

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0021 OF 2011

(Arising from Adjumani Grade One Magistrates Court Civil Suit No. 0001 of 2011)

**1. TEREZINA W/o KERUBINO }
2. AJUBARU LUKE } APPELLANT**

VERSUS

HAJI NASUR KURUBE RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

In the court below, the respondent sued the appellants jointly and severally for recovery of two plots of land measuring approximately 3.5 metres by 22 metres and 11.5 metres by 22 metres respectively situated at Karayi Road in Adjumani Town. The respondent's claim was that he acquired the plot measuring 11.5 metres by 22 metres in 1963 from a one Bamichi and has been occupying it since then. He purchased the plot measuring 3.5 metres by 22 metres from a one Mr. Badru Flamino on 10th June 2003. He began operating a kiosk on that land from the year 2006 until sometime in 2011 when the appellants unlawfully instructed labourers to begin digging a foundation on his land, claiming to be the rightful owners thereof. This land was the subject of previous suits filed by relatives of the appellants and the respondent himself before the L.C. Courts which were all decided in his favour.

In his written statement of defence, the second appellant contended that he acquired the land in dispute from Mr. Badru Flamino by an agreement dated 16th April 1997 witnessed by the L.C. officials and brought to the attention of the Land Supervisor of Adjumani Town Council. On 10th June 2003, realising that there was no development being undertaken on the plot, the Town Council threatened to deal with it prompting Mr. Badru Flamino on 21st June 2003 to offer to re-sell it to the respondent at the price of shs. 350,000/= if the second appellant failed to develop it.

Following the death of Mr. Badru Flamino, the respondent began laying claim to the land and causing disquiet within the first appellant's family.

In her written statement of defence, the second appellant refuted the respondent's claim and stated that the land in dispute belonged to her late brother Pasquino Eberuku who acquired it by gift in 1967 and constructed two buildings thereon. Upon Eberuku's death, her younger brother Opeleli took over the property. When he died in 1979, the second appellant together with Rose Ondo, daughter of the late Pasquino Eberuku took over the property. In 2009, there was a dispute between the respondent and Rose Ondo over a vacant portion of that land which was resolved in her favour by the elders who suggested to the respondent to offer a part of his own land in exchange for it if he desired to use it. On 29th February 2011, the respondent began depositing construction material on the disputed land intending to construct a permanent building but was stopped by the L.C.1 Secretary for Defence, hence the suit.

In his testimony, the respondent stated that a dispute arose between him and the late Badru Flamino over the land in dispute. When the dispute was submitted to the L.C.1 Committee of the area on 17th November 2011, it was decided that the land be shared equally between them but in future if any of them decided to sell off the part so acquired, he was to give the other the first option to purchase. Each then occupied their respective portion as decreed by the L.C. Subsequently on 16th June 2003, the late Badru Flamino approached him and offered to sell him his portion which the respondent agreed to buy. They agreed at a price of shs. 350,000/= which he paid from the office of Town Clerk who witnessed the transaction. He did not have the money and so did not pay immediately but when he eventually secured the funds he took the money to the office of the Town Clerk from where he advised the late Badru Flamino to pick it, but because he was sick at the time, he was unable to. After the death of Badru Flamino, he approached one of the sons of the deceased Mawadri Baru Andrew and together on 8th February 2010 they went to the office of the Town Clerk from where he received the money and signed for it. He then took possession of the land but when he attempted to construct a house on it, the first appellant stopped him.

P.W.2 Mawadri Baru Andrew, the eldest son of Badru Flamino testified that the land in dispute originally belonged to his late father who sold it to the respondent but died in 2005 before he could sign for the money which was at the time deposited with the Town Clerk where they had concluded the agreement. On 8th February 2010 he went to the office of the Town Clerk from where he received the money. He was surprised later to learn that the appellants were claiming the land as theirs and had stopped the respondent from developing it. P.W.3 Lagu Samuel, the then Town Clerk of Adjumani Town Council, testified that in 2003, the respondent planned to develop his plot but was stopped by the Town Council because it was too small. He and his neighbour the late Badru Flamino were summoned to the Town Council where it was suggested that the latter sell his part of the plot to the former if the development was to be permitted. The two agreed and entered into a transaction by which the latter sold his portion measuring 3.5 metres by 22 metres at the price of 350,000/=. The parties were assisted with the drafting of the agreement but the price was not paid immediately. He witnessed the agreement together with the Town Council's Land Supervisor. Unfortunately, shortly after the respondent had deposited the agreed amount with the Town Council, Badru Flamino died. On 10th June 2010 the respondent went with the eldest son of the deceased, Mawadri Baru, to the Town Council, who received the payment on behalf of the estate of the deceased. After about two months, the witness became aware of a dispute that sprouted between the respondent and the first appellant over ownership of the plot. He invited the disputants to his office where the first appellant disclosed that the late Badru Flamino had sold him the plot during the year 1997. He was unable to resolve the dispute since the parties never went back to him. P.W.4 Obote Nasur Ahmad, the L.C.1 Chairman at the time testified that during the year 2001, the respondent took him a complaint that the late Badru Flamino had encroached onto his land. On 11th October 2001, after summoning the parties and hearing them, the Committee established that the area in dispute measured about 8 meters by 22 metres. It was suggested that the parties share it in equal parts and they agreed. He was later informed that the deceased had sold his part to the respondent and that is what sparked off the dispute with the first appellant. The second appellant subsequently took to him a similar complaint over the same piece of land and he referred both to the Town Council. That was the close of the respondent's case.

In his defence, the second appellant testified that his uncle, the late Badru Flamino, had given him the land in dispute sometime during the year 1997 in the presence of their family member and a document was written evidencing the gift of land. During the course of developing the plot, he was stopped by agents of the Town Council on the allegation that he had encroached on land belonging to the respondent. Badru Flamino died during the year 2005 following which he was informed that money had been paid to his cousin, the eldest son of the late Badru Flamino, Mawadri Andrew, at the Town Council. A family meeting was convened at which it was agreed that Mawadri Andrew refunds the money to the respondent but he said he had already spent the money.

On her part, the first appellant testified that the respondent was claiming part of the piece of land which belonged to her late brother, Pasquino Eberuku who died during 1997. Her late brother had been given that land by their uncle Sabino Karayi. The widow of Pasquino Aberuku, Esther Mania was granted letters of administration but she too died around the year 2003. No one obtained letters of administration but she became the *defacto* in-charge of the estate. The respondent had operated a kiosk on that land for about three years. When she saw the respondent deposit construction material on the plot, she immediately notified the L.C.II Chairman summoned both of them but before the proceedings were concluded, she received summons from the Grade One Magistrates Court at Adjumani in the current matter.

D.W.3 Mary Terezina Lindrio, a cousin to the first appellant, testified that the land in dispute originally belonged to her late father Sabino Karayi who gave it to Pasquino Eberuku, the late brother of the second appellant. When the respondent was summoned to the L.C.II, he ignored the summons and instead filed the current proceedings before the Grade One Magistrates Court at Adjumani. The respondent operated a kiosk on the disputed land but this was on the understanding that he would surrender an area equivalent to that from the rear part of his plot, which he refused to do. In cross-examination, she testified that the late Sabino Karayi had given the land in dispute to a one Bamichi and it was clearly separate from that which was given to the late Pasquino Eberuku. D.W.4 Mama Pasqualino testified that upon the death of the second appellant's brother, the second appellant took charge of the estate. The late brother of the respondent, a one Alai Kurube, had built on a plot which belonged to the late Bamichi and

Pasquino Eberuku owned a plot adjacent to it where he too had constructed a building. The respondent took over and occupied Alai Kurube's building in 1963 after his death. That was the close of the defence case. The court then visited the *locus in quo* on 2nd September 2011 where it viewed the area in dispute and prepared sketch maps.

In his judgment, the learned trial magistrate found that in support of his case, the first appellant had produced a photocopied document which the court marked as exhibit D. Ex 1. None of the people who signed the document were called to testify about the transaction it represented. On the other hand, the respondent adduced evidence clearly indicating that he purchased the land in dispute. He therefore granted the respondent vacant possession of the land. Regarding the second appellant's claim that the respondent had encroached on land belonging to her late brother, the trial magistrate determined that the presence of the respondent's kiosk on that disputed part of the land for a long period of time was corroborative of his claim that it belonged to the respondent having acquired it from the late Bamichi in 1963. In any event, the second appellant had no letters of administration authorising her to lay claim to any part of the estate of her deceased brothers Eberuku and Opele. He decreed this part of the land to the respondent too. He issued a permanent injunction against both appellants and awarded the respondent the costs of the suit.

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

1. The learned trial magistrate erred in law and fact in finding that the first appellant had no legal basis to lay claim on the suit land simply because she had never obtained letters of administration of the estate of the late Pasquino Eberuku.
2. The learned trial magistrate erred in law and fact by failure to properly evaluate evidence on record thereby arriving at the wrong conclusion.
3. The learned trial magistrate erred in law and fact in finding the appellants were encroachers on their customary land.

Submitting in support of the appeal, counsel for the first appellant Mr. Manzi Paul, citing the decision in *Israel Kabwa v. Martin Banoba Musiga, S.C. Civil Appeal No. 52 of 1995, [1996] 1 KALR 109*, argued that a beneficiary of an estate, has the *locus standi* in his or her own name to

protect the interests of an intestate even without a prior grant of letters of administration. The second respondent adduced evidence that the 11.5 metres by 22 metres plot belonged to her late brother Pasquino Eberuku and she is now in charge of the estate and therefore had the capacity to protect the estate. With regard to the second ground, he submitted that the respondent did not adduce any evidence as to how he acquired the 11.5 metres by 22 metres plot from Bamichi in 1963 as pleaded. To the contrary, the evidence showed that the land belonged to the estate of the late Pasquino Eberuku. The kiosk was on the 3.5 metres by 22 metres and not this specific plot. The trial magistrate therefore misconstrued the evidence. In respect of the third ground, he submitted that the second appellant could not be a trespasser on land she was managing as part of the estate of her late brother. He therefore prayed that the appeal be allowed with costs.

In response, counsel for the respondent, Mr. Samuel Ondoma argued that the trial magistrate was correct in finding that the second appellant had no *locus standi* in the matter without a grant of letters of administration. She was not a beneficiary of the estate of her late brother and therefore the Supreme Court decision cited by counsel for the appellants is inapplicable. As regards the second ground, he submitted that the respondent testified that he acquired by gift, the 11.5 metres by 22 metres plot from Bamichi in 1963 and therefore had been in occupation for more than 40 years. The trial magistrate was therefore correct in finding that the second appellant had trespassed on the land. He prayed that the appeal be allowed.

The duty of a first appellate court was appropriately 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.

For purposes of clarity, this appeal is restricted to the decision of the court below regarding ownership of the plot of land measuring approximately 11.5 metres by 22 metres situated at Karayi Road in Adjumani Town. The second respondent's did not appeal the decision regarding the plot of land measuring approximately 3.5 metres by 22 metres within the same locality, and therefore was not party to the proceedings.

It is contended in ground one of the appeal that the trial court erred in finding that the first appellant, who claimed the disputed plot of land as having formed part of the estate of her brother, had no *locus standi* in the trial since she had no prior grant of letters of administration in her favour. I have considered the reasoning behind the trial Court's conclusion on this point, and I find that the court misdirected itself. The first appellant was sued by the respondent as a person who had stopped him from initiating developments on land he claimed to be his which the first appellant instead claimed formed part of the estate of her late brother Pasquino Eberuku. The question before court therefore was not whether the first appellant had the capacity to claim that land on behalf of the estate of her late brother but rather whether the respondent had sued the right person.

Although according to section 191 of *The Succession Act* no right to any part of the property of a person who has died intestate can be established in any court of justice, unless letters of administration have first been granted by a court of competent jurisdiction, section 222 of the Act permits grant of letters of administration to "the nominee of a party in the suit," limited for the purpose of representing the deceased in that suit, touching the matters at issue in that cause or

suit. This provision is intended only to facilitate the orderly conduct of a proceeding, and to avoid delay in the final decision till persons claiming to be representatives of the deceased party get the question of succession settled through a different suit. A representative of the deceased nominated in those circumstances is only for facilitating the early disposal of the action and the recognition of such a right in a party to a proceeding will not confer right on the recognised representative in the estate or property of the deceased. Such a nominee need not be a beneficiary of the estate. Therefore a suit involving property of a deceased person need not be defended by a beneficiary of the estate.

In the instant case, it is the respondent that impleaded the first appellant. She was sued not as a nominee of the estate of the deceased but in her own right as a person who had stopped the respondent from initiating developments on land he claimed to be his. From the perspective of the respondent, the first appellant had interfered with his quiet enjoyment of the land and was therefore a trespasser. The issues to be decided by court in a claim of this nature were; whether the respondent was owner / person in possession of the land in dispute and if so, whether the first appellant had entered onto that land, and if so, if the entry was without the consent of the respondent or other lawful authority and lastly, whether the respondent was entitled to the reliefs sought. Those were the substantive issues before the court and they had nothing, on the face of it, that would require the first appellant to be a holder of letters of administration since it was not a suit against an estate of a deceased person.

It then transpired during the proceedings that the basis of her impugned conduct was her assertion that the land belonged to her late brother and not the respondent. This assertion was only a question of fact as a matter collateral to one of the main issues for the determination of court i.e., as to whether the respondent was owner / person in possession of the land in dispute at the time of the acts complained of. In any event, if the trial court considered that resolving that collateral issue required participation of the legal representative of the estate of the late Pasquino Eberuku, then the proper course should have been to have one of the parties invoke section 222 of *The Succession Act* and join such nominated person to the proceedings. The decision in *Israel Kabwa v. Martin Banoba Musiga, S.C. Civil Appeal No. 52 of 1995, [1996] 1 KALR 109* was in respect of beneficiaries of the estate. The first appellant is not one since according to section 27

of *The Succession Act*, beneficiaries are either dependants or lineal descendants of the deceased, which the first appellant is not, more especially since in her own testimony she disclosed that her deceased brother, the late Pasquino Eberuku was survived by a daughter, a one Rose Ondo. In the circumstances, the decision as to whether the first appellant was a trespasser on the land in dispute did not require a pronouncement on her status as a legal representative of the estate of the late Pasquino Eberuku, or the lack of it, and therefore the first ground of appeal succeeds.

The second and third grounds hinge on the trial court's evaluation of the evidence. An appellate court will interfere with the findings made and conclusions arrived at by the trial court when it forms the opinion that in the process of coming to the conclusions it did, the trial court did not apply acceptable reasoning based on a proper evaluation of evidence, which evidence as a result was not considered in its proper perspective. This being the first appellate court, 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 may be reversed (See *Peters v Sunday Post Ltd [1958] E.A. 429*).

At the trial, the burden of proof lay with the respondent. To decide in favour of the respondent, the court had to be satisfied that the respondent had furnished evidence whose level of probity was not just of equal degree of probability with that adduced by the first appellant such that the choice between his version and that of the first 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 first appellant, might hold that the more probable conclusion was that for which the respondent contended. That in essence is the balance of probability / preponderance of evidence standard applied in civil trials.

In paragraph 7 of the amended plaint, the respondent claimed to have acquired the plot in dispute from a one Bamichi in 1963. The mode of acquisition was not pleaded. At the scheduling conference reflected at page 2 of the record of proceedings, he stated that he acquired it as a gift. 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).

Nowhere in his testimony at pages 3 – 5 of the record of proceedings did the respondent adduce evidence to support his averments in the plaint as well as at the scheduling conference. Section 2 of *The Evidence Act* defines evidence as: “the means by which an alleged matter of fact the truth of which is submitted to investigation is proved or disproved; and without prejudice to the foregoing generally includesadmission and observation by the court in its judicial capacity.” Assertions by parties in their pleadings and during the scheduling conference are not evidence. The trial court therefore was not furnished with evidence of the circumstance surrounding the grant of the gift *inter vivos* claimed by the respondent. Its decision to decree the land to the respondent on this basis is not supported by the evidence on record.

Counsel for the respondent argued that the respondent was in possession of the disputed land from as far back as 1963 when he obtained the land from Bamichi and that this was evidenced by the kiosk he had on the land. The trial court took a similar view in coming to its conclusion that the land belongs to the respondent evident in its evaluation at pages 21 – 22 of the record of appeal. This argument though misconstrues part of the evidence. In paragraph 6 (c) of the amended plaint, the respondent pleaded that when he purchased the plot measuring 3.5 metres by 22 metres from a one Mr. Badru Flamino on 10th June 2003, he began operating a kiosk on that land from the year 2006 until sometime in 2011 when the appellants unlawfully instructed labourers to begin digging a foundation on his land. D.W.3 at page 14 of the record of appeal as well testified that the kiosk was on the land which formerly belonged to Pasquino Eberuku (the 3.5 metres by 22 metres plot of land). When the court visited the *locus in quo* it indeed saw the kiosk but erroneously in his judgment, the trial magistrate ascribed its location to the plot measuring 11.5 metres by 22 metres in respect of which the respondent never adduced an iota of evidence, and which finding therefore is not supported by the evidence on record. In effect, there

was no evidence of occupancy of this land by the respondent, starting as far back as 1963 as the plot was vacant at the time the court visited the *locus in quo*.

On the other hand, the court did not evaluate the evidence of D.W.3 and D.W.4 regarding occupancy of this land. D.W.3 in cross-examination said that the late Sabino Karayi had given the land in dispute (the plot measuring 11.5 metres by 22) to a one Bamichi and it was clearly separate from that which was given to the late Pasquino Eberuku. D.W.4 too testified that the late brother of the respondent, a one Alai Kurube, had built on a plot which belonged to the late Bamichi and Pasquino Eberuku owned a plot adjacent to it where he too had constructed a building. The respondent took over and occupied Alai Kurube's building in 1963 after his death. These answers were elicited by the respondent's cross-examination and they were directed at establishing the fact that the respondent had since 1963, occupied a building owned by his late brother Alai Kurube, which is located on land formerly belonging to Bamichi which he acquired after the death of his brother Alai Kurube.

This version brought on board an entirely different theory to the respondent's case. A theory of occupancy not directly from Bamichi as pleaded, not by way of gift *inter vivos* from Bamichi as intimated during the scheduling conference but rather indirectly, though it was not explained whether it was by inheritance or otherwise, but certainly after the death of his brother Alai Kurube. This coupled with the fact that he himself did not adduce any direct evidence of the circumstances surrounding his acquisition of this specific property weakened the credibility of his claim further. He only through cross-examination established his occupancy of the building, which was not disputed by the first appellant and any of her witnesses, but he did not prove ownership of the vacant plot now in dispute. There was no evidence of any activities he ever carried out on the area in dispute over the period of over forty years. Moreover, there is no evidence as well on basis of which this court may conclude that the land on which the building he occupies is, the building he occupied after the death of his brother Alai Kurube on land obtained from Bamichi, forms part of the land now in dispute. The sketch map / drawing at page 16 of the Supplementary Record of Appeal does not indicate the presence of any building on the area in dispute, it certainly does not show any building of the late Alai Kurube in the vicinity.

On the other hand, the sketch map / drawing at page 16 of the Supplementary Record of Appeal indicates that the closest feature to the area in dispute is a house which belonged to the late Opeli John, brother of the first appellant, lending credence to her version that the land in dispute is comprised in the estate of the late Pasquino Eberuku which the late Opeli John managed for some time before his death. Had the trial magistrate properly evaluated the evidence as a whole, he would have come to the conclusion that the respondent's claim lacked cogent evidence to support it and therefore he had failed to prove his case on the balance of probabilities. Without proof of ownership or possession by the plaintiff, an action recovery of land or trespass respectively is unsustainable. The respondent failed to prove either and the trial court therefore erred in its finding that the first appellant was a trespasser on the land.

In deciding the case, the trial magistrate dwelt on the first appellant's perceived lack of capacity to assert the claim over the disputed land by the estate of the late Pasquino Eberuku rather than on a proper evaluation of the strength and weight of the evidence adduced by the respondent, on whom the burden of proof lay. He not only misdirected himself on the burden of proof but also failed to consider and properly apply to the facts before him, the standard of proof required in civil matters. For those reasons, the two grounds of appeal succeed.

In the final result, the appeal is allowed. The judgment of the trial court as against the first appellant, in respect of the plot measuring 11.5 metres by 22 is hereby set aside with costs to the first appellant of both the appeal and the trial.

Dated at Arua this 2nd day of March 2017.

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Stephen Mubiru
Judge