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**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT IGANGA
CIVIL SUIT NO. 083 OF 2022**

**KAMBA YUNUS ===== APPELLANT
VERSUS
IFUKE FRED ===== RESPONDENT**

BEFORE HON. MR. JUSTICE BATEMA N.D.A, JUDGE.

JUDGMENT:

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Introduction:

This is an Appeal from the Judgment and orders of Her Worship Aisha Nabukeera, Magistrate Grade One sitting at Mayuge. The land in dispute is part of the land that formerly belonged to the late Benon Muyuga situate at Nabalongo village, Baitambogwe sub-county in Mayuge District measuring approximately 60ft by 200ft.

It was claimed by the Appellant that the suit land in particular measuring approximately 6 sticks of 10ft x 20ft is family land and forms part of the estate of the late Benon Muyuga and therefore the Respondent illegally bought the suit land without Letters of Administration and without the knowledge and consent of the family of the late Benon Muyuga.

The Appellant further argued that even then, a one Robert Mugaya, his biological brother from whom the Respondent claims to have bought was since childhood, of unsound mind or mentally imbalanced and as such had no capacity to contract.

The Respondent on the other hand argued that he lawfully bought the suit land at UGX. 2,100,000/= (Uganda Shillings Two Million One Hundred Thousand only) on 26th September 2016 from Robert Mugaya, having carried out due diligence and established that the late Benon Mugaya had during his life time divided his land and

gifted it *intervivos* amongst his biological children including Robert Mugaya.

The Respondent further submitted that he was unable to take possession since the Appellant and a one Katushabe Edinansi, the Appellant's mother took forceful possession by uprooting boundary marks, harvesting and selling the sugar canes originally planted by Robert Mugaya.

40 I have had the benefit of reading and considering the written submissions of both the Appellant and the Respondent. I now proceed to resolve the grounds of Appeal.

Duty of this Court

It is the duty of this first Appellate Court to re-consider and analyse all the evidence on record and come up with its own decision.

Grounds of Appeal:

The grounds of Appeal as contained in the Memorandum of Appeal filed on 23rd June 2022 were poorly framed in an argumentative and narrative manner contrary to the provisions of Order 43 Rule 2 of the Civil Procedure Rules S1-71.

50 The rule stipulates;

"The memorandum shall set forth concisely and under distinct heads, the ground of the objection to the decree appealed from without any argument or narrative and the grounds shall be numbered consecutively".

60 However it's important to note that issues are framed to identify the crux of controversy and resolve them and thus it is in the interest of all the parties that relevant issues encompassing the entire dispute and focusing on the material aspects thereof are framed and decided. I will therefore re-phrase and modify the issues in that regard for court's determination.

Ground one:

That the learned trial magistrate erred in law and fact when she found that the Appellant committed trespass on the suit land.



Ground Two:

That the learned trial Magistrate erred in law and fact when she found that the land sale agreement was lawful and that the Respondent acquired proprietary rights therein.

Ground Three:

70 That the learned trial Magistrate erred in fact and in law when she failed to evaluate the evidence as a whole including preliminary objections and arrived at a wrong decision.

Resolution of the Grounds of Appeal:

I will merge ground 1 & 2 together because they rotate around failure to evaluate the evidence on record to establish whether the Appellant is the rightful owner of the suit land. I will resolve ground 3 distinctly because of the unique aspects it presents.

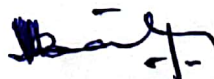
Ground 1 & 2:

80 The Appellant submitted that after the demise of his father, Benon Muyuga, a one Robert Mugaya his biological brother illegally sold the suit land to the Respondent without Letters of Administration and without the knowledge and consent of the Appellant and the rest of the family

The Appellant further submitted that Robert Mugaya was of unsound mind and therefore incapable of entering any land sale transaction. However there was is no evidence on record to substantiate this claim

90 The Respondent in rebuttal submitted that he lawfully purchased his interest in the suit land from a one Robert Mugaya, a son to the late Benon Muyuga one of the biological children to the late Benon Muyuga in 2016 following a distribution and gifting of the suit land to Robert Mugaya by his father whilst he was alive.

The Respondent further submitted that neither the Appellant nor his mother, Katushabe Edinansi protested the sale as at the time of the transaction between the Respondent and Robert Mugaya.



Analysis:

100 It is a basic principle of the law of evidence that a party who bears the burden of proof is to produce the required evidence of facts in issue that have the quality of credibility short of which his claim must fail. It follows that matters that are capable of proof must be proved by producing relevant and sufficient evidence so that on all the evidence a reasonable mind can conclude that the existence of the fact is more probable than its non-existence.

In the instant case, the crux of the dispute is that the Respondent unlawfully purchased the suit land from Robert Mugaya, a biological brother to the Appellant who supposedly had no authority and capacity to sell the suit land as the same did not belong to him

110 I have closely perused the record of proceedings and the submissions of both counsel and therefore proceed to state as follows;

120 Firstly, It is the evidence on record that some of the children of the late Benoni Muyuga, forexample Moses Kintu, Julius Wamukwo obtained their respective shares/ portions of land as gifts *intervivos* from their late father and have since sold off the same to other people. This was the uncontroverted testimony of Ndizairawo Samwiri (PW3) aged 81 years and a Paternal Uncle to the Appellant, who stated that he was present when both Moses Kintu and Julius Wamuko were selling. Kintu Moses (PW2), aged 40 years and a step brother to the Appellant corroborated the evidence of (PW3) by admitting to have been present at the time of gifting and received a portion of land from his late father as one of the sons and has since sold the same.

Secondly, it was the evidence of the Respondent that he made inquiries as to who owned the suit and established through Ndizairawo Samwiri, a younger brother to the late Benon Muyuga, that Robert Mugaya owned the suit land as his share given as a gift *intervivos* by his late father. This piece of evidence too was uncontroverted by the Appellant both at trial and in his submissions on appeal.



130 Thirdly, according to the evidence of Kintu Moses (PW2), a one Robert Mugaya before selling this suit land to the Respondent first approached the Appellant who unfortunately failed to purchase on account of not having money. This was also corroborated by Ndizairawo Samwiri, (PW3). This piece of evidence remained uncontested throughout the trial.

140 On the other hand, it was the testimony of the Appellant (DW1) that he had built himself a permanent house on a piece of land that he himself chose in consultation with his mother, a one Katushabe Edinansi who apparently authorized him to construct their. It was also the Appellant's testimony that no one can claim where he built his house.

Furthermore, it was the testimony of Mukisa Christine (DW2), a sister to both the Appellant and Robert Mugaya and a daughter to the late Benon Muyuga, that those who constructed on the land had no authority to do so. This was in respect of the Appellant's house and a one Geoffrey Ikendi. However she also stated that no one had refused the other children from constructing on the suit land. I found her testimony contradictory and highly inconsistent with evidence of the Appellant.

150 It is my opinion that the Appellant's quality of evidence is hollow, contradictory and not credible to prove that this suit land is part of the deceased's estate. I find it strange for the Appellant to thump his chest and assert that no one can claim the portion of land where he built a permanent house for himself and his family and yet have the audacity to tell off a one Robert Mugaya, his biological brother that he cannot sell his portion which was gifted *intervivos* to him by his father whilst he was alive. If this is not sheer entitlement and greed then I do not what to call it. (See **Dr. Diana Kanzira Vs Herbert Natukunda Rwanchwende & Anor (C.A.C.A No. 81 of 2020)**).

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To my mind, by the time the Appellant built his permanent house, he was also benefiting from the gift *intervivos* from the late Benon Muyuga and not a distribution of the deceased's estate. The Appellants actions inevitably put his share out of the purview of



family/ estate property and created proprietary rights on the land for his exclusive use and enjoyment.

170 There was no evidence on record to show that this suit land remained part of deceased's estate after the sharing and gifting had been done in the late 1990's by Benon Muyuga. In any case the Appellant who refutes the Respondent's ownership of the suit land has no Letters of Administration for his late father's estate to convince this court how he obtained and/ or acquired his share of the land.

180 It is therefore my considered opinion that by the time of the late Benon Muyuga's demise, there was no longer land left for the estate available for distribution. This opinion finds justification in the fact that ever since the late Benon Muyuga passed away in 2000, non of his surviving children or relatives found it necessary to apply for Letters of Administration to date because of the sole reason that there was no longer an estate to distribute.

The argument advanced by the Appellant that his brother Robert Mugaya is of unsound mind and therefore was incapable of entering into a land sale agreement with the Respondent is without merit and holds no water as no cogent evidence was ever adduced by the Appellant to prove the claim of insanity. I would rather believe that the Appellant was approached by Robert Mugaya in the first place to buy his share but declined on grounds of lack of money and not because the later was mentally incapacitated.

190 It is for these reasons that I find that the suit land belongs to the Respondent having lawfully purchased the same from Robert Mugaya, who had acquired the same as a gift *intervivos* from his late father, Benon Muyuga. The suit land no longer forms part of the deceased's estate and is not family property.

Having found that the suit land belongs to the Respondent, it follows that the Appellant committed and continues to commit the tort of trespass since he is currently in possession of the same to the detriment and peril of the Respondent.




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Having disposed of the 1st and 2nd ground of appeal, I need not discuss the 3rd ground for the reason that the preliminary objections as raised by Counsel for the Appellant are moot and of no legal consequence and also that the same were overruled by the trial Magistrate in his overall judgment.

In the result, this Appeal fails and is forthwith dismissed with costs.

DATED this¹¹..... day of^{Jan}....., 2024.


BATEMA N. D. A.
JUDGE

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