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**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KABALE**  
**LAND CLAIM NO.0032 OF 2018**

**BAHIRIRWE GETRUDE =====PLAINTIFF**

**VERSUS**

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**1. TUKORE DAVID**  
**2. NIWAGABA WILLIAM**  
===== **DEFENDANTS**  
**3. TURYATUNGA JONAN**

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**BEFORE: HON.JUSTICE MOSES KAZIBWE KAWUMI**  
**JUDGMENT**

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The Plaintiff filed this suit for a declaration that she is the lawful owner of land located in Kamukira Cell, Kirigime Ward, Kabale Municipality, a Permanent injunction against the defendants and those claiming through them, an eviction order against the defendants, general damages, mesne profits and costs.

**Background.**

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The Plaintiff and the 1<sup>st</sup> defendant are the only surviving children of the late Fransisco Nsekuye who died on 15<sup>th</sup> March 2017. The Plaintiff contends that prior to the death of their father, he had donated the suit land to her and another sibling Vanglista Katushabe who later died. A deed of gift in favor of the two sisters was executed on 3<sup>rd</sup> December 2015 and the land had also been bequeathed to them in Nsekuye's will dated 3<sup>rd</sup> August 2012.

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It is further contended that the 1<sup>st</sup> defendant had sold off land donated to him by Nsekuye and migrated to Ntungamo. He however returned and occupied the family house with his children. The Plaintiff allowed the 1<sup>st</sup> defendant to occupy a house she had constructed on the suit land. Despite the Plaintiff's protestations the 1<sup>st</sup> defendant sold off the land to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and the house was demolished hence the suit in court.

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The 1<sup>st</sup> defendant contends that he acquired the suit land under " *aclear understanding*" with the Plaintiff and that he legally sold it to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. It is averred by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants that they are bona fide

5 purchasers for value without notice and bought the land in good faith hence the suit filed by the Plaintiff ought to be dismissed with costs to them.

### **Legal representation.**

M/S. Mutungi & Co. Advocates represented the Plaintiff. M/S Nasiima Patience & Co. Advocates represented the defendants.

10 Counsel filed a joint scheduling memorandum in which the following issues were framed for resolution by the court:-

1. Whether or not the suit land belongs to the Plaintiff.
2. Whether or not there was a valid sale of the suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants by the 1<sup>st</sup> defendant.
- 15 3. Remedies available to the parties.

### **Summary of the evidence by the Plaintiff's side.**

Anna Mariya Bwabuhe (PW1) who is the mother of the Plaintiff and the 1<sup>st</sup> defendant confirmed to court that the suit land had been donated to the Plaintiff and Kamushabe. PW1 had witnessed the execution of the 3<sup>rd</sup> December 2015 Deed of gift and testified to the unauthorized disposal of the suit land by the 1<sup>st</sup> defendant.

In cross examination PW1 stated that the 1<sup>st</sup> defendant buried two children on the suit land much as Nsekuye had donated the land to the Plaintiff and Kamushabe.

25 Bahirirwe (PW2) being the Plaintiff confirmed the donation of two pieces of land including the suit land by Nsekuye. It was her evidence that in the Deed of gift dated 3<sup>rd</sup> December 2015 Nsekuye had indicated that the 1<sup>st</sup> defendant had sold the land he had been donated to him before migrating from the area.

PW2 further contended that the execution of the Deed of gift was further prompted by a criminal trespass on the suit land by the 1<sup>st</sup> defendant's son who was prosecuted and convicted. PW2 further contended that she had reported the 1<sup>st</sup> defendant's disposal of the suit land to the Resident District Commissioner who ordered him refund the money to the 2<sup>nd</sup> defendant but he did not take heed.

35 That she later acquired Letters of Administration to Nsekuye's estate which prompted the 1<sup>st</sup> defendant to sell off the remaining portion to the 3<sup>rd</sup> defendant. PW2 confirmed that she had with the 1<sup>st</sup> defendant commenced the process of surveying the suit land before he sold it off. PW2 further told court that she had

5 listed the suit land in the Petition for Letters of Administration to Nsekuye's estate because the 1<sup>st</sup> defendant had sold it.

Tumwesigye Charles(PW3) delivered to Nsekuye's family the Will made on 3<sup>rd</sup> August 2012 and kept with PW3's father.PW3 did not know Nsekuye's family members before delivering the document but used to see him visit their home  
10 before his demise in 2017.Nsekuye was a friend to the father of PW3.

### **Summary of the evidence by the defendants' side.**

RwesiraboLevi (DW1) stated that he was instructed by the Plaintiff to survey two plots of land. One plot was to be registered in the Plaintiff's name and the other in the name of the 1<sup>st</sup> defendant. That before the exercise paid for by the  
15 Plaintiff was completed, the 1<sup>st</sup> defendant sold off his plot. DW1 told court that an application to survey land is not evidence of ownership.

DW1 denied that he had been instructed to process the certificates of title with the land on which sits the family house to be registered in the names of the Plaintiff and the 1<sup>st</sup> defendant.DW1 further denied that according to the  
20 instructions the remaining plot was to be registered in the name of the Plaintiff.

DW1 further confirmed that he did not issue a receipt for his services in the names of the Plaintiff and the 1<sup>st</sup> defendant but only the Plaintiff.

Tukore (DW2) contended that Nsekuye never shared or bequeathed the suit land to any one and that he left two pieces of land.DW2 stated that he agreed with the  
25 Plaintiff that he inherits the piece of land with the family home and she inherits the suit land.DW2 stated that he then realized that his piece of land was small hence he sold it to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to relocate to a bigger place.

In cross examination, DW2 could not remember when he came to own the suit land but confirmed that it was after Nsekuye's death and that there was no  
30 agreement or family meeting prior to his acquisition of the land but he just built on it.DW2 stated that he shared the suit land with the Plaintiff and that he built on it before Nsekuye died.

DW2 further clarified that he had been given a piece of land which he sold to a one Kabakyenga before Nsekuye gave him the one on which he built and later  
35 sold to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

Asiimwe Ponsiano (DW3) claimed to have attended a family meeting in which it was agreed that the Plaintiff and PW1 take the land on which is the family house while the 1<sup>st</sup> defendant inherits the suit land. That the 1<sup>st</sup> defendant built a semi-

5 permanent house on the land with financial assistance from the Plaintiff which he occupied before selling the land.

DW3 clarified in cross examination that the meeting was held after Nsekuye's death and that it is true that the Plaintiff allowed the 1<sup>st</sup> defendant to occupy the house she built on the land.

10 Niwagaba (DW4) and Turyatunga (DW5) stated that they inquired about the ownership of the suit land before purchasing their respective portions and further talked to Rwesirabo (DW1) who assured them that the land belonged to the 1<sup>st</sup> defendant.

15 During cross examination DW4 clarified that the 1<sup>st</sup> defendant told him that Nsekuye gave him the land he was selling but showed him no document to the effect. DW4 further clarified that he did not inquire from any of the family members before buying the land but relied on the survey documents shown to him by DW1.

20 DW5 also told court that he made no inquiries from the 1<sup>st</sup> defendant's family members but relied on survey documents and what he learnt from the neighbors who confirmed that the land was owned by the vendor. The neighbors who confirmed the ownership of the land to DW5 were not stated and none of the family members witnessed the sale agreement.

### **Statement of the Law.**

25 The general rule is that he or she who asserts must prove and the burden of proof therefore rests on the person who must fail if no evidence at all is given on either side. The standard of proof required to be met by either party seeking to discharge the legal burden of proof is on a balance of probabilities.

**In Miller V Minister of Pensions [1947]2 ALL E R 372** Lord Denning stated:

30 *"That the degree is well settled. It must carry a reasonable degree of probability but not too high as is required in a criminal case. If the evidence is such that the tribunal can say, we think it more probable than not, the burden of proof is discharged but if the probabilities are equal, it is not."*

35 It is also the position of the Law that the evidential burden does not shift to the defendant unless there is cogent and credible evidence produced on the issue for determination.

Resolution of the 1<sup>st</sup> issue.

5 **Whether or not the suit land belongs to the Plaintiff.**

The Plaintiff pegs her case on a Deed of gift said to have been executed by Nsekuye on 3<sup>rd</sup> December 2015 and his Will dated 3<sup>rd</sup> August 2012. These two assertions are firmly rooted in the Plaint. The Written Statement of Defense and the Joint scheduling memorandum filed in court did not specifically traverse the  
10 assertions about the Deed of Gift and the Will attributed to Nsekuye.

The Deed of gift was admitted in evidence as Exhibit P1 and it specifically details how Nsekuye and DW1 donated two pieces of land to the Plaintiff and Katushabe on 3<sup>rd</sup> December 2015. The document further mentions the 1<sup>st</sup> defendant as having been given his share of land prior to 3<sup>rd</sup> December 2015 which he sold and  
15 was not to disturb the Plaintiff and Katushabe after the demise of the two donors.

The document was duly witnessed and the fact that the Plaintiff built a house on the suit land proves that she took possession on her behalf and that of the late Katushabe. It is also not denied that in 2015 Nsekuye had lodged a criminal complaint against the son of the 1<sup>st</sup> defendant who had trespassed on the suit land  
20 and he was prosecuted and convicted which dispels any claim that the 1<sup>st</sup> defendant could have owned the land before the demise of Nsekuye.

The Black's Law Dictionary, 8<sup>th</sup> Edition at Page 710 defines a gift as:-

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

25 **In Cases and Materials on Equity&Trusts,3<sup>rd</sup> Edition by Todd&Watts at Page 130 it is stated "-**

*"For a gift to be perfect, the donor must actually complete the disposition of the subject matter in favor of the intended donee or execute a formal deed of gift. Only then can a volunteer or donee enforce it. Intention not to be mistakenly inferred, must be joined by  
30 action."*

The fact of the existence of the Deed of gift and the surrendering of possession by the donor point to an intention by Nsekuye and DW1 to deprive themselves of the control of the suit land.DW1 firmly testified to the donation and her evidence was not disturbed in cross examination.

35 **Joy Mukobe V Willy Wambuwi,HCCA No.55 of 2005;Namugambe Balopera & Ors V Fredrick Njuki & Another.HCCS No.341/2013;Nakuya Edith V Ada Musoke & FredSeremba.HCCS No.64/2012(Mbarara).**

5 It is also evident in the contradicting evidence of DW2 and DW3 that the suit land was not given to the 1<sup>st</sup> defendant. While DW2 was firm on the evidence that no family meeting was convened to allocate him the suit land after the death of Nsekuye, DW3 was emphatic that he attended a family meeting in which it was agreed that the suit land be allocated to the 1<sup>st</sup> defendant. The alleged “*clear understanding*” with the Plaintiff allowing the 1<sup>st</sup> defendant to take the suit land  
10 was thus not backed by any credible evidence.

The detailed contents of the unchallenged Deed of Gift made by DW1 and late Nsekuye prove the fact of the donation of the suit land to the Plaintiff and Kamushabe. The undisputed evidence of DW3 that he built a house on the suit  
15 land for the Plaintiff who allowed the 1<sup>st</sup> defendant to occupy the same supports the contention of the Plaintiff about her ownership of the land in dispute.

Reliance on the Applications for Plots from the Municipal Council exhibited by DW1 does not further prove that the 1<sup>st</sup> Defendant owned the suit land. A perusal of the documents reveals that the applications were submitted on different dates.  
20 It is also evident that the 1<sup>st</sup> defendant was applying for a plot in Kamukira Cell while what was applied for by the Plaintiff was in Nyakambu Cell implying they could not have been applying for adjacent plots as the 1<sup>st</sup> defendant contends.

Nsekuye’s Will was admitted in evidence as Exhibit P3. It was not attested to by any person. The document thus lacks validity as a Will evidencing the  
25 bequeathing of the suit land to the Plaintiff.

I find that the suit land belonged to the Plaintiff.

Resolution of the 2<sup>nd</sup> issue.

**Whether or not there was a valid sale of the suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants by the 1<sup>st</sup> defendant.**

30 It is the position of the law that one cannot pass on valid title to what he did not lawfully own. The 1<sup>st</sup> defendant could thus not pass valid title to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants since he did not own the suit land. Evidence of survey documents and not a certificate of title duly registered in the 1<sup>st</sup> defendant’s name did not point to ownership.

35 The 2<sup>nd</sup> and 3<sup>rd</sup> defendants were obliged to carry out the necessary due diligence to establish whether the 1<sup>st</sup> defendant had the capacity to sell the suit land and the proper source was the Plaintiff and DW1 who were the only remaining family

5 members. Even a simple step like making an inquiry from the Local Council members was not taken by both the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

The only presumption this court can make is that both the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were privy to the information that the 1<sup>st</sup> defendant was only a licensee allowed by the Plaintiff to occupy the suit land.

10 I further find the 2<sup>nd</sup> and 3<sup>rd</sup> defendants claim to be bona fide purchasers without notice rather flawed. The claim about being a bona fide purchaser for value without notice does not also apply to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. It is a statutory defense only available to the person registered as a proprietor of land under the Registration of Titles Act.

15 **Haji Abdu Nasser Katende V Vathalidas Haridas & Co.CACA No.84/2003;Ndimwibo Sunday & Others V Allen Peace Ampaire.CACA No.65/2001;Sir John Bageine V Ausi Matovu CACA No.7/1997.**

I thus find that the sale of the suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants by the 1<sup>st</sup> defendant was devoid of any legal validity.

20 **Remedies available to the parties.**

The Plaintiff proved her case on a balance of probabilities. I find no basis on which to base an award for mesne profits since no evidence to the effect was led by the Plaintiff. I make the following declarations and orders:-

- 25 a) The Plaintiff is the lawful owner of the suit land located in Kirigime Ward, Southern Division of Kabale Municipality.
- b) A Permanent injunction is issued restraining all the defendants and their assignees/legal representatives or anyone claiming through them from trespassing on the suit land forthwith.
- 30 c) The 2<sup>nd</sup> and 3<sup>rd</sup> defendants are evicted from the suit land and are to remove/demolish any structures built by them thereon within two months from the date of this judgment.
- d) The defendants are jointly and severally liable to pay the Plaintiff general damages of Uganda Shillings 30,000,000/= for the suffering and mental anguish occasioned to her by their illegal actions on the suit land.
- 35 e) The defendants are jointly and severally liable to pay costs of the suit to the Plaintiff.

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**Moses Kazibwe Kawumi**  
**Judge**  
**9<sup>th</sup> March 2022**