THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

HCT-11-CIVIL APPEAL No. 26 OF 2014

(Arising from Kabale Civil Suit No. 23 of 2008)

1. TEODOZIO BARIYO
2. LEONARIDA TWINOBUSINGYE :::::::::::::::::: APPELLANTS

VERSUS

BAINGANA PATRICK :: RESPONDENT

BEFORE HON. MR. JUSTICE MICHAEL ELUBU

JUDGMENT

This is an Appeal against the Judgment and decision of the Chief Magistrate Kabale, **His Worship OTTO MICHAEL GULAMALI** dated **29th October, 2014.**

The background to the matter is that the **Beingana Paul**, Respondent was the Plaintiff in the trial Court where he sued the Appellants, **Teodozio Bariyo and Leonardia Twinobusingye,** for a declaration that 4 strips of land belonged to him, that a permanent injunction issue against the Appellants/Defendants restraining future trespass; and General damages amongst other prayers.

The Defendants denied the Plaintiffs claim.

The parties all come from one extended family. The Plaintiff is the grandson of the 1st Defendant, the mother of his father. The 2nd Defendant is the Plaintiff's Aunt, the Sister of his father.

Keresensio Nkubito, the Respondent's father got married to Rosemary Tumuramye, the Respondent's mother in 1985 and is said to have received the land as a marriage gift from one Thomas Byashushaki, Nkubito's father. Sadly, Nkubito passed away in 1993 leaving his wife Rose Tumuramye in possession of the land.

Byashushaki attempted to retake possession in 1994. He filed a Civil Suit in the Magistrates Court which he eventually withdrew. Tumuramye therefore retained possession. She too passed away in 2006.

In 2008 Byashushaki Thomas executed a will in which he bequeathed the contested land to the 1st Appellant. He died shortly after. After the reading of the will the appellants entered upon the disputed land and uprooted all food thereon which had been planted by the Respondent.

The Respondent reported the matter to Police and eventually filed a Suit in the trial Court The learned trial Magistrate believed his case and entered judgment in his favour.

Being dissatisfied with the holding of the learned trial Magistrate, the Appellants lodged this appeal with the following ground:

1. *The learned trial Magistrate erred when he misunderstood the facts of the case and the Will (EX.D1) and held that the Will gave the house where the Respondent lives with his siblings to the Defendant.*
2. *The learned trial Chief Magistrate erred in law and in fact when he held that Bagumira Boy mentioned in the Will as a son of Nkubito Kelesensio is not the Respondent.*

3. *The learned trial Chief Magistrate erred in law and in fact to hold that the evidence of Counsel was in admissible for appearing as both Counsel and a Witness.*

4. *The learned trial Chief Magistrate erred both in law and in fact when he held that the late Thomas Byashushaki died intestate simply because E.D1 does not show that it was read over to him before he thumb printed.*

5. *The learned trial Chief Magistrate erred in law and in fact to award damages and costs in a dispute grandson against grandmother over the estate of their family.*

The parties were granted leave by this Court to file written submissions.

I have carefully addressed myself to the trial record and the able submission of Counsel on both sides.

I shall start with the 4th ground of the Appeal.

The learned trial Magistrate made a finding that the drafting of Thomas Byashushaki's Will offended the provisions of the **Illiterates' Protection Act. Cap 78** rendering the Will in admissible and accordingly treated the deceased as having died intestate.

Counsel for the Appellant contends **the Illiterates Protection Act** is intended to protect the illiterate person from the consequences of making such a document.

The Respondents Counsel agreed with the decision of trial Magistrate regarding the Will.

Section 1 of **the Illiterates Protection Act** describes an illiterate as a person who is unable to read and understand the language in which a document is written. By the fact that Thomas Byashushaki simply appended a thumbprint as his signature it is my conclusion that he was an illiterate person falling within the ambit of this Act.

Sections 2 and 3 of the Act provide as follows:

2. Verification of signature of illiterates.

> *No person shall write the name of an illiterate by way of signature to any document unless such illiterate shall have first appended his or her mark to it; and any person who so writes the name of the illiterate shall also write on the document his or her*

own true and full name and address as witness, and his or her so doing shall imply a statement that he or she wrote the name of the illiterate by way of signature after the illiterate had appended his or her mark, and that he or she was instructed so to write by the illiterate and that prior to the illiterate appending his or her mark, the document was read over and explained to the illiterate.

3. Verification of documents written for illiterates.

Any person who shall write any document for or at the request, on behalf or in the name of any illiterate shall also write on the document his or her own true and full name as the writer of the document and his or her true and full address, and his or her so doing shall imply a statement that he or she was instructed to write the document by the person for whom it purports to have been written and that it fully and correctly represents his or her instructions and was read over and explained to him or her.

These two sections in my view must be read together with the long title to the act which provides that this is an Act for the Protection of illiterate persons and is where we find the intention of the legislature in enacting this particular law.

It is a cardinal rule of statutory interpretation that words of a Statute must first be given their ordinary natural meaning. The legislature must have given the language of a Statute for a purpose. It is where there is ambiguity as to the clear meaning of given provisions that one may resort to other principles of statutory interpretation. (see **Chowdry Vs Uganda Electricity Board S.C.C.A 27/2010).**

A careful perusal of Section 2 of The Illiterates' Protection Act shows that where an illiterate appends his mark by way of signature to a document and another person writes the illiterates' name against the mark, then that other person must write on the document his full name and address and in so doing that shall imply a statement that he wrote the illiterates' name on the document and that he was

authorized to do so. It shall imply farther, that prior to writing the name the document was read over to the illiterate.

Section 3 is couched in virtually the same wording only that it refers to a person who has written a document at the request of an illiterate and correctly represents the instructions of the illiterate and was read over and explained.

It is true that the provisions are mandatory and failure to comply with them renders a document in admissible (see **Kasaala Growers Co-operative Society Vs Kakooza S.C.C.A No. 19/2010**.

I do not see that it was the intention of the legislature that a certificate must be written on the document itself to show that the writer has read through and explained it to the illiterate. It is sufficient that by the writer putting his full name and address to the document, he has complied with the requirements of the law. Failure to do so nullified the document. This in my view is the plain meaning of the provision as it stands.

This being the case I turn now to Ex D1. It is the last Will and testament of Thosmas Byashushaki. It was drawn by one Wilfred Murumba an Advocate. He signed and indicated his full address. In the event he needed to be traced to make any clarification he could be.

In my view he complied with the provision of Section 2 and Section 3 of **The Illiterates' Protection Act.**

Additionally, S. 50 of **The Succession Act** regulates the execution of Wills. Under subsection (a) of Section 50 it is provided that the testator may may affix his mark to the Will in the presence of another person and it is shown thereby that it was intended by that to give effect to the Will.

This is exactly what appears to have been done to D Ex.1. I find that the strict requirements of S. 50 of the Succession Act were followed in making this Will.

I do not therefore agree with the finding of the trial Magistrate that this Will is inadmissible. The Will of Thomas Byabushaki is valid and admissible. The fourth ground of appeal succeeds.

I shall look at Grounds 1, 2 and 3 jointly.

The evidence adduced, as I accept it, is that the Plaintiff was the son of Nkubito and Tumuramye. His parents were in possession of the land and he took over possession at the death of his mother in 2006.

The first Appellant states that the land is hers and was given to her in 1960 as a marriage gift from her father in law and mother in law. She states she only gave Nkubito (her son and father of the Respondent) a piece of land where to build a house. She in the same breath states that the land was left to her by her late husband in his Will.

The case for the Plaintiff from all the plaintiff witnesses is that the Respondents had been using this land and before that his deceased parents. This evidence stands uncontroverted. It would be strange for the first Appellant to state that the land is hers given to her in 1960 and at the same time state it was bequeathed to her in a Will executed in 2008.

I have also perused the proceedings of Civil Suit No. 5/94 which is on record. It is a suit filed by Thomas Byashushaki against Rosemary Tumuramye. On the 12th of July 1994 the Plaintiff (Byashushaki) informed Court that he wished to have the matter taken from Court to 'Bataka' and he would inform the Court of the outcome of that process. The matter as then accordingly adjourned *sine die* and it lost position. The Plaintiff had sued the Defendant for trespass to land and for abusing him. His prayer was for her eviction under customary law.

The matter was never taken to Bataka nor was it concluded. According to PW 1 that suit was over the same land disputed in this case as was told to him by his mother. Both Appellants however deny the existence of that case filed by Byashushaki on the Magistrates Court. Because of the Court record which I have seen I find that both are lying. There was indeed a land claim filed by the late Thomas Byashushaki against the Respondents mother and that at that time Tumuramye was in possession.

It therefore clear that the Respondent and his parents have always had uninterrupted possession of the land since 1985. It was given to Nkubito Kelesensio and when he died his wife Rose Tumuramye continued to live there

with her children including the Respondent. I find that when Tumuramye passed away in 2006 the Respondent her son was on the land where he continues to stay.

In 2008 Thomas Byashushaki passed away and his Will was read. In it he bequeathed the disputed land to the Appellants. The Evidence however shows that the land had been given to Nkubito and no longer belonged to Thomas Byashushaki.

Section 36 (1) **The Succession Act** provides that every person of sound mind may by Will dispose of his or her property.

A person therefore may only bequeath his or her property meaning property that properly belongs to him or her. This land in dispute did not belong to Byashushaki and he could not dispose of it in his Will.

Therefore the bequests of land by the late Byashushaki Thomas that had been given by Byashushaki to Nkubito and was in possession of Beingana Patrick, Nkubito's son, at the time of Byashushaki's death is hereby declared void. Those parts of his Will are a nullity.

It would accordingly follow that the entry upon the land by **TEODOZIO BARIYO** and **LEONARDIA TWINOBUSINGYE**, which was in **BEINGANA PATRICK'S** possession, and the uprooting of sweet potatoes vines there from amounted to Trespass.

For those reasons Grounds 1, 2 and 3 of appeal fail.

The fifth ground of Appeal is that ***The learned trial Chief Magistrate erred in law and in fact to award damages and costs in a dispute grandson against grandmother over the estate of their family.***

It is a Complaint on costs and the award of damages.

Damages are a matter in the discretion of the Court. An Appellate Court may only interfere in the exercise of judicial discretion if it is shown that the trial Court acted illegally or followed a wrong principal.

The trial Magistrate stated that he based his assessment of the award of general damages on the conduct of the Appellants in uprooting the Respondents sweet potato vines thus making him lose that season's crops. He could no longer use the land profitably for sustenance. He added the respondent was an orphan with no one to turn to.

I have carefully perused the evidence of The Plaintiff who testified as PW 1. The elements of evidence referred to by the learned trial Magistrate do not arise from the evidence of the Plaintiff. They are not borne out by any of testimony in Court.

It is true general damages are compensation in monitory terms through a process of law for loss or injury sustained by the Plaintiff. General damages are awardable by Court after due assessment. They are compensatory in nature and should offer some satisfaction to the Plaintiff. They also focus on the conduct of the Defendant in causing injury to the Plaintiff (See **URA Vs Wanume David Court of Appeal 003/2010).**

From the evidence adduced one cannot determine the extent of loss from damage suffered by the Plaintiff nor the nature of anguish or suffering that resulted. This evidence is simply not there.

With respect the quantum of 3,000,000/= awarded to Respondent appears unjust and excessive to this Court. In the result I deem an award of 1,000,000/= to be sufficient. It is stated the Plaintiff currently has the use of the land even at the time of hearing. The award of damages is accordingly reduced to 1,000,000/= to the Respondent.

I am not persuaded by the Appellants complaint on costs. Costs must follow the event except if for good cause the Court deems otherwise. I find no good cause to deny the successful party here costs.

This Appeal is dismissed except for ground 4 which succeeds.

Costs to the Respondents here and in the Court below.

Dated at Kabale this ..**09th** .. day of December 2015.

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MICHAEL ELUBU

JUDGE