

THE REPUBLIC OF UGANDA,
IN THE SUPREME COURT OF UGANDA AT KAMPALA
(CORAM: OWINY – DOLLO CJ, MWONDHA, TIBATEMWA – EKIRIKUBINZA,
MUSOTA & MADRAMA, JJSC)
CIVIL APPEAL NO 03 OF 2018

10 PATRICK KAUMBA WILTSHIRE} APPELLANT

VERSUS

ISMAIL DABULE}RESPONDENT

*(Appeal from the judgment of the Court of Appeal (Kasule, Cheborion and
Musoke, JJA) delivered at Kampala on 31st January 2018 in Civil Appeal No.
15 130 of 2015)*

JUDGMENT OF CHRISTOPHER MADRAMA IZAMA, JSC

The facts on which this appeal are based are that the appellant, a biological son of Jane Kogere Wiltshire (deceased) who died in 1986 and is hereinafter also referred to as the deceased) lodged a second appeal against the
20 decision of the Court of Appeal affirming the judgment of the High Court holding that the respondent is the lawful proprietor of LRV 194 Folio 13 Plot 21 (the suit property). At the time of her death, the deceased was the registered proprietor of the suit property. The deceased had been registered as such on 21st of October 1981 by Instrument No 210504. On
25 6th November 1981, about 15 days later, the deceased obtained a special certificate of title under Instrument No 201 0562 upon information that the duplicate certificate of title to the suit property was lost. The respondent, a stepfather of the appellant, was married to the deceased. On 24th August 1988, the respondent applied for and was granted letters of administration
30 to the estate of the deceased on 19th of October 1988. The respondent was thereafter registered in the register of the suit property as the administrator of the estate of the deceased on 19th March 1997.



5 The appellant lodged a caveat on the suit property in the capacity of a
beneficiary of the deceased's estate on 19th October 2008. The respondent
reacted by filing HCCS No 155 of 2010 against the appellant for *inter alia*
removal of the caveat. The appellant counterclaimed against the respondent
for *inter alia* an account of the management of the estate of the deceased
10 and for an order to distribute the estate. On the other hand, the respondent
averred that the suit land did not form part of the estate of the deceased.
The learned trial judge held that the suit property did not form part of the
estate of the deceased and ordered cancellation of the special certificate of
title and vacation of the appellant's caveat. Further the respondent had
15 found the duplicate certificate of title which had been reported lost leading
to cancellation of the special certificate of title. The appellant being
aggrieved, appealed to the Court of Appeal and the Court of Appeal upheld
the Judgment and orders of the High Court. The appellant further appealed
to this court on 13 grounds of appeal as follows:

- 20 1. The Court of Appeal erred in law and fact when it held that the suit
land known as LRV 194 Folio 13 Plot 21 Kampala Rd does not form
part of Jane Kogere Wiltshire's estate.
- 25 2. The Court of Appeal erred in law and fact when it held that the
respondent's claim to ownership of the suit land is not barred by
approbation and reprobation.
- 30 3. The Court of Appeal erred in law and fact when it held that the
registration of Jane Kogere Wiltshire as proprietor of the suit land
was an error committed by the officials of the land registry.
- 35 4. The Court of Appeal erred in law and fact when it held that the
Supreme Court ruled in favour of the respondent in Civil Appeal No
2 of 1989.
5. The Court of Appeal erred in law and fact in ordering cancellation
of Jane Kogere Wiltshire's special certificate of title when fraud
and cancellation were not pleaded.



- 5
6. The Court of Appeal erred in law and fact when it ordered the cancellation of Jane Kogere Wiltshire's special certificate of title having made a finding that the respondent's cause of action was not for recovery of land but for removal of caveat.
- 10
7. The Court of Appeal erred in law and fact when it held that the remedies of cancellation of title and consequential orders were not time barred.
- 15
8. The Court of Appeal erred in law and fact in holding that the respondent has a cause of action against the appellant for cancellation of the Jane Kogere Wiltshire's special certificate of title.
- 20
9. The Court of Appeal erred in law and fact when it held that the order of cancellation of Jane Kogere Wiltshire's special certificate of title was in accordance with section 177 of the Registration of Titles Act.
- 25
10. The Court of Appeal erred in law and fact when it held that the English version of Jane Kogere Wiltshire's was forged and instead relied on an unapproved Luganda will purported to be that of Jane Kogere Wiltshire.
- 30
11. The Court of Appeal erred in law and fact in holding that Jane Kogere Wiltshire used a power of attorney and statutory declaration to register herself on the suit title.
- 35
12. The Court of Appeal erred in law and fact when it held that the appellant has no caveatable interest in the suit land and thus erroneously ordered the cancellation of the appellant's caveat.
- 40
13. The Court of Appeal erred in law and fact when it upheld the trial courts dismissal of the appellant's counterclaim.
- The appellant prays for a declaration that the suit land belongs to Jane Kogere Wiltshire's estate, and not the respondent. Secondly for a



5 declaration that the appellant's caveat on the suit land is lawful. Thirdly for
an order setting aside the Judgment and orders of the Court of Appeal and
substituting therefore an order dismissing the suit and allowing the
counterclaim. Fourthly he prayed for an order revoking letters of
administration to the estate of the deceased granted to the respondent.
10 Fifthly an order that the respondent accounts for all the income he has been
deriving from the suit property from the time he obtained letters of
administration to the time of Judgment of this court. Sixthly for an order
that the respondent pays the costs of the proceedings in this court and in
the courts below. Finally, for any other further relief as this court may deem
15 fit to grant.

Representation.

The Appellant was jointly represented by Messrs. Nambale, Nerima & Co.
Advocates & Legal consultants and Messrs. Candia & D.W. Oundo
Advocates. The Respondent was represented by Messrs. Omongole & Co.
20 Advocates. Both firms filed written submissions in this appeal as their
address to court. When the appeal came for hearing the appellant was
represented in court by learned counsel Mr. Nelson Nerima, Mr. Alex
Candia, Mr. Oundo David Wandera and Mr. Akuku Saviour while learned
Counsel Mr. Ekima Emmanuel appeared for the Respondent. Both counsel
25 adopted their written submissions on record as their address to this court
and judgment was reserved on notice.

Submissions of Counsel.

In the written submissions, the appellant argued grounds 1, 2, 4, 10 and 12 of
the appeal together and grounds 3 and 11 together. The appellant further
30 argued grounds 5, 6, 7, 8 and 9 of the appeal together and ground 13 alone.

Grounds 1, 2, 4, 10 and 12.

The gist of the submissions of the appellant's counsel on grounds 1, 2, 4, 10
and 12 are that the Court of Appeal found that the suit land was not part of
the estate of Jane Kogere Wiltshire (the deceased). The appellant's



5 assertion is that the suit land forms part of the estate of the deceased for
the following reasons. Firstly, the deceased was the registered proprietor
since 21st October 1981 under Instrument No 210504. A certificate of title
issued under the Registration of Titles Act is conclusive evidence of title
under section 59 thereof. Such certificate cannot be impeached or defeated
10 on account of any informality or irregularity in the application or in the
proceedings previous to the registration (see *Kampala Bottlers Ltd vs
Damanico (U) Ltd (1990 - 1994) EA 140*). Under section 46 (4) of the RTA, the
person named in such a certificate of title as proprietor shall be deemed to
be the duly registered proprietor of the land. The interest of the registered
15 proprietor is paramount in accordance with section 64 of the RTA. A
certificate of title can only be impeached for fraud under section 176 of the
RTA. The appellant's counsel submitted that the Court of Appeal erroneously
ignored all the above laws in arriving at its decision.

Counsel further submitted that the respondent applied for letters of
20 administration to the estate of the deceased and declared that the suit land
was part of the property of the deceased's estate. At the trial, the
respondent admitted that when he was applying for letters of
administration, he included the suit land on the list of properties of the
deceased. The appellant's counsel contended that there was no better
25 evidence to prove the fact of ownership of the deceased to the suit property
than the above admissions. He argued that the Court of Appeal disregarded
this admission.

Thirdly, the appellant's counsel submitted that when the respondent
obtained letters of administration, he was registered as an administrator of
30 the estate on 19th March 1997 under Instrument No 286237. Further under
sections 25 and 180 of the Succession Act, the estate of the deceased vests
in the administrator of the estate (see also *Halsbury's laws of England 3rd
Edition Vol 16 Para 281* cited with approval in the High Court Miscellaneous
Cause No 919 of 1997 *Jonah Senteza Kanyerezi and another vs Chief
35 Registrar of Titles and others*). Counsel argued that the suit property could



5 not have devolved upon the respondent as administrator of the estate of the deceased, had the property not belonged to the deceased.

The appellant's counsel faulted the Court of Appeal for relying on the Will of the deceased written in Luganda. He contended that it ought not to have relied on because the trial court had not admitted it in evidence for lack of
10 proof as neither the respondent nor his daughter Marion were attesting witnesses to the will. All wills have to be attested by two or more witnesses under section 50 (c) of the Succession Act cap 162. The will had to be proved in court by an attesting witness under section 67 of the Evidence Act. Where
15 no attesting witness is found, it is proved by proving the signature of the attesting witness under section 68 of the Evidence Act. Counsel argued that no attesting witness was called to prove the will. Further, the manner of the alleged attestation is suspicious by witnesses who are either unknown or who have incomplete and unascertainable names. Lastly, Mr Ernest Wiltshire Kalibala purportedly handed over the will to PW2 but he was not
20 called to testify. In addition, the respondent did not mention the will in his petition for letters of administration.

On the fourth ground, the appellant's counsel submitted that the respondent as administrator of the estate of the deceased voluntarily defended the title of the estate in Supreme Court Civil Appeal No 02 of 1989; Ismail Dabule vs
25 Mrs Georgia Pantelakis. The deceased had lost title to the suit property to Mrs Georgia Pantelakis pursuant to HCCS No 64 of 1986. In 1989, the respondent as an administrator of the estate, successfully appealed to the Supreme Court after the deceased died in 1986. The appellant's counsel submitted that if the suit land belonged to the respondent, he ought to have
30 sued Mrs Georgia Pantelakis separately and in his own right on the basis of the lost and found duplicate certificate of title but he chose to substitute the deceased in the appeal.

Further, the appellant's counsel contended that the foregone submissions also resolve ground 4 of the appeal where the Court of Appeal erroneously
35 held that the Supreme Court ruled in favour of the respondent in Supreme



5 Court Civil Appeal No 02 of 1989. He asserted that the Supreme Court ruled in favour of the estate of the deceased.

The appellant's counsel contended that the respondent never sued the estate of the deceased for recovery of the suit property since 1987 when he returned to Uganda from exile to date, being a period of more than 33 years.
10 Counsel contended that the respondent having acknowledged the proprietorship of the deceased in Administration Cause No 376 of 1988 and defending the ownership which the estate lost in HCCS No 64 of 1986 to Mrs Georgia Pantelakis, he was estopped from asserting personal ownership to the suit property (See section 114 of the Evidence Act). Counsel argued that
15 the respondent was approbating and reprobating by accepting the proprietorship of the deceased and rejecting it at the same time, something which this court ought not to condone.

On the question of whether the appellant has any proprietary interest giving him a right to caveat the suit property, the Court of Appeal held that he had
20 no beneficiary interest because the property was not part of estate of the deceased. Counsel contended that this was an error of law and fact. The appellant as a beneficiary to the estate of the deceased which owned the property had a right to lodge a caveat.

In addition, counsel argued that article 247 (a) of the Constitution requires
25 an efficient, fair and expeditious machinery for the administration and management of the estate of deceased persons to be promoted. He wondered whether it was fair for an administrator of the estate of the deceased to turn around and claim that the suit property is his personal property. Counsel submitted that the suit land forms part of the estate of
30 the deceased and therefore grounds 1, 2, 4, 10 and 12 of the appeal ought to be allowed.

In reply, it was argued for the respondent that he is the lawful registered owner of the suit property which he purchased in 1976 from Ms Georgia Pantelakis. The respondent deposited the duplicate certificate of title which
35 was registered in his names as proprietor with the Libyan Arab Bank before



5 he went into exile in 1979. While in exile, he gave powers of attorney to his
wife (the deceased) to manage all his businesses including Slow Boat
Restaurant located on the suit property. In the course of management, the
deceased discovered that the duplicate certificate of title was "missing" and
10 applied for a special certificate of title as an attorney of the respondent. This
was erroneously issued and the deceased was registered as proprietor on
the special certificate of title. The respondent's counsel asserted that the
name of the deceased does not appear on the original certificate of title and
entry in the special certificate was an error of the land office. Further the
respondent attempted to correct this error but was advised to seek relief
15 from court. The respondent applied for and was granted letters of
administration in respect of his late wife's estate so as to repossess the suit
land after the estate had been administered by two other persons. The will
of the deceased states that upon the respondent's return, his name should
be re-entered on the land title.

20 The respondent upon his return got his duplicate certificate of title from the
Libyan Arab Bank and it was exhibited twice in the Supreme Court against
another claimant and later in this matter rendering the special certificate of
title null and void. The respondent sought to cancel the special certificate of
title after his duplicate certificate of title had been recovered but the
25 appellant lodged a caveat on the suit land compelling the respondent to file
Civil Suit No 155 of 2010 in the High Court of Uganda seeking *inter alia* the
vacation of the caveat, compensation and costs of the suit. Judgment was
given in the respondent's favour. The appellant then appealed to the Court
of Appeal which upheld the judgment and orders of the High Court.

30 Grounds 1, 2, 4, 10, and 12.

In reply to the submissions of the appellant on grounds 1, 2, 4, 10 and 12 of
the grounds of appeal, the respondent's case is that the Court of Appeal as
the first appellate court properly evaluated the evidence on record when it
held that the suit land did not form part of the estate of the deceased.



5 The respondent's counsel submitted that the respondent explained how he
acquired the suit land and the circumstances under which the deceased
was registered on the special certificate of title. PW2 Ms Emily Kaumba
testified that the deceased told her before her death that the suit land
belonged to the respondent and she only applied for the special certificate
10 of title for purposes of managing the suit property.

The learned Justices of Appeal rightly considered the fact that the
respondent purchased the suit land from the attorney of Ms Georgia
Pantelakis who had granted powers of attorney to Obol - Ochola & company
advocates. Before he went to exile in 1979, he deposited his duplicate
15 certificate of title with the Libyan Arab Bank of Uganda and later gave
powers of attorney to the deceased to manage his account. The deceased
later discovered that the certificate of title was missing and obtained a
special certificate of title. The Justices of Appeal rightly found that the
power of attorney the deceased used had not been registered with the
20 Registrar of Documents. Secondly, it was not witnessed as required by
section 148 of the RTA. The power of attorney could not be legally used by
the deceased to apply for the special certificate of title. Thirdly the power
granted was specific for management of the respondent's account in the
Libyan Arab bank, Bombo branch. Fourthly a donee of a power of attorney
25 acts as an agent of the donor and cannot use the power for his or her own
benefit (see *Imperial Bank of Canada vs Beglay* (1936) 2 All EA 367 and
Fredrick Zaabwe vs Orient Bank Ltd and others SCCA No 04 of 2006).
Further the statutory declaration used by the respondent's wife to get
registered on the special certificate of title on 21st of October 1981, was
30 declared on 24th November 1981 more than a month after the date of
registration and this was an incurable irregularity as it contravenes section
70 of the Registration of Titles Act.

The respondent's counsel argued that the Court of Appeal did not ignore the
legal effect of a certificate of title under sections 59, 46 (4), 64, 176 of the
35 RTA because the law did not apply in the circumstances. The deceased got
registered illegally as proprietor on the title. Secondly, on the contention



5 that the respondent accepted the proprietorship of the deceased, the Court
of Appeal rightly considered the evidence on record and explored the
circumstances under which the respondent applied to administer an estate
that had already been administered by two other people. Part of the will of
the deceased stated that on returning to Uganda, the respondent was to
10 transfer the suit property back into his names. The application of letters of
administration did not imply conceding that the suit land formed part of the
estate of the deceased.

To the appellant's contention that the suit land would not have devolved on
the respondent as administrator if it did not belong to the estate of the
15 deceased, the respondent's counsel submitted that the learned Justices of
Appeal rightly re-evaluated the evidence and found that the application for
letters of administration, did not imply any waiver of the right of ownership.

The respondent's counsel relied on in *Re Edwards* (1958) Ch. 168 CA for the
proposition that one of the essentials of the doctrine of election is that the
20 benefit should be given in a will to the true owner of the property. In the
instant case, the deceased never intended to take the suit property for
herself. So in order to avoid acrimony she clarified on the proprietorship of
the suit property in her will which was admitted in evidence as exhibit D6.

The Court of Appeal Justices re-evaluated all the evidence and came to a
25 conclusion on that the deceased was registered on the special certificate of
title illegally, and the only way to correct that illegality was for the
respondent to apply for letters of administration so as to have a lawful right
to make changes on the title.

On whether the Court of Appeal rightly relied on the "Luganda will"

30 On whether the will should not have been relied on as it was unproven, the
respondent's counsel submitted that the Court of Appeal properly re-
evaluated the evidence on record when it considered the will and made
observations about it. It was the only valid will on court record. Further, the
estate had already been administered by the sister of the deceased, the late



5 Alice Madeleine Wilshire jointly with her brother. The respondent applied to administer the remaining part comprising the suit property.

In addition, the respondent's counsel submitted that at the hearing, PW2, Emily Marion stated that she was the custodian of her mother's will since 2000 and the will is written in Luganda. Evidence adduced not only proved the authenticity of the will but it was never challenged by the appellant in the High Court or the Court of Appeal. The will was given to the respondent by PW2 much later and after he had applied for letters of administration. The will and the translation thereof were exhibited in evidence.

10 On the fourth ground, the respondent's counsel submitted that the appellant's argument was that the Supreme Court in SCCA No 02 of 1989 ruled in favour of the estate of the deceased and not the respondent. In reply, the respondent's counsel submitted that the Court of Appeal properly re-evaluated the evidence on record when it held that the Supreme Court ruled in favour of the respondent. The respondent was a party in the SCCA No 02 of 1989 and the sole reason a re-trial was ordered was the production of the duplicate certificate of title for the suit property in the names of the respondent and this demonstrates that Supreme Court Civil Appeal No 02 of 1989 was decided in favour of the respondent.

25 On the fifth ground, the respondent's counsel pointed out that the appellant argued that the respondent has never sued the estate of the deceased for recovery of the suit property since 1987 and it is now 33 years since that time. The respondent's case is that when he returned to Uganda, there was no reason to sue anyone due to the fact that the will of the deceased clearly stated that he was the owner of Plot 21 Kampala Rd and he enjoyed quiet possession of the suit property since then. Upon return to Uganda, the respondent was handed a copy of the special certificate of title together with the will of the deceased which provided for return of the property to him and what remained was a rectification of the register to reflect his proprietorship.



5 On the issue of whether the appellant had a right that could be protected by
a caveat, the Court of Appeal rightly re-evaluated the evidence on record
and held that the appellant had no interest of a beneficiary in the suit
property. Further he is liable to pay compensation under section 142 of the
Registration of Titles Act (see *Boyes vs Gathure (1969) EA 385*). The
10 respondent's counsel further submitted that section 139 (1) of the
Registration of Titles Act and article 247 (A) of the Constitution do not apply
in the circumstances. He invited court to find in the negative on grounds 1,
2, 3, 4, and 12.

Ground 3 and 11. The question of whether the deceased was registered by
15 mistake or error, the respondent submitted that the learned Justices of
Appeal properly re-evaluated the evidence on record and rightly held that
the deceased was registered by the mistake of the land officials and gave
reasons for their conclusion. On whether the Commissioner land
registration rejected the respondent's application for cancellation of the
20 special certificate of title and removal of caveat, the respondent's counsel
submitted that the application was never rejected and the Commissioner
refused to remove the caveat because a beneficiary's caveat can only be
removed by an order of court under section 144 of the Registration of Titles
Act (see *Teja Singh and Others Vs Isher Singh and others (1957) EA 654* and
25 *Sanyu Lwanga Musoke Vs Yakobo Ntale Mayanja SCCA No. 59 of 1995*). With
regard to the argument that the Court of Appeal erred in condemning the
Commissioner for the mistakes without according him a fair trial, the
respondent submitted that it is not the Commissioner who is trying to
fraudulently deprive the respondent of his property but the appellant.
30 Secondly, this was never an issue both in the High Court and the Court of
Appeal. Thirdly, the plaintiff had the liberty to sue whomsoever he chose
and by the same token could not be forced to sue anybody.

On whether there is no link at all between the power of attorney, statutory
35 declaration and the Instrument Nos 210504 and 201562 which the deceased
used to apply for a special certificate of title, the respondent submitted that
these documents constitute the only logical explanation of registration of



5 the deceased on the title. Any absence of the documents impeaches her
registration even further to the detriment of the appellant. Further there
was an illegality which court could not ignore and cancellation of the special
certificate of title was the only way to do rectify the illegality. The order of
10 cancellation was necessary to meet the ends of Justice (see *Makula
International vs his Eminence Cardinal Wamala Nsubuga and another [1982]
HCB 11*).

The respondent's counsel submitted that a special certificate of title is
issued under section 70 of the Registration of Titles and only replaces the
15 duplicate certificate and the special certificate ought to have first been
registered in the names of the respondent whose names appear on the
registry copy and not register the names of deceased.

With regard to the argument that the reliefs granted were not pleaded, and
that the administrator of the estate of the deceased was not sued and no
relief could be ordered or sought against him, the respondent submitted
20 that the learned Justices of Appeal properly re-evaluated the evidence on
record and rightly upheld the order of cancellation of the special certificate
of title. The appellant did not have any explanation or evidence showing how
the deceased acquired the suit property or how she got the special
certificate of title registered in her names. Evidence at the trial on how the
25 deceased got registered on the special certificate of title was adduced by
the respondent. The appellant did not challenge this evidence and the Court
of Appeal rightly re-evaluated the evidence and held that the process of
registration was tainted with gross irregularities in violation of section 70
of the RTA. The cancellation was necessary to restore the respondent as
30 the lawful proprietor of the property to meet the ends of justice.

On whether the order to cancel the name of the deceased from the title was
an error of law and fact?

The respondent's counsel submitted that the learned Justices of Appeal
properly re-evaluated the evidence and rightly upheld the order of
35 cancellation. On the question of pleadings, the respondent reiterated



5 submissions that there was no need to sue anybody upon returning from
exile. The respondent was handed over a certificate of title and the will of
the deceased to enable him effect the changes. The order of cancellation of
the special certificate of title was an order necessary for the ends of justice.

10 On whether it was illegal to cancel the special certificate of title in the
absence of the registered proprietor, the respondent's counsel submitted
that the argument is misleading. The only person that needs to be heard
was the respondent due to the fact that the appellant had placed a caveat
on the suit property as a beneficiary. There was no violation of a right to be
15 heard as the suit was for removal of caveat and the appellant and the
respondent were heard. Moreover, this issue was never raised in the Court
of Appeal and the appellant raised it for the very first time in this court. He
invited this court to ignore the issue of whether any person's right to fair
hearing was infringed.

20 The respondent's counsel further submitted that the suit for cancellation is
not time barred. This is because the suit was for removal of caveat. The
cause of action arose on the 19th of May 2008 and the suit was filed in 2010
only one year from the date when the cause of action arose. The respondent
had already recovered his land in 1986 when the children of the deceased
handed over the will and title to the suit property to him to enable him effect
25 changes on the duplicate certificate of title. The Limitation Act and section
5 thereof prescribes a period of 12 years from the time the cause of action
arose. In the premises, the respondent's counsel prayed that this court finds
grounds ,6, 7, 8 and 9 in the negative.

30 Whether the title of the deceased was cancelled in accordance with section
177 of the Registration of Titles Act?

The respondent's counsel submitted that the appellant misapplied the law
in his submissions. The court rightly ordered cancellation of title under
section 177 of the RTA consequential to the irregularities in decisions
affecting interests on the title which had come to light at the trial. He
35 contended that it is appellant who is trying to recover land using a caveat



5 on the ground of being a beneficiary to the estate of the deceased. The rules cited by the appellant were inapplicable in the circumstances. The court upon re-evaluation of the evidence found that the appellant's interest was founded on wrong premises.

Grounds 3 and 11.

10 The appellant's counsel submitted on the question of whether the name of the deceased was registered on the suit title by mistake or error? The Court of Appeal held that the deceased was registered on account of errors and mistakes of land officials. The alleged error or mistake is that the deceased used a power of attorney granted by the respondent to manage the suit land and a statutory declaration to register herself on the title. He contended
15 that this holding is erroneous because:

Firstly, the respondent raised this issue with the Commissioner Land Registration under section 91 of the Land Act and it was rejected as baseless. Secondly, only the Commissioner can defend her actions, her
20 mistakes or errors. The appellant has no *locus standi* to defend the Commissioner's alleged mistakes or errors. Counsel wondered why the respondent refused to sue the Commissioner for her decision. He contended that since the appellant had no locus standi to defend the Commissioner and the latter was not sued, the courts below erred in
25 condemning the Commissioner for alleged mistakes or errors without a fair hearing as provided for under article 28 (1) & 44 (c) of the Constitution. Thirdly, the question was whether the deceased was in fact registered using the impugned power of attorney and statutory declaration. The appellant contends that exhibit P11 and P12 are strange documents obtained from an
30 unknown source. The documents were not from the land office which by law issues instrument numbers, registers and keeps them under section 48 (1) and (2) of the RTA. On their lodgement and registration, the instruments become public documents.

35 There is no evidence from the Registry of Titles that the deceased was registered on the basis of the impugned power of attorney and the statutory



5 declaration. There was no evidence that the alleged documents were ever
used to transfer the property as claimed by the respondent. The deceased
was registered as proprietor on the original title on 21st October 1981 under
Instrument No 210501 exhibit P7. Later on she applied for a special
certificate under Instrument No 210562. The respondent established no link
10 at all between the instruments 210504 and 210562 which had been exhibited
in evidence.

The appellant's counsel submitted that in the first place exhibits P11 and P12
have no instrument numbers. Secondly they have no embossed stamp of
the land office as evidence that they were lodged for registration. Further
15 they are not certified by the land office as public documents (see section 64,
63, 75 and 76 of the Evidence Act). Accordingly, they are barred by law from
being admitted in evidence to prove the contents and existence of
instruments 210504 and 210562. The Court of Appeal erred to rely on them.

Further and related, the respondent did not obtain certified copies but relied
20 on questionable documents purporting to be registered under instruments
210504 and 210562. The appellant's counsel submitted that this is not
surprising since the land office had already rejected the respondent's
claims as unsatisfactory. In the premises, he prayed that an adverse
inference be made against the respondent for not requesting for the
25 certified copies of the instruments.

With regard to ground 5, the complaint was against the granting of reliefs
that were not pleaded. The court held that an issue not pleaded can be a
basis for a decision if the parties have made it so and the parties had framed
the issue: "whether Kogere correctly acquired the special certificate".
30 Counsel contended that the Court of Appeal missed the point. To resolve
this ground, the court ought to have asked whether the estate was sued and
what case was pleaded against the estate. He contended that this is the
legal requirement under Order 6 rule 1 & 7, Order 7 rule 1 (c) (e) (g) an Order
7 rule 7 of the Civil Procedure Rules. That in order to cancel the title of the
35 estate of the deceased, the Court of Appeal held that the respondent's suit
was not for recovery of land but for removal of caveat. The appellant's



5 counsel submitted that the cancellation order is an error in law and fact as it is bad in law and barred by the law for the following reasons;

10 Firstly, the suit was neither for recovery of land nor against the estate of the deceased and the respondent did not seek any reliefs against the estate of the deceased. Counsel contended that the respondent is bound by his pleadings and cannot succeed against an estate he never sued. Secondly, an action for recovery of land lies only against the registered proprietor in terms of section 176 of the RTA (see *Kampala Bottlers vs Damanico* (supra)). The appellant who is not the registered proprietor has no locus standi to defend the registered proprietor's title. The administrator of the estate, who is the registered proprietor, is not a party. Thus, his title cannot be cancelled without action under section 176 and 177 of the RTA.

15 The appellant's counsel submitted that it is illegal to cancel a person's title in absentia as this violates the right of hearing, the right to property and it violates the rules of natural justice. That orders made without fair hearing are void ab initio and cannot be left to stand.

20 Thirdly, upon the order of cancellation, which is time barred, the court restored the respondent's proprietorship. An order for cancelling title is a consequential remedy upon recovery of land from the registered owner under section 177 of the RTA. Counsel contended that the court reverted the land to the respondent, which is in effect an order recovering land from the estate of the deceased.

25 The appellant's counsel submitted that the courts below had no jurisdiction to cancel the title of the estate to the suit property except in an action brought within 12 years from the time the cause of action arose. A court cannot grant reliefs which are barred by statute. In the instant case, the respondent knew of the proprietorship of the deceased in 1988 when he applied to administer the estate of the deceased and he was later registered on the title on 19th March 1997. He filed his suit on 24th of May 2010 more than 23 years after the cause of action accrued. No ground of exemption from the law of limitation was pleaded in the plaint in accordance with Order 7



5 rule 6 of the Civil Procedure Rules. Transfer of the property from the estate of the deceased to the respondent more than 22 years after the alleged cause of action arose is barred by section 5 of the Limitation Act.

10 Further counsel submitted that the title of the estate of the deceased was not cancelled in accordance with section 177 of the RTA, that requires a consequential order of cancellation of title upon recovery of land from the proprietor in a suit. The Court of Appeal acknowledged that the suit was not for recovery of land. Moreover, an action for recovery of land only lies against a proprietor under section 176 of the RTA. However, the registered proprietor is the respondent, as administrator of the estate of the deceased.

15 As an administrator of the estate, he was not sued for recovery of land. Since the suit was not for recovery of land and the proprietor thereof was not sued to defend the title, the Court of Appeal erred in holding that the cancellation order was made pursuant to section 177 of the RTA.

20 Counsel further prayed that we find that the cancellation order is barred by articles 26, 28 & 44 (c) of the Constitution of the Republic of Uganda, sections 176 and 177 of the RTA, sections 25 and 180 of the Succession Act, section 5 of the Limitation Act and the principles of natural justice. It also violated Order 6 rules 1 & 7 and Order 7 rules 6 and 7 of the Civil Procedure Rules and grounds 5, 6, 7, 8 and 9 of the appeal should be allowed.

25 Ground 13.

"The learned Justices of Appeal erred in law and fact when they upheld the dismissal of the appellant's counterclaim".

30 Appellant's counsel submitted that the court dismissed the counterclaim because of its finding that the suit property did not form part of the estate of the deceased. This conclusion was an error of law and fact as the land belongs to the estate of the deceased, and the counterclaim ought to be allowed. In the premises, he prayed that the appeal is allowed with the remedies prayed for in the memorandum of appeal.



5 Regarding the prayers to revoke letters of administration granted to the
respondent, the respondent asserted that it is null and void ab initio.
Secondly, that the suit land does not belong to the estate yet he applied to
10 it as part of the deceased's estate. Thirdly, he stated that all the properties
of the deceased were administered before he got the grant and that he only
got the grant to recover the land from the estate. Since this is the only
15 remaining property of the estate, which he disputes, the respondent cannot
be entrusted with the administration of the estate. Fourthly, letters were
not granted to administer as a means to recover property from the estate
but rather to enable them to deal with the estate according to the law by
20 collecting the property of the deceased, paying off the debts and distributing
the residue to the entitled beneficiaries.

The appellant's counsel contended that from the foregoing, the respondent's
grant was tainted with fraud and illegalities that should not be condoned by
this court. He prayed that the Supreme Court invokes its powers under
25 section 11 of the Judicature Act and rule 2 (2) of the Supreme Court Rules to
revoke the respondent's grant and grant letters of administration to the
appellant to avoid further proceedings.

In the premises, the appellant's counsel prayed that the court be pleased to
allow his appeal.

25 In reply, the respondent's counsel on whether the suit land formed part of
the estate of the deceased, reiterated earlier submissions that once the
Justices of Appeal found that the suit land did not form part of the estate of
the deceased, then the counterclaim could not succeed.

Regarding the prayer for revocation of the letters of administration, it was
30 submitted that the respondent had applied for letters of administration to
protect his interest in the suit land as he pursued the process to effect the
change in the white page in line with the will of the deceased and that this
was the only lawful procedure to correct the record.

The essence of the court's inherent jurisdiction is to prevent abuse of court
35 process and to do justice between the parties to secure a fair and just



5 termination of the real matter in controversy in the appeal (see *Livingstone Sewanyana vs Martin Alier* [1992] IV KALR 118 at page 121 – 123). Counsel submitted that the appellant is trying to grab the respondent's land using court and prayed that this court dismisses the prayer to revoke the respondent's letters of administration.

10 Secondly, the respondent's counsel submitted that the appellant filed a suit in the Family Division HTC – CS – 0043 – 2012 against the respondent for revocation of letters of administration. In light of that, the Court of Appeal found that the counterclaim was an abuse of court process since the same was being handled by the High Court Family Division which is better placed
15 to handle it. The respondent prays that the court be pleased to find no merit in the appeal and to dismiss it with costs.

In rejoinder, the appellant's counsel submitted that under section 59 and 176 of the RTA, a certificate of title is conclusive evidence of ownership and its production alone is an absolute bar to any claim for recovery of the land.
20 He submitted that the deceased got registered on the title on 21st October 1981 under Instrument No 210504. Secondly on 19th March 1997 the respondent got registered under Instrument No 286237 as administrator of the estate of the deceased. No oral or other evidence except the title itself should be admitted in evidence because the title is conclusive proof of
25 ownership of the suit land in terms of section 59 of the RTA.

Further, counsel submitted that illegality is a ground for impeachment of title under section 91 of the Land Act. The respondent attempted to invoke section 91 of the Land Act earlier before the Commissioner for land registration and his application was rejected as a baseless one.

30 The appellant's counsel submitted that in the instant case, the respondent did not sue the estate of the deceased to impeach the title even on the ground of illegality. The court could not therefore find that her registration was illegal without a suit against the estate. In the premises, the Court of Appeal did not seriously discharge its duty as a first appellate court.



5 The appellant's counsel further submitted that the Court of Appeal rightly held that the suit was not for recovery of land but went ahead to uphold the order cancelling the title of the deceased. The Court of Appeal held that cancellation of title is the tail end of the recovery process made as a consequential order and therefore the cancellation of title did not comply with the law. In Constitutional Petition No 04 of 2006; Turyatamba and others vs Attorney General and another, the Court of Appeal, sitting as the constitutional court, refused to cancel leases and titles of persons who were not parties to the petition on the ground that doing so would violate their right of hearing.

15 On administration of the estate of the deceased, the appellant's counsel submitted that the only valid will of the deceased was in English. Probate had been granted to Alice Wiltshire in Administration Cause No 522 of 1986 and the evidence does not support the respondent's argument that the will written in English was forged. The respondent applied for letters of administration after the death of the previous executor of the estate of the deceased. The respondent argued that he applied for letters of administration to the estate as a way of getting the land back in accordance with the alleged Luganda will of the deceased and not to hold it on behalf of the estate. This evidence was that because his late wife had not signed transfer forms he had to obtain letters of administration for purposes of being re-registered on the certificate of title.

The appellant's counsel wondered whether a person can be appointed an administrator of an estate as a means of recovering property from the estate of the deceased. Counsel argued that the only lawful options are obtaining a transfer from the administrator of the estate; obtaining a vesting order under section 167 of the RTA, moving the Commissioner for Land Registration under section 91 of the Land Act; or by suing the estate of the registered proprietor under sections 176 & 177 of the RTA.

35 The appellant's counsel contended that the decision of the lower courts has the effect of introducing a strange and nefarious alternative, which is of obtaining letters of administration with an ulterior motive of recovering land



5 from the estate to be administered. This makes it possible for a person with
a land dispute to wait until the other disputant dies so as to take over the
estate under the guise of administration for the said ulterior motives.
Counsel contended that this would breed anarchy and chaos.

10 Further, the appellant's counsel submitted that an administrator is a person
appointed by the court to administer the estate of a deceased estate and he
or she is a trustee with a legal duty to file an inventory or account in court.
The administrator is a legal representative of the deceased and all the
property of the estate vests in him or her for the benefit of the beneficiaries.

15 Further the administrator holds the property of the deceased in trust for the
beneficiaries of the deceased's estate. For the lower courts to hold
otherwise contravenes sections 25, 180, 2 (a) and the Long Title of the
Succession Act. Further that the Court of Appeal, in effect, amended the law
by implication and exercised legislative power in violation of article 79 of
20 the Constitution. Since the filing of the suit in 2010 and up to date, the suit
land remains in the name of the respondent as administrator of the estate
of the deceased and in terms of the relevant law cited under the Succession
Act and the RTA, the property belongs to the estate of the deceased.

25 The appellant's counsel wondered why, if the respondent applied for letters
of administration just to transfer the suit land back to himself, he did not do
so from 1988 to date? He wondered why the respondent is still registered
as an administrator of the estate of the deceased.

30 Finally, the appellant's counsel submitted that the respondent's case is that
his letters of administration should not be revoked but he is full of
controversy. In his reply to the written statement of defence and
counterclaim and in his witness statement, he stated that the grant is null
and void ab initio, but now he wants to states otherwise. The respondent
should to not take this court for granted. Courts do not exist for busybodies
but for serious legal issues and in the premises, the letters of
administration granted to the respondent should be revoked and granted to
35 the appellant.



5 Consideration of the appeal.

I have carefully considered the appellant's appeal, the submissions of counsel, the pleadings of the parties in the High Court as well as the grounds of appeal in the Court of Appeal, and in this court. I have also considered the judgment of the High Court and the Court of Appeal. This is a second appeal arising from the decision of the Court of Appeal dismissing the appellants appeal. The duty of this court is to consider points of law which include whether the Court of Appeal performed its duty as a first appellate court to subject the evidence to fresh scrutiny (see *Kifamunte Henry vs Uganda; (Criminal Appeal No. 10 of 1997) [1998] UGSC 20, (15 May 1998)* where the Supreme Court held that it is the Court of Appeal, as a first appellate Court which has a duty to evaluate the evidence under 30 (1) of the Judicature (Court of Appeal Rules) Directions (as revised, previously rule 29 (1)). Where the Court of Appeal re-evaluated the evidence and subjected it to exhaustive scrutiny, the Supreme Court would not interfere with any concurrent findings of fact supported by credible evidence). Conversely, the issue of whether there is no credible evidence in support of a finding of fact is a question of law.

While there is no factual controversy to try in this appeal, the issues raised on second appeal to this Court require a clear account of the facts and issues involved which I endeavour to set out below, the best way I can.

The genesis of this dispute is traced to High Court Civil Suit No 155 of 2010 in which the respondent sued the appellant for orders to vacate a caveat he had lodged on the suit property comprised in LRV 194 Folio 13, Plot 21 Kampala Rd on 19th of May 2008 under Instrument No 396337, for damages and for costs of the suit. The pleadings in the trial court disclose that the plaintiff brought the suit in his personal capacity and not as a legal representative of the estate of the deceased (Jane Wiltshire Kogere).

Further, the plaintiff pleading disclose that he was at all material times the lawful registered owner of the land comprised in LRV 194 Folio 13 (hereinafter referred to as the suit property) which he purchased in 1976



5 from one Ms Georgia Pantelakis. What is material being that among the
facts pleaded by the plaintiff, who is now the respondent, it is asserted that
he went into exile in 1979 and while in exile, he gave powers of attorney to
his wife, who is the appellant's mother, to manage all his properties. That in
10 the course of managing the property, his wife discovered that the original
duplicate certificate of title was missing and could not be traced and in her
wisdom, applied for and obtained a special certificate of title. However, the
title was registered in her names presumably by virtue of the power of
attorney he had granted her. I would particularly like to refer to paragraph
4 (h) of the plaint wherein the respondent who was the plaintiff averred that:

15 "The late wife to the plaintiff knew even before her demise that the property
belongs to the plaintiff. This is evident in her will which states that the plaintiff
should transfer the suit property into his names as soon as he returns to Uganda.
A copy of the said will is hereto annexed and is marked "E"."

In the written statement of defence, the appellant's defence disclosed that
20 he is the eldest son of the late Jane Kogere Wiltshire (the deceased), the
registered proprietor of the suit property by virtue of a registration under
Instrument No 210504. That the respondent who was the plaintiff then
obtained letters of administration for purposes of administering the estate.
The appellant counterclaimed against the respondent alleging inter alia
25 misappropriation of the estate and failure to account for monies received
while administering the estate of the deceased. The appellant sought an
order dismissing the plaintiff's suit with costs and for judgment to be
entered in the counterclaim and for an order of protection, preservation and
conservation of the caveat on the certificate of title. An order to account of
30 the proceeds realised by the plaintiff. Thirdly an order to assume, acquire,
own and possess the suit property. General damages for devastation and
for distribution of the estate by the respondent to the beneficiaries among
other orders.

In the High Court, the issues determined by the learned trial judge were:



- 5 1. Whether the property comprised in LRV 194 folio 13 Plot 21 Kampala Rd also known as Slow Boat forms part of the estate of the late Jane Kogere Wiltshire.
- 10 2. Whether the late Jane (the deceased) correctly acquired the special certificate of title.
- 15 3. Whether the defendant has any interest in the suit property as beneficiary of the estate of the deceased, and if not, whether the defendants caveat should be removed.
4. What are the remedies available to the parties?

On whether the suit property belonged to the estate of the deceased, the learned trial judge of the High Court discarded two different wills of the deceased adduced by the opposite sides and found it safer to determine the issue based on other cogent evidential material which had been adduced on record. The High Court found as a fact that the respondent was registered on the certificate of title on 22nd December 1976 under Instrument No 198963. The respondent produced several exhibits which showed how he got the transfer of title into his names. The court found on the other hand that the appellant only stated that his mother was registered on the suit property on 21st October 1981 but did not establish how his mother's name was registered on the duplicate certificate of title as proprietor. The court found that the plaintiff sought to administer the estate of the deceased because she was his wife and because the property had been registered in his wife's name by virtue of a special certificate of title issued in respect of the suit property. However, the respondent had adduced in evidence the duplicate certificate of title. He found that the registration of the deceased on the title was an error made by the officials of the land registry since the suit property did not in any way form part of her estate and answered the first issue in the negative.

35 The second issue was whether the deceased correctly acquired the special certificate of title. The trial judge found that the plaintiff who is now the



5 respondent was the registered proprietor of the property and had granted
powers of attorney to the deceased in her capacity as his wife on 3rd August
1980 and the said power of attorney was signed by the respondent and
attested by an advocate/Commissioner for oaths in the Republic of Sudan.
Because the power of attorney was executed outside Uganda it had to be
10 attested by a Notary Public for it to be admitted as duly executed in terms
of section 147 (1) (b) of the RTA. It followed that the actions of the deceased
with regard to the registered ownership of the suit property and having the
basis of the registration as a statutory declaration made more than a month
after she was registered and on other grounds referred to by the trial judge
15 led to the conclusion that the registration was made in error and the
deceased was not lawfully registered. Issue number 2 was answered in the
negative and to the effect that the deceased irregularly got registered and
on a special certificate of title.

On the third issue as to whether the defendant had any interest in the suit
20 property as a beneficiary to the estate of the deceased, the High Court found
that the counterclaim had no merit and dismissed it in light of its findings
on the issues numbers 1 and 2. The court also stressed that the Supreme
Court had earlier, in Civil Appeal No 02 of 1989, also found in favour of the
plaintiff as regards ownership of the suit property and ordered a retrial
25 because the "real certificate of title" had been recovered and would have a
bearing on the issue of validity of the special certificate of title. The trial
court concluded that the plaintiff was the rightful registered proprietor of
the suit land and the special certificate of title was illegally obtained in the
names of the deceased. With regard to remedies, the High Court ordered
30 the vacation of the caveat on the certificate of title. The Commissioner for
land registration was directed to cancel the special certificate of title for
having been illegally obtained by the deceased and any attendant entries in
the register in respect of the same. The suit in the High Court succeeded
with costs.



5 The appellant being aggrieved, appealed to the Court of Appeal and the Court of Appeal dismissed his appeal and issued the following declarations and orders;

1. The decision and orders of the learned trial judge are upheld.
2. The Commissioner for land registration is directed to cancel the appellants caveat on the title to the suit land.
- 10 3. The Commissioner for land registration is further directed to cancel the special certificate of title for having been illegally obtained by the late Jane Kogere Wiltshire and any attendant entries on the register in respect of the same.
- 15 4. Since the respondent has been in possession of the suit land, the prayer for damages is denied.
5. The respondent is awarded the costs of the appeal and those of the trial court.

20 The appellant was further aggrieved by the orders of the Court of Appeal and appealed to this Court. The is lodged on 13 grounds of appeal which I set out at the beginning of this judgment.

I have considered all the grounds for purposes of analysis of what decision or order any ground it is against. In the first place the Court of Appeal affirmed the decision of the High Court and orders it issued. The first and 25 second issues considered by the High Court are therefore relevant. These issues are; Whether the property comprised in LRV 194 folio 13 Plot 21 Kampala Rd also known as Slow Boat forms part of the estate of the late Jane Kogere Wiltshire and secondly whether the late Jane (the deceased) correctly acquired the special certificate of title. In the context of the two 30 issues which comprises the gist of the grievance on matters of law, an appeal can only flow from these two issues and I examine the grounds of appeal to this Court from those premises. Further the right of appeal under article 132 (2) of the Constitution only flows from a decision of the Court of Appeal. It provides that "(2) An appeal shall lie to the Supreme Court from 35 such decisions of the Court of Appeal as may be prescribed by law." The



5 decision appealed to this court is the affirmation by the Court of Appeal of the decision of the High Court.

Ground 1 is the crux of the appeal and is to the effect that the Court of Appeal erred to find that the suit property did not form part of the estate of the deceased. Corollary to these are other grounds which culminate in the
10 conclusion that the Court of Appeal erred to reach the decision it made that the suit property belonged to the respondent and not the estate of the deceased which is practically saying the same thing.

In ground 2 of the appeal, the appellant challenged the finding that the suit property belongs to the respondent and not to the estate of the deceased
15 on the ground that the respondent as administrator of the estate of the deceased, was barred from approbation and reprobation. He either had to be an administrator of the deceased's estate and protect the rights of the estate or sue in his own right and assert his title to the suit property. He could not assert both competing interests as he had sought to "recover" the
20 suit property from the estate. The word "recover" is given a technical meaning as provided for under section 176 of the RTA and from that perspective the appellant's case is that recovery of land had to be on the ground of the fraud of the deceased pleaded and proved to the requisite standard.

25 Ground 3 relates to registration of the deceased as proprietor on the basis of a special certificate of title and is attacked on the ground of alleged error in the finding that the special certificate was not lawfully obtained and that the name of the deceased was registered as proprietor unlawfully or in error. Other grounds relate to whether the registered proprietorship can be
30 cancelled without allegations of fraud and proof to the requisite standard before a consequential order of cancellation can be issued. This covers grounds 5, 6, 7, 8, and 9 of the appeal.

Ground 4 only relates to an aspect of a finding of fact as to whether the Supreme Court in Civil Appeal No. 2 of 1989 found that the duplicate



5 certificate of title, which has the name of the respondent was the "correct" certificate of title.

Ground 10 is particularly about which version of the will was proved. As I noted above, the High Court had discarded the two wills adduced by the parties as evidence to establish facts about the right of the respondent to the suit property. It follows that the High Court reached its decision that the property belongs to the respondent on the basis of other evidence.

Ground 11 relates to an issue of fact as to whether the Court of Appeal erred to find that the deceased used a power of attorney and a statutory declaration to register herself as proprietor on the certificate of title to the suit property. Obviously ground 11 still relates to the question of whether the Court of Appeal and the High Court reached the right decision that the suit property belongs to the respondent and not to the estate of the deceased. Ground 12 is a corollary issue as to whether the appellant had an interest that could be protected by a caveat and it obviously depends on the outcome of the issue of whether the suit property belonged to the estate of the deceased where the undisputable law depending on questions of fact is that the appellant can be a beneficiary.

Ground 13 relates to the order for dismissal of the appellant's counterclaim and its resolution depends on and is consequential to findings on whether the suit property belongs to the estate of the deceased.

The overarching issue is therefore whether the suit property was lawfully registered in the name of the deceased and corollary to this is whether any legal grounds were proved to cancel her title.

It is not in dispute that the respondent was the registered proprietor of the suit property by virtue of his registration on the title on the 22nd of December 1976 under Instrument No 198963 at 2.10 pm. The title of the suit property admitted on record shows that the deceased Jane Kogere Wiltshire was thereafter registered on the title on the 21st of October 1981 by virtue of Instrument No 210504 at 10.00 am. What document or deed is registered as Instrument No 210504? As a matter of fact, a special certificate of title was



5 issued on the 6th of November 1981 at 11.45 am by virtue of Instrument No 210562, a later instrument number to the one used for transfer of the property from the respondent to the deceased. I must emphasise as a question of law that the deceased could only have got title from the respondent who was the prior registered proprietor.

10 The respondent denied having transferred the property to her and only admitted or adduced evidence showing that he gave his wife (the deceased) a power of attorney when he was in Sudan. This power of attorney was admitted in evidence and is dated 3rd August, 1980. It has three paragraphs that I reproduce below. It stated:

15 BY THIS POWER OF ATTORNEY given on the third day of August 1980, I ABDU - RAHAMAN DABULE ISMAIL citizen appoint Mrs. Jane Kogere Wilshire my wife who is living in Uganda my attorney for me and in my name to claim for the lost land titles of Slow Boat Building on Plot No. 21 Kampala Rd. from the Land Office and to bring and prosecute all legal proceedings if need be for the above purpose and to deliver all deeds or other documents necessary for the above purpose.

20 Generally, to do all acts necessary or expedient in any interest as fully and effectively as I could have done if personally present.

And I hereby undertake to ratify whatsoever the said attorney shall lawfully do or cause to be done by virtue of this deed.

25 Without going into the issue of whether the power of attorney was lawfully admitted by the Ministry of Land officials for purposes of enabling what the deceased did, before the property was transferred from the respondent as registered proprietor into the names of the deceased as proprietor, I wish to consider whether the power of attorney was binding on the deceased.

30 The relevant law to consider for that purpose is section 14 of the Registration of Documents Act cap 81 which provides that:

14. Registration not to cure defect or confer validity.

Registration shall not cure any defect in any document registered or confer upon it any effect or validity which it would not otherwise have had, except insofar as provided in this Act



5 In other words, registration per se does not cure any defect or confer
validity and the question is where the validity comes from? Obviously the
validity of a power in the first place depends on the capacity and authority
of the donor and for that purpose, the place where the document is made
ought not to affect its validity. This is distinguishable from evidential rules
10 for purposes of admissibility in court or for official use where the document
has to be proved to be authentic. It is a donor of a power who confers
powers and registration or nonregistration of the power of attorney does
not affect his or her capacity.

Registration of a document is therefore for purposes of notice to the public
15 and where it emanates from a foreign country, for purposes of
authentication as we shall examine later. Where a document is registered,
it becomes admissible in evidence but the admissibility of the document
does not prove that it is not a forgery or is duly attested and if it is a forgery
the registrar is not liable for any damages caused as a consequence of
20 registration of the document. It is the person who utters the document who
is liable. Further section 17 of the Registration of Documents Act provides
that:

17. Certified copy of registered document admissible in civil cases.

25 (1) Every certified copy of any registered document purporting to be signed by the
registrar shall be admissible in evidence in any civil case without proof of the
correctness of the copy or the genuineness of the signature, unless it is alleged
either that the original is a forgery or that the copy purporting to be signed by the
registrar is a forgery or incorrect.

30 (2) The party proposing to use it in evidence shall deliver a copy of such certified
copy to the opposite party, and that copy shall be received in evidence if the court
is of opinion that the copy of it was delivered in sufficient time before the hearing
to enable the opposite party to inspect the original register from which the copy
has been taken.

35 In *Bryant Powis and Bryant vs La Banque Du Peuple* (1893) AC 170 at page
180 their Lordships agreed with Andrews J that the fact that an Attorney
abuses his authority and betrays his trust cannot affect bona fide holders



5 for value of instruments endorsed by him apparently and according to his
authority. To quote the last paragraph thereof at page 180:

10 "whenever the very act of the agent is authorised by the terms of the power, that
is, whenever by comparing the act done by the agent with the words of the power,
the act is in itself warranted by the terms used, such an act is binding on the
constituent, as to all persons dealing in good faith with the agent; such persons
are not bound to inquire into facts aliunde. The apparent authority is the real
authority."

15 In other words, where the act is authorised, it is binding on the principal but
where it is not authorised then it may not be binding on third parties
depending on whether there was ostensible authority. What should be
20 considered in this context is the liability as between agent and principal. In
fact, the act of the agent is the act of the principal where it is an act that is
authorised or an act that is incidental to the main authorised objective. This
requires a reading of the agent's authority according to the express words
used by the principal. Generally, a principal is liable for the torts of his or
25 her agent committed in execution of the terms of the power granted as held
in *Lloyd vs Grace, Smith & Company* [1912] AC 716. In that case an employee
who worked for a firm of solicitors as a conveyancing clerk was given
authority to arrange and negotiate a sale of real estate. The client of the
30 firm Mrs Lloyd dealt with him and the clerk fraudulently induced her to
transfer ownership of the property to himself. Mrs Lloyd sued the firm of
solicitors and Lord Macnaghten held that the principal is liable for the fraud
of its agent acting within the scope of his authority, whether the fraud is
committed for the benefit of the principal or for the benefit of the agent.
Further in *Percy vs Glasgow Corporation* [1922] AC 299, Viscount Haldane
35 cited with approved *Lloyd vs Grace, Smith and Company* (supra) for the
passage that

"the principal is liable to third persons in a civil suit 'for the frauds, deceits,
concealments, misrepresentations, torts, negligences, and other malfeasances
or misfeasances, and omissions of duty of his agent in the course of his
employment, although the principal did not authorise, or justify, or participate in,



5 or indeed know of such misconduct, or even if he forbade the acts or disapproved of them."

The principle of vicarious liability operates in agent/principal relationships though this relates to third party claims. In theory the acts of the deceased are the acts of the respondent. In its express terms, the power of attorney did not expressly authorise transfer of land into the names of the deceased. It only authorised those acts which were necessary to preserve the property. As to the power as between the principal and the agent, the principal confirmed that he issued the power when he testified in the High Court that he appointed his wife (the deceased) who lives in Uganda to be:

15 "my attorney for me and on my name to claim for the lost land titles of Slow Boat Building on Plot No. 21 Kampala Rd. from the Land Office and to bring and prosecute all legal proceedings if need be for the above purpose and to deliver all deeds or other documents necessary for the above purpose. Generally, to do all acts necessary or expedient in any interests as fully and effectively as I could have done if personally present."

20 As to whether transferring the proprietorship to herself could be a necessary act for preserving the property may be debatable and I need not dwell on it. This takes me to analysis of section 147 of the RTA which the High Court used to find that the special certificate of title could not have been obtained on the basis of the power of attorney which was not duly attested. Section 147 of the RTA deals with attestation of instruments while section 146 specifically deals with powers of attorney and I will first consider section 146 of the RTA which provides that:

146. Power of attorney and revocation of the power of attorney.

30 (1) The proprietor of any land under the operation of this Act or of any lease or mortgage may appoint any person to act for him or her in transferring that land, lease or mortgage or otherwise dealing with it by signing a power of attorney in the form in the Sixteenth Schedule to this Act.

35 (2) Every such power of attorney shall be registered in accordance with the Registration of Documents Act, and if so registered within four months after the date thereof shall be presumed to be in force at the time of its registration unless



5 a revocation of that power of attorney has been previously registered under that Act; but nothing in this subsection shall diminish the force and effect of any power of attorney if registered after the expiration of that period of four months.

(3) After the registration of any revocation of the power, the registrar shall not give effect to any transfer or other instrument signed pursuant to the power.

10 (4) A power of attorney in the form in the Sixteenth Schedule to this Act or to the like effect given by a person before as well as after becoming a proprietor of any land or of any lease or mortgage shall be deemed to be within the meaning of this section.

15 There is no evidence that the power of attorney was registered under the Registration of Documents Act but more so, there was the issue of attestation of the document for purposes of authenticity under section 147 (1) (b) of the RTA because it was executed outside Uganda. Section 147 of the RTA provides that:

147. Attestation of instruments and powers of attorney.

20 (1) Instruments and powers of attorney under this Act signed by any person and attested by one witness shall be held to be duly executed, and that witness may be—

(a) within the limits of Uganda—

(i) any officer in the service of the Government of Uganda or of Kenya;

25 (ii)...

(b) without the limits of Uganda—

(i) either a notary public or else the mayor or other chief officer of any city or municipal corporation within the United Kingdom of Great Britain and Northern Ireland or the Republic of Ireland;

30 (ii) the officer administering the government of, or the judge of any court of record in, any Commonwealth country;

(iii) a foreign service officer or a diplomatic representative of any Commonwealth country at any foreign place;



5 (iv) a police magistrate, resident magistrate, stipendiary magistrate or special magistrate in any Commonwealth country;

(v) the manager or accountant of any branch of any bank incorporated under the law of the United Kingdom of Great Britain and Northern Ireland or the Republic of Ireland; and

10 (vi) any other person authorised in that behalf by the Minister.

(2) Such witness, whether within or without the limits of Uganda, may also be any other person, but in such case he or she shall appear before one of the officers or persons specified in subsection (1), who, after making due inquiries of the witness, shall endorse upon the instrument or power a certificate in the form in the Seventeenth Schedule to this Act; and that certificate shall be deemed sufficient proof of the due execution of that instrument or power.

15 (3) Where an instrument or power of attorney purports to be attested or a certificate purports to be signed as provided in this section, the registrar may take official notice of the signature and of the fact that the person attesting or signing possessed the requisite qualification.

20 (4) No fee shall be demanded or taken by any officer in the service of the Government except a magistrate in the performance of the duties of a notary public, or by any chief for attesting within Uganda any instrument or power of attorney under this Act.

25 The issue is that the document was not duly attested as stipulated under section 147 (1) (b) of the RTA and therefore the Registrar of Titles could have erroneously used the power of attorney to make entries on the title initiated by the deceased. This presupposes that it was the power of attorney that had been used to effect the transfer but there is no direct evidence to this effect. The appellant's counsel attacked the lower courts for relying on a
30 statutory declaration of the deceased exhibit P12. I wish to state that the deceased was the wife of the respondent and the chronological progression of the transaction affecting the land was preceded by the impugned power of attorney. This is evident from exhibit P12 where the deceased declared that she was a donee of a power of attorney granted by the appellant. The
35 statutory declaration of the deceased was exhibited and relied on by the High Court and the Court of Appeal. Most importantly the statutory



5 declaration shows that the declaration was made on the 24th of November 1981 and it states in paragraph 1 that:

1. That I am the donee of a Power of Attorney granted to me by ABDU - RAHMAN DABULE ISMAIL the registered proprietor of the land comprised in the above mentioned folio, who is also my husband.

10 Exhibit D7 which is the certificate of title of the suit land demonstrates that a Special certificate of title was issued on the 6th of November 1981 under instrument No. 210562. The certificate of title further shows that Jane Kogere Wilshire was registered as proprietor on the 21st of October 1981 before the statutory declaration exhibit P12 was made. Both lower courts
15 reached the conclusion that the registration of the deceased as a proprietor was not supported but an entry was made on the Special Certificate on the basis of a Statutory Declaration. The High Court found it puzzling how the deceased was registered and inferred that it was an error or mistake of the land officials. When considered with the statutory declaration that the
20 respondent is the registered proprietor and this declaration was made on a later date after the deceased was registered, this conclusion is plausible in the circumstances.

For its part, the Court of Appeal agreed with the trial judge and stated that the registration of Jane Kogere on the title was tainted with gross
25 irregularities and contravened section 70 of the RTA. They also found that the registration was improper because there was no lawful transfer of title. This goes back to the issue of what the pleadings in the High Court were. The appellant pleaded estoppel against the respondent for asserting his title as he was an administrator of the estate of the deceased. He also asserted
30 a will which was attached. The trial judge found that the will attached by the appellant was not proved and another will, adduced in evidence by the respondent, was not proved. The Court of Appeal however referred to the will of the deceased written in Luganda and the fact that it referred to the land as belonging to the respondent. The Luganda will was made by the
35 deceased from Rubaga Hospital on 21st of November 1986 after registration of the deceased on the title.



5 As far as section 70 of the RTA is concerned, it only allows the Special Certificate of title to have the same entries as in the registry copy of the certificate. It provides that:

70. Lost grant.

10 If the duplicate certificate of title is lost or destroyed or becomes so obliterated as to be useless, the persons having knowledge of the circumstances may make a statutory declaration stating the facts and the particulars of all incumbrances affecting the land or the title to the land to the best of the deponents' knowledge, information and belief; and the registrar if satisfied as to the truth of the statutory
15 declaration and the bona fides of the transaction may issue to the proprietor a special certificate of title to the land, which *special certificate shall contain an exact copy of the certificate of title in the Register Book and of every memorandum and endorsement on it, and shall state why the special certificate is issued*; and the registrar shall at the same time enter in the Register Book
20 notice of the issuing of the special certificate and the date of its issuance and why it was issued; and the special certificate shall be available for all purposes and uses for which the duplicate certificate of title so lost or destroyed or obliterated would have been available, and shall be equally valid with the duplicate certificate of title to all intents; but the registrar before issuing a special certificate always
25 shall give at the applicant's expense at least one month's notice in the Gazette of his or her intention to do so. (emphasis added)

Section 70 states that the "special certificate shall contain an exact copy of the certificate of title in the Register Book and of every memorandum and endorsement on it, and shall state why the special certificate is issued". In the circumstances the duplicate certificate of title was lost and the
30 deceased was applying for a special certificate.

The appellant contended that the certificate of title was conclusive evidence of title of the estate of the deceased. The evidence however demonstrates that the registration was erroneous. However, even if it was not, she could presumably only hold the legal estate as a trustee for the donor of the
35 power of attorney who appointed her to manage the property on behalf of the family of the respondent. The evidence is that the respondent came and disclosed that he was the donor of the power of attorney and explained why he entrusted the property to his wife. He did not sell the property to her or



5 give it to her as a gift. There is no evidence of any consideration paid. If there
was any transfer as inferred from the instrument number, the presumption
is that the deceased got the transfer and held the legal title on behalf of the
respondent for purposes of handling their family needs since the
respondent had fled the country. The formal requirements for attestation
10 and registration of a power of attorney do not take away the evidence that
the respondent trusted his spouse to manage the suit land which was
registered in his names and confirmed by the deceased in the statutory
declaration deposed by the deceased and referred to above. To hold
otherwise still strengthens the respondent's case. This is because, on the
15 basis of his evidence, he only gave the deceased a power of attorney and as
the proprietor who is the only person who could transfer legal title to the
deceased, it would show that the transfer was not authorized by him in
terms of the power of attorney which was also rejected as noncompliant
with section 147 of the RTA. However, the fact that he did not intend to
20 transfer the property to the deceased in her own right is further confirmed
by the will of the deceased written in Luganda and relied on by the Court of
Appeal. The will is evidence of a writing of the deceased that was kept by
her daughter and has a statement about the ownership of the respondent.
It is evidence of what the deceased wrote about the property even if the will
25 was not being proved for grant of probate or letters of administration with
the will annexed.

According to Philip H. Pettit in his book; EQUITY AND THE LAW OF TRUSTS,
fourth edition London Butterworths 1979; a trust is a right of property held
30 by one person called the trustee for the benefit of another person, the *cestui*
que trust or beneficiary. Secondly, a trust is an obligation under which a
person to whom property is conveyed is bound in equity to deal with the
beneficial interest in such property in a particular manner in favour of the
beneficiary or beneficiaries thereof. The word trust is defined by section 2
of the Trustees Act, Cap 164 to extend to trusts and administration of estates
35 and executorships. The word "trusts" means any trust as defined and
includes implied and constructive trusts. Case law definitions of the trust
arrangement include express, statutory, implied, resulting and constructive



5 trusts. Resulting, implied and constructive trusts do not have to be in
writing. Implied trusts are inferred from words and actions of the settlor
such as in the evidence of the power of attorney that the respondent
intended the deceased to use the power to act on his behalf and benefit and
not for her personal benefit only. Resulting trusts are legal presumptions
10 where an intent to create a trust is presumed where a person who buys
property in the name of another is deemed to be a beneficiary and the
transferee a trustee and the property deemed to be held in trust for the
purchaser. Constructive trusts are imposed by courts of equity irrespective
of the intention of the settlor whenever justice and good conscience require
15 it.

In *Hussey vs Palmer* [1972] 3 ALL ER 744, the facts are that Mrs Hussey
brought an action against her son in law. The facts are that Mrs Hussey paid
£607 to enable her son-in-law build an extension to his house in which she
was going to live. She did not intend to make him a gift of the money and
20 regarded it as a loan. The son-in-law in his defence stated that the money
was paid to him as a gift. In an amended defence he averred that Mrs Hussey
was to be repaid if the house was sold at an early date. Lord Denning M.R
considered the issue of a trust resulting from the circumstances and at
page 747 stated that:

25 If there was no loan, was there a resulting trust? and, if so, what were the terms
of the trust? Although the plaintiff alleged that there was a resulting trust, I should
have thought that the trust in this case, if there was one, was more in the nature
of a constructive trust; but this is more a matter of words than anything else. The
30 two run together. By whatever name it is described, it is a trust imposed by law
whenever justice and good conscience require it. It is a liberal process, founded
on large principles of equity, to be applied in cases where the defendant cannot
conscientiously keep the property for himself alone, but ought to allow another
to have the property or a share in it. The trust may arise at the outset when the
property is acquired, or later on, as the circumstances may require. It is an
35 equitable remedy by which the court can enable an aggrieved party to obtain
restitution. It is comparable to the legal remedy of money had and received
which, as Lord Mansfield said, is very beneficial and, therefore, much
encouraged. Thus we have repeatedly held that, when one person contributes



5 towards the purchase price of a house, the owner holds it on a constructive trust
for him, proportionate to his contribution, even though there is no agreement
between them, and no declaration of trust to be found, and no evidence of any
10 intention to create a trust. Instances are numerous where a wife has contributed
money to the initial purchase of a house or property, or later on to the payment
of mortgage instalments; or has helped in a business: see *Falconer v Falconer*,
Heseltine v Heseltine and *Re Cummins (decd)*, *Cummins v Thompson*. Similarly,
15 when a mistress has contributed money, or money's worth, to the building of a
house: *Cooke v Head*. Very recently a purchaser has been held to hold on trust
for an occupier: *Binions v Evans*. In all those cases it would have been quite
inequitable for the legal owner to take the property for himself and exclude the
other from it. So the law imputed or imposed a trust for his or her benefit.

There is a similar situation in this appeal. There is no evidence whatsoever
of any possible conveyance (instrument not in evidence but there is
evidence that the respondent was the former registered owner) from the
20 respondent to the deceased was for consideration or evidence of how it was
achieved. The two lower courts found that the power of attorney was used
but albeit illegally. As a question of fact there is a statutory declaration I
have considered above sworn by the deceased after the instrument number
showing that she was registered earlier which shows that the property had
25 been conveyed to her but her statutory declaration unequivocally states
that the property at that material time of the declaration was registered in
the names of the respondent who was the "registered proprietor". This
supports the finding of the two lower courts. The registration of the
deceased could at best be of a legal title in trust for the respondent. It is
30 also equitable for the court to impose a constructive trust where the owner
came back and wants to use his property that he entrusted to his wife.
Further the Court of Appeal considered the credible evidence of a will in
Luganda. The will though not proved before the court was evidence of the
writing of the deceased confirming that she held the land as a trustee for
35 her husband, the respondent. This position is confirmed by the sister of the
appellant Ms Kaumba Emily Marion and daughter of the deceased in a
statutory declaration she made on the issue and her averments therein in
paragraphs 1 - 14. She further stated that her mother (the deceased) got



5 into possession of the suit property by virtue of powers of attorney granted by the respondent.

Notwithstanding the above, the parties made a previous decision of the Supreme Court a matter in issue both in the grounds of appeal and in their arguments. I have considered the facts adduced by the respondent in High Court Civil Suit No. 64 of 1985; Mrs Georgia Pantelakis vs Jane Wiltshire Kogere (deceased) through Alice Wiltshire (Administratrix) and Kibimba Rice Scheme Ltd and other witnesses who testified therein. I note that the Supreme Court in an appeal from the original suit vide Civil Appeal No. 2 of 1989 Ismail Dabule Vs Mrs Georgia Pantelakis allowed the appeal of the respondent who had succeeded. The Supreme Court on appeal set aside the High Court Judgment and ordered a retrial. Nevertheless, the High Court judgment is a relevant fact in issue and was adduced by the parties at the trial thereby making the facts mentioned therein facts that can be considered under section 41 of the Evidence Act which provides that:

20 41. Judgments, etc. other than those mentioned in sections 38 to 40, when relevant.

Judgments, orders or decrees, other than those mentioned in sections 38, 39 and 40, are irrelevant unless the existence of the judgment, order or decree is a fact in issue, or is relevant under some other provision of this Act.

25 The original suit had been filed by Mrs Georgia against the deceased. Mrs Georgia successfully prosecuted the suit and an appeal was commenced against the judgment by the Administrator of the estate of the deceased who was succeeded as a party by the respondent. The Supreme Court set aside the High Court judgment and remitted the suit for trial de novo. The suit in the High Court was subsequently dismissed for want of prosecution on 6th October 2005. The testimonies in that suit are still relevant in that the respondent to this appeal also testified and other witnesses testified on the issue of transfer of the suit title to Jane Wiltshire Kogere (deceased). The basis of the title of the respondent who transferred to the deceased was challenged by Mrs Georgia Pantelakis. Ms Georgia challenged a power of attorney she allegedly donated to Obol - Ochola and Co Advocates for sale



5 of the suit property and whereupon Obol - Ochola and Co Advocates sold
the property to the respondent. The case of the deceased was not that she
was a bona fide purchaser for value without notice but that the respondent
lawfully acquired the suit property. The learned trial judge in HCCS No. 64
of 1985 Mrs Georgia Pantelakis Vs Jane Wiltshire Kogere (supra) at page 3
10 of his judgment stated as follows:

15 The other witness to testify on behalf of the defendant was Dabule Ismail who
said that he had bought the property question on 22/12/76 and that he paid
700,000/= for it; he bought it through Kaija Katuramu and co. That he was issued
with certificate of title in respect of the property but that the certificate had been
destroyed at Bombo where he kept it with the Libyan Bank and that when he run
to the Sudan in May 1979 he decided to transfer the land to his late wife Jane
Wiltshire Kogere.

20 Alice Madalino did not have much to say apart from saying that the property Slow
Boat Pub belonged to her late sister Jane. The last witness in this case was a Mrs.
Grace Bonabana Elue the Chief Registrar of Titles. She testified that she knew
something about Plot 21 Kampala Road. That a special certificate had been issued
in respect of that property on 21/1/82 after the original certificate had been
reported lost. She was not sure as to who had issued it but after a careful
25 examination of the certificate Ex. D4 she felt that the person who issued it could
have been Mr. Odwe Senior Assistant Registrar of Titles. She thought that the
transfer of the property to Kogere was genuine and that the issue of special
certificate might also be genuine. She informed the court that the original file was
not available but there was a temporary file in which there was an original
certificate which showed that the owner of the property is the present plaintiff.

30 In these proceedings which are admissible pursuant to the judgment
attached as exhibit in the proceedings, the respondent acknowledged that
he transferred the property to the deceased. However, it is clear that it was
not meant to be for her exclusive ownership and this is evident from the
wording of the power of attorney he issued to the deceased appointing her
35 his attorney. Secondly he transferred it because he fled the country to
enable management of the property by his wife. From the facts it is clear
that the deceased was a trustee of the property and when the respondent



5 came back from Sudan, he took over the property in his own right as owner rather than as a widower.

Where property is held in trust and the trustee dies, that property passes to the legal representative of the trustee who may continue with the trust arrangement or renounce it. According to Sir David Hughes Parry in; The Law of Succession; London Sweet & Maxwell Limited page 217:

By the Conveyancing Act 1881, s. 30, however, real estate held on trust was made to vest in the sole trustee's personal representatives as if it had been a chattel real and this is continued by the administration of Estates Act 1925, Part I.

15 I do not have to establish whether the Conveyancing Act 1881 of the UK was a statute of general application in Uganda by virtue of the Uganda Order - in - Council 1902 as there is a similar provision under the Trustees Act Cap 64 Laws of Uganda which provides under section 18 (2) thereof that:

18. Devolution of powers or trusts.

20 (1) Where a power or trust is given to or imposed on two or more trustees jointly, the same may be exercised or performed by the survivors or survivor of them for the time being.

25 (2) Until the appointment of new trustees, the personal representatives or representative for the time being of a sole trustee, or, where there were two or more trustees, of the last surviving or continuing trustee, shall be capable of exercising or performing any power or trust which was given to, or capable of being exercised by, the sole or last surviving or continuing trustee, or the other trustees or trustee for the time being of the trust.

(3) This section takes effect subject to the restrictions imposed in regard to receipts by a sole trustee, not being a trust corporation.

30 (4) In this section, "personal representative" does not include an executor who has renounced or has not proved.

This provision is discussed by Philip H. Pettit (*supra*) at page 258 where he considers section 18 of the Trustees Act 1925 of the UK which is in *pari materia* with the Ugandan Act where he states that:



5 Upon death of a sole or last surviving trustee, the trust estate, since 1925,
devolves on his personal representatives, and it is provided by section 18 (2) of
the Trustees Act 1925. That such personal representatives (excluding an executor
10 who has not renounced or has not proved), "shall be capable of exercising or
performing any power or trust which was given to, or capable of being exercised
by, the sole or last surviving or continuing trustee, or the other trustees or trustee
for the time being of the trust". It will be observed that this provision does not
15 impose any obligation on the personal representatives to act, and it would seem
therefore that the old law still applies, that "such personal representative of a
deceased trustee has an absolute right to decline to accept the position and duties
of a trustee if he chooses so to do". Presumably, however, if such a personal
representative chose to accept the trust, he would thereafter be liable as a
20 trustee in the ordinary way. Even if personal representatives do not accept the
trust, they can only act until the appointment of new trustees, but
are themselves likely to be the appropriate persons to appoint new trustees, but
if such other person has such a power which is validly exercised, it will operate
forthwith to oust the personal representative for all purposes from the trust.

After reviewing the evidence and the law, my overall conclusion is that the
property was registered in the names of the respondent in 1976 after it was
sold to him under an impugned power of attorney by Mrs Georgia
25 Pantelakis. Mrs Georgia Pantelakis successfully prosecuted a suit where
that sale was nullified on the ground that she did not issue the power of
attorney by which the property was sold to Ismail Dabule, the respondent.
Letters of Administration with the will annexed were granted to Mrs Alice
Kogere Madeline Wilshire on 16th of February 1987 by Kakorora J in
30 Administration Cause No. 522 of 1986. The respondent testified in HCCS No.
64 of 1985 which had been brought against the deceased and succeeded to
by Mrs Alice Kogere Madeline after she died by virtue of letters of
administration with the will annexed. Thereafter the respondent got another
grant on the 31st of October 1988.

35 However, when he filed a suit against the Appellant, which suit is the basis
of the appeal in this court, he filed it in his own names and personal capacity
and it was not in his representative capacity. It is mandatory to state the
representative capacity under which a suit is brought as provided for under
Order 7 rule 4 of the Civil Procedure Rules which provides that:



5 4. When plaintiff sues as representative.

Where the plaintiff sues in a representative character, the plaint shall show not only that he or she has an actual existing interest in the subject matter but that he or she has taken the steps, if any, necessary to enable him or her to institute a suit concerning it.

10 This is read together with Order 7 rule 9 (2) which makes it mandatory to plead in the plaint, the representative capacity of the plaintiff and it provides that:

15 (2) Where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, the statements shall show in what capacity the plaintiff or defendant sues or is sued.

The respondent subsequently sued the appellant for removal of caveat and the basis of that suit was whether the appellant was a beneficiary of the deceased and therefore entitled to lodge a caveat. The respondent therefore appeared in his own right and the issue of approbation and reprobation does not arise. He claimed the property as his and the orders of the High Court faulted the deceased for registering herself as a proprietor. In light of my extensive discussion above, even if the deceased was properly registered as a proprietor, she held the legal title as a trustee on behalf of the respondent. This leads me to the inevitable conclusion that the deceased, as a trustee, did not hold the legal title to the suit property as her own property but as a trustee for the benefit of the respondent. In such circumstances, a legal representative to the estate of the deceased succeeds as a successor trustee. In the premises, ground 1 of the appeal has no merit. Though arriving to its conclusion via a different route, the Court of Appeal did not err to conclude that the suit property did not form part of the estate of the deceased and ground 1 therefore fails.

Ground 2 of the appeal likewise fails based on the proposition that the appellants suit was commenced in his own right and the fact that he was an administrator of the estate of the deceased was not pleaded as a capacity to commence the suit contrary to Order 7 rule 4 and 9 (2) of the Civil Procedure Rules. Secondly, the deceased as a trustee, had her office as a



5 trustee of the property of the respondent inherited, firstly by Alice
Madeleine Wilshire, and later by the respondent. The respondent could not
be the beneficiary and the trustee at the same time and therefore the estate
reverted back to him as the beneficiary. In those circumstances he was not
approbating and reprobating as such. He was handling his own property
10 issues just as the deceased did on his behalf. Ground 2 of the appeal has no
remit and is disallowed.

With regard to ground 3 of the appeal, the issue of registration of the
deceased as proprietor has been overtaken by finding that she was holding
and managing the property as an implied trustee anyway. In the
15 circumstances the holding of the Court of Appeal was an error on a matter
of fact as the proceedings in HCCS No. 64 of 1985 shew in the least that the
deceased was registered with the consent of the respondent though it does
not show what kind of instrument was used to gain that registration or
whether it was a lawful procedure that was used. Ground 3 though allowed
20 does not help the appellant's case in light of the holding in grounds 1 and 2.

Ground 4 of the appeal that the Court of Appeal erred to find that the
Supreme Court ruled in favour of the respondent leads to no possible good
as the Judgment speaks for itself. The Judgment shows that the High Court
in HCCS No. 64 of 1985 allowed the suit of Georgia Pantelakis against the
25 deceased but found that the High Court decision was not satisfactory on the
issue of a power of attorney granted to Obol Ochola and Co advocates to
sell the property and that there was need to have her appear in Court
personally. Secondly the issue of Special Certificate of title was considered
on the premises that the duplicate certificate of title had been found and it
30 had the property registered in the names of the respondent. The material
fact is that judgment of the High Court was set aside and a retrial was
ordered. However, Mrs Georgia Pantelakis did not appear to prosecute her
suit which was dismissed for want of prosecution leaving the status quo as
that before Mrs Georgia Pantelakis filed her suit. The observations of the
35 Supreme Court did not affect the suit of the respondent and counterclaim
of the appellant and therefore the matter remained for trial. In that regard,



5 ground 4 of the appeal has not merit as it is of no consequence except to
revert the suit property back to the deceased or the respondent, a matter
that remained for trial upon discovery of the duplicate certificate of title as
against the issuance of a special certificate for loss of the duplicate
10 certificate. In any case the Supreme Court has recognised that the evidence
of the Duplicate Certificate of title in the names of the respondent warranted
a trial between the respondent and Mrs Georgia Pantelakis to test whether
Mrs Georgia Pantelakis indeed authorised Obol – Ochola and Co Advocates
to sell the property, as they did to the respondent. This amounted to
15 recognition of the duplicate certificate of title in the names of the
respondent by the Supreme Court.

Ground 5 of the appeal has no merit in light of my finding that the deceased
held the suit property as a trustee on behalf of the respondent.

Ground 6 of the appeal has no merit as the respondent's suit for removal of
caveat was decided on the issue of whether the suit property belonged to
20 the estate of the deceased where the appellant was a beneficiary. When the
court found that the property belonged to the respondent, they cancelled
the special certificate of title of the deceased. In any case two titles cannot
exist for the same property, the first title registered in time is that of the
respondent and it was equitable and just to make an order that gave it back
25 the legal title to the respondent.

Grounds 7, 8 and 9 of the appeal fail for the same reasons given above.

With regard to ground 10, that the Court of Appeal erred to hold that the
English version of Jane Kogere Wiltshire's will was forged and instead
relied on the unapproved Luganda will said to be that of the deceased, I have
30 carefully considered the matter. The Court of Appeal noted that the trial
Judge disregarded both wills. They faulted the trial judge for not considering
the evidence. They found the evidence of Kaumba Emily Marion who testified
as PW2 to be credible. She testified that she had the will written in Luganda
in her custody. They faulted the appellant for not producing the English



5 version of the will he relied on and they noted that this confirms the submission that the will was a forgery.

From the perspective of the Court of Appeal, what was important was to prove either that the Luganda will was valid or not. There can be different wills made at different times and when proved, it is the last will and testament which prevails. The appellant did not have a will on record and what is important here is the fact that the will produced by PW2 as a custodian showed that the deceased wrote that she held the property on behalf of the respondent and did not consider it as her property. The will is evidence of a trust arrangement and is not relied on for purposes of execution of the will and has nothing to do with the administration of the estate of the deceased. In the premises, while there was no proof of another will before the court, the Court of Appeal ought not to have reached a conclusion that the English version of a will was a forgery because the will had not be admitted in evidence when the appellant sought to produce it. The trial judge failed to ascertain whether it was the will annexed to the letters of administration granted to Alice Madeleine Wiltshire. The trial judge accordingly rejected it. This does not whittle down the question of fact that the deceased in the Luganda will referred to the suit property as being one she held for the respondent who would claim it when he came back from exile. In the premises, ground 10 of the appeal has no merit and is disallowed.

Ground 11 of the appeal is allowed because the Court of Appeal conclusion that the deceased registered herself on the basis of a power of attorney and statutory declaration was an inference but the learned Justices of Appeal did not have sufficient proof that it referred to the instrument whose instrument numbers are recorded on whose basis a transfer was made to the deceased.

Ground 12 of the appeal fails on the basis of the finding that the suit property belongs to the respondent and the deceased held it as a trustee. It did not form part of the estate of the deceased and the interest of the appellant as a beneficiary to the estate was not proved. The appellant who is a step son



5 of the respondent had no interest unless that interest is derived from the respondent himself.

Because the suit property was held on behalf of the respondent it was the respondent's property as the *cestui que trust* and therefore it was not being recovered from the estate of the deceased as such. Secondly, the
10 respondents suit in the lower court was for removal of caveat and was not time barred. A suit for recovery of trust property by a beneficiary is governed by section 19 (1) of the Limitation Act cap 80 which provides that:

19. Limitation of actions in respect of trust property.

(1) No period of limitation prescribed by this Act shall apply to an action by a
15 beneficiary under a trust, being an action—

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds of the trust property in the possession of the trustee, or previously received by the trustee and
20 converted to his or her use.

While the action of a beneficiary to recover trust property is not barred by the law of limitation except in circumstances where the property has been conveyed to a bona fide purchaser for value, without notice, the respondent's suit was not a suit for the recovery of trust property as such.
25 He already had recovered the property and was in possession of it. What he wanted was for the legal title to revert back into his names. Indeed, he was already the equitable owner of the suit property and holding the legal estate in the capacity as administrator for the former trustee thereof. One ought not to perpetually be a trustee of property for himself and the property had
30 to revert back to him as the legal and beneficial owner. The order of the court to cancel the special certificate of title constitutes a formal process that restores the name of the beneficiary. It does not amount to recovery of property under section 176 of the RTA.

Ground 13 deals with consequential orders and therefore it was proper to
35 dismiss the appellant's counterclaim which was based on interest in the

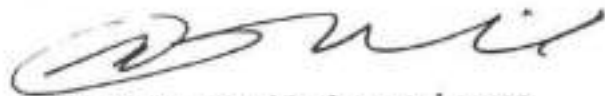


5 suit property as a lineal descendant and therefore a beneficiary of the estate of the deceased. Pursuant to the finding that the property belongs to the respondent and not the estate of the deceased, this ground also fails.

The final result is that the appellant's appeal substantially fails and I would make an order that the appeal stands dismissed with $\frac{1}{2}$ of the costs in this
10 Court to the respondent.


I would further affirm the orders of the Court of Appeal inclusive of the order as to costs.

Dated at Kampala the 31st day of October 2024



15 Christopher Madrama Izama

Justice of the Supreme Court

Delivered by the Registrar

Reg
31/10/24

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

Coram: Owiny-Dollo, CJ, Mwendha, Tibatemwa-Ekirikubinza, Musota, Madrama, JJ.SC

CIVIL APPEAL NO. 3 OF 2018

PATRICK KAUMBA WILTSHIRE.....APPELLANT

VERSUS

ISMAIL DABULE.....RESPONDENT

(An appeal arising from the judgment and decision of the Court of Appeal Civil Appeal No. 130 of 2015, before Kasule, Cheborion and Musoke, JJA dated 31st January 2018)

JUDGMENT OF MWONDHA, JSC

(Dissent)

I have had the benefit of reading in draft the judgment of my learned brother Christopher Madrama, JSC, apart from the facts as accepted by the Court of Appeal and the trial Court, I do not agree with the resolution of all the grounds. For clarity, I shall reproduce the 13 grounds raised by the appellant in the memorandum of appeal as follows: -

1. The Court of Appeal erred in law and fact when it held that, the suit land comprised in LRV 194 Folio 13 Plot 21 Kampala Road does not form part of the late Jane Kogere Wiltshire Estate.
2. The Court of Appeal erred in law and fact when it held that the respondent's claim of ownership of the suit land is not barred by approbation and reprobation.
3. The Court of Appeal erred in law and fact when it held that the registration of Jane Kogere Wiltshire as proprietor of the suit land was an error committed by the officials of the land Registry.
4. The Court of Appeal erred in law and fact when it held that the Supreme Court ruled in favour of the respondent in Civil Appeal No. 2 of 1989
5. The Court of Appeal erred in law and fact when it ordered cancellation of Jane Kogere Wiltshire Special Certificate of Title when fraud and cancellation were not pleaded.
6. The Court of Appeal erred in law and fact when it ordered cancellation of Jane Kogere Wiltshire Special Certificate of Title having made a finding that the respondent's cause of action was not for recovery of land but for removal of caveat.

7. The Court of Appeal erred in law and fact when it held that the remedied of cancellation of title and consequential orders were not time barred.
8. The Court of Appeal erred in law and fact in holding that the respondent has a cause of action against the appellant for cancellation of Jane Kogere Wiltshire's Special Certificate of Title.
9. The Court of Appeal erred in law and fact when it held that the order for cancellation of Jane Kogere Wiltshire Certificate of Title was in accordance with s. 177 of Registration of Titles Act.
10. The Court of Appeal erred in law and fact when it held that the English version of Jane Kogere Wiltshire's will was forged and instead relied on unapproved Luganda will purported to be that of Jane Kogere Wiltshire.
11. The Court of Appeal erred in law and fact in holding that Jane Kogere Wiltshire used Powers of Attorney and Statutory Declaration to register herself on the Certificate of Title of the suit land.
12. The Court of Appeal erred in law and fact when it held that the appellant had no caveatable interest in the suit land and ordered erroneously the cancellation of the caveat by the appellant.
13. The Court of Appeal erred in law and fact when it upheld the trial Court's dismissal of the appellant's counter claim.

It was proposed that, (1) Court makes a declaration that the suit land belonged to Jane Kogere Wiltshire not the respondent.

(2) The Court makes a declaration that the appellant's caveat on the suit land is lawful

(3) Court issues an order setting aside the judgment and orders of the Court of Appeal and substitute it with an order dismissing the suit and allowing the counter claim.

(4) The Court issues an order revoking the respondent's letters of Administration as regards the suit land

(5) Court issues an order that the respondent accounts for all the income he has been deriving and or collecting from the suit property from the time he obtained the letters of Administration till judgment of this Court.

(6) Costs of this Court and the Court below be paid to the appellant

(7) Any other further relief this Court deems fit.

The facts as reproduced by the Court of Appeal and as accepted by the trial Court are as follows: -

The plaintiff (now respondent) is a step father of the appellant (defendant then) the respondent having married his mother Jane Kogere Wiltshire (deceased) and had delivered the appellant from her previous marriage. In 1976 the respondent allegedly purchased the suit property from one Georgia Pantelakis and deposited the Certificate of Title thereof with the Libyan Arab Bank Kampala for safe custody before he went to exile in 1979. While in exile the respondent allegedly gave Powers of Attorney to his wife Jane Kogere Wiltshire to manage all his properties. In due course the wife Kogere discovered that the duplicate Certificate of Title of the suit property was missing and could not be traced. She applied for a Special Certificate of Title of the suit property and she was registered thereon as proprietor of the suit property. It would appear that the deceased who was the respondent's wife knew before her demise that the suit property did not belong to her because she allegedly stated in her will that the respondent (plaintiff) should transfer the suit property into his names as soon as he returned to Uganda. Upon return from exile the plaintiff (respondent) applied for letters of administration for the estate of his late wife and was registered on the Special Certificate of Title as administrator of the estate of Jane Kogere Wiltshire. In due course however, the respondent/plaintiff's Duplicate Certificate of Title (owners copy) which was allegedly lost was recovered. The plaintiff/respondent applied to have the Special Certificate of Title cancelled but the Registrar of titles declined because the (defendant) appellant had lodge a caveat on the suit property as beneficiary in the estate of his late mother.

The plaintiff (respondent) had allegedly involved in other Court battles on the suit property up to the Supreme Court. (Started in High Court Georgia Pantelakis v. Jane Kogere Wiltshire and Kibimba Rice Scheme in 1986 where Georgia Pantelakis was the successful party and Jane Kogere lost. Dabule as administrator of the estate of Kogere appealed to Supreme Court and a retrial was ordered by order in SCCA No. 2 of 1989 by Platt, JSC

The appellant had put up a counter claim seeking dismissal of the suit but it was dismissed summarily by the trial Court with costs.

Judgment was entered in favour of the respondent (plaintiff) and the appellant (defendant) was dissatisfied with the same and he (appellant) appealed to Court of Appeal. The Court of Appeal upheld the trial Court judgment and decision and dismissed the appeal, hence this appeal to this Court by the appellant.

Representation

At the hearing, Mr. Nelson Nerima of Nerima, Candia D. Wandera and Akulu Co. Advocates and Legal Consultants represented the appellant. The respondent was represented by Omongole and Co. Advocates.

Submissions.

Counsel for the appellant submitted on grounds 1, 2,4,10 and 12 together, and he submitted on grounds 3 and 11 together, then grounds 5,6,7,8 and 9 together and ground 13 was submitted on alone.

Ground 1, 2, 4, 10 and 12.

Counsel submitted that the suit land formed part of the estate of Jane Kogere Wiltshire and argued that the late Jane Kogere Wiltshire was the registered proprietor since 21st 10-1981 vide instrument No. 210504 as per Certificate of Title Ex D 7 at pages 449 to 454 of the Record of Appeal.

Counsel cited s. 59 of the RTA, which provides that a Certificate of Title is conclusive evidence of ownership. Counsel argued that, it cannot be impeached or defeated on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate. Counsel relied on **Kampala Bottlers Ltd v. Damanico (U) Ltd (1990-94) EA 140**.

Counsel argued inter alia that under s. 64 of the Registration of Titles Act Certificate of Title can only be impeached for fraud under s.176 of the RTA. Under s.46 (4) of the RTA the interest of the registered proprietor is paramount. Counsel faulted the Court of Appeal for ignoring the well-known legal effect of a Certificate of Title.

Counsel argued that the respondent applied for letters of Administration in respect of the Estate of Jane Kogere Wiltshire and he declared voluntarily the suit land to the High Court as the deceased property as seen on the petition pages 441 on the Record of Appeal. Counsel quoted as the respondent declared "I Ismail Dabule the applicant, do solemnly and sincerely declare that what is stated in this application is true to the best of my knowledge and belief and I make the solemn, declaration consciously believing the same to be true and by virtue of the provisions of the Statutory Declarations Act 1835 of the United Kingdom."

Counsel submitted that on the admission as above stated there is no better evidence needed to prove a fact as provided in s. 56 of the Evidence Act. Counsel faulted the Court of Appeal for having ignored the admitted fact as per the declaration in the High Court.

Counsel submitted that when the respondent applied for letters of administration and obtained the grant, he applied to the Commissioner Land Registration to succeed the deceased as proprietor and he was registered as such on 19.3.1997 under instrument 286237 as an Administrator of Jane Kogere Wiltshire Estate vide High Court of Uganda Administrative Cause No. 376 of 1988 (Ex D7 at page 449-450 of the Record of Appeal).

Counsel argued that his being registered as an Administrator was pursuant to s. 134(1) of the RTA which deals with succession upon death of the registered proprietor. S. 25 and 180 of the Succession Act vest the deceased's properties in the Administration of the Estate as such.

Counsel submitted further that it was wrong for the Court of Appeal to rely on the Luganda Will which had not been attested. There was need to prove it as it is a legal requirement in s. 68 of the Evidence Act. There was no single witness who attested to it so it was not proved at all. In the Supreme Court in SCCA No.2 of 1989 Ismail Dabule (Administrator of the estate of Kogere) v. Mrs. Georgia Pantelakis, Jane Kogere Wiltshire who the respondent represented as administrator had lost the ownership of the suit land in the High Court Suit No. 64 of 1986. In the appeal at the Supreme Court, the respondent who was the Administrator of Jane Kogere Wiltshire's estate prosecuted the appeal, not in his own right but as an administrator and legal representative of Jane Kogere. Counsel contended that the respondent would not have defended the Jane Kogere title as she died in 1986. And if the suit land was not Jane Kogere Wiltshire, the respondent could not have defended it successfully, instead he would have sued Mrs. Georgia Pantelakis separately in his own right based on an alleged found duplicate Certificate of Title, but he did not.

Counsel argued that in the Supreme Court Appeal No. 2 of 1989 the Court of Appeal erroneously held that the Court ruled in favour of the respondent, whereas the Court ruled in favour of Kogere's estate's legal representative because the respondent was the legal representative of the estate of Jane Kogere as administrator as per Administration Cause No. 376 of 1988 and thereafter succeeded on the Certificate of Title upon obtaining the letters of administration upon her death. Kogere had lost ownership to Georgia Pantelakis in HCCS No. 64 of 1986.

Counsel contended that the respondent cannot now turn around claiming that the land is not Jane Kogere's but his personal property. That the respondent could not approbate and reprobate by accepting Kogere as owner and reject her ownership at the same time, he is estopped from making contrary assertions. Counsel referred to s. 114 of the Evidence Act and the CACA No. 44 of 1996, *Ddegeya Trading Stores (U) Ltd v URA*.

Having submitted as above, Counsel for the appellant asserted that, it was an error in law and fact for the Court of Appeal to find that the appellant had no caveatable interest. Counsel affirmed that the appellant was a biological son of the late Kogere the deceased the owner of the suit land. It followed that the appellant had a beneficial interest and had the right to lodge a caveat as per s.139 (1) of the RTA. Counsel argued that Article 247(a) of the Constitution requires an efficient, fair and expeditious machinery for the administration and management of the deceased person's estates. That it could not be fair for an administrator to turn around and claim estate property as his own.

Counsel submitted that if the Court of Appeal properly evaluated the evidence on record and applied the correct legal principles, it would have found that the suit land formed part of late Jane Kogere's estate. Counsel submitted that grounds 1, 2, 4, 10 and 12 would be allowed.

Grounds 3 and 11

Counsel submitted that the holding by the Court of Appeal that Registration of Jane Kogere as proprietor was an error or mistake made by the Land Ministry officials. Counsel argued that the respondent raised this issue with the Commissioner Land Registration under s. 91 of the Land Act and it was rejected as baseless. Further, Counsel argued that it was the Commissioner who can defend the alleged mistake or errors, the respondent ought to have sued the Commissioner but he did not which could have facilitated the Commissioner to defend himself on the decision of the erroneous entry. So in the result the Commissioner was condemned unheard.

On the issue that Jane Kogere used impugned Powers of Attorney and the Statutory Declaration to register herself as proprietor on the Certificate of Title, Kogere was registered on the title on 21.10.1981 under instrument No. 210504 (Ex D7). Later she applied for a special certificate vide instrument No. 210562. Counsel argued that the respondent did not establish any link at all between instruments 210504 and 210562 and Ex P11 and 12 for the following reasons: -

- 1) Both Ex P11 and P12 bore no instrument numbers
- 2) They have no embossed stamp of Land Office as evidence of lodgment and
- 3) They are not certified by the Land Office as public documents in terms of s. 64 (1) e and f, (4), 73, 75 and 76 of the Evidence Act.

Counsel cited the case of **Kakooza John Baptist v. Electoral Commission & Another EPA No. 11 of 2007** and argued that those documents Exp11 and Exp12 were barred by law from being used as evidence to prove the contents and existence of instruments 210504 and 210562 and therefore the Court of Appeal erred to rely on them.

Ground 5

The complaint in that ground was that the Court of Appeal erred in law and fact to grant unpleaded reliefs. The Court of Appeal held that unpleaded issue can be a basis for a decision if parties have made it so. Counsel pointed out that in the instant case the parties framed the issue, whether Kogere correctly acquired the Special Certificate of Title. Counsel submitted that the estate of Jane Kogere Wiltshire was not sued and therefore the Court of Appeal ought to have asked whether Kogere's estate was sued, if so what reliefs were pleaded against the estate which it did not do.

Counsel further argued that it was a legal requirement under O.6 rr 1, 7, O. 7 r 1(c), (e), (f), (g) and O. 7 r 7 of the CPR. The intention was to enable the person sued to defend himself or herself. Counsel argued that in this case the administrator of the estate was not sued so no relief was sought against him. (See plaint at page 422-425 of ROA). As such the cancellation of title of the estate was in error in law and fact in view of O.6 rr 1 and 7 as already stated above.

Counsel further submitted that the suit was not for recovery of land and it was not against the estate nor did the respondent seek any reliefs against the estate among others.

On ground 13, Counsel submitted that the Court of Appeal erred in law and fact to dismiss the appellant's counter claim on the basis that the suit land did not form part of Kogere's estate. Counsel reiterated the earlier submission that the suit land formed part of Kogere's estate consequently, the counter claim ought to have been allowed.

Counsel elaborated on the prayer 4 in the memorandum of appeal which prayer was not part of the appellant's defence and counter claim. Counsel pointed out that the respondent himself stated that the letters of administration are null and void *ab initio* as he got them to recover the suit land from Kogere's Estate paragraphs 3, 4, 9-10 of his reply to WSD at pages 431-432 of the Record of Appeal. Counsel argued that the letters of administration are not for purposes of recovery of their own land, from the estate *inter alia* see s. 279-299 and 27 of the Succession Act.

Counsel submitted that from the foregoing the grant was tainted with fraud and illegalities which should not be condoned by this Court. Counsel cited SCCA No.15 of 2009, NSSF & Another v. Alcon International, SCCA No. 3 of 2014, Simba (K) Ltd & Others v. Uganda Broadcasting Corporation. He prayed that this Court invokes s. 11 of the Judicature Act and r. 2 (2) of this Court Rules to revoke the respondent's grant and grant

the letters to the appellant to avoid multiplicity of pleadings. Further Counsel prayed that this appeal be allowed with costs of this Court and the Court's below.

Counsel for the respondent also submitted on grounds 1, 2, 4, 10 and 12 together.

Counsel supported the finding of the Court of Appeal and argued that the respondent in paragraph 1, 2,3,4,5,6,7,8,9,10,11,12,13,15 and 27 of his witness statement on pages 399-401 of the Record of Appeal testified on how he acquired the suit land among others. Counsel referred to a statement of the step daughter Emily Kaumba PW2 who said that she clearly explained that the late Kogere told her before her death that the suit land belonged to the respondent among others.

Counsel further submitted that the Court of Appeal considered that the respondent purchased the suit land from Georgia Pantelakis vide Powers of Attorney granted to Obola Ochola. And that before the respondent went in exile in 1979 he deposited his duplicate Certificate of Title with Libyan Arab Bank Uganda and that he later gave Powers of Attorney to his wife Kogere to manage his account. That she later discovered that the title was missing and she then applied for Special Certificate of Title.

Counsel submitted that the learned Justices of Appeal rightly observed that (a) the Powers of Attorney had not been registered with the Registrar of documents.

(b) That it was not also witnessed contrary to section 148 of the Registration of Titles Act and therefore could not be legally used by the deceased to apply for the Special Certificate of Title.

(c) That the Powers of Attorney were specifically granted to manage the respondent's account in the Libyan Arab Bank Bombo Branch'

(d) The donee of the Powers of Attorney acts as an agent of the donor and could not use them for her/his own benefit. (See **Imperial Bank of Canada v. Beglay (1936) 367** and **Fredrick Zaabwe v. Orient Bank Ltd & Others SCCA No. 4 of 2006**. That the Statutory Declaration used by Kogere the wife of the respondent to be registered on the Special Certificate of Title was sworn on 24/11/1981 and yet she was registered on 21/10/1981. Counsel contended that this offended s. 70 of the Registration of Titles Act and was an incurable irregularity.

Counsel for the respondent submitted that the Court of Appeal rightly considered the evidence on record and explained the circumstances the respondent applied to administer the estate which had been already administered by two people. That it was to effect the part of the Will that stated that on returning to Uganda the respondent would transfer the suit land to his names. That the respondent was not conceding to the fact that the suit land was

part of the estate of the deceased (see pages 45 lines 8-11 page 340 lines 20-26 and pages 34 lines 1-9 of the Record of Appeal).

Counsel submitted that the Court of Appeal did not accept Counsel for the appellant submission, to the effect that the suit land would not have devolved on the respondent as administrator of Kogere's estate if it did not belong to her. The learned Justices held that the respondent applying for letters of administration did not mean that he waived his right of ownership.

Counsel argued that the late Kogere never intended to take the suit property for herself and to avoid acrimony she clarified as stated on the Record of Appeal page 7-11 the proprietorship of the suit land in her Luganda will. Ex D 6 in the supplementary Record of Appeal.

On the complaint by the appellant faulting the Court of Appeal for having relied on the Luganda will which had not been proved for lack of attestation, Counsel for the respondent supported the Court of Appeal finding and argued that there was no need to sue anyone because the will of late Kogere clearly stated that the owner of Plot 21 Kampala road was the respondent. (Referred to the Luganda will on pages 473-477 of the Record of Appeal).

Counsel further argued that the appellant had no caveatable interest, though the appellant argued that the suit property formed part of Kogere interest, so as a beneficiary he had the caveatable interest among others.

Grounds 3 and 11

Counsel for the respondent submitted that the learned Justices of the Court of Appeal properly evaluated the evidence on record when they held that the respondent's wife was registered by mistake of the land officials. Counsel argued that the Commissioner refused to remove the caveat because caveats are removed by Court (s. 144 of the RTA) and relied on the cases of **Sanyu Lwanga Musoke v. Yakobo Ntale Mayanja SCCA No. 59 of 1995**.

Counsel argued that the Statutory Declarations and the Powers of Attorney which had no link between instrument numbers 210504 and 210562 which the late Kogere used to apply for the Special Certificate of Title were the only logical declaration explanation on how the late Kogere got to be registered on the suit property *inter alia*.

That the registration was an illegality which the Court of Appeal could not ignore (relied on the **Makula International v. His Eminence Cardinal Wamala & Another (1982) HCB 11**).

Counsel further submitted that the appellant did not have an account of how his mother acquired the suit property *inter alia*. That therefore though the relief of cancellation was

not prayed for, it was necessary to enable the respondent as proprietor of the property to be restored on the title.

Counsel argued that the appellant submitted that the respondent/ plaintiff was bound by his pleadings and could not succeed against an estate he never sued nor sought any remedy. Counsel for the respondent reiterated the earlier submission that there was no need to sue anyone upon return from exile. That the respondent was given back his land.

Counsel submitted against the prayer for this Court to revoke the respondent's letters of administration in regard to the suit land. Counsel submitted that the grant was not tainted with fraud and irregularities. That the letters of administration were applied for to protect his interest in the suit land as he pursued the process to effect the change on the white page in line with the will of late Kogere. Counsel submitted that this was the only lawful procedure (see s. 180 and 192 of the Succession Act)

Counsel further submitted that the Court of Appeal dismissed the counter claim because it was an abuse of Court process. That the appellant had filed a suit in the High Court HCT-CS-0043 of 2012 in family division against the revocation of the letters of administration and so it could not waste time on it as the family Court was handling the same.

Appellant's submission in rejoinder were considered.

Consideration of the appeal.

This is a second appeal and the duty of the second appellate Court was long settled in various decisions of this Court. It is trite law that as a second appellate Court, we are not expected to re-evaluate the evidence. However, where it is shown that they did not evaluate or re-evaluate the evidence or where they are proved to be manifestly wrong on findings of fact the Court is obliged to do so and to ensure that justice is properly and timely served. See **Tito Buhingiro v. Uganda SCCA No. 8 of 2014**. It was stated in the earlier case of **Kifamunte Henry v. Uganda SCCA No. 10 of 1997** that, on second appeal it is sufficient to decide whether the first appellate Court on approaching its task, applied or failed to apply such principles see also **Pandya v R 1957 EA 336**.

Rule 31 of this Court rules provides: -

(1) where the Court of Appeal has reversed, affirmed or varied a decision of the High Court acting in its original jurisdiction, the Court may decide matters of law or mixed law and fact, but shall not have discretion to take additional evidence.

Section 7 of the Judicature Act provides: -

Supreme Court to have powers of the Court of original jurisdiction.

“For purposes of hearing and determining an appeal, the Supreme Court shall have all powers, authority and jurisdiction vested under any written law in the Court from the exercise of the original jurisdiction of which the appeal originally emanated”

The duty of the first appellate Court is provided in rule 30 of the Court of Appeal rules inter alia as follows: -

“On any appeal from the decision of the High Court acting in the exercise of its original jurisdiction, the Court may-

- (a) Re-appraise the evidence and draw inferences of fact and
- (b) ..

I shall be guided by the above principles in determining this appeal.

Ground 1.

Counsel for the appellant faulted the Court of Appeal for holding that the suit land comprised in LRV 194 folio 13 Plot 21 Kampala Road did not form part of late Jane Kogere estate. Counsel submitted at length to justify that the suit property actually formed part of the late Jane Kogere estate in that the late Kogere was the proprietor of the suit land since 21st October 1981 vide instrument No. 210504. Counsel submitted that the respondent in his application for letters of administration for the estate of the late Kogere, the suit property and other properties which included the House at Plot No. 822 Mawanda Road Kampala, land at Nkumba College of commerce, House on Plot No. 917 Mawanda Road Kampala, Bank Accounts at Libyan Arab Bank Kampala Uganda. Counsel argued that, the respondent declared them to Court and undertook to administer and make inventory of the said property and credits, exhibit and render to Court a true account within a year after the grant or any such further time as permitted by Court from time to time which the respondent failed to do, to date. There was nothing on Court record to show that what the respondent undertook to do was done. The letters of administration were granted to him signed by Justice Moses Kasule Kalanda on the 31st October 1988.

According to the Record of Appeal as Counsel for the appellant submitted, at the time of Kogere's demise she was the registered proprietor and therefore owner of the suit land and it is apparent therefore that it formed part of the late Kogere's estate. If it was not, then the respondent if he wanted to defend his ownership he ought to have brought it at that time. Failure to do so he could not raise it now. And raising it now showed that he had a fraudulent intention.

Definitely under s. 59 of the Registration of Titles Act and s. 64 of the said Act Kogere was the owner. The application by the respondent to be granted letters of administration

was confirmation that Kogere was the owner of the suit land/property of which the respondent was obligated to render inventory, accounts and credits of the same to Court as he committed or declared as required by law.

In his written statement of evidence in the High Court, the respondent stated that he applied for the letters of administration in Administrative Cause No. 376 of 1988 so as to transfer back his property (suit land) under the Special Certificate of Title in the Names of Kogere (his deceased wife). This just confirms how fraudulent the respondent is, (1) he told lies to Court that he was going to administer the estate of late Kogere and undertook to render and make full inventory of the property, credits and the accounts which he failed to do, to date.

(2) The purpose of letters of administration is not to recover land from the estate the person is administering. The Succession Act provides the law applicable in both intestate and testamentary success. Counsel for the respondent did not point out the law that gives authority for a person to seek letters of administration for purposes of claiming any property. The Succession Act in s. 25 and 180 are instructive.

(3) The Luganda version of the will, the respondent claims to have given him authority to transfer, was not a valid testamentary disposition. The *will* was not proved by either primary evidence or secondary evidence as required under s. 64 of the Evidence Act Cap. 6 Laws of Uganda. The trial Court rejected it but then at the same time when the background facts were recorded the judge seemed to have believed it which was a grave error and the Court of Appeal followed suit. Those who purported to have been witnesses never gave evidence that the will was written or made by the late Kogere or that the late Kogere was the one who wrote it in her own handwriting.

But even if I were to believe that it was the late Kogere who made that Luganda will, which was not the case, the way the purported will was made, one cannot know what her intention was whether, she was giving him as a gift or wanted him to get letters of administration and take care of it as provided in s.33 of the Succession Act which provides for Children's Advancement. It provides, "Where a share in the property of an intestate is due to a child or any lineal descendant of a child of the intestate, no money or other property which the intestate may, during his life, have paid, given or settled to, or for the advancement of, the child to whom or to whose descendant the share is due shall be taken into account in estimating the share."

Counsel for the respondent submitted at length to show that the respondent was the owner of the suit land and referred to paragraph 3 of the respondent witness statement and other witnesses. But the issue was whether it formed part of Kogere estate, which it did by the evidence as pointed out above from the Record of Appeal.

I was not persuaded by the submissions of Counsel for the respondent because, the trial Judge in his judgment found according to the Record of Appeal at page 337 that, "The plaintiff (respondent) was however unable to prove that the will was made by late Kogere Wiltshire. Some of the witnesses to its execution such as lawyers from Mugerwa & Matovu Advocates inter alia were not called to give authenticity which left a glaring gap. As I stated above, the will was the primary evidence of the respondent as he claimed that Kogere stated therein that he transfers it in his names. For the purported unproved Luganda stated, "*Slow boat Ismail Dabule bwaba aze e uganda, agiza mumanya gge. Naye bwaba tanada, Alice Wiltshhire mukulu wange agira agirabirira esente ezivaamu zikuze abaana bange oku basomesa okutuusa nga bakuze.*" In English when translated truthfully it means in my understanding as follows: - "If Ismail Dabule comes to Uganda he transfers it in his names, but if he does not come my elder sister Magdalene Wilshire takes care of it and the money that it generates she educates my children until they grow up." (See s.33 of the Succession Act supra)

The above in my view expressed the intention of Kogere of educating her children, it does not suggest that her intention was to have Ismail Dabule take it and own it. It was for all intents and purposes for caring for her children education in her absence.

Counsel for the respondent submitted that at page 392-401 of the Record of Appeal the respondent in his witness statement he said that he bought the suit land from Georgia Pantelakis vide Powers of Attorney granted to Obola Ochola and further that the Powers of Attorney and all relevant documents were attached and marked A1-A6. Counsel for the respondent referred to the evidence of Emily Kaumba PW2 to the effect that the suit land belonged to the respondent as was told by Kogere. Counsel for the respondent further submitted that before the respondent went in exile he had deposited his duplicate Certificate of Title for safe custody in the Libyan Arab Bank Kampala Uganda. Further Counsel submitted that the respondent gave Powers of Attorney to Kogere to manage his business and so the Court of Appeal considered and found that the Powers of Attorney the respondent gave his wife could not be used legally to transfer title.

I am unable to accept the submissions of Counsel for the respondent, they fail short of the evidence on the Record of Appeal. The trial Court had already found that the evidence of PW2 Emily Kaumba was not useful to prove the "will" and that the fact that the plaintiff respondent received the copy of the will together with other documents from the late Alice Wiltshire did not prove that the copy of the will was authentic. The trial Judge said,, that "*it was safer to determine the issue of whether the suit property formed part of the estate of late Kogere on the cogent material particularly the evidence which concerned how each party came to own the suit property (see page ...of the Record of Appeal).*"

I have to say here that the trial Court misdirected itself when **First** instead of dismissing the suit as the plaintiff failed to prove the will where he claimed to derive the authority to apply for letters of administration and allow the counter claim he framed another issue. By framing another issue, he caused an injustice to the appellant. Obviously the appellant could not have known how his mother acquired the suit land. However, there was evidence of the letters of administration which the respondent had gotten. **Second** the appellant's complaint as far as the record revealed, was about the respondent obtaining letters of administration and failure to administer it in accordance with the law and went to claim the property which formed part of his mother's estate as his. By so doing the respondent was denying the appellant's beneficiary right of the estate.

The burden under s. 101 of the Evidence Act lay on the respondent to prove the case on a balance of probabilities.

Third it was apparent on the Record of Appeal particularly in the supplementary Record of Appeal filed in Court on 30th March 2020 that, the Civil Suit No. 155 of 2010, Ismail Dabule v. Patrick Kaumba Wiltshire was as a result of retrial ordered by the Supreme Court in SC Civil Appeal No. 2 of 1989, which arose from Civil Suit No 64 of 1986, Georgia Pantelakis v. (1) Jane Kogere Wiltshire (2) Kibimba Rice Scheme before Hon. Justice CM Kato (RIP). The evidence which the trial Judge in the retrial referred to as *cogent particular materials* had formed part of the evidence (in Civil Suit No. 64 of 1986) had been heavily discredited and the Judge found that Pantekalis never sold the suit property to the respondent or anybody and that Pantekalis never gave any authority to Obola Ochola to sell the suit land.

In the very original suit No. 64 of 1986 (of which Dabule (respondent) was not party) the evidence of the defence was that the property was sold to Dabule who in turn transferred it in his wife's name Kogere (1st defendant). The plaintiff (Pantekalis) denied having signed the Powers of Attorney to Obola Ochola and stated in an affidavit sworn by her that the signature appearing on the Powers of Attorney was a forgery. The affidavit was dated 21/5/86 which was Exp3 in Civil Suit No. 64 of 1986. The original trial Judge Kato C M found that the signature was forged.

Forth the affidavit of the Magistrate at Bukoba Court, stated that the Powers of Attorney were never signed at Bukoba Court and that the plaintiff Pantekalis did not appeal before that Court to sign the purported Powers of Attorney. (This confirms that the Powers of Attorney were a forgery).

Fifth the defence witness by the name of Monday, claimed to have typed the said Powers of Attorney, stated that, it had the expression "Dated at Kampala" when in fact it was

supposed to be "dated at Bukoba." The trial Judge did not believe that witness on the basis that there was no reason for the Magistrate to retain it at Bukoba, and the only logical conclusion was that the said Powers of Attorney never found its way to Bukoba as the defence was suggesting.

Sixth the Judge found that the plaintiff's signature appearing on the Powers of Attorney was far different from that appearing on the letters (documents A-A6) the respondents referred to and which the trial Court in Civil Suit No. 155 of 2010 relied on. The original trial Judge found that the Powers of Attorney referred to were not genuine.

Seventh from the above foregoing especially the evidence by the defence that the respondent allegedly transferred it to Kogere and then thereafter took the Duplicate Certificate of Title to Libyan Arab Bank Kampala Uganda for safe custody, then at the same time claimed to have given Kogere his wife Powers of Attorney to manage his property. All that bring out inconsistencies and contradictions in the respondent's case. This tainted the evidence on record about buying the suit land to be tainted with lies, fraud and malpractice. The respondent in Civil Suit No. 64 of 1986 where he was a witness as Alice Wiltshire (administratrix) was the one representing the estate of Kogere as legal representative, he avoided stating what he stated in the earlier suit. And he avoided to state when he transferred the land to his wife Kogere Wiltshire. It showed that the purported Duplicate Certificate of Title had not got lost as the respondent stated, so he was not truthful because the respondent said that before he went to exile he took it to the Libyan Arab Bank for safe custody. As to why the respondent did not disclose to his wife that he took the title in the Libyan Arab Bank for safe custody means that he was hiding the truth.

The fact remained that by the time of demise of Kogere, Kogore was the registered proprietor and was the owner of the suit land and therefore formed part of Kogere Wiltshire estate.

So this ground succeeds.

Ground 2.

The complaint was that the Court of Appeal erred in law and fact when it held that the respondent's claim of ownership of the suit land was not barred by approbation and reprobation.

I have already found that the suit property formed part of late Kogere's estate. There was incontrovertible evidence on record to the effect that the respondent, sincerely declared that what was stated in the application was true to the best of his knowledge and belief and that he made the solemn declaration consciously believing the same to be true

and by virtue of the provisions of the Statutory Declaration Act of 1835 of the United Kingdom (see page 441 of the Record of Appeal).

The submission of Counsel for the respondent that the respondent explained the circumstances in which he applied for letters of administration had no merit. The purpose of the Succession Act is well laid out in the long title and there cannot be circumstances above the law. The respondent was an administrator of the estate of Kogere in trust for the beneficiaries in accordance with the law. It is apparent that the Court of Appeal and the trial Court failed in their duty to properly evaluate and re-evaluate the evidence on record. If both Courts had properly executed their duty, they ought to have found that the respondent was guilty of approbation and reprobation and so I find. **This ground succeeds.**

Ground 3.

The complaint was that the Court of Appeal erred in law and in fact when it held that the Registration of Jane Kogere Wiltshire as proprietor of the suit land was an error committed by the land office officials.

Counsel for the respondent supported the Court of Appeal finding. However on perusal of the Record of Appeal, the suit land had been registered in the names of Georgia Pantekalis since 1969 who the respondent claimed that she had sold that land to him. The elder sister to Kogere by the name of Alice Magdalane Wiltshire gave evidence in the original suit No. 64 of 1986 and said that the suit land was Kogere's land (she was later an administrator of the estates of Kogere).

The respondent alleged that the title allegedly obtained from Pantekalis was taken by him and kept in the Libyan Arab Bank Kampala which means that, he was telling a lie when he said that it was lost because he knew that he had kept it at the Libyan Arab Bank. He was not coming to equity with clean hands. Also the fact that in the original suit the respondent told Court that after buying he transferred it to his wife (Kogere). This shows that the respondent was not truthful and confirms that he never acquired the suit land.

According to the Record of Appeal the Certificate of Title which the respondent produced in Court, which was produced in Civil Suit No. 64 of 1986 did not have any link with Kogere Special Certificate of Title upon which she was registered under instrument No. 210562 and 210504. The documents including the Certificate of Title, the Powers of Attorney and Statutory Declaration did not bear instrument numbers and they were not embossed by the stamp of the Land office as evidence of lodgment. They were not certified by the land office as public documents in terms of s. 64 (1) (e) and (f) (4) and 73, 75 and 76 of the Evidence Act. See **Kakooza John Baptist v. Electoral Commission & Another EPA No. 11 of 2007**

Those very documents were rejected by the Court in first Civil Suit No. 64 of 1986. The Court said, "according to the evidence available the copy of the Certificate of Title held by the defendant is not free from suspicion. That suspicion starts with the fact that the entries in that Certificate of Title ExD4, ExP11/ExP3 according to the trial judgment in Civil Suit No. 155 of 2010 and ExP12 are unknown to the land office so far as the first defendant (Kogere Wiltshire) was concerned. The other aspect which creates suspicion is the manner in which the alleged sale was conducted among others."

It is on record that when the Chief Registrar of Title gave evidence in cross examination, she stated that the copy which was kept by the defendant could not be believed to be true, and that it was the copy kept by the Land office produced by the plaintiff (Pantekalis as exhibit on the plaint that was to be believed as genuine but not ExD4 Certificate of Title and that when there is a discrepancy between two documents, the one kept by the Land office prevails.

I observed that in the original suit the Chief Registrar of Titles gave evidence unlike in Civil Suit No. 155 of 2010 where the respondent never ensured that the Commissioner Land Registration came to testify. This did not come about by mistake but it was deliberate because of the untruthfulness of the respondent. No wonder the trial Court in Civil Suit No. 155 of 2010 advanced the assertion of registering Kogere by error by the Land office. The Court of Appeal just followed without re-evaluating the evidence as it is required to do as a first appellate Court.

Before I take leave of this ground, the word error is defined as an assertion or belief that does not conform to objective reality; a belief that what is false is true or that what is true is false; mistake. The verb "err" means to make an error, to be incorrect or mistaken (see Black's Law Dictionary 9th Edn page 621).

The alleged Powers of Attorney allegedly in favour of Kogere by the respondent, did not bear any evidence that it's the one used to register her as proprietor on the Special Certificate of Title. Also on the Statutory Declaration there was no evidence to support the assertion as submitted by Counsel for the respondent that it was used to register Kogere as proprietor of the suit land. It was a question of conjuring evidence here and there without any truth to make it appear that it was true whereas not.

The Court of Appeal erred in law and fact to find the way they did because the finding did not conform to the objective reality. **So this ground succeeds.**

Ground 4.

Counsel for the appellant faulted the Court of Appeal Justices for holding that the Supreme Court in Civil Appeal No. 2 of 1989 ruled in favour of the respondent. The Record of Appeal especially in the supplementary record filed by Counsel for the respondent, it was clear that the respondent became an administrator of the estate of Kogere after Magdalane Wiltshire (dead) who was the administrator of the late Kogere estate. An administrator is not synonymous with the estate administered. I took judicial notice of the fact that at the time of the appeal the citation was wrongly made i.e Ismail Dabule v. Pantekalis. The respondent had never been a party but he only became a legal representative so the citation ought to have been Ismail Dabule (Administrator of the estate of late Jane Kogere Wiltshire). The respondent was not an appellant in his own right but holding it in trust for those entitled (s. 25 of the Succession Act). In fact the Supreme Court stated, "*Mr. Ismail Dabule as administrator of the estate of Jane Kogere Wiltshire has appealed against the above decision...*"

Accordingly the Court of Appeal erred in law and fact to hold that the judgment was in favour of the respondent when it was in favour of the estate of Jane Kogere Wiltshire.

So this ground succeeds.

Grounds 5, 6, 7 and 9

Counsel faulted the Court of Appeal for ordering cancellation of the Special Certificate of Title registered in the names of Jane Kogere Wiltshire when fraud and cancellation were not pleaded.

I had the opportunity to carefully read the plaint as per the Record of Appeal. In paragraph 3 there to the plaint stated (*the plaintiff brings this action against the defendant for orders of vacating and removing a caveat which the defendant lodged on the plaintiff's property vide LRV 194 Folio 13 Plot 21 Kampala Road on the 19th day of May 2008 under instrument No. 396337.*

The plaintiff prayed for cancellation of the caveat from his alleged property.

It is apparent that there was no prayer for cancellation of the Special Certificate of Title or recovery of land or both.

I am unable to accept the reasons advanced by the Court of Appeal that it was a consequential order.

The rules are very clear in respect of pleadings.

O. 6 r 7 of the Civil Procedure Rules provides, "no pleading shall not being a petition or application except by way of amendment raise any new ground or claim or contain any allegation of facts inconsistent with the previous pleadings of the party pleading that pleading."

The rule was affirmed in the cases of *Jan Properties Ltd v. Dar es Salam City Council* (1966) E.A 281 and *Struggle Ltd v. Pan African Insurance Co. Ltd* 91990) ALL 46,47. The Court stated, the parties in civil matters are bound by what they say in their pleadings which have the potential for forming the record narrower, the Court itself is also bound by what the parties have stated in the pleadings as to the facts relied on by them. No party can be allowed to depart. So no Court can order remedies not prayed for.

It is clear that the Court of Appeal erred in law to grant orders not pleaded and not prayed for.

These grounds 5, 6, 7 and 9 succeed.

Grounds 8 and 10

Counsel for the appellant faulted the Court of Appeal for holding that the Luganda version of the will was the one made by the late Kogere and the English version was forged. As a result relied on the Luganda will which was not proved.

I have discussed the issue of the alleged or purported Luganda will allegedly written or made by Kogere earlier in this judgment. The will was neither attested nor proved that it was made by Kogere. It was not in the least a testamentary disposition to be admissible and relied on by Court. Section 68 of Evidence Act provides: - "if no attesting witness can be found, it must be proved that, the attestation of the one attesting witness at least is in his own handwriting, and that the signature of the person executing the document is in the handwriting of that person."

In the instant case there was no single attesting witness to the will and so the document fell short of the proof as evidence. **These grounds 8 and 10 succeed.**

Ground 11

Counsel for the appellant faulted the Court of Appeal for holding that Jane Kogere Wiltshire used the impugned Powers of Attorney and Statutory Declaration to register herself on the Special Certificate of Title. I have already discussed this issue in this judgment. There was no evidence to support the respondent's Counsel Submissions.

This ground succeeds.

Ground 12

Counsel for the appellant faulted the Court of Appeal for holding that the appellant had no caveatable interest and erroneously ordered cancellation of the caveat.

I have already discussed exhaustively in this judgment in resolution of ground 1 and I found that the appellant was a biological son of the late Kogere. S. 25 of the Succession Act provides, "all property in an intestate estate devolves upon the personal representative of the deceased UPON TRUST for persons entitled to the property under the Act. It is important to note that the administrator or administrators exercise the power to administer the estate of the deceased person not for themselves But in trust... They get registered as Administrators or Executors not as proprietors. (See: SCCA No. 09 of 2014, *Silver Byaruhanga v. Fr. Emmanuel Ruvugwaho & Rudeja*).

I would also add that there was no evidence showing that the respondent distributed the properties and the appellant had his share. There was no evidence on Record to show that the suit property was distributed by Magdalene Wiltshire the administratrix of the estate before the respondent obtained the letters of administration of Kogere's Estate.

The grievance of the appellant from the evidence on record emanated from the failure by the respondent to file an inventory and render credits and accounts of the appellant's mother's estate which failure would deprive him (appellant) of his beneficiary interest in accordance with the law. The appellant did not in his written statement of defence and counter claim, state anywhere that he was claiming ownership of his mother's estate.

The Court of Appeal and the trial Court turned the suit into a recovery of land suit from the estate where the respondent was an administrator.

What comes out clearly is that the respondent abused the authority as the holder of letters of administration to the estate of the late Kogere Wiltshire. He said in evidence, that he wanted to get back his land and this exposed him. It showed that the respondent was an artful fraudulent and untruthful person with no shame.

S. 134 of the Registration of Titles Act provides inter alia...and shall hold it subject to the equities upon which the deceased held it, but for purposes of any dealings there with the executor or administrator shall be deemed to be the absolute proprietor. This is for purposes of management and administration in trust for those entitled to like the beneficiaries, creditors etc. in accordance with the law.

That provision has to be read together with s.25 and 180 of the Succession Act in order to know the intention of the legislature and most importantly Article 247 of the Constitution which provides for the Administration of Estates. By the principles of constitutional and legislation interpretation long settled by this Court in its decisions and other decisions in Countries in the Commonwealth jurisdiction, this Court is guided by the principle, *inter alia*, (1) that in interpreting a legislation its purpose and effect must be taken into consideration. Both effect and purpose are relevant in determining either its effect animated by the object of the legislation it intends to achieve. See: **Attorney General v. Silvatori Abuki Constitutional Appeal No.1 of 1998 (SC)**.

(2) That the provisions of the laws (cited) have to be read together as an integral whole with no particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness (See: **P K Ssemwogere & Another v. Attorney General Constitutional Appeal No. 1 of 2002 (SC)**).

As such s. 134 of the RTA, s. 25 and 180 of the Succession Act above all Article 247 of the Constitution. It establishes the Administration of Estates, have to be read together. It has to be understood that the administrator or executor is proprietor in as far as the equities upon which the deceased held it. He or she at all times holds the estate as such. The estate of the deceased devolves in accordance with the law as provided. The intention of the legislature was not to grant absolute ownership to Administrator or Executor to the detriment of the beneficiaries, creditors etc.

The Court of Appeal Justices therefore erred in law and fact to find as they did.

This ground succeeds.

Ground 13.

Counsel for the appellant faulted the Court of Appeal for upholding the trial Court decision to dismiss the counter claim of the appellant.

I carefully read the Record of Appeal which include the supplementary Record of Appeal. I considered the counter claim. It is clear from what I have discussed earlier in this judgment that the respondent failed and or neglected to render an inventory, give accounts and credits of the property to the Court as a true account of the estate of the late mother of the appellant to date since 1988 when he obtained the letters of administration.

Upon careful consideration of the counter claim and the evidence on record, I found no merit in the submission by Counsel for the respondent because the evidence in support of the respondent's case was mere conjecture. **"It is trite law that Courts act on credible evidence adduced before them and do not indulge in conjecture, attractive reasoning**

or fanciful theories.” (See Constitutional Petition No. 14 of 2011, Advocate Coalition for Development and Environment v. Attorney General)

I accept the submissions of Counsel for the appellant that the respondent obtained the letters of administration with dirty hands tainted with fraud and illegalities. Citing the NSSF & Another v. Alcon International SCCA No. 15 of 2009, Counsel submitted that this Court cannot condone such. This Court indeed cannot condone the fraud and illegalities on the face of record.

In the result since all the grounds succeeded I would allow the appeal as follows: -

- (1) Set aside the judgment and orders of the Court of Appeal and the High Court
- (2) Allow the counter claim and enter judgment in favour of the appellant.
- (3) Declare that the suit land formed part of the late Jane Kogere Wiltshire estate of which the respondent was the administrator or legal representative and the appellant had a caveatable interest.
- (4) The respondent's letters of administration are hereby revoked in respect of the suit land.
- (5) The respondent ordered to render accounts to Court of all the income he has been deriving and or collecting from the suit land from the time he was granted the letters of administration in 1988. To be done within 30 days from the date of this judgment.
- (6) Costs of this Court and the Court's below awarded to the appellant.

Dated at Kampala this 31st day of ... October 2023.

.....
Mwondha
Justice of the Supreme Court

Delivered by the Registrar
Juahe
Ref
31/10/24

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

CIVIL APPEAL NO.03 OF 2018

*(Arising from the Judgment of the Court of Appeal at Kampala dated 31st
January 2018 before (Kasule, Cheborion and Musoke, JJA) in Civil Appeal
No. 130 of 2015)*

**[CORAM: OWINY-DOLLO CJ; MWONDHA, TIBATEMWA-
EKIRIKUBINZA, MUSOTA, MADRAMA; JJSC]**

PATRICK KAUMBA WILTSHIRE:.....APPELLANT

VERSUS

ISMAIL DABULE:.....RESPONDENT

JUDGMENT OF STEPHEN MUSOTA, JSC

I have had the benefit of reading in draft the judgment of my
learned sister Mwendha, JSC. The facts on which the appeal is
based have been clearly set out in her judgment as well as the
arguments of counsel in support of and against the appeal. I adopt
the facts, background and submissions of counsel for purposes of
my judgment.

While I concur with her analysis, conclusions and orders she has
proposed, I would like to add a few words to her analysis on
grounds 1, 2, 3, 4 and 10.

Ground 1:

The respondent, in his application for letters of administration declared the suit land as part of the estate of the Late Jane Kogere Wiltshire and was thus aware of the fact that the deceased Kogere was registered as proprietor of the suit land in 1981 under instrument No. 210504. The Respondent did not contest the registration of the late Kogere Wiltshire at the time of registration up till her death.

The Respondent applied for the letters of administration vide Administrative Cause No. 376 of 1988 so as to transfer back the suit land under the Special Certificate of Title in the Names of Kogere. I must emphasize that the purpose of letters of administration is not to recover land from the estate being administered by that person. There are various modes of recovery of land in circumstances where a person's interests in land have been infringed. It appears to me that the respondent's actions were a deliberate dishonesty to take over the interest of the appellant in the estate of his late mother, an injustice we should not condone.

Needless to say, the principle of indefeasibility of title as provided for under Section 59 and 64 of the Registration of Titles Act has to be respected and restored in order to reinstate rationality in land transactions. **Section 59** of the **Registration of Titles Act** states as follows;

"59. Certificate to be conclusive evidence of title.

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No certificate of title issued upon an application to bring land under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate, and every certificate of title issued under this Act shall be received in all courts as evidence of the particulars set forth in the certificate and of the entry of the certificate in the Register Book, and shall be conclusive evidence that the person named in the certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the certificate is seized or possessed of that estate or interest or has that power."

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The application by the respondent to be granted letters of administration of the estate of the deceased Kogere was a confirmation that the suit land was owned by the deceased. Therefore, this fact coupled with the other evidence as evaluated by my learned sister in her judgment proves on a balance of probabilities that the suit property indeed formed part of the estate of the deceased Kogere.

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I agree with my learned sister that the purpose of the succession Act is not to make the Administrator a Registered proprietor but rather to collect manage and deal with the estate of the deceased in accordance with the law. The reason given by the respondent as an explanation is actually an abuse of court process as it amounts to

an improper use of an otherwise legitimate process of court. In coming to this conclusion, I am persuaded by the decision **R-Benkay Nigeria Ltd Vs Cadbury Nigerian PLC SC 29 of 2006** where the Supreme Court of Nigeria outlines circumstances which give rise to abuse of court process and includes:

“1. Instituting a multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of actions on the same matter between the same parties where there exists a right to begin the action.

2. Instituting different actions between the same parties simultaneously in different courts even though on different grounds.

3. Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and the respondents' notice.

4. Where an application for adjournment is sought by a party to an action to bring an application to court for leave to raise issues of fact already decided by a lower court.

5. Where there is no law supporting a court process or where it is premised on frivolity and recklessness.

6. Where a party has adopted the system of forum shopping in the enforcement of a conceived right.

7. *Where two actions are commenced, the second asking for a relief which may have been obtained in the first. In that case the second action is prima facie, vexatious and an abuse of court process.*

5 *In a nutshell, the common feature of an abuse is in the improper use of the judicial process by a party in litigation."*

An improper use of the court process to achieve an improper purpose as the respondent did in pursuing the purpose of defeating the appellant's interest in the estate of his mother is indeed an
10 abuse of court process which we cannot condone.

Therefore, for the reasons I have given I agree with the finding of my learned sister that grounds 1 and 2 of the appeal ought to succeed.

Ground 3:

I agree with my learned sister that the registration of the late Jane
15 Kogere Wiltshire as proprietor of the suit land was not an error committed by the land office officials but was a proper decision. The evidence as evaluated by learned sister Mwendha JSC. clearly shows that the Respondent acknowledged the proprietorship of the deceased on the suit land. In my view it is an afterthought for the
20 Respondent to claim now that the land did not belong to his deceased wife.

Accordingly, I agree with learned sister that ground 3 of the appeal should succeed too.

Ground 4:

On this ground of appeal, I agree that the respondent was not litigating on his own behalf but on behalf of the beneficiaries of the estate of the deceased in which case included the appellant. Therefore, it was indeed an error of law and fact for the High Court and the Court of Appeal to rule in favor of the Respondent as an individual rather than as an administrator of the estate of the Late Kogere Wiltshire whose beneficiaries included the Appellant.

I accordingly agree with my learned sister that ground 4 of the appeal should succeed as well.

Ground 10:

The Luganda will, which purported to transfer the suit land to the Respondent was not proved by either primary evidence or secondary evidence as required under **Section 64** of the **Evidence Act Cap. 6**. No attesting witness was called to testify and Mr. Ernest Wiltshire Kalibala, in whose custody the purported will was, was never called to testify. The trial Court had initially rejected it but then at the same time believed it in the background facts, which, as rightly found by my sister Mwendha, JSC, was a grave error for the High Court and the Court of Appeal.

Conclusion

For the reasons I have given I would allow this appeal with the orders as proposed by learned sister Mwendha JSC.

I would so order.

Dated this 31st day of October
2024

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Stephen Musota

Stephen Musota
JUSTICE OF THE SUPREME COURT

Delivered by the Registrar
Jalifa
Reg

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THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

**[CORAM: OWINY -DOLLO CJ; MWONDHA, TIBATEMWA-EKIRIKUBINZA,
MUSOTA & MADRAMA, JJSC]**

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CIVIL APPEAL NO. 03 OF 2018

BETWEEN

PATRICK KAUMBA WILTSHIRE ::::::::::::::::::::::::::::::: APPELLANT

15

AND

ISMAIL DABULE ::::::::::::::::::::::::::::::::::::::: RESPONDENT

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[Appeal arising from the judgment of the Court of Appeal at Kampala dated 31st January 2018 before (Kasule, Cheborion and Musoke, JJA) in Civil Appeal No. 130 of 2015.]

JUDGMENT OF TIBATEMWA-EKIRIKUBINZA, JSC.

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I have had the benefit of reading the judgment of my learned brother, Hon. Justice Christopher Madrama, JSC.

I agree with his analysis and conclusion that the appeal fails and should be dismissed.

I also agree with the orders he has proposed.

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Dated at Kampala this *3rd* day of *October* 2023.

Lillian Tibatemwa-Ekirikubinza

**HON. JUSTICE PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA
JUSTICE OF THE SUPREME COURT.**

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Delivered by the Registrar
Jaliff
3.10.23

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(Coram: Owiny-Dollo, CJ; Mwendha, Tibatemwa-Ekirikubinza; Musota & Madrama, JJ.S.C)

CIVIL APPEAL NO. 03 OF 2018

PATRICK KAUMBA WILTSHIRE APPELLANT

VERSUS

ISMAIL DABULERESPONDENT

[An Appeal from the Judgment and decree of the Court of Appeal at Kampala in Civil Appeal No. 130 of 2015 Delivered on 31st January, 2018 (Kasule; Cheborion & Musoke, JJA)

JUDGMENT OF OWINY - DOLLO, CJ

I have had the benefit of reading, in draft, the judgment of my learned brother Madrama, JSC. I agree with his decision that this Appeal fails for the reasons he has given in his judgment. I also agree with the orders he has proposed.

As Tibatemwa, JSC also agrees with Madrama, JSC; this Appeal is by majority decision dismissed on the terms proposed.

Dated at Kampala this.....^{31st}..... day of^{October}.....2024



ALFONSE C. OWINY - DOLLO
CHIEF JUSTICE

Delivered by the Registrar



31/10/24