

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0040 OF 2014

(Arising from Adjumani Grade One Magistrates Court Civil Suit No. 0019 of 2012)

HON. OWOLE NIXON **APPELLANT**

VERSUS

1. OWOLE THOMAS }
2. BURAHAN ALIAS } **RESPONDENTS**
3. SWALI DRAKUWA }

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The Appellant sued the respondents jointly and severally for trespass to land, seeking an award of general damages, an order of vacant possession against the second and third appellants, a permanent injunction, interest and costs. The appellant's case was that he owned the land in dispute, measuring approximately 160 acres at Pakwinya village, Mungula Parish in Adjumani District which he acquired as a gift from his uncle, Oneka Anzelo in August 2011. He took possession of the land immediately and planted trees along its boundaries. Without any colour of right, the first respondent uprooted all the trees, and sold the land to the second and third respondents. The second and third respondents embarked on ploughing and tilling the land against the appellant's protestations and attempt to involve the police to stop them from undertaking those activities on his land. The appellant challenged the second and third appellant's acquisition of the land as having been fraudulent.

In their joint written statement of defence, the second and third respondents denied the appellant's claim against them and contended that the first respondent had been murdered in connection with the dispute over the land and the appellant's witnesses had been arrested as suspects. They claimed to have acquired the land lawfully by purchase from the lawful owner

and that they were therefore in lawful possession. They in turn counterclaimed against the appellant, seeking a declaration that they were the lawful owners of the disputed land, general damages for trespass, a permanent injunction, interest and costs.

In his testimony, the appellant stated that he was at the material time the L.C.5 Chairman of Ajumani District. The second and third appellants had in the year 2012 trespassed on his land situated at Pakwinya village after purporting to have purchased part of it from the first respondent. He had acquired the over 160 acres of land as a gift *inter vivos* from his maternal uncle Oneka Anjelo in the year 2011, on a date he could not remember. The grant was witnessed by the widow of Oneka Anjelo and some members of the L.C.I. of Pakwinya village. Following that grant, he planted teak and mahogany trees in August or September 2011 all around the perimeter boundary of the land, aggregated at 150 trees in all. The second and third respondents had uprooted some of the trees. They had cut down a number of trees for charcoal burning and had ploughed part of his land with a tractor. He reported the trespass to the police who ordered the respondents to vacate the land. His uncle, the late Oneka Anjelo had settled on the disputed land in 1977 until 1980 when he was forced to abandon it by reason of insurgency that engulfed the area. The land was subsequently gazetted as East Madi Controlled hunting area by the Uganda Wildlife Authority. It was de-gazetted on 2nd May 2002. Several people, including his late uncle Oneka Anjelo then randomly acquired chunks of land in the de-gazetted area. At the time Oneka Anjelo gave him the land as a gift *inter vivos*, there was a one Drichi John who had a hut on the land. Oneka Anjelo had sued him and the matter decided in his favour.

P.W.2. Oloya Ensio, a brother to the late Oneka Anjelo testified that the deceased had land at Pakwinya estimated at about 160 acres as his entire land. He recollected that the late Oneka Anjelo gave this land to the appellant in July 2010. The grant was witnessed by many people. The appellant started cultivating the land and planted a variety of exotic trees around it but these were later destroyed by the respondents. The respondents began growing crops on the land. Owole Thomas' land was about 80 meters away from the land now in dispute. The late Oneka Anjelo had lived on the land in dispute for one year before his death and was buried at the home of this witness upon his death.

P.W.3. Elivira Azienzo, daughter of the late Oneka Angelo testified that the late Oneka Anjelo gave 300 acres of his land to the appellant in the year 2011. The witness was present during the transaction together with very many other people. The appellant immediately planted a variety of trees on the land but when the witness subsequently went to the land to undertake cultivation he found the trees were missing.

P.W.4. Acimani Patrick, a neighbour of the late Oneka Angelo testified that he came to know the appellant when he was planting trees on the disputed land. The land was given to him by Oneka Angelo in the year 2011 in his presence. It measures 80 acres and subsequently some people came onto the land and uprooted the trees. He did not know how big Oneka Angelo's land was.

P.W.5. Eliza Ezienjo, a widow of the late Oneka Angelo testified that in the year 2011 her husband told her he had given a piece of land to the appellant for cultivation. She was present when her husband gave the land to the appellant. The appellant planted a variety of exotic trees on the land but during 2012 a one Drichi John constructed a hut on the land. The late Oneka Angelo reported this to the L.C.I. During 2012, Owole Thomas gave the land to some other people who began cultivating it. She and her late husband had lived on the land since the Idi Amin Regime and together had twelve children in all while living on that land. When her husband Oneka Angelo died during 2012, he was buried at his brother's home, Oloya in Manyiya village. The deceased had no other land apart from the one he gave to the appellant.

P.W.6. Jurugo George, the L.C.I Vice Chairman of Pakwinya village testified that the late Oneka Angelo gave the land in dispute to the appellant around July or November 2011. Before that, the late Oneka Angelo had sued a one Drichi John before the L.C.I Court for trespass to that land. The suit was decided in favour of the late Oneka Angelo. The respondents had subsequently entered onto the land and destroyed the appellant's trees. He was present when the late Oneka Angelo was handing over the land to the appellant. The late Oneka Angelo had no other land except the one now in dispute. That was the close of the appellant's case.

The first respondent did not testify, he having died before commencement of the hearing of the suit. In his defence, the second appellant testified that he bought a portion of the disputed land

measuring 850 metres by 784 metres from the first respondent at a price of shs. 18,000,000/= He was formally introduced to the village on 17th June 2012 after paying the last instalment and a feast was held to receive him as a new settler on the village. Copies of the agreements of purchase were tendered in evidence. On 18th June 2012 the land was handed over to him and he began cultivating it. The late Owole Thomas was later arrested by the police on instigation of the appellant but was cleared by the police only for the first appellant thereafter to receive court summons indicating that the appellant had sued him for trespass to the land.

The third respondent testified that he bought part of the land in dispute jointly with the first respondent from the late Owole Thomas, after which it was divided between the two of them in equal shares. A feast was held after they paid the last instalment of the purchase price on 17th June 2016. As they were in the process of clearing the bush, the appellant caused the arrest of the first respondent by the police. Later Owole Thomas was murdered in broad day light by some of the appellant's witnesses listed in his pleadings.

D.W.3. Setimio Gitara, testified that he was a neighbour to the late Owole Thomas for a long time whom he knew as the owner of the land in dispute. The two respondents purchased part of it from the late Owole Thomas. Oneka Angelo was wrong in purporting to give the land to the appellant. The late Owole Thomas had inherited the land from his father Labwenge. The late Owole Thomas complained to the elders that Oneka Angelo had unlawfully given his land to the appellant. The elders met and resolved the dispute between Oneka Angelo and Owole Thomas in the latter's favour.

D.W.4. Tabe Francis, another neighbour to the late Owole Thomas, testified that he witnessed the sale of land by the late Owole Thomas to the respondents. From his childhood, he knew the land in dispute as owned by the late Owole Thomas' father, Justin Kojoka, from whom the late Owole Thomas inherited it. Sometime in the past the late Owole Thomas had complained to the elders that Oneka Angelo had unlawfully given his land to the appellant. The elders met and resolved the dispute between Oneka and Owole Thomas in the latter's favour.

D.W.5. Drichi John, a brother to the late Owole Thomas, testified that the disputed land originally belonged to their late father Labwenge upon whose death it was inherited by the late Owole Thomas. This witness occupies part of it. The late Oneka Angelo had migrated from Acholi and come to live with his uncle Ovuluku and when he died he was buried at the home of that uncle of his. When a dispute erupted between the late Oneka Angelo and the late Owole Thomas, the appellant caused the arrest of the latter but he was released by the police. Some of the appellant's witnesses then dragged him from his house and killed him in broad daylight.

D.W.6. Fred Anyisi, the L.C.I Chairman and a resident of the village, testified that he had since his childhood known the land in dispute as belonging to the late Owole Thomas. He was killed by a mob and was buried on that land. The land did not belong to the late Oneka Angelo and when he died he was buried elsewhere at the home of his uncle Ovuluku where he lived before his death. This witness was present when the late Owole Thomas sold off about 100 acres of the land to the two respondents. A feast was organised after which the land was handed over to the two respondents. For all the time he had known the disputed land, he had never seen the late Oneka Angelo carry out any activity on it. When the late Oneka Angelo tried to grab it from the late Owole Thomas, the dispute was referred to the elders who unanimously decided on 11th September 2011 that it belonged to the late Owole Thomas. The respondents then closed their case.

The court later visited the *locus in quo*, recorded its observations and prepared a sketch map of the disputed land and subsequently delivered its judgment. In his judgment, the learned trial magistrate observed that at the *locus in quo*, neither the appellant nor P.W.5 the widow of the late Oneka Angelo were able to show court where the residence of the late Oneka Angelo had stood. The trial magistrate noted the discrepancies in the size of the land allegedly given to the appellant. The court disbelieved the appellant's version that the late Oneka Angelo would give away his entire land without making any provision for his relatively large family. The court found that the appellant had failed to prove that the land belonged to the late Oneka Angelo. The trial magistrate found the evidence adduced by the respondents more consistent and believable and found that the land in dispute belonged to the late Owole Thomas through inheritance from Labwenge. He dismissed the suit with costs and awarded the respondents *mesne profits* of shs.

30,000,000/= in light of the duration of the litigation and a permanent injunction against the appellant, his servants, agents and workers from further acts of trespass on the land.

Being dissatisfied with the decision the appellant appeals on the following grounds, namely;

1. The learned trial magistrate erred in law and fact when he failed to properly evaluate the overwhelming evidence on record adduced by the plaintiff that the suit land belonged to Oneka Angelo and also came to the wrong conclusion that Oneka Angelo gave the appellant the whole land.
2. The learned trial magistrate erred in law and fact when he imported his own evidence which was not adduced at the trial and relied on them (sic) to the prejudice of the appellant.
3. The learned trial magistrate erred in law and fact when he failed to judiciously record evidence at locus in quo thus arriving at wrong decisions to the prejudice of the appellant.
4. The learned trial magistrate erred in law and fact in awarding the defendants damages of Uganda Shillings 30,000,000/= (thirty million shillings), which amount is excessive and beyond his pecuniary jurisdiction.

Submitting in support of the appeal, counsel for the appellant Mr. Madira Jimmy argued in respect of the first ground that the evidence of the appellant and his witnesses sufficiently established that the disputed land belonged to the late Oneka Angelo who in the year 2011 gave the land to the appellant as a gift *inter vivos*. The gift was perfected upon the appellant accepting it and taking possession. He cited *Joy Mukobe v. Willy Wambuwu, H. C. Civil Appeal No. 0055 of 2005*, applied in *Muyingo John Paul v. Abasi Lugemwa and two others, H. C. Civil Suit No. 24 of 2013* where the essential elements of a valid gift were stated to be; (i) the absence of consideration; (ii) the donor and the donee; (iii) the subject matter; (iv) transfer and acceptance, which all were satisfied in the instant case. The late Oneka did not give away all his land but only a part of it. There was no evidence to prove that the late Owole Thomas had inherited the land from his late father and thus the trial magistrate erred in that finding. The respondents did not undertake any due diligence before they purchased the land and had they done so, they would have discovered that the land belonged to the appellant and that it is him who had planted the trees thereon.

In respect of the second ground of appeal, counsel for the appellant argued that the trial magistrate made a number of findings of fact that were not based on evidence before him such as; his reference to absence of graves at the locus yet no witness had referred to such, attributing Owole Thomas' death to the land dispute, the appellant pestering Oneka to give him his land, and reference to numerous contradictions in the appellant's evidence without specific examples. All this prevented the magistrate from making a proper evaluation of the appellant's evidence.

In respect of the third ground of appeal, counsel for the appellant argued that the proceedings at the locus in quo were not recorded yet the trial magistrate relied on his observations thereat to make his decision. He relied on the decision in *Deo Masanga v. Uganda* [1998] KALR 57 and *Registered Trustees of Tororo Diocese v. Wesonga and Five others*, H. C. Civil Appeal No. 96 of 2009 to support his submission that this is a fatal error to the proceedings. The observations made by the trial magistrate helped in filling up gaps in the respondents' case, contrary to the purposes of such a visit. None of the parties was given the opportunity to cross-examine the other's witnesses while at the *locus in quo*.

In respect of the fourth ground of appeal, counsel for the appellant argued that in awarding general damages of shs. 30,000,000/=, the trial magistrate exceeded his pecuniary jurisdiction prescribed by s. 207 (1) of *The Magistrates Courts Act* limiting it to shs. 20,000,000/=. He cited *Makula International v. His Eminence Cardinal Nsubuga and another* [1982] HCB 11, *National Medical Supplies v. Penguins Limited* H. C. Civil Suit No. 29 of 2012 and *Koboko District Local Government v Okujjo Swali*, H.C. Misc. Application No. 1 of 2016 for the argument that court cannot sanction an illegality. He prayed that the appeal be allowed with the costs of appeal and of the court below.

In response, counsel for the respondents, Mr. Innocent Omara submitted that there was overwhelming evidence that the respondents acquired the land in dispute through purchase. There was evidence that the seller had inherited it from his deceased father. To the contrary, the appellant claimed the land had been de-gazetted in the year 2002 and thus did not belong to anyone. There was no evidence that Oneka Angelo, from whom the appellant claimed, had ever lived on the land. Disputes between Oneka Angelo and Owole Thomas over the land had been

resolved in favour of the latter by the elders. The evidence adduced by the respondents remained largely unchallenged and according to *Habre International Company Limited v. Ebrahim and others*, S. C. Civil Appeal No. 4 of 1999, where a party fails to challenge that evidence that evidence is taken as true.

In respect of the second ground of appeal, counsel for the respondents argued that the trial magistrate chose to write a concise judgment and cannot be faulted for this. He made reference only to essential facts. The trial magistrate was entitled to question the improvident character of the gift. The conclusions reached were all based on the evidence before him.

In respect of the third ground of appeal, counsel for the respondents argued that at the *locus in quo*, the record of proceedings reveals an agenda, moving around the disputed land, the drawing of the sketch map, and there is no evidence that anyone who had not testified during the trial was permitted to give evidence at the *locus in quo*. A visit to the locus in quo is not mandatory as was held in *Yeseri Waibi v. Edisa Byandala [1982] HCB 28*. Even without that visit, the court had sufficient evidence on record to support the decision. The decision was based on evidence recorded in court rather than at the *locus in quo*.

In respect of the fourth ground of appeal, counsel for the respondents argued that an appellate court ought not to interfere with an award of general damages by a trial court except where the award is inordinately low or high. He cited *Matiya Byabarema and others v. Uganda Transport Company (1975) Ltd. S.C. Civil Appeal No. 10 of 1993 (Unreported)*. In the instant case use of the land was injuncted for over one and a half years of the duration of the trial. Under section 207 (4) of *The Magistrates Courts Act*, where the matter before court is purely of a customary nature, the pecuniary jurisdiction of a magistrate's court is unlimited. In *Bushenyi- Ishaka Town Council v Muhumuza, H. C. Civil Appeal No. 68 of 2011*, an award of shs 45,000,000/= as general damages by a magistrate's court in a suit whose subject matter was of a civil nature governed only by civil customary law. He therefore prayed that the appeal be dismissed with costs of the appeal and of the court below, to the respondents.

This being a first appeal, it is the duty of this court as a first appellate court to observe the principles stated in *Selle v Associated Motor Boat Co. [1968] EA 123*, thus:

An appeal is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270*).

This court therefore is enjoined to weigh the conflicting evidence and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law and remembering to make due allowance for the fact that it has neither seen nor heard the witnesses. The appellate Court is confined to the evidence on record. Accordingly the view of the trial court as to where credibility lies is entitled to great weight. However, the appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. This being the first appellate court, it is the duty of this court to interfere with those findings of fact which were based on no evidence, or on a misapprehension of the evidence, or in respect of which the trial court demonstrably acted on the wrong principles in reaching those findings (See *Peters v Sunday Post Ltd [1958] E.A. 429*).

Grounds one and two of the appeal assail the manner in which the trial magistrate went about evaluation of the evidence before him leading to the decision he made. It is trite law that there is no set form of evaluation of evidence and the manner of evaluation of evidence in each case varies according to the peculiar facts and circumstances of the case (see *Mujuni Apollo v Uganda S.C. Criminal Appeal No.46 of 2000*). An appellate court will not normally interfere with findings of fact by a trial court or will be slow to differ with the trial court and will only do so with caution and only in cases where the findings of fact are based on no evidence, or on a misapprehension of the evidence, or where the court below is shown demonstrably to have acted on wrong principles in reaching its conclusion. Being a rehearing, which requires the appellate

court to evaluate the evidence itself and draw its own conclusions, the appellate court is not bound by the trial court's findings of fact if it appears that either it failed to take into account particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

The burden lay of the appellant to prove his ownership of the disputed land. In doing so, he came up with two explanations. The first version, evident at pages 3 to 4 of the record of proceedings was that his uncle, the late Oneka Anjelo had settled on the disputed land in 1977 until 1980 when he was forced to abandon it by reason of insurgency that engulfed the area. The land was subsequently gazetted as East Madi Controlled Hunting Area by the Uganda Wildlife Authority. It was de-gazetted on 2nd May 2002 whereupon several people, including his late uncle Oneka Anjelo, then randomly acquired chunks of land in the de-gazetted area, which land he later gave to the appellant as a gift *inter vivos*.

This version has two shortcomings; firstly it does not explain under what tenure the late Oneka Anjelo acquired the land in 1977. This version as well does not explain as to whether the late Oneka Angelo acquired the land by gift, purchase or inheritance. If the evidence is to be interpreted as suggesting that this being unregistered land, whatever mode of acquisition was adopted, that the late Oneka Angelo acquired customary tenure, then it fell short of proof of Oneka Angelo having acquired such tenure. Customary tenure is characterised by local customary rules regulating transactions in land, individual, household, communal and traditional institutional ownership, use, management and occupation of land, which rules are limited in their operation to a specific area of land and a specific description or class of persons, but are generally accepted as binding and authoritative by that class of persons or upon any persons acquiring any part of that specific land in accordance with those rules. Therefore, a person seeking to establish customary ownership of land has the onus of proving that he or she belongs to a specific description or class of persons to whom customary rules limited in their operation, regulating ownership, use, management and occupation of land, apply in respect of a specific area of land or that he or she is a person who acquired a part of that specific land to which such rules apply and that he or she acquired the land in accordance with those rules. The onus of proving customary ownership begins with establishing the nature and scope of the applicable

customary rules and their binding and authoritative character and thereafter evidence of acquisition in accordance with those rules, of a part of that specific land to which such rules apply. The appellant did not adduce evidence of that nature. On basis of the *Nemo dat quod non habet* principle, in absence of proof of a legal estate in the disputed land vested in Oneka Anjelo by gift, purchase, inheritance or law, he lacked capacity from the very beginning, to grant the land to the appellant as a gift *inter vivos*.

The second shortcoming with this version is that even assuming that Oneka Anjelo acquired customary tenure over the disputed land in 1977, the appellant's evidence that the land was subsequently gazetted as East Madi Controlled Hunting Area by the Uganda Wildlife Authority, implies that upon gazetting of the land as forming part of a controlled hunting area, there was an automatic restriction on all private ownership of customary holdings therein, since only activities for the sustainable management and utilisation of wildlife would be carried out on such land. Under sections 18 and 92 of *The Uganda Wildlife Act*, the Uganda Wildlife Authority is empowered to declare wildlife conservation areas. Under section 18 (8) of the same Act, a community wildlife area declared under subsection (3) (b) is an area in which individuals who have property rights in land may carry out activities for the sustainable management and utilisation of wildlife if the activities do not adversely affect wildlife and in which area the State may prescribe land use measures. Declaration of the East Madi Controlled Hunting area did not concern itself with ownership of land in the area, but rather the protection of the relevant named animal species in issue in the area. It restricted the manner of hunting that could be carried out within the area and land use within the area but not land ownership.

However, the appellant appears to have interpreted this as a termination of customary ownership of land in the area since according to his testimony, the late Oneka Anjelo, together with very many other people, was able to re-occupy the land only after it was de-gazetted. Oneka Anjelo had technically abandoned the land for the period it formed part of the East Madi Controlled Hunting area. Abandonment of a customary interest in land terminates the interest. Abandonment may occur where a holder of a customary interest in land leaves the whole of the land unattended to by himself or herself or a member of his or her family or his or her authorised agent for three years or more (see section 37 (1) (a) of *The Land Act, Cap 227* by way of analogy). Where the

failure to use the land is long, continued and unexplained, it gives rise to an inference of an intention to abandon. Although the law expressly recognised and permitted human settlement in Controlled Hunting Areas, in the instant case there does not appear to have been any human settlement in the area during the time the disputed land constituted part of the East Madi Controlled Hunting area. This explains the random acquisition following the de-gazetting. Since the land did not belong to anyone at the time it was de-gazetted, by virtue of article 241 (1) (a) of *The Constitution of the Republic of Uganda, 1995* and section 59 (1) of *The Land Act*, upon the promulgation of the Constitution, being land that was not owned by anyone, the power to hold and allocate it was vested in Adjumani District Land Board.

In *Bwetegeine Kiiza and Another v Kadooba Kiiza C.A. Civil Appeal No. 59 of 2009*, the Court of Appeal disagreed with the proposition that when one occupies or develops unregistered land then *ipso facto*, a customary interest is created. The effect of such a proposition would be that no matter how one comes to the land, as long as one develops it, a customary interest is acquired. The court was of the view that if such a proposition is accepted, even trespassers would acquire interest in property which they otherwise shouldn't. As a general proposition of customary law, that possibility was found unacceptable. The court rather opined that customary law must be accurately and definitely established and sweeping generalities will not do. Mere occupation and user of unregistered land does not of itself create customary tenure over the land. The learned trial magistrate therefore did not err when he found that the appellant had not proved customary ownership of the land in dispute by the late Oneka Anjelo, based only on evidence of occupation and user without proof that such occupancy and user was in accordance with known customary rules accepted as binding and authoritative in respect of that land, proved by the evidence adduced before court to that effect. On this account therefore, still on basis of the *Nemo dat quod non habet* principle, in absence of proof of a legal estate in the disputed land vested in Oneka Anjelo by gift, purchase, inheritance or law, he lacked capacity from the very beginning, to grant the land to the appellant as a gift *inter vivos*.

The second explanation advanced by the appellant was that he acquired the over 160 acres of land as a gift *inter vivos* from his maternal uncle Oneka Anjelo in the year 2011, on a date he could not remember. The grant was witnessed by the widow of Oneka Anjelo and some members

of the L.C.I. of Pakwinya village. Following that grant, he planted teak and mahogany trees in August or September 2011 all around the perimeter boundary of the land, aggregated at 150 trees in all. Whereas ownership of land under customary may be acquired by gift, three elements must be established in order to have a valid gift (or to “perfect” the gift): (a) an intention to donate (sometimes referred to as donative intent, or *animus donandi*); (b) acceptance of the gift by the donee; and (c) a sufficient act of delivery or transfer. The intention to donate is ordinarily manifested by declaration of the gift by the donor. Acceptance of the gift must be expressed or implied from conduct by or on behalf of the donee, and there must be evidence of delivery of such possession of the subject of the gift by the donor to the donee. An *inter vivos* gift exists if the donor, while alive, intends to transfer unconditionally legal title to property and either transfers possession of the property to the donee or some other document evidencing an intention to make a gift and the donee accepts the gift (See *Standard Trust Co. v Hill*, [1922] 2 W.W.R. 1003, 1004 (Alta. Sup. Ct. App. D). In the Canadian case of *Kavanaugh v. Lajoie*, 2014 ONCA 187, the Ontario Court of Appeal noted that for a gift to be valid and enforceable it must be perfected. In other words, the donor must have done everything necessary and in his power to effect the transfer of property. An incomplete gift is nothing more than an intention to gift. The donor is free to change his mind (See *Bergen v. Bergen* [2013] BCJ No. 2552).

The gift must be from a spontaneous act of a donor able to exercise free and independent will. For that reason, wherever the relation between donor and donee is such that the latter is in a position to exercise dominion over the former by reason of the trust and confidence reposed in the latter, the presumption of undue influence is raised. Undue influence in the *inter vivos* gift context is usually divided into two classes: 1) direct or actual undue influence, and 2) presumed undue influence or undue influence by relationship (see *Allcard v. Skinner* (1887), 36 Ch. D. 145 at 171, and John E.S. Poyser, B.A., LL.B., TEP in his book, *Capacity and Undue Influence*, (Toronto: Carswell, 2014) at p.473).

Conduct amounting to actual undue influence often happens when the influencer and the victim are alone, which means it may be difficult to produce direct evidence. However, actual undue influence can be proven by circumstantial evidence. On the other hand, presumed undue influence does not depend on proof of reprehensible conduct. Under this class, equity will

intervene as a matter of public policy to prevent the influence existing from certain relationships from being abused. Undue influence is presumed from the relations existing between the parties and these relations include those of parent and child, guardian and ward, trustee and *cestui que trust*, advocate and client, physician and patient and cases of religious influence. The relations mentioned, however, do not constitute an exhaustive list of the cases in which undue influence will be presumed from personal relations. Wherever the relation between donor and donee is such that the latter is in a position to exercise dominion over the former by reason of the trust and confidence reposed in the latter, the presumption of undue influence is raised (see *Dent v. Bennett*, [1839] EngR 434; (1839) 4 My. & Cr. 269; 41 E.R. 105 and see also *Smith v. Kay*, [1859] EngR 38; (1859) 7 H.L.C. 750; 11 E.R. 299). Where certain special relations exist undue influence is presumed in the case of gifts. Relationships that qualify as a “special relationship” exist where the “potential for domination inheres in the relationship itself.” Such relationships of dependency defy easy categorization, (see *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at para. 42). Where a relation of dominion or dependence exists, the age and condition of the donor are irrelevant so far as raising the presumption of undue influence is concerned.

For example, in the Australian High Court decision of *Johnson v. Buttress* [1936] HCA 41; (1936) 56 CLR 113, a sixty-seven years old man, who was wholly illiterate, of low intelligence and quite devoid of any capacity for, or experience in, business affairs, was habitually dependent on others for advice and assistance. After the death of his wife he transferred to a relative of his wife a piece of land on which his home was erected and which was substantially his only asset. The transfer was executed in the office of the donee's solicitor, and was expressed to be for natural love and affection. The donor did not have any independent advice concerning the transfer, but it was shown that he was appreciative of kindnesses shown from time to time by the donee to his wife and to himself. At the suit of the donor's son the transfer was set aside as having been made under the undue influence of the donee. It was held that wherever the relation between donor and donee is such that the latter is in a position to exercise dominion over the former by reason of the trust and confidence reposed in the latter, the presumption of undue influence is raised. To rebut the presumption it must be affirmatively shown by the donee that the gift was the pure, voluntary, well-understood act of the mind of the donor.

In that case, Latham, C.J., Dixon, Evatt and McTierman JJ., opined that this presumption was necessary because a special relationship of influence was shown by the circumstances to have arisen between the donee and the donor and the presumption of undue influence which arose from the relationship had not been rebutted. On his part, Starke J., said this was required because the evidence justified the finding of the trial judge that the transfer was the result, not of the full and deliberate judgment of the donor, but of unfair and undue pressure on the part of the donee. The trial court inferred that the influence of the defendant was undue from the fact that the defendant was not a blood relation of the deceased, but was a relative of his wife whom the defendant and her family addressed as "aunt," from the improvident nature of the transfer itself, from the circumstances that the defendant took the deceased to her own solicitor, that independent advice was not suggested or obtained, and that the deceased parted with the whole of his property. The court regarded the facts that after the execution of the transfer the defendant accounted for the rents and the deceased was accustomed to speak of the property as his own as affirmative evidence that the deceased did not exercise a free and unfettered judgment in the making of the transfer. The court observed;

It cannot be denied that the absolute transfer to the defendant of the property which was his sole source of income was highly improvident. It is true that the defendant and her daughter gave evidence that it was understood that the defendant would support him for the rest of his life, but the learned judge has found that there was no contract to that effect, and, if the defendant had died the day after the transfer, the deceased would have been left practically without any property and without any enforceable rights to ensure his support.

Since there is no conclusive definition of what constitutes fiduciary relationship, where in respect to a transaction a person places confidence and trust in another, a fiduciary relationship is established from which the presumption flows. Once a relationship is established, the onus moves to the person alleging a valid gift to rebut it. The donor must be shown to have entered into the transaction as a result of his or her own "full, free and informed thought." It must be affirmatively shown by the donee that the gift was (to use the words of *Eldon* L.C. in the leading case of *Huguenin v. Baseley* (1807) 14 Ves. 273; 33 E.R. 526; *White and Tudor's Leading Cases in Equity*, 7th ed. (1897), vol. i., at p. 247, "the pure, voluntary, well-understood act of the mind" of the donor.

For gifts that are of significant value, relative to the estate of the donor, the standard or criteria for testamentary capacity arguably may apply to gifts *inter vivos*. For example in the case of *Re Beaney (Deceased)*, [1978] 2 All E.R. 595, a mother of three children made a gift *inter vivos* to one of them alone of the mother's only asset of value, at a time when she was in an advanced state of senile dementia. The other two siblings contended that the gift was void because the claims of the donee's siblings and the extent of the property to be disposed of had not been explained to the mother. The donor could not understand the relevant transaction and its effects without explanation. The court found that in order for the gift to be valid, the mother should have been in a condition to fully understand; (1), that she was disposing of her only asset of value and depriving herself of title to it; (2), that she was thereby pre-empting the provisions of her Will and, (3), that she was preferring one child and cutting out the others from all benefit.' The court observed that;

The degree or extent of understanding required in respect of any instrument is relative to the particular transaction which it is to effect. In the case of a will the degree required is always high. In the case of a contract, a deed made for consideration or a gift *inter vivos*, whether by deed or otherwise, the degree required varies with the circumstances of the transaction. Thus, at one extreme, if the subject matter and value of a gift are trivial in relation to the donor's other assets a low degree of understanding will suffice. But, at the other extreme, if its effect is to dispose of the donor's only asset of value and thus, for practical purposes, to pre-empt the devolution of his estate under his will or on his intestacy, then the degree of understanding required is as high as that required for a will, and the donor must understand the claims of all of the potential donees and the extent of the property to be disposed of.

Gifts *inter vivos* that are of significant value, relative to the estate of the donor, must meet the standard that evolved from the case of *Banks v. Goodfellow (1870)*, L.R. Q.B. 549, 39 L.J.Q.B. 237, i.e. that the donor must be able to: (1) understand the nature of the act and its effects; (2) understand the extent of the property of which he or she is disposing; (3) comprehend and appreciate the claims to which he or she sought to give effect; and, (4) with a view to the latter object, that no disorder of the mind shall poison the testator's affections, pervert the testator's sense of right, or present the exercise of the testator's natural faculties. The donee should not influence the testator's will in disposing of his or her property and bring about a disposal of it which, but for that influence, would not have been made.

In the instant case, at the time of this grant of gift the appellant was a retired teacher and L.C.5 Chairman of Ajumani District, a position of considerable political clout. From the accounts of all witnesses who testified in the suit, the late Oneka Anjelo was not a person of any comparable status to that of the appellant. The appellant and the deceased were not on equal terms: the latter being a person of ordinary station in life. Having been born in 1951, according to the testimony of the appellant at page 3 of the record of appeal, the late Oneka Anjelo was a person of advanced age (about 60 years old) at the time he made this gift. He had a wife and twelve children. He was living at the homestead of his brother and appears to have led a life dependant on that brother. When he died, he was not buried on his own land, presumably because he had given it all to the appellant, but rather at the home of that brother of his. The appellant was therefore in a position to exercise dominion over Oneka Anjelo by reason of the trust and confidence reposed in him as a nephew. Wherever the relation between donor and donee is such that the latter is in a position to exercise dominion over the former by reason of the trust and confidence reposed in the latter, the presumption of undue influence is raised (see *Dent v. Bennett* (1839) 4 My. & Cr. 269; 41 E.R. 105; *Smith v. Kay* (1859) 11 E.R. 299). Since there is no conclusive definition of what constitutes fiduciary relationship, where in respect to a transaction a person places confidence and trust in another, a fiduciary relationship is established from which the presumption flows. The burden was therefore cast on the appellant to adduce evidence sufficient to rebut that presumption.

In the instant case, the evidence before court was that Oneka Anjelo gave the appellant all or practically all of his land, without making provision for himself and his relatively large family. P.W.2. Oloya Ensio, a brother to the late Oneka Anjelo testified that the deceased had land at Pakwinya estimated at about 160 acres as his entire land. P.W.3. Elivira Azienzo, daughter of the late Oneka Angelo testified that the late Oneka Anjelo gave 300 acres of his land to the appellant in the year 2011. P.W.4. Acimani Patrick, a neighbour of the late Oneka Angelo testified that it measures 80 acres but he did not know how big Oneka Angelo's land was. P.W.5. Eliza Ezienjo, a widow of the late Oneka Angelo testified that the deceased had no other land apart from the one he gave to the appellant such that when he died during 2012, he was buried at his brother's home, Oloya in Manyiya village. P.W.6. Jurugo George, the L.C.I Vice Chairman of Pakwinya village testified that the late Oneka Angelo had no other land except the one now in dispute.

On the face of it, this was a highly improvident donation considering that its effect was to dispose of all or practically the donor's entire single asset of value constituting his sole source of sustenance of that family. The burden of disproving the presumption is heavier upon the donee where the donor has given him all or practically all of his property (see *Price v. Price (1852) 1 DeG.M. & G. 308; 42 E.R. 571*). To rebut the presumption, the appellant had to affirmatively show that the gift was the pure, voluntary, well-understood act of the mind of the donor. Evidence that Oneka Anjelo received competent independent advice prior to the grant is one means, and the most obvious means, of helping to establish that the gift was the result of the free exercise of independent will. Absence of such advice, even if not sufficient in itself to invalidate the transaction, would plainly be a most important factor in determining whether the gift was in fact the result of a free and genuine exercise of the will of the donor. This observation was made in *Inche Noriah v. Shaik Allie Bin Omar [1929] A.C., 127*, where undue influence was alleged against a nephew over his elderly aunt. One solicitor had drafted the deed of gift, and another had witnessed it. The solicitor had established that she understood it and entered into it freely, but had not asked enough to establish that it was almost her entire estate, and had not advised her that a better way to achieve the result would be by will. The court held that the gift failed for undue influence. The court observed that usually a presumption of undue influence may be rebutted by showing that the transaction was entered into "after the nature and effect of the transaction had been fully explained to the donor by some independent qualified person." However according to Lord Hailsham LC;

Their Lordships are not prepared to accept the view that independent legal advice is the only way in which the presumption can be rebutted.....It is necessary for the donee to prove that the gift was a result of the free exercise of independent will. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely to satisfy the court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing; and in cases where there are no other circumstances, this may be the only means by which the donee can rebut the presumption.

The evidence before the trial magistrate established that the relationship between the appellant and Oneka Anjelo can properly be described as one in which the donee was in position to

dominate the will of the donor and thus the appellant had an ascendancy, with potential for abuse. The relationship resulted in a highly improvident donation which effectively disposed of all or practically the donor's entire single asset of value constituting his sole source of sustenance of that family in circumstances where the gift was not explicable on the grounds of natural affection which the donor could be taken to have for the donee. If the transaction was an expression of the natural love and affection that Oneka Anjelo had for the appellant, then it was a quite remarkable, extraordinary and inappropriate way of seeking to do that. This was a transaction which no one with proper regard for his own interests would enter into without careful and informed thought as to its wider effect. It is that feature which gives rise to the presumption of undue influence which the trial magistrate correctly identified. This evidence was sufficient to shift the evidential burden to the appellant, as the donee of the property, to support the gift by showing that it was made after full, free and informed thought of Oneka Anjelo. In a presumed undue influence case, there does not have to be evidence of actual pressure or as to what Oneka Anjelo would have done if fully informed. According to *Hammond v Osborne* [2002] EWCA Civ 85, in situations of this kind, "the court does not interfere on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy which requires it to be affirmatively established that the donor's trust and confidence in the donee has not been betrayed or abused."

This principle was followed and emphasized in *Goodchild v. Branbury and others*, [2006] EWCA Civ 1868, where it was held that;

The circumstances that the donor is vulnerable, in the sense that the relationship between the donor and the donee has potential for abuse, and that the gift is one which is not to be explained by the ordinary considerations by which men act lead, as a matter of public policy, as Sir Martin Nourse pointed out in *Hammond v Osborne*, to the need for the donee to show that the donor really did understand and intend what he was doing. That is why it is necessary to show that the gift was made after full free and informed consideration. A gift which is made without informed consideration by a person vulnerable to influence, and which he could not have been expected to make if he had been acting in accordance with the ordinary motives which lead men's actions, needs to be justified on the basis that the donor knew and understood what he was doing. In this case, that requirement was not met.

Similarly in the instant case, the gift of the disputed land was not objectively readily explainable by the relationship between the appellant and the late Oneka Anjelo yet the appellant failed to adduce evidence rebutting the presumption of undue influence. There was no evidence adduced by the appellant to prove either that there was no influence or, if there was, that it was not such that Oneka Anjelo did not act of his own full, free and properly informed will. Thus the transaction cannot stand by reason of the general policy of the law directed to preventing the possible abuse of relations of trust and confidence. This in my judgment was a finding well open to the trial magistrate on the evidence. The trial court had to be satisfied that the appellant had furnished evidence whose level of probity was not just of equal degree of probability with that adduced by the respondents such that the choice between his version and that of the respondents would be a matter of mere conjecture, but rather of a quality which a reasonable man, after comparing it with that adduced by the respondents, might hold that the more probable conclusion was that for which the appellant contended. The appellant failed to achieve that standard of proof and I therefore find no merit in grounds one and two of this appeal.

The third ground of appeal assails the judgment of the court below on account of failure by the trial magistrate to judiciously record evidence at the *locus in quo* thus arriving at wrong decisions to the prejudice of the appellant. Order 18 rule 14 of *The Civil Procedure Rules* empowers courts, at any stage of a suit, to inspect any property or thing concerning which any question may arise. Although this provision is invoked mainly for purposes of receiving immovable items as exhibits, it includes inspection of the *locus in quo*. The purpose of and manner in which proceedings at the *locus in quo* should be conducted has been the subject of numerous decisions among which are; *Fernandes v Noroniha* [1969] EA 506, *De Souza v Uganda* [1967] EA 784, *Yeseri Waibi v Edisa Byandala* [1982] HCB 28 and *Nsibambi v Nankya* [1980] HCB 81, in all of which cases the principle has been restated over and over again that the practice of visiting the *locus in quo* is to check on the evidence by the witnesses, and not to fill gaps in their evidence for them or lest Court may run the risk of turning itself a witness in the case. This was more particularly explained in *David Acar and three others v Alfred Acar Aliro* [1982] HCB 60, where it was observed that:-

When the court deems it necessary to visit the *locus-in-quo* then both parties, their witnesses must be told to be there. When they are at the *locus-in-quo*, it isnot a public meeting where public opinion is sought as it was in this case. It

is a court sitting at the *locus-in-quo*. In fact the purpose of the *locus-in-quo* is for the witnesses to clarify what they stated in court. So when a witness is called to show or clarify what they had stated in court, he / she must do so on oath. The other party must be given opportunity to cross-examine him. The opportunity must be extended to the other party. Any observation by the trial magistrate must form part of the proceedings.

The procedures to be followed upon the trial court's visit to a *locus in quo* have further been outlined in *Practice Direction No. 1 of 2007*, para 3, as follows; -

- a. Ensure that all the parties, their witnesses, and advocates (if any) are present.
- b. Allow the parties and their witnesses to adduce evidence at the locus in quo.
- c. Allow cross-examination by either party, or his/her counsel.
- d. Record all the proceedings at the locus in quo.
- e. Record any observation, view, opinion or conclusion of the court, including drawing a sketch plan, if necessary.

The determination of whether or not a court should inspect the locus in quo is an exercise of discretion of the magistrate which depends on the circumstances of each case. That decision essentially rests on the need for enabling the magistrate to understand better the evidence adduced before him or her during the testimony of witnesses in court. It may also be for purposes of enabling the magistrate to make up his or her mind on disputed points raised as to something to be seen there. Since the adjudication and final decision of suits should be made on basis of evidence taken in Court, visits to a *locus in quo* must be limited to an inspection of the specific aspects of the case as canvassed during the oral testimony in court and to testing the evidence on those points only. Considering that the visit is essentially for purposes of enabling magistrates understand the evidence better, a magistrate should be careful not to act on what he or she sees and infers at the *locus in quo* as to matters in issue which are capable of proof by evidence in Court. The visit is intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony.

Considering the susceptibility of the magistrate upon such a visit perceiving something inconsistent with what any of the parties and their witnesses may have alleged in their oral testimony or making personal observations prejudicial to the case presented by either party, the magistrate needs to acquaint the parties with the opinion so formed by drawing it to their attention and placing it on record. This should be done not only for maintenance of the court's impartiality but also in order to enable the parties test or rebut the accuracy of the court's

observations by making appropriate, timely responses to such observations. It would be a very objectionable practice for the court to withhold from a party affected by an adverse opinion formed against such a party, keep it entirely off the record, only to spring it upon the party for the first time in his judgment. Furthermore, in case of an appeal, where the trial Court limits its judgment strictly to the material placed before it by the parties in court, then its judgment can be tested by the appellate court by reference to the same materials which are also before the appellate court. This will not possible where the lower court's judgment is based on personal observations made out of court and off the court record, the accuracy of which could not be tested during the trial and cannot be tested by the appellate court.

Upon examination of the record of appeal, it is evident at pages 24 – 29 of the record of appeal that during the visit to the *locus in quo*, the trial magistrate only recorded the agenda, objections raised by counsel for the respondent against the repeated adjournments of proceedings at the *locus in quo*, the ruling thereon, the list of persons in attendance, and nothing more. He did not record the observations he made, some of which were revealed for the first time in his judgement. The Trial Magistrate therefore failed to comply with the procedural requirements of courts during such visits.

When there is such a glaring procedural defect of a serious nature by the trial court, the High Court is empowered to direct a retrial if it forms the opinion that the defect resulted in a failure of justice. In the instant case, I am of the view that the defect did not occasion a miscarriage of justice since the decision of the case hinged on the veracity of the appellant's evidence regarding receipt of the land as a gift *inter vivos* rather than on basis of any comments and observations that the trial court made as a result of the impugned visit to the *locus in quo*. In his judgment at pages 32 to 33 of the record of appeal, the trial magistrate relied on the testimony in court rather than the observations made at the *locus in quo*. There were no physical aspects of the evidence to be harnessed, or indeed that were harnessed, at the *locus in quo* that would help or helped in conveying and enhancing the meaning of the appellant's oral testimony regarding receipt of the land as a gift *inter vivos*. Even if the comments about those observations are disregarded, the conclusion reached is supported by the rest of the evidence. Therefore this ground of appeal too fails.

The last ground of appeal questions the trial court's award and assessment of general damages. In *Matiya Byabalema and others v. Uganda Transport company (1975) Ltd., S.C.C.A. No. 10 of 1993 (unreported)* it was held that:-

It is now a well settled principle that an Appellate court may not interfere with an award of damages except when it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on a wrong principle or that he misapprehended the evidence in some material respect, and so arrived at a figure, which was either inordinately high or low ...General damages are compensatory. The person injured must receive a sum of money that would put him as good but not in worse position before the wrong was committed”

The trial court was satisfied that the respondents had furnished evidence whose level of probity was not just of equal degree of probability with that adduced by the appellant such that the choice between their version and that of the appellant would be a matter of mere conjecture, but rather of a quality which a reasonable man, after comparing it with that adduced by the appellant, might hold that the more probable conclusion was that for which the respondents contended. The respondents established proof on the balance of probabilities that the land in dispute originally belonged to Owole Thomas's grandfather Labwenge. Upon his death it was inherited by Owole Thomas's father Justin Kojoka. When he died, Owole Thomas inherited it and subsequently sold part of it to the second and third respondents. The testimony of D.W.3, Setimio Gitara, a neighbour to the late Owole Thomas and D.W.4, Tabe Francis, another neighbour of his, was consistent in this and corroborated that of the two respondents. The trial court was therefore justified in finding in their favour on the counterclaim.

Having found in their favour, there however was no basis for awarding them general damages since the appellant's actions did not constitute a tort or breach of contract. That the appellant's suit had deprived them of user of the land for the duration of the trial cannot form the basis of awarding them damages. An unsuccessful litigant is only liable for damages foreseen or which could have been reasonably foreseen as occurring in the ordinary course of events, at the time of his or her tortious act, or act or omission in breach of contract complained of, or breach of a constitutional or a statutory right or duty. When a claim for damages is included in a counterclaim, the counterclaimant is required under the law to provide evidence in support of the claim and to give facts upon which the damages could be assessed. Simply put, before

assessment of damages can be made, the counterclaimant must first furnish evidence to warrant the award of damages. He or she must also provide facts that would form the basis of assessment of the damages he or she would be entitled to. Failure to do so is fatal to the claim for damages. In the instant case, the respondents failed to provide evidence not only that would warrant the award of damages but also facts that would form the basis of assessment of the damages they claimed to be entitled to.

The only evidence adduced was that the contract price for the land in dispute was shs. 18,000,000/= as at 17th June 2012 and that by the appellant having sought an interlocutory injunction during the course of the trial, the respondents were denied user of that land from August 2012 until September 2014 when the judgment was delivered, a period of nearly two years. This was a restriction imposed by due process of law and was not a tortious act, or act or omission in breach of contract, or breach of a constitutional or a statutory right or duty that would otherwise have entitled the respondents to an award of damages. The trial court therefore erred when it proceeded on a wrong principle to award mesne profits to the respondents. Ground four of the appeal succeeds and as a result the award of shs. 30,000,000/= is therefore set aside.

That aside, the appellant having succeeded only on one ground of appeal which does not constitute the gravamen of the controversy between the parties, the appeal is otherwise dismissed. The costs of this appeal and those of the trial are awarded to the respondents. I so order.

Dated at Arua this 10th day of January 2017.

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Stephen Mubiru
Judge