THE REPUBLIC OF UGANDA

IN THE HIGH COURTOF UGANDA AT KAMPALA

LAND DIVISION

CIVIL APPEAL NO. 0020 OF 2023.

(Arising from Makindye Court Chief Magistrate's Court Civil Suit No. 712 of 2005)

1. **LILLIAN NANTONGO::::::::::::::::::::::APPELLANTS**
2. **ABDALATIFF MAKUBUYA**
3. **SEMEO SENTONGO**

VERSUS

1. **KYOBE GERALD**
2. **NAKKU GETRUDE::::::::::::::::::::::::::::RESPONDENTS**

BEFORE HON. JUSTICE TADEO ASIIMWE

JUDGEMENT

BACKGROUND

This appeal arises from the decision of the Chief Magistrate, Her Worship Basemera Sarah Anne in Civil Suit No. 712 of 2005 delivered on 17th January 2023 at Makindye Court.

In the original suit, the respondents herein were the plaintiff who sued the Appellants seeking for declaration that the suit land belonged to the estate of late Musota Musoke Paul, a permanent injunction restraining Aisha Nalumansi and Serugo Moses from claiming ownership, use and

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development of the suit land, recovery of general damages, mesne profits and the costs of the suit. The trial Court decided the matter in favor of the respondent hence this Appeal with the following grounds; -

1. That the Trial Court erred in law and fact when it proceeded with the hearing and determination of the suit and the property rights of the late Nalumansi in the suit land after her death, in absence of any legal representative to represent her estate, thereby occasioning a miscarriage of justice.

2. That the Trial Court erred in law and fact when she declined to admit in evidence and rely on the crucial documents relating to the ownership of the suit property, thereby reaching a wrong decision that the suit land did not belong to the late Aisha Nalumansi, thus occasioning a miscarriage of justice to wit a deed of donation by Paulo Musoke to Ntabadde dated 27/4/1994 and land purchase agreement between Namwandu Ntabadde and Aisha Nalumansi dated 10/4/1998.

3. That the Trial Court failed to properly evaluate evidence on record, thereby coming to a wrong decision that the suit land formed part of the estate of the late Musoke Musota Paul.

4. That the trial Court erred in law and fact when it granted declaration and orders sought in the plaint without any supporting evidence.

At the hearing of this Appeal on 8th April 2024, the Appellants were represented by Counsel Ambrose Tibyasa while the respondents by Counsel Ssegamwnge Hadson. Both Counsel made written submissions which I will consider in this Judgment.

Duty of the 1st Appellate Court.

This being a first appeal, this court is under an obligation 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. This duty is well explained in *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; [2004] KALR 236 thus;

"It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although 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."

This court therefore is enjoined to weigh the conflicting evidence and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law and remembering to make due allowance for the fact that it has neither seen nor heard the witnesses. The appellate Court is confined to the evidence on record. However, the appellate 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 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 demeanor of a witness is inconsistent with the evidence in the case generally.

RESOLUTION

Both Counsel argued the 4 grounds separately, I will resolve ground one alone and grounds 2,3& 4 together since they are related

GROUND 1: *That the Trial Court erred in law and fact when it proceeded with the hearing and determination of the suit and the property rights of the late Nalumansi in the suit land after her death, in absence of any legal representative to represent her estate, thereby occasioning a miscarriage of justice.*

On this ground counsel for the appellant relied on order 24 rule 4 CPR arguing for the need to substitute a defendant who had died during proceedings with a legal representative. That a legal representative of the deceased must be appointed before proceedings continue.

Counsel for the respondent referred this court to Miscellaneous Application No. 9 of 2011 where in the appellants/ defendants substituted the late Aisha Nalumansi as defendants.

In have perused the record in Miscellaneous Application no 9 of 2011. It is clear that on 23rd September 2011, the application was allowed and the appellants were added as parties to the suit substituting the deceased.

I therefore find no merit in ground one of the Appeal and the same here by fails.

GROUND 2. *That the Trial Court erred in law and fact when she declined to admit in evidence and rely on the crucial documents relating to the ownership of the suit property, thereby reaching a wrong decision that the suit land did not belong to the late Aisha Nalumansi, thus occasioning a miscarriage of justice to wit a deed of donation by Paulo Musoke to Ntabadde dated 27/4/1994 and land purchase agreement between Namwandu Ntabadde and Aisha Nalumansi dated 10/4/1998.*

GROUND 3. *That the Trial Court failed to properly evaluate evidence on record, thereby coming to a wrong decision that the suit land formed part of the estate of the late Musoke Musota Paul.*

GROUND 4. *That the trial Court erred in law and fact when it granted declaration and orders sought in the plaint without any supporting evidence.*

From the evidence on the lower court record, the gist of this mater in the lower court was/is a gift intervivos versus estate property. The respondent's/plaintiffs claim in the lower court is that that the suit land belonged to their father, the late Musoke Musota Paul before his demise on 27th April 1997. That the sale of the suit property by the widow without letters of administration was null and void. On the other hand, the appellant's /defendants response was that they bought the suit land from Aisha Nalumansi who had been given the suit land through a deed which she showed to him.

At the end of the trial, Court did not find satisfactory evidence of a gift intervivos. I shall revisit the law regarding a gift intervivos an estate property while re-evaluating the evidence on record.

The law is that a gift inter vivos takes effect when three situations are fulfilled, that is, there is intention to give the gift, the donor must deliver the property, and the donee must accept the gift.

The question to ask in this case is whether, from the adduced evidence on record, and on applying the relevant laws, there was intention on the part to give the gift intervivos, whether he actually delivered and whether it was accepted.

In determining whether the deceased created a gift inter vivos in respect of the disputed land, court has to ascertain the intention of the donor, and then examine whether the formal requirements of the method of

disposition which he attempted to make have been satisfied. Mellows in The Law of Succession 5th Edition, Butterworth 1977 pages 9 to 10 stated as follows regarding gifts intervivos: -

"Various formalities are necessary for gifts inter vivos. Thus a gift of land must be by deed; a gift of land where the title is registered at the Land Registry must be effected by an instrument of transfer which is registered;"

In this case, evidence on record by PW1 and PW2 is that the suit land belonged to respondents' father who died in 1997 leaving his two widows. The defendants further testified that in his will, their father gave one of the widows the suit land to stay with instructions not to sale. However, the said will was not produced in court to prove the averments there to. In cross examination they confirmed that in the suit land the widow had a one bedroomed house where he stayed with her friend but being family land he could not sell it. They also confirmed that in the distribution of the late Musoke Musota Paul's estate as per the inventory, they distributed the suit land to another person but did not give anything to the widow. However, PW1 had earlier stated in her testimony that during his life time his father had stated that the widow should not be chased from the land but she should not sale family land as well.

On the other hand, DW1 testified that her mother Aisha Nalumansi purchased the suit land in her presence after being given documents of

ownership to wit a gift deed and agreements. The said DW1 was not a witness on the agreement of purchase and that she does not know the persons who appear in the agreement of purchase.

Unfortunately, from the reading of the lower court record, the gift deed and the agreement of purchase were exhibited as identification documents. The chief magistrate correctly stated that the said identification documents do not have any evidential value. And indeed there was no corroborative evidence to provide the same evidential value. The only witness who tried was a daughter of the third party that could never explain or support the gift deed which was exhibited as a document for identification.

Giving of gifts is a physical symbol of a personal relationship and an expression of social ties that bring individuals together, if the relationship between the donor and the donee at the time of giving is personal, then it is more likely to be a gift **(see Muyingo John Paul v. Abasi Lugemwa and two others, H.C. Civil Suit N0. 24 of 2013).** *A gift intervivos of land may be established by evidence of exclusive occupation and user thereof by the donee during the lifetime of the donor. A gift is perfected and becomes operative upon its acceptance by the donee and such exclusive occupation and user may suffice as evidence of the gift (Ovoya Poli v. Wakunga Charles, H. C. Civil Appeal No. 0013 of 2014).*

In this case no evidence was led to show how long the said Ntabadde Gaudensia, a widow of the deceased stayed on the suit land before the death of her husband/lover and under what terms she came on the land.

The only evidence that was led was that of the appellants that she was granted user rights which do not amount to a gift intervivos.

In the absence of evidence to the contrary, I find that the trial magistrate rightly found that the suit property was not a gift intervivos to the late Ntabadde Gaudensia and belonged to the estate of the late Musoke, Musota Paul. Therefore, the sale between Ntabadde Gaudensia and Aisha Nalumansi cannot be said to be lawful.

As regards the claim for general damages, the Appellants Counsel faulted the trial magistrate for awarding general damages of Ugx. 10,000,000/= (Ten million) when it was not prayed for and not backed by the documents. I wish to state that grant of general damages is based on the discretion of Court to put a party in his or her earlier position. Court can only interfere with the award if it's not backed by evidence or found to be excessive in the circumstances.

In this case the learned trial magistrate considered the evidence of nonuse of land since 2005 as a basis for the grant of general damages at Shs. 10,000,000/= (Ten million). I do not find this amount to be excessive so as to interfere with her discretion.

This award of general damages is upheld.

In conclusion, I find no merit in the 2nd, 3rd and 4th grounds of this Appeal and the same fails.

Accordingly, all the grounds of Appeal having failed, the decision of the trial chief magistrate is here by upheld. Costs of this appeal are awarded to the respondents.

I so order.

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TADEO ASIIMWE

JUDGE

22/4/2024.