

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO.228 OF 2014

SYLVESTER BYARUHANGA ::: APPLICANT

5

VERSUS

FR. EMMANUEL RUVUGWAHO ::: 1ST RESPONDENT

YOFESI RUDIGIRA ::: 2ND RESPONDENT

CORAM: HON.MR.JUSTICE ALFONSE OWINY DOLLO, DCJ

HON.LADY. JUSTICE ELIZABETH MUSOKE, JA

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HON.MR.JUSTICE BARISHAKI CHEBORION, JA

RULING

This is an application by notice of motion brought under Section 6(2) of the Judicature Act and Rules 40 (1) a and b, (2) (a) and (b), Rule 43(1) and (2) of the Rules of this Court.

15 The Applicant seeks the following orders;

(a) The intended appeal raises issues of great public and or /general importance.



(b) Leave to lodge an appeal in the Supreme Court against the Judgment and orders of the Court of Appeal in Civil Appeal No.113 of 2011 be granted to the Applicant.

(c) Costs of this application be provided for.

5 The grounds of the application as set out in the motion are that;

i. *The Applicant is dissatisfied with the whole judgment of their Lordships delivered on 26/5/14 in CACA No.113 of 2011 and has already lodged a notice of appeal.*

10 ii. *That the Applicant is required to obtain leave of this Honorable Court to institute a third appeal to the Supreme Court.*

iii. *That the intended Appeal involves questions of great public importance and / or general importance with regard to succession and management of deceased persons' estate in Uganda.*

15 iv. *That there was a fundamental flaw/misconstruction of Section 272 of the Succession Act; and the Supreme Court as the final Appellate Court in the land should determine the fundamental points of law being raised by the Applicant.*

20 v. *That the said Judgment/ decision sets a very dangerous precedent with respect to the law of succession and management of deceased persons' estates.*



- vi. *That holding one of the several executors of a deceased estate, any of them can act alone and convey estate property without the consent of the others would encourage fraudulent dealings in the estate's properties.*
- vii. *That it is in the interest of justice that this application be granted.*

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The motion is supported by the affidavit of the applicant. The relevant paragraphs are as follows;

2. *That I am the Applicant in the above matter and the Appellant in Civil Appeal No.113 of 2011 and swear this affidavit in that capacity.*
- 10 3. *That I was the unsuccessful party in Civil Appeal No.113 of 2011. A copy of the Judgment and decree are hereto attached and marked as "A" and "B" respectively.*
- 15 4. *That through my lawyers M/s Muhimbura & Co.Advocates I have already filed a Notice of Appeal in this honorable Court seeking to appeal against the whole decision in Civil Appeal No.113 of 2011.*
6. *That I am further advised by my aforesaid lawyers which advice I verily believe to be true that the intended Appeal involves questions of great public and / or general importance with regard to succession and management of the deceased persons' estate in Uganda.*
- 20 7. *That I am further advised by my aforesaid lawyers which advice I verily believe to be true that the decision hinges on misconstruction of Section*



272 of the Succession Act by their Lordships in Civil Appeal No 113 of 2011 and the Supreme Court as the highest Appellate Court should determine the fundamental points of law the intended appeal seeks to address.

- 5 8. *That I am further advised by my aforesaid lawyers which advice I verily believe to be true that the said decision if maintained will set a bad precedent on matters of management of deceased persons' estate which all other subordinate courts will be obliged to follow.*

The application was opposed by Counsel for the Respondents whose advocate,
10 Benedict Lwanga Nsibambi, filed an affidavit in reply contending that there is no merit in this application. The affidavit set forth the following grounds in opposition;

- a) *The applicant has already appealed to the Supreme Court without leave vide Civil Appeal No.09 of 2014*
- 15 b) *The effect of section 272 of the Succession Act which is alluded to by the applicant can only be changed by legislative reform but not litigation*

An affidavit in rejoinder was filed by one John Paul Rubagumya, an advocate from the firm representing the Applicant in this application. He sought to counter the claim that the Applicant had already filed an appeal in the
20 Supreme Court without leave. In Counsel's view, grant of this application would validate the appeal already lodged in the Supreme Court.



He also deponed that Section 272 of the Succession Act was unambiguous and was simply misconstrued by their Lordships hence legislative reform was unnecessary.

At the hearing of this application, Mr. Stanley Omony appeared jointly with Ms
5 Gloria Mujoyawimana holding brief for Mr. Paul Muhimbura. Mr. Nelson Nerima appeared for the Respondents.

Counsel for the Applicant reiterated the contents of the Notice of Motion and argued that this Court in its judgment in Civil Appeal No.113 of 2011 had
10 misconstrued the import of Section 272 of the Succession Act and erroneously held that under the said provision, it was permissible for one single executor, appointed jointly with other executors, to register himself on a certificate of title.

In Counsel's view, the holding of the Justices of this Court was to the effect that in light of Section 272, a single individual who had been granted probate
15 jointly with 3 other executors was permitted to register himself on a certificate of title alone without the rest of his joint executors. This Court's decision also permitted an executor or administrator of an estate to be entered on a certificate of title as the registered proprietor without specifically indicating the fact that his/her registration is on account of being an administrator or
20 executor of the estate of the deceased registered proprietor.

Counsel argued that if this impugned construction of Section 272 of the Succession Act is allowed to stand, it would not only promote fraud in the



administration of estates of deceased persons but would also set a very dangerous precedent.

Counsel conceded that he had, out of vigilance, filed the appeal in the Supreme Court without leave and was therefore seeking validation of the same.

5 In support of his arguments, Counsel relied on ***Sophatia Beithi & Others vs Nangobi Jane & 2 Others, Civil Application No.080 of 2014*** and ***Bitamisi Namuddu vs Rwabuganda Godfrey, SCCA appln. No.4 of 2015***

In reply, counsel for the Respondent objected to the grant of the application on grounds that there was no justification for this Court to grant the same. He
10 also pointed out that this application was wrongly brought under rule 40 of the rules of this Court instead of Rule 39 of the Supreme Court Rules. He hastened to add that he raised this concern of the relevant Rule only for purposes of seeking this court's clarity.

On the merits of the application, Counsel argued that the Applicant had
15 already lodged his appeal in the Supreme Court and was therefore estopped from seeking leave. Further, that some of the grounds on which this application is based are not grounds on which leave to file a third appeal is granted.

In counsel's view, Section 272 of the Succession Act was very clear and did not
20 contain any ambiguity to warrant clarification; and the mere fact that Section 272 could lead to some difficulties was not sufficient ground for granting leave. Rather, he argued, that the Applicant's intended appeal would merely be



academic on grounds that it could not resolve the issue of ownership of the suit land because some of the necessary parties were not involved in this litigation. In support of his arguments, he relied on ***Rwabuhemba Tim Musinguzi vs Harriet Kamakume, Civil Application No.142 of 2009.***

5 We find it necessary to begin by addressing the preliminary remarks by Counsel for the Respondents regarding the relevant rule under which this application was brought.

The Applicant's Motion indicates that this application is brought inter alia under Section 6(2) of the Judicature Act and Rule 40 of the Judicature (Court
10 of Appeal) Rules. Rule 40 of the Rules of this Court provides as follows;

(1) In civil matters –

- 15
- a. Where an appeal lies if the High Court certifies that a question or questions of great public or general importance arise, application to the High Court shall be made informally at the time when the decision of the High Court is given against which the intended appeal is to be taken; failing which, a formal application by notice of motion may be lodged in the High Court within fourteen days after the decision, the costs of which shall lie in the discretion of the High Court; and**
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- b. If the High Court refuses to grant a certificate under paragraph (a) of this subrule, an application may be lodged by notice of motion in the Court within fourteen days after the refusal to**



grant the certificate by the High Court for leave to appeal to the court on the ground that the intended appeal raises one or more matters of public or general importance which would be proper for the Court to review in order to see that justice is done.

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(2) Where formerly an appeal lay from the High Court to the Supreme Court with leave of either the High Court or Supreme Court the same rules shall apply to appeals to the Court

10 We are in agreement with Counsel for the Respondent that Rule 40 is only applicable in respect of applications that seek to have a third appeal entertained by this Court and not the Supreme Court. The phrase “to the Court” in the Court of Appeal Rules refers to this Court.

The relevant provision that should have been cited is Rule 39 of the Judicature
15 (Supreme Court) Rules which is in *pari materia* with Rule 40 above save that it specifies that the application for leave is filed in the Court of Appeal. Consequently, Counsel’s concern has merit but as he rightly conceded, it does not affect the merits of the application.

Turning to the merits of this application, this Court has in a number of similar
20 applications, adopted the definition of “great public importance” and/or “general importance” set forth by the Kenyan Supreme Court in **Hermanus**



Phillippus Steyn vs Giovanni Gnechi-Ruscione, Application No.4 of 2010
(Supreme Court of Kenya)

The said decision defined both “great public importance” and “general importance” as follows;

5 **“A matter of general public interest could take different forms for**
instance, an environmental phenomenon involving the quality of air
or water which may not affect all people, yet it affected an
identifiable section of the population; a statement of law which may
affect a considerable number of people in their commercial practice
10 **or in their enjoyment of fundamental or contractual rights; or a**
holding on law which may affect the proper functioning of public
institutions of governance or the Court’s scope for dispensing
redress or the mode of discharge of duty by public officers”

The following principles were listed as important guidelines for determining
15 whether a Court should grant a certificate of importance;

i. **For a case to be certified as one involving a matter of general**
public importance, the intending appellant ought to have
satisfied the Court that the issue to be canvassed on appeal was
one the determination of which transcended the circumstances
20 **of the particular case and had significant bearing on the public**
interest;



ii. Where the matter in respect of which certification was sought raised a point of law, the intending appellant ought to have demonstrated that such a point was a substantial one, the determination of which would have a significant bearing on the public interest;

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iii. Such question or questions of law must have arisen in the lower courts and must have been the subject of judicial determination;

iv. Where the application for certification had been occasioned by a state of uncertainty in the law arising from contradictory precedents, the Supreme Court could either resolve the uncertainty as it may determine, or refer the matter to the Court of Appeal for its determination;

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v. Mere apprehension of miscarriage of justice in a matter most apt for resolution in the lower superior courts was not a proper basis for granting certification for an appeal to the Supreme Court. The matter to be certified for a final appeal in the Supreme Court ought to fall within the terms of Article 163 (4)(b) of the Constitution;

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vi. The intending applicant had an obligation to identify and concisely set out the specific elements of general public importance which he or she attributed to the matter for which certification was sought;

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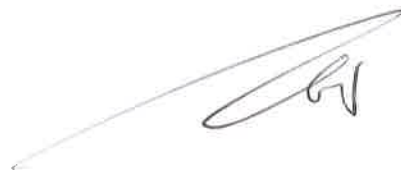
vii. **Determinations of fact in contests between parties were not by themselves, a basis for granting certification for an appeal before the Supreme Court.**

The principles laid down above have been variously adopted by this Court in similar applications including **Charles Lwanga Masengere vs God Kabagambe & 2 Others Civil Application No.125 of 2009, Sophatia Beithi & 3 others vs Nangobi Jane & 2 others, Civil Application No. 080 of 2014 and John Paul Baingana vs Uganda, Criminal Application No.76 of 2016.**

In **Bitamisi Namuddu vs Rwabuganda Godfrey, Supreme Court Civil Application No. 04 of 2015**, their Lordships of the Supreme Court held that an application for a third appeal which sought to correct an error made by the Court of Appeal in exceeding its jurisdiction in hearing an appeal it was seized with constituted an issue of great public importance.

Their Lordships further held that the question of when substituted service amounts to effective service, in view of a prior decision of the court, also raised issues of great public importance.

We shall therefore determine the present application taking into account the aforementioned decisions of this Court and the Supreme Court. It is now settled law that an erroneous statement of the law can, in appropriate cases, constitute an issue of great public importance.



In Civil Appeal No.113 of 2011 between the parties to this application, this Court found that one Edward Kalusi applied with other executors and obtained a grant of probate as executors of the estate of the Edward Wilson Mukasa Kakooza. It was also established that although probate was granted to four
5 executors, only Edward Kalusi registered his name on the Certificate of Title and then subsequently sold part of the suit land to the 1st Respondent who in turn sold it to the 2nd Respondent.

This Court held that the said Edward Kalusi's actions were permissible under Section 272 of the Succession Act and unless his co-executors raised
10 objections, the buyer obtained a good title.

This Court further upheld the trial judge's finding that Edward Kalusi was duly registered on the certificate of title by virtue of the grant of probate obtained in 1990, and the fact that he was not reflected on the title as an executor is of no consequence.

15 These statements of law are the subject of attack by Counsel for the Applicant in this application. In his view, the interpretation rendered to Section 272 by this Court serves to encourage fraud in estates of deceased persons.

Section 272 of the Succession Act provides as follows;

20 **“When there are several executors or administrators, the power of all may, in the absence of any direction to the contrary, be exercised by any one of them who has proved the will or taken out administration.”**



Counsel for the Applicant contends that this provision applies to a situation where one executor or administrator has been granted probate or administration alone despite the fact that the will appointed other executors. Counsel for the Respondent disagrees and contends that the provision
5 authorizes a single executor or administrator to conclude binding transactions on behalf of the estate without the other co-executors or co-administrators.

The consequence of latter interpretation, which was upheld by this Court, is that a single executor or administrator of an estate may conclude transactions lawfully without the awareness and or consent of his/her fellow co-executors.

10 We are also not certain that the construction of Section 272 of the Succession Act that this Court arrived at in determining Civil Appeal No.113 of 2011 is beyond criticism. We think the alternative interpretation advanced by Counsel for the Applicant could also be plausible.

We find that there is merit in the Applicant's contention that the construction
15 favored by this Court could have some problematic consequences that transcend the facts of the dispute between the present parties.

In view of the fact that the interpretation favored by this Court may have dire consequences for the management of estates of deceased persons which have more than one executor or administrator, we are satisfied that the
20 interpretation of this section is a point of law of public importance which merits reconsideration by the Supreme Court as a final appellate court. We find



that the Applicant has demonstrated to the satisfaction of Court that the intended appeal raises a question of law of general importance.

This application, therefore, succeeds and we hereby grant leave to the Applicant to proceed with his appeal in the Supreme Court.

5 We hereby certify that the Applicant's intended appeal to the Supreme Court against the judgment of this court in Civil Appeal No.113 of 2011 raises a question of law of general importance regarding the interpretation of Section 272 of the Succession Act.

As a consequence of our above finding, leave is hereby granted to the Applicant
10 to lodge an appeal in the Supreme Court against this Court's judgment in Civil Appeal No.113 of 2011. We are not in agreement with Counsel for the Respondent that the Applicant's filing of the appeal prior to obtaining leave is fatal.

It is trite law that a document lodged without leave stands duly lodged once
15 such leave is granted. ***See Crane Finance Co. Ltd vs Makerere Properties Ltd, SCCA No.1 of 2001.*** The Applicant's third appeal that was lodged without prior leave is hereby validated.

The question that needs to be determined by the Supreme Court on a third appeal, for which leave has been granted, is;

20 **“Whether, on proper construction, Section 272 of the Succession Act authorizes a single administrator of an estate to execute and**

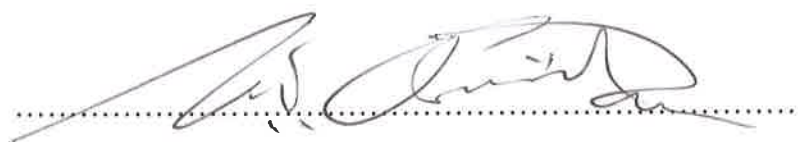


complete a conveyancing transaction on behalf of the estate without the involvement of other co-administrators of the same estate appointed jointly with him/her.”

This application is accordingly allowed with no order as to costs.

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Dated at Kampala this.....12th.....day ofApr.....2017



HON. MR. JUSTICE ALFONSE OWINY DOLLO

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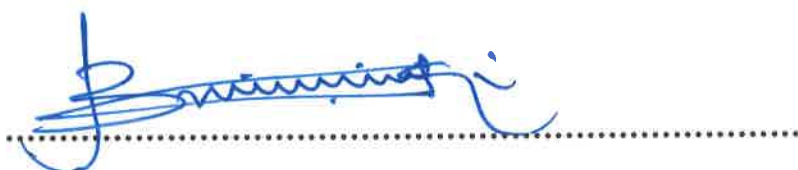
DEPUTY CHIEF JUSTICE



HON. LADY JUSTICE ELIZABETH MUSOKE

JUSTICE OF APPEAL

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HON. MR. JUSTICE BARISHAKI CHEBORION

JUSTICE OF APPEAL

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e/ Amo. 22814

SILVER BYARUTANGA

FR. EMMANUEL RUVUSWATHO

Admin - I will
 - Stanley Owen 1/6
 - Paul Mulimburaga
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 - Caroline Bamukunda 1/6
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July delivered in
Open Court.

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F. H. Keller
12/12/17.