

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**  
**HCT - 01 - LD - CA - 0026 OF 2016**  
**(Arising from KAS - 00 - CV - CS - 038 of 2010)**

**1. ANIFA MUCHOKOCHO**

**2. JOHN BURE**

**SELE**

**3.**

.....  
.....**APPELLANTS**

**4. BAZIRIO**

**VERSUS**

**1. THE ADMINISTRATRIX OF THE ESTATE**

**OF THE LATE YUSUFU MUCHOKOCHO**

**2. MUCHOKOCHO**

**RAMADHAN**

.....**RESPONDE**  
**NTS**

**3. SAFIA MUCHOKOCHO**

**4. KABUGHO MUCHOKOCHO**

**BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE.**

**Judgment**

This is an appeal against the decision of His Worship Mfitundinda George Magistrate Grade one at Kasese, delivered on 29/4/2016.

**Background**

The Respondents instituted a Civil Suit against the Appellants for the following declarations and orders;

1. A declaration that the properties mentioned in paragraph (a) of the plaint belong to the estate of the late Yusufu Muchokocho and both the Plaintiff and the 1<sup>st</sup> Defendant are beneficiaries of the estate and entitled to the same.
2. A declaration that documents dated 7<sup>th</sup>/01/1983 is not the will of the late Yusufu Muchokocho and is a forgery and that the late Yusufu Muchokocho died intestate.
3. A declaration that land disposition and sale between the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants were illegal, unlawful, null, and void and of no effect at law and passed no legal and/or equitable interest to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.
4. A declaration that the 1<sup>st</sup> Defendant did intermeddle and has intermeddled with the estate of the late Yusufu Muchokocho.
5. An order restraining the 1<sup>st</sup> Defendant by herself, her agents, employees, workmen and any person whomsoever is claiming under the 1<sup>st</sup> Defendant from interfering with the Plaintiff's quiet possession and user of the state of the late Yusuf Muchokocho in whatever manner at all.
6. An order that the 1<sup>st</sup> Defendant accounts for the proceeds and earnings from the estate of the late Yusuf Muchokocho from the date of her initial intermeddling in the deceased's estate to date.
7. An eviction order against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Defendants.
8. A declaration that all the properties of the late Yusufu Muchokocho vest in the 1<sup>st</sup> Plaintiff and not the 1<sup>st</sup> Defendant.
9. General damages.
10. Mesne profits
11. Costs of the suit.
12. Interest at 25% p.a on (9), (10) and (11) from the date of the cause of action arose until payment in full.

13. Any other and incidental relief court may deem fit.

The facts constituting the cause of action are that the late Yusuf Muchokocho died on 22/07/1984 intestate leaving behind, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> Respondents, 1<sup>st</sup> Appellant, Idi Muchokocho and Mwamini Muchokocho. That deceased left a number of properties and the 1<sup>st</sup> Appellant sold part of the land Rwehingo to 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Appellants and also sold part of the land at Mpondwe Lubiriha trading Centre to the 2<sup>nd</sup> Appellant without obtaining Letters of Administration. That the said property was being used by the Respondents until 2009 when the 1<sup>st</sup> Appellant claimed ownership of the same under a forged will.

The Appellants on the other hand averred that the 1<sup>st</sup> Appellant being the daughter of the late Yusuf Muchokocho, he gave her the land in Kikwaso cell, Mpondwe Lhubiriha Town Council in 1980. She then developed it and constructed a commercial house in 1996. That before the late's death; he had given authority to the 1<sup>st</sup> Appellant to recover the land at Rwehingo which had been grabbed. The 1<sup>st</sup> Appellant litigated over the same and won whereof and she gave portions to her siblings.

### **Issues for determination were:**

1. Whether the commercial house at Mpondwe Lhubiriha Town Council and the agricultural land at Rwehingo form part of the estate of the late Yusuf Muchokocho?
2. What are the remedies available to the parties?

Judgment was passed in favour of the Respondents. The trial Magistrate found that the land situate at Rwehingo formed part of the estate of the Late Yusuf Muchokocho. A declaration was made that the sale agreement and distribution of part of the land at Rwehingo by the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Appellants was null and void, a declaration that the 1<sup>st</sup> Appellant's actions amount to intermeddling with the estate of the late Yusuf Muchokocho, declaration that the 1<sup>st</sup> Defendant accounts for the proceeds

and earnings from the estate of the late Yusuf Muchokocho from the time she started intermeddling to date, an eviction order against the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Appellants, the 1<sup>st</sup> Appellant pays costs to the Respondents and no order was made as to general and mesne profits.

The Appellants being dissatisfied with the above decision lodged the instant whose grounds as per the Memorandum of appeal are;

1. That the learned trial Magistrate erred in law and fact when he held that the suit land was not given to the 1<sup>st</sup> Appellant as gift inter vivos by her late father Yusufu Muchokocho.
2. That the learned trial Magistrate erred in law and fact when he based on the evidence of DW4 which was not on Court record thus arriving at a wrong conclusion.
3. That the learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record thus arriving at an erroneous conclusion.

### **Representation:**

Counsel Chan Masereka appeared for the Appellants and Counsel Bwiruka Richard represented the Respondents. By consent both parties agreed to file written submissions.

### **Duty of the first Appellate Court:**

The duty of the first Appellate Court has been reiterated in numerous cases and it is to re-evaluate and re-appraise the evidence on record and come to its own conclusion.

In the case of **Banco Arabe Espanol versus Bank of Uganda, SCCA No.8 of 1998**, Order JSC held that;

*“The first Appellate Court has a duty to re-appraise or re-evaluate evidence by affidavit as well as to evidence by oral testimony, with the exception of the manner and demeanour of witnesses, where it must be guided by the impression made on the trial judge.”*

## **Resolution of the Grounds:**

All the grounds are discussed separately.

### **Ground 1: That the learned trial Magistrate erred in law and fact when he held that the suit land was not given to the 1<sup>st</sup> Appellant as gift intervivos by her late father Yusufu Muchokocho.**

Counsel for the Appellants submitted that before the demise of the 1<sup>st</sup> Appellant's mother, the 1<sup>st</sup> Appellant was staying with her on the suit plot. The 1<sup>st</sup> Appellant ever since being given the plot has developed the same with a commercial building thereon and the building plan as tendered in Court was obtained in 1986. The time the 1<sup>st</sup> Appellant was making developments on the property the Respondents did not complain. The plot was therefore given to the 1<sup>st</sup> Appellant as a gift inter vivos and had stayed on the same with her mother. And her siblings are staying on other pieces of land that belonged to their mother. Thus, the suit land does not form part of the estate of the late Yusuf Muchokocho and the Respondents are stopped from claiming what was given to the 1<sup>st</sup> Appellant yet nobody is claiming what was given to them.

Counsel for the Respondents on the hand submitted that it was the evidence of the 2<sup>nd</sup> Respondent that the their father's estate has never been subdivided and they had been using it jointly as a family until 2009 when the 1<sup>st</sup> Appellant stopped them from collecting rent from the same. That the elders during a meeting resolved that the Respondents should continue using the suit land jointly. The 1<sup>st</sup> Appellant protested this resolution and the matter was taken to the mosque leadership and it resolved that that the property be distributed according to sharia law and this resolution was dated 17/01/2010. The 1<sup>st</sup> Appellant opposed the resolution of the mosque too.

Further that the 1<sup>st</sup> Appellant sold the part of the estate to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Appellants without the consent of the

Respondents. That she also applied for a lease in her names for the commercial house. That PW3 Muhammed Ibrahim told Court that he presided over the burial of the Late Yusuf and no will was read and the late had also never told him that he had left property for the 1<sup>st</sup> Appellant. This was corroborated by Salim Kemis PW4 and KagoroBoniface PW5.

Counsel for the Respondents submitted that from the evidence as adduced by both parties it is very clear that the late Yusuf Muchokocho left land with a building in Mpondwe, land at Kyobolokya and Rwehingo, a plot and house in Katwe-Kabatooro Town Council, a plot in Mubuku Trading Centre and the estate has never been distributed.

In addition Counsel for the Respondents submitted that the 1<sup>st</sup> Appellant never brought evidence in Court to prove that she was given land at Mpondwe, Rwehingo and Katwe and no will was produced to support her claim. That the 1<sup>st</sup> Appellant's evidence had major contradictions, she told Court that she had been told by her late father to litigate over the land at Rwehingo whereas the 5<sup>th</sup> Appellant told Court that the same was trespassed on after the death of their father. That the 1<sup>st</sup> Appellant told Court that she settled on the land at Rwehingo in 1998 and distributed part to Ramathan, Iddi and Mwamine and there is no evidence to prove that she had obtained Letters of Administration to allow her deal with the estate of the late Yusuf Muchokocho.

Counsel for the Respondents cited the case of **Stream of Life Giving Water Ministries versus Agnes Ocheng and 4 others (2003) KALR 370**, where it was held that **Section 191** of the Succession Act prohibits any person from dealing with the property of the intestate without obtaining Letters of Administration. Thus, the sale to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Appellants was unlawful and was an act of intermeddling in the estate of late Yusuf Muchokocho.

Furthermore, that the evidence of PW1 Ramadhan Muchokocho was never challenged by the Appellants in cross examination

and according to the case of **URA versus Stephen Mabosi, SCCA 29/95 Reported in (1996) KALR 153**, PW1's evidence should be believed as true that the estate of Yusuf Muchokocho was not distributed at all and the same should be in the hands of the Administratrix.

I have read the submissions of both Counsel. The 1<sup>st</sup> Appellant alleged that she was given the suit land at Mpondwe as gift inter vivos and also land at Rwehingo however, the Respondents contented that this was not true as they were all using it as a family. That it was not until 2009 that the 1<sup>st</sup> Appellant chased them off the suit land. In the circumstances if the suit land had been given to the 1<sup>st</sup> Appellant the Respondents would not have told Court that they had also been using it as a family. The 1<sup>st</sup> Appellant would have been using the same alone and with no contentions.

In that case of **Bulasio Mawereza versus Christopher Mbusye (1977) HCB 206 at page 2017**, it was held that;

*"This was an absolute gift to a member of the family. A gift is one made of alienating by gift, the beneficiary exercises all the rights of ownership and the land cannot be taken away without any wrong doing."*

The 1<sup>st</sup> Appellant stated that the suit land was being occupied by her and her mother, which I find not to be true because as per the testimonies of the Respondents the 1<sup>st</sup> Appellant was brought up by the co-wife to her mother and her mother is actually the 4<sup>th</sup> Respondent who is still alive and has never died.

I find that there was also no valid will that was left behind giving the 1<sup>st</sup> Appellant land as the purported will made mention of a deceased grandmother at the time of the writing of the will contravening the provisions of **Section 99** of the Succession Act.

The alleged will was never attested by any witnesses, it eliminated some of the late Yusuf's properties, the late could

also not write therefore could not have signed on them same. There ought to have been a thumb print was missing.

The Respondents also told Court that the construction on the Mpondwe land was over seen by the 1<sup>st</sup> Appellant with the contribution of other family members, that it was not true that the developments were solely her effort. The 1<sup>st</sup> Appellant did not bring any proof that indeed her late father told her to litigate over the land at Rwehingo and nor did she bring any proof of the suit land at Mpondwe being given to her as a gift inter vivos. The 1<sup>st</sup> Appellant went ahead to distributed the land at Rwehingo without obtaining Letters of Administration contravening the provisions of the succession Act. I therefore, find that the 1<sup>st</sup> Appellant failed to prove on a balance of probabilities that the suit land was given to her as a gift inter vivos and there was no valid willing giving the 1<sup>st</sup> Appellant land.

This ground therefore fails.

**Ground 2: That the learned trial Magistrate erred in law and fact when he based on the evidence of DW4 which was not on Court record thus arriving at a wrong conclusion.**

Counsel for the Appellants submitted that the evidence of DW4 was relied on by the trial Magistrate and yet the same is not reflected on the record of proceedings and this occasioned a miscarriage of justice and this amounted to fabricated evidence.

Counsel for the Respondent submitted that it was not true that the evidence of DW4 who is Bazirio Mugisa is not on the record of proceedings. That his testimony is reflected at page 14 of the record of proceedings and the only error is that he was reflected as DW5 instead of DW4. Thus, this ground be dismissed.

I have perused the Court record and I find that the record of proceedings is a bit messed up and not coherent. However, as



Counsel for the Respondents submitted there was a typing error and the evidence of DW4 is on record.

This ground also accordingly fails.

**Ground 3: That the learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record thus arriving at an erroneous conclusion.**

Counsel for the Appellants submitted that it is a cardinal rule that the evidence be evaluated as a whole however, from the record of proceedings there is only evidence of the defence. Thus, indicating that the evidence was not properly evaluated and resulted into an erroneous judgment. That it was the evidence of PW3 and PW2 that the 1<sup>st</sup> Appellant had stayed with her mother on the suit property and the same was given to her by her late father and therefore belongs to her.

Further that from the evidence of DW3, he told Court that the 1<sup>st</sup> Appellant had obtained building plans in her name and the same were approved by the local authorities and there was no complaint by the siblings. However, when the mosque council investigated and found that the 1<sup>st</sup> Appellant being a moslem and was living with a catholic decided that the suit property be given to her brothers and sisters. That the whole dispute is religion based.

Furthermore, that the evidence of the Respondent was full of inconsistencies. That the Magistrate Grade one had no pecuniary jurisdiction to handle the matter and the same was prematurely closed without Ramathan being cross examined.

Counsel for the Respondents submitted that this ground is too general and offends the provisions of **Order 43 Rule 1(2)** of the Civil Procedure Rules which requires a memorandum of appeal to have concise grounds of appeal. Without prejudice Counsel for the Respondents went on to submit that the record of proceedings Counsel for the Appellants relied on is not correct and the correct record of proceedings is from 19/4/2011

to 30/4/2015. Thus, it is not correct to say that the trial Magistrate based his findings on the evidence of the defence.

This ground though too general, Counsel for the Appellants narrowed it down in his submissions. However, the record of proceedings I see on file has evidence of both parties and thus Counsel for the Appellants perhaps did not get the full record with all due respect.

This ground also fails.

In a nut shell this appeal lacks merit, fails on all grounds and is dismissed with costs. The decision of the lower Court is upheld.

Right of appeal explained.

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**OYUKO. ANTHONY OJOK**

**JUDGE**

**20/09/2017**