THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: **ODOKI,** CJ; TSEKOOKO, KANYEIHAMBA, KATUREEBE AND OKELLO, JJSC.)

CIVIL APPEAL No. 5 OF 2006

BETWEEN

IDAH ITERURA ..... APPELLANT

AND

JOYCE MUGUTA ..... RESPONDENT

[Appeal from the judgment of the Court of Appeal at Kampala (Mukasa-Kikonyogo, DCJ., Twinomujuni and Byamugisha, JJA.) dated l&th August, 2005in Civil Appeal No. 22 of2002]

JUDGMENT OF TSEKOOKO, JSC.:

This is a second appeal from the decision of the Court of Appeal which upheld the Judgment of the High Court (Musoke-Kibuuka, J.) that decided a land dispute suit against the appellant's father.

The background of this appeal is rather interesting. Once upon a time, there were three brothers named Yesse Iterura, Ismail Muguta and Joab Mujungu all sons of Abeli Rwandongyero who died in 1941.

In his intestate estate was a piece of land (kibanja) (the suit land), which was inherited by his three sons who shared it equally among themselves. Yesse Iterura, the eldest of the brothers, remained in charge and control of the suit land. Ismail Muguta established a home on his portion. Joab Mujungu acquired a personal kibanja elsewhere where he set up his home. In 1975, Yesse Iterura got a certificate of title to the whole suit land in his names and without the knowledge of his other two brothers.

When in February, 1995, Mujungu attempted to construct a house on what he believed to be his portion of the suit land, Yesse Iterura prevented him asserting that the latter owned the entire land having been registered as freehold proprietor under the Public Land Adjudication Rules, 1958. Thus Muguta and Mujungu for the first time became aware that Iterura had deprived them of their respective interests in the suit land.

So the two deprived brothers instituted HCCS No. 33 of 1995 in the High Court, Mbarara, against Iterura as defendant. Mujungu died before the trial of the suit started. However, counsel for both sides agreed that the trial should proceed because they apparently believed that the death of Mujungu would not affect the interests of the parties. On 1st February, 2001, the trial judge gave judgment against Iterura. He found that Iterura registered land through fraud and ordered restoration of individual customary holdings of the three brothers and further that the certificate obtained by Iterura had to be rectified to reflect the decision.

A notice of appeal was filed because Iterura intended to appeal to the Court of Appeal against the decision of the High Court. Iterura died thereafter. On 10th/04/2002, his daughter, Idah Iterura, the present appellant, obtained Letters of Administration to the estate of her father. Subsequently, the appeal in the Court of Appeal was instituted under her names and only against Ismail Muguta. The first ground challenged the validity of the trial, on the basis that it was conducted after the death of Mujungu without a personal representative. The second and third grounds challenged the validity of the trial and its conclusions because the trial was conducted without a next friend for Iterura, the defendant who was alleged to be insane. Idah Iterura lost the appeal although the first ground in effect succeeded.

The Court of Appeal held that the two issues did not affect the merits of the case. It is interesting to note that before the trial began, court was informed of the death of Mujungu and counsel for both sides agreed to frame the issues but did not include any issues as to the effect of the death of Mujungu (the then 2nd plaintiff) and the alleged insanity of Iterura (the then defendant).

^Ftfesef5ur issues were framed on the basis that there was only one plaintiff. The trial judge answered the issues framed in the affirmative and made the following declarations and orders, inter alia, that-

(a) Plot 53 Sheema Block 2, comprised the unregistered customary interest of the defendant, the plaintiff and their brother, Mujungu. The defendant, at one time, held the land in trust for himself and his brothers. The defendant secured a certificate of title over the entire land in his personal name, through fraud. Accordingly, the individual customary holdings of each brother must be restored and separated from the defendant's title.

(b) The Commissioner, Land Registration (Chief Registrar of Titles) is ordered to rectify the certificate of title issued to the defendant in respect of Plot 53, Sheema, Block 2 so that it encompasses only the customary holding of the defendant and exclude those of his brothers.

According to pleadings and the certificate of title, the Plot No. is 153 and not 53, which must be a typographical error.

Iterura was dissatisfied with the above orders and declarations and through his daughter unsuccessfully appealed to the Court of Appeal. She has now appealed against the dismissal of the appeal by the Court of Appeal. The appeal to this Court is based on six grounds the wording of some of which is confusing.

The appeal in this Court was filed against Ismail Muguta, the survivor of the brothers. However, before the hearing of the appeal, he too

died. His widow, the present respondent, was granted letters of administration and so she was made the respondent.

Mr. Muhwezi argued the appeal on behalf of the appellant. He argued the grounds in four batches, beginning with grounds 3 and 5, followed by grounds 4 and 6, then 2 and lastly ground 1. On the other hand, Mr. Katembeko, for the respondent, argued each ground separately starting with ground 2. He did not argue ground 1.

Grounds 3 and 5 were framed as follows -

3. The learned Justices of the Court of Appeal erred in law and in fact in holding that the judgment in the High Court was not directly passed in favour of the deceased brother.

5. The learned Justices of the Court of Appeal erred in law and in fact in upholding the learned trial Judge's declarations in favour of the deceased plaintiff without a legal representative and permission of Court to replace him in the suit.

Arguing these grounds Mr. Muhwezi in effect contended that since Mujungu died before the suit was heard and there was no legal representative appearing on his behalf during the trial the suit should have been dismissed in respect of his claim. Counsel relied on Sections 191 and 192 of the Succession Act and on Section 11 of the Law Reform (Miscellaneous Provisions) Act.

Mr. Katembeko contended that the case of the deceased Mujungu abated because of his death and that in any case the trial judge gave a declatory judgment in respect of the rights of the living and the dead. On ground 5, learned counsel argued that Mujungu's death did not affect the rights of the respondent in whose favour the trial judge gave judgment. Counsel relied on Order 24, Rule 2 of the CP Rules. He supported the decision of the Court of Appeal. (Rule 2 sets out the procedure to be followed in case of death of one of several plaintiffs or of a sole plaintiff).

Page 17 of the record shows that at the beginning of the trial in the High Court, Mr. Katembeko informed court that Mujungu had died and then submitted that "*The case abates in respect of him.*" Mr. Mwene-Kahima who represented the (defendant) apparently said nothing. Thereafter, in the afternoon, four issues framed for the decision of the trial judge read as follows -

1. whether the father of the parties owned the suit land as *kibanja?*

2. whether the plaintiff was entitled to a share of the suit land?

3. whether the defendant obtained the certificate of title fraudulently?

4. Whether the plaintiff is entitled to the remedies.

These issues show that the suit was to be tried with only one plaintiff. Although in the first part of his judgment the judge summarised the facts of the case as if there were more than one plaintiff, the judge was alive to the fact of the death of Mujungu. Thus at page 3 of his typed judgment, the learned trial judge stated

"*By the time the case was cause-listed for hearing, the second plaintiff had died. Nobody had been granted probate or letters of administration of his estate. In the absence of a personal representative, the case proceeded with only the first plaintiff as the claimant. It was the understanding of both counsel that the remedies sought by the first plaintiff if granted, would in effect benefit the estate of the deceased brother.*"

Subsequently, the judge refers to only one plaintiff. Thus at the end of his judgment (page 13) in the first order, the judge declared that -

"*Plot 53, Sheema Block 2, comprised the unregistered customary interests of the defendant, the plaintiff and their brother Mujungu.*"

This clearly shows that there was only one plaintiff during the trial of the suit and the judge decided the suit against the appellant because the appellant had acted fraudulently in registering the suit land in only his personal names.

In the Court of Appeal where this matter was a subject of the first ground of appeal, Byamugisha, JA., relied on Sections 191 and 192 of the Succession Act for her view that *the suit abated when the estate of the deceased plaintiff failed or omitted to take out a grant for purposes of pursuing the claim.* On the other hand, the majority on the Court, Mukasa-Kikonyogo, DCJ., and Twinomujuni, JA., did not quite agree with her on ground 1 of the appeal before that court.

The learned Deputy Chief Justice who wrote the lead judgment relied on Order 21, Rules 1, 2 and 3, of CP Rules and stated that although failure to get a legal representative "*may have resulted in abatement of the deceased's suit*", the cause of action remained alive. She further held that the trial judge gave a declaratory judgment on the issue of ownership of the suit land.
Rules 1, 2 and 3 of Order 21 read as follows:-

1. *The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.*

2. *Where there are more plaintiffs or defendants than one, and any one of them dies, and where the cause of action survives or continues to the surviving plaintiff or plaintiffs alone or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving*

plaintiff or plaintiffs, or against the surviving defendant or defendants.

3. (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law an application is made under sub-rule (1'), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff.

The three rules reflect the objectives of S. 11 of the Law Reform (Miscellaneous Provisions) Act regarding the effect of death on certain causes of action.

The learned Deputy Chief Justice again held that because fraud had been proved against the appellant and that the finding on fraud was not challenged on appeal, the trial judge was justified in directing the Chief Registrar to rectify the appellant's certificate of title by excluding from the certificate shares of the surviving and the dead brothers.

In the plaint, the respondent and his dead brother had alleged that the appellant had fraudulently caused the "certificate of title to be made and issued in his own personal names instead of being as a legal representative of or heir of their deceased father."

Their prayer in that plaint was for an order directing the Registrar of Titles to cancel or rectify the certificate of Title on account of fraud.

Once the trial judge was satisfied on the evidence available that the appellant had committed fraud in getting registered as proprietor, I think that the obvious order to give was either to have the certificate cancelled or rectified as prayed in the plaint regardless of whether Mujungu was still a party to the suit or not. I think that the most practical and reasonable choice was the order made by the trial judge directing the Registrar of Titles to rectify the certificate. I think that the Court of Appeal was justified in upholding the decision of the trial judge. The death of Mujungu did not affect the rights of Muguta. Arguments in support of the appeal are purely technical. The appellant will not suffer any injustice at all because of the decisions of the courts below.

Therefore both grounds 3 and 5 have no merit and ought to fail.

Next Mr. Muhwezi argued grounds 2 and 4 together. These were worded thus:-

1. *The learned Justices of the Court of Appeal erred in law and in fact in holding that the appeal was non-existent in respect of the respondent when incompetency of the suit raised on appeal covered the respondent too.*

4. *The learned Justices of the Court of Appeal erred in law and in fact in holding that the appellant is not entitled to the portion of the disputed land fraudulently registered in his father's name when the suit was instituted against him while without guardian ad l'item and never defended himself.*

These grounds are extremely vague because of the style of drafting.
I see these grounds as centering on technicalities in the same way as grounds 3 and 5 which I have just disposed of.

Be that as it may, Mr. Muhwezi refers us to arguments in the Court of Appeal and argues that the trial was a nullity in as much as the trial judge did not inquire into the sanity of Iterura before the trial. He also contends that Iterura was incapable of appointing an attorney. Learned counsel relied on Order 32 Rule 15 of CP Rules as well as on Orgers On Civil Court Actions, 24th Ed.

Now Order 32 Rule 15 reads as follows:-

The provisions contained in rules 1 to 14 of this Order, so far as they are applicable, shall extend to persons adjudged to be of unsound mind, and to persons who though not so adjudged are found by the

court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interest when suing or being sued.

To be precise the relevant Order should be old Order 29 since the suit was instituted in 1995 before the 2000 revision. But the contents of the two rules are identical. In my opinion out of the 14 rules referred to in Rule 15, it is Rule 3 which is pertinent, when it is read with reference to an insane person. The rule states:-

3. (1) Where the defendant is a minor, the court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian ***ad litem*** of such minor.

(2) An order for the appointment of a guardian ***ad litem may be obtained upon application in the name and on behalf of the minor or by the plaintiff.***

(3) Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed.

(4) No order shall be made on any application under this rule except upon notice to the minor and to any

guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father or other natural guardian, or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objections which may be urged on behalf of any person served with notice under this sub-rule.

As sub-rules (2) and (3) provide, appointment of a guardian *ad litem* by court must be initiated by someone on behalf of the affected litigant.

Mr. Katembeko contends, correctly in my view, in relation to ground 2 that in the Court of Appeal, arguments were directed at the absence of Mujungu as the 2nd plaintiff but not about Muguta. As regards ground 4, Mr. Katembeko contends that in the plaint it was alleged that Iterura (as defendant) was of sound mind and that this was admitted in the written statement of defence. Then Iterura as defendant appointed his daughter to act as his Attorney in the case. She attended Court in that capacity.

As contended by the respondent's counsel, it was alleged in paragraph 2 of the plaint that the defendant (Iterura) was of sound mind. This was admitted in paragraph 1 of the written statement of defence. The position remained the same through-out the trial. Nobody moved court to appoint a guardian *ad Utem* as requied by

Order 29. The record of appeal shows that on 26th April, 2000, counsel for both sides attended court and agreed on certain undisputed facts following which four issues (ante) were framed for determination. Thereafter Muguta the then only plaintiff testified as PW1.Towards the end of his cross-examination, he stated as follows:-

7/7 1991 is when he started getting insane. ……I did not tell my lawyer that Iterura was mentally sick. It is true at times he is mentally disturbed."

Again Perpetua Bwitiriire, (PW4), aged 81 years, and a sister of the three brothers was cross-examined. Towards the end of her cross- examination, she answered thus -

'*!"Iterura is very sick. He is not mentally stable…… The dispute started when Iterura was already mentally disturbed.*"

On the other hand, one Gideon Kateshumbwa (DW1) a former teacher and village-mate of Iterura testified on behalf of Iterura. Towards the end of his examination-in-chief, this is what he stated -

'*Iterura is normal but sickly. He does not move outside the house. He has problems with his eyes.*"

Apparently, no medical evidence was adduced about the mental condition of Iterura. According to PW1, Iterura was aged 74 in 2000

suggesting that he was an old man. May be his behaviour was due to age though I would not speculate.

There was no issue on insanity framed for determination by the learned trial judge, in his reasoned judgment he resolved the 4 issues that were framed for his determination. He cannot, therefore, be blamed for not investigating alleged insanity of Iterura especially when the question of such insanity was not made an issue to be decided by the trial judge. Neither was any application made for the alleged insanity to be investigated nor for the appointment of a guardian *ad litem.*

Mr. Muhwezi for the first time raised this issue when arguing ground 2 in the Court of Appeal. He relied on the evidence of Muguta (PW1) and PW4. Surprisingly learned counsel avoided any reference to the evidence of DW1 who testified on behalf of Iterura (appellant) asserting that the appellant was normal though sick. DW1 who would have probably been the best defence witness on Iterura's mental condition never said anything about his mental state. Was it by design? I don't know.

DW1 testified only that Iterura hardly moved out of his house. This may explain why his daughter was appointed his attorney to attend court on his behalf during the hearing of the suit.

In my opinion, the Court of Appeal held, correctly, that there was no credible evidence of insanity on which it could base itself to hold that the trial judge was aware of Iteruras' insanity and therefore trial judge should have investigated the issue and appointed a guardian.

At the end of the case for the defence, defendant's counsel, (Mr. Mwene-Kahima) addressed the court in these words -

"*The last person I would have called would be the Attorney of Iterura but her evidence would be hearsay. I therefore dose the defence.*"

I would have expected that the attorney should have explained why her father, the defendant, could not attend court personally. She should have been asked to explain his mental condition. Unfortunately and for reason best known by the defence lawyer she was not asked to explain.

I find no merit in grounds 2 and 4. The same ought to fail.
Ground 1 was formulated as follows:-

The learned Justices of the Court of Appeal erred in law and in fact in holding that ***fraud*** *on the part of the appellant's father was admitted as it was not raised on appeal.*

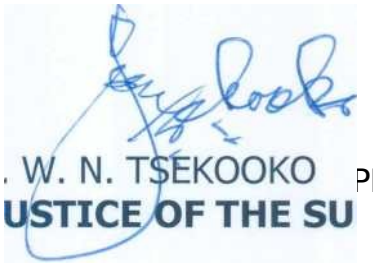
Mr. Muhwezi argued that because Iterura was insane, it was wrong to file a suit against him. Therefore the suit was a nullity. This was a repetition of what counsel had argued earlier.

This ground has no substance as arguments on it are the same as those considered under grounds 2 and 4. It ought to fail.

Ground 6 was discussed during submissions on ground 4. I find no merit in it.

In conclusion, this appeal has no merit and I would dismiss it with no orders as to costs, in as much as the land dispute is between members of the same family.

Delivered at Mengo this ...7th.. day of  2008.



J PREME COURT.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: ODOKI, CJ, TSEKOOKO, KANYEIHAMBA, KATUREEBE AND OKELLO, JJ.SC)

CIVIL APPEAL NO 6 OF 2006

BETWEEN

IDAH ITERURA APPELLANT

AND

JOYCE MUGUTA RESPONDENT

[Appeal from the decision of the Court of Appeal at Kampala (Mukasa-Kikonyogo DCJ, Twinomujuni and Byamugisha, JJA) dated 19th August 2002 in Civil Appeal No 22 of 2002]

JUDGMENT OF ODOKI, CJ

I have had the benefit of reading in draft the judgment prepared by my learned brother, Tsekooko JSC, and I agree with him that this appeal should be dismissed. I also agree with the order he has proposed as to costs.

As the other members of the Court also agree, this appeal is dismissed with no order as to costs.

Dated at Mengo this ……7th……day of ……January……2008

B J Odoki

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: ODOKI, C.J, TSEKOOKO, KANYEIHAMBA, KATUREEBE, OKELLO, *JJ.S.C.)*

CIVIL APPEAL NO.5 OF 2006

BETWEEN

ID AH ITERURA APPELLANT

AND

JOYCE MUGUTA RESPONDENTS

(Appeal from the judgment of the Court of Appeal at Kampala (Mukasa-Kikonyogo, D.C.J Twinomujuni and Byamugisha,)J.A.) in Civil Appeal No.022. of 2002, dated 19th August, 2005)

JUDGMENT OF KANYEIHAMBA, J.S.C

I have had the benefit of reading in draft, the Judgment of my learned brother, Tsekooko, J.S.C. and I agree with his findings and decisions. I concur that this appeal ought to fail. I would therefore dismiss it with costs to the respondent.

Dated at Mengo thi« ^ [1] rlav«f i \ 200^

G.W.KANYEIHAMBA

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: ODOKI, CJ, TSEKOOKO, KANYEEHAMBA, KATUREEBE AND OKELLO,JJ.SC).

CIVIL APPEAL NO. 5 OF 2006

B E T W E E N

IDAH ITERURA:: APPELLANT

AND

JOYCE MUGUTA:: RESPONDENT

(Appeal from the judgment of the Court of Appeal at Kampala (Mukasa-Kikonyogo, DCJ., Twinomujuni and Byamugisha, JJ.A) dated August, 2005 in Civil Appeal No. 22 of2002).

JUDGMENT OF KATUREEBE, JSC.

I have had the benefit of reading in draft the judgment of my learned brother Tsekooko, JSC, and I fully agree with him that the appeal has no merit and ought to be dismissed.

I also agree that these parties being close family members who should probably have been better advised to settle their dispute out of court, and considering that the original brothers and parties to the suit are all dead, there should be no order as to costs.

DATED at Mengo this.....day of .. .200^?

Bart M. Katureebe
Justice of The Supreme Court

THE REPUBLIC OF UGANDA IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: ODOKI, CJ, TSEKOOKO, KANYE1HAMBA, KATUREEBE AND OKELLO, JJSC.)

CIVIL APPEAL NO. 05 OF 2006 B E T W E E N

IDAH ITERURA: :::::: :::::: :::::: APPELLANT

AND

JOYCE MUGUTA: :::::: :::::: :::::: RESPONDENT

[An appeal from the judgment of the Court of Appeal at Kampala (Mukasa-Kikonyogo, DCJ, Twinomujuuni and Byamugisha, JJA) dated 19th August 2005, in Civil Appeal No. 22 of2002].

JUDGMENT OF G. M. OKELLO, JSC:

I have had the opportunity to read in draft, the judgment of my learned brother, Tsekooko, Justice of the Supreme Court, just delivered. I entirely agree with his reasoning and conclusion that the appeal must fail for lack of merit.

I would dismiss the appeal on the terms proposed by Tsekooko, JSC, since this dispute is between members of the same family.

Dated at Mengo this ……day o f . .

G. M. OKELLO JUSTICE OF THE SUPREME COURT