**THE REPUBLIC OF UGANDA**
**IN THE HIGH COURT OF UGANDA**
**HOLDEN AT MBALE**

**HCT-04-CV-CA-0054 OF 2015**
**(ARISING FROM KAPCHORWA CIVIL SUIT NO. 008/2013)**

**CHESANG FREDRICK SINDET :::::::::::::::::::: APPELLANT**

**VERSUS**

**TWALLA ALEX :::::::::::::::::::: RESPONDENT**

**BEFORE: HON. MR. JUSTICE HENRY I. KAWESA**

**JUDGMENT**

This is an appeal from the decision and orders of **Her Worship Nabukere Aisha** Grade 1 Kapchorwa.

The appeal is premised on 4 grounds of appeal;

1. That the learned trial Magistrate erred in law and fact when she held that the late **Yollam Twala** did not have the capacity to sell the suit land.

2. The learned trial Magistrate erred in law and fact when she held that the Respondent was wrongly sued.

3. The learned trial Magistrate erred in law during the locus proceedings.

4. The learned trial Magistrate failed to correctly evaluate the evidence on record thus reaching a decision not supported by evidence on record which has occasioned a miscarriage of justice.

The respondent never filed their submission as agreed. This court will therefore follow the order of arguments as agreed by appellants.

The duty of this court as a first appellate court is to re evaluate the evidence, make fresh conclusions thereon aware that it never had the chance to listen to and observe the witnesses.

**Issue 1: (Whether late Yollam had capacity to sell the suit land)**

Evidence on record was that **PW1 Chesang Fredrick** bought the suit land from **Yollam Twalla** in 2011 in two installments. An agreement was executed received in court as PE1

The agreement was witnessed by **PW2 Mwanga Stephen** and **PW3 Sam Satya** (the writer thereof).

Defendant **Alex Twalla ( DW1**) stated that he was given the land by his father as a gift in 2006. He constructed on a house and a latrine.

**DW2- Kaserep Lazaro** said land in dispute was given to DW1 by his father in 2006. He was present, with a neighbor called **Steven Kityo**. The defendant constructed a latrine and a house.

**DW3 Anna Zange Twalla** mother of DW1 and wife of **Twalla** (late) said its true the land was given to DW1 by his father as a gift. He built on a pit latrine and a house. The land was given in 2006.

The learned trial Magistrate in his Judgment found for defendant on grounds that defendant had been given the land by his father as a gift intervivos and hence the father could not again sale it after giving it out.

The plaintiff has the burden to prove on balance of probability that he purchased the land and owns it.

The law is that he who alleges a fact must prove its existence (Section 101 -103) Evidence Act. The evidence has sufficiently shown through PW1, PW2 and PW3, and PE1 that a sale transaction occurred. Evidence also through D1, D2 and DW3 has conclusively shown that the late **Twala**, gave this same land as a gift to his son in 2006.

The legal question here is who had the right Title to the land in 2011 between the **Twala** and D1, when **Twalla** sold it to the plaintiff.

The definition of "*gift intervivos*" as per *Halsbury's laws of England* is as follows:

> "*The transfer of any property from one person gratuitously while the donor is alive and not in expectation of death. It is an act whereby*

*something is voluntarily transferred from the true possessor to another person with full intention that the thing shall not return to the donor and with full intention on the part of the receiver to retain the thing as his own without restoring it to the giver*."

The definition above settles the scenario in this dispute. If DW1, DW2 &DW3 are to be believed, (which I do, their evidence was not controverted by plaintiff then the evidence is conclusive on the finding that the land was given as a gift to D1 by his father the late **Yollam Twalla**. Having donated the land in 2006, and D1 having taken possession

The said **Yollam** could not have any right to again sale the same land in 2011, to the plaintiff . This position was explained by my brother **Hon J. Musota** in the case of ***Sajjabi V. Zziwa (CA/50/2012***). Where he held that;

"*Once the suit land was donated to the widow, it no longer formed part of the estate of the deceased…. this property could no longer be part of the deceased's estate ..*"

This is the law. The burden of proof having been properly asserted that plaintiff had to prove his case on the balance of probability, the competing rights here show that the plaintiff's title was rooted in an illegality. **Yollam Twalla** had no rights left in the land he purportedly sold to him. Therefore by virtue of the finding above I agree with the learned trial Magistrate that the late **Yollam Twalla** did not have the capacity to sale the suit land. This ground therefore fails.

**Ground 2: Whether the Respondent was wrongly sued.**

Having found under Grade 1 that the appellant's Title to the land is based on a purchase transaction with **Twalla**, who sold land which he had already donated to the defendant, it follows that he could not legally sue him.

This is because the defendant was rightly utilizing the land as shown by D1, D2 and D3. He took possession in 2006. By the time of the death of **Yollam Twalla**, plaintiff had not taken possession, he did not even raise this matter at the burial yet he was the master of ceremonies. The defendant had a better claim of right to the land than the plaintiff. The plaintiff had no cause

of action against the defendant. The learned trial Magistrate was right to find as she did on the evidence and facts before her. This ground fails and is not proved.

**Ground 3: Locus**

I did not find any merit in this ground. No argument was raised to show what error was committed at locus by the learned trial Magistrate. The findings by the learned trial Magistrate at locus are contained in her Judgment paper No. 3 paragraph 6, 7 and 8 the trial Magistrate considered the locus proceedings and made the following observation.

> "*This court visited the locus in quo and indeed from the observation of the suit plot it was more of a compound to the adjacent house belonging to the defendant. There was minimal grass on the on the suit plot with an indication of foot passage in it leading to the defendant's house …"*

The description goes beyond a mere reference to foot path as argued by appellant. The argument raised is therefore moot.

This ground is not proved. It fails

**Ground 4: Failing to evaluate evidence and occasioning miscarriage of justice**

By virtue of the findings under grounds 1, 2 and 3, ground 4 is not proved. This court finds the learned trial Magistrate correctly evaluated the evidence. The decision is supported by the evidence on record. There is no miscarriage of justice that occurred. There is on the whole no merit in any of the grounds of appeal that have been raised. In ground 4 the appellant was trying to establish that he is a bonafide purchaser. The evidence does not support that assertion. He was aware of the interests of DW1 as a close family friend who even was master of ceremonies during the funeral of DW1's father. The whole appeal fails on all grounds. It is dismissed with costs.

**Henry I. Kawesa**

**JUDGE**

**19.04.2017**