THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CASE NO: HCT -00 –CV- 0085 – 1995

VICENT TAMUKEDDE :::::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

SERUNJOGI :: RESPONDENT

BEFORE:HONOURABLE MR. JUSTICE MOSES MUKIIBI

JUDGMENT

This is an appeal brought by Vicent Tamukedde (hereinafter called "the Appellant") against Gerald Serunjogi (hereinafter called "the Respondent"). The appeal was preferred against the judgment and decree of the learned Magistrate Grade One, Her Worship Gladys Nakibuule Kisekka, of the 4th day of July, 1995 at Masaka. In the lower court the appellant was the 2nd defendant while the Respondent was the plaintiff.

The brief facts of the case are as follows:

One Yokana Lugwana of Kamanda village died and he was survived by two sons: Vicent Tamukedde, the appellant, and one Kalori Alias Alozio Lwanga. The late Yokana Lugwana left property which included land measuring 33.20 acres situate at Kamanda village (hereinafter referred to as "the land"). Kalori Lwanga also died but he was survived by one Flugensio Mwebe, who was the 1st defendant in the lower court.. Mwebe was installed as customary heir of the late Kalori Lwanga. On the other hand the appellant was the customary heir of the late Yokana Lugwana. The land left by the late Yokana Lugwana was comprised in Buddu Block 235 Plot 7, and at all material times it remained registered in the deceased's names. Karoli Lwanga and the appellant owned customary holdings (Bibanja) on the said land. Mwebe, in his capacity as customary heir of the late Kalori Lwanga, took over the latter's Kibanja. He sold it to the Respondent. The Appellant also sold portions of his own Kibanja and a portion of his grandson's Kibanja to the Respondent. Mwebe believed that Kalori Lwanga, his late father, and the appellant were the only beneficiaries of the land left by Yokana Lugwana. Mwebe further believed that his late farther was entitled to 15 acres of the land. He also believed that the 15 acres would be surveyed in the area covered by Karoli Lwanga's Kibanja. The land was never

surveyed. By a written agreement dated 30/1/1992 Mwebe sold 15 acres of land, to be surveyed from and cut out of the land left by Yokana Lugwana, to the Respondent, for an agreed purchase price of shs. 75,000/=. The agreement was admitted in evidence as Exhibit PE.6. The Respondent paid the purchase price to Mwebe. Thereafter, the Respondent wanted Mwebe to effect a transfer of the 15 acres of land to his names. Mwebe approached the appellant and informed him about the sale of land. The appellant refused to endorse the sale. He claimed that the late Yokana Lwanga left a will. An original hand written document in pencil and vernacular dated 16/2/1950 was admitted in evidence as Exhibit DE.I. It was translated by the lower court. The appellant refused any suggestion that 15 acres of land be transferred to the Respondent. The Respondent sued both Mwebe and the Appellant in the lower court seeking orders that:

(a) The defendants do effect transfer of the land to him; or
(b) In the alternative that the defendants refund the purchase price and also pay compensation for developments carried out by him on the land;
(c) General damages for breach of agreement.
(d) Interest on the awards at 30% from the date of judgment till payment in full;
(e) Costs of the suit.

Mwebe (as DI) filed a written statement of Defence where in he admitted that he had made an agreement with the plaintiff and sold to him the land covered by the Kibanja which he had sold to the plaintiff earlier. Mwebe averred that the appellant had refused the sale of the land to the plaintiff. Mwebe further averred that he had decided to refund the Respondent's money but the Respondent rejected the refund. He averred that other clan members, who are also successors to the said land refused the sale of the land. He claimed that the appellant would only allow the Respondent to stay on the land as a customary tenant. Mwebe finally averred that even RC officials advised the Respondent to accept a refund of the Purchase Price.

The appellant also filed a written Statement of Defence. He denied having sold land (as distinguished from a Kibanja) to the Respondent. He denied having been a witness to any sale agreement of land to the plaintiff. He contended that the land could not be sold. He denied having consented to the sale of land by Mwebe to the plaintiff. He averred that any body who

owned a Kibanja on the land could sell his Kibanja (customary holding). He finally contended that he could not transfer the land (purportedly sold by Mwebe to the plaintiff).

The learned trial Magistrate proceeded with the trial between the Respondent (as Plaintiff) and the Appellant (as D2). On 16/6/94, before the hearing commenced, Mwebe (as DI) had told court that he admitted the plaintiff's claim. However, the record of proceedings does not show that court entered Judgment against Mwebe (DI). Learned Counsel for the plaintiff said:
"However, defendant I to remain on the plaint because at the end of the day Judgment will/may be entered against both."

Next it was recorded: "Plaintiff case commences". At the end of the trial the learned Magistrate gave Judgment in the plaintiff's favour, jointly and severally and ordered that "the defendant do effect transfer of the suit land in favour of the plaintiff relying on the 1st defendant's sale agreement with the plaintiff".
The trial court awarded costs of the suit to the Respondent (Plaintiff) payable by appellant (Defendant II). The appellant was aggrieved by and dissatisfied with the said judgment and decree, and hence this appeal.

The main grounds of appeal are as follows:-

1. Learned trial Magistrate erred in law and in fact when she failed to properly evaluate the evidence and so came to a wrong conclusion that the suit land was only bequeathed to the two (2) children of the deceased, the late Yokana Lugwana disregarding the grand children.
2. The learned trial Magistrate erred in law and in fact when she failed to meticulously determine the issue that the sale of the jointly held family land was void abinitio in that the two sons of the deceased only held the land in trust for all the beneficiaries including the appellant and the grand children of the deceased but without a right to sale (sic).
3. The learned trial Magistrate erred in law and in fact when she erroneously held that the two sons held the land as tenants in common but not as joint tenants as stipulated in the deceased's last will.

4. The learned trial Magistrate failed to properly evaluate the evidence and so came to a wrong conclusion that the vender was a bona fide purchaser without notice of defect of title and entitled to obtain a transfer from the Vendor.
5. The learned trial Magistrate acted Contrary to law when she ordered the appellant to effect the transfer of the suit land in favour of the respondent without sufficient directing herself to the fact that the appellant had/has no legal powers whatsoever to secute (sic) a transfer on the jointly owned deceased's estate.
6. The learned trial Magistrate erred in law and in fact when she held that the respondent lawfully acquired the customary holding in 1985 on the suit land from Mwebe without obtaining the permission of the prescribed authority as provided under Land Reform Decree 3 1975.

The appellant prayed that the judgment and decree of the lower court be quashed with costs.

When the appeal came up for hearing the appellant was represented by learned Counsel Mr. Kiryowa Joseph, while the respondent was represented by learned Counsel Mr. Matovu John.

Learned Counsel for the appellant submitted, in respect of the first ground of appeal, that the trial court found that the will of the late Yokana Lugwana was valid. Counsel submitted that by the said will the late Lugwana bequeathed his land to his children and grand children. He submitted that it was an error on the part of the trial Magistrate to say that the land was bequeathed to two children, thereby completely disregarding the interest of the grandchildren as joint beneficiaries. Counsel Kiryowa then argued ground 3 of appeal. He referred to the finding by the trial court that the bequest made in the will was legally valid. Counsel attacked the observation by the trial court that on the death of Karori Lwanga the joint vested interest in the land split automatically. The learned trial Magistrate concluded that Kalori Lwanga had acquired a vested interest in Yokana Lugwana's land and that when Kalori Lwanga died it became part of his estate which Mwebe, his child, could inherit. The learned trial Magistrate said that Mwebe acquired vested interest in his late father's portion of Lugwana's land. Counsel Kiryowa submitted that the doctrine of survivorship in respect of joint tenancies was not applied by the trial court. Learned Counsel submitted that after the death of a joint tenant the tenancy does not split automatically.

He submitted that the appellant, as the surviving joint tenant, was entitled to the whole interest in the land.

Counsel Kiryowa then argued ground No.2. He submitted that the trial Magistrate rightly found that the operative words in the will are: "My land is never to be sold off, not even an inch of it. I have bequeathed it to my children and grandchildren".

Counsel submitted that the property was given to the sons and grandchildren jointly. He submitted that any enjoyment by any of the beneficiaries had to take into consideration the interests of the others. Counsel Kiryowa submitted that No grant had ever been made by any court to any one to administer the estate of the late Lugwana. He submitted that Mwebe had no grant of probate or Letters of Administration in respect of the estate of his father, the late Kalori Lwanga. Counsel submitted that there was no resolution by the beneficiaries of the land to have any portion thereof sold to the Respondent. He contended that Mwebe could not alienate any part of the land in the absence of the above mentioned factors. He submitted that the purported sale of land by Mwebe was void ab initio.

Counsel Kiryowa said that his submissions in respect of the second ground of appeal covered ground 5. He submitted that to date no one has applied for a grant of probate in respect of the late Lugwana's will. Counsel argued that the Appellant is not the person who purported to sell land to the Respondent. Counsel submitted that the learned trial Magistrate misdirected herself when she exonerated Mwebe, the seller of the land, and instead directed the appellant to transfer what he had not sold.

In respect of the fourth ground of appeal Counsel Kiryowa submitted that the Respondent failed to take steps to investigate the title of what he wanted to buy. Counsel submitted that the Respondent was in approximate position to the appellant's family, and he should have known the family's objections to the purported sale of the said land.

Counsel Kiryowa abandoned the sixth ground of appeal. He concluded his submissions by a prayer that this court should allow this appeal, set aside the judgment and decree of the lower court, and award costs to the appellant in this and the lower court.

Counsel Matovu, on the other hand, submitted that he supported the judgment of the learned trial Magistrate in its entirety. He submitted that the trial Magistrate applied the proper law to the issues. For ground No. I Counsel Matovu submitted that most of the evidence had been agreed upon, and that the trial Magistrate had nothing to evaluate. He submitted that the trial Magistrate was left to tackle legal issues. Counsel gave one such issue as:
Whether Mwebe could dispose of his interest or whether he was prohibited by the restrictive clause in the will that the land was not for sale. Counsel submitted that the trial Magistrate did not ignore the grand children of Yokana Lugwana although they were not an issue before court.
Counsel Matovu submitted that there was no joint tenancy in respect of the estate of the late Yokana Lugwana. Counsel submitted that the intention of the testator, derived from the will, was that the property had to be derived from the will, was that the property had to be divided between the beneficiaries.

Counsel contended that there was uncertainty as to who the grandchildren were. Counsel argued that the appellant's interest was acquired through a direct bequest from the late Lugwana while Mwebe's interest was through in heritance from his father Karoli Lwanga. Counsel submitted that the position that Mwebe could inherit from Karoli Lwanga was accepted by the appellant.

For ground No.2 Counsel Matovu submitted that the facts of this case do not show jointly held family land. Counsel submitted that the evidence showed that the late Lugwana owned land as an individual, and, by his will, he bequeathed it to the appellant and the late Karoli Lwanga. Counsel submitted that Mwebe succeeded to the portion of the late Karoli Lwanga. Counsel contended that there was no trust created by the will.

Counsel Matovu said that ground No. 3 had been covered under the first ground.

For ground No. 4 Counsel Matovu referred to the evidence of Mwebe (PW3). According to Counsel Mwebe informed the Respondent that he had inherited 15 acres of land from his father Kalori Lwanga and that he wanted to sell the same.

Counsel Matovu argued that the Respondent did not need any further investigation.

Counsel submitted that the appellant's objection to the sale came after the transaction had been completed. Counsel submitted that there was no need for the Respondent to make any further search to ascertain ownership of the land. Counsel submitted that the Respondent was a bona fide purchaser for value who had no notice of any restriction on the sale of the land.

For ground No.5 Counsel Matovu submitted that the appellant:

(i) is the customary heir of the late Lugwana;
(ii) is the only surviving son of Lugwana;
(iii) ranks first in entitlement to apply for letters of administration;
(iv) has custody of the will.
(v) Was given responsibility to be a custodian of his father's estate by the clan authorities;
(vi) Owns a bigger share of the land.

Counsel contended that Mwebe had sold and passed his interest to the Respondent, and so, had nothing to do with Lugwana's estate. Counsel Matovu submitted that the learned trial Magistrate had the power to appoint the Appellant or anyone else an administrator of the estate of the late Lugwana for purposes of effecting the necessary transfers. Counsel submitted that if the appellant obtains a grant to administer the estate of the late Lugwana he can make direct transfer of the land to the Respondent.

Counsel Matovu prayed this court to find that the appeal has no merit and to dismiss it with costs to the Respondent. Counsel also prayed this court to make appropriate orders which will enable the Respondent to acquire title to the land which he purchased.

This is an appeal to this court from a trial by the learned Magistrate grade one. This court must reconsider the evidence, evaluate it and draw its own conclusions. As an appellate court I must bear in mind the fact that I have neither seen nor heard the witnesses, and I must make due allowance for that. This court is not bound to follow the findings of fact made by the learned trial Magistrate if it appears that (with due respect) she has clearly failed on some point to take account of particular circumstances or probabilities materially to weigh the evidence, or where it is apparent that she has not properly evaluated the evidence.

See: SELLE & ANOR V. ASSOCIATED MOTOR BOAT CO. Ltd &Others (1968) E.A. 123, Court of Appeal, in the judgment of Sir Clement De Lestang, V.P. at Page 126.

PRICE V. KELSALL (1957) E.A.752.

In the instant case the Respondent (then plaintiff) testified in his - evidence - in chief that Lugwana's land is 33 acres 20 decimals. The land was never divided into plots or demarcated to each heir. However, each heir remained and possessed the area where his Kibanja was. None of the heirs had surveyed off his interest. The plaintiff further testified that by virtue of Mwebe inheriting the Kibanja from his father he even acquired the land (the legal interest in the deceased's land). He told court that Lugwana gave birth (sic) to only two sons, the late Kalori Lwanga and transfer the land the latter refused to effect the transfer. So, the plaintiff sued him.

Fulugensio Mwebe (PW3) testified that his father was Alozio Lwanga who died, and the witness was installed as the customary heir. The witness' grandfather was the late Yokana Lugwana. Yokana Lugwana was the father of Alozio Lwanga and Vicent Tamukedde (the appellant), his only sons.

He testified that Yokana Lugwana left land measuring 33.40 acres at Kamanda village. Alozio Lwanga and Vicent Tamukedde were the only beneficiaries. Alozio Lwanga's share was 15 acres and the balance was for Tamukedde. On the death of his father the witness inherited his 15 acres of land. He testified that by the time his father died his interest had not been surveyed off. He told court that after selling bibanja (Customary holdings) to the plaintiff (Respondent) he sold to him his entire interest in the 15 acres of land. He made a written agreement (Exhibit P.E. 6. He

informed Tamukedde (the appellant) that he had wholly sold off his interest in the land to the plaintiff. Tamukedde (the appellant) refused to transfer the land sold to Serunjogi (the Respondent). The witness told court that he has no objection to the transfer of his portion of land to Serunjogi (the Respondent). The witness was cross-examined by Tamukedde (the appellant). He answered that he sold to Serunjogi (the Respondent) the land he inherited from his father. He said that Tamukedde (the appellant) refused to witness the agreement of sale. The witness testified that his grandfather left two children, Tamukedde (the appellant) and his father. His father had to inherit part of the land. The witness said that he was told this fact by his grandfather. He told court that during the celebration of funeral rites he was informed of his father's interest.

In the agreement for sale of land (Exhibit PE.6) Mwebe stated that he had succeeded to that land from his late father, Kalori Lwanga. He clarified that it was part of the land comprised in Buddu Block 235 Plot 7. He stated that the land and title belonged to his grandfather, Yokana Lugwana. He confirmed that the land, the subject matter of the sale measured 15 acres. It was stated that the buyer would meet the costs of survey.

On the other hand Vicent Tamukedde (the appellant) testified that his father was Yokana Lugwana and that he left a will (Exhibit DE.I). He testified as follows:
His father was survived by two sons, himself and Karoli Lwanga. Mwebe is the son of Kalori Lwanga. The witness' father, Yokana Lugwana left land. Mwebe came to him saying that he wanted to sell his customary interest, and, as this was not land, he agreed. Mwebe used him as a witness to the sale of customary holdings. The purchaser was Serunjogi (the Respondent). He (the appellant) demanded for his Kanzu. After sometime Mwebe brought to him an agreement and said that he was selling land to Serunjogi (the Respondent). He asked Mwebe which land he was selling. He told Mwebe that he had no land to sell. He told Mwebe that he was going to call a clan meeting to inform them of Mwebe's intention. The witness knew that his father had bequeathed the land to his sons and relatives. He had not sold any land to the Respondent. He knew nothing about the agreement concerning land. He asked Mwebe to call a clan meeting. The will of his father prohibited any sale of the land. The land was for him (the witness), Kalori Lwanga (deceased) and the clan. The land had never been apportioned to them. He was on the

land as a caretaker/custodian and customary heir. He did not own even one decimal of the land as his separately.

In response to cross-examination the witness testified as follows:
The land is in the names of Yokana Lugwana. Kalori Lwanga (deceased) had a customary holding on the land. He had never got court probate with the will annexed. However he got consent from the clan authorities to be a custodian. He admitted that the land was left to the two sons and the deceased's two sisters. It was the four of them to share out the land.

The then Counsel for the plaintiff (Respondent) framed three issues, namely:

(i) Whether Yokana Lugwana died testate.
(ii) Whether the disputed land belongs to the clan and (was) not for sale.
(iii) Remedies, if any.

In her judgment the learned trial Magistrate did not specifically list the issues she had to determine. Apparently, she adopted the issues framed by Counsel for the plaintiff (Respondent). In my view, and with all due respect to her, this was the point where the learned trial Magistrate got derailed. It is my considered opinion that the issues which arose and had to be determined should have included the following:

(i) Whether or not Mwebe had valid interest in any portion of the land comprised in Buddu Block 235 Plot 7 which he could legitimately sell to the plaintiff.
(ii) Whether or not the sale of land by Mwebe to the plaintiff was valid.
(iii) Whether or not the second defendant (appellant) can be compelled to transfer 15 acres of the land comprised in Buddu Block 235 Plot 7 to the plaintiff.

It is also my view that the learned trial Magistrate failed to direct her mind to the following provisions of the law in the Succession Act [Cap. 139).

Section 187 provides:

“No right as executor or legatee shall be established in any court of justice, unless a court of competent jurisdiction within Uganda has granted probate of the will under which the right is claimed, or has granted letters of administration under Section 180 of this Act”.

Section 190 provides:
“Except as hereinafter provided, no right to any part of the property of a person who has died intestate shall be established in any court under what law did Mwebe inherit the land in dispute in this case from the late Kalori Lwanga his father?

The Busuulu and envujjo Law, 1928 used to provide for succession to a Kibanja in Section 8. It used to provide:
“8. (1) Nothing in this law shall give any person the right to reside upon the land of a mailo owner without first obtaining the consent of the mailo owner except _____

(a) the wife or child of the holder to a Kibanja or
(b) a person who succeeds to a Kibanja in accordance with native custom upon the death of the holder thereof”.

Under that law, in Buganda, a son and/or customary heir could succeed to a Kibanja of his deceased parent under customary law. However, the Busulu and Envujo law was repealed by Section 3(4) (a) of the Land reform Decree, No. 3 of 1975. In any case the Busulu and Envujjo Law was not concerned with the succession to mailo land by a child of a deceased person.
Vicent Tamukedde (the appellant) told court that the land is registered in the names of Yokana Lugwana. He testified that he had never got a court grant with the will annexed. There was no evidence that someone else had ever applied for a grant of letter of administration with the will annexed in respect of the estate of Yokana Lugwana. If, as alleged, the late Kalori Lwanga was a legatee under the will of Yokana Lugwana then by reason of the provisions of Section 187 of the Succession Act he could not establish any right to his legacy unless a court of competent jurisdiction in Uganda had first granted probate of the will under which the right would be claimed; or unless Letters of Administration with the will annexed were granted.

Fulugensio Mwebe (PW3) in his testimony did not mention the alleged will of Yokana Lugwana. He did not say that his late father's entitlement to a portion of the land was derived from a will. Nor did he say that any one had applied for a grant of Letters of Administration in respect of the estate of Yokana Lugwana. In response to cross-examination Mwebe (PW3) testified that his grandfather was survived by two children, Tamukedde (the appellant) and his father, the late Karoli Lwanga. He further testified that his father had to inherit part of the land left by Yokana Lugwana. No evidence was led to show that someone applied for a grant of Letters of Administration in respect of the estate of Yokana Lugwana. In those circumstances the late Kalori Lwanga would not have been able to establish any right to any part of the property of Yokana Lugwana (assuming there was no will) unless Letters of Administration had first been granted by a competent court. Mwebe (PW3) testified that his father's share was 15 acres of land and the balance was for Tamukedde (the appellant). Several questions arise here: When, how and by whom, and under what authority was the land left by Yokana Lugwana distributed?

Mwebe testified that on the death of his father he inherited his 15 acres of land. He testified that by the time his father died his interest had not been surveyed off. Vicent Tamukedde (the appellant) testified that he told Mwebe that he had no land to sell. He testified that the land had not been apportioned to the beneficiaries of Yokana Lugwana's estate. He told court that he was on the land as a caretaker/custodian and customary heir. He testified that he did not own even one decimal of the land in his personal right.

Mwebe (PW3) did not lead evidence to show that he had applied to court for a grant of letters of administration in respect of the estate of the late Karoli Lwanga. Nor did he say that some one else had done so. In the absence of an Administrator of the estate of the late Kalori Lwanga no one can lay any claim to the deceased's share in the estate of the late Yokana Lugwana. There is no legal representative of the late Kalori Lwanga to demand for that share. In my view Mwebe (PW3) as a customary heir lacks legal capacity to make the demand. Mwebe (PW3) as the customary heir and son of the late Karoli Lwanga has locus standi to take steps to preserve or protect property which was vested in his father and is part of his estate. In ISRAEL KABWA V. MARIN BANOBA MUSIGA, S.C. Civil Appeal No. 52/1995 (J.W.N. TSEKOOKO, Jsc.) it was held that an intending applicant for Letters of Administration can institute a suit to stop trespass

to the deceased's land. His acts in preserving or protecting the estate are valid. However, in my view, this does not extend to making claims, on behalf of the deceased's estate, for property believed to be due to the estate from the estate of another deceased person (in this case Yokana Lugwana). It is my opinion that by reason of the provisions of Section 190 of the Succession Act Mwebe (PW3) could not establish his any right to any part of the property of the late Kalori Lwanga (who apparently died intestate) because Letters of Administration have not been granted by any competent court. Mwebe (PW3) could not establish any such right in any court of justice in the circumstances of this case.

The learned trial Magistrate said:
"It is not disputed that divisions were made of the land that Defendant II (the appellant) shared 18.20 acres while Karoli Lwanga remained with 15 acres of land". In my view this is a matter strongly disputed by the appellant (D2).
The learned trial Magistrate also said:
"Mwebe at diverse times sold off Bibanja and over time which covered the whole of his entire inherited interest of 15 acres to the plaintiff".

In my view it is not an established fact that the Bibabja which Mwebe sold to the Respondent (plaintiff) covered the whole of his entire inherited interest of 15 acres. I say so because according to the evidence the 15 acres of land were not surveyed.
The learned trial Magistrate then said:
"All agreements for Bibanja sales from Mwebe to the plaintiff were exhibited and Tamukedde (Def. II) admitted having witnessed the same to cover up Mwebe's interest of 15 acres." From the evidence on record Tamukedde (the appellant) never admitted that the purpose of selling his portions of Bibanja, and that of his grandson, was to enable the plaintiff cover fully an area of land measuring 15 acres.

The learned trial Magistrate said:
"He (Mwebe) in his evidence as a witness he clarified that when he was installed as the heir to his father, the clan heads informed him of his interest of 15 acres as inherited from his father (the late Lwanga)".

The point to make here is that Buganda Customary law no longer applies to intestate succession. The clan heads have no powers to distribute the property of an intestate deceased person. They could not confer on any beneficiary title to land.

The learned trial Magistrate added this:
"Defendant II never challenged this nor the allegation that he (Defendant II) remained with 18 acres of land". In my view where the appellant (Def. II) testified that he does not own even a decimal of Lugwana's land it is not correct for the learned trial Magistrate to say that he did not challenge the alleged distribution of Lugwana's land.

The learned trial Magistrate said;
"Since the presented will was never contested in the courts of law, and has no apparent error on the face of it; this court for the purposes of this case finds it that the original land lord Yokana Lugwana died testate."

Thereafter she continued as follows:
"Now since the court found the will of Lugwana valid, court is bound by the succession law that the testator intention (sic) is always paramount. As per the will, Lugwana (testator) bequeathed his land to his children and grandchildren".

In my view the effect of the above statements was to declare the will attributed to the late Yokana Lugwana duly proved. However, this was not a probate action. The will had not been pleaded by the respondent (plaintiff) or the appellant (defendant 2).

Its validity was not an issue. I must say and with all due respect that it was not proper for the learned trial Magistrate to purport to grant probate of the will. The learned trial Magistrate went a head to construe clauses in the will, and thereafter, enforced the will.
The learned trial Magistrate said:

"Hence relying on the above analysis I find that Mwebe acquired half of Lugwana's land on death of his father Lwanga and Tamukedde remained with the other part until when death would claim him."

Then the learned trial Magistrate concluded as follows:
"I hence find Mwebe had a right to alienate his interest by sale reasonably so since he had sold all the customary holdings covering his 15 acreage or his whole acreage on Lugwana's land to the plaintiff".

In my view the learned trial Magistrate failed to direct herself properly on the law applicable to the case. It appears to me that she clearly failed to take into account the fact that nobody has ever been granted letters of administration, with or without the will annexed, in respect of the late Yokana Lugwana's land. She failed to direct her mind to the legal consequences of this situation to any claims of inheritance of portions of the late Lugwana's estate/land. With all due respect to her it is apparent that the learned trial Magistrate did not properly evaluate the evidence. It is my view that, as a result of all the foregoing, she reached a conclusion which is erroneous in the circumstances. Instead I would hold that Mwebe (DI) had no valid interest in any portion of the land comprised in Buddu Block 235 Plot 7, and he could not legitimately sell any interest in land to the plaintiff. I would go on and say that the purported sale of land by Mwebe (DI) to the Respondent (Plaintiff) was null, void and of no effect.

The learned trial Magistrate said:
"Mwebe passed his interest to the plaintiff but the land is still registered in the names of the late Yokana Lugwana……. Since therefore now Mwebe has relinquished (sic) his interest to part of Lugwana's land to the plaintiff, I find it only logical that Tamukedde gets probate with will annexed as Lugwana's customary and surviving legal heir of the 1st degree to Lugwana. Then he is obliged to sign transfer forms to the plaintiff and attach the sale agreement of land by Mwebe to the plaintiff of the 15 acres of Lugwana's land.

With all due respect I regret to say that the learned trial Magistrate seems to have given no regard to the provisions of Section 143 of the Registration of Titles Act [Cap. 205]. If what she

suggested above was allowed to be implemented it would, in my view, constitute a great transgression of the Provisions of the Succession Act.
The learned trial Magistrate finally reasoned as follows:
"It is only reasonable too that the bought land is transferred in the plaintiff's names because it is apparent that the aged def. II Tamukedde who is even blind and incapacitated cannot raise money to refund to the plaintiff and to compensate him as regards the developments on the bought Plot. Same with the distraught Mwebe (def.I) who is now completely at a loss".

The learned trial Magistrate has given reasons which enable this court to know the considerations which weighed with her. It appears to me that she was concerned to ensure that the respondent (plaintiff), having paid for the land, does not lose. According to the learned trial Magistrate since the defendants appeared too poor to refund the purchase price then the plaintiff (Respondent) should have the land transferred to him. With all due respect I do not agree with that reasoning. Having held that Mwebe had no valid interest in the land and that he could not legitimately sell any interest in the land to the plaintiff I would go on to say that the appellant (defendant 2) could not be compelled/obliged to transfer 15 acres of the land comprised in Buddu Block 235 Plot 7 to the Respondent (plaintiff).

I have noted that grounds of appeal Nos. 2 and 3 relate to the construction of the will by the learned trial Magistrate. I did not consider it necessary to go that far. I would hold that the first part of ground I, and grounds 4 and 5 do succeed.

In my view the admission by Mwebe (DI) of the plaintiff's claim does not alter the position of the law on the matter. It may well be fortunate that the trial court did not enter judgment against Mwebe (DI) on the basis of that admission. This court cannot condone an illegality once it is brought to its notice. I would set aside any judgment entered against Mwebe (DI) on his admission. Instead I would hold that after due trial it was established that the respondent (plaintiff) is entitled to a refund of the purchase price being the sum of shs. 75,000/= as against Mwebe (DI). I would accordingly order that the respondent be paid the sum of shs. 75,000/= and his costs of the suit by Mwebe (DI). I also order that the award of the sum of shs. 75,000/=

should carry interest at the rate of 8% per annum from the date of judgment of the trial court till payment in full.

I would therefore allow this appeal, set aside the judgment and decree of the trial court as against the Appellant. I would award costs of this appeal and in the court below to the appellant to be paid by the Respondent.

I would also substitute my orders above for the judgment and orders of the trial court against Mwebe (DI).

MOSES MUKIIBI
JUDGE
29/10/2002.

29/10/2002 at 3.30 pm.
Mr. Nsubuga Nsambu – Counsel for the Appellant is in court.
Appellant is not in court.
Mr. Matovu John Counsel for the respondent is absent.
Respondent is absent.
Ngobi: Court Clerk/Interpreter.
Court:- Judgment is delivered in open court.

MOSES MUKIIBI

JUDGE.

29/10/2002.