THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CIVIL APPEAL NO. 066 OF 2007

1. **MUGANZA LUBALE (KIBEDI GRACE)}**
2. **BAWOMA SAMUEL }**
3. **WAISWA WILLIAM }**
4. **MUYAAYA JOHN }**
5. **WAKYALO GOD }::::::::::::::::APPELLANTS**

VERSUS

MUKODA CATHERINE :::::::::::::::::::::::::::::::::::::: RESPONDENT

[Appeal from the Judgment of Her Worship Nabafu Agnes (GI) in Kamuli Civil Suit No.0043 of 2004]

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

JUDGMENT

This is an appeal from the judgment of Her Worship Agnes Nabafu in which she declared that the land in dispute belongs to the plaintiff (now the respondent) and ordered that the 1st and 2nd defendants (appellants) be evicted from the land and pay general damages of shs 500,000/= to the plaintiff, as well as the costs of the suit.

Muganza Lubale a.k.a Kibeedi Grace (1st defendant/appellant) and Bawoma Samuel (2nd defendant/appellant) were the brothers of the respondent being the offspring of one Kakombekato Wambi. Kakombekato was the 3rd defendant in the suit but he died before judgment was delivered. Waiswa William (3rd appellant) was the 4th defendant in the suit and the LCI Chairman of Kalembe "A" Village where the land in dispute is situated, while Muyaaya John (4th appellant/5th defendant) was the Vice Chairperson LC1 of the same village. It is not clear how the 5th appellant (6th Defendant) was related to the respondent or why she sued him. However, the 4th, 5th and 6th defendants (now also appellants) did not

defend the suit and the trial magistrate discharged them from liability. It is not clear why the three appealed against the decision which was not against them. I therefore considered that the necessary appellants to this appeal were the 1st and 2nd appellant; the rest were superfluous.

The background to the appeal was that the plaintiff sued the 6 defendants in the Kamuli District Land Tribunal but when the operations of land tribunals were suspended the suit was transferred to the Magistrates Court at Kamuli which rendered judgment. The plaintiff claimed that sometime in 1989, their father Kakombekato Wambi distributed his land held under customary law among his offspring. The plaintiff got a share of the land and was allotted one room of his house on the land for her use. The plaintiff complained that sometime in 2004, Kakombekato Wambi colluded with all the defendants, gave away part of her land to the 1st appellant and later sold off the rest to the 2nd appellant. She claimed that when he gave it to her, Kakombekato demarcated off the piece of land her with *birowa*. She therefore the land under the provisions of s.29 and s.40 of the Land Act and prayed that she be declared the owner thereof and awarded general damages. She also prayed that the defendants be ordered to vacate the land.

The defendants did not file a written defence but when the suit came before the District Land Tribunal they denied the claim under the provisions of rule 19 of the Land Tribunals (Procedure) Rules, 2002. They also called evidence in rebuttal by which they sought to prove that Kakombekato did not give land to the respondent but only allowed her to cultivate crops on it. That subsequently, he sold off part of the land to the 1st appellant and gave away the rest to the 2nd appellant.

The trial magistrate framed 4 issues for determination, i.e.

i) Whether the plaintiff was a bona fide occupant of the suit land.
ii) Whether the plaintiff had a cause of action against the defendants.
iii) Whether the defendants were bona fide purchasers of the land without notice.
iv) Remedies available to the parties.

The trial magistrate found that the respondent was neither a bona fide nor a lawful occupant of the land within the meaning of s. 29 Land Act. However, she found that the respondent

occupied the land legally since her father had given it to her more than 12 years before 2004 when he purported to sell part of it to the 2nd defendant and give away the other part to 1st defendant. The trial magistrate found in favour of the respondent on the rest of the issues framed and made the orders that I have stated above. The defendants appealed and framed 3 grounds of appeal in their memorandum of appeal as follows:

1. That the trial magistrate erred in law and fact when she failed to evaluate the evidence on the court record thereby leading to a miscarriage of justice.

2. The trial magistrate erred in law and fact when she failed to hold that the suit land is owned by the appellants having been given to them by their father.

3. The trial magistrate erred in law and fact when she failed to hold that the appellants were declared the rightful owners of the suit land by the LCI Court.

When the appeal was called on for hearing on 7/10/08, during the the appellants' counsel's submissions, I realised that part of the record of proceedings was missing. The evidence and notes that had been taken at the *locus in quo* were not typed when the record was prepared by the lower court. I therefore adjourned the hearing to have that part of the record typed so that both parties could be availed with copies thereof. After that, on the 01/07/09 I ordered that the advocates file written submissions in the appeal. Mr. Charles Wafula then filed submissions on behalf of the appellants on the 14/07/09. A reply was filed for the respondents by Ms. Monica Birungi on the 16/07/09.

In his submissions, Mr. Wafula argued all the three grounds of appeal together under the first ground that the trial magistrate failed to evaluate the evidence on record and came to a wrong finding. He argued that the evidence on record showed that Kakombekato (the father of all the parties to the suit) gave land measuring 10 x10 sticks to the respondent but the trial magistrate did not consider this evidence. Further that she did not consider the testimonies of the 1st and 2nd appellant about the size of land that their father gave to the respondent. That as a result of this omission, the trial magistrate erroneously declared that the whole piece of land was given to the respondent. Mr. Wafula contended that had the trial magistrate considered the measurements of and the size of land claimed by the appellants compared to that which

was given to the respondent by their father, she would have arrived at a different decision. Mr. Wafula conceded that it was wrong of Kakombekato Wambi to withdraw the piece of land that he had given to the respondent and which she had used for such a long time. He also conceded that he ought to have left her that piece of land measuring 10 x 10 sticks of 10ft each as her property. He then prayed that this court finds so and orders that the respondent is entitled to a piece of 10 x 10 sticks of the land while the appellants are entitled to the parts that their father had given and sold to them before his death.

Mr. Wafula also argued that the trial magistrate erred when she ordered that the appellants pay the costs of the suit to the respondent. He argued so because in her testimony, the respondent told court that she would forgo the costs of the suit because she was a born again Christian. It was his view that the trial magistrate should have considered this and not awarded costs of the suit to the respondent. He prayed that this court reverses that decision for the sake of uniting the parties to the suit who are siblings and therefore members of the same family.

In reply, Ms. Birungi noted that the appellants had conceded defeat in the appeal by conceding that part of the land in dispute belonged to the respondent. Further that the testimonies of the appellants at the trial in respect of the size of the land they received and bought had material contradictions which implied that they lied to court or that they did not know the correct measurements of the land. She argued that the decision made by the trial magistrate should be upheld because in coming to her decision she relied on the evidence that when she was given the land, Kakombekato Wambi demarcated off her portion with *birowa.* That since the visit to the *locus in quo* showed that the *birowa* were still in place, the trial magistrate was correct when she relied on what the respondent showed court on the ground in order to find in her favour. She urged court to follow the testimonies of the independent witnesses at the *locus in quo* and uphold the decision of the trial magistrate.

With regard to the costs of the suit, Ms. Birungi relied on s.27 of the Civil Procedure Act (CPA) which provides that costs follow the event. She submitted that the trial magistrate was correct when she exercised her discretion to award costs to the respondent who had succeeded in her suit. She prayed that court awards her the costs given that she had experienced pain and suffering due to the actions of the appellants.

The duty of the first appellate court is to rehear the case on appeal by reconsidering all the evidence before the trial court and to come up with its own decision. The parties are entitled to obtain the court's own decision on issues of fact as well as of law. [See and **Father Narsension Begumisa & Others v. Eric Tibekinga, S/C Civil Appeal No. 17 of 2002 (unreported).**] I will therefore re-evalute all the evidence taking into consideration the questions which were raised by Mr. Wafula on behalf of the appellants as follows:-

i) Whether the trial magistrate caused a miscarriage of justice when she disregarded the testimonies of the defendants about the measurements of the land in dispute.
ii) Whether the trial magistrate erred when she awarded costs of the suit to the respondent.

With regard to the first issue, it is important first to get the gist of the respondent's testimony before a decision can be made whether the appellant's testimonies rebutted her claim for the suit land. Her testimony in-chief was that sometime in 1989 her father Kakombekato gave her the suit land. She further stated that after he gave it to her, he urged her to stay on it and not to return to her marriage because her husband's family practiced witchcraft. That he had also warned her that if she left the land and let her brothers encroach on it she would have no defence. The respondent testified that she complied with the terms of the donation and stayed on the land till 2004 when her father turned round and gave part of the same land to the 1st appellant and sold off the rest to the 2nd appellant.

In cross-examination the respondent said that when she was given the land in dispute her father demarcated it and *birowa* were planted in the presence of witnesses. Her sister Alikoba Jennifer (PW2) said nothing about the size of the land but she confirmed that their father gave the land to the respondent who had been in occupation of it for a long time.

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 take effect 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. The testimonies of the respondent and her sister confirmed that Kakombekato donated the land to

the respondent as a gift during his life. The demarcation of the land for the respondent and the cautionary words that went with it confirmed to me that the respondent's father had the intention to give and to give absolutely, a specific piece of land. The respondent took possession of it and began to use it thus perfecting the gift.

For the defendants, Kakombekato Wambi testified as DW1. He stated that the respondent was a widow, her husband Mutaya having died. He further testified that 3 years after his death the respondent asked him to give her some land temporarily so that she could cultivate it and grow maize and potatoes. That the land that he allowed her to use measured 10 x 10 sticks of 10 ft each, i.e. 100 sq. ft. That later on he asked her to stop using the land but she refused to do so and continued to cultivate it beyond the one season that he had allowed her to use it. That it was then that he decided to give away the land to the appellants. When he was cross-examined he denied having demarcated the land for her.

One of the consequences of a gift is that unless it is made conditionally and the donee breaches the conditions, the gift cannot be revoked. In this case, Kakombekato had no reason to revoke the gift because the respondent complied with the terms. She continued to utilise the land till the donor purported to withdraw the gift from her. I find that the donor breached the terms of the gift; he went against the caution that he had given to the respondent about her brothers encroaching on the land and instead personally gave the land away to the appellants. I would say this behaviour was not only illegal but appeared to be irrational on his part.

On his part, the 1st appellant's testimony was that his father Kakombekato Wambi gave him the land in dispute and that the transaction was documented. However, he did not produce the document in evidence. The 1st appellant went on to say that the land his father gave him measured 6 sticks each 10 feet in width and over 200 sticks in length (i.e. 60ft x 2000ft which is 120,000 sq. ft). The 1st appellant further stated that the land in dispute had no house on it and he resided on another piece of land that his father gave him in addition to the piece in dispute. When he was cross-examined he admitted that when his father gave him the land the respondent was using it for cultivation. Further that he left Nabitala village and moved (presumably onto the suit land) in 2004.

On his part, Bawoma Samuel (2nd appellant) stated that in 2004, he bought part of his father's land measuring 26 sticks by 235 sticks, each 10 ft long (i.e. an area of 611,000 sq. ft.) at a price of shs 600,000/=. That before he bought the land his brothers and sisters cultivated it. Further that after he bought he tried to use the land but the respondent prevented him from doing so by an order that was issued by court. He too insisted that their father only loaned land to the respondent but did not give it to her permanently.

The testimony of the 1st appellant confirmed that the respondent was still in occupation of the land when their father purported to withdraw the gift. The presence of crops evidentially pointed to this. His efforts to take over what had been given to another were shown by his departure from Nabitala where he previously lived to the suit land or nearer to it in order to dispossess the respondent. The fact that the land was given to the respondent was also made more credible by her opposition of the 2nd appellant's attempts to use it.

Re-evaluation of the evidence adduced by the three defendants also made it clear to me that Mr. Wafula's proposition that the land Kakombekato gave to his daughter was only part of that which he gave to his sons was not tenable. It appears all three defendants were trying to completely dispossess the respondent of the land. Neither of them adverted to Mr. Wafula's proposition that the respondent was entitled to only a portion of the land in dispute. On the contrary all the three seemed to want to have it all for the men in the family leaving the respondent landless. Confirmation of this is the respondent's testimony that on 27/5/2004, her father sold off part of the land he had given her to the 2nd appellant and gave away the rest to the 1st appellant. My conclusions from the above are supported by the testimony of the 1st independent witness at the *locus in quo,* Nguda Moses.

Nguda Moses testified that he was the first born son of Kakombekato Wambi. According to the site map that the trial magistrate drew at the *locus in quo*, his land was adjacent to the piece of land in dispute. He testified that sometime in 1984, his father gave him a piece of land. He further testified that Bawoma (2nd appellant) received a donation of land in 1988 and another sister called Nabutono also received a gift of land on the same day. He confirmed that the land that remained in the middle was given to the respondent. Nguda further testified that before Kakombekato gave her the land the respondent was already using it, which

contradicted what Kakombekato himself told court. This led me to believe that he (Kakombekato) was either irrational at the time he gave away the land or that he was a liar.

Nguda further testified that after Kakombekato gave land to the respondent, boundary marks were planted. That at first Kintu, also their brother, tried to interfere with the respondent's quiet possession but their father prevented him from doing so. He also said that his father also prevented him (Nguda) from interfering with the respondent's possession of the land. Nguda further testified that these actions by their father showed him that the particular piece of land belonged to the respondent. He finally said that in 1994 their father wanted to give the same piece of land away to the 1st and 2nd appellant but the respondent stood her ground.

When he was cross-examined by the 1st appellant, Nguda said that when his father tried to give the same land to the 1st appellant, he (Nguda) resisted it. Also that he did not know about any agreement that his father had signed giving land to the 1st appellant and he made no agreement for him (Nguda) either when he gave him land. He confirmed that their father had given the land to the respondent because he even planted boundary marks for her and she used it by planting bananas, potatoes and other crops till a short time before he testified.

The 2nd appellant also cross-examined Nguda. Nguda then said his father had never withdrawn gifts he gave to him (Nguda) nor done so of gifts he gave to other persons. He confirmed that the respondent and her sister Babirye were the females in the family who received gifts of land. Further that his father fell sick (of heart disease). Nguda told court that Kakombekato then got disturbed (mentally) and began to change his brain (mind). He also asserted that if his father executed any agreements at the time he was disturbed and the agreements were invalid because he (Kakombekato) did not understand what he was doing. Nguda also revealed that the local authorities may not have known about Kakombekato's problem (mental illness or confusion).

The testimony of Nguda clearly belied all that the 3 defendants had told court in their testimonies. Though he also implicated himself in previous attempts to dispossess the respondent of her land, he turned round and told court the truth about the transactions on it. His testimony that his father was mentally confused due to an illness when he gave to the

appellants is especially important in affirming the respondent's absolute rights to the land in dispute.

Following that Waiswa Willy, a *mutaka* in the village and the LCI Chairman testified that on 7/04/2004, Kakombekato called them and gave the land in dispute to the 1st appellant and sold the rest to the 2nd respondent. He also told court that at the time there were crops on the land: cassava, maize bananas and potatoes. That the land was demarcated in his presence and that of the appellants but there were old boundaries. When he was cross-examined, Waiswa said that there were many people using the land at the time, apart from the respondent. He confirmed Nguda's testimony that there was once a dispute between the respondent and Nguda over the land but it was resolved.

The Vice Chairperson of the village, Muyaaya John confirmed Nguda's testimony that at the time that he gave away the land to the appellants in 2004, Kakombekato was sick. Also that there were documents signed but again they were not produced in evidence. Muyaaya also told court that at the time Kakombekato gave away the land to the appellants there was a maize and banana garden on it. Also that it was the respondent and her aunt Federesi who were cultivating the land. In cross-examination he confirmed, as Waiswa did in his testimony, that the respondent was not summoned to witness the transaction though she was at the time in occupation by cultivating the land and had crops on it. Banerya Yekoyasi, a neighbour and *mutaka* also confirmed that though the respondent was at the time cultivating the land, Kakombekato gave it away to the appellants and he (Banerya) witnessed both transactions.

Though the testimonies of the three witnesses above showed that Kakombekato gave land to the appellants, he legally could not revoke an absolute gift that he made with the unequivocal intention of dispossessing himself of the land by planting *birowa* for the respondent. These three residents of Kalembe "A" village confirmed that the respondent was in occupation of the land when her father purported to sell it and give it away. Also that she had crops which he made no efforts to facilitate her to remove. That may be so, but Nguda's testimony that his father was mentally disturbed when he purported to change his mind and give the land to the appellants made any contracts that Kakombekato's entered into at the time null and void.

In conclusion of this first ground of appeal, I find that the trial magistrate made no error when she omitted to consider the different sizes of the land adverted to by the appellants and their father. It appears that by the testimony of Nguda, the whole piece of land in dispute was irrevocably given to the respondent. The appellants were given other pieces of land by their father. They therefore had no reason to turn round and try to dispossess the respondent of her land.

Ground 2

As to whether the trial magistrate erred when she awarded the costs of the suit to the respondent, the claim filed in the lower court *did* have a prayer that costs be awarded to the complainant. She however stated in her evidence in-chief that she would forgo the costs of the suit because she was/is a born again Christian. The decision to forgo the costs was of course within her rights.

The trial magistrate gave no reasons for awarding costs to the respondent contrary to her prayers to court. The respondent did not hire counsel to prosecute the suit for her and the matter was between family members. I think that in the interest of repairing family relations between the parties, it would have been prudent to comply with the respondents request and award no costs. I therefore find that the trial magistrate erred when she awarded costs to the respondent.

In the end result, this appeal only partially succeeds. The judgment and orders of the trial magistrate are upheld, save for the order for costs. Due to the fact that this appeal was defended by an advocate on her behalf, the appellants shall pay the respondent's costs for this appeal.

Irene Mulyagonja Kakooza
JUDGE
16/09/2010