THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

HIGH COURT CIVIL APPEAL NO. 017 OF 2023

(ARISING FROM CIVIL SUIT NO. 021 OF 2021 IN KISORO GRADE 1 MAGISTRATE)

1. NGUGE RICHARD
2. KICONCO ALLEN
3. ATUHEIRE ALEX
4. AINEMBABAZI BOSCO::APPELLANTS

VERSUS

1. TUMUSHIIME SAM
2. NKURUNZIZA KENNETH ::::::::::::::::::::::::::::::::::::::RESPONDENTS

BEFORE: HON. JUSTICE SSEMOGERERE, KAROLI LWANGA

JUDGEMENT

Brief Facts:

This is an appeal from the decision of the learned Grade I Magistrate Kisoro, His Worship Vueni Raphael, as he then was. In the trial court, respondents brought an action against the appellants for the following declarations:

1. That land and houses thereon at Kisoro Hill cell, Central Ward, Central Division, Kisoro Municipality in Kisoro district constitute the ancestral home of the respondents, to be used to the exclusion of the appellants.
2. An order issue directing the appellants to vacate the suit land and the house thereon and occupy their respective homesteads which belonged to their respective mothers and the shares they got from their father, the late Nvugye "Ngugi" Barijane.

3. An order of eviction against the appellants from the suit land.
4. A permanent injunction against the appellants stopping them from further trespass.

The same action prayed for general damages and costs of the suit.

Each of the parties are lineal descendants of the late "Nguge" who allegedly died intestate without making a will. He was in a polygamous relationship with 2 of the 3 mothers of the respective parties. Respondents share the same mother, Kyempaye Florence. 2nd, 3rd and 4th Appellants share the same mother, the Ms. Tumwebaze Perpetua. 1st Appellant's mother is the late Angelica Nyirazibonye.

Each of the wives, had a separate homestead. Respondents' and their mother lived at Kisoro Hill Cell, Central Ward, Central Division, Kisoro Municipality. 2nd, 3rd and 4th Appellants and their mother lived at a place called Russia, also in Kisoro Hill Cell, Central Ward, Central Division, Kisoro Municipality. 1st Appellant was born out of wedlock and his homestead or details of where he was raised are not known.

The facts leading to the dispute are as follows: After the death of Nguge, the patriarch of the family, the mother of the 2nd, 3rd and 4th Appellants remarried and abandoned their home in Russia, Kisoro while they were still young. The family by consensus agreed that they move to the home occupied by the respondents and their mother until they attained majority age.

The respondents allege their father died intestate, while the appellants allege their father died testate, and that the deceased and appellants signed and thumb printed on his will. That the instructions in the will were followed in a subsequent distribution and that the suit land belonged to their mother, Tumwebaze Perpetua and her children. The respondents rejected the existence of any valid will.

At trial, three issues were framed:

1. Whether or not the late Nguge died testate/having made a valid will?

2. Whether or not the suit land and the house thereon form the homestead of the respondents.
3. What remedies are available to the parties.

The learned Trial Magistrate dismissed the will, for failure by the testator, the late Nguge to sign on all pages of the will. He made a finding of fact that not all testators were present at the time, the testator made the alleged will. Some of the witnesses did not see the testator sign the will if at all. The testimony at trial was to the effect that the testator was illiterate, and the provisions of the **Illiterates Protection Act, Cap 288** (the "**Illiterates Protection Act**") applied. The learned Trial Magistrate found the alleged will to be in non-compliance with the provisions of the said act and ruled that the deceased did not leave behind a valid will.

He further dismissed the appellants' claims of ownership of the suit land. He upheld the respondents' claims at page 10 of his judgment to the effect that the suit land was acquired by the respondents' father and their mother, and that they had developed and built thereon houses. The respondents' claims were upheld, and reliefs sought were awarded hence this appeal.

Memorandum of Appeal:

Appellants listed three grounds of appeal in their memorandum. These are:

1. That the learned Trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record thereby arriving at a wrong decision, that the suit land belongs to the Respondent.
2. That the learned Trial Magistrate erred in law and fact when he ignored the will of the Appellants' late father Nvuge Barijane, "Ngugi".
3. That the learned Trial Magistrate erred in law and fact when he ordered an eviction of the Appellants from their late father's property including the residential holding which occasioned a miscarriage of justice to the appellants.

Appellants prayed that the appeal be allowed and the judgment and decree of the learned Magistrate Grade I dated October 17th, 2022 be set aside; that the suit land be declared to form part of the estate of the late Nvugye Barijane and the same be administered in accordance with the will of the deceased. Lastly, they prayed for costs of the appeal and the courts below.

Representation:

This appeal was argued by M/S Tugume Byensi & Co. Advocates for the appellants. M/S Lawtons Advocates, argued the appeal on behalf of the respondents. At an oral hearing held on June 11, 2025 before this honourable court, parties agreed to proceed by way of written submissions, with which they have accordingly complied.

Discussion and Analysis:

This appeal turns on points of law articulated by the parties in their arguments.

This is an interesting appeal, that emphasizes the rationale established by this court in **Kemitare & another v Kanyaruju, Civil Appeal No. 26 of 2013, 2025 UGHC 316,** the importance of determining ownership of the land, prior to discussion and analysis of other issues. Appellant appear to concede this rationale, when they stated at page 2 of their submissions, praying this court to declare that the suit land formed part of the estate of the late Nvugye "Nguge" Barijana and that the same be administered in accordance with the **Succession Act, Cap 268**, (the **"Succession Act"**)

Appellant submitted first on the second ground of appeal.

> **That the learned Trial Magistrate erred in law and fact when he ignored the will of the Appellant's late father Nvugye Barijane**

In support of this ground, the appellants stated that the minimum attestation requirements, requiring two witnesses to a will, under **Section 47(1)(c) of the Succession Act,** did not apply to wills executed before May 31st, 2022. In support of this proposition, they cited **Section 337(5) of the Succession Act**.

The respective provisions state as follows. Section 47(1)(c) provides as follows:

> "the will shall be attested by two or more witnesses, each of whom must have seen the testator or testatrix sign or affix his or her mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator or testatrix, or have received from the testator or testatrix a personal acknowledgment of his or her signature or mark, or of the signature of that other person; and each of the witnesses must in the presence of the testator or testatrix, sign and write his or her name and address on every page of the will except that it shall not be necessary that more than one witness be present at the same time."

Further, **Section 337(5) of the Succession Act** provides as follows:

> "Section 47(1)(c) shall not apply to a will made before the 31st day of May, 2022."

In short, the appellant argued, the will complied with the provisions of **Section 47 of the Succession Act**, prior to the amendment, as stated above.

The appellants contested the learned Trial Magistrate's strict application of Sections 2 and 3 of the **Illiterates Protection Act**, which require attestation. **The Illiterates Protection Act** in Uganda is designed to safeguard individuals who cannot read or understand a document from being exploited or misled when signing it. It mandates that everyone writing a document must clearly identify themselves as the author, and state they explained the documents' contents to the illiterate individual.

The long title to the **Illiterates Protection Act, (the "Act")** provides:

> "An act for the protection of illiterate persons."

Section 1(b) of the Act defines an illiterate person as:

> "illiterate" means in relation to any document, a person who is unable to read and understand the script or language in which the document is written or printed."

Section 2 of the Act, provides as follows:

> "No person shall write the name of an illiterate by way of signature to any document **unless** such illiterate shall have first appended his or her mark to it, and any person who so writes the name of an illiterate shall also write on the document his or her own true and full name

and address as a witness, and his or her doing shall imply a statement that he or she wrote the name of the illiterate by way of signature after the illiterate had appended his or her mark, the document was read over and explained to the illiterate." [Emphasis mine]

The statutory scheme requires the illiterate to append his signature, then the person attesting the document writes his or her own signature and adds his or her own address.

Section 3 of the Act, provides as follows:

"Any person who shall write any document for at the request, on behalf or in the name of any illiterate shall also write on the document his or her own true and full name as the writer of the document and his or her true address, and his or her doing shall imply a statement that she was instructed to write the document by the person for whom the person to have been written and that it fully and correctly represents his or her instructions and was read over and explained to him or her."

Appellants concede that the will did not conform to the requirements of the Act, but argue against strict application of Section 2, which requires attestation and Section 3, which requires certification. Lastly, the appellant argued that these deficiencies were a curable procedural defect and cited **Article 126(2)(e) of the Constitution** in support. Appellants cited the Supreme Court's decision in **Utex Industries v Attorney General Supreme Court Application No. 52 of 1995,** where court held:

"Regarding Article 126(2)(e), I am not persuaded the Constituent Assembly Delegates intended to wipe out the rules of procedure of our courts by enacting Article 126(2)(e). Paragraph (e) contains a caution against undue regard to technicalities. The Article appears to be a reflection of the saying that rules of procedure are handmaidens of justice, meaning they should be applied with due regards to the circumstances of each case. [Emphasis mine].

Respondents agreed with the finding of the learned Trial Magistrate. They agreed with his evaluation of the evidence which found the respondents

showed that the suit land was owned by their late mother; and there is no way the late Ngugi would have disposed of the land by the alleged will.

Respondents raised a second objection of law, to the effect, that the alleged will has void bequests in respect of witnesses who were beneficiaries named in the will in contravention of **Section 51(1) of the Succession Act**. These witnesses were Ndagije Moses, Ndagije Isah, the late Mugyema, Solomana Daniel, Dusabwe Mulangwe, **Perpetua, Sam, Kenneth** and Richard who all received pieces of land. **Section 51(1) of the Succession Act** provides as follows:

> "A will shall not be considered as insufficiently attested by any reason of any benefit given by the will either by way of bequest or by way of appointment, to any person attesting it, or to his or her spouse, but the bequest shall be void so far as it concerns the person attesting, or the spouse of that person or any person claiming under them." [Emphasis mine].

This provision voided any bequests made to the respondents and their mother, but would otherwise have upheld the validity of the will. It is not clear how this finding would help the case for the respondents.

Lastly, the respondents agreed with the application of **Section 3 of the Illiterates Protection Act**, whose purpose was to protect illiterate persons like the deceased.

This ground, in my view, at resolution, disposes of the entire appeal. The learned Trial Magistrate, however, should have advised himself, correctly, that upon invalidating the alleged will/testamentary disposition by the deceased under **Sections 2 and 3 of the Illiterates Protection Act**, should have made a specific finding that **Section 20 of the Succession Act** applied. **Section 20 of the Succession Act** provides as follows:

> "A person dies intestate in respect of all property which has not been disposed of by a valid testamentary disposition."

With the alleged will disabled, by a finding of law under the **Illiterates Protection Act**, the laws governing intestacy would apply. Devolution of property of an intestate is governed by **Section 21 of the Succession Act**.

The inadmissibility of a document where **s.3 of the Illiterates Act** is contravened, is settled law in Uganda. In **Kasaala Growers Cooperative Society v Kakooza and Another, Supreme Court Civil Appeal No. 19 of 2010,** the Supreme Court held that;

> "Section 3 of the Illiterate Protection Act (supra), enjoins any person who writes a document for or at the request or on behalf of an illiterate person to write in the jurat of the said document his/her true name and full address. That this shall imply that he/she was instructed to write the document by the person for whom it purports to have been written and it fully and correctly represents his/her instructions and to state therein that it was read over and explained to him or her who appeared to have understood it."

Further, the Supreme Court stated the fate of impugned documents which did not meet the requirements of the law.

> "The illiterate person cannot own the contents of the documents when it is not shown that they were explained to him or her and that he understood them. Further, that the Act was intended to protect illiterate persons and the provision is couched in mandatory terms, and failure to comply with the requirement of the Act renders the document inadmissible." [Emphasis mine].

This is the correct position of the law in Uganda, as recently elaborated in the decision of my sister, Busingye Immaculate, J., in **Harriet Nababiito Nakato v David Lukanga Civil Suit No. 618 of 2018, at pages 7-9,** reported at **2024 UGHC 225**. I find no basis to disagree with this specific finding of the learned Trial Magistrate.

Section 22(1) of the Succession Act would apply to the alleged principal residential holding, protecting the surviving widow, who in this case was Kyempaye Florence. Tumwebaze Perpetua, would not benefit from **Section 22(1)** because she remarried after the death of her husband.

> "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 in the principal residential holding, shall be held by his or her personal representative upon trust for his or her spouse and lineal descendants subject to the rights of occupation and terms and conditions set out in Schedule 3 to this Act."

The respondents' and the appellant's share of this property would come into play after the death of the widow, Kyempaye Florence under **Section 22(3) of the Succession Act**, which provides as follows:

> "Upon the death of a surviving spouse, the principal residential holding and any other residential holding shall devolve to the lineal descendants equally, who shall occupy it subject to terms and conditions set out in Schedule 3 to this Act."

The orders of the learned Trial Magistrate are as a result; void, as they are made outside the legal framework of the Succession Act. In respect of the estate of an intestate, no claim to property can be made without grant of a letters of administration under **Section 187 of the Succession Act**, which provides as follows:

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

The learned Trial Magistrate applied the wrong procedure, entertaining the suit as an ordinary civil suit, rather than an Administration Cause, as it dealt with questions of validity of the will, and distribution of effects of a deceased person. The **Succession Act**, has guidance on its mandatory application in all cases in **Section 1 of the Succession Act** which provides as follows:

> "Except as provided by this Act, or by any other law for the time being in force, the provisions in this Act shall constitute the law of Uganda applicable to all cases of intestate or testamentary succession."

The Succession Act is the specific law applicable to such matters. In order to resolve any doubt, I make the following additional finding to resolve this issue, the **Illiterates Protection Act**, aids in construction of the will, and determination of its validity under the **Succession Act**. There is no specific inconsistency between the two Acts, as the **Illiterates Protection Act** exists for a specific purpose, protection of the illiterates, while the Succession Act applies to all cases of intestate or testamentary succession.

Comment:

This is an unfortunate decision where the learned Trial Magistrate correctly framed the issue at hand; the validity of the will, admitted oral evidence as to the validity of the will, a recognized exception to exclusion of oral by

documentary evidence under Section 91 of the Evidence Act, Cap 8, then failed to apply the correct law to dispose the issue in dispute.

Second, the learned Trial Magistrate deprived the litigants of the elaborate legal framework governing intestate succession after striking down the will. The issue of ownership of any portion of an estate of the deceased was not given the primacy it deserved. This alone caused a miscarriage of justice, see the decision of this court in **Nyiranzwa Frida v Kinganis Vanis Civil Appeal No. 1 of 2024.**

This is a case where the correct interpretation of Article 126(2)(e) of the Constitution would find, by the court applying the correct procedure and the right law would produce substantive justice, rather than the opposite as argued by the appellants.

The respondents prevailed on the triable issue, but title to the suit property could not pass, absent grant of letters of administration to any of the parties in the suit.

Findings and Conclusion:

This appeal succeeds.

All orders of the learned Trial Magistrate are immediately vacated.

The trial court erred in law, and the following order is made under **Section 80(1)(b) and (c) of the Civil Procedure Act**. The Civil Suit is remanded to the Chief Magistrates' Court to determine the monetary value of the estate of the deceased, and allow parties to complete necessary formalities to commence an administration cause under the applicable law and in the correct court under the Succession Act.

Each party to bear its own costs in this court and the court below.

I SO ORDER

DATED AT KABALE THIS 8TH DAY OF JULY 2025.

SSEMOGERERE, KAROLI LWANGA
JUDGE