

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
CIVIL SUIT NO. 1559 OF 2000

5 **THE REGISTERED TRUSTEES OF**
KAMPALA ARCHDIOCESE:.....PLAINTIFF

VERSUS

NABITETE NNUME MIXED
CO-OPERATIVE FARM LIMITED:.....DEFENDANT

10 **BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW**

JUDGMENT

The Registered Trustees of Kampala Archdiocese (*hereinafter referred to as the “plaintiff”*) brought this suit against M/s. Nabiteté Nome Co-operative Farm Ltd. (*hereinafter referred to as the “defendant”*) seeking orders and a declaration that the land and developments comprised in
15 Kibuga Block 4 Plot 629 situate at Bakuli, Kampala District (*hereinafter referred to as the “suit land”*) belongs to the plaintiff, the same having been given to them out of natural love and affection by the then registered proprietor Yozefu Kapere, an order that the defendant be de-registered as registered proprietor of the suit land, and it be registered in the names of the plaintiff, an order evicting the defendants from the suit land and developments thereon, an order
20 that the defendant pays *mesne* profits to the plaintiff for unlawful occupation, general damages, and costs of the suit.

Background:

The plaintiff's claim is that at all material times one Joseph Kapere, now deceased, occupied and later became the registered proprietor of the suit land which was then Plot 41 Namirembe Road
25 now comprised in Kibuga Block 4 Plot 629 land at Bakuli, Kampala District. He put up a house of cement blocks of 8 rooms and 2 bathrooms. That on 13/03/1980 Joseph Kapere out of natural love and affection donated in writing the said house to Nakulabye Catholic Church, which is owned by the plaintiff; for the church to own and to use for whatever purpose after his death. That the agreement of donation was signed by Yozefu Kapere as the donor and Rev Father F.
30 Payeur the then Parish Priest of Nakulabye Catholic Parish signed for and on behalf of the church as a donee. That Yozefu Kapere died about 1990, and thereafter the plaintiff through Nakulabye Parish Catholic Church became owner and occupier of the premises and paid rates for the same to Kampala City Council then without any other claim of ownership whatsoever by anyone else to the contrary.

35 That it was not until March 1999, when the defendant started claiming ownership of the suit land and property thereon and purported to evict the plaintiff. The plaintiff contends that they are entitled to be registered as proprietors of the suit land the same having been donated to them together with the house thereon. In the alternative that the house situate on the suit land is their property and that whoever becomes owner of the suit land owns the same subject to respecting
40 rights of the plaintiff as owners of the house. The plaintiff also averred that since January, 1999, it has been deprived of rent from the house on the suit land at a rate of UGX 400,000/= per month due to the unlawful acts of trespass by the defendant which has caused the financial loss and damage.

The defendant filed a defence and denied the plaintiff's claim and all the allegations. It averred
45 that in 1980 Joseph Kapere was not the registered proprietor of the suit land, and that Block 4
Plot 629 has never been Plot 41. Further, that the purported donation was cancelled by Joseph
Kapere himself in his Will dated 16/07/1986 which was acknowledged by the donor and some of
his family members. That as such the purported donation did not amount to a gift *inter vivos* as
the intention to donate it was never implemented by the donor. The defendant also contend that
50 they lawfully acquired the suit land from the then registered owner in 1988 and their ownership
on the suit land was not contested by the plaintiff. The defendant supported of its averments with
the various copies of correspondences with the plaintiff on the ownership of the suit land.

At the scheduling conference the following facts were agreed;

1. *The land in question is known as Kibuga Block 4 Plot 629 situate at Bakuli in Kampala.*
- 55 2. *The area of the land is 0.03 hectares.*
3. *The defendant currently is registered as proprietor.*
4. *There is an 8 roomed house with 2 bathrooms outside the house.*
5. *Part of the house is occupied by the plaintiff and the other part is occupied by the
defendant's tenants. The plaintiff has tenants in the premises as well.*
- 60 6. *The original proprietor is deceased.*

Matters contested between the parties;

1. *Registration of the defendant is alleged to have been secured through forgery.*
2. *The Will (codicil) of the original proprietor Yosefu Kapere which allegedly cedes the
donation to the plaintiff is alleged to be a forgery.*

65 The following issues were agreed and framed for court's determination;

1. *Whether the late Yozefu Kapere bequeathed the land in dispute to the plaintiff.*
2. *If so, whether or not he revoked the bequest.*
3. *Whether the late Yozefu Kapere mortgaged the suit land to the defendant.*
4. *Whether the late Yozefu Kapere executed the instrument of transfer of the suit land to*
70 *the defendant.*
5. *Whether the defendant's acquisition of the suit land was bonafide.*
6. *Whether the plaintiff is entitled to the remedies sought.*

The plaintiff adduced evidence of four witnesses to wit; Kanyike Sepronius PW1, Gerald Iga PW2, Father Pascal Mugerwa PW3, and John Baptist Mujuzi PW4. The defendant also adduced
75 evidence of five witnesses to wit; Mukwaya Yubu DW1, Mwanje Ben DW2, Kayanja Ddumba James DW3, Kabugo Fred Sebugulu DW4 and Kabanda Joseph DW5. Their respective evidence is on court record and I will not reproduce it in detail in this judgment but will give its evaluation and conclusions and inferences drawn from it.

The plaintiff was represented by *M/s. Kizito, Lumu & Co Advocates*, while the defendant was
80 represented by *M/s. Ambrose Tebyasa & Co Advocates*. Counsel for the parties also filed written submissions to argue the case; which I have considered together with the pleadings and evidence adduced in resolution of the issues. ***Resolution of the issues***

I will resolve *Issue Nos.1 and 2* together as they are interrelated.

Issue No.1: Whether the late Yozefu Kapere bequeathed the land in dispute to the plaintiff;

85 **Issue No.2: If so, whether or not he revoked the bequest.**

A gift intervivos is defined in Black's Law Dictionary 8th Edition at page 710 as;

"...a gift of personal property made during the donor's life time and delivered to the donee with the intention of irrevocably surrendering control over the property."

The law, as it relates to the issue of gifts intervivos, is well established. In the case of *Joy*
90 ***Mukobe vs. Willy Wambuwu HCCA No. 55 of 2005*** relying on other decided cases, the court held that;

"...for a gift intervivos to take irrevocable roots, the donor must intend to give the gift, the donor must deliver the property, and the donee must accept the gift. In this case Musika intended to give the gift because it was reduced into writing. He delivered the
95 ***gift because the appellants took possession. The donee also accepted the gift because they took possession...the requirements of a gift intervivos were fulfilled."***

The plaintiff's evidence is that on 13/03/1980 the late Yozefu Kapere, out of natural love and affection, donated in writing Plot 41 to the plaintiff to use for whatever purpose, after his death. The deed of donation was signed by the late Yozefu Kapere as the donor and Rev. Fr. F. Payeur
100 the then Parish Priest of Nakulabye Catholic Parish for and on behalf of the plaintiff as a donee. The plaintiff adduced in evidence copy of the deed of donation as *Exhibit P1*. This piece of evidence was corroborated by PW1 Kanyike Sepronius who actually wrote the agreement and was witness to it together with PW2 Gerald Iga. However, PW1 stated that he was not aware that the Plot 41 in *Exhibit P1* was different from the plot number of the suit land. PW1 also stated
105 that the plaintiff never took possession of the suit land.

PW2 also confirmed the fact that the plaintiff was given the suit land as Plot 41 although he only saw the agreement and not the certificate of title. PW2 further stated that the plaintiff never took possession of the suit land after it was donated.

110 It is to be noted that none of the plaintiff's witnesses; despite alleging that the suit land was registered in the names of the plaintiff, ever produced a certificate of title to verify the same. In fact none of them stated that they have ever seen the title. It is also essential to note that even though PW1 and PW2 alleged to have collected rent from the premises on suit land, no proof of rental collection from any tenants was adduced in evidence.

115 For its part, the defendant through DW1, Mukwaya Yubu, testified that one Erifazi Nyanzi resided on the house on suit land, and that it is the defendant taking care of the late Kapere's house. DW2 Mwanje Ben also testified that the late Erifazi Nyanzi was his father and that DW2 is his late father's heir. Further, that DW2 has lived on the suit land with his late father since his birth up to the moment.

120 The evidence adduced by the defendant's witnesses as to the defendant's possession and occupation of the suit land was never challenged by the plaintiff. It proves that the plaintiff has never had any possession of the suit land. Premised on the same evidence, it is clear that the plaintiff never at any one time took possession of the suit land prior or after the death of Yozefu Kapere.

125 The totality of the evidence above is that *Exhibit P1* does not in law constitute a gift *intervivos*. The plaintiff as a donee never acted on it by taking possession of the suit land. In absence of a legally recognised gift *intervivos*, it cannot be that the late Yozefu Kapere ever bequeathed the

suit land to the plaintiff. As such, even the issue as to whether or not he revoked the same also would not arise. *Issue No.1 and 2* are answered in the negative.

I will also resolve *Issue Nos. 3, 4 and 5* together for the same reason that they are interrelated.

130 ***Issue No.3: Whether the late Yozefu Kapere mortgaged the suit land to the defendant.***

Issue No.4: Whether the late Yozefu Kapere executed the instrument of transfer of the suit land to the defendant.

Issue No.5: Whether the defendant's acquisition of the suit land was bonafide.

DW1 Mukwaya Yubu, DW2 Mwanje Ben, DW3 Kayanja Ddumba James, and DW5 Kabanda
135 Joseph; all testified to the fact that the late Yozefu Kapere approached the defendant sometime in
1986 for a credit facility of UGX 1,000,000/=. That the defendant instead extended UGX
700,000/= repayable in 10 years with interest which came to a total of UGX 900,000/=. To
support this evidence the defendant adduced in evidenced by *Exhibit D9 and D10* an agreement
that was signed by DW5 as Secretary to the defendant with the late Y. Kapere. The said
140 defendant's witnesses further testified that the late Yozefu Kapere secured the credit facility with
the suit land for which he signed transfer forms and left them with the defendant. The defendant
adduced in evidence copies of the transfer forms as *Exhibit D11*.

DW5 further testified that apart from the late Yozefu Kapere, the defendant had also transacted
similarly with non – members of the co – operative, such as one William Ruhara, by lending
145 them money against land as collateral security. To support this claim, DW5 adduced in evidence
the documents relating to William Ruhara's transaction as *Exhibit D13*.

DW5 further stated that after the loan period had expired, the surviving relative of the late Yozefu Kapere; one Kibuuka James, agreed with the defendant to treat the outstanding loan money as sufficient consideration for the suit land, and on that account Kibuuka James assisted the defendant to process a special certificate of title for the suit land which was later registered in the name of the defendant. The copy of the certificate of title was adduced in evidence as *Exhibit D8*.

It is noted that the plaintiff neither denied nor controverted the defendant's evidence. The plaintiff only placed all its reliance on *Exhibit P1* copy of the alleged donation, which has already been discounted as not legally constituting a gift *intervivos*. The plaintiff through PW4 the handwriting expert, attempted to show that the signature of Y. Kapere on *Exhibit P2*; the letter revoking the donation in *Exhibit P1, Exhibit D9 and D10, and Exhibit D11* were forged and appeared different from that on *Exhibit P1*. However, having found that in law there was no gift *intervivos, Exhibit P1* is irrelevant even for comparison purposes by the expert. That also renders the testimony of PW4 is of little or no evidential value.

It is in no doubt that the late Yozefu Kapere mortgaged the suit land as security to the defendant in a loan transaction he entered into with the defendant. It is also in no doubt that by signing a transfer forms at the time of applying for the loan and failing to pay back, it meant that late Y. Kapere executed a transfer of the suit land in favour of the defendant. The defendant thus acquired the suit land *bonafide*. The net effect is that the plaintiff has failed to prove its case on balance of probabilities.

Issue 6: Whether the plaintiff is entitled to the remedies sought.

Having found as above, the suit is dismissed with costs to the defendant.

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BASHAIJA K. ANDREW

JUDGE

14/06/2017

Mr. Ambrose Tebyasa Counsel for the defendant present.

Defendant's representatives present.

175 Mr. Godfrey Tumwikirize Court Clerk present.

Court: Judgment read in open Court.

BASHAIJA K. ANDREW

JUDGE

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14/06/2012