THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CIVIL APPEAL NO. 0020 OF 2008

LAMUSA MAGIDU:: APPELLANT

VERSUS

1. **ALAMANZANI NSADHU}**
2. **FATINA NABIRYE }::::::::::::::::::::::::::::::::::::RESPONDENTS**

[Appeal from the Judgment of Her Worship J. Natukunda (GI) in Iganga Civil Suit No. 0033 of 2004, formerly Iganga District Land Tribunal
Claim No. 33 of 2004]

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

JUDGMENT

The appellant/plaintiff brought this appeal against the judgment and orders of Natukunda J. (Magistrate Grade I) sitting at Iganga, in which she ordered that the appellant's suit be dismissed with costs to the defendants/respondents.

The brief facts upon which the appeal is based are that the appellant and the first respondent were brothers, both the sons of Byakika Badiru (PW2). The 2nd respondent was the 1st respondent's mother. The appellant sued the respondents in the Land Tribunal at Iganga for encroachment and trespass on a piece of land situated at Ndoya Village, Bukanga sub-county in Iganga District. He claimed that the land, which was 10 acres in size, originally belonged to his father (Byakika), who acquired it by purchase from one Bazibu of Ndoya. It was the appellant's

case that after Byakika bought the land, he gave it to his half-brother, the 1st respondent but subsequently, Byakika changed his mind and gave the land to the appellant. The respondents did not acquiesce in Byakika's change of heart. The appellant alleged that they entered onto the land and destroyed his house and crops and insisted on staying on the land; hence the suit to evict them.

The respondents' case was that Byakika and the 2nd respondent got married customarily sometime before 1983. The 2nd respondent testified that around 1983 they purchased a piece of land at Ndoya measuring 10 x 12 sticks from one Erifereti Bazibu at a purchase price of shs 160,000/=. The 2nd respondent further testified that sometime in 1985, Byakika gave the land to their fast born son, the 1st respondent, by a deed of gift in the presence of clan members. The deed was admitted in evidence as Exh.D1. Further that in 2003 the 2nd respondent relocated from Naigobya to Ndoya where the appellant was in occupation of the land which he had entered forcefully. It was also the respondent's case that by the time of filing the suit they were in occupation of the land and the appellant was not on the land. Neither did have anything of value thereon. The appellant had his own piece of land at Naigobya where his home was located.

It was also the respondents' case that the disputed land was the 2nd respondent's matrimonial home and that it was inhabited by the respondents and the 2nd respondent's other children with Byakika (PW2). That by virtue of Exh. D2, a memorandum of understanding that was entered into by PW2 and the 2nd respondent on 16/03/2003 before a Probation Officer, PW2 had confirmed his gift to the 1st respondent. Further that the appellant had come to the land after the 1st respondent and her children took possession of the land.

The trial court framed two issues for determination as follows:

1. Whether Badiru Byakika had any right to withdraw the land that he had given to Alamanzani Nsadhu 19 years back and give it to the plaintiff.
2. What remedies are available to the plaintiff?

The trial magistrate answered both issues in the negative and dismissed the plaintiff/appellant's suit with costs. The plaintiff appealed to this court and framed 5 grounds in his memorandum of appeal as follows:

1. That the learned trial magistrate erred in law and fact to rule in favour of the defendants holding that the appellant did not have title to the suit land.

2. That the trial magistrate erred in law and occasioned a substantial miscarriage of justice in failing to hold that the appellant's claim to the suit land was caught up by the law of the will whereby the appellant's father had the right to change his mind and bequeath the land to another son.

3. That the trial magistrate erred in law and occasioned a substantial miscarriage of justice in failing to subject the evidence to proper scrutiny.

4. That the trial magistrate erred in law and occasioned a defeat of justice in holding that the appellant's witness No.2's evidence who bequeathed the suit land to the appellant was invalid.

5. That the trial magistrate erred in law and occasioned a miscarriage of justice when she failed to visit the suit land in dispute for some independent evidence from the elders.

When the parties' advocates appeared before me on the 31/10/08, I ordered that they file written submissions for their clients which they did. The appellant's advocate filed written submissions on the 27/04/09 while the respondent's advocate filed a reply on 14/05/09. The appellant's advocate made no rejoinder to the reply.

In her written submissions, Ms Mildred Nassiwa for the appellants addressed grounds 1, 2, 3, and 4 together and ground 5 separately. In answer to grounds 1, 2, 3 and 4, she submitted that though there was evidence that the appellant's father gave the suit land to the 1st respondent, the donation was for a special (specific) purpose. She was of the view that the purpose for which the land was given to the 1st respondent was stated in Exh.D2; i.e. to facilitate him in getting school fees but not for 1st respondent to hold as owner thereof.

With regard to Exh.D1, a deed of gift in Luganda which the respondents relied on to deduce the 1st respondent's interest in the land, Ms. Nassiwa challenged it because though it was received in evidence as "an agreement" it was not translated into English. It was her view that it was very necessary to translate Exh.D1 into English in order to deduce the intention of Badiru Byakika. Because Byakika's intention could not be deduced from Exh.D1 it also could not qualify to be called a deed of gift. Ms. Nassiwa further contended that Exh.D1 was not an agreement because the parties thereto were not stated in the document. She was also of the view that though she testified that her husband and she bought the land the 2nd respondent was not a party to Exh.D1 because she only signed it as a witness.

Ms. Nassiwa also attacked Exh.D1 because it was admitted in evidence as a deed without paying the relevant stamp duty in contravention of the Stamps Act. She further submitted that Exh.D1 did not qualify to be called a will. That since it was not an agreement, deed of gift or will it was ambiguous and should not have been admitted in evidence. Ms. Nassiwa was of the view that had the trial magistrate evaluated the evidence properly she would have come to the finding that DW2's intention of giving land to the 1st respondent was for a particular purpose. That consequently PW2 had a right to give the same land to another person for another purpose, i.e. for life. In her view, the trial magistrate failed to find so and thus occasioned a miscarriage of justice.

In answer to ground 5 of the appeal, Ms. Nassiwa submitted that the trail magistrate had an obligation to visit the locus in quo because all the witnesses that testified did not establish the size of the land. While the appellant testified that it was 10 acres, PW2 did not state its size. John Ntumba (PW3) testified that it was 4 acres in size while the 2nd respondent testified that it was 10 sticks by 12 feet. Ms. Nassiwa was of the view that because of these discrepancies in the evidence the trial magistrate ought to have visited the *locus in quo* to establish the size of the land in dispute. Ms. Nassiwa cited the decisions in the cases of **David Acar & 30 Others v. Alfred Acar-Aliro [1982] HCB 60, Yeseri Waibi v. Edisa Lusi Byandala [1982] HCB 28 and E. Kange v. E. Bwana C/S No. 38 of 1994, reported in (1994) 2 KALR 29**. She concluded that the trail magistrate's failure to visit the *locus in quo* occasioned a miscarriage of justice because the issue of the size of the land in dispute was never established and that this court would find it difficult to resolve the same issue, absent such evidence. She concluded that the judgment of the

lower court since it occasioned a miscarriage of justice. She prayed that this court set aside it aside and order a retrial before another magistrate.

Mr. Onesmus Tuyiringire for the respondents addressed grounds 1, 2 and 3 together and grounds 4 and 5 separately. With regard to grounds 1,2 and 3 he submitted that by giving the land in dispute to the 1st respondent, PW2 gave him a gift. He relied on the definition of a gift in Words and Phrases Legally Defined, Volume 2 where a gift was defined. He submitted that the donation of the disputed land to the 1st respondent fell within that definition because it passed the three tests necessary to qualify it as such: an act to pass property, a deed of gift and delivery to the beneficiary of the gift. Counsel for the respondents also submitted that both by his actions and the deed of gift PW2 was estopped from denying that he gave away the land by the doctrine of estoppel by deed. He relied on Halsbury's Laws of England, 4th Edition, at paragraph 1018. It was his view that Exh.D1 when translated into English was very clear and unambiguous and by it PW2 had given the land to the 1st respondent. He could not turn round and take it away and give it to the appellant. It was also Mr. Tuyiringire's submission that in order to revoke the deed of gift, PW1 had to do so by another instrument in writing.

With regard to the non-payment of stamp duty on Exh.D1, Mr. Tuyiringire was of the view that the error could be rectified by an order of this court requiring the respondents to pay stamp duty on the document and thereafter admit it into evidence. He cited various authorities, notably**, Salim Bin Awadh Bin Mbarak Bakharesha v. Ramadhan Bin Awadh Bin Mbarak Bakharesha, (1956)22 EACA, 55.** He prayed that this court follows the decision in that case, and admit the document in evidence. He concluded that the trial magistrate properly evaluated the evidence on record and came to the correct finding and so grounds 1, 2 and 3 should fail.

With regard to magistrate's finding about the evidence of PW2 that was raised in ground 4, Mr. Tuyiringire submitted that it was not true as proposed by ground 4 that the trial magistrate considered it or found it to be invalid. On the contrary she addressed this evidence at page 3 of her judgment. It was Mr. Tuyiringire's view that the trial magistrate correctly evaluated the evidence but came to the legal finding that after giving away the suit land to the 1st respondent, PW2 had nothing left to give away to the appellant as he later purported to do. It was therefore his view that ground 4 of the appeal should also fail.

In answer to ground 5, Mr. Tuyiringire submitted that it was not mandatory for the trial court to visit the *locus in quo*. He added that it was within the magistrate's powers to decide whether or not to visit the locus in quo. The appellant sued in respect of a block of land; there was no question about the boundaries of the land in dispute. Mr. Tuyiringire submitted that the purpose of visiting the *locus in quo* is to check on the evidence adduced by the parties and not to fill in gaps for then the trial magistrate may run the risk of making himself a witness in the case; such a situation should be avoided. He too relied on the decision in the case of **Yeseri Waibi v. Edisa Lusi Byandala, [1982] HCB 28-30** for this submission. It was also Mr. Tuyiringire's view that a visit to the locus give the appellant the opportunity to influence the elders that he wanted to give evidence there. He proposed that ground 5 should fail.

The duty of this court, as the first appellate court, is to rehear the case on appeal by reconsidering all the evidence before the trial court and come up with its own decision. The parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. [See **Pandya v. R [1957] EA. 336; Father Narsension Begumisa & Others v. Eric Tibekinga, S/C Civil Appeal No. 17 of 2002 (unreported)**].

I have carefully examined the grounds stated in the memorandum of appeal. Ground 3 related to evaluation of evidence and I believe that encompasses grounds 1, 2 and 4 of the appeal which are components of evaluation of evidence. It was only ground 5 that deserved separate consideration because it was a complaint about the procedure that the trial magistrate adopted before evaluating the evidence and coming to her findings. I shall therefore address ground 3, which is the duty of this court, and while doing so I shall take into consideration the complaints raised in grounds 1, 2 and 4 of the appeal. Ground 5 will be addressed separately.

Grounds 3

In order to bring clarity to the sub-issues raised in the submissions above, I shall address the following questions that arise as well as others that arose from the pleadings and the evidence of the parties which the trial magistrate did not consider in her judgment as follows:

i) Was Exh.D1 properly admitted in evidence? If not, what would be its fate?

ii) Did Exh.D1 amount to a deed of gift? If so,
iii) Did PW2 effectively give away the suit land to the 1st respondent? If so,
iv) Could PW2 subsequently take away the land from the 1st respondent and give it to the appellant?
v) Was the 2nd respondent a trespasser on the disputed land? And finally,
vi) Remedies available.

Did Exh.D1 amount to a deed of gift?

Counsel for the appellant complained that Exh.D1 on which the respondent relied to prove that PW2 gave the suit land to the 1st respondent was in Luganda and was admitted with no translation and that as a result, it was not possible for the trial court to establish the contents of the document. She charged that the same should have at most been translated to facilitate the trial magistrate's evaluation of the evidence adduced by the respondents. In reply Mr. Tuyiringe purported to translate the document. With due respect that is giving evidence from the bar and such evidence is inadmissible.

However, the document had already been admitted in evidence by the trial court. It also seemed to be one on which the case revolved. S. 161 (2) of the Evidence Act provides that the court, if it sees fit, may inspect the document (produced) in evidence, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility; and if for such a purpose it is necessary to cause any document to be translated, the court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence. I believe this provision facilitates this court to order translation of any document before it since it is its duty to re-hear the case by re-evaluating the evidence. I thus ordered Mr. Kalera, a clerk in this court to translate the document into English and it appears on the record as Exh. D1A. The contents of the document were as follows:

Naigobya, On 5.6.85

I, Badiru Byakika of Naigobya have given away my kibanja which I bought from Erifereti Bazibu situated at Ndoya Mumyuka subcounty Bukanga to my son Alamanzani Nsadhu.

In the presence of	Yesero Muzale
	Amiiri Waiswa
	Ibandha Kitabula
	Fatina Nabirye
	Wabombi Grace,
And I, the secretary:	Swaga
Signed by: Badiru Byakika:	Thumb Mark
	(Though very feint)

Ms Nassiwa for the appellant submitted that this document was not clear as to the intention of the author, i.e. Byakika (PW2). And that the members of the Land Tribunal had referred to PW2's act as "an allocation" and to the document as "an agreement" due to the fact that PW2's intentions were not clear. She concluded that Exh.D1 was not a will; neither was it an agreement nor a deed of gift.

Mr Tuyiringire was of the view that Exh.D1 was a deed of gift. He relied on the definitions of a gift given in Words and Phrases Legally Defined (Ed.2nd) at page 317 where a gift is defined as follows:

> "A gift at law or equity supposes some act to pass the property: in donations inter vivos … if the subject is capable of delivery, delivery; if a chose in action, a release, or equivalent instrument; in either case, a transfer of the property is required."

Relying on the same authority Mr. Tuyiringire submitted that in order to constitute a gift there must be perfect knowledge in the mind of the person making the gift of the extent of the

beneficial interest intended to be conferred, and of which it is intended to divest oneself in making it. He submitted that according to the evidence on record, PW2's acts constituted the granting of a gift of the suit land to the 1st respondent. He gave by a deed; the 1st and 2nd respondents took possession of the property, built a permanent house thereon and were in occupation of it. He concluded that PW2 knew that he had divested himself of the rights over the land and the gift had been perfected. I agree with the submissions of counsel for the respondents that PW2 made a gift of land to the 1st respondent.

As to whether Exh.D1 was a deed of gift, a deed has been defined as a written instrument, which has been signed and delivered, by which one individual, the grantor, conveys title to real property to another individual, the grantee; a conveyance of land, tenements, or hereditaments, from one individual to another. At common law, a deed was an instrument under seal that contained a covenant or contract delivered by the individual who was to be bound by it to the party to whom it was granted. It is no longer required that such an instrument be sealed. A deed must describe with reasonable certainty the land that is being conveyed. The conveyance must include operative words of grant; however, technical terms do not need to be used. The grantor must be adequately identified by the conveyance, although it is not required that the grantor's name be specifically mentioned. In order for title to property to pass, a deed must specify the grantee with sufficient certainty to distinguish that individual from the rest of the world. In order for a deed to be properly executed, certain acts must be performed to create a valid conveyance. Ordinarily, an essential element of execution is the signature of the grantor in the proper place. It is not necessary, however, that the grantee signs the deed in order for it to take effect as a conveyance. Generally statutes require that the deed be signed in the presence of witnesses, attesting to the grantor's request. In the instant case, PW2 signed Exh.D1. Several persons witnessed him put his signature on the document.

Proper delivery of a deed from the grantor to the grantee is an essential element of its effectiveness. In addition, the grantor must make some statement or perform some act that implies his or her intention to transfer title. There is no particular prescribed act, method, or ceremony required for delivery, and it is unnecessary that express words be employed or used in a specified manner. In the instant case, when the land was given to 1st respondent he and his mother were resident on it; PW2 further confirmed the donation when he signed Exh.D2.

Exh.D1 complied with all the requirements above. There is therefore no doubt that it was a deed of gift in respect of the disputed land in favour of the 1st respondent, and I find so.

Was Exh.D1 properly admitted into evidence?

On this sub-issue, Ms. Nassiwa was of the view that since no stamp duty was paid on the deed before it was admitted into evidence, Exh.D1 was inadmissible because it offended the provisions of the Stamps Act. She relied on the decision in the case of **Yokoyada Kaggwa v. Mary Kiwanuka & Another [1979] HCB 23** where it was held that an instrument on which a duty is chargeable is not admissible in evidence unless that instrument is duly stamped as an instrument on which the duty chargeable has been paid.

Mr. Tuyiringire agreed with this submission but added that the document could be perfected by paying the requisite dues under the Stamps Act before judgment is delivered and then be allowed in evidence. He relied on the decisions in the cases of **Yokoyada Kaggwa v. Mary Kiwanuka & Another (supra)**, **Sunderji Nanji Ltd. v. Muhamed Ali Kassam [1958] EA 762** and **Salim Bin Awadh Bin Mbarak Bakharesha v. Ramadhan Bin Awadh Bin Mbarak Bakharesha, (1956)22 EACA, 55.** In the Bakhresha case the Court of Appeal for Eastern Africa held that such an error could be rectified before delivery of judgment by requiring the party relying on the document to pay the stamp duty required and the penalty and then admitting the document in evidence. He prayed that this court follow the decision therein by adjourning this matter and allowing the respondent to pay the stamp duty before delivery of judgment.

I agree with counsel's submissions in respect of perfecting Exh.D1 to enable its admission in evidence following the authorities cited. In **Sunderji Nanji Ltd. v. Muhamed Ali Kassam (supra)** the High Court for Tanganyika was called on to determine the sole issue whether or not an unstamped document (a letter of guarantee) tendered as evidence could be admitted in evidence. The party producing the document had been denied the opportunity to pay stamp duty and penalty to make the document admissible. On appeal the court held that the issue as to whether or not a document is inadmissible for want of stamping must be decided when the document is sought to be put in evidence or at some other stage before final judgment, so as to give the party introducing it an opportunity of paying the requisite duty and penalty and thus making it admissible. The court found that the party producing the document had never been

given the opportunity of paying the duty and penalty required by the Tanganyika Stamp Ordinance. It was held that the appellate court could make an order for payment of the stamp duty and penalty required. The appeal was allowed and the party producing the document was ordered to pay the duty. The case was remitted to the lower court and the parties given the liberty to adduce any further evidence they considered desirable as a consequence of the document.

In **Salim Bin Awadh Bin Mbarak Bakharesha v. Ramadhan Bin Awadh Bin Mbarak Bakharesha (supra)** the suit was between two brothers. The document in issue was an agreement for partition of immoveable property that was adduced in evidence when it was insufficiently stamped. No objection was taken at the trial by either of the parties or by the court. An order for specific performance was made. On appeal, the appellant raised the issue of the insufficiency of the stamp duty that had been paid, among other grounds of appeal. Counsel for the appellant only argued that one ground of appeal. The Court of Appeal for Eastern Africa held that an appellate court (on a first appeal) had similar powers to the trial court and could make orders for payment of the requisite duty and the penalty for the justice of the matter and the protection of the revenue. It was thus ordered that after payment of the balance of duty payable and the penalty, the appeal would stand dismissed with costs; otherwise, the appeal would stand adjourned for further consideration.

I have considered the options offered by the authorities cited by Mr. Tuyiringire. However, I am of the view that the justice of this case may require a different measure, at the risk of prejudicing the Uganda Revenue Authority. This is an appeal that was filed in 2008 in a suit that was filed in the lower court in 2004. It is a relatively old dispute. The parties have already filed written submissions herein and are waiting for judgment. I do not think it would be in the litigants' interests to delay this judgment any longer. For reasons that will become apparent as the next issue is disposed of I do not think that process will be necessary. This court can dispose of this appeal even without relying on Exh. D1. It shall therefore be disregarded.

Did Badru Byakika, other than by deed of gift, effectively give away the suit land to the 1st respondent?

Osborn's Concise Dictionary of Law (Ed. 7th, Sweet and Maxwell) defines a gift as a gratuitous grant or transfer of property. For a valid gift to there must be an intention to give and such acts as

are necessary to give effect to the intention, either by manual delivery of the chattels or of some token on the part of the subject matter, or by change of possession as would vest possession in the intended donee. It may be by deed. From this definition, I concluded that it is not always necessary to have a deed in order to perfect a gift.

Ms. Nassiwa strenuously argued that Byakika's (PW2) intention when he gave away the suit land to the 1st respondent was not clear because he did not indicate whether the gift was for life. Further that the members of the District Land Tribunal referred to the donation as an "allocation" because there was lack of clarity of PW2's intention. It was also Ms. Nassiwa's argument that the 1st respondent was still a baby when PW2 gave him the land. He could not have known about it or been able to ascertain his intention. His assertions that his father gave him land were therefore purely hearsay evidence that should not have been admitted by the trial court. Turning to Exh.D2, Ms. Nassiwa contended that the document proved that PW2 gave the land to the 1st respondent for a specific purpose. It therefore confirmed that PW2 did not give away the land to the 1st respondent as was claimed in the suit. Mr. Tuyiringire did not respond to this submission. He focused more on Exh.D1 and the testimonies of the appellant's witnesses that tended to establish the 1st respondent's rights.

The evidence on record was that according to the appellant (PW1) the land in dispute had earlier been *"allocated"* to the 1st respondent. Later on, in the year 2003, PW2 decided to allocate it to the appellant. The appellant also asserted that in exchange for the land at Ndoya PW2 allocated another piece of land at Naigobya to the respondents. On cross-examination by the 1st respondent the appellant stated that the land was allocated to the 1st respondent 10 years before his father allocated it to him. On cross-examination by the 2nd respondent the appellant clarified that he had no document to show that PW2 gave him the disputed land. When the Land Tribunal put questions to him the appellant informed the members that before his father gave him the land at Ndoya in 2003 he had land and his homestead at Naigobya. Further the PW2 also allocated land to the respondent in Naigobya which was lying fallow at the time of the hearing.

Badiru Byakika (PW2) testified that he bought the land in dispute when he was married to the 2nd respondent. At the time they had only one child, the 1st respondent, but they later got three more children to make 4 offspring. That in a year he could not recall he gave the land to his son

Alamanzani Nsadhu (the 1st respondent). PW2 confirmed that he did this in writing and the document was witnessed by Yesero Muzale, his brother who was deceased by the time of the hearing. Further that after about 13 years he changed his mind, withdrew ownership from the 1st respondent and gave the land to his elder son Magidu Lamusa, the appellant; that the gift to the appellant was not evidenced in writing. Further, that after he gave the land in Ndoya to the appellant he gave another piece of land at Naigobya to the 1st respondent but he (PW2) was still using it. In cross-examination PW2 stated that in 2001 while at the Probation Officer's at Iganga he again gave the land in dispute to 1st respondent and his other siblings, Ziriya Kaguna and Birali Muzale. Further that Tayemba (his other son) was given land in Ndoya. When PW2 was cross-examined by the 2nd respondent he stated that at the time he gave the disputed land to the 1st respondent the 2nd respondent was resident on it, most probably with the 1st respondent who was then a baby.

There is no doubt that the testimony of PW2 was central to the trial magistrate's decision that PW2 effectively gave the land in dispute to the 1st respondent. It is therefore not true that the trial magistrate found it PW2's testimony invalid as was advanced in ground 4 of the memorandum of appeal.

The appellant also called John Ntumba (PW3) a member of their clan, the Baise Iwumbwe. PW3 testified that PW2 had inherited the disputed piece of land from his father. PW2 gave the land to the 1st respondent in a year that PW3 did not recall. But on 26/8/03, PW2 changed his mind and gave the land to the appellant. According to PW3 this was because he gave another piece of land at Naigobya to the 1st respondent. In cross-examination PW3 stated that PW2 gave the land to the appellant on an occasion when they convened at the LC Chairman's place but there was no document written in respect of this donation. However, PW3 claimed he was called to witness that the land was given to the appellant. He did not know where the boundaries of the land were; neither did he know the other land owners bordering the disputed land which in examination in chief he stated was 4 acres in size.

The testimony of PW3 tried to establish that the land in dispute was clan land. However, his was the only testimony that adverted to PW2 having inherited the land from his father. The testimony of PW2 himself was clear on how he acquired the land, i.e. by purchase. On the whole, PW3

seemed to have little knowledge about the land in dispute or he tried to tell lies to ensure that the 2nd respondent's proprietary interest in the land would not be recognised.

The respondent testified as DW1. He stated that his father (PW2) and his mother (2nd respondent) informed him that PW2 gave him the disputed land in 1985. Further that his mother had informed him that there was a document in respect of the donation. He produced Exh.D1 and Exh.D2 which were admitted in evidence. The 1st respondent further testified that there was a permanent house on the land in which he resided with is mother and his siblings and the house was his mother's matrimonial home. DW1 further stated that the appellant was given land in Naigobya where he had his home; that the appellant only began to challenge their occupation of the land in 2003 when he influenced PW2 to give it to him. When his attempts to influence PW2 failed the appellant decided to grab the land as a result of which he filed the claim before the Land Tribunal.

In her testimony the 2nd respondent stated that the land in dispute belonged to PW2 and she in 1983. She confirmed that after the land was purchased PW2 gave it to their son (the 1st respondent) by executing a document in the presence of members of the clan. She referred to Exh.D1 and D2. It was her further testimony that she re-located to the land in Ndoya from Naigobya in 2003 when she found out that the appellant had entered onto the land forcefully. She then built a permanent house and settled on the land. She informed the Land Tribunal that the land was purchased at shs 160,000/= from Erifereti Bazibu. It was also her testimony that the appellant was not in occupation of the suit land; he had no home on it and his activities were all on the land in Naigobya. The 1st respondent was also able to tell the Land Tribunal the size of land and describe the neighbours adjoining it. She was unsuccessfully challenged in cross-examination.

The respondents called Lubise Laulensio (DW3) the 2nd respondent's brother. He testified that the 2nd respondent was married to PW2 customarily. That they acquired land together which PW2 later gave to the 1st respondent in writing in the presence of clan members. It was also his testimony that the appellant influenced PW2 to give him the disputed land yet he had land in Naigobya. That the appellant began to cultivate the land before PW2 gave it to him. The 2nd respondent then reported to the Probation Officer that PW2 was neglecting her children. DW3

was present at the proceedings. In response to the complaint PW2 pleaded that he was an old man and that the land which he had given to the 1st respondent should be used to provide for the 2nd respondent's children born to him. DW3 testified that all this was written down in a document that had been admitted in evidence.

The testimonies of all the witnesses in the case confirmed that PW2 indeed gave the disputed piece of land to the 1st respondent. The 2nd respondent who claimed to also have an interest in it acquiesced in the donation. Although the record refers to the donation in PW1's testimony as an "allocation", PW2's testimony was clear. He unequivocally stated that he "gave" the land to his then only son (the 1st respondent) and this he did in writing. Though he claimed to have changed his mind and given the land to the appellant, he had no document to prove that he took away the land from the 1st respondent.

I shall next address Exh.D2 and for clarity of the discussion of this sub-issue, Exh.D2 is reproduced below.

PROB/1053

Probation Office
Iganga District
P. O, Box 358
IGANGA
16th March, 2001

RE: MEMORANDUM OF UNDERSTANDING

Fatina Nabirye reported to office complaining against Badiru Byakika for denying her son Nsadhu Alamanzani the piece of land which he gave him.

Byakika was invited to office for a joint discussion and we were made to understand that the complainant has four children with the respondent (Byakika).

Sometime back in 1985 **he made an agreement to the effect that he was giving a piece of land at Ndoya, Bukanga to his son Nsadhu Alamanzani.**

He at the same time gave one of his children one Faruku Tayemba a share on his piece of land at Naigobya leaving out the other two children (Birali Muzale and Ziriya Kaguna).

After a lengthy discussion it has been agreed **that the son Nsadhu Alamanzani retains the piece of land at Ndoya which will for the time being benefit him for his school fees.** The two other sisters who were not given anything also have a share on the piece of land at Ndoya, Bukanga Subcounty. Badiru Byakika also has the responsibility of providing school fees for his children.

…….RTM
Badiru Byakika

Signed: Nsadhu Alamanzani

Signed: Fatina Nabirye

Witnessed by: …….signature
Leo Lubise:

……signature
Kibale Dhabangi

Before:

…….Signed
SANYA PAUL

For PWO, IGANGA. Stamped with stamp for Probation and Social Welfare Office, Iganga District

{Emphasis added}

There is no doubt that Exh.D2 spelled out in no uncertain terms that there was a dispute between PW2 and the 1st respondent over maintenance of their children. It was stated therein that PW2 had agreed that his son Nsadhu Alamanzani would retain the piece of land at Ndoya, Bukanga Subcounty. This would for the time being benefit him for his school fees. The two other sisters who had not been given anything were also given shares in the same piece of land. Badiru Byakika placed his right thumb mark on the document; the 1st and 2nd respondent also signed the document. Witnesses thereto were Leo (Laulensio) Lubise (DW3), Kibale Dhabangi and Paul Sanya, the Probation and Welfare Officer. With slight variations, Exh.D2 confirmed what DW3 stated in his testimony.

The preamble to the understanding between PW2 and the respondent expressed PW2's intention when he first donated the land to the 1st respondent in 1985 and it used the expression "gave" as opposed to "allocated" which the members of the Iganga DLT used in the record of proceedings. PW2 did not deny that he executed this document. Neither did he deny that he was present at the Probation Office when the document was drawn and executed. Although the 1st respondent was only a baby when PW2 first gave him the land in 1985, PW2 confirmed the gift in the 1st respondent's presence when he was about 17 years old. In the face of Exh.D2, PW2's intention to give away the land in dispute to the 1st respondent and his sisters was indubitable.

I am therefore of the firm opinion that the use of the word "allocate" in the proceedings was an error in translation or a misnomer of PW2's actions because it was also used in respect of the gift that PW2 purported to give to the appellant. I therefore do not agree with Ms. Nassiwa's submission that use of the word "allocate" meant PW2 had only allowed the 1st respondent to use the land for some time for a specific purpose and not given it to his for life. PW2 himself did not say so in his testimony. The fact that PW2 delivered the gift to the beneficiary is also not doubted because in his own testimony PW2 stated that he gave the land to his son when he and the 2nd respondent were resident thereon. The volume of evidence shows that the requirements for making a gift under the law were all satisfied. I therefore find that even in the absence of Exh.D1, the respondents proved that PW2 effectively gave away the disputed piece of land to the

1st respondent. The trial magistrate therefore properly evaluated the evidence before her and her decision in favour of the 1st respondent cannot be faulted. Grounds 3 and 4 of the appeal therefore fail.

Could PW2 subsequently take away the land from the 1st respondent and give it to the appellant?

In answer to this question, Ms. Nassiwa submitted that since PW2 had not given the land to the 1st respondent for life, PW2 could change his mind, take the land away from the 1st respondent and give it to another person of his choice for another purpose. In reply, Mr. Tuyiringire submitted that PW2 could not take away the land because he had nothing left to give away. He added that it seems PW2 was disgruntled with the 1st respondent. This was evident from his testimony where he stated that he did not feel for the 1st respondent's children because she used to move with them to her subsequent marriages. Mr. Tuyiringire relied on the doctrine of estoppel by deed, sections 91 and 92 of the Evidence Act and the decision in the case of **Fenekansi Semakula v. Ezekiel Mulondo, [1985] HCB 29** for his submission**.**

I have already held that the deed of gift was improperly admitted in evidence because of non-payment of stamp duty and it would be disregarded. However, there is Exh.D2, the memorandum of understanding entered into at the Probation Office in Iganga. In Exh.D2 PW2 confirmed in writing that he gave away the land to the 1st respondent and that he and his sisters would share the same. There was consideration for this understanding between the 2nd respondent and PW2 which was PW2's natural love and affection for his children. Further consideration was that the 2nd respondent would ensure that the land facilitates the 1st respondent's schooling. Though the 1st respondent signed the memorandum of understanding I did not consider him a party thereto because at the time that Exh.D2 was executed he was below the age of 18 years. He fell short of the requirements for executing such documents under the common law because he was still a minor. However, that memorandum of understanding had the same force as an agreement entered into between PW2 and the 2nd respondent in respect of the land for the benefit of the 1st respondent, their infant son. It was thus one that bound both PW2 and the 2nd respondent in all future transactions in respect of the land.

It may be argued that Exh.D2 was also improperly admitted in evidence because no stamp duty was paid on it before it was admitted. I have closely examined the schedule to the Stamps Act which lists the documents that need to be stamped under the Act. In the first part of that schedule, item 5 provides for agreements or memoranda of agreements. I am of the considered opinion that though it had the same force as an agreement, Exh.D2 did not fall under item 5 because it was simply confirmatory of an already existing deed. It was therefore admitted as secondary evidence to add weight to Exh.D1 or to confirm that PW2 indeed executed Exh.D1.

In his testimony, PW2 stated that no deed was executed when he gave the land to the appellant. The appellant confirmed this; so did PW3. Section 91 of the Evidence Act provides for exclusion of oral by documentary evidence as follows:

> "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."

I therefore find that the appellant could not take away the land and orally give it to another. Even if he had done that in writing, such an act would have been contrary to his intention and he would have been estopped by his earlier actions from doing so. Property in the land had passed to the 1st respondent and PW2 could no claim it back because the gift appeared to have been unconditional. The trial magistrate was therefore correct when she ruled that by the time he purported to give the land to the appellant PW2 had no property left in the land to pass on to him. Grounds 1 and 2 of the appeal therefore fail.

Was the 2nd respondent a trespasser on the disputed land?

The 2nd respondent was dragged to court as a trespasser on the appellant's land. The 2nd respondent claimed to be a joint owner of the suit land having purchased it with her husband during the course of their marriage. It is true that she did not produce any evidence to show that

she was a joint purchaser or owner of the land with her husband. However, she knew what the purchase price was and the size of the land. PW2 did not challenge her testimony on these two points. It is certain from her testimony and from the testimonies of PW2 and DW3 that the land in dispute was indeed purchased during the course of the marriage between the 2nd respondent and PW2.

The position of the 2nd respondent in respect of the suit land can be derived from Article 31(1) (b) of the Constitution of the Republic of Uganda. Parties to a marriage have equal rights at, and in marriage, during marriage and at its dissolution. There is now a series of decisions that hold that property acquired during the course of a marriage is matrimonial property. In **Anne Musisi v. Herbert Musisi, H.C.D.C. No. 17 of 2007,** (unreported) Eldad Mwangusya, J. held:

> *"On the issue of property the first principle to consider before distribution of property is that the couple are entitled to equal rights at the dissolution of the marriage as enshrined in Article 31(1) of the Constitution of the Republic of Uganda which provides that "men and women of the age of eighteen years and above have the right to marry and to find a family and entitled to equal rights in marriage, during marriage and its dissolution. The second principle is that the contribution of each of the spouses to the acquisition of the property must be recognized. In this case there is no doubt that both spouses made financial contributions to the property acquired during their marriage. But even if there were no such direct contributions courts have established that indirect contributions of spouses are recognized when distribution of matrimonial property is in issue."*

The same principle was expounded in **Peri Sasira v. John Mutegeki, H.C.C.S. 828 of 1994 Anne Nabukomeko Sempiga v. James Musajjawaza Sempiga, H.C.D.C. No. 7 of 2005** and **Julius Rwabunumi v. Hope Bahimbisomwe, C/A Civil Appeal No. 30 of 2007** (all unreported).

The body of evidence on record thus established that the 1st respondent had an interest in the suit land as a joint owner by virtue of her marriage to PW2. By necessary implication, PW2 could not

give the property away to the appellant without her acquiescing in the donation of the same (s. 39 Land Act). She could therefore never be a trespasser on the land, and I find so. In the end result, grounds

Ground 5

There is no doubt that the appellant's claim in the lower court was for the whole piece of land on which the respondents resided with the 1st respondent's siblings. There was no issue as to boundaries or the extent of the alleged encroachment. Though the appellant claimed the respondents had trespassed on his land he did not prove that he was in occupation of the land in dispute. There was therefore nothing to see at the *locus in quo* and such a visit would have been a waste of court's time. The trial magistrate properly exercised her discretion not to visit it. Ground 5 therefore also fails.

In the end result, the appellant's appeal had no merit and it is hereby dismissed. The respondent shall have the costs for this appeal as well as the costs in the court below.

Irene Mulyagonja Kakooza
JUDGE
29/06/2009