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THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA

[CORAM: ARACH-AMOKO, NSHIMYE, OPIO-AWERI, MWONDHA,
TIBATEMWA-EKIRIKUBINZA, JJSC.]

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CIVIL APPEAL NO.010 OF 2015

BETWEEN

ELIZABETH NALUMANSI WAMALA ::::::::::: APPELLANT

15

AND

1. JOLLY KASANDE
2. NABUKEERA ESTHER
3. RONNIE M. LUTAAYA } :::::::::::RESPONDENTS

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[Appeal from the decision of the Court of Appeal (Egonda-Ntende, Kakuru & Kiryabwire, JJJA) in Civil Appeal No.070 of 2014, dated 18th June 2015.]

Representation

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Mr. John Mary Muwaya appeared for the appellant while Mr. Byamugisga Guma appeared for the 1st respondent and Mr. Mwanje Hakim appeared for the 2nd and 3rd respondents.

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JUDGMENT OF HON. JUSTICE PROF. DR. LILLIAN TIBATEMWA- EKIRIKUBINZA.

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Introduction

This is a second appeal from the judgment of the High Court.

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The appeal arises from a dispute as to who should administer the estate of the late Wilberforce Noah Wamala, who died intestate on 4th February, 2012.

Brief Facts

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The background to the appeal is that the appellant and the deceased got married in the United Kingdom in 1992 and obtained a marriage certificate. The couple begot one child but subsequently the man returned to Uganda while the appellant remained in the U.K. In 1999, the deceased entered into a "customary marriage" with the 1st respondent and four children were born to the couple. The couple settled in Muyenga - an affluent suburb of Kampala.

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Following a brief return of the appellant to Uganda in 2010, the deceased and the appellant renewed their marriage vows at Namirembe Cathedral and were issued with a marriage certificate. Thereafter, the appellant went back to the UK and only returned after the death of the deceased.

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The appellant petitioned for Letters of Administration of the estate of the deceased on 13th March, 2012. However, the 1st respondent, the 2nd respondent (daughter of the deceased) and the 3rd respondent (brother of the deceased) jointly lodged caveats against the petition alleging that the appellant was not the right person to apply for the grant of Letters of Administration.

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On 1st June 2012, the appellant instituted a suit against the respondents for orders that the caveats lodged by the

5 respondents be removed and Letters of Administration be granted to her as the widow.

Issues of contention at the High Court

1. *Whether the plaintiff (now appellant) is entitled to jointly administer the estate.*

10 2. *Whether the caveats should be lifted*

3. *Available remedies*

At the hearing of the appeal, counsel for both parties adopted their written submissions duly filed in court.

Findings of High Court

15 The trial judge held that the inconsistencies and break ups in the marriage of the plaintiff and the deceased did not qualify the appellant to be a fit and proper person to administer the estate solely.

20 That there was a subsisting marriage between the deceased and the 1st respondent by the time of the renewal of marriage vows between the appellant and the deceased. The court also noted that the marriage certificate of UK was neither registered nor notarized in Uganda.

25 That given the animosity that had developed between the appellant and the Co-interim administrators (the respondents) of the estate, coupled with the fact that the appellant lived partly in UK, the appellant could not keep hands-on administration of the estate. Based on the above reasoning, the trial court on its own motion appointed the
30 Administrator General as the Administrator of the estate and vacated the caveats lodged by the respondents to enable the Administrator General distribute the estate.

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The trial court also ordered that by virtue of the customary marriage between the deceased and the 1st respondent, the 1st respondent and her children were entitled to occupy the Muyenga property as part of their share.

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Court rejected the prayer for a paternity test by the appellant, finding that the deceased never denied any of his children.

Dissatisfied with the High Court decision, the appellant appealed to the Court of Appeal on the following grounds:

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1. *The learned trial judge erred in law and fact when he wrongly granted letters of administration to the Administrator General*

2. *The learned trial judge erred in law and fact when he found that there was a customary marriage between the deceased and the 1st respondent*

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3. *The learned trial judge erred in law and fact when he wrongly failed to evaluate the evidence on record*

4. *The learned trial judge erred in law and fact when he distributed the estate property*

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5. *The learned trial judge erred in law and fact in holding that the 1st respondent and her children occupy the Muyenga property which is a commercial entity.*

Findings of the Court of Appeal

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In rejecting the appeal, the Justices of Appeal found, *inter alia*, that from the evidence on record, it was clear that there existed cogent reasons that rendered the appellant unsuitable to administer the estate. These included the appellant's residence outside of Uganda which made her unavailable to deal with the day to day issues in the

5 administration of the estate, the significant and
substantial nature of the estate, the nature of inventory,
and the multiplicity of the beneficiaries including minor
children who were not children of the appellant. That, this
necessitated a neutral person to be able to make impartial
10 decisions in the matters of the estate for the benefit of all
beneficiaries.

In regard to the fact that the Administrator General was
not heard before being appointed as required by Section 4
of the Administrator General's Act, court found that this
15 was a fundamental mishap by the trial judge but that such
failure to comply with the letter of the law would not result
in setting aside an order that was made, as there was no
miscarriage of justice.

20 Further, that whether the appellant was a wife was not a
matter to be resolved as an agreed fact. Whether or not the
appellant was entitled to share in the estate of the
deceased and therefore entitled to letters was dependent
on whether or not she was a lawful spouse to the deceased.

25 On the issue of the Muyenga property, the learned Justices
noted that even if the 1st respondent were to be found not
to be entitled to share in the estate of the deceased, as a
natural guardian of her four minor children, it was logical
to provide necessities of life to the minor children like
accommodation out of the estate and this would be
30 counted as part of their share in the estate of the deceased.

Aggrieved by the decision of the Court of Appeal, the
appellant appealed to this Court on the following grounds:

1. **The learned justices of the Court of Appeal erred
in law when they held that the appellant was not**

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a wife and thus the lawful widow of the deceased thereby occasioning a miscarriage of justice.

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2. The learned justices of the Court of Appeal erred in law when they found that there existed a customary marriage between the deceased and the 1st respondent without proof of any such marriage let alone it being registered at the material time the appellant celebrated marriage with the deceased.

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3. The learned justices of the Court of Appeal erred in law when they confirmed the grant of the letters of administration to the Administrator General, having found at the same time that the trial judge had not followed the provisions of S.224 of the Succession Act in making such a grant.

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Counsel for the appellant prayed that leave be granted to amend ground 3 to read that:

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The learned justices of the Court of Appeal erred in law when they confirmed the grant of the letters of administration to the Administrator General, having found at the same time that the trial judge had not followed the provisions of S.4 (5) of the Administrator General's Act.

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Leave was granted.

The appellant prayed that the appeal be allowed with costs.

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Appellant's submission

Ground 1

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The Appellant submitted that the fact that she was a wife to the deceased was never controverted by the respondent. That the digital certificate adduced to support this fact was agreed upon by the respondent during the scheduling conference. That this meant that the respondent admitted the fact that the appellant's marriage with the deceased was a valid marriage. It was submitted further that the statement of the appellant being a widow was an admitted fact which needed no proof. In support of his arguments, appellant's counsel relied on **Section 57 of the Evidence Act**. The Section provides:

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Facts admitted need not be proved.

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No fact need be proved in any proceeding which the parties to the proceeding or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings; except that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

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Counsel concluded that arising from the above, the Justices of Appeal had no basis in law to disregard such an admitted fact by finding that the marriage between the appellant and the deceased during his lifetime was not a

5 matter that would be resolved as an agreed upon fact
between the parties.

Respondents' submission

10 The 1st respondent submitted that there was no finding by
the Court of Appeal that the appellant was not a widow.
That what the learned Justices of Appeal found was that
the issue of whether or not the appellant was a wife of the
15 deceased was not a matter that could be resolved by
admission of the parties.

Counsel argued that in spite of the admission by both
parties, it was pertinent for the Court of Appeal to
investigate whether the appellant was a widow and thus
20 entitled to administer the estate of the deceased

Furthermore, counsel urged that the Court of Appeal
found that in line with Section 30 of the Succession Act,
the Appellant could not qualify as an applicant for Letters
25 of Administration because at the time of the death of the
deceased she was not living with him.

30 For the 2nd and 3rd respondents, it was submitted that
since there was no order made by the court on the alleged
admission, the issue of the status of the appellant as a
widow remained to be investigated and determined by the
court. Counsel relied on Order 12 rule 1 and 2 of the Civil
Procedure Rules which provide that where parties reach
an agreement, Orders shall immediately be made in
35 accordance with Rules 6 and 7 of Order 15. Counsel
further argued that illegalities once brought to the
attention of court override all questions of pleadings,
including admissions. That during trial, evidence was

5 adduced that the appellant was not a wife of the deceased therefore an admission contrary to such evidence was an illegality that court should not close its eyes to.

Rejoinder by appellant

10 In reply to the issue that the appellant was not an entitled beneficiary of the deceased's estate because they had separated with the deceased, counsel submitted that there was no evidence on record that the appellant was deliberately or intentionally not living with the deceased.
15 That staying apart per se did not in any way connote separation in law. He thus urged that Section 30 of the Marriage Act was wrongly applied.

20 In regard to the issue of proof of customary marriage between the 1st respondent and the deceased, counsel submitted that no custom was ever proved at the trial and that there was no counter-claim on the marriage between the appellant and the deceased as the marriage certificate was admitted without any objection.

25 Concerning the grant of the Letters of Administration to the Administrator General, counsel reiterated his earlier submission that the grant was unlawful as it was made in utter disregard of the provisions of the law.

30 In reply to the 2nd and 3rd respondents' written submissions, counsel pointed out that the 3rd respondent being introduced as a brother to the deceased was false. He made reference to the High court proceedings on record
35 wherein the 3rd respondent had testified during cross-examination that he was not a blood brother of the deceased.

5 Further, counsel pointed out that the 2nd and 3rd
respondents wrongly applied Order 15 rule 6 (b) of the Civil
Procedure Rules. He emphasized that the issue of the
appellant being widow had been settled and no evidence
10 was required to prove an issue that was agreed upon. That
the action of the judge attempting to resolve a matter
which had been resolved without giving an opportunity to
the appellant to be heard on the matter amounted to being
condemned without being heard.

15 **Ground 2**
Appellant's submission

It was argued for the appellant that during the trial, the issue
of customary marriage was never raised nor adjudicated upon.
20 The only evidence on the issue of customary marriage between
the 1st respondent and the deceased was the testimony of the
respondent. Counsel for the appellant argued that since the
issue of customary marriage was not raised for trial, it was not
proper for the Justices of Appeal to adjudicate upon it.

25 Counsel for the appellant relied on the authority of **M/S Fang
Min vs. Belex Tours & Travel Ltd SCCA No.6 of 2013** for the
proposition that basing a court decision and relief on an un-
pleaded matter or issue not properly placed before it for
determination is an error of law.

30 **Respondents' submission**

It was the submission of the 1st respondent that the existence
of a customary marriage between the 1st respondent and the
deceased was a concurrent finding of both the High Court and
35 the Court of Appeal. That as such the appellant's appeal to the
Supreme Court on this fact was in effect calling upon this Court
to re-evaluate the evidence on record. In support of the
argument, counsel relied on the authority of **Kifamunte Henry**

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v Uganda SCCA No.010 of 1997 wherein Court held that, on a second appeal, the Court of Appeal is precluded from questioning the findings of fact of the trial court, provided that there was evidence to support those findings, though it may think it possible, or ever probably, that it would not have itself come to the same conclusion.

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The submissions of the 2nd and 3rd respondents on this issue were substantially the same as that of the 1st respondent.

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Ground 3
Appellant's submission

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On this ground it was submitted that the learned Justices of Appeal having found that the procedure of grant of Letters of Administration to the Administrator General was contrary to the stipulated procedure in Section 4 (5) of the Administrator General's Act, court was obligated to find that the grant made to the AG was unlawful.

Respondents' submission

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In regard to ground 3, the 1st respondent submitted that the appellant's argument about court not following the procedure stipulated in Section 4 (5) of the Administrator General's Act was a new ground not reflected in his Memorandum of Appeal which should be struck out in accordance with Rule 98 (a) of The Judicature Supreme Court Rules Directions. That the amendment of the ground was without the leave of court and thus should not be accepted.

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Further, counsel supported the finding of the Court of Appeal that although the High Court flawed in the procedure of the grant of the Letters of Administration, there was no miscarriage of justice.

5 For the 2nd and 3rd respondents, it was submitted that the fact
that the appellant was residing in the UK, there was no way she
could administer the estate. That the trial judge had a wide
discretion under Section 98 of the Civil Procedure Act to ensure
10 that the ends of justice are met by appointing the Administrator
General as the administrator of the deceased's estate.

Rejoinder

Counsel argued that the grant of Letters of Administration
to the Administrator General was unlawful in utter
disregard of the provision of law.

15 In response to the 2nd and 3rd respondents' submission, it was
submitted that the appellant being out of the country per se
does not disentitle a person from being Administrator of an
estate.

Court Analysis and Findings

20 Duty of second appellate Court

In resolving the issues raised in this appeal, we are guided
by the *locus classicus* case of **Kifamunte Henry vs.
Uganda SCCA No. 10 of 1997** that *on a second appeal, a
25 second appellate court is precluded from questioning the
findings of fact of the trial court, provided that there was
evidence to support those findings, though it may think it
possible, or even probably, that it would not have itself come
to the same conclusion; it can only interfere where it
considers that there was no evidence to support the finding
30 of fact, this being a question of law.*

Ground 1

The pertinent issues arising from this ground are: whether
or not the appellant was a wife of the deceased and

5 whether or not she was entitled to a share in the estate of the deceased.

10 It was the appellant's argument that this issue was settled at the trial Court by the admission of both parties of the digital certificate of marriage tendered by the appellant to support the fact that she was married to the deceased. On the other hand, the respondent opposed the appellant's argument by arguing that the fact of existence of a marriage was a legal issue that had to be determined by the court even though the issue was not raised for resolution by the parties.

15 I note that **Rule 98 (a) of the Supreme Court Rules** prohibits the raising of a new ground or argument on appeal save with leave of the Court. The Rule provides:

At the hearing of an appeal—

20 no party shall, without the leave of the court, argue that the decision of the Court of Appeal should be reversed or varied except on a ground specified in the memorandum of appeal or in a notice of cross-appeal, or support the decision of the Court of Appeal on any ground not relied on by that court or specified in a notice given under rule 88 of these Rules;

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30 Although the rule is restrictive on the parties raising new grounds, this Court may on its own motion in exercise of its inherent powers in **Rule 2 (2) of the Supreme Court Rules** consider a legal issue not presented and agreed upon by the litigants. The Rule provides thus:

35 **Nothing in these Rules shall be taken to limit or otherwise affect the inherent**

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power of the court, and the Court of Appeal, to make such orders as may be necessary for achieving the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent an abuse of the process of any court caused by delay.

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In determining whether the appellant was a wife the Court of Appeal held:

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The issue of whether or not the appellant was a wife of the deceased was not a matter that could be resolved as an agreed fact. This was ultimately a legal question which could only be resolved after establishment of the relevant facts. It is clear that on the pleadings of the 3rd respondent, the legality of the union between the appellant and the deceased was called in question. This is a matter that could only be resolved by the court though the parties could abandon the issue obviating the need for a court decision... The inquiry into whether there was subsisting marriage does not lose relevance because of the death of a party to it. To the contrary, it is important to establish the legal relationship between the deceased and other people claiming a share in his estate as an entitlement, including the right to apply for and be granted Letters of Administration. The right to share in the estate of a deceased or to be granted Letters of Administration ordinarily depends on the legal relationship between those persons and the deceased.

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In spite of the finding by the trial judge that the question of who was married to [the deceased] was not important the trial judge then went on to hold that both the appellant and the respondent no.1 were entitled to share in the estate of the deceased as were all the deceased's children. The trial judge in effect held that both the appellant and the respondent were spouses of the deceased who would be entitled to share in his estate.

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Having correctly pointed out that the question of the marital status of the appellant was a legal question that warranted determination by the court, the Court of Appeal had to go ahead and clearly state whether or not the appellant was a wife in law.

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In its judgment, the court stated as follows:

The resolution of the nature of relationship that each of these persons enjoyed with the deceased was key to resolving the matters in controversy in this suit. At some point the trial judge states that since the deceased was no longer alive it was immaterial to determine whether the appellant was married to him or not. However, in the same breath, the court concludes that she was a beneficiary of the estate of the deceased. This was untenable. The relationship had to be determined before determining whether or not she was a beneficiary;

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I note that the Court of Appeal faulted the trial judge for not resolving the legality of the "marriage" to the deceased.

5 Nevertheless, the court did not itself make a finding on this matter.

10 I therefore find that the Court of Appeal failed in its duty as a 1st appellate court to re-evaluate all the evidence and come to its own conclusions and findings. [See: **Rule 30 (1) (a) of the Court of Appeal Rules, Kifamunte Henry vs. Uganda (supra) and Fredrick Zaabwe v Orient Bank Ltd & Ors. SCCA No. 4 of 2006**].

15 I will therefore go ahead to determine whether the appellant was a wife in law.

20 The record shows that the appellant got married to the deceased in the UK in 1992 and obtained a marriage certificate. However, the trial judge found this marriage to be invalid on ground that it was not proved in evidence. The finding was based on the fact that the appellant had neither registered nor notarized the certificate of marriage in Uganda. However, the judge did not cite any law which obliges a person whose marriage has been celebrated outside to have it registered or notarized as a prerequisite for its recognition as a valid union. I therefore find that the High Court's finding, confirmed by the Court of Appeal, that the appellant's marriage celebrated in the UK was invalid was an error. Lack of subsequent registration of the marriage can only go to proof of the marriage and not its validity. I am fortified in my view by the provisions of **Section 2 (w) (ii) of the Succession Act** which defines a wife as: "*one married to a deceased in another country by a marriage recognized as valid by any foreign law under which the marriage was celebrated*".

30 I thus come to the conclusion that, as long as the marriage between the appellant and the deceased was recognized as a valid marriage in the UK where it was celebrated, that marriage is recognized as valid in Uganda.

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5 Ground 1 therefore succeeds.

Ground 2

10 The Court of Appeal agreed with the finding of the High Court that there was a customary marriage subsisting between the deceased and 1st respondent. On this premise, the respondents argued that this Court should not interfere with this concurrent finding.

15 It is a trite principle of law that where factual findings have been made by the trial court and affirmed by the first appellate court, the second appellate court, like this one, must be careful not to interfere with those findings unless the court is satisfied that the findings were devoid of support in evidence on record or that they are so glaringly erroneous that the findings by the trial court were perverse. [See: **Areet Sam vs. Uganda SCCA No. 20 of 2005, Akbar Hussein Godi vs. Uganda; Supreme Court Criminal Appeal No. 3 of 2013**].

Section 11 (5) of the Customary Marriages (Registration) Act provides for validity of a Customary marriage as follows:

“A customary marriage shall be void if—

25 **One of the parties has previously contracted a monogamous marriage which is still subsisting.”**

30 I have already made a finding above that a valid marriage existed between the deceased and the appellant. It is not on record that the marriage between the appellant and the deceased was dissolved prior to the deceased contracting a customary marriage with the 1st respondent. It therefore follows that the deceased did not have the capacity to enter a valid customary marriage with the first respondent. In the

5 circumstances, I find that the High Court and the Court of Appeal were erroneous in law.

Therefore, ground 2 succeeds.

Ground 3

10 The major contention under this ground was the flawed procedure by which letters of Administration were granted to the Administrator General.

Letters of Administration constitute a legal document issued by the Court, which allows the administrator(s) to manage and distribute the deceased's assets.

15 The purpose of a grant of Letters of Administration is to collect the deceased's assets, pay any debts and then distributing the assets to the beneficiaries.

Section 4 (5) of the Administrator General's Act provides that —

- 20 (a) **when the peculiar circumstances of the case appear to the court so to require, for reasons recorded in its proceedings, the court may if it thinks fit, of its own motion or otherwise, after having heard the Administrator General, grant letters of administration to the Administrator General ... even though there are persons who, in the ordinary course, would be legally entitled to administer (the Estate).**
25
30 (Emphasis added)

35 The High court came to the conclusion that in the circumstances surrounding the estate of the deceased, the ends

5 of justice would be served if Letters of Administration were issued to a neutral person.

10 The appellant's contention is to the effect that the failure by the High court to hear the Administrator General before granting Letters of Administration as stipulated in Section 4 of the Administrator General's Act was a material defect which went to the root of the grant, warranting revocation of the same.

15 **Section 234 (1) of the Succession Act Cap 162** provides that the grant of Letters of Administration may be revoked or annulled for just cause.

According to **Section 234 (2)**, "just cause" *inter alia* means: **"that the proceedings to obtain the grant were defective in substance."**

20 In addressing the consequences of the failure by the High court to hear from the Administrator General before granting him letters of Administration, the Court of Appeal held as follows:

25 *It is desirable that the trial courts should follow the letter of the law in all matters where the law lays down the procedure to be followed before the exercise of some power. Where a step has been missed it does not follow that in every case the failure to comply with the letter of the law will result in setting aside an order that was made. The approach ought to be, in order, to ensure that litigation is not unnecessarily prolonged, that an appellate court will consider if the omission resulted in a miscarriage of justice, and if not, may allow the impugned order to stand. (My emphasis)*

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40 In re-evaluating the evidence on record, the Court of Appeal held that, there existed clear and cogent reasons when considered together that rendered the appellant unsuitable to administer the estate of the deceased. The Court found that a more neutral person like the Administrator General was called

5 for to be able to make impartial decisions for the benefit of all beneficiaries. On this premise, I am unable to fault the finding of the Court of Appeal.

10 I am also unable to fault the learned Justices of Appeal for upholding the grant of Letters of Administration to the Administrator General on the basis that the procedural irregularity was not a material defect going to the root of the grant.

15 I now proceed to discuss the law regarding the circumstances in which a person whose legal relationship with the deceased is that of spouse, can be disentitled from benefiting from the estate.

20 In his lead judgment, Egonda Ntende JA held that the fact that there was a separation between the appellant and the deceased, the appellant was precluded from any entitlement in the estate of the deceased in accordance with Section 30 of the Succession Act.

Section 30 of the Succession Act provides:

Separation of husband and wife.

- 25 **1. No wife or husband of an intestate shall take any interest in the estate of an intestate if, at the death of the intestate, he or she was separated from the intestate as a member of the same household.**
- 30 **2. This section shall not apply where such wife or husband has been absent on an approved course of study in an educational institution.**
- 35 **3. Notwithstanding subsection (1), a court may, on application by or on behalf of such husband or wife, whether during the life or within six months after the death of the other party to the marriage, declare that**

5 subsection (1) shall not apply to the applicant.

10 4. Section 38(5) shall apply *mutatis mutandis* to an application made under subsection (3) in determining whether a declaration under this section should be made.

15 My understanding of Section 30 is that it deals with cases where although the legal relationship between an intestate deceased and his/her partner was that of wife and husband at the time of death, the parties were not living as members of the same household. I also opine that the section deals with separation as a factual issue and does not limit its application to legal separation resulting from a court order i.e. judicial separation.
20 Had the enactors of the law intended to limit the Section to parties living separately as a result of a court order, they would have specifically said so.

25 I must also state that my interpretation of Section 30 is that subsection 1 creates a general rule that a spouse who is *prima facie* separated from the other as a member of the same household is not entitled to any interest in the estate in case the other spouse dies intestate. Subsections 2-3 create exceptions to the general rule in subsection 1. The exceptions are:

- 30 (i) If the spouse has been absent on approved course of study, [Section 30 (2)]
(ii) If a court has on application by the spouse, declared that subsection 1 shall not apply. [Section 30 (3)].

35 It is on record that the appellant resided in the UK where she was employed as a psychiatric nurse. She therefore does not fall under the first exception to the general rule. Furthermore,

5 she did not apply to court for a declaration that she be
exempted from the consequences of not living in the same
household with the husband at the time of his death.
Consequently, by virtue of the provisions of **Section 30** of the
Succession Act, I am in agreement with the Court of Appeal
10 decision that the appellant cannot take any interest in the
estate of her deceased husband.

Having made a finding that the appellant cannot take interest
in the estate of the deceased, I hold that she cannot be granted
Letters of Administration.

15 I now turn to address the issue of distribution of the estate.

As rightly held by the Court of Appeal, the power to distribute
the estate is left to the personal representative(s) of a person
who dies intestate. A personal representative is defined in
Section 2 (r) of the **Succession Act** as the person appointed
20 by law to administer the estate of a deceased person. This
includes the Administrator General.

The bone of contention in the distribution of the deceased's
estate was a Muyenga building that was occupied by the 1st
respondent and her children. The appellant contended that
the building was not a residential house but a commercial
25 building and thus the 1st respondent had no right to stay in
the premises.

In resolving the aspect of the Muyenga property the Court of
Appeal referred to the trial court's order that the property be
occupied by the 1st respondent and her four minor children
who she had with the deceased and that the property would
30 be part of their share of the estate.

The appeal court then held as follows:

5 *“Even if the respondent no.1 was not to be entitled to share in
the estate of the deceased, as the natural guardian of the four
minor children of the deceased who was responsible for their
necessaries it would be logical ... to allow her and the children
accommodation out of the estate and this would be counted as
10 part of their share in the estate of the deceased. It is the duty of
the personal representative to make final distribution of the
estate and any dissatisfied party would be free to contest the
same in courts of law. The order of the trial court was subject to
the final distribution by the personal representative.”*

15 It is to be noted that the Court of Appeal’s decision dealt with
two separate issues: the right of occupancy and the right of
the children to share in and therefore own property of their
deceased father. I will first deal with the right of occupancy.

20 I observe that the decision of the High Court which in effect
was upheld by the Court of Appeal regarding occupancy of the
Muyenga property was based on **Section 26** of the Succession
Act Cap 162 which dealt with devolution of residential
holdings of an intestate’s property as follows:

25 **The residential holding normally occupied
by a person dying intestate prior to his or
her death as his or her principal residence
or owned by him or her as a principal
residential holding, including the house
chattels therein, shall be held by his or her
30 personal representative upon trust for his
or her legal heir subject to the rights of
occupation and terms and conditions set
out in the Second Schedule to this Act.**

35 I however note that in **Law & Advocacy for Women in Uganda
vs. AG, Constitutional Petitions No. 13 of 2005 and No.5
of 2006**, the Constitutional Court declared null and void,

5 Section 26 as well as Rules 1, 7, 8 and 9 of the second schedule to the Succession Act for contravening the Constitutional principle of equality between men and women.

I therefore fault the courts for citing a provision which no longer has legal effect.

10 Be that as it may, I note that Rule 3 was not included in the court's declaration. The Rule provides as follows:

15 **Where a child or children are entitled to occupation under paragraph 1 of this Schedule and in fact occupy a residential holding, the person legally entitled to the custody of the child or of the majority of the children shall either himself or herself occupy or appoint some other suitable adult person or persons to occupy the residential holding for so long as any such child or any of such children continue to do so and the person so occupying shall be subject to the duties and liabilities of an occupier hereunder; except that in default of occupation by the person entitled to custody or his or her appointee, a**
20 **magistrate may, on application of the personal representative or any person interested or on his or her own motion, appoint a person or persons to occupy as aforesaid.**
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35 It may be argued that none of the Rules in the second schedule can stand on its own because the Rules derive their existence from Section 26 and that it would follow that all the Rules (including Rule 3) are no longer on the statute book. However, a reading of Rule 3 shows that the provision does not

5 differentiate between rights accruing to male and female children. It does not discriminate against the children of an intestate deceased merely on the basis of sex. I therefore come to the conclusion that the Constitutional Court deliberately left out Rule 3 in the provisions it declared unconstitutional.

10 The decision to leave the rule on the statute books is in line with **Articles (2)** and **Article 274** of the **Constitution**. **Article (2) (2)** provides:

15 **If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that law or custom shall, to the extent of the inconsistency be void.**
(Emphasis mine)

Article 274 (1) provides:

20 **Subject to the provisions of this article, the operation of the existing law after the coming into force of this Constitution shall not be affected by the coming into force of this Constitution but the existing law shall be construed with such**
25 **modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution.**

30 The essence of **Article (2)** and **Article 274** of the **Constitution** is to enable a court faced with a partially unconstitutional law to sever and excise the unconstitutional provisions so that the remainder which complies with the Constitution can be enforced.

5 It must also be stated that inherent in Rule 3 is the principle
of "the best interest of the child and her/his welfare." This
universally accepted principle is to the effect that the best
interest of the child shall be a primary consideration in all
10 decisions taken by courts of law. It is this same principle which
I must follow in resolving the issue of the Muyenga property. I
would therefore uphold the decision of the Court of Appeal to
the effect that, even if the 1st respondent was not entitled to
share in the estate of the deceased, as the natural guardian of
15 the four minor children of the deceased who was responsible
for their necessaries, it would be logical in order to provide
necessaries of life to the minor children to allow her and the
children accommodation out of the estate as this was a
necessity of life for the minor children.

20 I now move on to the court's order that the Muyenga property
be taken as the children's share in their deceased father's
estate.

25 The Court of Appeal upheld the decision of the High Court that
the Muyenga property would be counted as part of the
children's share in the estate of the deceased. The Court of
Appeal however went on to state that the order of the trial
court was subject to the final distribution by the personal
representative.

30 In resolving this issue, I have found it pertinent to refer to
Section 25 of the Succession Act which provides that: **"All
property in an intestate estate devolves upon the personal
representative of the deceased upon trust for those
persons entitled to the property under this Act."**

35 Consequently, the final decision regarding devolution of the
said property will be determined by the personal
representative, who in this case is the Administrator General,
at the time of distribution of the estate.

5 In the result, I find that ground 3 fails.

Arising from the above, I would make the following orders:

1. The grant of the Letters of Administration to the Administrator of the estate of the late Wilberforce Noah Wamala Sendeeba is maintained.

10

2. The minor of children of the 1st respondent together with their mother are to continue occupying the Muyenga property.

15

3. The Administrator General is to file an inventory in the High Court within six (6) months from the order of the Court given herein.

20

4. The appellant having partially succeeded in this appeal, I would order that costs of the same be borne out of the estate of the deceased.

Dated at Kampala this 18th day of July 2017.

25

.....
Lillian Tibatemwa-Ekirikubinza

PROF. DR. LILLIAN TIBATEMWA-EKIRIKUBINZA.
JUSTICE OF THE SUPREME COURT

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

(Coram: Arach-Amoko, Nshimye, Opiyo-Aweri, Faith Mwendha, Tibatemwa, JJSC)

CIVIL APPEAL NO. 10 OF 2015

BETWEEN

ELIZABETH NALUMANSI WAMALA:.....APPELLANT

AND

1. JOLLY KASANDE
2. NABUKERA ESTHER :.....RESPONDENT
3. RONNIE .M. LUTAYA

(Arising from Court of Appeal, Civil Appeal No. 070 of 2014)

(Arising from High Court (Nakawa) Civil Suit No. 133 of 2012 also arising out of Probate and
Administration Cause No. 215 of 2012)

JUDGMENT OF OPIO-AWERI, JSC

I have had the benefit of reading the judgment of Hon. Lady Justice Prof. Lillian Tibatemwa-Ekirikubinza, JSC.

I agree with her reasoning and conclusion that this appeal should partially succeed. So be it.

Dated at Kampala this.....10th.....day of.....July.....2017.

JUSTICE OPIO-AWERI

JUSTICE OF THE SUPREME COURT

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

(CORAM: ARACH-AMOKO, NSHIMYE, MWANGUSYA, OPIO-AWERI ,
MWONDHA & TIBATEMWA- EKIRIKUBINZA, JJ.S.C.)

CIVIL APPEAL NO.10 OF 2015.

[Arising from Court of Appeal Civil Appeal No.070 of 2014]

[Arising from High Court (Nakawa) Civil Suit No.133 of 2012 also arising
out of Probate and Administration Cause No.215 of 2012

BETWEEN

ELIZABETH NALUMANSI WAMALA:.....:APPELLANT

AND

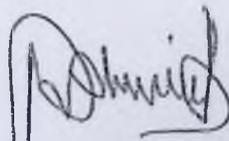
1. JOLLY KASANDE
2. NABUKERA ESTHER:.....: RESPONDENTS
3. RONNIE M. LUTAYA

JUDGMENT OF A.S. NSHIMYE. JSC.

I have had the benefit of reading the lead judgment of Hon Lady
Justice Prof L. Tibatemwa Ekirikubinza JSC.

I agree with her reasoning and conclusion. I also agree with the orders
she has proposed and the award of 2/3 costs to the appellant.

Dated at Kampala, this 10th day of July 2017.


A.S. NSHIMYE

JUSTICE OF SUPREME COURT

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

*(CORAM: Arach-Amoko, Nshimye, Opio-Aweri, Mwondha,
Tibatemwa - Ekirikubinza; JJSC)*

CIVIL APPEAL NO. 10 OF 2015

BETWEEN

ELIZABETH NALUMANSI:..... APPELLANT

AND

1. JOLLY KASENDE
2. NABUKERA ESTHER
3. RONNIE M. LUTAAYA } RESPONDENTS

{Appeal from the decision of the Court of Appeal at Kampala (Egonda-Ntende, Kakuru, Kiryabwire JJA). Dated 18th June, 2015 in Civil Appeal No. 70 of 2014}

JUDGMENT OF M.S.ARACH-AMOKO, JSC

I have had the benefit of reading in draft, the Judgment of my learned sister Hon. Justice. Prof. Lillian Tibatemwa-Ekirikubinza, JSC. I agree with her that this Appeal should partially succeed. I also agree with the Orders she has proposed.

As the majority of the members on the Coram agree, this Appeal is hereby partially allowed by a majority of 4 to 1 on the terms as proposed by the learned Justice.

Dated at Kampala this 10th day of July.....2017

.....

M.S. ARACH-AMOKO

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

[CORAM: STELLA-AMOKO, AUGUSTINE NSHIMYE, OPIO AWERI, FAITH MWONDHA, TIBATEMWA EKIRIKUBINZA, JJSC]

CIVIL APPEAL NO.010 OF 2015

ARISING FROM COURT OF APPEAL CIVIL APPEAL NO.070 OF 2014

ARISING FROM HIGH COURT (NAKAWA) CIVIL SUIT NO.133 OF 2012 AND ALSO
ARISING OUT OF PROBATE AND ADMINISTRATION CAUSE NO. 215 OF 2012

BETWEEN

ELIZABETH NALUMANSI WAMALA.....APPELLANT

AND

1. JOLLY KASANDE
2. NABUKEERA ESTHER
3. RONNIE M. LUTAAYA.....RESPONDENTS

JUDGMENT OF MWONDHA ISC

I have had the opportunity of reading in draft the judgment of my learned sister Ekirikubinza Tibatemwa JSC, I agree with her decision on grounds 1 & 2. However on ground 3 specifically about the application of section 30 of the Succession Act I differ as hereunder:-

Ground 3 as amended by counsel for the appellant states:

“The learned Justices of the Court of Appeal erred in law when they confirmed the grant of letters of administration to the Administrator General, having found at the same time that the trial judge had not followed the provisions of section 4(5) of the Administrator General’s Act “

I will start with the complaint against the Court of Appeal confirming the grant of letters of administration to the Administrator General having found that the trial judge had not followed the provisions above stated of the Administrator General’s Act.

While I agree that the learned Justices of Appeal cannot be faulted for upholding the grant of letters of administration to the Administrator General on the basis that the procedural irregularity was not a material defect going to the root of the grant, I am persuaded by the High Court decision which in my view was good position. The case of Gladys Ella Felster Omella Vs Nicholas Etieng & anor (1994) KALR 98. It was held that:

"While the widow of the intestate is the proper person who should apply for letters of administration to the estate of her deceased husband, in the instant case there were other children of the deceased not begotten from the applicant wives. This fact causes doubt as to whether the estate may be preserved for the benefit of all concerned, particularly the children begotten from other women. Therefore, a clan elder would be joined to co-administer the estate with applicants." I would amend it by stating that the widow can be co-administrator jointly with the Administrator General.

The principle I draw from this decision is that where there are children mothered by other women, it is prudent to give letters of administration to the widow and the Administrator General.

So in this case, I would grant the letters of administration to the appellant and Administrator General jointly.

On the issue of application of section 30 of the Succession Act

Section 30 of the Succession Act provides:

Separation of husband and wife

- (1) No wife or husband of an intestate shall take any interest in the estate of an intestate if, at the death of the intestate, he or she was separated from the intestate as a member of the same household.
- (2) This section shall not apply where such wife or husband has been absent on an approved course of study in an educational institution.
- (3) Notwithstanding subsection (1), a court may, on application by or on behalf of such husband or wife, whether during the life or within six months after the death of the other party to the marriage, declare that subsection (1) shall not apply to the applicant.
- (4) Section 38(5) shall apply mutatis mutandis to an application made under subsection (3) in determining whether a declaration under this section should be made.

Section 2(w) of the Succession Act defines wife in the following terms:

Wife means a person who at the time of the intestate's death was-

- (i) Validly married to the deceased according to the laws of Uganda; or
- (ii) Married to the deceased in another country by a marriage recognized as valid by any foreign law under which the marriage was celebrated

Section 2 (k) defines a husband in the same terms.

These provisions of the Succession Act were enacted in 1906 way before the coming into force of the 1995 Constitution as amended. Their application therefore, can only go as far as they conform to the dictates of the Constitution which is the Supreme law of the land. For this provision (Section 30 of the Succession Act) to apply therefore, must be construed with such modifications, qualifications and exceptions as may be necessary to bring it in conformity with the Constitution under Article 274.

Article 274 states:

Existing law

- (1) subject to the provisions of this article, the operation of the existing law after the coming into force of this constitution shall not be affected by the coming into force of this constitution but the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this constitution
- (2) for the purposes of this article, the expression "existing law" means the written and unwritten law of Uganda or any part of it as existed immediately before the coming into force of this Constitution, including any Act of Parliament or statute or statutory instrument enacted or made before that date which is to come into force on or after that date.

Section 30 of the Succession Act takes away a widow or widower's right to a share in the property of the intestate deceased spouse, we should therefore be mindful of the constitutional dictates under Article 26 of the constitution also.

Article 26 provides:-

Protection from deprivation of property

- (1) Every person has a right to own property either individually or in association with others.

- (2) No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied-
- (a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and
 - (b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for -
 - (i) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property ;
and
 - (ii) a right of access to a court of law by any person who has an interest or right over the property.

It is now settled law that at the termination of marriage, a spouse is entitled, to the extent of his or her contribution, to a share in the property. (See Julius Rwabinumi Vs Hope Bahimbisomwe Civil Appeal No.10 of 2009.

Marriage can only be terminated either through divorce, legal or voluntary separation or death of one of the parties thereto.

Definitely, section 30 of the Succession Act is not about defacto separation. If the legislators wanted it to be defacto separation, the law would have provided so expressly which is not the case under section 30 of the Succession Act.

I am aware of the case of Baguma Vs Serufosa Matembe Civil suit No.12 of 1985 and Mboijana James Vs Mboijana Prophine (1990-91) HCB 10 which applied section 30 of the Succession Act peddling the intention of the legislation which was enacted in 1906. At that time, the legislature was addressing the issue of not letting a separated spouse benefit from his or her intestate spouse's estate. These cases considered separation to be questions of fact not law. For reasons I will give later, I don't share that view. JK

But even if I were to have the same view which is not the case, those cases are not applicable to this case for two reasons: - (1) They were adjudicated before the enactment of the 1995 constitution as amended

(2) There was no separation whether de-facto or otherwise in the instant case. The evidence on record, not disputed is that the appellant and the intestate husband had renewed their marriage vows in 2010. This clearly shows that there were no

irreconcilable marital differences which is the other implied intention of section 30 of the Succession Act. It would be a gross mis-direction for one to conclude defacto separation between the couple.

It has to be noted that section 30 of the Succession Act has to be understood within the context of the period in which the same was enacted. It was passed at the beginning of the 19th century with many underlying assumptions based on inequality in gender because of cultural beliefs and customs. These cultural beliefs and customs favoured men to a very large extent. And it was men (husbands) who used to own property not women or wives (see Article in the Yale Human Rights and Development Journal 4(I) : 171 -187 (2014) women own less than 20% of the land registered in Uganda by Jacqueline Asimwe, making women's rights a reality in Uganda; Advocacy for Co-ownership by spouses.

It is not by accident that under Article 32(2) of the 1995 constitution, laws, cultures, customs and traditions which are against the dignity, welfare or interest of women, undermines their status are prohibited by the Constitution. This is partly why Constitutional court petitions No.13 of 2005 and 05 of 2006 declared sections 26 & 27 rules 1,7,8,9 of the second schedule of the Succession Act inconsistent with and in contravention of Articles 21(1)(2)(3) and 31 of the Constitution.

I hasten to add that the fact that section 30 of the Succession Act was not declared null and void doesn't in the least mean that it is not unconstitutional.

According to the Black's Law Dictionary 9th Edn. at page 1487, separation entails an agreement whereby a husband and wife live apart from each other while remaining married either by mutual consent(often in a written agreement or by judicial decree.

I also find it a contradiction that one can be wife or husband legally and at the same time regarded separated legally unless if there is a legal separation recognized in law in which you cease to be a wife or husband or where there is a separation agreement. AS

So strictly speaking, the facts surrounding this case can't be construed to mean that the deceased was no longer husband to the appellant and vice versa

As already pointed out herein above, at the termination of a marriage, a spouse is entitled, to the extent of his or her contribution to a share in the estate. However, as for termination of marriage by death, the issue of property is treated differently by the Succession Act. There is a danger in property jointly acquired but registered in one

party's name belonging in its entirety to the estate of that person in whose name it is registered without regard to the other party especially when they are staying in different households at the time of death. Section 30 of the Succession Act underpins this problem

It seems to me what section 30 of the Succession Act does is to take away a surviving spouse's right to a share in the property on the simple ground that he or she was not literally staying in the same house-hold with the intestate deceased spouse. It disregards a surviving spouse's contribution which may have been monetary or indirect through provision of domestic services and provision of emotional support and comfort. Needless to Say that this spousal contribution creates an interest in the property.

This section therefore deprives a surviving spouse of his or her interest in the estate of the intestate without even providing for prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of property. I opine therefore, that this provision is not consistent with Article 26 of the Constitution of the Republic of Uganda.

It is no wonder therefore that the promulgators of the Constitution enacted Article 31(2) of the Constitution. It provides:

(2) Parliament shall make appropriate laws for the protection of the rights of widows and widowers to inherit the property of their deceased spouses and to enjoy parental rights over their children.

Parliament is yet to make that law. This 1906 Succession Act is clearly unprotective of the rights of widows and widowers to inherit the property of their deceased spouses. It actually takes them away on grounds of house-hold separation. Going by the letter and spirit of Article 31(2) of the Constitution, Parliament is to make laws with a specific purpose of protecting the rights of widows and widowers to inherit the property of their deceased spouses.

However, as we wait for that time, I find Article 26 sufficient refuge for widows and widowers who may suffer being compulsorily deprived of property by law (Succession Act) without prompt payment of fair and adequate compensation.

The constitution of Uganda is the supreme law, and any law that is inconsistent with it, is void to the extent of the inconsistency vide Article 2 of the Constitution.

Article 2 provides:-

Supremacy of the constitution.

- (1) This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda
- (2) If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void.

It is very clear to me that section 30 of the Succession Act is inconsistent with the constitution and is null and void. It is against the spirit of Article 26 and Article 31(1) of the Constitution about family rights.

In *Osotraco Vs Attorney General HCCS No. 1380 of 1986*, while clarifying on Article 137(5) and 274 of the Constitution, High Court presided over by the Honourable Justice FMS Egonda Ntende as he then was stated;

"I am aware that under article 137(5) of the Constitution if any question arises as to the interpretation of the Constitution in a court of law, (which includes this Court), the court may, if it is of the opinion that the question involves a substantial question of law refer the question to the Constitutional Court for decision in accordance with clause (1) of article 137. It is the constitutional court to determine any question with regard to interpretation of the Constitution. But where the question is simply the construing of existing law with such modifications, adaptations, qualifications and exceptions as to bring such law into conformity with the constitution, in my view, this may be determined by the Court before which such question arises"

This reasoning was approved by the Court of Appeal in *Attorney General Vs Osotraco Ltd Civil Appeal No. 32 of 2002*. I equally concur with this reasoning. The questions before Court are whether the appellant can or cannot take any interest in the estate of her deceased husband and whether the existing law, in terms of the proviso to section 30 of the Succession Act, is in conformity with the Constitution of Uganda and if not, whether it may be construed in such a manner as to bring it in conformity with the Constitution of Uganda. As in the *Osotraco* case (*Supra*), the task before us is not to interpret the Constitution but to subject the 1906 Succession Act to the Constitution, and if necessary comply with Article 274 of the Constitution and construe the Succession

Act with such modifications, adaptations, qualifications and exceptions, so as to bring it into conformity with the Constitution.

As hi-lighted herein above, section 30 of the Succession Act apparently negates a surviving spouse's interest in the deceased's property and this is inconsistent with Article 31 (I) of the Constitution. I would therefore construe it in such a manner and declare it null and void.

I would conclude this matter by stating that the widow in this case, the appellant, has an interest in the estate of the deceased, to the extent of her contribution and is entitled to share the property accordingly.

I would allow the appeal and the letters of administration granted to the appellant and the Administrator General jointly.

Dated this.....*10th*.....day of.....*July*.....2017

Mwondha

.....
MWONDHA
JUSTICE OF THE SUPREME COURT