THE REPUBLIC OF UGANDA
IN HIGH COURT OF UGANDA AT JINJA

CIVIL CASE NO. 107 OF 2003

1. **REV. ONESIFOLO NGAAGA**
2. **ROBINAH S. NGAANGA :::::::::::::::::::::::::::: PLAINTIFFS**

VERSUS

1. **MOSES MATOVU**
2. **JAMES MULUMBA MUSIISI :::::::::::::::::::: DEFENDANTS**

BEFORE: HON.MR. JUSTICE BASHAIJA K. ANDREW

JUDGMENT

Rev. Onesifolo Ngaanga and Mrs Robinah S. Ngaaga *(hereinafter referred to as the "1st" and "2nd" Plaintiffs respectively)* brought this suit against ***Matovu Moses and James Mulumba Musisi*** *(hereinafter referred to as the "1st" and '2nd" Defendants respectively)* seeking, *inter alia,* for an order of specific performance of the sale agreements, an order directing the 2nd Defendant to let the Plaintiffs survey their land, and an order directing the Defendants to transfer in favour of the Plaintiffs the land the Plaintiffs bought and costs of the suit.

Summary of facts.

The 2nd Defendant is son to late Marko Lule (now deceased) who was the owner of land at Nakabango and comprised in ***Kyaggwe Block 107 Plot 323****(hereinafter referred to as the "suit land")* and after his death the 2nd Defendant became the customary heir. On 20/1/96, after the death of the said Marko Lule the 2nd Defendant sold 0.60 acres of his late father's land to the Plaintiffs and a sale agreement was executed to that effect. Further, on 01/02/191997, the 2nd Defendant sold to the Plaintiffs yet another 1.00 acre-piece of the same land, and he was fully paid and a sale agreement to that effect was also duly executed. The Plaintiffs took possession in 1996 and have since occupied and lived on the suit land.

In 1997 the Plaintiffs lodged a caveat against the above title in order to protect their interest in the land. Further in 2000 they requested the 1st Defendant to let them survey

off part of the land they had bought, and that he executes a transfer into their names, but the 2nd Defendant declined. In 2002 the Plaintiffs then instituted a suit against the 2nd Defendant at Mukono magistrate's court seeking orders of specific performance and up to now the suit is still pending in court.

After 17/09/2003 the Plaintiffs received a letter informing them that they are trespassers on the 1st Defendant's land comprised in ***Kyaggwe Block 107 Plot 1309,*** part of which they had purchased from the 2nd Defendant, and that they should vacate or face eviction. Apparently, the caveat which the Plaintiffs had lodged was removed by the Registrar of Titles after there was no response to the notice issued to the Plaintiffs, and one Silvest Katende Ssalongo was registered as the proprietor on the in 2000 through letters of administration of the estate of late Marko Lule, vide ***Administration Cause No. 26 of 2000 Mukono Court***. The administrator then transferred the land to a one Aida Merabu Nakitende and subsequently to the 1st Defendant.
Three issues were raised for determination as follows:

1. ***Whether the Plaintiffs are owners of the land in dispute.***
2. ***If so whether the 1st Defendant is a trespasser on the suit land.***
3. ***Whether the parties are entitled to the remedies they pray.***

Mr. Zaabwe of *M/s Zaabwe & Co. Advocates* represented the Plaintiffs and filed written submissions. The Defendants did not file any submissions after their lawyer declined service stating he no longer represented them. The Defendants were served in person, but still never attended court nor made any submissions.

Issue 1.

This issue relates to whether the Plaintiffs are owners of the suit land, and it is a cross-cutting issue in the entire case, and its resolution one way or the other renders any further discussion on the other issues purely academic. On the facts of the case it is evidently clear that the Plaintiffs are not the rightful owners of the suit land. The suit land constitutes part of the estate of the late Marko Lule who died intestate and the 2nd Defendant, though supposedly a customary heir, had no authority under the law to deal

with the estate whatsoever, when he had not obtained letters of administration. ***Section 191 of the Succession Act (Cap 162)*** states:

> ***"Except as hereinafter provided, but subject to Section 4 of the Administrator General's Act, no right to any part of the property of a person who died intestate shall be established in any court of justice, unless Letters of administration have first been granted by a court of competent jurisdiction."***

The above statutory position has been reflected in various authorities. See ***Israel Kabwa v.Martin Banoba Musinga, S.C. Civ. Appeal No.52 of 1995; Paulo Kawesa v. Administrator General & 2 or's, H.C.C.S No.918 of 1993.***
Kothari v. Quresh [1967] E.A564.
The direct import of the above position of the law to the instant case is that the 2nd Defendant, though a customary heir could not lawfully deal in the deceased's estate without letters of administration, and the transactions into which he entered with the Plaintiffs are accordingly null and void. See also ***Tumukudde v. Serunjogi,H.C.C.S No.85 of 1995 per Mukiibi J.; Aisha N. Tifu v. Ddamulira K. James, H.C.C.S per Murangira J.***

It needs no emphasis that being customary heir is a cultural function which does not bestow legal authority on a person to deal with property of deceased, but is essentially meant for someone to "step into the shoes" of the deceased, as it were, solely for cultural functions. However, when it comes to the deceased's property and its administration the customary heir must first obtain the legal authority even if he or she may be a beneficiary; in absence of which he or she invariably becomes an intermeddler in the estate of the deceased.

In the instant case, the Plaintiffs do not claim as bona fide occupants of the suit land but through outright purchase which is illegal. The 2nd Defendant, as a customary heir could not legally confer good title on the Plaintiffs, and as such, the transaction was null and void. The effect of such was stated in ***Kisugu Quarries v. Administrator General, S.C. Civ. Appeal No. 10 of 1998*** that***:***

"***Further as the agreement was, like in the instant, case prohibited by law and void ab initio, nothing subsequently done could convert it into an enforceable contract….***"

In the same case above, Mulenga JSC. (R.I.P) held:

"… It is trite law that the court cannot be used to enforce an illegal contract even if both parties entered into it willingly.

In the result is that the Plaintiffs cannot have any remedy from this court. The suit is accordingly dismissed. No order as to costs is made owing to the reason that the Defendants did not put in their submissions and had consistently not attended court even when served with the notice.

BASHAIJA .K. ANDREW
JUDGE
18/12/12