



IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 026 of 2012

In the matter between

ATIM BETTY

APPELLANT

And

1.OKELLO VINCENT

2.ADOT JUSTINE

3.ONEKA JOSEPH

4.ODUR MARSHAL

RESPONDENTS

Heard: 22 August, 2019.

Delivered: 26 September, 2019.

Civil Procedure — *sufficient interest in the subject matter of litigation is the determinant of the existence or otherwise of locus standi — The beneficiary of an estate of a deceased person has interest in the proper administration of the estate and does not have to take out a grant of letters of administration in order to file a suit seeking to protect the estate.*

Family Law — *Succession — Section 191 of The Succession Act is procedural and merely enabling, rather than a jurisdictional provision — It is not intended to disenfranchise beneficiaries as persons lacking in locus standi but it is rather designed;- to have the estate administered under the guidance and protection of the Court; to facilitate the determination of the persons entitled to share in the estate and the extent of the shares to which they are entitled; to facilitate collection of debts by identifiable persons who succeed to the estate of the deceased creditor; to protect debtors against rival claimants and provide an identifiable person who can give them complete discharge of the debts by requiring that moneys forming part of the estate are paid to a person who has been considered suitable for the grant; and to prevent the courts from being flooded with litigation from multiple beneficiaries coming one by one —*

Entitlement to participate in the distribution of the property of an intestate as a beneficiary, flows down to a grandchild only if the deceased lineal descendant is otherwise unable to take his or her share — An administrator must act in the best interests of the estate and all of the beneficiaries and cannot act in his or her own interests, if they are not the same as the interests of the estate and the beneficiaries — Fiduciaries owe two main duties to the beneficiaries: a duty of loyalty and a duty of care — A third party who knowingly participates in a fiduciary's breach of duty may be liable along with the fiduciary as a joint tortfeasor.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

- [1] The appellant sued the respondents jointly and severally seeking recovery of land comprised in plots 22/24, and 26/28 at Dagomin Crescent, Kanyagoga "C" village in Gulu Municipality, general damages for trespass to land, *mesne* profits, an order of vacant possession, a permanent injunction restraining the appellants from further acts of trespass onto the land, and the costs of the suit.
- [2] The appellant's claim was that she is the administratrix of the estate of her late grandfather Yosam Onguti, and the four plots in dispute constituted part of land that originally belonged to the said deceased. Upon his death, one of his sons, the late Oryang Wilson, fraudulently obtained a grant of letters of administration to his estate without involving any of the beneficiaries of the estate nor publishing a notice of the application. On basis of that grant, between the years 2000 and 2004 the late Oryang Wilson fraudulently sold the named four plots to the first three respondents. The 4th respondent who is a neighbour to the land in dispute, constructed a perimeter wall that encroached on plots 22/24.
- [3] In their joint written statement of defence, the respondents denied the appellant's claim. They averred instead that they rightfully bought the plots in dispute without any fraud from the holder of a grant of letters of administration to the estate of the late Yosam Onguti, with the consent of all the immediate family members of the

deceased and the local authorities. The appellant has no *locus standi* to sue for the recovery of the land in dispute. They have since the purchase developed and occupied the plots. They prayed that the suit be dismissed.

The appellant's evidence in the court below:

- [4] The appellant, Atim Betty, testified as P.W.1 and stated that the land now in dispute formed part of the estate of her late grandfather Yosam Onguti. The extension of the wall by the 4th respondent was in 2002. The 2nd respondent occupies plot 22/24 by virtue of a purchase he claimed to have made on 28th March, 2000. The 1st respondent claimed to have purchased part of plot 24 by an agreement dated 8th April, 2004. By April, 2004 the plot was occupied by one of her grandmothers, Acan Onguti and her paternal uncle P.W.3 Oloya Kennedy. The 3rd appellant claimed to have purchased part of the same plot on 7th July, 2004. All the impugned transactions were undertaken by her father, Oryang Wilson.
- [5] P.W.2 Komakech Walter testified that he is one of the grandsons of the late Yosam Onguti. Before his death, the late Yosam Onguti owned plots 22/24 and 26/28. He was survived by his two sons Oryang Wilson and Oloya Kennedy. The 4th respondent owned a plot adjacent to Yosam Onguti's plot 22/24. During the year 2002, the 4th respondent extended his perimeter wall onto part of plot 22/24. The 2nd respondent as well put up some structure on plot 22/24 without the consent of the beneficiaries of the estate of the late Yosam Onguti. He claimed to have bought the land. P.W.3 Oloya Kennedy testified that he is the paternal uncle of the appellant, son of the late Yosam Onguti and elder brother to the late Oryang Wilson. His late brother Oryang Wilson purported to sell parts of the land forming part of the estate of the late Yosam Onguti to the four respondents, which sales are disputed by the beneficiaries of the estate of the late Yosam Onguti.

[6] Although the late Oryang Wilson had a grant of letters of administration, he did not obtain the consent of the beneficiaries before he sold the land. The witness admitted having thumb marked the sale agreement between Oryang Wilson and the 3rd respondent on 7th July, 2004 (exhibit D. Ex.1). He denied having witnessed the sale agreement between Oryang Wilson and the 2nd respondent. The 2nd and 3rd respondents have permanent buildings on the land, while the 1st respondent fenced off part of it and the 4th respondent extended his perimeter wall to enclose part of the land. The late Yosam Onguti was survived by many of his children including; Nyero Charles, Laboke Sam, Ayaa Florence and Ouma Odyek. Upon the death of Oryang Wilson, the appellant took over administration of the estate of her late grandfather, Yosam Onguti.

The respondent's evidence in the court below:

[7] In his defence, the 1st respondent, Okello Vincent, testified as D.W.1 and stated that he only came to know the appellant following the death of Oryang Wilson when she sued him before the L.C. Courts. He bought part of plot 22/24 from the late Oryang Wilson at a price of shs. 1,340,000/= in three instalments and the agreement of sale dated 8th April, 2004 (exhibit D. Ex.2) was witnessed by P.W.3 Oloya Kennedy. He thereafter fenced off the area he purchased. At the time of purchase, he was aware the land belonged to a deceased person and he inquired from the late Oryang Wilson whether there were any other beneficiaries of the estate. That is why he involved P.W.3 Oloya Kennedy.

[8] In his defence, the 2nd respondent, Justine Adot, testified as D.W.2 and stated that she came to know the appellant when she came to attend the burial of her father, Oryang Wilson and later in October 2006 when she filed a suit against her before the L.C. Courts. He bought part of plot 22 constituting a part of the estate of the late Yosam Onguti from Oryang Wilson and P.W.3 Oloya Kennedy at the price of shs. 900,000/= by an agreement dated 27th March, 2000 (exhibit D.

Ex.3). She has since constructed a permanent residential house on the land during the year 2007.

[9] In his defence, the 3rd respondent, Oneka Joseph, testified as D.W.3 and stated that he came to know the appellant when she sued him before the L.C. Courts. He purchased part of the land comprising the estate of the late Yosam Onguti from Oryang Wilson and the transaction was witnessed by P.W.3 Oloya Kennedy, at the price of shs. 3,800,000/= The agreement is dated 2nd February, 2005 (exhibit D. Ex.4). He has since constructed a permanent residential house on the land. Oryang Wilson died in September, 2006 and it is after his death that issues concerning those sales began to emerge.

[10] In his defence, the 4th respondent, Marshal Odur, testified as D.W.4 and stated that the 1st respondent is his biological son. He came to know the appellant when she sued him before the L.C. Courts in 2006 three weeks following the death of her father, Oryang Wilson. He entered into a gentleman's agreement with the late Oryang Wilson by which the latter during the year 2002 allowed him to adjust his perimeter wall fence and enclose part of plot 22/24 and part of plot 26/28 before he sold parts of the rest to developers. It is during the year 2004 that he paid for that extension. At the time of the transaction, he was aware that Yosam Onguti was deceased and he was survived by his wife and seven children, one of whom was Oryang Wilson to whom a grant of letters of administration had been made.

Proceedings at the *locus in quo*:

[11] The court then visited the *locus in quo* on 3rd March, 2012 where it recorded additional evidence from; (i) Mrs. Okot Gladys; (ii) Ochola David Wilson; and (iii) Opiyo Patrick Oko. The court observed that the 4th respondent had extended his perimeter wall fence by 18.2 meters into plot 22/24. It prepared a sketch map illustrating the observations made thereat.

Judgment of the court below:

[12] In his judgement, the trial Magistrate found that the late Oryang Wilson obtained a grant of letters of administration to the estate of his father the late Yosam Onguti on 3rd March, 2003 yet he sold part of the land in dispute to the 2nd appellant on 28th March, 2000. He therefore had no power of sale at the time he purported to do so with regard to the 2nd appellant. At the time he sold to the 1st and 3rd respondents during the year 2004, he had secured the grant and those sales were accordingly lawful. P.W.3 Oloya Kennedy admitted having thumb printed the agreement of sale to the 3rd respondent. The 4th respondent constructed a wall fence that protruded onto plots 22/24 by 18.2 meters with the permission of Oryang Wilson. Failure to honour his undertaking to offer the same size of land from his plot in exchange did not constitute his act as a trespass onto the two plots. The appellant is not a beneficiary to the estate of her grandfather the late Yosam Onguti. She is the administratrix of the estate of her father the late Oryang Wilson. She did not present evidence of being the administrator of the estate of the late Yosam Onguti. She had no *locus standi* as against the 2nd and 4th respondents.

The grounds of appeal:

- [13] The appellant was dissatisfied with that decision and appealed to this court on the following grounds, namely;
1. The learned trial Magistrate erred in law and fact when he found that the late Oryang Wilson had authority to sell the land in dispute thereby occasioning a miscarriage of justice.
 2. The learned trial Magistrate erred in law and fact when he held that the first three respondents did not acquire the land fraudulently thereby coming to the wrong conclusion, hence occasioning a miscarriage of justice.

3. The learned trial Magistrate erred in law and fact when he found that the 4th respondent was not a trespasser on the land in dispute which occasioned a miscarriage of justice.
4. The learned trial Magistrate erred in law and fact when he found that the appellant had no *locus standi* to sue the respondents thereby occasioning a miscarriage of justice.

Arguments of Counsel for the appellant:

[14] In their submissions, counsel for the appellant, argued that appellant does not challenge the finding of the trial Magistrate regarding the 2nd respondent. However, as regards the rest of the respondents, the trial Magistrate erroneously disregarded the need for the consent of the beneficiaries of the estate of the late Yosam Onguti to the transactions undertaken by Oryang Wilson as administrator of that estate. The widow of the deceased was resident on the land but she was never consulted and so were the rest of the beneficiaries. That P.W.3 Oloya Kennedy witnessed some of the transactions does not signify consent. Alterations made in the particulars of the plot number are indicative of fraud on the part of the 1st and 3rd respondents. In none of the agreements did Oryang Wilson state that he sold in his capacity as administrator of the estate. P.W.3 Oloya Kennedy witnessed never witnesses the 3rd respondent's agreement. By the time of the purported transaction to swap land between the 4th respondents and the late Oryang Wilson in 2002, the latter had not obtained a grant of letters of administration, which he obtained much later in 2003. He therefore had no legal authority at all to enter into that transaction. Being the daughter of Oryang Wilson and granddaughter of Yosam Onguti, the appellant had *locus standi* to sue as a beneficiary of the estate of the late Yosam Onguti. The appeal should therefore be allowed.

Arguments of Counsel for the respondents:

[15] In response, counsel for the respondents, submitted that since the late Oryang Wilson was granted letters of administration to the estate of the late Yosam Onguti, he had the capacity to enter into the transactions he did with the respondents. He did this with the consent and in the presence of P.W.3 Oloya Kennedy, his then only surviving brother. The alterations in the documents were mere corrections of errors and are not indicative of fraud. Oryang Wilson consented to the 4th respondent's extension of his perimeter wall into plot 22/24 and therefore the trial Magistrate came to the correct conclusion that it did not constitute an act of trespass. It was a correct finding that the 4th respondent could only be sued for breach of contract. The appellant was granted letters of administration to the estate to the late Oryang Wilson and not to the estate of the late Yosam Onguti. She therefore had no *locus standi* to sue with regard t the estate of the late Yosam Onguti. The appeal should accordingly be dismissed.

Duties of a first appellate court:

[16] It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000; [2004] KALR 236*). In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*).

[17] In exercise of its appellate jurisdiction, this court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular, this court is

not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

Errors in conducting the proceedings at the *locus in quo*

- [18] Before addressing the merits of the appeal, it is pertinent to comment on the record of proceedings of what transpired at the *locus in quo*. The purpose of a visit to the *locus in quo*, as has been stated repeatedly, is not to recite the evidence already led but to clear doubts which might have arisen as a result of the conflicting evidence of both sides as to the existence or non-existence of a state of facts relating to the land, and such a conflict can be resolved by visualizing the object, the res, the material thing, the scene of the incident or the property in issue. Where there exists such conflicting evidence as aforesaid, it is expected that the trial Magistrate will apply the court's visual senses in aid of its sense of hearing by visiting the locus in quo to resolve the conflict.
- [19] Visiting the *locus in quo* is to check on the evidence by the witnesses, and not to fill gaps in their evidence for them or lest Court may run the risk of turning itself a witness in the case (see *Fernandes v. Noroniha* [1969] EA 506, *De Souza v. Uganda* [1967] EA 784, *Yeseri Waibi v. Edisa Byandala* [1982] HCB 28 and *Nsibambi v. Nankya* [1980] HCB 81). Admission of the evidence of; (i) Mrs. Okot Gladys; (ii) Ochola David Wilson; and (iii) Opiyo Patrick Oko was an error.
- [20] That notwithstanding, according to section 166 of *The Evidence Act*, the improper admission or rejection of evidence is not to be ground of itself for a new trial, or reversal of any decision in any case, if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the

rejected evidence had been received, it ought not to have varied the decision. I have therefore decided to disregard the evidence of the "independent witness," since I am of the opinion that there was sufficient evidence on basis of which a proper decision could be reached, independently of the evidence of those three witnesses.

[21] A court will set aside a judgment, or order a new trial, on the ground of a misdirection, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, only if the court is of the opinion that the error complained of has resulted in a miscarriage of justice. A miscarriage of justice occurs when it is reasonably probable that a result more favourable to the party appealing would have been reached in the absence of the error. The court must examine the entire record, including the evidence, before setting aside the judgment or directing a new trial. Having done so, I have decided to disregard the evidence of the three additional witnesses, since I am of the opinion that there was sufficient evidence to guide the proper decision of this case, independently of the evidence of those three witnesses.

Ground four; beneficiaries' *locus standi*.

[22] In the fourth ground of appeal, the trial Magistrate is faulted for having found that the appellant had no *locus standi* to sue with regard to the estate of the late Yosam Onguti. It was an agreed fact at the scheduling conference that the land in dispute originally belonged to Yosam Onguti. It was sold by his son Oryang Wilson to the 1st, 2nd and 3rd respondents under authority of a grant of letters of administration to the estate of the late Yosam Onguti.

[23] For deceased persons who fail to prepare a will or do not make complete distributions of their estates by will, the statutory default scheme under The Succession Act provides the basis for disposition of their assets. Under section 2

of *The Succession Act* “lineal descendant” includes legitimate, illegitimate and adopted children, but does not include grandchildren. P.W.3 Oloya Kennedy qualifies as one, the appellant does not. Under section 27 (1) (a) (iii) thereof, the lineal descendants are entitled to receive 75 percent of the whole of the property of the intestate. Section 86 of the Act provides that “grandchildren” applies only to lineal descendants in the second degree of the person whose children or grandchildren are spoken of.

[24] In order to take by intestate succession, a person must survive the deceased intestate. Distribution of an intestate's property requires a beneficiary to survive the intestate otherwise their share is sent back up, not down, for re-distribution among the survivors of whatever class or generation the pre-deceased came from. A beneficiary must be alive to be entitled to his or her share; failing which that share accrues to the surviving members of the stated group. Yosam Onguti died in 1970 while Oryang Wilson died in September, 2006.

[25] However, under section 28 (2) of the Act, any child of a deceased lineal descendant, whose descent is not traced through any living lineal descendant and who survives the intestate, takes the share which the deceased lineal descendant would have taken under section 28 (1) of the Act, had he or she survived the intestate. Therefore, entitlement to participate in the distribution of the property of an intestate as a beneficiary, flows down to a grandchild only if the deceased lineal descendant is otherwise unable to take his or her share (i.e. dies before the distribution) but was entitled to a share in the intestacy by virtue of having survived the intestate. In that case the grandchild takes the share which his or her deceased ancestor would have taken if he or she had been living. In the case the grandchild represents his or her ancestor, that is, stands in the same place as the person himself or herself would have done, had he or she been living.

- [26] As a result, grandchildren take in substitution for their parent, if their parent would have taken if alive at the time of distribution but died before distribution; but grandchildren will not take if their parent is entitled to take and is alive at the time of distribution. In the instant case, the appellant's father, Oryang Wilson survived Yosam Onguti but died before the estate of Yosam Onguti was distributed.
- [27] Section 191 of *The Succession Act* is procedural and merely enabling, rather than a jurisdictional provision. It is not intended to disenfranchise beneficiaries as persons lacking in *locus standi* but it is rather designed;- to have the estate administered under the guidance and protection of the Court; to facilitate the determination of the persons entitled to share in the estate and the extent of the shares to which they are entitled; to facilitate collection of debts by identifiable persons who succeed to the estate of the deceased creditor; to protect debtors against rival claimants and provide an identifiable person who can give them complete discharge of the debts by requiring that moneys forming part of the estate are paid to a person who has been considered suitable for the grant; and to prevent the courts from being flooded with litigation from multiple beneficiaries coming one by one. Section 191 of *The Succession Act* only acts as a bar to the establishment of rights under intestacy unless letters of administration have been granted. Because it does not concern who are to be the beneficiaries but the appointments of administrators, that provision deals with procedure and not with devolution of property, which is a matter of personal law, but rather with the transmission of property which is a matter of general law, and forms part of the machinery under the general law for the transmission of the property of the deceased.
- [28] The requirement of sufficient interest in the subject matter of litigation is the determinant of the existence or otherwise of *locus standi*. When a person dies intestate leaving behind assets, the beneficiaries of the estate are the people entitled to receive those assets. The administrator of the estate is the person in charge of distributing the assets in the estate. The administrator is often, but not

always, also a beneficiary. The beneficiary of an estate of a deceased person therefore has interest in the proper administration of the estate and does not have to take out a grant of letter of administration in order to file a suit seeking to protect the estate (see *Israel Kabwa v. Martin Banoba Musiga*, S. C. Civil Appeal No. 52 of 1995; (1996) KALR 253). By virtue of being a lineal descendant, the appellant takes in substitution for her parent, Oryang Wilson since her parent would have taken if alive at the time of distribution but died before distribution. She is thus a beneficiary of the estate of the late Yosam Onguti.

[29] Beneficiaries of an estate have important rights including the right to receive what is due to them in a timely manner, to receive information about the estate, to request that the court removes the administrator and appoints a new one, and for the administrator to act in their best interests. This means the administrator must make decisions based on what is best for the estate, not what is best for the administrator. An administrator must act in the best interests of the estate and all of the beneficiaries and cannot act in his or her own interests, if they are not the same as the interests of the estate and the beneficiaries. An administrator has the duty to protect all of the assets of the estate until they are distributed. If there is a proposal that the assets be dealt with other than by distribution, the administrator will need to inform all beneficiaries and obtain consent from all adult beneficiaries to the proposed dealing, preferably in writing.

[30] The primary duty of an administrator is to collect the assets of the deceased and distribute them to the beneficiaries. *The Succession Act* adopts the *per capita* mode of intestate distribution among descendants at each generation. The underlying premise behind such approach is that those equally related to the intestate deceased receive an equal portion of the estate. Under section 28 (1) of the Act, all lineal descendants, wives and dependent relatives are entitled to share their proportion of a deceased intestate's property in equal shares. The *per capita* distribution plan divides the intestate estate into equal shares at the first generational level where there are living takers. When one dies after the death of

the intestate but before distribution, his or her share in the estate passes to his or her lineal descendants of the next generation who survive at the time of distribution.

- [31] It was contended by the appellant that her father Oryang Wilson transferred parts of the estate of the late Yosam Onguti to the respondents respectively, in breach of his fiduciary duties to the beneficiaries of the estate. Where property is transferred in breach of the fiduciary duties of an administrator of an estate, a beneficiary can either bring a proprietary claim to recover the property or a personal claim against a knowing recipient of the estate property (*see El Ajou v. Dollar Land Holdings [1994] 2 All E.R. 685 (CA), 700 and Re Diplock [1948] Ch. 465 (CA), 521*). Constructive knowledge of the breach will suffice (*see Karak Rubber Co. Ltd. [1972] 1 W.L.R. 602 (Ch), 632 and Belmont Finance Corp Ltd. v. Williams Furniture Ltd. (No 2) [1980] 1 All E.R. 393 (CA), 405*).
- [32] It was the testimony of the appellant and P.W.3 Oloya Kennedy that the estate of the late Yosam Onguti has never been distributed. Under the law of succession, after allotting for the surviving spouse's share of the estate, section 27 of *The Succession Act* provides for how property should be divided if there is more than one descendant (children and / or grandchildren) who is entitled to inherit from the estate. Before distribution, the administrator is the "owner" of the property. A beneficiary does not own any property of the intestate until the administrator distributes the property from the estate. Under section 278 (a) of *The Succession Act*, an administrator has one year from the grant, or such further time as the court may from time to time appoint, within which to distribute an estate. The grant was issued to Oryang Wilson on 3rd March, 2003. He should have completed the distribution of the estate and filed an account by 4th March, 2004 or sought from court, extension of time within which to complete the distribution and file an account. There is no evidence of a distribution nor of court's extension of time for distribution, by the time of his death in September, 2006.

- [33] Although beneficiaries have a right to receive information about what is going on in the administration of the estate, and for their consent to be sought when it is proposed that the assets be dealt with other than by distribution, it was the testimony of the appellant that she learnt about the sales to the respondents after the death of Oryang Wilson, hence the suit filed on 9th September, 2008 seeking recovery of the property disposed of in breach of the fiduciary duties.
- [34] The underlying principle of the equitable regime is to enable the recovery of property transferred in breach of the fiduciary duty of an administrator to preserve the beneficiary's interests in identifiable property (*the "duty of preservation" see Taylor v. Plumer (1815) 3 M. & S. 562 at 574; Salway v. Salway (1831) 2 Russ. & M. 215, at 219–20; Foskett v. McKeown [2001] 1 A.C. 102 (HL) 129 and Millett, P., "Proprietary Restitution" in Degeling, S. and Edelman, J. (eds.), Equity in Commercial Law (Sydney 2005), 315–17*). The beneficiary's secondary right replicates the performance of the beneficiary's primary rights as closely as possible. Thus, the proprietary claim achieves what the administrator can no longer do; it preserves the beneficiary's interests in identifiable property by enabling the beneficiary to recover specific property.
- [35] A third party (non-fiduciary) who knowingly participates in a fiduciary's breach of duty may be liable along with the fiduciary as a joint tortfeasor. The wrongdoing which unlocks the door to the beneficiary's right to bring a direct claim to recover property under the equitable regime is the failure of the administrator to retain control over estate property in breach of his or her duty to preserve the beneficiary's interests in identifiable property (*see Attorney General v. The Earl of Chesterfield (1854) 18 Beav. 596, at 599–600 and Re Smith, Fleming, & Co. (1879) 11 Ch. D. 306 at 31*). This duty will be breached where the administrator makes an unrestricted transfer and can no longer preserve the beneficiary's interests in the transferred property.

[36] This proprietary claim does, however, have limits. A proprietary claim in equity will be defeated if the property has been received by a good faith purchaser of the legal title (see *Burgess v. Wheate (1759) 1 Eden 177, 195, per Clarke M.R.*). Where the defendant has obtained property in good faith and for value then, as between the owner of the property and the recipient, the latter should have the better claim to the property, since he or she should be secure in the validity of the receipt of the property if there is nothing to put him or her on notice that the transferor did not have a good title to transfer. Where, however, the defendant has purchased an equitable proprietary interest (see *Bishopsgate Motor Finance Corp v. Transport Brakes Ltd [1949] 1 KB 322 at 336-7 (Denning J)* for value the defence will not be available, because of the rule that the first equitable interest in time takes priority (see *Macmillan Inc v. Bishopsgate Investment Estate plc [1995] 1 WLR 978,1000 (Millett J)*). But the defence will defeat an earlier mere equity, such as the equity to rescind a contract. See D O'Sullivan, "The Rule in *Phillips v. Phillips*" (2002) 118 LQR 296).

[37] Before *The Limitation Act*, no statutory time-bar applied to a claim by a beneficiary against an administrator of an estate. The practice of equity was to apply statutory limitation periods by analogy to equitable claims, in addition to its own doctrines of laches and acquiescence. But by way of exception statutory limitation periods were not applied, even by analogy, to claims by a beneficiary against an administrator of an estate for breach of trust. Administrators were accountable to their beneficiaries without limitation of time. However, now according to section 19 (2) of *The Limitation Act*, an action by a beneficiary to recover estate property or in respect of any breach of trust from a person other than the administrator, should be brought within six years, but the right of action is not deemed to have accrued to any beneficiary entitled to a future interest in the estate property until the interest falls into possession.

[38] An individual has an interest in possession over estate property, when he or she has "a present right of present enjoyment" (see *Pearson v. IRC [1980] STC 318*

(HL) 326b), such as an immediate right to income. If a beneficiary has to meet a condition (such as surviving to a certain age, or surviving another beneficiary) he or she has a contingent interest, not a vested interest. When he or she meets the condition, his or her interest vests. Property is vested in interest, if it is a "present right to future enjoyment," such as a right to an asset which is ready to take effect when another beneficiary's interest ends.

- [39] In the instant case, the appellant's participation in the distribution of the estate of the late Yosam Onguti was vested in interest, in that it was a "present right to future enjoyment," that would take effect only upon the death of her father, Oryang Wilson. It is upon the death of Oryang Wilson, which occurred in September, 2006, that the appellant acquired an "interest in possession" over estate property of Yosam Onguti. It is thus in September, 2006 that the six year period of limitation began to run against her. It is during the same year that the appellant commenced action against the respondents before the L.C. Courts until a re-trial was ordered, that culminated in the filing of the suit during the year 2008, from which this appeal arises. Therefore, not only did the appellant have *locus standi* to file the suit but she also was not barred by limitation. The trial court came to the wrong conclusion in this regard and for that reason this ground of appeal succeeds.

Ground one and two; validity of the purchases.

- [40] In the first and second grounds of appeal, the trial Magistrate is faulted for having found that purchases by the 1st and 3rd respondents were valid. It is trite that an administrator holds the estate in trust for the beneficiaries. An administrator is obligated to act in the estate's best interest. Administrators are "fiduciaries," which means that the administrator must act with the highest degree of good faith in behalf of the estate.

- [41] Fiduciaries owe two main duties to the beneficiaries: a duty of loyalty and a duty of care. The duty of loyalty requires that as fiduciaries they act solely in the interest of the estate and its beneficiaries, rather than in their own interest. An administrator is required to invest and manage the estate property solely in the interest of the beneficiaries. Thus fiduciaries must not derive any direct or indirect profit from their position, and must avoid potential conflicts of interest. The duty of loyalty is the hallmark of a fiduciary relationship. The Administrator must at all times place the interests of the beneficiary above his or her own.
- [42] On the other hand, the duty of care requires that fiduciaries perform their functions with a high level of competence and thoroughness, in accordance with standards of reasonable and careful persons as a prudent investor would, by considering the purposes, distribution requirements, and other circumstances of the estate. The fundamental duties of an administrator include the use of the skill and prudence which an ordinary, capable and careful person would use in the conduct of his or her own affairs. In satisfying this standard, the administrator is required to exercise reasonable care, skill, and caution. For matters other than investments, an administrator is under a duty in administering the estate to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his or her own property. An administrator must use the same care and skill that a person of ordinary prudence would use to preserve estate property.
- [43] It is a well-settled rule that an administrator can make no profit out of the estate. The rule springs from his or her duty to protect the interests of the estate, and not to permit his or her personal interest to in any way conflict with his or her duty in that respect. The intention is to provide against any possible selfish interest exercising an influence which can interfere with the faithful discharge of the duty which is owing in a fiduciary capacity. An administrator must also exercise a discretionary power "reasonably." This must be done impartially, based on what is fair and reasonable to all of the beneficiaries. An administrator should not

stand to profit by any transaction where the administrator represents the estate's interests. He or she should and not make a gift or otherwise transfer any of the estate's money, personal property, or real estate to himself or a third party except in accordance with the rules of intestacy.

[44] In the instant case, although he was dealing with estate property, Oryang Wilson did not in any of the transactions expressly contract as a personal representative. The contracts were not made within his authority as personal representative. Since he did not disclose that he was contracting as personal representative of a named estate, dealt with the land other than by distribution, without informing all beneficiaries and obtaining their consent to the proposed dealing, he could not bind the estate. Furthermore, all the respondents admitted that they were aware at all material time that the property they were dealing in belonged to the late Yosam Onguti and that he was survived by his wife and children. The widow and some of the surviving children, such as P.W.3 Oloya Kennedy, lived on the land. A third party who knowingly participates in a fiduciary's breach of duty may be liable along with the fiduciary as a joint tortfeasor. The tort subjects the actor who culpably participates in fiduciary breach to liability that is accessory to the liability of the primary tortfeasor, who breached a fiduciary duty.

[45] One can expect that a purchaser of land from a person the purchaser knows to be an administrator and the subject matter of the transaction being part of the estate of the deceased, will take care not to have notice of breaches of the administrator's fiduciary duties. The rule, therefore, is that a purchaser must be diligent and act in a reasonable manner, making all those investigations that a purchaser of land is normally expected to make. Then, he or she will be affected only by actual notice of the breach. If he or she omits to make the usual investigations, then, he or she lays himself or herself open to be affected by constructive notice.

- [46] Notice has long been implied when a purchaser omits to investigate the vendor's title properly, or to make reasonable enquiries as to deeds or facts which come to his or her knowledge. He or she will be deemed to have notice of anything which he or she has failed to discover because he or she did not investigate the title properly or if he or she did not inquire for deeds or inspect them. The equitable doctrine of notice states that a purchaser is bound by any right which he or she would have discovered if he or she had made the ordinary investigations of deeds, births, deaths, marriages, and other facts which affect the ownership of land. Such a buyer, as the respondents are in the instant case, cannot claim to be a bonafide purchaser.
- [47] A third party's accessory's conduct that induces or instigates a breach of fiduciary duty, including through agreement with the fiduciary, occurs prior to, or almost simultaneously with, the fiduciary's decision to breach the duty. Although the accessory's liability is joint and several with the fiduciary's, accessory liability does not require that their culpability be identical. Thus, a third party's accessory's liability is contingent on another actor's breach of duty, but the accessory's liability constitutes an independent wrong, not an instance of vicarious liability. For liability to attach to the third party, the beneficiary must show: (i) the existence of a fiduciary relationship; (ii) a breach of the fiduciary's duty; (iii) the third party's knowing participation in that breach; and (iv) damages or loss to the beneficiary proximately caused by the third party's breach. As a consequence, a third party may be subject to accessory liability through knowing participation in a fiduciary's purposeful or negligent breach of duty.
- [48] The various remedies available for a fiduciary's breach of his or her duties and a third party's accessory's liability are designed to put beneficiaries in the same position they would have been in if no breach had been committed and to charge the fiduciary and the third party with any loss and give the estate any gain resulting from a breach of fiduciary duty. The beneficiary may trace estate property of which the administrator wrongfully disposed and recover the property

or proceeds from the property (see *Ciro Citterio Menswear plc v. Thakrar and Others* [2002] 1 WLR 2217). The main advantage of tracing in equity is that it will not be defeated by the irretrievable mixing of property (see *Agip (Africa) Ltd v. Jackson* [1991] Ch 417; *Re Hallett's Estate* (1880) 13 Ch D 696 and *Sinclair v. Brougham* [1914] AC 398).

[49] Whereas Common Law views property as physical assets, equity is able to view property metaphysically (see *Re Diplock* [1948] Ch 465 at 520). Equity is able to assume that the claimant's property continues to exist in the mixture, albeit that it is not possible to say which specific property belong to which party. When the claimant has traced an equitable proprietary interest into a mixed property, an equitable charge will be placed on the whole property as security for the claim (see *Re Hallett's Estate* (1880) 13 Ch D 696 at 708-10 (Jessel MR); *Sinclair v. Brougham* [1914] AC 398 at 420-2 (Viscount Haldane LC), at 441-2 (Lord Parker of Waddington), and at 459-60 (Lord Sumner); *El Ajou v. DollarLand Holding* [1993] 3 All ER 717 at 735-6 (Millett J). This gives the claimant a power to sell the relevant asset to which the charge is attached and so recover the value received and retained by the defendant plus interest.

[50] Claims to recover estate property from third parties arise in response to the administrator's duty to preserve identifiable property, meaning of "tracing." In *Foskett v. McKeown* [2001] 1 AC 102 at 109D, Lord Browne Wilkinson said that "it is a process whereby assets are identified." In the same case, Lord Millet stated at 128C as follows:

tracing is thus neither a claim nor a remedy. It is merely the process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property. Tracing is also distinct from claiming. It identifies the traceable proceeds of the claimant's property. It enables the claimant to substitute the traceable proceeds for the original asset as the subject matter of his claim. But it does not affect or establish his claim. That will depend

on a number of factors including the nature of his interest in the original asset. He will normally be able to maintain the same claim to the substituted asset as he could have maintained to the original asset.

- [51] It will be appreciated from the above statements of principle that for a claimant to be able to trace his or her original asset into the traceable proceeds thereof or substituted asset, he must first show his ownership of, or a proprietary interest in, the original asset. For example, in *Scott v. Scott and others (1963) 109 CLR 649*, an administrator of an estate of a deceased person in breach of estate applied estate moneys together with his own in the purchase of a property in which he lived till his death. Shortly prior to his death he repaid to the estate the amount of estate moneys used by him in its purchase. After its purchase the property had increased substantially in value. One of the issues which arose for decision was whether the estate was entitled to share in the increase in value of the property in the same proportion to the total increase as the amount of estate moneys employed in the purchase bore to the total purchase price. The High Court of Australia (McTiernan, Taylor and Owen JJ) held that the estate was so entitled.
- [52] It follows that the right only ceases when the means of ascertainment fails. However, for as long as the identity of the property itself can be ascertained to be such, it is recoverable by the beneficiary. The late Oryang Wilson having disposed off part of the estate of the late Yosam Onguti in breach of his fiduciary duties to the detriment of the beneficiaries, inclusive of the appellant, and the respondents having been proved to be knowing participants in that breach, the property was recoverable from them.
- [53] There is a distinction between "following" and "tracing" in circumstances of this nature, in that the process of following seeks to locate the property, usually in order to assert pre-existing rights while tracing identifies the passage of value from one asset into its substitute: what is traced is not the physical asset itself but the value inherent in it. An asset is followed when it passes through the hands of

subsequent recipients without substitution and remains in the same form. Tracing, by direct contrast, involves substitution. The distinction helps the court determine when it will grant proprietary remedies to a claimant, as opposed to personal remedies. Following an asset into the hands of a third party recipient is clearly a proprietary claim as the beneficiary can show it was initially part of the estate property. By contrast, in a tracing claim, a beneficiary may decide that he or she wishes to assert ownership over the new asset which has been acquired with his or her original asset. The reason why a court would order ownership over the new asset to the beneficiary is to prevent the unjust enrichment of the recipient of the new asset.

[54] The process of "following" is establishing who the original owner of property is, where that property is, and returning it to the original owner. In the instant case, the land belonged to the estate of the late Yosam Onguti, it is now wrongfully in the hands of the respondents since it was sold to them in breach of the administrator's fiduciary duties with the respondents' knowing participation, and it ought to be returned to the estate of Yosam Onguti for the benefit of the beneficiaries. Had the trial court properly directed itself, it would have found in favour of the appellant. For that reason, the two grounds of appeal succeed.

Ground three; the status of the respondents as trespassers on the land.

[55] In the third ground of appeal, the trial Magistrate is faulted for not having found that the 4th respondent was a trespasser on land belonging to the estate of the late Yosam Onguti. Having found in favour of the appellant in respect of the rest of the grounds, it follows that the respondents' possession of part of the land belonging to the estate of the late Yosam Onguti is unlawful. Construction of that perimeter wall fence by the 4th respondent, by way of extension onto the estate property, too constituted an act of trespass. For that reason the appellant is awarded nominal general damages of shs. 4,000,000/= per annum hence shs. 60,000,000/= to be paid by each of the respondents for the last 15 years of their

trespass. That amount is to carry interest at 8% per annum from the date of judgment until payment in full.

Order:

[56] In the final result, the appeal is allowed. The judgment of the court below is set aside. instead judgment is entered for the appellant against the respondents in the following terms;

- a) The sales of part of the estate of the late Yosam Onguti by Oryang Wilson to the 1st, 2nd and 3rd respondents are declared null and void.
- b) The 4th respondent's fence that protrudes by 18.2 meters onto plots 22/24 and 26/28 constitutes an act of trespass onto the said plots.
- c) An order of vacant possession of land forming part of the estate of the late Yosam Onguti is granted against all four respondents.
- d) A permanent injunction restraining the respondents, their agents and persons claiming under them from further acts of trespass onto the land.
- e) General damages of shs. 60,000,000/= against each of the respondents.
- f) Interest thereon at the rate of 8% per annum from the date of judgment until payment in full.
- g) The costs of the appeal and in the court below.

Stephen Mubiru
Resident Judge, Gulu

Appearances

For the appellant : M/s Donge and Co. Advocates.

For the respondent : M/s Odongo and Co. Advocates.