THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

CIVIL APPEAL NO. 4 OF 2007

GOOBI RODNEY :: APPELLANT

VERSUS

CHRISTINE NABUNYA :::::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE RUBBY AWERI OPIO

JUDGMENT

This is an appeal against the judgment and orders of Magistrate Grade I sitting at Mengo Chief Magistrate's Court. The brief facts of the case are that the Appellant was the Plaintiff in the lower court. The Plaintiff brought the suit against the Defendant who was his aunt seeking for orders that he be paid Uganda Shillings 1,600,000/= special damages for loss and damages to property, General damages for trespass and permanent injunction. In his plaint the Plaintiff averred that the Defendant who was his aunt and who initially owned a semi-permanent structure on the disputed land, gave the same to the Plaintiff as a gift under a deed. However the land on which the structure stood was part of the estate of the **late Ponsiano Semakula** who died intestate and the land was given to one **Musabe Samwiri**, a son and beneficiary of the estate of the **late Ponsiano Semakula** as per the distribution of the estate of **Semakula.** The Plaintiff averred that on 15/12/2002, he bought the said land from the said **Musabe Samwiri** and paid the purchase price. After the said purchase, the Plaintiff sought to have the said land registered in his names whereupon transfer

forms were signed on behalf of the seller by Paul Serunjogi who was the holder of Letters of Administration of the said estate. The Plaintiff further alleged that he later developed the structure into a permanent house with four bedrooms and went on to occupy the said house at all material times before the Defendant without any colour of right whatsoever, entered the premises and threw away all his property, locked the house and carried away the keys thereby causing immense loss, suffering and damage both to the Plaintiff and his property.

The Defendant denied the claim and stated that she was a bonafide occupant of the suit land and house thereon as she had for over a period of 30 years owned the suit house and that her nephew, the Plaintiff only came into possession thereon after he had bitter disagreements with his (Plaintiff's) father leading to his being chased away from the family home and that out of pity for the Plaintiff, she provided shelter for him in form of the suit house with permissions to collect rent from the tenants thereon on her behalf. Later the Plaintiff turned around and began claiming ownership of the suit house under a purported agreement by which she was purported to have transferred the suit house to the Plaintiff.

During the scheduling conference two issues were framed for determination:

(1) Whether the Defendant bestowed the house on the suit property as a gift to the Plaintiff.

(2) ***What are the remedies available to the parties***?

Both parties adduced evidence in support and defence of the above issues. In her judgment, the learned trial Magistrate found that the Defendant had not bestowed the house to the Plaintiff, that the Defendant was a bonafide occupant and that the suit property belonged to the Defendant. She accordingly dismissed the Plaintiff's claim with costs and declared that the Defendant was the owner of the suit house and that she be given vacant possession. Hence this appeal.

The appeal was based on the following grounds:-

(1) The learned trial Magistrate erred in law and fact when she failed to consider the opinion of the handwriting expert hence reaching a wrong decision.

(2) The learned trial Magistrate failed to properly and judicially evaluate all the evidence before her thereby reaching the wrong decision.

(3) The learned trial Magistrate erred in law and fact when she held that the Respondent had not bestowed the suit property as a gift intervivos to the Plaintiff.

When the appeal came up for hearing, I ordered both Counsel to file written submissions which they complied with.

Before I consider the submissions of Counsel I have to re-echo the duty of this court as a first appellate court. In **Hellen Oyeru vs Florence Namuli Matovu; Supreme Court Civil Appeal No. 7 of 2008** the Supreme Court stated as follows:-

"It has long been accepted that a first appeal is in the nature of rehearing and if a first appellate court feels certain that a trial Judge has come to a wrong conclusion because of failure to take into due account important facts or has drawn incorrect references from the evidence adduced, it should reverse the decision."

My cardinal duty is to decide whether the learned trial Magistrate came to a wrong conclusion because of failure to evaluate evidence or take into account important facts or drew incorrect inferences from the evidence adduced.

As far as the first ground of appeal is concerned, the learned Counsel for the Appellant submitted that the learned trial Magistrate erred in law and fact when she failed to consider the opinion of the hand writing expert hence reaching a wrong decision. Counsel submitted that on 29/3/2005 the learned trial Magistrate was of the view that considering the number of documents submitted and the allegations by the Plaintiff that both parties did sign a gift deed and the Defendant denied ever signing the same, there was need to seek the opinion of the handwriting expert to be able to determine and arrive at a just decision on the following issues:-

(i) Whether Eliya Sefu Luyombya put his signature on the various submitted documents.

(ii) Whether Nabunya Christine put her signatures on the various documents submitted.

The learned Counsel contended that the report of the handwriting expert was to the effect that the Defendant signed the gift deed in question but the learned trial

Magistrate ignored the same and decided that the Defendant did not sign the gift deed, thereby reaching a wrong decision.

Counsel for the Respondent in reply submitted that it was true that the learned trial Magistrate ordered for the opinion of a handwriting expert. However, there was no evidence to show that the said opinion was received by court. The learned Counsel contended that the duty to prove that the Defendant had signed the gift deed was on the Plaintiff under **Section 102 of the Evidence Act.** Lastly Counsel was of the view that the handwriting issue was considered by the Magistrate with reference to **Section 72 (1) of the Evidence Act** and found that the Defendant did not write the gift deed.

In the instant case the most important issue was whether there was transfer of the suit house by the Defendant to the Plaintiff by way of a gift deed executed between him and the Defendant in respect of the house. The said document was exhibit P1. The Defendant vehemently denied ever executing the said gift deed.

Section 101 (1) of the Evidence Act Cap 6 states that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist. **Section 102 of the Evidence Act** further provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The above sections were interpreted in **Sebuliba vs Co-operative Bank (1982) HCB 129** where it was held inter alia, that the burden of proof in civil matters lies upon the person who asserts or alleges. It therefore goes without saying that the burden of proof rested on the Plaintiff to prove on the balance of probabilities that the Defendant did execute a gift deed transferring the suit land on him.

In her judgment, the learned trial Magistrate ruled that the Defendant did not execute the alleged gift deed. She based her finding firstly by comparing the Defendant's signatures on KCC receipts (exhibited) with her alleged signature on the gift deed (exhibit P1) and found that two signatures were different because their characters were not similar. She accordingly concluded that the Defendant did not sign the alleged gift deed.

Under **Section 66 of the Evidence Act**, if a document is alleged to be signed or 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 his or her handwriting.

On the other hand, **Section 72 (1) of the Uganda Evidence Act** provides for the comparison of signature with the one which is to be proved.

Proof of handwriting may be done by an expert witness (Section 43 of UEA) or by person acquainted with the handwriting of the author (Section 45 of UEA), court may as expert of experts make findings on handwriting without a handwriting expert: See **Premchandra Shenoi & Another v Maximov Oleg Petrovich; Supreme Court Civil Appeal No. 9 of 2003.**

In the instant case the learned trial Magistrate was of the view that opinion of a handwriting expert was necessary. However there is no record to show that such an expert was called or that an expert opinion was received in evidence. No reasons were availed for failure to utilize the expertise of a handwriting expert. However, the learned trial Magistrate went ahead and made comparison of the Defendant's signatures on KCC receipts and the alleged gift deed and concluded that the Defendant did not sign the gift deed. According to the case of **Premchandra Shenoi (Supra)** the learned trial Magistrate acted within her

powers by comparing the Defendant's signatures and came to the conclusion that she did not sign the gift deed. The learned trial Magistrate made the following observations in her well reasoned judgment.

"In the instant case I have examined the Defendants (sic) signature on the Kampala City Council receipts (exhibit D1) and compared it with the one where the Defendant is alleged to have signed on the gift deed (exhibit P1) and I have not found the two signatures similar. Reason being the characters are not similar and the characters in exhibit D1 are smaller compared to the character in exhibit P1. For that matter I have come to the conclusion that it is (sic) not the Defendant who signed on exhibit P1, and in that regard she did not transfer/give her house in Makerere 2 Zone C to the Plaintiff."

I totally agree with the learned trial Magistrate's assessment evidence on that point.

Another point which the learned trial Magistrate relied on was that if indeed the Defendant had given the Plaintiff the said house, why was it that it was the Defendant who continued paying Kampala City Council rates up to the year 2002. The only reason the Plaintiff gave for not paying the City rates was that he had not completed the process of transferring the land on which the suit house was situated into his names. I cannot believe the Plaintiff on that point. Gift intervivos means gift between the living which are perfected and become absolute during the life time of the donor and donee: See **Black's Dictionary 6th Edition.** If it was true that the Defendant executed a gift deed, why then did it take all that long before the Plaintiff could transfer the house into his names, leaving the Defendant to continue paying City rates for property she had given away? The Defendant's evidence was that she never executed the said gift deed which is believable. In fact it was the Defendant's case that the Defendant gave

the Plaintiff a different property which she had inherited from her late father and co-owned with her deceased brother, the Plaintiff's father from which she executed a gift deed. It would certainly be the preposterous for the Defendant with biological children to give her nephew property from which she derived a living and continue paying City rates. It is also questionable how an aunt could bequeath to her nephew two houses and yet she had her own biological children.

Lastly the credibility of the Plaintiff's witnesses are also in doubt as observed by the learned trial Magistrate. One wonders how they failed to attest to the deed and yet they alleged that they were present during the execution of the deed. Another important point is that the original copy of the deed has a one Paul Luyombya as a signatory yet the translated version does not include him as a signatory. The Appellant does not also mention him anywhere as a witness. One wonders whether the said Luyombya is alive or not and if he is alive why did not the Plaintiff call him as a witness in the absence of his deceased father. All those would go to strengthen the proposition that the gift deed never existed.

The above issue is the crux of the Plaintiff's case. Since it has failed, the same disposes of the whole appeal. It is therefore not necessary to discuss the other grounds of appeal. In any case in discussing the 1st ground, I find that the learned trial Magistrate properly evaluated the evidence on record and concluded that the Plaintiff had failed to discharge the burden of proof. Therefore in conclusion, I find that the appeal lacks merit and it is dismissed with costs both in this court and the lower court.

HON. MR. JUSTICE RUBBY AWERI OPIO

JUDGE

16/5/2011

30/5/2011

Byaruhanga Denis for the Applicant.

Respondent present.

Judgment read in Chambers as in Open Court.

HON. MR. JUSTICE RUBBY AWERI OPIO
JUDGE
30/5/2011