amounts to in law.

Therefore, the court, in its overall duty to see that justice is done, ought to grant the applicants leave to lodge the third appeal.

Submissions by Counsel for the respondents.

Mr. Rukanyangira opposed the application. He began by raising objections concerning the affidavits of the 1st applicant. He argued that the said affidavits raise doubts about their authenticity since in previous affidavits the 1stapplicant had used thumbprints in addition to his signature.

In addition to the foregoing, Counsel submitted that the said affidavits are defective for noncompliance with the Illiterates Protection Act (Cap 78) of the laws of Uganda since they were not

accompanied by a certificate of the person who had commissioned them stating that they were read and explained to the deponent and that he appeared to understand them before pending his signature. Counsel relied on the case of **Kasaala Growers Cooperative Society V Kakooza Jonathan & Anor, SCCA No.19 of 2010** in supportof this submission**.**

Counsel prayed that the 1st applicant's affidavits should be struck out since they cannot be trusted, and this leaves the affidavits of the 4th applicant which do not provide any evidence regarding the circumstances under which the suit land was given or purportedly withdrawn.

Turning to the substantive arguments by learned counsel for the applicants, Mr. Rukanyangirasubmitted with respect to the first issue, that section 6(2) of the Judicature Act envisages two scenarios under which this court can entertain a third appeal. The first scenario is where the intending appellant either gets the certificate of importance from the Court of Appeal or leaves it to this Court in the exercise of its overall duty to see that justice is done under the second scenario. Counsel contended that the Court of Appeal had rejected the application for a certificate of importance under the first scenario, finding correctly, that the intended appeal did not concern any matter of law of great public or general importance.

He submitted that the applicants' submissions present no material that was not presented to and considered by the Court of Appeal. The applicants are repeating the same arguments that they had presented before the Court of Appeal and that court,

basing itself on the principles laid down by the Supreme Court in **Hermanus Phillipus Steyn vs Giovani Gnecchi-Ruscone, Application No. 4 of 2012,** unanimously found that the issues involved were personal to the father and his children. TheCourt of Appeal also found that the law governing wills and gifts *inter vivos* and what differentiates the one from the other is well settled as is the law regarding interpretation of documents including wills. The Court of Appeal further found that there was no lacuna or ambiguity in any of the relevant laws that should require intervention by the court. Lastly, the Court of Appeal specifically found that the matters alleged to be of public and general importance are all matters of fact and law that were restricted to the special facts and circumstances of this particular case. Counsel invited us to agree with that finding.

Regarding the second scenarioenvisaged under section 6(2) of the Judicature Act, Counsel submitted that itrequires the applicant to convince this Court that the intended appeal should be heard to ensure that justice is done. He contended that the applicants had not in any way demonstrated how their being granted leave to appeal to this Court would be ensuring that justice is done. He submitted that, on the contrary, if this Court grants the leave sought, the Court will be prolonging the injustice that the respondents have suffered by being denied the enjoyment of their property now for 11 years.Consequently this Court would not be ensuring that justice is done at all. In addition to the above,Counsel asked the court to award the respondents a sum of 198,000,000 shillings (one hundred and ninety eight million

shillings) with interest at 22% per annum as compensation for unjustly denying them enjoyment of their property for 11 years.

In conclusion he prayed that the application be dismissed with costs to the respondents.

Rejoinder by Counsel for the applicants

In his reply to the objection to the affidavits sworn by the 1st applicant,Mr. Okalany submitted firstly, that the respondents ought to have raised the issue of the signature in their affidavit in reply rather than adducing evidence in their submissions, hence prejudicing the applicants.

Secondly, he submitted that the applicant is not barred from having more than one way of signing a document and that there is no legal requirement that an illiterate person must sign with both thumb prints and signature. Lastly on this point, Mr. Okalany contended that the signatures on all the documents are similar andthe affidavits contain certificates of translation confirming that the affidavits were translated and sworn before commissioners forOath. The case of **Kasaala Growers**relied on by counsel for the respondents is therefore distinguishable from the instant one.

Regarding issue one, counsel reiterated his earlier submissions that this Court is not restricted to the decision of the Court of Appeal. The matter concerns questions of both law and mixed law and fact of great public importance which ought to be conclusively determined by Court.

On issue two, he maintained his argument that the appeal raised issues that merit consideration therefore there is a likelihood of success.

Regarding irreparable loss, he submitted that the 4th applicant denied renting out the suit premises and neither did the respondents adduce evidence to prove this allegation. He further submitted that the 4th applicant's school has never been closed for any illegality and it is operating with the knowledge and approval of the licensing authorities.

With regard to the question of compensation, Mr. Okalany argued that the respondents did not raise this as a ground in the Court of Appeal, neither did they pray for mesne profits at the trial court. To consider this point at this stage would therefore be to pre-empt the intended appeal to the prejudice of the applicants.

The law

Section 6(2) of the Judicature Act under which the application was made provides that:

"***(2) Where an appeal emanates from a judgment or order of a chief magistrate or a magistrate grade1 in the exercise of his or her original jurisdiction, but not including an interlocutory application, an aggrieved party may lodge a third appeal to the Supreme Court on the certificate of the Court of Appeal that the appeal concerns a matter of law of great public or general importance , or if the Supreme Court considers, in its overall duty to see that justice is***

done, that the appeal should be heard."(Underlining was added for emphasis)

Rule 39(1) (b) of the Supreme Court Rules provides as follows:

"(1) In civil matters----

(a)----------

(b) if the Court of Appeal refuses to grant a certificate as referred to in paragraph (a) of this sub rule, an application may be lodged by notice of motion in the court within 14 days after the refusal to grant the certificate by the Court of Appeal to the court on the ground that the intended appeal raises one or more matters of great public or general importance which would be proper for the court to review in order to see that justice is done."

It is evident that the purpose of a certificate in third appeals is to avoid unnecessary protracted litigation by sieving out matters of law of great or general public importance which require review by the Supreme Court in order to guide judicial practice through precedent. As this Court has stated in the case of **Farook Aziz Vs Abdalla Abdu Makuru. SCCA No.4 of 2002 that**:

"...the purpose of this provision(s.6) is to limit the right to lodge a third appeal to only cases where questions of great public or general importance which have far reaching consequences on the society and the general development of the law are involved....."

This Court had occasion to interpret the above provisions in the case of **Namudu Christine v Uganda, Supreme Court Criminal Appeal No. 3 of 1999** where the Court stated that:

"Under subsection (5) of section 6 (now sub section (2)), this Court will grant leave if the court, in its overall duty to see that justice is done, considers that an appeal should be heard. In other words, this court is not bound by the restrictions placed on the Court of Appeal, when that court is considering an application for a certificate. This Court of Appeal grants a certificate where it is satisfied: (a) that the matter raises a question or questions of law of great public importance; or (b) that the matter raises a question or questions of law of general importance.

On the other hand, this Court will grant leave if it considers that in order to do justice, the appeal should be heard. Anything relevant to doing justice will be considered including questions of law of general or public importance.

It appears to us that in deciding whether or not to grant leave we are not restricted to questions of law like the Court of Appeal. We have the power to consider other matters."(The underlining is added for emphasis).

The definition of the terms ***"great public importance"*** and ***"general importance"*** are not given in the Judicature Act.

We have had the opportunity to consider other jurisdictions like Kenya and England with similar laws. These jurisdictions have

gone further to give guidelines as to what may constitute matters of great public importance.

For instance, in the English case of **Glancare Teorada V A.N Board Pleanala [2006] FEHC 250**it was stated that such matters of great or general public importance include cases where:

(i) The matter goes substantially beyond the facts of the case, and the appropriate test is not whether there is a point of law, but whether the point of law transcends thefacts of the individual case;

(ii)The law in question should stand in a state of uncertainty- so that it is for the common good that such law be clarified, so as to enable the Courts toadminister the law, not only in the instant case, but also in future cases;

(iii)The point of law must have arisen out of a decision of the Court, and not from a discussion of a point in the course of the hearing.

In the **Hermanus** case(supra), the Supreme Court of Kenya, was reviewing the decision of the Court of Appeal dismissing an application for leave to appeal to the Supreme Court on matters of general public importance. That Court followed the principles in the above decision together with decisions from other varying jurisdictions and summarized some of the governing principles for grant of a certificate of importance in the case of a third appeal as follows:

(i)for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;

(ii) where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;

(iii)such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;

(iv)where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;

(v)mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of the Constitution;

This is equivalent to our Article 132(3) and S.6(2) of the Judicature Act.

(vi)the intending applicant has an obligation to identify and concisely set out the specific elements of "general public importance" which he or she attributes to the matter for which certification is sought;

(vii)determinations of fact in contests between parties are not, bythemselves, a basis for granting certification for an appealbefore the Supreme Court.

(viii)issues of law of repeated occurrence in the general course of litigation may, in proper context, become "matters of general public importance", so as to be a basis for appeal to the Supreme Court;

(ix)questions of law that are, as a fact, or as appears from the very nature of things, set to affect considerable numbers of persons in general, or as litigants, may become "matters of general public importance", justifying certification for final appeal in the Supreme Court;

(x)questions of law that are destined to continually engage the workings of the judicial organs, may become "matters of general public importance", justifying certification for final appeal in the Supreme Court;

(xi)questions with a bearing on the proper conduct of the administration of justice, may become "matters of

general public importance," justifying final appeal in the Supreme Court.

The Court of Appeal, in its Ruling on the application for a certificate of importance, adopted the guidelines and applied them to the application before them and, rightly observed,that although the said decisions do not define the terms ***"great public importance***" and **"general importance"**, they nonetheless set out the context in which the two terms ought to apply. Likewise, we arealso persuaded by the guidelines and wehave adopted and applied them to the instant application.

We also note that, unlike the Court of Appeal,thisCourt is not restricted to only matters of law of greatpublic or general importance because S.6 (2) alsoprovides that if this Court in its duty sees that a substantial miscarriage of justice may occur if the appeal is not heard, thenit can hear the appeal to see that justice is done. This was the principle followed in the case of **Bitamisi Namuddu Vs Rwabuganda Godfrey SCCA No. 04 of 2015,** which followed an earlier thedecision in the caseof **Namuddu Christine v Uganda** (supra).

Consideration of the application by the Court

We have carefully considered the contents of the notice of motion as well as the submissions by both learned counsel and we find and hold as follows:

On the issue of affidavits, first of all, a careful perusal of the affidavits sworn by the 1st applicant in support of the Notice of

Motion and in Rejoinder indicate that it bears the signature of the 1st applicant. However, we agree with counsel for the applicants that signing a document without a thumb print does not make it invalid. Further, acomparison between the signatures from the previous affidavits together with the current ones seems to be consistent.

Secondly, the record shows that both the affidavit in support of the Notice of Motion and in Rejoinder were sworn by the 1st applicant before a commissioner for oaths and were accompanied by certificates of translationas required by section 3 of the Illiterate Protection Act.The applicant's affidavits are therefore admissible and the case of **Kasaala Growers**(supra) is distinguishable from the instant case in the circumstances. In that case the Court found that the affidavit was inadmissible since it did not indicate in the Certificate of Translation that the contents thereof were translated to the deponent in the language he understood and that in fact he understood them or appeared to have understood them. Further, it did not bear the full name and address of one Charles Kaddu who had purportedly read over and explained to the applicant the contents of the affidavit in the language he understood before the applicant appended his signature.

We shall now proceed to determine the merits of the application.

Regarding the first issue, the applicants counsel contend that the 1stapplicant, in contemplation of death, executed an unambiguous document which constituted a valid will and

bequeathed the suit land to his daughters, the respondents. He therefore had a right to revoke his "will". He argued that the Court of Appeal was therefore wrong to disregard the 1st applicant's intention and turn the bequest into a *gift inter vivos.*

Counsel for the respondents on theother hand has maintained the position that the land was given to the respondents by their father as a *gift inter vivos.* He could not therefore legally withdraw it and sell it to someone else, namely, the 4th applicant.As stated before, the dispute has come all the way from the Magistrate Grade 1 through to the High Court and the Court of Appeal.

We have given due consideration to the affidavits, submissions of counsel and the law. We find that the matter involves a question of law of general importance that is, the question of wills. To us, the sticking point that should be finally resolved by this Court is whether the property was "bequeathed" to the respondents or given to them as a gift *inter vivos.* This begs the question whether a person who is still alive can make a "will" and execute it himself. Hence,the distinction between a will and a *gift inter vivos* has to be defined by this Court. The issue of damages and compensation also remain unresolved.

In the premises, we are of the opinion that this Court should hear the appeal to ensure that justice is done and the dispute is finally put to rest.

The second prayer is for a stay of execution. The principles that govern the stay of execution are correctly stated by counsel for the applicants. At this stage, the court will not go into the merits

of the intended appeal, but the court must be satisfied that the appeal raises issues which merit consideration by the court. See: **Gashumba Maniraguha vs Sam Nkundiye, Supreme Court Civil Application No 24 of 2015.**

Applying the above principle to this case, we find that the intended appeal raises serious issues for consideration by this Court as stated above.It is not frivolous.

Secondly, the affidavits show thatthe 4th applicant is currently operating a school on the land from which she derives sustenance. She would thus suffer irreparable damage if the order is not given and the respondents go ahead to evict her.

Thirdly, we also find that the balance of convenience lies in favour of maintaining the status quo until the disposal of the intended appeal.The appeal would be rendered nugatory if execution is not stayed.

We further note that counsel for the respondents invited court to award the respondents a sum of 198,000,000 shillings (one hundred and ninety eight million shillings) with interest at 22% per annum as compensation for unjustly denying them enjoyment of their property for 11 years. This issue, in our view, should be considered on merit in the appeal, and not at this stage.

In conclusion and for the foregoing reasons, we grant the application and order as follows:

a) Leave is hereby granted to the applicants to file a third appeal in this Court.

b) The execution of the judgment and orders of the Court of Appeal is stayed pending the determination of the intended appeal or any further orders of this Court.

c) The costs of this application shall abide the outcome of the appeal.

Dated at Kampala this.....**20th** ..day of ....**December**.....2017

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TUMMWESIGYE

JUSTICE OF THE SUPREME COURT

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DR. E. KISAAKYE

JUSTICE OF THE SUPREME COURT

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M.S. ARACH-AMOKO

JUSTICE OF THE SUPREME COURT

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E. MWANGUSYA

JUSTICE OF THE SUPREME COURT

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F. MWONDHA

JUSTICE OF THE SUPREME COURT