THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL HOLDEN AT KAMPALA

Coram: Kiryabwire, Musoke & Mulyagonja, JJA

CIVIL APPEAL NO. 02 OF 2014

NASSOZI M. KIZITO :: APPELANT

VERSUS

MUSA NSUBUGA :: RESPONDENT

(Appeal from the decision of Mwangusya, J. (as he then was) dated 15th February 2013, in High Court (Civil Division) Civil Suit No. 347 of 2005)

JUDGMENT OF IRENE MULYAGONJA, JA

Introduction

This is an appeal from the decision of the High Court in which the trial judge gave judgment in favour of the respondent and ordered the appellant and the co-defendant, her deceased husband Dr Yusuf Kizito, or the administrator of his estate to transfer to the respondent the land that they donated to him in writing. He further issued a permanent injunction restraining the appellant and the Administrator of the estate of the 1st defendant from interfering with or interrupting the respondent's use and enjoyment of the land, and that they pay to him UGX 5,000,000, being general damages for inconvenience caused, and the costs of the suit.

Background

The facts, as I understood them from the record of appeal, were that on 3rd January 2001, the appellant and her husband Associate Professor/Dr Yusuf Kizito, the 1st defendant in the suit, donated a piece of land

measuring ¼ of an acre to the respondent. The ¼ acre was part of land registered as Kyadondo Block 197 Plot 330 at Kitetika. Both husband and wife signed the agreement or deed which was in *Luganda*, on the same day. The signatures of the appellant and her deceased husband were witnessed by Dr Fred Bugenyi on 3rd January 2001 and Dr A. Kezimbira Muyingo on 4th January 2001. The respondent signed the document on 7th January 2001. There is no indication that there was a witness when he signed. Dr Kizito admitted that his wife and he signed the deed and that the land was given to the respondent out of *"mutual love."*

The respondent claims that he immediately took possession of the land and began to develop it but the appellant interrupted his use thereof by uprooting his fence and destroying his bricks. Further that the appellant and her husband refused to sign a transfer in his favour in respect of the land. He thus filed a suit against them to effect the transfer.

Before the hearing of the suit could be concluded, the 1st defendant, Dr Yusuf Kizito, passed away. He was substituted by his brother, Henry Lwanga, who obtained letters of administration on 9th December 2009 for purposes of representing the deceased in the suit. He appeared in court and gave further evidence in addition to that which was given by the deceased, but the appellant did not do so after the death of her husband. She therefore did not testify.

The trial judge decided to proceed with the suit in her absence. He considered the testimony of the respondent and his one witness, that of the deceased and the administrator to his estate and gave judgment in favour of the respondent. The appellant who was the second defendant in the suit now appeals against this decision on the following six (6) grounds of appeal:

1. The learned Judge of the High Court erred in law and fact when he improperly evaluated the evidence leading to the conclusion that the defendants' refusal to sign transfer forms in favour of the respondent was in breach of a contract.
2. The learned judge of the High Court erred in law when he failed to properly apply the principles relating to contracts of a domestic nature and also gifts, thereby arriving at a wrong decision.
3. The learned Judge of the High Court erred in law and in fact when he entertained Lwanga Henry's evidence on behalf of the 1st defendant thereby arriving at a wrong decision.
4. The learned Judge of the High Court erred in law and in fact when he ruled that the case should proceed in the absence of the second defendant thus leading to a miscarriage of justice.
5. The learned Judge of the High Court erred in law and fact when he failed to visit the *locus in quo* and in so doing failed to appreciate the intrinsic changes describing the exact location of the suit property thereby arriving at a wrong decision.
6. The learned Judge of the High Court erred in law and fact when he disregarded the handwriting expert's findings challenging the respondent's evidence presented in proof of consideration thereby reaching a wrong decision.

The appellant proposed that the judgment and orders of the trial court be set aside and the appeal be allowed with costs. The respondent opposed the appeal.

Representation

At the hearing of the appeal the appellant was represented by learned counsel, Mr Herbert Musinguzi. Mr Sebanja Abubaker, learned counsel,

represented the respondent. The parties prayed that they be allowed to rely on written submissions and their prayers were granted.

The appellant filed written submissions on 29th July 2020 to which the respondent filed a reply on 3rd August 2020. The appellant filed a rejoinder on 19th August 2020. The appellant's counsel addressed the grounds of appeal chronologically and the respondent's counsel responded in similar fashion.

Duty of the Court

The duty of this court as a first appellate court, is stated in rule 30(1) of the Rules of this court (**SI 13-10**). It is to reappraise the whole evidence adduced before the trial court and reach its own conclusions. But in so doing the court should be cautious that it did not observe the witnesses testify. **(**See **Fr Narsensio Begumisa & 3 Others v. Eric Tibebaga, SCCA No. 17 of 2002.)**

Disposal of the Appeal

Pursuant to rule 30 (1) of the Rules of Court, I proceeded to reappraise the whole of the evidence on the record with regard to the grievances that the appellant set out in her Memorandum of Appeal. The submissions of both counsel are summarised immediately before the disposal of related grounds of appeal.

I propose to dispose of grounds 1 and 2 together. The rest of the grounds will each be addressed separately.

Grounds 1 and 2

The appellant's grievance in ground 1 was that the trial judge did not evaluate the evidence properly which led to the erroneous decision that

the defendant's refusal to sign a transfer in favour of the respondent was in breach of contract. Related to that, in ground 2 the appellant complained that the trial judge failed to apply the principles relating to contracts of a domestic nature, as well as to gifts, which resulted in a wrong decision.

Submissions of Counsel

With regard to ground 1, counsel for the appellant argued that the land given to the respondent was a gift and that if there was any contract it was of a domestic nature. Further, that the contract or the document upon which the respondent claims to have derived his interest in the land was unenforceable. He relied on the decision in **Balfour v Balfour [1919]2 KB 571** to explain the nature of domestic contracts. He asserted that in such contracts, the parties do not intend to create legal relations and so they are not bound by them. He explained that some of the elements of a valid contract are lacking in such contracts, for example consideration and the intention to create legal relations.

Counsel went on to submit that the document that the respondent relied upon to assert that there was an agreement was prepared in his absence and without his knowledge. And that from this, it should be inferred that the appellant and her husband gave the land to the respondent as a gift with no intention to create legal relations at the time of its preparation. He referred to the dates that were stated in the document which showed that the respondent only came to know about the document four days after it was prepared by the author. That the spirit in which the piece of land was given to the respondent was that of a big brother and his wife giving a gift to a younger brother. That it was in that same spirit that they asked him to occupy a different piece of land than that described in the agreement to

donate land. Further that this was even before the respondent began to carry out any developments on the land.

The appellant's counsel went on to submit that the trial judge erred when he concluded that there was a valid contract when in fact the alleged contract lacked consideration. He referred to section 2 of the Contracts Act, 2010 which provides for the definition of consideration and contended that the contested document did not disclose any form of consideration. That instead it showed love and affection which was consistent with the testimony of the 1st defendant at the trial. That in addition, the trial judge did not consider the conduct of the respondent who tried to sneak a document dated 5th April 2001 into the evidence. That the document was subjected to analysis by a handwriting expert whose report was received in evidence showing that the document was not authentic. That the trial judge erred when he did not consider the report of the handwriting expert in his decision yet it was a fundamental piece of evidence to establish whether there was a valid contract or not.

Counsel referred to the decision in **Kifamunte Henry v Uganda, Supreme Court Criminal Appeal No. 10 of 1997** for the principles upon which appeals in this court are considered and invited court to reappraise this particular piece of evidence and come to its own finding on the issue.

With regard to ground 2, counsel for the appellant submitted that though the piece of land that was given to the respondent was described in the 'agreement for a donation,' when they got the certificate of title, the donors realised that the piece of land that they gave to the respondent did not exist. That this was because what was on the ground was different from what was stated in the document. And that as a result, the appellant and the deceased decided to give him another piece of land, but he did not

accept it. Counsel further submitted that as soon as the respondent filed this suit, he in effect refused the gift or offer thereof. That in the case of a contract, the respondent issued a counter offer and so did not accept the subsequent piece of land that was offered to him.

Counsel went on to explain that when a survey of land was carried out, it was found that the piece of land that was given to the respondent was not part of his clients' land comprised in Block 197 Plot 330. The question then arose as to where the piece of land that they gave to the respondent was located. Counsel then asserted that at the time the donors realised that there was an error in their gift to the respondent, the gift reverted to them. Further, that the respondent could not dictate the location of the land that was given to him; that the discretion was in the appellant and her husband to give and they opted to give him land on the other side of their plot. That as a result, the respondent filed a suit for specific performance of a contract to recover a non-existent piece of land.

The appellant's counsel went on to submit that the Contracts Act does not define a gift. However, the Transfer of Property Act, 1882 of England defined it in section 122 thereof as *"the transfer of certain existing moveable or immoveable property made voluntarily and without consideration by one person called the donor, to another, called the donee, and accepted by or on behalf of the donee."* He went on to explain that there are essentials of a gift. They are that there must be a transfer of ownership; the ownership must relate to property that is in existence; the transfer must be without consideration; it must have been made voluntarily; the donor must be a competent person; and lastly, that the transferee must accept the gift.

With regard to the existence of the gift, counsel submitted that in the instant case, it was impossible to give the gift since it was not in existence

for the donor to give away. That the first piece of land that the donors purported to give away was not within their capacity to give because they had no authority to give it away. That this lack of capacity voided the gift and so it could not be enforced. He referred court to section 17 of the Contracts Act for the doctrine of mistake to support his submissions.

In reply to the submissions in ground 1, counsel for the respondent submitted that the trial judge properly applied the principles of the law of contract when he found that the appellants were in breach of their agreement with the respondent. He explained that the mere existence of a blood relation between the parties does not of itself render a contract domestic. He relied on the decision in **Merrit v Merrit (1970) 2 All ER 760,** wherein it was held that a contract between family members can be enforceable if there is proof of the intention to be legally bound. He emphasised that there is an agreement that was denied by the appellant; that the existence of the agreement showed the intention to create legal relations when the author stated that the respondent should hurry up and demarcate his land from the rest of the parcel held by the author; and that no one had the authority to vary the donation.

Counsel relied on the decision in **Carlil v Carbolic Smoke Ball Co. (1893) 1 QB 256** and submitted that the intention to be legally bound can be construed from the wording of the agreement. He emphasised that the document in issue disclosed a commitment and an intention to create obligations that were legally binding.

With regard to the question whether there was consideration for the agreement, relying on the definition of the term in the Contracts Act, counsel submitted that the respondent prepared a coffee plantation and in exchange for his labour, he was given a piece of land. He pointed out

that this evidence was corroborated by Henry Lwanga, the legal representative of the deceased. He concluded his submissions on this ground with the observation that the appellant did not testify in court or take any steps to rebut the evidence and testimony of Henry Lwanga.

With regard to ground 2, the respondent's counsel submitted that the trial judge properly evaluated the evidence and concluded that the agreement conferred rights of ownership upon the respondent. And that therefore, the appellant's refusal to sign a transfer in his favour was in breach of contract.

Counsel further referred to the observation of the trial judge that while the land in issue was transferred to the appellant and her husband in 31st October 2000, the agreement donating the land in dispute was executed on 3rd January 2001. That this meant that by the time the donors executed the agreement, they knew the exact location of the land that they donated to the respondent. And that as a result, the refusal to transfer it to him was in breach of contract. He prayed that ground 2 be resolved in favour of the respondent.

Resolution of Grounds 1 and 2

The submissions of both counsel with regard to grounds 1 and 2 raise two questions for determination: i) whether **ExhP1**, the document that was the basis of the respondent's claim to the land in dispute amounted to a contract to dispose of land, whether it be a domestic or commercial one, and ii) if not, whether it amounted to a deed of gift.

The trial judge resolved this impasse in his judgment, at page 6 (page 60 of the record of appeal) when he observed and held as follows:

"After admitting the fact that the defendants gave the plaintiff a plot of land measuring 0.25 of an acre there was a contention as to whether or not it was in consideration of work the plaintiff did for the defendants, or for love and affection as claimed by the defendants. My observations on this issue is that from the testimony of the plaintiff supported by that of Henry Lwanga the defendants gave the plaintiff the piece of land in consideration for work done by the plaintiff for the defendants. Henry Lwanga an elder brother of both the plaintiff and the deceased defendant was aware of the work the plaintiff did for the defendants and the circumstances under which the plaintiff was given the piece of land and I believed his testimony. I considered him an honest witness who in the absence of the 2nd defendant wants to see an end to this dispute. My second observation is that whether it was in consideration of work done or for love and affection the plaintiff was given the piece of land irrespective of the consideration. This is the land he is claiming."

The testimony of the deceased, Dr. Kizito, at pages 29 to 34 of the record of appeal, was to the effect that the land in dispute was given to the respondent on the basis of *'mutual love and affection'*. He denied that it was in consideration for any work done by the respondent. Most importantly, he stated that he was the author of the document that was admitted in evidence as **ExhP1**, upon which the respondent based his claim to ownership of the land.

The trial judge largely disregarded the contents of **ExhP1** and preferred the testimony of DW2, Henry Lwanga who testified after the death of the DW1, the author of the document. He found that the testimony of DW2 supported that of the respondent but he did not consider the testimony of the deceased. While it is true that the testimony of DW2 supported that of the respondent, it largely contradicted that of the deceased who was the author of **ExhP1**. The testimonies of both DW2 and the respondent were opposed to the contents of **ExhP1**, in terms of the reason why the appellant

and her husband (DW1) gave land to the respondent, yet the respondent was also a signatory to **ExhP1**.

It is my opinion that the oral testimonies of the witnesses to prove the manner in which the land was given to the respondent became largely irrelevant after the court admitted **ExhP1** in evidence. **ExhP1** was Annexure **"A"** to the plaint and it was accompanied by the translation which was marked as Annexure **"B".** For the purposes of this appeal, it is presumed that the two documents were admitted in evidence together. The English translation of **ExhP1** read as follows:

AGREEMENT FOR DONATION OF LAND AT KITETIKA

Today the 3rd of January, 2001 (3/01/2001) I Dr Yusuf Kizito together with my wife Nassozi M. Kizito residents in Katalemwa Makerere University Estates have resolved to give Musa Nsubuga (my younger brother, I Dr Y. S. Kizito) who is resident at Mindi, Kaswo sub-county in Nakifuma County. (sic) The land donated is a mailo land. We have donated (to) him 25 decimals (¼ an acre).

Musa has to be speedy in demarcating off his land from ours on Block 197 Plot No. 330 at Kitetika starting from the "main road".

No one has authority to vary this donation.

Donors of land

1. Dr Yusuf Kizito	(signed)	3rd/01/2001
2. M/s Nassozi M. Kizito	(signed)	3rd/01/2001

Donee

Mr Musa Nsubuga	(signed)	7th/01/2001

Witnesses

1. Dr Fred Bugenyi	(signed)	3rd/01/2001
2. Dr. A Kezimbira Muyingo	(signed)	4th/01/2001

I CERTIFY THAT THIS IS A TRUE TRANSLATION OF THE AGREEMENT DATED 3RD JANUARY 2001.

Signed, Abubaker Sebanja, Advocate

Regarding **ExhP1**, the respondent states, at page 23 of the record, that the appellant and her husband were in breach of an agreement. That in consideration of work that he did for them, planting a coffee *shamba* in 1999, they gave him land at Kitetika. That he then requested for a written agreement and it was prepared and he signed it acknowledging that he agreed with the contents thereof. He referred to **ExhP1**, **Annexure A** to the plaint, as the agreement. He did not deny anything in the agreement in his testimony save for asserting, contrary to the agreement, that it was payment for work done for the appellant and her husband. He added that before **ExhP1** was made, Dr Yusuf Kizito showed him the boundaries of the land donated to him.

The respondent further stated that during the inspection of the land with Yusuf Kizito, there were other people present, including one Mwalimu Rashid Wamala. That the said Wamala was resident on the same piece of land. Further, that after the inspection, he started his work on the land while he was with the appellant and her husband. That he made bricks and erected a fence. He also produced a letter, admitted in evidence as **ExhP2**, subject to its being analysed by a handwriting expert. He stated that the letter was from Yusuf Kizito to him and that Yusuf Kizito asked him to demarcate the land that he had showed him and to reserve some coffee seedlings for him. He asserted that the letter dated 5th April 2001 was in Yusuf Kizito's handwriting. Court ordered that the letter be subjected to analysis by the Government Analyst.

The respondent was cross examined. He insisted that he planted coffee for the appellant and the deceased at Buwanuka in Buwambo and he could take court to the place where he did this. That though **ExhP1** was made in 2001, he was shown the Plot of land in the year 2000. That he did not

erect the fence according to fence pits that had already been dug by the appellant and the deceased but he dug pits himself, from the appellant's home. That he also made some bricks. He explained that he made the bricks and planted banana plants in 2004, following boundaries that were shown to him by Yusuf Kizito. He also explained the he did not carry out a professional survey of the land but followed the boundaries that were shown to him before.

The respondent's witness was Rashid Wamala. He testified that in the **year 2000**, the respondent went to the land with Dr Kizito. That in his presence, Dr Kizito told the respondent to build on a piece of land that was near the borehole. He further stated that Dr Kizito came to the land a second time and then the respondent began making bricks and planted a banana plantation. He did not state the date or year in which Dr Kizito came to the land the second time.

In cross examination, PW2 stated that the borehole that he referred to in his testimony was not on the land in dispute. That however, there was a path going down to the road. Further that his residence was along the road to Bugonga and he used to collect water from the borehole.

In his testimony, Yusuf Kizito admitted that the appellant and he gave ¼ an acre of their plot of land measuring one acre to the respondent. He produced the certificate of title which was admitted in evidence as **ExhD1**, and the agreement in respect of the donation as **ExhD2**. He explained that the respondent came to their home after he left the Seminary, having been expelled. That they supported and maintained him and once gave him two bags of coffee to sell, but it was not given to him as a salary. That he wrote the agreement to donate land dated 3rd January 2001 after he obtained

permission from his wife, a co-owner of the land. Further that the witnesses thereto were his colleagues from Makerere University in the Department of Zoology. He added that the agreement was made without the knowledge of the respondent. He therefore did not sign it at the same time that the other persons signed it. That the agreement was a surprise to the respondent.

Dr Kizito went on to testify that they bought the land from one Hajati Mariam Nabukko. The agreement in that regard was admitted in evidence as **ExhD3**. And that by the time **ExhP1** was written he had not yet obtained the certificate of title to the land from the vendor, Hajati Nabukko. He admitted that according to **ExhP1**, the land that was donated was to be measured starting at the main road and going inwards. That however, when the title was handed over to them, contrary to clause No.3 in **ExhD3** (agreement of sale with Nabbukko) the plot had been relocated to another place. It was no longer fronting the main road. That as a result, they had to relocate the plot that was given to the respondent to a new setting because of the change in the description given in the agreement upon which the land was donated. That it was no longer possible to partition the plot from the main road and they could not give away what did not belong to them.

Dr Kizito further testified that by the time he got the certificate of title, he had not shown the physical boundaries of the ¼ acre of land to the respondent. He added that he had not shown him the boundaries even at the time he testified in court. That the respondent had never requested him to identify the boundaries of land donated but he was still willing to give him other land. He charged that PW2 was a false witness who was brought by the respondent to justify that he wrote the letter admitted in

evidence as **ExhP2**. He asserted that **ExhP2** was a forgery. He denied that he took the respondent around the land in dispute with the said Rashid Wamala because he could not have done so in the absence of his wife, the appellant.

Yusuf Kizito specifically denied that the land was given to the respondent as a salary. He explained that though the respondent helped with the setting up of coffee nursery beds, he did so in kind, not for a salary; he was never a servant because they maintained him as a brother and member of the family. He added that the discretion to give is inherent and exercisable by the giver without being dictated to by the receiver. Further that when the respondent fenced off the land, no survey had been done; he fenced off the land on his own without their knowledge and without approaching them to hire a surveyor. Further, that the whole area was not developed and what he fenced off was not what they wanted to donate to him.

In cross examination, Yusuf Kizito denied that he was in breach of an agreement. Further that he followed what he wrote but he did not own the plot at the main road. That he had not yet surveyed and demarcated the plot at the time the land was donated. That the donation was based on **ExhD3**, the agreement with Hajati Nabukko. That he did not know who the owner of Plot 331 was but it was not his plot. Further that the donation was not urgent. That he stated in the donation that no person should change it because he could not tell what would happen in the future. He also explained that after the boundaries of the land that they bought changed, he informed the respondent. Further that the respondent was never given a copy of the certificate of title to the land. Finally, that he donated the land to the respondent out of *"mutual love."*

In re-examination, Yusuf Kizito stated that he was not sure whether he opened the boundaries of the land with the respondent. He again stated that he was willing to give land to the respondent but the respondent never approached him to give him the ¼ acre of land elsewhere, though he still had land in that area.

In his testimony in chief, DW2, Henry Lwanga, stated that Yusuf Kizito gave the land to the respondent in consideration of work that he had done on his farm of planting clonal coffee. However, in cross examination he admitted that it was not true that his deceased brother sold land to the respondent. At page 46 of the record he stated that, *"the truth is that he just gave him the piece of land but did not sell it to him as he alleges."*

The respondent's witness, Rashid Wamala, did not refer to any consideration flowing from the respondent to Dr Kizito and his wife. He simply stated that the deceased went to the land and showed it to the respondent and then told him to build on the piece of land near the borehole. And that when Dr Kizito came back a second time, the respondent began to make bricks and plant a banana plantation. Notably, Rashid Wamala did not state that Dr Kizito gave the said piece of land to the respondent. Therefore, the only person that testified that the land was given in consideration for work done for the Dr Kizito and the appellant was the respondent.

Section 91 of the Evidence Act falls under a part of the Act that relates to *Exclusion of Oral by Documentary Evidence.* It provides as follows:

91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.

When the terms of a contract or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence, except as mentioned in section 79, shall be given in proof of the terms of that contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Halsbury's Laws of England, Volume 52 (2020), at paragraph 385 summarises the exceptions to the provision above, *the parol evidence rule*, in the following terms:

> *385. Extrinsic evidence generally excluded.*
>
> *Where the intention of the parties has been reduced to writing it is, in general, not permissible to adduce extrinsic evidence, whether oral or contained in writings such as instructions drafts, articles, conditions of sale or preliminary agreements or memoranda provided for the 'protector' of a settlement, either to show that intention or to contradict, vary, or add to the terms of the document. This principle applies to records, arbitrators' awards , bills of exchange and promissory notes, bills of lading and charter parties , bonds, descriptions of boundaries, guarantees, leases, contracts for the sale of goods, and patents. Verbal statements made by an auctioneer may or may not be part of the contract of sale.*
>
> ***Extrinsic evidence cannot be received in order to prove the object with which a document was executed; or that the intention of the parties was other than that appearing on the face of the instrument .*** *{My Emphasis}*

The terms for the donation of land were contained in **ExhP1** which was admitted in evidence at the behest of the respondent. Most importantly, it was the basis on which he brought his suit against the appellant and her husband. It specifically stated that the agreement was for the donation of land. No consideration was stated for the donation. Having relied upon its contents as the gist of his claim, there was no need for the court to admit

further evidence about consideration for the donation, as was done through the testimonies of the respondent and Henry Lwanga. At common law, such evidence was inadmissible in the face of what was contained in the document.

I therefore find that the oral evidence of the deceased on record put together with the instrument by which the donation was given far outweighed the respondent's testimony that the land was given to him in consideration for work done for the appellant and her husband.

As to whether the trial judge erred when he did not consider whether the transaction in issue was a contract of a domestic nature, the position at common law is that where the relationship between the parties is of a personal nature and lacking in formality, it is likely that the law will presume that the parties did not intend that the transaction between them would give rise to legal relations. Such a transaction is defined as a domestic agreement or contract.

In **Balfour v Balfour [1919] 2 KB 571**, a husband and wife entered into an agreement when she was unable to return with him (because of illness) to his place of work, in Ceylon. He agreed that he would pay her £30 per month while he was away. The marriage later broke up and the wife sued her husband for failing to honour his agreement of paying her the monthly allowance. It was held that in denying the wife's claim, the court focused on the lack of consideration from the wife. However, the court also held that given the nature of the personal relationship between the parties it could not be said that it was their intention that it would give rise to legal relations.

In **Merritt v Merritt [1970] 1 WLR 1211**, Lord Denning distinguished the decision in **Balfour** (supra) on the basis that it is altogether different when the parties are not living in amity but are separated, or about to separate. They then bargain keenly. They do not rely on honourable understandings. They want everything very clear or precise. As a result, it may be safely presumed that they intend to create legal relations.

It appears that the more distant the personal relationship between the parties, the weaker the presumption becomes. The presumption of no legal relations was found to exist between uncle and nephew in **Mackey v Jones (1959) ILTR 177**. In that case, the uncle had promised his nephew's mother that if he came to live with him and help look after the farm it would pass to the nephew upon his demise. It was held that there was no intention to create legal relations. However, in **Hynes v Hynes, (1984) IEHC 48,** it was held that an arrangement between two brothers did give rise to legal relations. But in **Leahy v Rawson 2003 WJSC-HC 7100**, it was held that the presumption only applies to the closest family kinships, such as parent and child, and spouses.

In this case, the agreement to donate land was between a husband and his wife on the one part, and the husband's younger brother. It therefore could have been construed as a domestic contract given the close kinship between the donors of the land and the donee. The trial judge therefore erred when he did not consider whether the agreement amounted to a domestic contract that was enforceable against the donors of the land or not.

With regard to the issue whether the trial judge erred when he did not apply the principles relating to gifts, Black's Law Dictionary, 9th Edition by West, defines a gift as *"the voluntary transfer of property to another without*

compensation." The common law principles that attach to a donation/gift were stated in **Commissioner of Taxation of the Commonwealth v McPhail [1967-68]41 A.L.J.R. 346,** at 348, as follows:

> *"But, it is, I think, clear that to constitute a "gift", it must appear that the property transferred was transferred voluntarily and not as a result of a contractual obligation to transfer it and that no advantage of a material character was received by the transferor by way of return."*

As a result, I find that the contents of **ExhP1** and the testimonies of DW1 and DW2 resolve the issue as to whether there was a valid contract, in commercial terms, where the Kizitos vested their interest in ¼ acres of land, part of Plot 330 at Kitetika to the respondent for consideration. What comes out strongly instead is that the appellant and the deceased intended to make a donation of land measuring ¼ an acre to the respondent.

It must then be decided whether the trial judge erred when he held that when the appellant and the deceased refused to sign transfers in favour of the respondent, it amounted to a breach of contract. The decision of the trial judge on that point was at page 8 of his judgment (page 62 of the record) where he held that:

> *"In conclusion of the first issue the finding of this court is that the part of the land the plaintiff fenced off and started using is the one given to him by the defendant and their refusal to transfer it to him was in breach of contract and arising out of this finding court now considers as to what remedies are available to the plaintiff."*

In view of the dichotomy that is displayed by the evidence on record, I found it necessary to establish whether a gift or donation is equivalent to a commercial contract, so as to result in a breach of contract when the donor fails or refuses to deliver or hand over the gift.

Starting with contracts, it is trite law that the failure or omission to perform the terms of a contract amounts to a breach of the contract. The remedies, depending on the breach, are either an order for specific performance or damages for the breach. However, it has already been established that the transaction in this case was not a commercial contract.

In relation to gifts of land, the legal position about the making of a gift thereof is stated in Halsbury's Laws of England, Volume 52 (2020), paragraph 231, as follows:

> **In general a legal estate in land must be granted by deed, and an instrument is not a deed unless it makes clear on its face that it is intended to be a deed by the person making it, whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise, and it is validly executed as a deed by that person. It must be signed by the donor in the presence of a witness who attests the signature, or at his direction and in his presence and the presence of two witnesses who each attests the signature, and delivered as a deed.**
>
> ***If the title to land is registered, a gift of the legal estate must be made by registered transfer.***
>
> *{Emphasis supplied}*

A deed is defined by Black's Law Dictionary (supra) as *"a written instrument by which land is conveyed."* It is also defined by the same source, at common law, as *"any written instrument that is signed, sealed and delivered that conveys some interest in property."*

In Uganda, the principle that a gift of legal estate in land must be by transfer is supported by section 92 of the Registration of Titles Act (RTA) Cap 230, which provides for dealings in land as follows:

(1) The proprietor of land or of a lease or mortgage or of any estate, right or interest therein respectively may transfer the same by a transfer in one of the forms in the Seventh Schedule to this Act; but where the consideration for a transfer does not consist of money, the words "the sum of" in the forms of transfer in that Schedule shall not be used to describe the consideration, but the true consideration shall be concisely stated.

(2) Upon the registration of the transfer, the estate and interest of the proprietor as set forth in the instrument or which he or she is entitled or able to transfer or dispose of under any power, with all rights, powers and privileges belonging or appertaining thereto, shall pass to the transferee; and the transferee shall thereupon become the proprietor thereof, and while continuing as such shall be subject to and liable for all the same requirements and liabilities to which he or she would have been subject and liable if he or she had been the former proprietor or the original lessee or mortgagee.

In the instant case, one of the proprietors of the land, Dr Kizito, stated that he did not transfer the land in dispute to the respondent. The appellant, a co-owner, though she did not participate in the proceedings, objects to the order to transfer the land to the respondent and that is why she lodged this appeal. She cannot testify in the appeal but the evidence of the deceased is on the record.

From the careful appraisal of the evidence on the record, the main reason why the deceased could not transfer the land to the respondent was because the location of the land that was donated changed. Dr Kizito testified that between the execution of **ExhD3** and the agreement to donate land (**ExhP1**) the position of the main road in relation to the land that the appellant and he bought changed. That the land immediately bordering the main road was Plot 331, not Plot 330 which was transferred to them by Hajati Nabukko after the subdivision of the land. The subdivision or

mutation was done in order to make Dr Kizito and his wife a certificate of title in respect of the one acre which they bought from Mariam Nabukko.

ExhD3, the agreement of sale between Mariam Nabukko and the Kizitos shows that the vendor was the registered proprietor of land known Block 197 Plot 308 at Kitetika, measuring 2.190 hectares (5.14 acres) of which the Dr Kizito and the appellant agreed to buy one acre. The parties further agreed that the cost for obtaining the certificate of title for the piece of land would be borne by the purchasers. It was further stated in clauses (3) and (4) thereof that the parties expressly agreed that the piece of land bought should be partitioned right from the main road inwards; and that they undertook to act in good faith with each other to secure the completion of the terms of the agreement.

Therefore, it is clear that the appellant and her deceased husband did not buy the land that is the subject of the dispute as Plot 330. They bought a piece of land measuring one acre, and the agreement of sale stated in clause 3 that the *"The parties have expressly agreed that the sold piece of land should be partitioned right from the main road inwards."* But contrary to the agreement, after the mutation that caused the subdivision of the land, their piece of land was fronted by another piece of land, designated as Plot 331. This was the land that shared its border with the main road. Dr Kizito expressed his predicament in his testimony when he stated, at page 31 of the record, that this Plot 331 was in front of their Plot 330. I therefore find that after the subdivision of the land, which was done by the vendor contrary to the agreement of sale, it was no longer possible for the Dr Kizito and the appellant to donate the portion that had been identified in **ExhP1** as ¼ an acre *"Starting from the main road."*

Dr Kizito further stated that he tried to explain this anomaly to the respondent but the latter did not understand. That he still wished to give land to the respondent as it had been agreed with his wife, the appellant. But instead, the respondent, without his knowledge, went to Kitetika, fenced off a piece of the land and began to make bricks and plant a banana plantation on it.

Under common law, three conditions must be met for a gift *inter vivos* to be valid. The first one is that the individual making the transfer actually intends to make a gift; it must be demonstrated that the donor's objective was to make a gift when he or she transferred the property. The second condition is that the donee accepts the gift made to him or her; the donee must agree to the transfer of property that the donor made in his or her favour. In general, such acceptance is presumed once the third condition is met, that is, the delivery of the property that is the subject-matter of the transfer by the donor to the donee. The donor has to divest him or herself of the property; he or she has to place it in the possession of the donee. This delivery confirms the donor's intent to make the gift and must be deemed to be unequivocal since the courts will refuse to intervene to perfect a gift that is not complete. (See Concept of a gift, Comparative Study, Civil Law, Common Law and Tax Law)[1]

In this case, the appellant and her husband neither conclusively determined the location of the gift, nor divested themselves of it. They did not sign a transfer in favour of the respondent as is required by section 92 of the RTA. The respondent accepted and attempted to take the gift but it did not belong to the donors. The dispute in court and the testimonies of

[1] https://www.justice.gc.ca/eng/rp-pr/csj-sjc/harmonization/siroi/gtoc-tdm.html

the parties show that the gift was equivocal due to the changes that happened to the land in the process of transferring it to the appellant and her husband. The gift was therefore not perfected as it is required at common law.

The trial judge therefore erred when he ruled that there was breach of a contract. He also erred when he did not consider the law relating to gifts and so came to the wrong conclusions about the rights of the respondent with respect to the land. I would therefore find that grounds 1 and 2 of the appeal succeed.

Ground 3

The appellant's grievance in this ground was that the trial judge erred in law when he entertained the testimony of Henry Lwanga in support of the appellant's case and on that basis, he came to a wrong decision.

Submissions of counsel

In this regard, counsel for the appellant submitted that Henry Lwanga, the Administrator of the estate of Dr Kizito, had a duty to represent the estate. That he had to wait for the judgment of the court, since both parties had already closed their cases, but instead he took the stand and gave hearsay evidence which was inadmissible. And that in spite of this, the trial judge relied on this evidence to come to his decision. Further, that Henry Lwanga's evidence contradicted that of the principal witness, Dr Kizito.

Counsel went on to contend that the only evidence Lwanga Henry ought to have brought before court was about the will of the deceased where it was stated that the deceased gave the piece of land in dispute to the respondent but did not sell it to him as alleged. Further, that court should

have given that document the greatest value; the will ought to have been read in its entirety so as to understand the last wishes of the deceased. He prayed that the evidence of Lwanga Henry be only admitted in as far as the will was concerned, and that the rest should be disregarded.

In response, counsel for the respondent submitted that it is trite law that the administrator of a deceased person's estate represents the interests of the deceased. He referred to the Amended Record of Appeal which shows that Henry Lwanga applied for and was granted leave to testify on behalf of the deceased. Counsel further asserted that this evidence was useful because it threw more light on the dispute before court. He disputed the appellant's contention that Lwanga's evidence was hearsay. He referred court to the judgment where the trial judge stated that he considered Henry Lwanga to be an honest witness who genuinely wanted to see an end to the dispute.

Resolution of Ground 3

The chronology of events that led to the Henry Lwanga testifying as the defendant starts on 3rd September 2009, at page 37 of the record. When the suit was called for hearing before Kasule, J (as he then was), Mr Sam Njuba represented the defendants. He informed court that the 1st defendant passed on and the matter relating to his estate was before court in a dispute. He prayed for an adjournment. Court granted it but ordered that the matter be set before the Registrar for mention on 29th May 2009. The Registrar would then fix it for hearing or mention, depending on whether court had appointed an administrator or executor of the will of the deceased.

The matter was not set before the Registrar as ordered. It was again set before the judge on 15th July 2009 who again ordered that it be fixed for mention before the Registrar Family Division. This was done with a view to establishing whether probate had been granted and whether the executor had applied to be added as a party to the suit. The matter was again called on for mention on 3rd September 2009 and 6th October 2009. On 6th October 2009, it was fixed for hearing on 9th November 2009 but it did not take off because the issues of the estate of the 1st defendant had not been concluded.

Finally, on 22nd February 2012, the matter came up for hearing before another trial Judge, Mwangusya, J (as he then was). Mr Henry Lwanga, one of the Administrators of the estate, was in court but the 2nd defendant, now the appellant, was not. Sebanja Abubaker informed court that he discussed the matter with Musa Kabega, counsel for the defendants, with a view to reaching a settlement but they did not conclude the matter. He prayed that the parties be given an opportunity to continue the discussions. Henry Lwanga agreed with the proposal. However, he added that he consulted the appellant, widow of the deceased, and she informed him that she already distributed the property to the beneficiaries. That she also had nothing to do with the plot that the respondent claimed in the suit. The matter was adjourned to the 12th April 2012 for further hearing.

When the matter was called on for hearing on 12th April 2012, Henry Lwanga was in court but the appellant was not. Mr Sebanja said he was not ready to proceed and so applied for an adjournment. Henry Lwanga informed court that he knew that his late brother gave the land in dispute to the respondent but the dispute could only be resolved in the presence of the appellant and their lawyer. The lawyer, Musa Kabega was also not

in court at the time so the matter was again adjourned to 24th April 2012 for hearing, with an order that the defendant's counsel be served with notice thereof.

On 24th April 2012, Mr Sebanja was in court when the suit was called on for hearing. He informed court that the defendant's counsel was served but endorsed the notice with the comment that the date was not convenient. Mr Lwanga then charged that the lawyers were on the widow's side. She had refused to comply with her late husband's offer of the land to the defendant, the respondent in this appeal. Court adjourned the suit to the 9th July 2012 and ordered that counsel for the defendants be notified.

On 9th July 2012, it was recorded that counsel for the 1st defendant was present; so was counsel for the respondent. Mr Sebanja stated thus:

> *"The second defendant was served and so was her counsel. None of them is in court. They are deliberately frustrating the court proceedings. I pray court proceeds with the testimony of the first defendant."*

It is clear that by this time the defendants had parted company. Henry Lwanga, as administrator of the estate was clearly against the appellant. The record shows that the trial judge made the decision to continue the hearing with the defendant who had been appearing in court because in his view, there was evidence that the 2nd defendant (the appellant) and her lawyer were properly served with notice of the hearing. However, Mr Lwanga informed court that he did not have a lawyer. He would represent himself and so conduct the defence. He then took the stand and testified as one of the defendants. The appellant now complains about the propriety of his testimony and I observed that it was not long. It will therefore be

useful to set out the relevant part here to aid the understanding of my proposed decision on this ground.

> *"To begin with I am the elder brother of both deceased, Professor Yusuf Kizito and the plaintiff. I am the first born in the family.*
>
> *The plaintiff followed Dr Kizito. Dr Kizito wanted to grow colonel (sic) coffee of 8 acres. He instructed the plaintiff to propagate the colonel (sic) coffee seedlings from the plaintiff's nursery in Kasawo sub-county. When the colonel (sic) coffee seedlings were ready for planting Prof Kizito instructed the plaintiff to transport them and plant them in Buwambo. The plaintiff did the work. He dug the holes, planted all the eight acres. After the exercise had been done the Prof appreciated the job well done. He gave the plaintiff a plot measuring about 30 decimals in Kitetika. By that time the Professor was still alive working in Zoology Department, Makerere University. He made an agreement which was witnessed by the late Kezimbira Muyingo, duly signed by the deceased. The second defendant witnessed the same agreement and signed it.*
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> *The Professor informed all of us including our father, Asuman Nsubuga, now also deceased that he had given the plaintiff that part of the land. After some time,* ***we had information that the 2nd defendant was complaining that her husband had given Musa (plaintiff) a piece of land that was very strategic near the road and was advising the husband to make a change and give the plaintiff a plot where they dump garbage at Kitezi****. On being given the plot by the Professor the Plaintiff went ahead and made 10,000 bricks and enclosed the piece of land with barbed wire. The second defendant was not happy. She went to the site and destroyed the barbed wire and the bricks. Following the actions of the 2nd Defendant the Plaintiff brought this suit to court. Before my brother passed way he stated in his Will that the case brought in court by the plaintiff would be decided by court but the truth is that he just gave him the piece of land but he did not sell it to him as she (sic) alleges. I have a copy of the Will as one of the trustees of the Estate of Professor Yusuf Kizito. I can present the copy to court. It is in Luganda. The original copy is with the 2nd Defendant."*

Court admitted the Photostat copy of the will in evidence as **Exh. DE1,** subject to its being translated into English. Mr Sebanja, counsel for the respondent at the trial cross examined the witness about the will. He

stated that he was following the will of the deceased in distributing property. That apart from the plot of land in dispute, he handed over a plot of land to the elder son of the deceased as it was desired by the deceased in the will. He explained that the *kibanja* which he handed over to the son of the deceased, Kijjambu Ismail, had a cocoa plantation on it.

Following the testimony of Henry Lwanga, court closed the taking of evidence. The trial judge ordered the parties to file written submissions and judgment would be delivered on 23 August 2012. Counsel for the respondent then filed written submissions on the 24th August 2012. No submissions were filed for the defendants. Judgment was delivered by the trial judge on 15th February 2013.

I observed that in his judgment, the trial judge did not seriously evaluate the evidence that was given in court by the deceased. And if he did, he did not appreciate it in the least. He preferred the testimony of Henry Lwanga to that of the deceased who seems to have testified for the benefit of both defendants in the suit. Counsel for the appellant complained that Mr Lwanga's testimony was full of hearsay evidence and I would accept his submission on that point for the following reasons.

First of all, Mr Lwanga stated that the late Dr Kizito informed him and his late father that he gave 30 decimals of land to the respondent. Mr Lwanga did not clearly identify the land in dispute. He did not state exactly where it was, save for stating that it was along the road. He also stated that the land in dispute was 30 decimals, yet the document in which the land was donated stated that it measured 25 decimals (¼ of an acre). In doing so, Mr Lwanga did not only contradict the testimony of the deceased but also the contents of a written document signed by the deceased, whom he

purported to represent in the suit. It also proves that his evidence was hearsay evidence.

Secondly, Mr Lwanga stated that *"they got information that the appellant complained that her husband gave a strategic piece of land near the road to the respondent."* He did not state how they got this information. Neither does he specify who *"they"* were that gave him this information. He adds that the deceased wanted to give the respondent a piece of land in Kitezi where garbage is dumped. He does not state how he came by this information. The respondent did not state so in his testimony so this too was hearsay evidence.

On the contrary, the deceased in his testimony affirmed that the intention of the appellant and he was to give another piece of land in the same location to the respondent. In his cross examination, at page 33 of the record, the deceased stated that he still had land *"in the neighbourhood of the disputed land."* In his re-examination, at page 34 of the record, the deceased stated that he was still willing to give 25 decimals of land to the respondent which was part of the same land. That however, the respondent never approached him for that purpose. Clearly, it was not proved that it was the intention of the deceased and the appellant to give the respondent land on which there was a garbage dump in Kiteezi.

Finally, the trial judge seems to have relied on the testimony of Mr Lwanga about the contents of the will of the deceased to come to his decision in favour of the respondent. At page 5 of his judgment, the trial judge stated thus:

> *"His late brother left a will in which he stated that the case brought to court by the plaintiff would be decided by court. The will confirmed what he stated in his testimony that he had given the piece of land to the plaintiff but it was*

not on the consideration of the work he allegedly did for him. The will was tendered in evidence as an exhibit. It was dated 24.12.2005. The deceased defendant testified on13.06.2007."

However, there is no evidence on record that the will was ever translated into English. The will therefore could not have been used to confirm that the deceased and his spouse perfected the gift of land that they intended to give to the respondent.

Moreover, contrary to the finding of the trial judge that Henry Lwanga was a truthful and reliable witness, it is pertinent to point out that Mr Lwanga assigned to himself tasks that were not lawfully his. He admitted that he handed over property to the deceased's son, Ismail Kijjambu, a piece of land that had a cocoa plantation on it. Further that he did so following the will of the deceased. However, the Letters of Administration that were granted to Mr Lwanga on 9th December 2009 did not authorise him to distribute the estate of the deceased. The grant was made by Oguli Oumo, J. under section 222 of the Succession Act, for purposes of representing the deceased in Civil Suit No. 437 of 2005, or any other suits which may be commenced in the same, or other suits between the deceased and the respondent, Musa Nsubuga.

That being the case, Mr Lwanga admitted in court that he intermeddled in the estate of the deceased. Without having proved the will or obtained a grant of probate thereof, he went ahead to distribute the property of the decease, albeit to the deceased's son, Kijjambu.

It is pertinent to note that by the time he died, the deceased had already concluded giving evidence that was required of him in the suit. He had been cross examined and re-examined. Mr Lwanga was not mentioned in the summary of evidence (page 18 of the record) as a witness that would

be called to testify on behalf of the defendants. In the summary of evidence, the defendants' main defence attached to their Written Statement of Defence was that they would testify that the land in dispute was given to the respondent as a gift. It had not been identified, surveyed or demarcated at the time. They also proposed to call only two witnesses, the defendants, and any others with leave of court. Since the deceased had already testified, there was really no need for the court to call or admit another witness to testify on his behalf. The only other witness that should have been called was the 2nd defendant, the appellant here. However, that is the subject of ground 4 of this appeal and I will dispose of it thereunder.

It is therefore my opinion that Henry Lwanga was a hostile witness who had other interests at heart, not the proper or lawful management of the estate of the deceased. He was an unreliable witness who intermeddled in the estate of the deceased and contradicted the evidence that the latter gave on oath in the suit. I would therefore find that the trial judge erred when he relied on the substantially hearsay evidence of Henry Lwanga.

Ground 3 of the appeal therefore also would succeed.

Ground 4

The appellant's complaint in this ground of appeal was that the learned trial judge erred in law and fact when he ruled that the case should proceed in the absence of the second defendant, which resulted in a miscarriage of justice.

Submissions of Counsel

In this regard, counsel for the appellant relied on Order 5 rule 10 of the Civil Procedure Rules which provides that service on the defendant should be in person or on a recognised agent. He submitted that the court ought

to have ascertained why neither the appellant nor her lawyers at any one time appeared in court even when there were affidavits of service upon them on the record. Counsel contended that the court had the power to order that the appellant be served personally since the plaintiff knew where she resided, being her brother in law.

In reply counsel for the respondent, referred us to the decision in **High Court Miscellaneous Application No. 347 of 2013, Dr. Yusuf Kizito & Nassozi M Kizito v Musa Nsubuga,** in which the appellant was one of the applicants for an order to set aside of the judgment that is the subject of this appeal. He informed court that the judge in that application dismissed it on the ground that the proceedings in HCCS 437 of 2005 were not *ex parte*. That the defendants were properly served and they deliberately chose not to attend court, even after several adjournments.

Counsel for the respondent noted that the appellant did not appeal against the said ruling. He asserted that the appellant tried to smuggle this ground into this appeal because it was already disposed of in the application referred to above. He relied on Order 17 rules 3 and 4 Civil Procedure Rules, which provide that the High Court may proceed to hear a case in the absence of either party where it is proved to the satisfaction of the court that the party was properly served with court process. That for this reason, the trial judge could not be faulted for proceeding to dispose of the suit where the defendants had in the middle of the trial adamantly refused to return to court.

Resolution of Ground 4

I perused the ruling of Nyanzi, J in **HCMA No 347 of 2013**, arising from **HCCS No. 437 of 2005**, in which he found that the suit did not proceed *ex parte* because the defendants were both represented by counsel. For

that reason, he refused the application to set aside the judgment under appeal.

While it is true that the appellant did not attend the proceedings since the 7th September 2005 when it was recorded by the trial judge that she was present, it is not true that she was not represented by counsel after that date. I note that on the 30th November 2011, court noted that neither the defendants nor their counsel were in court and the matter was adjourned to give them a chance to attend the hearing on the adjourned date, 22nd February 2012.

On 22nd February 2022, only Henry Lwanga attended the hearing as the personal representative of the deceased, the 1st defendant. Mr Sebanja for the respondent informed court that he was in touch with Mr Musa Kabega, Counsel representing the defendants. That both counsel were trying to see to it that the dispute is resolved amicably. He prayed that the matter be adjourned for the last time. Henry Lwanga indicated that he too had a discussion with the appellant. That she informed him that she had already distributed the property to beneficiaries of the estate but she had nothing to do with the piece of land that the respondent claimed in the suit. The trial judge granted the application to adjourn the matter and he adjourned it to 12th April 2012.

However, on that date, the appellant was absent. So was Mr Musa Kabega who is recorded as *"Counsel for the defendant."* It was also recorded that Henry Lwanga, defendant was in court. Mr Lwanga was still willing to have the appellant appear in court and testify to verify his statement that his brother, the deceased, gave the land in dispute to the respondent. The trial judge adjourned the matter to the 24th April 2012. On that day it was

recorded that the 1st defendant, Henry Lwanga, was in court, while the appellant who was the 2nd defendant was absent. Further, according to counsel for the respondent Sebanja Abubaker, the defendants' counsel was served but they indicated on the hearing notice that the date was not convenient. It is then that Henry Lwanga, representative of the 1st defendant broke ranks with his co-defendant. He informed court that the lawyers were siding with the widow who had refused to comply with her husband's offer of the land to the plaintiff. However, court still adjourned the suit to give Counsel for the defendants a chance to attend the next hearing. It was ordered that he should be informed about the next hearing date, 9th July 2012.

When the suit was next called for hearing on the adjourned date, counsel for the respondent informed court that the 2nd defendant was served and so was her advocate. He said they were not present because they were deliberately frustrating the proceedings. He prayed that court proceeds to hear the testimony of the first defendant. Court noted that the 2nd defendant was properly served and so decided to proceed with the defendant *"who had been appearing in court."* Henry Lwanga then informed court that he had no lawyer but he would defend himself. He then proceeded to testify on behalf of the 1st defendant (deceased).

Though he did not state so on that day, it is assumed that the trial judge decided to proceed in the absence of the appellant (the second defendant) and her advocate on the basis of Order 17 rule 4, as he stated on the 22nd February 2011. The rule provides as follows:

4. Court may proceed notwithstanding either party fails to produce evidence.

Where any party to a suit to whom time has been granted fails to produce his or her evidence, or to cause the attendance of his or her witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding that default, proceed to decide the suit immediately.

It is clear that the 1st defendant did not fail to adduce evidence in the suit but the 2nd defendant, the appellant here, failed, refused or neglected to appear and to give evidence in the suit. She did not appear on several occasions though it is stated that her advocate was served with notice of the hearing.

I therefore find that the trial judge made no error when he decided to proceed with the suit in the absence of the appellant. However, in such a case, he ought to have decided the case immediately, as it is stated in the Order 17 rule 4 CPR. Having made the decision to proceed without the 2nd defendant, he had no power to take further evidence from Henry Lwanga because the 1st defendant whose personal representative he was had already testified on his own behalf. When he did take further evidence from Henry Lwanga, the decision occasioned a miscarriage of justice, as it has been established under ground 3.

In spite of that, I would still find that ground 4 of the appeal fails.

Ground 5

In this ground, the appellant complained that the trial judge erred both in law and fact when he failed to visit the *locus in quo* before coming to his decision. And that when he omitted to do so, he did not appreciate the changes in the location of the land in dispute and so arrived at the wrong decision.

Submissions of Counsel

Counsel for the appellant submitted that the trial judge ought to have visited the *locus in quo* in order for him to appreciate the fact that the land given to the respondent did not belong to the defendant, hence their decision to give him another piece of land. He relied on the decision in **Dissan Sempala v Ndagire Godfrey & Kaija Simon, Civil Appeal No 45 of 2011,** to support his submission.

In reply, counsel for the respondent submitted that none of the parties applied to court to visit the *locus in quo.* That therefore the trial judge cannot be faulted for not doing so. He too referred to the decision in the case of the **Dissan Sempala** (supra) where the judge stated that it is not in every case that it is necessary to visit the *locus in quo.* Counsel for the respondent further asserted that their case did not necessitate a visit to the *locus in quo.* He maintained that the suit was for breach of contract; that once the court established the existence of a contract that was breached by the defendants, the issue of visiting the *locus in quo* became irrelevant. He explained that the point of contention was the mistaken belief by the appellant and her husband that they retained the right to take away the land already paid to the respondent in exchange for any other of their choice.

Counsel for the respondent further referred to the trial judge's decision, at page 61 and 62 of the record, where he stated that he did not believe that the defendants donated the said plot of land in 2001, but took more than five (5) years to demarcate the respondent's portion from their one acre, until the respondent sued them in 2005. That the trial judge also pointed out that it was shown, in Henry Lwanga's evidence, that the respondent had started developing the land as soon as it was given to him.

Resolution of Ground 5

It has already been established that the facts that were disclosed in this case did not support the respondent's assertion that his claim was for breach of contract. What came out clearly from the evidence was that land was donated to him by the appellant and her late husband. However, due to what appears to be an error on the part of the vendor from whom the deceased and the appellant bought, the donation could not be effected.

Having found so in the resolution of grounds 1 and 2 of the appeal, I note that the first trial judge in the suit, Kasule, J (as he then was) at the commencement of hearing of the suit framed 2 issues. They appear at page 22 of the record of appeal. He noted that the first issue was to decide the location of the given portion of land on Kyadondo Block 197 Plot 330 at Kitetika that was given to the respondent. The second issue was the remedies available to the parties.

The second trial judge, Mwangusya, J (as he then was) properly identified the same issues at page 3 of his judgment, page 57 of the record of appeal. However, in the resolution of the issue about the location of the land, he did not believe the testimony of Dr Kizito. The witness laboured to explain that the location of the land that they bought from Hajati Mariam Nabukko changed during the subdivision of their land from the vendor's title, indicated in the agreement of sale (**ExhD3**) as Block 197 Plot 308.

Clearly, this dispute required the court to not only establish from the oral and documentary evidence whether the deceased and the appellant donated land to the respondent but it also required court to establish exactly which piece of land it was that was donated to him. It has already been established from the agreement to donate land (**ExhP1**) that the

description of the land was not clear from the document. This was compounded by the fact that what was required of the vendor, Mariam Nabukko, in clause 3 of the agreement of sale was not fulfilled.

With regard to the location of the land in dispute, Dr Kizito testified, at page 12 of the record, that when the title came out, the vendor had not complied with clause 3 of **ExhD3**. It is also clear from the copy of the certificate of title that was adduced in evidence as **ExhD1,** that the deed plan contained therein was not clear about the location of the various plots of land that the late Dr Kizito referred to in his testimony. At pages 30-31 of the record he stated thus:

> *"We had bought land in issue from the lady Hajati Mariam Nabukko. The agreement is **Exhibit D3**. By the time we gave land to Plaintiff we had not yet obtained the certificate of title from Hajati Mariam Nabukko. According to D3, the partitioning was to be from the main road inwards.*
>
> *When the land title came out, No.3 in D3 was not the case. The Plot had been relocated to another place, not starting from the main road. The lady selling to us was very ill and bed ridden. There was Plot 331 in front of our plot. The plot was no longer fronting the main road. We had to relocate in the new setting on a new Plot for the Plaintiff. It was no longer possible to partition for him from the main road. It was not possible to give away what was not ours."*

The witness also stated that the portion in dispute had not been surveyed off their Plot 330, yet it was part of registered land. But the trial judge found and held, at page 61 of the record, as follows:

> *"He tendered a land title indicating that the land title in issue was transferred from Hajati Mamiam Najjuko (sic) to Dr Yusuf Kizito and Nassozi Mwamini Kizito on 13.10.2000. The agreement donating the land in dispute was executed on 03.01.2001 which means that by the time the defendant executed the agreement they knew the location of the land donated to the*

plaintiff. Arising out of this issue was as to whether or not the defendant identified the piece of land donated to the plaintiff and showed it to him. ... In the agreement donating the land which the defendants admitted, it is stated that ***"Musa has to be speedy in demarcating off his land from ours on Block 197 Plot No 330 at Kitetika starting from the main road. No one has authority to vary this donation."***

This indicates that from the time the land in issue was donated the defendants knew the land they had given to the plaintiff. ... This court does not believe that the defendants donated an unidentified plot of land to the plaintiff on 03.01.2001 and for more than five years they had not demarcated his plot from their one acre and it took this suit filed on 02.06.2005 for them to come out and say that by the time they gave him the plot of land they had not fully acquired it from the previous owner and did not know the extent ... It is likely that after the plaintiff had been given the land, the defendants changed their mind as to which part of the land the plaintiff should be given and that is why they did not want to transfer the area that he had started utilising within their knowledge, Henry Lwanga said this much in his testimony.

In conclusion of the first issue the finding of this court is that the part of the land the plaintiff fenced off and started using is the one given to him by the defendant and their refusal to transfer it to him was in breach of contract and arising out of this finding court now considers as to what remedies are available to the plaintiff."

My understanding of the evidence on this point is that at the time that the deceased and the appellant wrote the agreement to donate land to the respondent, they thought they knew the portion of land that they were donating to him: ¼ an acre of land starting from the main road. However, what they got from Mariam Nabukko on the issuance of the title did not comply with the covenant in clause 3 of the agreement of sale (**ExhD3**) that the land had to be demarcated from the main road, inwards. Instead, Plot 330 which was the Kizitos' property extended from Plot 331 inwards, Plot 331 being the Plot that fronted the main road.

I carefully examined the deed plan contained in the certificate of title, **ExhD1**. It was not possible to identify Plots 330 and 331 which Dr Kizito referred to in his testimony, yet the main issue that was framed by the court was to decide where the location of the land that was given to the respondent was, as a portion of Block 197 Plot 330 at Kitetika. Neither was it possible to identify the location of the main road referred to in the agreement for the donation of land. I also noted that in his testimony the respondent did not in any way describe the location of the land that he fenced off or took possession of and tried to develop. PW2, Rashid Wamala also fell short of describing the location of the land. Instead of tracing its location on the basis of the main road referred to in **ExhP1**, he described it according to a borehole and a path. He never at all referred to the main road except when he stated that he stays at Bugonga Road.

It is also my opinion that the fact that the donation was made on 3rd January 2001 and the transfer to the Kizitos had already been registered on 31st October 2000 did not mean that the Kizito were already in possession of the certificate of title. This is especially so because the agreement between them and Hajati Nabukko (**ExhD3**) stated that it was she to effect the transfer of the land to them. Had they been in possession of the certificate of title at the time, they would have been aware of the fact that the piece of land they intended to donate did not front the main road, as it was stated in **ExhP1** and **ExhD3**.

I therefore came to the conclusion that in view of the error in the demarcation of the Kizitos' Plot 330 from Hajati Mariam Nabukko's Plot 308 at Kitetika, as it was explained by Dr Kizito, there was insufficient evidence on the record for the trial judge to establish the location of the land in dispute.

It is also true, as counsel for the respondent contended, that none of the parties applied to court to visit the *locus in quo*. However, it is not always necessary for the court to be moved to visit the *locus in quo*. Paragraph 3 of Practice Direction No 1 of 2007, on Orders relating to Registered Land with an Impact on Tenants by Occupancy, states that during the hearing of land disputes the court ***should*** take an interest in vising the *locus in quo*. The procedure to be employed on such visits is clearly set out therein.

The purpose of visiting the *locus in quo* was restated by this court in **Matsiko Edward v Uganda, Criminal Appeal No 75 of 1999** (unreported). The court relied on the principles that were laid down by the East Africa Court of Appeal in **Mukasa v Uganda [1964] EA 698 at 700**, as follows:

> *"A view of a locus in quo ought to be, I think to check on the evidence already given and, where necessary, and possible, to have such evidence ocularly demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings. It is essential that after a view a judge or magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observation should be a substitute for evidence."*

It is my opinion that the principles above are equally applicable to civil trials were the court wishes to establish exactly what is on the ground, compared to what is in contest between the parties from their testimonies in court, as it was in this case. In view of the fact that the main issue in the suit involved establishing the actual location of the piece of land that was in dispute, the trial judge *should* have interested himself in vising the *locus in quo*.

I therefore find that the trial judge erred when he did not visit or commission a Registrar to visit and take evidence at the *locus in quo*, and that the omission to do so led to a miscarriage of justice.

Ground 5 of the appeal therefore would succeed.

Ground 6

The complaint in this ground of appeal was that the trial judge erred when he disregarded the handwriting expert's report in which the respondent's evidence with regard to consideration was challenged, and that as a result, he came to the wrong decision.

Submissions of counsel

Counsel for the appellant submitted that though he is aware that the opinions of experts are not binding on the court, judicial officers have an obligation to explain why they do not agree with the expert's opinion. That in this case, there was a document, purportedly authored by the deceased, showing that he gave land to the respondent for consideration but the deceased denied that he authored it. The court requested the opinion of a handwriting expert.

Counsel went on to state that the opinion of the handwriting expert was that it was not likely that the document was authored by the deceased. That the expert came to this opinion after comparing various documents authored by the deceased against the document in contention. That it is difficult to understand why the judicial officer who requested the handwriting expert's opinion completely ignored it. He concluded that had the trial judge considered the handwriting expert's report, he would have come to a different decision about the issue of consideration.

In reply, counsel for the respondent submitted that at common law, the principle that a court is not bound by an expert's opinion has been

established for a long time. He relied on the decision in **Davie v Edinburg Magistrates [1953) SC 34 at 40,** for the submission that it is the duty of the expert witness to furnish the judge with necessary scientific criteria to the facts proved in evidence. Counsel explained that even where the trial judge requests for an expert's opinion, it is within the discretion of the judge to weigh its evidential value. That as a result, the trial judge could not be faulted for exercising his discretion to decline considering the expert's opinion.

Counsel went on to emphasise that the agreement for donation of the land to the respondent was not the subject of the expert's evidence. That both parties and their witnesses agreed that the agreement was signed to donate the land in dispute to the respondent. That the opinion of the expert was sought in respect of a letter dated 5th April 2001 said to be from the deceased to the respondent. That it had been admitted in evidence as **ExhP2** but the court disregarded it.

Counsel further submitted that the trial judge made no reference to the letter, **ExhP2,** in his judgment since the contents of the agreement to donate land had been admitted to by the deceased. That the trial judge thus properly exercised his discretion to disregard the expert's opinion.

Counsel for the respondent then prayed that this court finds that the trial judge was correct when he found that there was a contract between the appellant and the deceased on the one part and the respondent on the other which was broken by the appellant and the deceased. He prayed that the appeal be dismissed with costs to the respondent.

Resolution of Ground 6

The basis of admitting expert opinions in evidence is section 43 of the Evidence Act, which provides as follows:

> **43. Opinions of experts.**
>
> **When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to the identity of handwriting or finger impressions, are relevant facts. Such persons are called experts.**

In the instant case, there is evidence that by an undated letter from the Acting Assistant Registrar of the Court, at page 74 of the record, Mr Apollo Ntarirwa, Government Analyst, received the letter in dispute on the 21st March 2006, upon the order of the trial judge at the time, Kasule, J. He acknowledges receipt of the letter **ExhP1** as well as **ExhP2**, on 19th May 2006.

At page 73 of the record, there appears an entry that the report of the handwriting expert was **Court Exhbit 1**. The document itself appears at page 69 of the record and it was signed by A. M. Ntairwa, Government Analyst. However, it is not clear to me how the handwriting expert's report came to be on the record of the court. There is no evidence on the record to show how the report was transmitted from the author to the court.

With regard to signature of documents produced in evidence, section 66 of the Evidence Act provides as follows:

> **66. Proof of signature and handwriting of person alleged to have signed or written document produced.**

If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his or her handwriting.

Mr Ntarirwa was not called to verify the authenticity of his signature on the Laboratory Report which appears on the record as **Court Exh1**. He was therefore not cross examined by counsel for the respondent on the report. In my opinion, it was the duty of counsel for the defendants (the appellant and the deceased) who sought to challenge the contents of **ExhP2** to ensure that the opinion of the expert was properly brought onto the record. After the passing of Dr Kizito, it would have been the role of counsel for the appellant to draw court's attention to the letter and challenge its authenticity and therefore bring the report of the Handwriting Expert into evidence. However, the appellant and her lawyers seem to have chosen not to pursue the matter any further after the death of Dr Kizito.

On the other hand, the trial judge who ordered that the letter be analysed had moved on. The succeeding trial judge, Mwangusya, J (as he then was) did not think that the report was relevant or important and so he ignored it. He did not analyse the evidence in that regard though it related to the location of the land that had been donated to the respondent. I find that he was within his rights to do so, in the absence of the appellant who would have made use of the report but did not appear to given evidence in the suit.

I would therefore find that Ground 6 of the appeal fails.

Finally, the appellant prayed that the costs of the appeal and those in the court below be granted to her in the event that this appeal succeeds. However, since the matter was between members of the same family it is

my view that in order to restore family equilibrium and bring this dispute to an end, each party should bear their advocates costs for this appeal and in the court below.

In conclusion, this appeal substantially succeeds. I would therefore set aside the judgment and orders of the trial judge and substitute them with an order dismissing the suit. Each party will bear their advocates' costs in this appeal and in the court below.

Dated at Kampala this 20th Day of March 2023.

Irene Mulyagonja

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 02 OF 2014

NASSOZI M. KIZITO::APPELLANT

VERSUS

MUSA NSUBUGA:::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kampala (Civil Division) before Mwangusya, J. (as he then was) dated 15th February, 2013 in Civil Suit No. 347 of 2005)

CORAM: HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA
HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. LADY JUSTICE IRENE MULYAGONJA, JA

JUDGMENT OF ELIZABETH MUSOKE, JA

I have had the advantage of reading in draft the judgment of my learned sister Mulyagonja, JA, and I agree with it. For the reasons that she gives, I, too, would substantially allow the appeal and make the orders she proposes.

Dated at Kampala this ......30th...... day of......March......2023.

....

Elizabeth Musoke

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 002 OF 2014

(Appeal from the decision of the High Court of Uganda at Kampala (Commercial division) before Mwangusya dated 15th February 2013 in Civil Suit No.347 of 2005)

NASSOZI M. KIZITO==========APPELLANT

VERSUS

MUSA NSUBUGA ==========RESPONDENT

CORAM HON. MR. JUSTICE GEOFFREY KIRYABWIRE, J.A.

HON. LADY JUSTICE ELIZABETH MUSOKE, J. A.

HON. LADY JUSTICE IRENE MULYAGONJA, J. A.

JUDGMENT OF HON. MR. JUSTICE GEOFFREY KIRYABWIRE, J.A.

I have had the benefit of reading in draft the Judgment of my learned sister, Hon. Lady Justice Irene Mulyagonja, JA. I agree with her reasons and conclusions. Since Hon. Lady Justice Elizabeth Musoke, also agrees. It is now hereby ordered as follows;

1) This Appeal substantially succeeds.
2) The Judgment and Orders of the trial Judge are set aside and substituted with an Order dismissing the suit.
3) Each party will bear their Advocates costs in this Appeal and in the court below.

Dated at Kampala this.....20th.....day of.....March.....2023.

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HON. MR. JUSTICE GEOFFREY KIRYABWIRE, J.A.