THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 162 OF 2021

(Appeal from the Judgment of Katunguka J. in High Court (family division) Civil Suit No. 170 of 2013, dated 26th June 2020)

(Coram: Elizabeth Musoke, Muzamiru Kibeedi and Christopher Gashirabake, JJA)

1. MUGYENZI JUSTUS

2. KARAMUZI GODFREY

3. RWENDURU RWEISHE MUSA:::::::::::::::::::::::::::::::: APPELLANTS

VERSUS

1. KATEEBA ROSE

2. KAMUKAMA MARGARET

3. KANSHONGI JANE

4. TUMUSIIME DORA:: RESPONDENTS

JUDGMENT OF CHRISTOPHER GASHIRABAKE, JA

Introduction

This appeal is from the judgment and decree of the High Court (Family Division) before Katunguka, J. dated 26th June, 2020 in Civil Suit No. 170 of 2013.

Background to the appeal

The respondents brought the suit in the High Court (Family Division) seeking a declaration that the land comprised in Block 69 Plot 5 measuring 220 hectares situated at Omukobwire village, Kyabagyenyi Parish, Kenshunga Sub-county, Nyabushozi County, Kiruhura District forms part of the estate of the late Yosamu Rwakaniora; a declaration

that the appellants (then defendants) jointly and/or severally knowingly misrepresented and fraudulently applied to Kiruhura District Land Board for freehold offers as customary owners when they very well knew that this was family estate land; a declaration that the appellants jointly and/or severally knowingly misrepresented and fraudulently caused a sub-division of Block 69 Plot 5 without any approval from Kiruhura District Land Board to carry out such a sub-division; a declaration that the appellants jointly and/or severally oppressively, arbitrarily, knowingly connived, colluded and fraudulently obtained freehold offers from Kiruhura District Land Board; a declaration that Block 69, Plot 5 existed, was registered and not customarily owned by the appellants; an order for cancellation of the freehold offers; a declaration that all the dealings in the above estate/land are illegal, unlawful, null and void; an order for a certificate of no objection to be issued to the respondents (then plaintiffs) to enable them apply for Letters of Administration; a permanent injunction restraining the appellants and or their agents, servants or anyone claiming from them from further interference and intermeddling with the estate of the deceased until it is properly administered and distributed; general damages; interest and costs of the suit.

The appellants and the respondents are all children of the late Yosamu Rwakaniora ("the deceased") who died intestate on 4th January 1979. The deceased was survived by a widow, one Erina Rwakaniora (who died sometime in 1983) and 11 children, nine of whom are still alive, and seven of whom are the parties to this appeal. It was common ground that the deceased left property, namely land at Omukobwire Village, Kyabagyenyi Parish, Kenshunga Sub-County, Nyabushozi County, Kiruhura District measuring 220 hectares ("the suit land") having thereon a banana plantation, and 210 heads of cattle; and that no letters of administration were obtained by any of the beneficiaries of the estate.

It was the respondents' case that Erina Rwakaniora, the widow, distributed only the cattle amongst the children because the elder boys were beginning to sell them off, but that she never distributed the land. That instead, the appellants stealthily distributed the land amongst themselves and subdivided the land into plots 29, 30 and 31 measuring

a total of about 160 hectares, for themselves and plot 35 measuring about 60 hectares for the eight female children of the deceased, including the respondents, and obtained freehold offers from Kiruhura District Land Board in respect of the land after misrepresenting that they were the customary owners of the respective pieces. They claimed that the said actions amounted to intermeddling in the estate, were illegal and fraudulent. They sought the prayers set out above.

The appellants denied the allegations. They maintained that in 1980, the entire estate of the deceased, including the land, was distributed amongst the beneficiaries; that the entire extended family, including the female children other than the respondents, all agree that this was the case; that after the distribution all parties proceeded to occupy their respective portions and have developed the same since. They averred that they lawfully surveyed their shares out of the estate as they were entitled to obtain freehold interest thereon; that the respondents were fully aware of the ongoing survey, participated in the same and even applied for freehold offers for their own portion, but that the application was rejected when one Kabibi, the widow of Rwanshara who had been brought on the respondents' land to look after their cows, demanded a share out of their portion. They contended that the lease offer to the late Rwakaniora for what was formerly plot 5 had expired before a certificate of title was processed whereupon the land was occupied customarily; that when the appellants and respondents inherited their respective portions, they became bonafide/lawful occupants, in which capacity the appellants applied for freehold titles for their own portions; that their actions did not amount to intermeddling, fraud or misrepresentation. They contended that the suit, brought 33 years after the distribution, was barred by limitation, was frivolous and vexatious and should be dismissed.

After hearing the evidence, the trial Judge delivered judgment in favour of the respondents. She found that the appellants, who had in the meantime gone ahead to obtain certificates of title for the three plots, obtained the titles illegally and fraudulently, and ordered that the titles be cancelled. She ordered that the parties continue to utilize the portions of land each hitherto utilized without interference from the other parties, but no party may mortgage, sell or in any way alienate the suit land

without the consent of all beneficiaries to the estate of the deceased until after each beneficiary has got their share. She also awarded the respondents general damages of Ug shs. 40,000,000/= and costs of the suit.

GROUNDS OF APPEAL

The appellants appealed against the decision, on 4 grounds, namely-

1. The learned trial judge erred in law and fact in failing to find that there was distribution of the suit property in 1980;

2. The learned trial judge erred in law and fact in failing to hold that the respondents' cause of action arose in 1980;

3. The learned trial judge erred in law and fact in failing to hold that:
   (1) The respondents' suit was barred by limitation under section 5 of the Limitation Act (cap 80) (Limitation of actions to recover land);
   (2) The respondents' suit was barred by limitation under section 20 of the Limitation Act (cap 80) (Limitation of actions claiming personal estate of a deceased person).

4. That the learned Judge erred in law in failing to dismiss the grounds of exemption from limitation pleaded by the respondents in their amended plaint.

The appellants prayed that the appeal be allowed, that the judgment and orders of the High Court be set aside, and that costs of the Court and the court below be awarded to the appellants.

REPRESENTATION

At the hearing of the appeal, Mr. Patrick Turinawe, learned counsel appeared for the appellants while Mr. Peterson Mwesigwa, learned counsel appeared for the respondents. Both counsel with leave of court filed written submissions.

SUBMISSIONS OF COUNSEL FOR THE APPELLANTS

Appellants' submissions on ground 1 and 2

Counsel submitted on grounds 1 and 2 together.

Counsel for the Appellants submitted that the distribution of the suit land was done in 1980 in accordance with the customs of the community to which the parties belong. He submitted that the parties took their respective inheritances since they were customary owners of their respective portions of the suit land. He further submitted that the distribution of 1980 was accepted and never challenged by the Respondents for 33 years. That this must be taken as the year in which the cause of action arose.

Counsel for the Appellants submitted further that there was no intermeddling because the distribution of the deceased's estate was made in 1980. He argued that from that time each of the parties had the legal right to use the properties they were given as they wished.

Counsel for the Appellants referred Court us to the case of **Annet Namilimu v Rev. Aloni Mulondo (H.C.C.S No.27 of 2011)** for the definition of intermeddling which refers to the assuming of authority to administer the estate of another person when a person does not have the authority. He argued that if the Appellants intermeddled then the

Respondents also intermeddled because they also used the properties they were given.

It was further submitted by Counsel for the Appellants that the first Respondent admitted in her testimony that she and her co- Respondents have since built a residential house on the land and had their cattle thereon.

Counsel also argued that the Respondents were estopped from setting up a contrary view since they had acquiesced in and accepted the distribution of the suit property and were beneficiaries of the distribution.

Appellants' submissions on ground 3

Counsel for the Appellants submitted that upon the expiry of twelve years, which was in 1992, the Respondents' right to sue to recover land was lost. He argued that the Respondents cannot come back 33 years later to claim that the Appellants received a bigger portion and that the estate should be redistributed.

He further argued that a right to receive a share or interest in property of a deceased person must be brought at the time of death of the deceased in accordance with section 6(2) of the Limitation Act. He submitted that the late Yosam Rwakaniora died in January 1979 and thus the right of action expired in 1991.

Counsel for the Appellants submitted further that the trial Judge erred in law and fact when she failed to find that the Respondents' suit was barred by limitation under section 5 and 20 of the Limitation Act.

Counsel for the Appellants submitted that an action in respect of any claim for recovery of land has to be brought within 12 years from the death of the deceased. Likewise, a claim to personal estate of a deceased person must be brought with 12 years from the date when the right to receive interest accrued.

He submitted that the estate of the late Rwakaniora was distributed in 1980 and thus the Respondents lost their right to sue in 1992.

Counsel argued that statutes of limitation are rigid and inflexible and once a suit is barred by limitation, that is the end of the story, its merits notwithstanding.

Appellants' submissions on ground 4

Counsel for the Appellant submitted that the reliefs sought by the Respondents related to the Appellants taking possession of the land and not fraud. He argued that the Respondent's contention that the suit was brought after the discovery of fraud in or after 2009 could not cure their claim being time barred by section 5 and 20 of the Act.

He also submitted that the Respondent's Cause of action was not founded on fraud. Rather it was a suit for recovery of land by enforcing a right to share in the estate of the late Rwakaniora.

Submissions of counsel for the respondents

Respondents' submissions on ground 1 and 2

Counsel for the Respondent Submitted that the trial Judge correctly found that there was no distribution of the suit property in 1980.

He argued that the Appellants did not adduce cogent evidence like that of the Resident District Commissioner or Kabibi (Rwanshara's widow) to prove that there was distribution. He submitted that the trial Judge correctly found the evidence of DW3 and DW4 on the meeting held at the RDC's office to be hearsay evidence which was inadmissible.

Secondly, he submitted that that the trial court was correct to find that the widow had neither legal nor customary authority to distribute the land since she had not proved that she was the culturally recognised administrator of the estate. He further argued that the land, being a lease required consent of the Uganda Land Commission allowing the widow to distribute and transfer, otherwise the purported distribution was illegal.

He referred us to the case of **Kayabura Enock v Joash Kahangirwe CA No. 88 of 2015** for the proposition that where some of the beneficiaries have not conceded to the distribution, the law requires that there must be a legally appointed representative of the deceased person to settle the matter or distribute the property.

He further submitted that pursuant to section 191 of the Succession Act (cap. 162), for a distribution to stand there must have been letters of administration granted to someone to administer the property of the intestate.

Respondents' submissions on ground 3

Counsel for the Respondent submitted that the trial Judge correctly found that the suit was not barred by limitation.

He argued that since the trial court found that there was no distribution of the suit land in 1980, no right of action could accrue until letters of administration had been granted. He relied on the case of **Eridad Otabong V Attorney General S.CC.A 6 /1990** for the proposition that where a period of limitation is imposed, it only begins to run from the date on which the cause of action accrues.

Counsel for the Respondent submitted that the Respondents only discovered that the Appellants had started surveying the suit property when a one Kabibi lodged a complaint against the surveys and later in 2012 when the Appellants applied for conversion of the suit property from lease to freehold. He argued that was when the cause of action arose and not in 1980.

Respondents' submissions on ground 4

Counsel for the Respondent submitted that the suit was not barred by time since it was premised on fraud which is one of the causes of action that attract exemption from the general rule of limitation.

He argued that there was ample evidence of fraud attributable to the Appellants that the grant and registration of the freehold titles on the suit land was intended to defeat the unregistered interest of the Respondents.

He further submitted that the findings of the trial court on fraud and illegalities perpetrated by the Appellants had not been appealed and is therefore conceded by the Appellants. He submitted that the trial judge had found that the process leading to and including the transfers into the names of the defendants was tainted with illegalities and fraud.

Appellants submissions in rejoinder

In his submissions in rejoinder, counsel for the Appellants rejoined argued in respect to ground 1 that the appellants were within their rights to choose not to call Kabibi and the RDC as witnesses, and the court was not entitled to conclude from that that the appellants were dishonest or untruthful. He referred to the case of **Singer Margaret Nankabirwa (SCCA 03 of 2016)** for this position.

Counsel further rejoined that the law recognizes customary distribution of property of intestate persons, considering that customary law is part of the law applicable in Uganda. He referred in this respect to several cases, including **Administrator General vs George Mwesigwa Sharp (CA 6 of 1997)**. He also referred to The Succession Act (Exemption) Order (SI 139 – 3) which had the effect of exempting native Ugandans from the operation of the Succession Act.

On grounds 2, 3 and 4, counsel reiterated his earlier arguments. He pointed that a beneficiary is not required to wait for letters of administration to be issued before he can make his or her claim for a share in the estate of the deceased intestate. He referred Court to the case of **Israel Kabwa vs Martin Banoba Musiga (SCCA 52 of 1995)** for this position and concluded that the time within which an action may be brought begins to run right from the death of the intestate, not when an administrator is appointed.

Consideration by Court

I have carefully considered the grounds of appeal, the submissions of both counsel, the laws cited, the law generally, and the record of appeal in reaching this decision. This being a first appeal, the court, as first appellate court has the duty to rehear the case by re-evaluating and subjecting the evidence presented to the trial court to fresh and exhaustive scrutiny so as to draw its own conclusions (**See Pandya vs R [1957] EA 336; Fr. Narsensio Begumisa and 3 Ors vs Eric Tibebaga, SCCA No. 17 of 2002; [2004] UGSC 18; Kifamunte Henry vs Uganda, SCCA No. 10 of 1997).** The court has to bear in mind the fact that it has not seen or heard the witnesses and, in that regard, the view of the trial judge as to the credibility of a given witness carries great weight. However, this court may interfere with a finding of fact if the trial Judge is found to have overlooked a material feature in the evidence of a witness, or if the balance of probability is inclined against the findings of the trial court, or if the impression formed by the trial Judge basing on the demeanor of a witness is inconsistent with the evidence in the case generally.

I will now proceed to deal with the grounds of appeal. I will deal with grounds 1 and 2 separately and ground 3 and 4 together since the latter are interconnected.

Ground1:
The learned trial Judge erred in law and fact in failing to find that there was distribution of the suit property in 1980.

Whether or not there was a distribution of estate property is a question of fact to be proved by evidence. On the other hand, whether or not the distribution was valid is a question of law.

The appellants alleged that the estate was distributed by Mrs. Erina Rwakaniora, the widow of the deceased and mother of the parties, with the assistance of family members, the Parish Chief and neighbours.

The respondents denied this and claimed that only cattle were distributed on account of the fact that the appellants were

misappropriating them but that the land remained intact and was being used by members of the family without distribution. The respondents also maintained that even if Mrs. Erina Rwakaniora had purported to distribute the land, the distribution would be null and void on account of the fact that Mrs. Rwakaniora conducted it without authority as she had not obtained letters of administration.

Since it is the appellants that claimed that the land was duly distributed the onus was on them to prove that this was the case in accordance with Sections 101 and 103 of the Evidence Act Cap 6.

In the instant case several of the witnesses called by the appellants testified on this matter. Although in the index of the Record of Appeal, Canon Charles Karikatyo is listed as a plaintiff's witness it is clear from the record of proceedings before the High Court, at page 646 that he was called as DW2, though his name was apparently misspelled as 'Can. Charles Karakati' and later as 'Cannon Charles Karikati' instead of Charles Karikatyo. The learned trial judge corrected this in her judgement. It is also obvious from his witness statement on page 71–72 of the record that he was a witness for the defendants, now the appellants.

DW 2 testified that the mother of the parties to this appeal was his sister and then in paragraphs 4 to 10 as follows:

> ***"4. In 1980 when my sister fell sick, she summoned me and told me that as her strength was going, she was desirous of distributing the family property among her children.***
>
> ***5. I went to their home in Nyabushozi, together with the late Yekonia Karekyezi, the paternal uncle to the parties to this suit. We found at home the neighbors, including Bwayomba (since deceased), Kacere, (also deceased), Kagangisa, Rutaraka, Tindifa, Birija and others I cannot recall.***
>
> ***6. We began by distributing the cattle. They were around 210 in number. We gave each individual child his own cows. The three boys took a total of 60 cattle while the eight girls took a total of 150 cattle, but the cows for each individual were known/identified.***

7. We then turned to land. The land was in two distinct portions, separated by a valley. We gave the boys the eastern ridge and the girls the western ridge. The valley became their boundary. We planted there boundary markers in form of "Oruyenje' and 'ebiko", and "ebitooma", the trees traditionally used for the purpose. For the land, we gave each gender its portion as a whole, without sub-dividing for each individual. This is how their mother wanted it, and we complied.

8. From then on, the boys occupied their land with their cattle, the girls also likewise occupied theirs. Later the boys shared theirs among themselves, but the girls kept theirs undivided.

9. Thereafter, I kept visiting them all as my children. They were in peace. There never was a complaint about the distribution. I was therefore surprised to hear that 34 years after the distribution, they are now suing each other.

10. I ask the court, if it wants the full truth, to visit the land and I show the boundaries which we put up for the disputing parties. The boundary markers are now mature trees, but they are clearly evident. That is when this dispute will be properly resolved.

11. I feel much pain, to see my children destroying the family by fighting each other, because this is also going to create enmity among their own children. I don't see how a law of 1995 can change what had already been settled in 1980."

In cross examination he stated that the meeting called by the parties' mother to distribute the estate of her deceased husband sat at their home in Rushere, at a place called Kyankonko; and was attended by, among others, a relative of the parties' father called Yekonia Kalekezi, who recorded the minutes of the proceedings to which those present appended their signatures which were left in a book which he claimed the 1st respondent took away upon the death of the mother.

On why matters of the estate were not handled through the Administrator General, he explained at page 656 of the record:

'By that (then) they were using culture distribution. There was no people going to the Administrator's office. It was cultural.'

Later he added;

"By that time there was no these rules of appointing administrators"

Asked whether any government official was present at the distribution he said there was a Muruka Chief. He also stated that in addition to the deceased's wife and children, also present were Kalekyezi, Bayomba, Shilling, Kakere and others he could not recall, considering that he was testifying 39 years after the event. In re-examination, DW2 explained that it was the mother of the parties, and not the appellants, who decided what each side/party took as their share of the estate.

On his part DW1, Karamuzi Godfrey, stated in his witness statement as follows;

4 By 1980, our mother was also of ill-health and she indicated that she wished to have the family property distributed before her death, so that wrangles are avoided. Accordingly, she called most of our prominent relatives and nearly all our neighbours to help her effect the distribution, and this was done in 1980. By then I was nearly 30 years and I recall clearly what transpired.

5 The cattle were distributed to all the children, whereby the female-children got 150 cows while the male-children got 60. But within this gender categorization, each individual was given his/her own cows.

6 The land of the deceased was also distributed. It was sub-divided into two portions whereby one portion was given to the male children as a group, while the other consisting of one hill/ridge was given to the girls. The two parcels of land faced each other and were initially crudely separated by a

valley. Permanent boundary markers (oruyenje, emitooma and ebiko) were erected. Most of them still stand today, and can be seen if the court visits the land.

7 Later we, the defendants, shared our portion among ourselves and put up boundary markers separating us three and these, too, still stand and are well-known to our neighbours and relatives and they, together with those separating us from the plaintiffs, formed the basis of survey and planting of mark-stones when we embarked on the process of securing certificates of title for our respective acquisitions in 2009. We have each fully developed our respective parcels, preparing pastures, planting banana plantations, digging valley dams and wells, fencing with barbed wire and even putting up temporary houses initially and, later, permanent ones. The developments by each are restricted to his parcel, and none have encroached on the land allocated to our sisters.

8 The female children also went ahead to move to and occupy their portion with their cattle in the early 1980s and even put up temporary houses as we all had done at the time. Afterwards, as they got married, they took their cattle with them leaving their land to go fallow. The wells on their land, got filled up while the banana plantation also got overrun by bushes. But for all that time, we their brothers never encroached on their land because we recognized their ownership thereof, as we still do.

9 In around 2007 our said sisters, who include the plaintiffs, had brought onto their land our brother called Rwanshara Wilson, whom our father had fathered out of wedlock, to help them look after their cattle on their land. For many years he did so and also acquired his own cattle. He married Ms. Kabibi Margaret and continued to live on our sisters' land, under his arrangement with our sisters, to which we the defendants were not parties. After his death, his widow continued to live on their land. Then in 2011, our sisters tried

to evict her. This compelled her to file a complaint against the family before the RDC of Kiruhura District. The RDC advised the family to settle the matter amicably. A family meeting was called whereat our sisters accepted that it was unfair to evict her after all that her husband had done for them. They, without any compulsion, agreed to give her 20 acres out of their own land, and this was captured in minutes of the family meeting (see annexture F to the amended defence). At this time, the question of whether they could make such a gift did not arise, because their ownership of that land was never in dispute.

In 2012, after the 4th plaintiff had returned home upon losing her husband, our six surviving sisters, being the 4 plaintiffs together with Kyobutungi Victo and Kampororo Jesca, pooled resources and put up a permanent home for themselves on their portion, and allowed the 4th defendant to live in it to this day. No-one has interfered with that process.

DW3, Kyobutungi Victo testified more or less in the same vein: that their mother convened a meeting of relatives and neighbors who distributed and nobody disputed the distribution till the filing of the suit giving rise to this appeal.

Against this is the evidence of PW1, who stated that their mother only distributed cattle and not land. That she did so notwithstanding that she had not obtained letters of administration. On the distribution of cattle, PW1 said she accepted the distribution "because that is how our parent distributed." Asked whether she accepted her mother's right to distribute she answered 'yes'. (Pages 390-91 of the record of appeal). The witness also confirmed that the female children, including the respondents, are currently looking after their cattle on the land and that they have a two-bedroomed house thereon, apparently the property of Tumusiime Dorah, the 4th respondent who looks after her own cattle and those of her sisters. Likewise PW2, the 4th respondent, testified that cattle were distributed and that, 'We were contented with the distribution'. She repeated in cross examination that she only wanted redistribution of land, not the cattle.

From the evidence of the witnesses for both sides it is common ground that the late Yosamu Rwakaniora's widow, Mrs. Erina Rwakaniora, did distribute the cattle. However, whether or not she also distributed the land remains disputed.

It would have been ideal if court had visited the locus, to look at the nature of the holdings of each party, the boundaries claimed to be on the land and developments thereon. This, however did not happen.

In evaluating evidence with regards to whether there was distribution of the property of the deceased Rwakaniora, the learned trial Judge pointed to the fact that DW2, PW2 and DW3 all testified that there was a distribution of the estate in 1980, that the female and male siblings took possession of their respective shares with the female children taking their cattle to their share of land. That when the appellants were going to survey the land the wife of one Kabibi, the widow of Rwanshara who had earlier been brought onto the land by the female children to help them with managing their cattle complained, the 'girls' agreed to give her 20 acres of their land.

The testimony of Kyobutungi Victo, DW3, seems to explain what really happened. This is how the learned trial judge recaps the testimony, at page 15 of her judgement (Page 752 of the record of appeal)-

> ***"According to DW3 Kyobutungi Victo, they the girls brought Rwashara Kabibi's husband to look after their cattle, that in 2011 she complained to the RDC and after that they gave her 20 acres of their land. That after they realized that they had remained with little land the plaintiffs decided to claim more land from the defendants; that the plaintiffs claim that their father's land was not distributed is false and their dishonesty is exhibited by their failure to make (no) mention of both the DW3 and DW4's interests yet they are also their siblings, that the claim is devised to force a redistribution."***

In declining to find that there was distribution of both land and cattle the learned trial Judge stated reasons why she did not. Firstly that the testimonies of DW3 and DW4 were hearsay because they did not attend the meetings; secondly that there was a discrepancy in the dates of the meeting that allegedly took place at the RDC's office; and thirdly that the

appellant's last minute decision to drop Kabibi as their witness and also failure to call the RDC to confirm Kabibi's alleged complaint pointed to a major inconsistency which led her to believe that 'there is something more than meets the eye', with the result that she was unable to consider whether the respondents had acquiesced with the distribution and were therefore estopped from challenging at the same.

She then concluded that "the defendants (now appellants) did not prove their assertion that indeed there is land called girls' land and that Kabibi lives on such land and as a result of the intervention of the RDC and a meeting of the family."

This finding is with the greatest respect not borne out by the weight of evidence. DW1 and DW2 were consistent in their claim that Erina Rwakaniora convened and chaired a meeting at which both land and cattle were distributed. Secondly, even if it is accepted that DW3 and DW4 did not actually sit in the meeting at which the distribution was done, they were present at the venue, the home where the meeting took place. DW3 explained that the time she could not sit in the meeting because she was young. DW4 also explained that "It is the older people who sat", but that she could not recall who was in the meeting and who was chairing. She explained in her witness statement that at the age of 13 years she could follow what was happening. The two add that in the due course the beneficiaries took up their respective heads of cattle and portion of the land.

The testimonies of these witnesses about the distribution cannot be hearsay. Court cannot in all justice be oblivious to the fact that while actual distribution of property may be a one-day event, the process of taking up the allocations, which logically unfolds over a longer time, can be confirmed by persons other than those who were in the actual meeting, especially when they happen to be some of the beneficiaries. The testimonies of DW1 and DW2, who actually attended the meeting as corroborated by PW2 DW3 and DW4, cannot be simply brushed aside in determining whether or not there was a distribution.

On the claim that the female children went ahead to give part of their share of land to Kabibi, the appellants' witnesses were also consistent in their testimony that the female children invited Rwanshara to help them in looking after cattle and that later when his widow complained to the RDC, they sat and agreed to give her 20 acres. A discrepancy in the dates of the meeting cannot take away that evidence.

The learned trial judge made much of the fact that Kabibi was dropped as a witness after her statement was tendered, while the RDC was not called at all. This finding is unsustainable on two accounts. Firstly, PW1 herself already testified that indeed the meeting did take place. As the judge points out in her judgment PW1 claimed that the meeting was "for other reasons", but she did not say which reasons. DW3 and DW4 were clear about what the meeting was about, and there was no good reason to reject their testimony on this point. But more importantly, the appellants were not under obligation to specifically call Kabibi and the RDC as witnesses. Once they were satisfied with the evidence already presented, they were within their rights to close their case. Section 133 of the Evidence Act (cap 6) provides that subject to any other law, no particular number of witnesses shall in any case be required for the proof of any fact. I agree with counsel for the appellants that a party to a suit is at liberty to call such witnesses as he or she deems necessary, and the decision not to call a particular witness cannot be held against him or her. In **Ali Singer vs Margaret Nankabirwa (SCCA No. 03 of 2016),** the Supreme Court, referring to s. 133 of the Evidence Act stated:

> **"It is clear from the above provision that once a party determines the witnesses he or she needs to prove or disprove a fact, the opposite party or the court cannot fault him or her for failing to call any other witness."**

Indeed, if the respondents thought these two witnesses were important for the just determination of their case, it was up to them to call them, if necessary by moving court to issue witness summons under Order 16 Rule 1 of the Civil Procedure Rules. Incidentally the Judge had herself earlier cautioned the parties and their lawyers to drop some of the statements if they tended to be repetitive in their contents (Page 396 of the record of Appeal). Once DW1, 3 and 4 had testified on the matter of Kabibi Rwanshara, what purpose would be served by calling her to repeat the same evidence, especially when the respondents had not cast doubt on it?

Be that as it may, considering the evidence as a whole it would appear that in fact both the cattle and the land were distributed. The respondents in their evidence seem to have accepted the right of their mother to effect distribution but maintained that as a matter of fact she did not distribute the land. The appellants maintain that everything was distributed.

From the testimonies of DW1, 2 and 3 and the fact that the parties have since occupied distinct portions of the land of the deceased with each side developing its own portion including constructing thereon their residences, I am inclined to accept the evidence of DW1, 2, 3 and 4 that in fact Mrs Erina Rwakaniora, assisted by family and neighbours distributed both the land and the cattle. That she gave one hill to the female children and two hills to the male children, who later shared their inheritances among themselves.

I have earlier pointed out that when evaluating evidence, the court as a first appellate court is restricted to the evidence on record and that the view of the trial court as to the credibility of particular witnesses carries great weight. However, if the balance of probabilities is inclined against the opinion of the trial court, or if a finding of the trial court on a given fact is against the weight of the evidence as a whole, the appellate court may depart from the lower court's findings of fact.

But there is another angle to the respondent's arguments: that without Letters of Administration, the Widow of Yosamu Rwakaniora, and the meeting she convened, had no legal authority to distribute the estate and, accordingly, that the purported distribution was void and of no effect. To support their argument, the respondents referred to section 191 of the Succession Act (cap 162) which states-

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

They also referred to the decision of this court in **Kayabura Enock and 2 others –v- Joash Kahagirwe (CA No. 88 of 2015).**

On their part, the appellants (then defendants) contended that a distribution based on customary law was valid, and that probate and letters of administration do not provide an exhaustive list of the ways in which a person can legally become a legal representative of the deceased. They argued further that section 191 of the Succession Act only deals with situations where a person tries to assert through the court process, a right to the property of the deceased person and that since in the

instant case the appellants did not obtain their shares to their father's property through the court process, the section was irrelevant. They relied on section 25 of the Succession Act, which provides that all property of the intestate estate devolves upon the personal representative of the deceased intestate upon trust for the entitled beneficiaries. They referred to section 2 of the same Act which defines a "personal representative" as a person appointed by law to administer the estate of a deceased person. They argued that such law by which a person can be appointed is not limited to the Succession Act but also include customary law, which under section 14 of the Judicature Act is part of the law of the land. They therefore concluded that the distribution of the estate was valid, notwithstanding the absence of Letters of Administration. They relied on the decision of Justice Opio Aweri, as he then was, in **Safi Bin Ali vs Sam Buzu and another (HCCS No. 839 of 2004).**

The learned trial Judge agreed with the respondents' contention. She took the position that the view in **Safi Bin Ali vs Sam Buzu and another** (Supra)—that probate and letters of Administration do not constitute an exhaustive list of the ways in which a person can legally become a legal representative of a deceased person and that the beneficiary under customary law is at law a legal representative—is only persuasive in circumstances where the customary practice has been proved and court is convinced that the said distribution was done and people have taken their allocated portions and there are no issues, but that where some of the beneficiaries have not accepted the alleged distribution, then the law requires that there must be a legally appointed representative of the deceased person to settle the matter or distribute to the beneficiaries. The Judge found authority for this in the decision Christopher Madrama Izama, JA (as he then was) in the case of **Kayabura Enoch and Others – v- Joash Kahangirwe (Supra),** wherein his Lordship held:

> **"The law vests legal title of the estate property in the appointed administrator in a character of a trustee liable to distribute the estate to the lawful beneficiaries in accordance with the law. If the property was settled by the children of the intestate, it can only be settled by the parties but if once the matter is brought to the courts of law, the formal process of succession has to take effect. The formal process comes into operation upon grant of letters of administration or probate respectively, vesting the estate on a trustee known as the administrator where the deceased died intestate or executor**

where there is a will. The formal process of the law transmits the estate to an entitled beneficiary, under the law of intestacy or under the last testament of the deceased."

The trial Judge found that the widow, who distributed the estate of the deceased Rwakaniora was neither the holder of Letters of Administration nor had she been proved to have been the culturally recognized administrator of the estate with the mandate to distribute; that no consent of the Uganda Land Commission to transfer the land to the beneficiaries had been obtained pursuant to the provisions of the Land Reform decree, 1975; and that there was no proof of acquiescence by the respondents in the distribution pursuant to section 28 of the Limitation Act.

In their written submissions filed in this Honourable Court, counsel for the respondents agreed with the trial Judge and maintained that so long as the respondents had not conceded to the alleged distribution, the distribution could only stand if the distributor held Letters of Administration.

I have already found that as a matter of fact, there was a distribution of the estate (both land and cattle) in 1980. The remaining question in this regard, then, is whether the respondents conceded to or acquiesced in the distribution. The sum total of the testimonies of DW1, DW2, DW3 and DW4 is to the effect that the respondents accepted and went along with the distribution at least until 2009 when, following the appellants' commencement of the process of obtaining freehold titles for their acquisitions, Ms. Kabibi Rwanshara demanded a share out of the female children's share for reasons already canvassed above.

Following a meeting at the RDC's Office, which PW1 conceded took place, the female children agreed to give her 20 acres out of their allocation. Because what remained was deemed too small, the respondents then, in the words of DW4, sought to force a redistribution.

The practice of families distributing assets of the deceased persons without letters of administration is more commonly practiced in Uganda than the practice of distribution of the estate after obtaining the letters of administration. After the Parties had acquiesced the distribution for over 30 years and the Limitation Act extinguished any claimant's rights on account of adverse possession, it becomes acrimonious when some of the beneficiaries contest the portion that was given to them at the time .

The respondents' acquiescence is manifest in the fact not only did they take cattle distributed to them, but they also moved them to their allocated portions of land where one of them built a two-bedroom house. For at least 33 years, they were content to go along with the distribution without ever lodging a complaint anywhere. They were content to let the appellants build permanent homesteads on their allocated portion, plant permanent crops such as bananas on the land, to develop cattle farms including valley dams/wells thereon and do all other things that owners of land do with it. Their acquiescence is also evident in the fact that they, too, had started the processing of the freehold title for their allocated portion by the time they filed suit giving rise to this appeal. Having accepted the state of affairs for 33 years, the respondents cannot in all justice turn around and claim that they never conceded to the allocation.

In the circumstances, I am unable to agree with the learned trial Judge that there was no proof of acquiescence by the respondents. Their attempt to challenge the distribution, from which they had benefitted for over three decades, came too late. In the case of **Kayabura Enock and another vs Joash Kahangirwe** (Supra), Justice Madrama took the position that if the property was "settled" by the parties, then their settlement was valid but if it was brought to the courts by some of the entitled beneficiaries then, in the terms of section 191 of the Succession Act, nothing short of letters of the administration would suffice. Even if that position is accepted, surely in the instant case the distribution was "settled by the parties" and allowed to remain undisturbed for over 33 years. It cannot be that unless the distribution is effected by a holder of Letters of Administration a party who has conceded to the distribution and benefitted from it can one day come up to contest the distribution, the length of time notwithstanding.

The learned trial Judge erred when she found that the widow was not proved to be the culturally recognized administrator of the estate with the mandate to distribute. She found that DW2, Canon Charles Karikatyo, was not an expert witness on the culture of the parties to this appeal because he was a resident of Rukungiri District formerly part of Kigezi District while the facts of the case arose in Kiruhura formerly part of Ankole District. But this finding missed the point. Both sides testified that Canon Karikatyo is their maternal uncle. It was stated by DW1, DW2, DW3, and DW4 that the distribution was done by the widow, together with other family members who were stated to include Yekonia

Karekyezi, the paternal uncle of the parties, and in the presence and with the participation of the parish chief. If both the maternal and paternal uncles of the parties took the position that the culture of the parties recognized the widow as the party mandated to distribute the estate, and if all the parties also at the time conceded to that, that was surely sufficient!

The question cannot be whether the persons concerned were resident within Kiruhura formerly of Ankole. The question is what their culture was. It is far-fetched to suggest that the paternal and maternal uncles of the parties to the dispute were unfamiliar with the customs of those parties, their own children, just because one of them happens to reside in a different district. Court is bound to accept that the cultural concerns were fully addressed.

I also found it strange that court would find the distribution invalid on the ground that it was effected without the consent of the controlling authority – the Uganda Land Commission. It is true that when the lease offer was not taken up or when the lease expired and a full term was not brought, the land reverted to the Controlling Authority pursuant to the Land Reform Decree.

But as the Judge correctly found, the Decree recognized the rights of customary occupants of the land and that such rights could be inherited by the successors in title of the customary occupant, in this case the widow and children of Yosamu Rwakaniora.

The Land Reform Decree section 4(1) thereof only required notice to the "Prescribed Authority" in the cases of **transfer by sale or gift** of customary interest. It made no mention of acquisition by inheritance. If the drafters of the Decree had wanted inheritance to be subjected to the same process, they would have expressly stated so. They did not. To hold that no inheritance of customary interest in land was valid unless there was consent of the Controlling Authority would be to suggest that the possibly millions of inheritances of land effected throughout Uganda from 1975 to the repeal of the Decree were all void. They were not, because acquisition of customary interest in land by inheritance did not require the consent of the prescribed authority.

By the time the appellants sought to convert their customary inheritance into freehold tenure, the Land Reform Decree had long been repealed. As a matter of fact, the Supreme Court has held in a number of decisions

that the absence of consent of the prescribed authority did not invalidate transaction in the land, especially considering that it was not even clear under the decree who the prescribed authority was, and also because section 4(1) of the Decree only required "notice" to and not consent of the prescribed authority. **(See Tifu Lukwago vs Samuel Mudde Kizza (SCCA No. 13 of 1996) and Asuman Mugyenyi vs M. Buwule (SCCA No 14 of 2016).**

In the result, therefore, I am satisfied that Mrs. Erina Rwakaniora, assisted by the paternal and maternal uncles of the parties and the Parish Chief and other members and friends of the family, had the right to distribute the estate. I am also satisfied that she did distribute the entire estate, including the land. I am further satisfied that all the children of the deceased, including the respondents, conceded to and acquiesced in the distribution and are estopped by conduct from denying its validity. It would be a classic case of approbation and reprobation for the respondent to insist that they endorsed the distribution of cattle, but not of the land when the two were effected in the same transaction.

Ground 1 is accordingly resolved in the affirmative.

Ground 2

The learned trial Judge erred in law and fact in failing to hold that the respondents' cause of action arose in 1980.

The parties were in agreement that Yosam Rwakaniora died on 4th January 1979. I have also found that the property was distributed in 1980.

The term "cause" of action and "right of action" are in law used interchangeably. Indeed, section 1(8) of the Limitation Act states that references to a right of action shall include references to a cause of action and to ".... a right to receive a share in the personal estate of a deceased person." Section 6 of the Limitation Act deals with accrual of right/cause of action in land matters. Sub-section 2 thereof provides-

> **"where any person brings an action to recover any land of the deceased person, whether under a will or on an intestacy, and the deceased person was, on the date of his or her death, in possession of the land... and was the last person entitled to the land to be in possession of it, the right of action shall be**

deemed to have accrued on the date of his or her death." (emphasis supplied)

Without more, it is clear that in the instant case, the respondents' right of action accrued on 4th January 1979.

The trial Judge only addressed this question in relation to the issue of whether the suit was barred by limitation. Counsel for the respondents did not address this question at all, because in their framing of the issues for trial in this Court they, for reasons best known to themselves, omitted this ground of appeal.

In the judgment, the learned trial Judge never made reference to section 6(2) of the Limitation Act. She took the distribution of the estate in 1980 as her point of departure. She based on paragraph 4(i) of the plaint to conclude that the distribution was waiting first for the 3rd appellant to finish school, which he supposedly did in 1997 and later for the same 3rd appellant to marry, which he did in 2007. Having found that all this time the estate was still intact, the learned Judge then concluded, in reliance on section 191 of the Succession Act, that the estate would not be distributed until someone first obtained letters of administration, she then concluded, at page 21 of the judgment that-

> ***"having determined as above that issues of limitation cannot arise because the general rule is that time begins to run once the action has accrued and there is both a competent plaintiff and defendant (see case of Al Hajj Nasser Ssebaggala vs A.G & others, Constitutional petition No. 1 of 1999), before 2012 as far as the plaintiffs were concerned nothing had been done by anyone to try and alienate the estate."***

With greatest respect, the learned trial Judge misdirected herself. Section 6(2) of the Limitation Act is very clear. The date on which the cause of action arose was the date of the death of the owner of the land the subject of the suit. The section does not expect a claimant to a share in the land of a deceased person to wait until there is an act of "trying to alienate the land" in order to file suit. It was an error for the trial Judge to consider the time the appellants started to process freehold titles for the pieces they had always occupied as the time when the time began to run. It was also an error to have accepted without question the unsubstantiated pleading in paragraph 4(1) of the plaint that distribution was waiting for the completion of schooling and or marriage of the 3rd

appellant, and to use that as the time when the cause of action started to run. Distribution was actually not the point at which the time started to run according to section 6(2) of the Limitation Act. But even if it was, I have already found that the distribution actually occurred in 1980, and that is when the cause of action would have arisen.

The right to receive an interest in the estate of a deceased intestate does not accrue when letters of administration are obtained. It accrues upon the death of the deceased. That is why a beneficiary can maintain an action even without letters of administration, as the respondents did in the instant case.

Ground 3

The learned trial Judge erred in law and fact in failing to hold that;
(1) The respondents' suit was barred by Limitation under section 5 of the limitation act Cap 80.
2) The respondents' suit was barred by limitation under section 20 of the limitation Act Cap 80.

Ground 4

That the learned Judge erred in law in failing to dismiss the grounds of exemption from limitation pleaded by the respondents in their amended plaint.

Relating to the first leg of the 3rd ground of appeal, section 5 of the Limitation Act provides-

> **"No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or, if it first accrued to some person through whom he or she claims, to that person."**

In the instant case and having regard to section 6(2) above-cited the right of action accrued in 1979 or at the very latest in 1980. By the time the suit was filed in November 2013 the twelve-year limitation period had long expired. The respondents attempted to save their action by pleading the fraud exemption. But the acts claimed to amount to fraud all occurred long after that twelve-year period had expired and could not cure the claim by exempting them from the limitation. I accept the arguments of the appellants that in seeking to bring their claim under

the section 25 exemption, the respondents implicitly conceded that the action was filed out of time. Yet the grounds of exemption cited did not help the respondents' case being events that post-date the limitation period.

The learned trial Judge agreed with the counsel for the appellants (then the defendants) that the particulars of fraud cited by the respondents which started from 2009 could not cure the limitation. However, she then went ahead to find her own supposed acts of fraud, not raised by the respondents as exempting factors. Be that as it may, all these would only help the respondents' case, if the cause of action had not arisen in 1979 when Yosam Rwakaniora died or 1980 when the estate was distributed. This suggestion by the learned judge that any demand to have the estate distributed only occurred after 1997 or 2007 is immaterial. Such demand, if it existed, is not what would trigger the limitation period under section 5 and 6 (2) of the Limitation Act.

Regarding ground 3(2), it is clear that counsel for the appellant misunderstood what section 20 of the Limitation Act is about. The section reads;

> **"20 Limitation of actions claiming <u>personal estate</u> of a deceased person**
>
> **Subject to section 19(1), no action in respect of any claim to the <u>personal estate</u> of a deceased person or to any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiration of twelve years from the date on which the right to receive the share or interest accrued, ..." (emphasis supplied)**

From its wording the section is clearly about actions claiming 'personal estate' of a deceased person. Section 1(1)(h) of the same Act states that personal estates do not include **<u>chattels real,</u>** that is to say, land.

The suit out of which this appeal arises was a claim for a share in the land of the deceased. It is therefore covered under section 5, not 20 of the Limitation Act. Ground 3(2) therefore fails.

The effect of the suit being barred by limitation is very clear. Section 16 of the limitation act states-

"16. Extinction of title after expiration of period

Subject to sections 8 and 29 of this Act and subject to other provisions thereof, at the expiry of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action), the title of the person to the land shall be extinguished."

The provisions of section 16 are couched in mandatory terms. No action to assert title to or interest in land can be sustained outside the limitation period. A suit barred by limitation is a suit barred in law. (See **Iga vs Makerere University (1972) EA 65; Auto Garage vs Motokov (No.3) 1971 EA 514.**

In **Mohammad B. Kasasa vs Jasphar Buyonga Sirasi Bwogi (CA No.42 of 2008)**, this Honourable Court, citing **In Re application by Mustapha Ramathan for orders of certiorari, prohibition and mandamus, Civil Appeal No. 25 of 1996,** stated the law thus-

"The purpose of the law of limitation is to put an end to litigation. The law is applied by courts strictly. ...

Statutes of limitation are in their nature strict and inflexible enactments. Their overriding purpose is interest reipublicae ut sit finis litum, meaning that litigation shall be automatically stifled after a fixed length of time, irrespective of the merits of a particular case. A good illustration can be found in the statement of Lord Green, M.R. in Hilton vs Sutton Steam laundry (1946) 1 KB 61 at P.81 where he said;

'But the statute of limitations is not concerned with the merits. Once the axe falls, it falls, and the defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled, of course, to insist on his strict rights.'"

From the above quotation, it is evident that whether or not the appellants are in anyway blameworthy becomes irrelevant. Once limitation has kicked in, the plaintiffs/respondents' suit must fail.

Ground 3 (1) is therefore decided in the affirmative, though 3(2) fails. Ground 4 also succeeds. The grounds of exemption invoked by the

respondents post-date the limitation period and could not exempt the respondents.

In the result, having substantially answered the grounds of appeal in the affirmative, I would allow the appeal and set aside the judgment and decree of the High Court in HCCS No. 170 of 2013 and substitute instead an order dismissing the suit, with costs to the appellants here and in the High Court.

Dated at Kampala this 20th day of 03 2023.

Christopher Gashirabake

Justice of Appeal

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 162 OF 2021

1. **MUGYENZI JUSTUS**
2. **KARAMUZI GODFREY**
3. **RWENDURU RWEISHE MUSA::::::::::::::::::::::APPELLANTS**

VERSUS

1. **KATEEBA ROSE**
2. **KAMUKAMA MARGARET**
3. **KANSHONGI JANE**
4. **TUMUSIIME DORAH::::::::::::::::::::::::::::::::::RESPONDENTS**

(Appeal from the decision of the High Court of Uganda at Kampala (Family Division) before Katunguka, J dated the 26th day of June, 2020 in Civil Suit No. 170 of 2013)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE MUZAMIRU MUTANGULA KIBEEDI, JA
HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, JA

JUDGMENT OF ELIZABETH MUSOKE, JA

I have had the advantage of reading in draft the judgment of my learned brother Gashirabake, JA. I agree with it, and for the reasons stated therein, I would allow this appeal and make the orders that Gashirabake, JA proposes.

As Kibeedi, JA also agrees, the Court unanimously allows the appeal and makes the orders proposed in the judgment of Gashirabake, JA.

It is so ordered.

Dated at Kampala this ....20th..... day of.....03.....2023.

.....

Elizabeth Musoke

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Elizabeth Musoke, Muzamiru M. Kibeedi & Christopher Gashirabake, JJA]

CIVIL APPEAL NO. 162 OF 2021

1. **MUGYENZI JUSTUS**
2. **KARAMUZI GODFREY**
3. **RWENDURU RWEISHE MUSA:: APPELLANTS**

VERSUS

1. **KATEEBA ROSE**
2. **KAMUKAMA MARGARET**
3. **KANSHONGI JANE**
4. **TUMUSIIME DORA:: RESPONDENTS**

JUDGMENT OF MUZAMIRU MUTANGULA KIBEEDI, JA

I have had the advantage of reading in draft the Judgment prepared by my Learned Brother, Hon. Justice Christopher Gashirabake, JA. I concur with the orders proposed following the analysis and reasons he has set out in detail. I have nothing useful to add.

Dated at Kampala this 20th day of 03 2023

Muzamiru Mutangula Kibeedi
JUSTICE OF APPEAL