IN THE COURT OF APPEAL

AT KAMPALA

(Coram: MUSOKE, P. LUBOGO, V.P. & NYAMUCHONCHO, J.A.)

CIVIL APPEAL NO. 7 OF 1980

BULASIO KONDE……APPELLANT

AND

1. BULANDINA NANKYA
2. NUWA BOMBOKKA……...…….....RESPONDENT.

(Appeal from the Ruling and order of the High Court of Uganda at Kampala

(Khan, Ag. J.) dated 26th November, 1979.

IN

H.C. CIVIL SUIT NO.271 OF 1978

JUDGMENT OF THE COURT.

On June 19, 1981 when this appeal came for hearing we were informed by Mr. Kyambadde, who was holding brief for Mr. Sendege, counsel for the appellant, that the appeal had been withdrawn, that the case had been settled between the appellant and that he wished the court to enter a consent order in the terms agreed between the parties. The draft consent order which was before us was in effect reversing the ruling of the lower court. We now give our reasons; but, in order to appreciate the reasons that compelled us to dismiss the appeal, it is necessary to set out in brief the history of this case, which is as follows:

Erina Namirembe, a wealthy woman, died in Nsambye Hospital August 21, 1977. She left behind an estate worth, according to Konde (to whom we shall hereinafter refer as "the defendant") 1.5 million shillings, but according to Nuwa Bombokka (to whom we shall hereinafter refer as the "2nd Plaintiff") 3.4 million shillings.

Erina died, intestate. She had no child and no husband. She is survived by her mother Bulandina Nankya (to whom we shall hereinafter refer as "the 1st plaintiff") the only

dependant the relative of the deceased who is very old indeed. According to Section 28(1) (c) of the Succession Act (hereinafter referred to as "the Act"), as amended by the Succession (Amendment) Decree, 1972, 99% of Erina's estate should go to her and, according to sections 201 and 202 of the Act the 1st plaintiff is entitled to the grant of letters of administration. However the defendant, who described himself as the step-brother of the deceased, without the knowledge of the 1st plaintiff and without disclosing that she is the sole dependent of the deceased as is required by section 246 of the Act applied (through Mr. Sendege his advocate) for and was granted letters of administration on January 10, 1978.This grant was contrary to the provisions of sections 201 and 202 of the Act. Section 201 provides that administration shall be granted to the person entitled to the greatest proportion of the estate in priority to all other relatives of the deceased; and section 202 provides that administration shall not be granted to any relative if there is some other relative entitled to a greater proportion of the estate until a citation has been issued and published in the manner provided, by the Act calling on such relative to accept refuse letters of administration.

About a month after the grant the plaintiffs instructed M/s. Kawanga and Kasule Advocates to contest the grant. On February 15, 1978 Mr. Kasule filed an application by way of Notice of Motion praying that the letters of administration granted to the defendant be revoked on the grounds, inter alia, that the grant was obtained fraudulently. This application was dismissed on March 1, 1978 on procedural grounds. However, the judge pointed out, in his ruling, that the proper procedure was for the plaintiffs to file a suit pursuant to section 265 of the Act. The plaintiffs, accordingly, filed a suit on March 14, 1978. They alleged in paragraph 4 of the plaint that the 1st plaintiff was the sole dependent of the deceased and is entitled solely or together with others to administer the estate of the deceased; and in paragraph 7 they alleged letters that the defendant fraudulently obtained the Letters of administration and that "since the obtaining of the said letters of administration the defendant has fraudulently failed/neglected/abandoned to administer the said estate, but has instead misappropriated and wasted the property thereof". After filing the suit, the plaintiffs sought and obtained an ex-parte temporary injuction on April 5, 1978 restraining the defendant from disposing of the property or in any way dealing with the property until the disposal of the suit. The defendant was also ordered to deposit the letters of administration with the Chief Registrar. However, the defendant did not restrain himself from administering the estate nor did he return the letters of administration to the Chief Registrar instead, Mr. Sendege filed an application on

his behalf to have the injuction discharged. On June 27, 1978, this application was dismissed and, at the same time, the court under s. 218, of the Act, appointed the Administrator General to administer the estate-.pendente lite. The defendant appealed. During the pendency of the appeal, the defendant refused to hand over the administration of the estate to the Administrator General. Between June and November, 1978 correspondence passed between the Administrator General, the Chief Registrar and the defendant and his counsel and counsel for the plaintiffs. In the correspondence, the defendant was urged to abide by the order of the court and furnish with the administrator pendente lite cash, inventory etc. of the estate to enable him to administer the estate, but the defendant, no doubt encouraged by his advocate, refused to do so. Mr. Sendege, his advocate, wrote to the Administrator General, On behalf of his client, informing him that he (the Administrator General) had no legal basis to demand such things from his client as the order appointing him administrator pendente lite did not specifically say so. The defendant continued to administer the estate as an executor de son tort.

When the defendant refused to hand over the administration of the estate to the administrator pendente lite and refused to return the letters of administration to the Chief Registrar, counsel for the plaintiffs applied for a warrant of arrest of the defendant for contempt of court. The Administrator Genaa1 also filed an application on November 15, 1978 praying that the court should order the defendant to abide by the order of the court. The defendant was summoned on November 29, 1978 to show cause why he should not be committed for contempt. However, Mr. Sendege succeeded to have the committal proceedings adjourned from week to week until December 13, 1978 when both applications were heard. That the defendant was in contempt can not be doubted. He refused to obey the court order. He did not even turn up on the date when the applications were heard. His lawyer who had succeeded to have so many adjournments on flimsy pretext did not turn up either. No reason was given. As it is no cause was shown why the defendant should not be committed. The ruling in both applications was delivered on December, 18, 1978. In his ruling the learned judge said that he was satisfied that the respondent had disobeyed the order of the court but gave him 14 days within which to comply with the court order.

It is a matter of regret that the Administrator General failed to take over the administration of the estate because of the conduct of the defendant and his legal adviser. It is also regretted

that when he turned to the court for assistance he received no such assistance from the Officers of the court. The court officials did not even assist counsel to see to it that the court order was obeyed at all costs. However, the refusal by the defendant and his counsel to give the administrator pende lite the things and information he required was no excuse for not taking over and managing the rest of the estate as he was being urged to do by Mr. Kasule.

So, the defendant continued to intermeddle with the estate until on June 15, 1979 when the case took a dramatic turn. It was a dramatic turn because that day despite. Mr.Kasule's knowledge of what was going on; he reached a settlement with Mr. Sendege and allured this court to record such settlement by a consent order reversing the decision of the High Court and discharging the temporary injuction against the defendant.
In effect the consent order allowed the appeal. The Court was not informed of the authorities which declare such procedure to be contrary to the general law that an appeal cannot be allowed by consent without hearing it; besides, the court agreed to the compromise and stripped the administrator pendente lite of his powers to administer the estate when he was not a party to the compromise. On that same day, both counsel disposed of the suit by consent. The Registrar entered a consent order in the following terms:

> "(1) The administrator of the estate Mr. Bulasio Konde under the supervision and with, the consent of Counsel for the 1st plaintiff and that of Counsel for the defendant do realize, distribute and file in Court the final account of the estate within a period of 30 days of the date hereof or within such further period as the Court may direct or as the parties may initially agree upon.
>
> (2) The Administrator General will cease acting as administrator pedente lite and subject to the conditions set out in one above, Bulasio Konde will assume the administration of the estate as from the date of service of this settlement on the Administrator General.
>
> (3) In the distribution of the state Bulandina Nankya the first plaintiff shall receive 12% of the estate and the remaining 88% shall be distributed amongst the

remaining beneficiaries in such manner as the defendant administrator shall deem fit.

(4) The costs of the suit to be shared between the 1st plaintiff and the defendant equally and to be a charge on the estate.

That consent order was agreed to by Mr. Kasule without consultation with his clients as their correspondence with the Registrar and affidavit sworn to set aside the judgment later confirmed. It was unfair to the sole dependent, the 1st plaintiff. Under (3) the sole beneficiary who was entitled to 99% of the estate was given only 12% of the estate and the so called administrator of the estate was given very wide discretion to distribute 88% of the estate amongst the remaining beneficiaries as he shall deem fit. According to information available on the record, there were no such beneficiaries. It is, difficult to understand what law these learned gentleman were applying. The agreement reached by counsel was illegal because it was perpetuating a fraud which started with the grant of letters of administration, it as in contravention of
statute law. M/s Kasule and Sendege knew of the existence of sec. 28(1) (c) of the Act which gives the 1st plaintiff 99% of the estate. In his letter ref Mengo/AC/763/77 of 6/2/78 the Administrator General had warned Mr. Sendege to inform hi client to distribute tae estate accordingly. They ignored it all.

On July 17, 1979 the plaintiffs withdrew instructions from Mr. Kasule and briefed Messrs Byamugisha Rwaheru Advocates. The new advocates filed an application, to set, aside the consent order. The application was heard by Khan, Ag. J. who allowed it and set aside the consent order. The defendant appealed. Before the hearing of the appeal Mr. Sendege wrote to the Registrar on January 28, 1981 informing him that both parties had agreed that the appeal be withdrawn and that no order should be made as to costs. He sent him a draft consent order accompanying this letter. The letter and the Consent draft order were thumb printed by the 1st plaintiff. The 2nd plaintiff was left out, and in fact he was not aware of these maneuvers. Counsel for the plaintiffs was not a party to this compromise. It is undoubtedly a wrong practice for counsel who seeks to compromise a case to bargain with litigants of the opposing side without the knowledge of counsel representing them. It is important and necessary that

any settlement should be agreed to by both counsel in consultation with their clients. Only in that way should the settlement be binding on the parties.

When we told Mr. Kyambadde that we would not enter the consent order and asked him to argue the appeal, Mr. Kyambadde declined and informed us that his instructions from Mr. Sendege were to enter a consent order and no more. The draft consent order which he sought to record is couched in the following terms:

> "By the consent of the parties the consent judgment which was entered herein on 15th June, 1979 and was subsequently set aside by Ag. Justice Khan on 26th November, 1979, be and is hereby reinstated as the judgment of Court."

We asked Mr. Kyambadde for an authority for entering a consent judgment which reverses the judgment of the court below by agreement of the parties but he had none. The general rule is, as we know that an appeal could not be allowed by consent without hearing it. This rule was stated in Lees.v. Motor Insurers' Bureau (1953) W.L.R. 620 by the English Court of Appeal hen hearing an appeal from a decision of Lord Goddard, CJ. The plaintiff's claim had failed before Lord Goddard, C.J. but on appeal his counsel stated that the defendant, the Motor Insurers' Bureau, had voluntarily agreed to pay the whole of the claim; and ho sought an order that the appeal be dismissed. At this Denning, L.J. said:

> "an appeal could not be allowed by consent, for that would be reversing the judgment of Lord Goddard, C.J. without hearing the appeal."

A similar point arose in Lloyd v. Rossleigh Ltd. (1961) R.V.R.448. We do not have the report of this case, but it is referred to in Slaney V. Kean (1970) Ch. 243, a case we will shortly refer to. The following facts are taken from the report of Slaney's case at p.247. It was a rating appeal from the Lands Tribunal, and the successful ratepayers had agreed with the valuation officer that the appeal should be allowed. When the Court of Appeal was told this by Sir Derek Walker Smith .C. who appeared for the valuation officer, Sellers, L.J. said:

> "They cannot do that. They can agree different figures, but they cannot allow the appeal. We alone can do that. You will either have to withdraw or dismiss it. I am sorry, but we never allow an appeal unless we have heard it. It has the same effect; but I do not think it is fair to the Lands Tribunal or anybody else to allow an appeal by consent. It has never been done in the Court of Appeal, so far as I am aware Sir Derek."

In the following discussion, Sellers, L.J. said:

> "We cannot state the law by an agreement between the parties;"

and Devlin L.J. said:

> "..... you are asking us to straighten the law without satisfying us that gone crooked, merely because you say two members of the Bar have agreed that it has gone crooked. Plainly we cannot do that."

The last case on the point is Slaney v. Kean (supra). That was an income tax case. The taxpayer had appealed against an assessment in respect of his emoluments to the general commissioners who allow his appeal. The Crown appealed and when the appeal came on for hearing a document was put before the judge recording an agreement between the Crown and the taxpayer that the appeal should be allowed. Megarry, J. (as he then was) refused to record the consent and dismissed the application. He held that the general rule was that an appellate court could not reverse a decision by consent, and there being no authority which supported exception thereto. In discussing the issue whether an appeal could be allowed by consent the learned judge said at page 246:

> "An appeal may, of course, be dismissed by consent; for the appellant thereby merely gives up his right of appea1, and the decision of the court or tribunal below is left standing. But certainly under the law, an appellate court will not allow an appeal by consent. If it were to do so, it would be making an order holding that the decision

below was wrong; and it would be doing this merely on the agreement of the parties, and without hearing the case. Indeed the appellate court might be reversing a decision based upon proportions of law which, if argued, would be held to be entirely correct. The law is a matter for decision by the court after considering the case, and not for agreement between John Doe and Richard Roe, with the court blindly giving its authority to whatever they have agreed."

We have quoted extensively from these cases in order to clarify and emphasize the legal position that an appeal cannot be allowed by consent. The law as enunciated in these cases shows that:

(1) The parties cannot by consent reverse a judgment of the court,

(2) Only an appellate court can reverse a decision of the court below after hearing the appeal

(3) Issues of law cannot be the subject of consent orders.

In the light of these decisions it is evident that this Court was misled in recording the consent order on 15th June, 1979 reversing the judgments Of the Court below without hearing the appeal.

The appeal before us raises issues of law which ere decided in the court below. A reading of the grounds of appeal clearly shows that the appeal is on points of law. The decision of the trial judge which gave rise to this appeal was based on the law as stated in Halsburys Laws of England 3rd Ed. Para 74 at p.15 and on the construction of the provisions of section. 28(1) (c) of the Act. Under section 28(1) (c.) the plaintiff is entitled to 99% of the estate but the proposed consent order gives tier only 12% of the estate and it authorises the distribution of 87% of the estate, the root of her entitlement, amongst imaginary beneficiaries (we say

imaginary beneficiaries since by virtue of section 28(1) (c) there are none) in such manner as the defendant administrator shall deem fit. The consent order thus authorises a new kind of distribution among a new class of beneficiaries not envisaged by section 28 of he Act. If we had recorded the proposed consent order, we would be altering the statute law.

Dr. Byamugisha submitted, and we agree with him that this estate is not being administered according to law. The letters were granted to someone who had no right to get them. The letters were granted contrary to the provisions of sections 201 and 202 of the Act. The plaintiffs have tried in vain to get them revoked but their efforts have been thwarted by delaying tactics of counsel. The defendant has been unco-operative to the extent of disobeying the court's orders. Then the case is compromised in a most suspicious manner and contrary to law. Obviously we could not accept such compromise; and as the appeal could not be argued we were left with no alternative except to dismiss it with costs.
DATED at Kampala this 14th day of August 1981.

(SGD) S. MUSOKE.
PRESIDENT.

D.L.K. LUBOGO
VICE PRESIDENT

P. NYAMUCHONCHO
(J.D)