

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

FAMILY DIVISION

CIVIL APPEAL NO. 05 OF 2012

**ARISING OUT OF CIVIL SUIT NO 109 OF 2004 AT MAGISTRATE GRADE 1 COURT
OF MENGO**

1. NORAH NASSOZI

2. THOMAS KALINABIRI.....APPELLANTS

VERSUS

GEORGE WILLIAM KALULE.....RESPONDENT

BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

JUDGEMENT

This was an appeal from the judgment and decree of His Worship Kagoda Samuel Moses Ntende Magistrate Grade 1 Mengo dated 3rd September 2012.

The background to the appeal is that the respondent in this appeal filed civil suit no. 109 of 1996 against the administrator general who had assumed administration of his late father's estate. He sought a declaration that he was the rightful equitable owner of two acres of land comprised in Kyadondo Block 230 plot 35 at Kamuli; an order that that the defendant issues letters of succession in respect of the two acres to facilitate his registration on the land under the RTA; that the defendant pays the plaintiff general damages and any other relief court deems fit. The administrator general never filed a defence, but the 2nd and 3rd defendants successfully applied to be added on the suit at its commencement. The defendants denied that the land was given to the plaintiff as a gift *inter vivos*. They contended that if that had been the case, the same would have been in writing.

The trial magistrate found for the plaintiff and declared him the rightful equitable owner of the two acres of land. He also ordered the 1st defendant to issue letters of succession in respect of the land to facilitate the plaintiff's registration on the land under the RTA, that the defendants pay general damages of Uganda shillings 6,000,000/= with interest of 20% per annum from the time of cause of action up to payment in full, and that the defendants pay costs of the suit with interest of 20% from the time of judgment up to payment in full.

The appellants, being dissatisfied with the judgment, appealed against it on the following grounds:-

1. *The learned trial magistrate erred in law and fact when he held that the deceased Banalekaki gave the suit land to the respondent inter vivos.*
2. *The learned trial magistrate erred in law and fact when he held that the respondent acquired the suit land and that equitable rights were conferred upon him.*
3. *The learned trial magistrate erred in law and fact when he held that the inclusion and distribution of the suit land by the administrator general (the 1st defendant in the suit) violated the respondent's rights.*
4. *The learned trial magistrate erred in law and fact when he awarded the respondent the remedies he awarded in particular he erred when he awarded the respondent general damages of Uganda Shillings 6,000,000/=.*
5. *The learned trial magistrate erred in law and fact when he awarded interest on the general damages at the rate of 20% per annum from the date of the cause of action till payment in full.*
6. *The learned trial magistrate erred in law and fact when he awarded the respondent interest on costs at the rate of 20% per annum from the date of judgment till payment in full.*

The appellants prayed this court to allow the appeal, to set aside the trial magistrate's decision and substitute it with an order dismissing the suit. He also prayed for costs of the appeal and the suit.

At the hearing of the appeal, this court gave time schedules within which counsel filed written submissions.

Ground 1: The learned trial magistrate erred in law and fact when he held that the deceased Banalekaki gave the suit land to the respondent inter vivos.

Ground 2: The learned trial magistrate erred in law and fact when he held that the respondent acquired the suit land and that equitable rights were conferred upon him.

Ground 3: The learned trial magistrate erred in law and fact when he held that the inclusion and distribution of the suit land by the administrator general (the 1st defendant in the suit) violated the respondent's rights.

Learned Counsel for the appellants addressed grounds 1, 2 and 3 together. He submitted that the learned magistrate was in error to reach the conclusion he reached especially on the basis of oral evidence of the respondent and of the clan elders. He argued that the magistrate, in holding that the deceased gave the suit land to the respondent *inter vivos* and that the respondent was the equitable owner of the land, he considered the evidence of the respondent and the clan elders especially PW3.

He argued that the magistrate did not address the law of gift of the land as was held in *Yozefu Sentamu V Nalinya HCCA No. 84/1959* (copy of the case decision not availed to court). Referring to various other authorities he argued that a person purporting to have been given a gift of land should not come to court and invoke equity or ask for an order to complete his title; that a gift is complete if the donee has everything necessary to complete his title without any further assistance from the donor, that is, signed transfer forms; and that a gift of registered land becomes effective upon execution (signing) and delivering of the transfer to the donee.

He argued that according to section 92 of the Registration of Titles Act (RTA) it is upon registration of the transfer that the interests of the registered proprietor pass on to the transferee. He argued that the deceased Daudi Banalekaki who was the registered proprietor of the suit land did not execute a transfer in accordance with section 92 of the RTA, that no interest in the suit land was passed upon the

respondent, and that the respondent's possession of the duplicate certificate of title does not show that he was given the land.

He also argued that the evidence of the clan elders was of no use because they had no role in the distribution of the property of the deceased, and that the respondent's staying on the land for over 40 years does not give him the title to claim the land.

The respondent's counsel submitted in reply that the salient features of a gift *inter vivos* are that the donor must intend to give a gift, the donor must deliver the property and the donee must accept the gift, as was held in ***Joy Mukobe V Willy Wambuwu HCCA 055/2005***. He highlighted the evidence of PW3 to the effect that the deceased while alive used to say that he had given the land together with the title to the respondent, and that the said land was never touched by the clan during distribution because it was given to him by the deceased and they authorized him to transfer the land into his names.

He also submitted that delivery of the gift was completed when Banalekaki handed over the land title to the respondent, and as such no family member can claim recovery of the same. He concluded that the trial magistrate properly evaluated the evidence and reached a clear position when he held that this was a gift *inter vivos* to the respondent. He argued that this is confirmed by the evidence of Rovisa Nalukenge in her evidence that the plaintiff (respondent) occupied all his two acres and when there was sub division among the brothers and sisters they only limited themselves to the three acres and did not tamper with the two acres occupied by the respondent.

He also referred to the evidence of PW4 that the deceased wanted his son Kalule (respondent) to grow up and stay in the land which he was going to buy. He argued that this was a clear indicator had the intention of giving the respondent a piece of land distinct from the three acres of his family, which he did by buying and giving the respondent both the land and the title. He argued that in absence of fraud or theft of title by the respondent, he enjoys full equitable rights/interest in the two acres of land.

On the trial magistrate's holding that the inclusion and distribution of the suit land by the administrator general violated the respondent's rights, the respondent's counsel submitted that it was clearly an error for the administrator general to include the respondent's land among the properties to be distributed. He referred to the evidence of PW1 and PW3 that the deceased left no will. He added that the averment by the appellant that "*the will did not mention Kalule because Banalekaki had given Kalule land during his lifetime*" indicated that Kalule's land was not part of the estate. He argued that the administrator general had no *locus* to tamper with the property of the respondent for he enjoyed equitable interest on the land since 1945 when he was given the land until 1993 when the appellants claimed unlawful interest in the same.

The issue giving rise to the first three grounds of appeal was framed by the trial court as follows:-

"Whether the late Daudi Banalekaki gave the suit land comprised in Block 230 plot 35 to the plaintiff inter vivos and whether the defendant's inclusion and administration of the suit land in the late Banalekaki estate violated the plaintiff's rights."

In determining this, the trial magistrate relied on the evidence of the plaintiff that he was given the land during the lifetime of the deceased and he settled on the suit land with his grandmother when he was seven years old, that when the plaintiff's grandmother died he was buried on the same land on the instructions of the deceased, and that the deceased gave him the certificate of title to the land to which he remained in exclusive possession for forty five years since 1945. The trial magistrate also relied on the evidence of PW3 Joseph Kawoya Twesige (trial magistrate referred to him as Tulinye in the judgment), DW1 Nakiranda, DW2 Rovinsa Nalukenga and DW3 Norah Nassozi that distribution of the land by the elders was confined to the three acres of land and did not cover the plaintiff's two acres since the deceased gave them to the plaintiff (respondent) during his lifetime.

The law is that a gift *inter vivos* takes effect when three situations are fulfilled, that is, there is intention to give the gift, the donour must deliver the property, and the donee must accept the gift.

The question to ask in this case is whether, from the adduced evidence on record, and on applying the relevant laws, there was intention on the part of Banalekaki to give the gift of registered land to Kalule, whether he actually delivered the property, and whether Kalule accepted the gift donated to him by Banalekaki.

Kalule testified as PW1 that he was given the land which he has stayed on since 1945, and that Banalekaki gave him the actual land and the title on the land. He produced the title before court a photocopy of which was tendered in evidence as exhibit "a". It was his testimony that Banalekaki was buried on the three acre piece of land, that they never buried him on the land he gave to him, that he was lazy to transfer the land, and that his maternal grandmother was buried on the disputed land with the consent of the late Banalekaki.

PW2 testified on oath that the deceased used to tell them that he gave Kalule the land plus the title, that it was up to him to effect transfer, that they did not touch the land given to Kalule because it was given to him just like they did not touch the other pieces of land given to the other children. PW4 testified that he was requested by Banalekaki to identify land for him to buy, that he did buy the land from a one Kamulegeya and built a small house for Kalule and his maternal grandmother, that when the grandmother died her clan mates wanted to take her for burial but Banalekaki said he had bought the land for Kalule and the grandmother should therefore be buried there so that Kalule should look after his grandmother's grave.

DW3 Rovinsa Nalukenge, in cross examination testified that the deceased had authorized Kalule to live on the land, that in distributing the deceased's land they did not interfere with those who had already been given land. DW3 also testified in cross examination that the will of the late Banalekaki never mentioned Kalule because Banalekaki had given him land during his lifetime.

There is also evidence that the land in dispute was registered land, in the names of Banalekaki, measuring 2 acres comprised in Block 230 Plot 35 land at Kamuli Kyadondo. The evidence adduced by the respondent is that his late father Banalekaki did not sign transfer forms. He gave him the title to the land where he let him settle since his childhood. The learned trial magistrate was alive to this fact. He based his decision in equity when he declared the respondent the equitable owner of the disputed land.

The question to answer here is purely one of law. Was Banalekaki's divesting himself of the title to the land during his lifetime and leaving it to the respondent for use good enough to be recognized by law as a way of transferring title to land which is registered?

In determining whether the deceased created a gift *inter vivos* in respect of the disputed land, court has to ascertain the intention of the donour, and then examine whether the formal requirements of the method of disposition which he attempted to make have been satisfied. Mellows in ***The Law of Succession 5th Edition, Butterworth 1977*** pages 9 to 10 stated as follows regarding gifts *inter vivos*:-

“Various formalities are necessary for gifts inter vivos. Thus a gift of land must be by deed; a gift of land where the title is registered at the Land Registry must be effected by an instrument of transfer which is registered;”

In Uganda, the law as embodied in section 92 of the Registration of Titles Act is that transfer of registered land is effected by the transferor signing transfer forms in favour of the transferee. The section refers to legal interest in registered land which in general can be granted by deed only. It is upon registration of the transfer that the interests of the registered proprietor pass on to the transferee. To that extent the appellants' counsel was correct in submitting that no legal interest in the suit land passed on to the plaintiff since the deceased did not sign any transfer form in favour of the respondent in respect of the disputed land.

Thus, in my opinion, the law does not recognize a verbal gift of land. Regarding registered land, a gift *inter vivos* of the same is completed when the donour signs the transfer forms in favour of the donee.

In this case however, the trial magistrate based his decision on his finding that the respondent's interest in the land was equitable. The adduced evidence in this case shows that the deceased just gave the certificate of title to the disputed land to the respondent. He did not sign any transfer forms and he died before doing so. The respondent stated to court that he was lazy to have the title transferred in his names during the lifetime of the deceased. Can the respondent's interest be protected under equity?

The known principle is that in equity a gift is complete as soon as the donour has done everything that the donour has to do, that is to say, as soon as the donee has within his control all those things necessary to enable him, the donee to complete his title. Thus a gift of registered land becomes effective upon execution and delivery of the transfer. It cannot be recalled after that, even though the donee has not yet been registered as proprietor. See ***The Registered Trustees Anglican Church of Kenya Mbeere Diocese The Rev. David Waweru Njoroge Civil Appeal No 108/2002; Pennington V Waine [2002] 1WLR 2075; Snell's Equity 29 edition page 122.***

In this case, the deceased, in addition to letting the respondent use the land since his childhood, handed over a certificate of title without signing the transfer forms. The respondent was not put in a position of control such as to enable him complete his title. The respondent's staying on the land could not in the circumstances where the land was registered, perfect his claims to the land even in equity. If the donour had done all in his power to vest the legal interest in the property in the donee the gift would not fail even if something remained to be done by the donee or some third person. Thus the gift *inter vivos* of registered land was not complete to be recognized even under equity. It would have been so recognized if the deceased had signed the transfer forms and the registration of the title in the respondent's names was hampered by third persons or other extraneous factors.

The respondent's counsel cited *Joy Mukobe V Willy Wambuwu*. He submitted that delivery of the gift was completed when Banalekaki handed over the land title to the respondent, that as such no family member can claim recovery of the same. On basis of the legal principles expounded above, I do not agree with this position. The case of *Joy Mukobe V Willy Wambuwu* is distinguishable from the facts of the current case. In *Mukobe's* case court found that the donour Musika intended to give the land, which was unregistered, as a gift to the appellants because it was reduced into writing. This contrasts with the instant case where nothing was reduced in writing. In addition, there was no signing of transfer forms by Banalekaki, yet it is an important requirement for a donation of registered land to take effect.

This would in effect mean that title to the disputed land of 2 acres remained with the deceased. The gift he purportedly gave to the respondent was not completed under the legal provisions governing this type of gift, considering the steps taken by the donour to effectuate the gift. The respondent's case that he grew up and stayed on the land for a long time is a moving testimony, but it does not accord him legal or equitable claims to the land under the legal principles highlighted. It does not matter how long the respondent stayed on the land or what he did with the land. Thus, upon the death of Banalekaki, the registered land automatically passed on to his estate despite the purported gift he made, and was available for distribution in accordance with the laws governing intestate estates. In that regard, I find that the administrator general (the 1st defendant in the suit) did not violate the respondent's rights when he distributed the disputed land as part of the deceased's intestate estate. Grounds 1, 2 and 3 of the appeal are allowed.

Ground 4: The learned trial magistrate erred in law and fact when he awarded the respondent the remedies he awarded in particular he erred when he awarded the respondent general damages of Uganda Shillings 6,000,000/=.

Ground 5: The learned trial magistrate erred in law and fact when he awarded interest on the general damages at the rate of 20% per annum from the date of the cause of action till payment in full.

Ground 6: The learned trial magistrate erred in law and fact when he awarded the respondent interest on costs at the rate of 20% per annum from the date of judgment till payment in full.

The appellant's counsel submitted that though general damages were prayed in the plaint the same were not proved and the burden of proof was on the respondent. Counsel argued that the respondent did not testify to anything justifying the award of general damages and the submissions did not address them. He submitted that it was an error on the part of the magistrate to make an award of general damages. He cited ***Fulgensio Semako V Edirisa Ssebugwawo [1979] HCB 15*** to support his position.

On the 20% interest on the award, the appellant's counsel submitted that it was too high. He cited ***Ecta (U) Ltd V Geraldine S. Namurimu & Another SCCA 29/1994*** to support his position. The appellants' counsel also argued that the magistrate's holding that interest was to run from the date of the cause of action was an error as the date was not specified and liable to speculation. He cited ***Sietco V Noble Builders Ltd SCCA 31/1995*** and ***Fernandes V People Newspaper Ltd [1972] EA 63*** and submitted that such damages are assessed by the court, and the right to them arises from the date of judgement. On the 20% interest on costs, the appellants' counsel submitted that it was an error for court to award interest on costs. He cited ***Hassanali V City Motor Accessories Ltd [1972] EA 423*** to support his position.

It was submitted for the respondent that there was no error whatsoever when the trial magistrate awarded damages, costs and interest on the same. He argued that the principle for awarding general damages is to try as much as practicable to place an injured party in a good position in monetary terms, as he would have been had the wrong complained of not occurred. He submitted that the appellants sold part of the respondent's land to third parties as a result of the administrator general's orders which occasioned a grave loss to the respondent.

On interest, counsel argued that section 26 of the Civil Procedure Act gives court jurisdiction to award interest where a party has been denied use of his land claimed by another person. He argued that in the instant case the interest was in

line with the respondent's failure to use his land since 1993 when litigation ensued, and as such the trial magistrate was justified to award such interest. On costs counsel argued that section 27 of the Civil Procedure Act gives court the discretion to award such costs, that the general rule is that the successful party should not be denied costs unless there is justifiable cause. He submitted that the trial magistrate was justified to award costs to the respondent who was the successful party in the case.

It is trite law that general damages are the direct probable consequences of the act complained of. Such consequences may be loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering. Damages must be prayed and proved, as held in ***Kampala District Land Board & George Mitala V Venansio Babweyana SCCA 2/2007***. The object of damages is to compensate a party for the damage, loss or injury suffered. They can be pecuniary or non pecuniary, the former comprising of all financial and material loss of business profit and income, and the latter representing inroad upon a person's financial or material assets such as physical pain or injury to feelings, as was held in ***Robber Coussens V Attorney General SCCA 8/1999***. In ***Fulgensio Semako V Edirisa Ssebugwawo [1979] HCB 15***, it was held that counsel owes a duty to their clients and to court to put before court material which would enable it arrive at a reasonable figure by way of damages.

In this case general damages were prayed in the plaint. There is nothing on record however to show that the same were proved before court. The burden of proof was on the respondent to prove his damages but he adduced no evidence to that effect. There is nothing in his sworn testimony justifying the award of general damages. His counsel did not address them in his submissions either. I would in that respect agree with the appellants' counsel that it was an error on the part of the magistrate to make an award of general damages based on no adduced evidence.

On the issue of interest on general damages, the law gives discretion to a Judge to award reasonable interest on the decretal amount. Section 26(2) of the Civil Procedure Act provides that,

“Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.”

The Supreme Court in ***Ecta (U) Ltd V Geraldine S. Namurimu & Another SCCA 29/1994*** stated that a distinction must be made between awards arising out of commercial business transactions which would normally attract a higher interest, and awards of general damages which are mainly compensatory. The court found merit in the complaint regarding the award of interest of 25% on general damages. It considered such interest as too high and reduced it to 8%.

The respondent argued that the interest is in line with the respondent's failure to use his land which the appellants sold to third parties after the administrator general distributed it as part of Banalekaki's estate. This court has already made a finding that the respondent did not adduce any evidence before court to justify an award for general damages. The learned trial magistrate did not give reasons in his judgement as to why he awarded the 20% interest on general damages. In the circumstances, I find the award of 20% interest on the general damages was erroneous as the award of the damages themselves. The other aspect to this ground of appeal is that the magistrate's holding that interest was to run from the date of the cause of action was an error as the date was not specified and liable to speculation.

The principle laid down by court decisions is that where damages have been assessed by court, the right to those damages does not arise until they are assessed and their interest is only given from the date of judgement. See ***Sietco V Noble Builders Ltd SCCA 31/1995; Fernandes V People Newspaper Ltd [1972] EA 63***. I therefore agree with the appellant's counsel that the magistrate's holding that interest on general damages was to run from the date of the cause of action was an error. This is so because, first, the date of cause of action was not

specified and thus liable to speculation. Secondly, case decisions indicate that such interest on general damages runs from the date of assessment of such damage by court, which is the date of judgement.

Thus, I find that the learned trial magistrate erred in law and fact when he awarded interest on the general damages at the rate of 20% per annum from the date of the cause of action till payment in full.

On costs, I am prompted by the respondent's counsel's earnest submissions to point out that the magistrate's awarding costs was not in issue, judging from the ground 6 of the appeal. The issue was on the 20% interest on costs, and this is what I will address.

Section 27(3) of the Civil Procedure Act provides that the court or judge may give interest on costs at any rate not exceeding 6 percent per year, and the interest shall be added to the costs and shall be recoverable as such. In ***Hassanali V City Motor Accessories Ltd [1972] EA 423*** held as follows:-

"I have no doubt that this court has power to award interest on costs but it is not the normal practice and I do not consider that facts of this issue call for a warrant a departure from the normal practice."

In this case I found no exceptional facts to warrant a departure from the normal practice and justify the award of interest on costs which the learned magistrate made. In that respect grounds 4, 5 and 6 of the appeal are allowed.

In the final result this appeal is allowed. The judgment and orders of the lower court are set aside and substituted with an order dismissing the suit. The appellants are awarded costs of the appeal here and in the court below.

Dated at Kampala this 25th day of February 2014.

Percy Night Tuhaise

Judge.