

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT MASAKA  
CIVIL APPEAL NO. 29 OF 2018  
(ARISING FROM LWENGO CIVIL SUIT NO. 021 OF 2017)

1. KIWALABYE ALIFUNSI
  2. KAWADDA PETER
  3. SERUNJOJI JOHN
  4. NALONGA NAMPAA
  5. NAMAKULA HARRIET ..... APPELLANTS
- VERSUS
1. MAGOBA GULGENSIO
  2. KAWALYA PETER .....RESPONDENTS

***BEFORE; Hon Lady Justice Victoria Nakintu Nkwanga Katamba***

**JUDGMENT**

The Respondents/Plaintiffs instituted Civil Suit No. 021 of 2017 against the Appellants jointly and severally on a claim of trespass seeking an eviction order, permanent injunction, general damages and costs of the suit. The Plaintiffs' claim was that the 1st Plaintiff is a son, heir and administrator to the estate of the Late Lulenti Ngubi Salongo. The late bequeathed to the 1st Plaintiff a kibanja which he (1st Plaintiff) later sold a part of to the 2nd Plaintiff vide a sale agreement dated the 28th November, 2016. When the Defendants/Appellants heard of the sale, they forcefully entered on the suit kibanja and denied the Plaintiffs/Respondents free and full enjoyment of their land.

In their joint Written Statement of Defence, the Defendants/Appellants denied the claim and averred that before the death of their father, he distributed his land save for the suit kibanja which was left to the widow not the heir/1st plaintiff.

At the scheduling conference, the Parties raised the following issues for determination by Court;

1. Whether the kibanja is for the 1st plaintiff, widow Namugga Milia and Nakanjako
2. Whether the 1st Plaintiff is the rightful owner of the same

3. Whether the 1st plaintiff had a right to sale to the 2nd Plaintiff
4. Whether the defendants have an interest in the same
5. What are the remedies available

The Plaintiffs/Respondents' case opened for hearing with the testimony of PW1 Magoba Fulugensio, the 1st Plaintiff, who stated that the Defendants are his siblings. He inherited the suit kibanja from his father the late Ngoobi who stated in his Will that the suit kibanja belongs to his widow and the 1st Plaintiff.

PW2, Kawooya Peter, the 2nd Plaintiff stated that he bought the suit kibanja from the 1st Plaintiff on 19.10.2016 at Shs. 21,500,000/=. He bought a kibanja of 0.899 hectares bordering a one Kavuma Wassajja Sion, Mazzi Fred. He was restrained from cultivating on the land by the Defendants who said that the 1st plaintiff had no right to sell. The Defendants are in possession. He did not know that the kibanja was for family and no family member was present when he was buying. He bought the kibanja that has no house. The 1st Plaintiff told him that he owned the suit kibanja.

That was the Plaintiffs' case.

The Defendants/Appellants case opened with the testimony of DW1, Kiwalabye Alifunsi who stated that the 1st plaintiff is his elder brother and the Plaintiffs are trespassing on the suit kibanja. The suit land of 3½ acres was given to their mother Namugga Milina. The 1st plaintiff was given land in Nkoni but he sold it. The 1st plaintiff did not have authority to sell to the 2nd Plaintiff.

DW3 Nampa Nalongo stated that the Will stated that the 1st Plaintiff would care take the suit kibanja. The 1st plaintiff is not entitled to the estate because he sold his share. The Will restrained them from selling the kibanja.

DW4 Namakula Agnes stated that the Will restrained them from selling and the 1st Plaintiff was supposed to care take the suit kibanja.

That was the Defendants/Appellants' case.

The Court conducted locus in quo on the 08.02.2018.

In his judgment, the trial Magistrate relied on the Will of the late Ngoobi to hold that the suit kibanja was bequeathed to the 1st Plaintiff and Namugga Milina, and that 1st Plaintiff proved on the balance of probability that he is the rightful owner of the suit kibanja. The trial Magistrate declared that the suit kibanja was bequeathed to the 1st plaintiff and the sale to the 2nd Plaintiff was therefore lawful and recognizable in law.

Being dissatisfied with the judgment of the trial magistrate, the Appellants/Defendants filed this appeal on the following grounds;

1. That the learned trial Magistrate erred in law and fact when he declared that the 1<sup>st</sup> Respondent / 1<sup>st</sup> Plaintiff's sale transaction with the 2<sup>nd</sup> Respondent / 2<sup>nd</sup> Plaintiff was lawful and recognizable in law whereas this was against the Will of the Late Lulenti Ngubi Ssalongo Zivamu omukulu and this was a wrong decision.
2. That the learned trial Magistrate erred in law and fact when he failed to consider what was contained in the Will of the Late Lulenti Ngubi Ssalongo Zivamu omukulu which led him to reach to a wrong decision because it prohibited any type of sale of his properties.
3. That the learned trial Magistrate erred in law and fact when he awarded the plaintiffs Shs. 6,000,000/= as general damages failing to conceive that this issue of the Kibanja was between the same family which led him to reach to a wrong decision and moreover by the time of filing the suit the 4<sup>th</sup> defendant had already died in Late year 2015 which made this suit a nullity.
4. The learned trial Magistrate erred in law and fact when he ordered the defendants to give vacant possession of the suit Kibanja forgetting that the Kibanja in issue forms part of the estate of the Late Lulenti Ngubi Ssalongo Zivamu omukulu where the Appellants are also beneficiaries as their home since they are biologically born with the 1<sup>st</sup> Respondent / 1<sup>st</sup> plaintiff by the same father and mother.

Ground two was abandoned.

Both Parties filed written submissions and they are on the court record;

The Appellants argued grounds one and four concurrently and submitted that the Respondent sold the suit kibanja before distributing the estate of the late Ngooba as Administrator. The Appellants cited Section 278 of the Succession Act which requires an administrator to make a true account and inventory of the distribution of the estate within six months. That no inventory was tendered into evidence and without it, it was erroneous for the trial Magistrate to hold that the 1st Respondent was legally justifiable to sell the suit kibanja to the 2nd respondent when the 1st respondent had not properly executed the Will of the late Ngoobi.

It is also the Appellants' submission that the trial Magistrate injudiciously invoked the discretionary powers under Section 98 of the CPA to distribute the estate yet that power is only vested in an executor. Further that there is no evidence on record to justify the amount of Ugx. 6.000.000/= that the trial magistrate awarded to the Respondents. They prayed for the appeal to be allowed with costs.

In their written submissions, the Respondents argued that the 1st respondent was at liberty to sell the suit kibanja and since all the children of the late Ngoobi received their shares, the trial magistrate was right in holding that the sale transaction was lawful. They further submitted that the Appellants have made the Respondents suffer a lot yet they know that the 1st respondent is the owner of the suit kibanja, and should be held liable in general damages.

#### **Determination of the Appeal;**

The duty of this court, as a first appellate court, is to re-evaluate the evidence adduced at the trial and subject it to a fresh and exhaustive scrutiny, weighing the conflicting evidence and drawing its own inferences and conclusion from it. In so doing, however, the court has to bear in mind that it has neither seen nor heard the witnesses and should, therefore, make

due allowance in that respect. See: *Fredrick Zaabwe v. Orient Bank & 5 Ors, S.C.C.A. No. 4 of 2006* *Kifamunte Henry v. Uganda, S.C.C.A No 10 of 1997*; *Banco Arabe Espanol v. Bank of Uganda, S.C.C.A No. 08 of 1998*. With this duty in mind, I proceed to consider the grounds of appeal.

I will consider the grounds of appeal in the same order as they were argued by the Appellants.

**Grounds one and three;**

*Ground one; That the learned trial Magistrate erred in law and fact when he declared that the 1<sup>st</sup> Respondent / 1<sup>st</sup> plaintiff's sale transaction with the 2<sup>nd</sup> Respondent / 2<sup>nd</sup> Plaintiff was lawful and recognizable in law whereas this was against the will of the Late Lulenti Ngubi Ssalongo Zivamu omukulu and this was a wrong decision.*

*Ground four; The learned trial Magistrate erred in law and fact when he ordered the defendants to give vacant possession of the suit Kibanja forgetting that the Kibanja in issue forms part of the estate of the Late Lulenti Ngubi Ssalongo Zivamu omukulu where the Appellants are also beneficiaries as their home since they are biologically born with the 1<sup>st</sup> Respondent / 1<sup>st</sup> plaintiff by the same father and mother.*

These two grounds fault the trial Magistrate's finding in regards to ownership of the suit kibanja and the sale between the 1st and 2nd Respondent.

The 1st Respondent claims ownership of the suit kibanja as an inheritance from his late father vide the Will dated the 28th March 2001. I have carefully persued the Will of the late Ngoobi and established that indeed the suit kibanja situate at Kaswa was bequeathed to the 1st Respondent and his mother.

It is the Appellants' submission and allegation that the 1st Respondent was not given authority to sell the suit kibanja as per the Will. However, the Will does not restrict the 1st respondent from selling as alleged. It is also clear that the suit kibanja was left to only the 1st Respondent and the widow. DW4 and 5 testified that the late Namugga Milina sold part

of the kibanja. They alleged that the 1st Respondent only had responsibility to care take the suit kibanja but as I have already observed, the 1st respondent received the suit kibanja as a bequest and therefore he had an interest over the same. It is also clear that the other siblings (Appellants) had their own bequests as per the Will which are distinct from the suit kibanja.

The Appellants challenged the ownership and sale on the basis of Section 278 which required the 1st respondent to file an inventory. It is true that the inventory was never tendered into evidence, however, failure to file an inventory does not affect the distribution of property especially for an estate of a deceased testate where the property was distributed in accordance with the Will. Failure to file an inventory willfully or without reasonable cause is a ground for revocation of a grant where the parties are challenging the distribution as per the inventory (Section 234 of the Succession Act). In the instant case, the Appellants are challenging ownership of the suit kibanja which clearly belongs to the 1st Respondent as per the Will.

I therefore find no fault in the trial Magistrate's finding that the 1st Respondent was the true owner of the suit kibanja thereby giving him the right to sell the same which made the sale lawful.

Grounds one and four therefore fail.

***Ground three; That the learned trial Magistrate erred in law and fact when he awarded the plaintiffs Shs. 6,000,000/= as general damages failing to conceive that this issue of the Kibanja was between the same family which led him to reach to a wrong decision and moreover by the time of filing the suit the 4<sup>th</sup> defendant had already died in Late year 2015 which made this suit a nullity.***

In his judgment, the trial Magistrate awarded general damages of Ugx. 500,000/= to each Plaintiff by each Defendant.

It is now trite that general damages are at the discretion of the court and are intended to place the injured party in the same position in monetary terms as he would have been had the act complained of not taken place. See **Phillip vs. Ward [1956] 1 AU ER 874.**

In the instant case, the Appellants submitted that there is no evidence justifying the amount awarded whereas the Respondents argued that they have suffered anguish, loss and trauma, and deprivation of the sources of income.

I do not find the award by the trial magistrate to be excessive and hereby uphold the same as awarded.

In the result, this appeal on the whole fails. The judgment of the trial Magistrate is wholly upheld. Taking into consideration that the parties are family, I make no order as to costs.

I so order.

Dated at Masaka this 24th day of May, 2021

**Victoria Nakintu Nkwanga Katamba**  
**Judge**