THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

CIVIL APPEAL NO. 30 OF 2015

(ARISING FROM CIVIL SUIT NO. 31 OF 2011, KITGUM CHIEF MAGISTRATE'S COURT)

OCAYA SAMUEL OWEN
(Administrator of the estate
of the late OCHAN H.K).....APPELLANT

VERSUS

1. AKENA KRISTY ROSE
2. ACAN CHRISTINE
3. OKELLO FRANCIS PIDO
4. ODONGKARA RICHARD FRANK.....RESPONDENTS

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

JUDGMENT

Background facts

This is an appeal from the Judgment and Decree of Her Worship Akello Irene, Magistrate Grade One, given on 14th July, 2015 in Civil Suit No. 031 of 2011, a land dispute. The Appellant was sued by the Respondents over a piece of land said to be measuring approximately 10 (ten) acres, situate in Pem village,

Akwang Sub- County, Kitgum District. The Respondents claimed that their late mother purchased the suit land in 1986, occupied it, but left in 1989 due to insurgency and went to Mbale where she died that same year (1989). The Appellant allegedly took advantage of the absence of the 'land owner' to trespass thereon. The Respondents sought a declaration of ownership, eviction, mesne profit, general damages, interest and costs. The Appellant denied the claim and contended that he has lived on the suit land since the year 1980 without any adverse claim. He denied that the suit land was purchased by the Respondents' mother.

The parties adduced evidence and the trial Court visited the *locus in quo* where it interviewed witnesses. In its Judgment, the Court declared the Respondents to be the owners of the suit land (measuring six (06) acres); ordered vacant possession; awarded general damages of Ugx 1,000,000 (One Million Shillings) plus costs, hence the appeal.

Grounds of Appeal

In the amended Memorandum of Appeal lodged by consent of counsel for the parties on 23rd August, 2022, four grounds were framed, namely,

1. The trial Magistrate (sic) erred in law and fact when she held that there was a valid sale between the Respondents'

mother and a one Everina (sic), thereby occasioning a miscarriage of justice.

2. The trial Magistrate (sic) erred in law and fact when she failed to take into account that it is the Appellant who has all along been in possession of the suit land.

3. The trial Magistrate (sic) erred in law and fact when she held that because the late Barakiya was buried on the suit land, he had been given the same permanently, hence occasioning a miscarriage of justice.

4. The trial Magistrate (sic) erred in law and fact when she disregarded the contradicting evidence of the Respondents' witnesses thereby occasioning a miscarriage of justice.

Prayers

The Appellants prayed that the Appeal be allowed; the findings, decision, judgment and Orders of the trial Court be set aside; the Appellant be declared the owner of the suit land; and costs of the Appeal and of the trial Court be provided for.

Legal representation

The Appellant was represented by Learned Counsel Mr. Louis Odongo, while Learned Counsel Mr. Lloyd Ocorobiya

represented the Respondents. During the hearing, the Appellant was in Court while the Respondents were absent. Learned Counsel filed written submissions which court has considered and is grateful.

Duty of the first appellate Court

As a first appellate Court this Court has a duty to subject the evidence as a whole to a fresh and exhaustive examination and reach its own decision on the evidence. The Court must weigh conflicting evidence and draw its own conclusions. It is not merely to scrutinize the evidence and see if there was some evidence to support the lower court's findings and conclusions, and only then can the court decide whether the trial court's findings should be supported. In doing so, the appellate court should make due allowance for the fact that the trial court had the advantage of hearing and seeing witnesses. In short, an appeal from a trial court is by way of a retrial and an appellate court is not bound to follow the trial court's findings of facts if it appears either that it failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally. See: **Selle & another Vs. Associated Motor Boat Co. Ltd & others (1968) E.A 123**; **Pandya Vs. R (1957) E.A 336**; **David Muhenda & 3 Others Vs. Margaret Kamuje, Civil Appeal No. 9 of 1999 (SCU)**; **Fr. Narensio Begumisa & 3 others Vs. Eric Tibebaga, Civil Appeal No. 17 of 2002**.

In **Kifamunte Henry Vs. Uganda, Criminal Appeal No. 10 of 1997**, the Supreme Court held that it was the duty of the first appellate court to rehear the case on appeal, by reconsidering all the materials which were before the trial court, and make up its own mind. The Court observed that failure by a first appellate court to evaluate the material as a whole constitutes an error of law.

Resolution of the grounds of Appeal

Bearing the above principles in mind, I will resolve ground two first, and shall proceed to resolve the rest of the grounds together as they overlap. The grounds could have also been better drafted.

Ground 2 relates to the alleged failure of the trial court to take into account the fact that it is the Appellant who has all along been in possession of the suit land.

In their submissions, the Appellant's Learned Counsel changed the substance of ground 2 and argued an entirely new ground, purportedly under ground two. Ground two ground, aside from being vague, was not argued at all. With respect, Learned Counsel for the Appellant transposed and argued alien ground thus, ***"the trial Magistrate erred in law and fact when she ignored and failed to resolve the issues of limitation and***

disability in favour of the Appellant, thereby leading to a miscarriage of justice."

Interestingly, in response, the Respondents' Learned counsel argued the transposed ground as if it had flowed from an amended memorandum of appeal whereas not. I, therefore, hold that, by conduct of the Appellant's counsel, the original ground as framed, is deemed abandoned, as it was not argued at all. Consequently, I hold that the alien ground is baseless, having not sprung from any known memorandum of appeal on court record. The transposed ground is contrary to the provision of Order 43 rule 2 of the Civil Procedure Rules which provides that an appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal.

Accordingly, I reject the arguments in respect of the limitation or disability, as the same is not borne out of the amended memorandum of appeal lodged in court on 23rd August, 2022. I am emboldened by the fact that during the oral highlights of 5th April, 2023, the Appellant's Learned Counsel intimated to Court that he was proceeding with the appeal hearing on the basis of the aforesaid amended Memorandum of Appeal. Ground 2 of the appeal as framed, accordingly fails.

Grounds 1, 3 and 4

Ground 1 relates to the trial court's finding that the Respondents' late mother had purchased the suit land. Ground three springs from the trial court's holding to the effect that the alleged land vendor (Evalina Lakot) owned the suit land by virtue of her late husband's (Bakariya) burial thereat. Ground four relates to the evaluation of the evidence generally, with a focus on the Respondents' evidence which the Appellant claims were contradictory.

The findings of the trial Court were predicated on the main issues which have resulted into this appeal, namely, the ownership question; the allegation of trespass; and the remedies available. As noted, whereas issues of limitation and disability were framed and resolved, the holdings on those issues have not been challenged in this appeal.

In holding that the Respondents own the suit land and that the Appellant is a trespasser thereon, the trial court referred to the testimonies of witnesses. The court also visited the *locus in quo* where it did a form of fact finding from persons who had not testified in court. It then made an affirmative finding that the suit land was bought by the mother of the Respondents, a one Lalam Rose (deceased). The trial Court also observed that the witnesses at the *locus* had corroborated those who had testified in Court. In this Judgment, I will comment on the conduct of

the *locus in quo* proceedings in my concluding observations, as the conduct of the *locus in quo* proceedings did not feature as a ground of appeal.

The 1st Respondent testified as PW1 on his own behalf and on behalf of the rest of the Respondents who are his siblings. The co-respondents did not testify. PW1 called two additional witnesses, that is, Katanina Lalobo (PW2) and Jerodina Ladu (PW3), and closed the Respondents' case.

PW1 (who at the time was 27 years old, on 22nd November, 2011) stated that the disputed land is located at Pem Lukira (mistyped as *Pew* Lukira) and measures approximately ten (10) acres. He stated he did not know how the late mother (Lalam Rose) acquired the land because PW1 was young at the time. He also stated that the mother (Lalam Rose) passed away in the year 1989 when PW1 was about five years old. PW1 also stated that the mother had built two grass thatched houses on the suit land and PW1 lived with her. PW1 however asserted in cross examination that the mother purchased the suit land from a one Valina Lakot.

On her part, PW2 who said she was the maternal grandmother of the Respondents, testified that she did not know how her daughter Lalam Rose (Respondents' mother) acquired the suit

land. PW2 however stated the daughter got the land from a one Eburnia Evalina, wife of a one Bai.

I note that the trial Court's subsequent record (both typed and hand-written) is not clear on the facts of the alleged purchase. The trial Court was also not clear as to whom PW2 was speaking about next in her narrative, especially regarding the alleged purchase. However, from the general understanding of the material on record and the thread of the evidence, it is apparent the trial court meant to record that the Respondents' mother, according to PW2, purchased the suit land by furnishing consideration in the form of a cloth (Gomasi) and a belt for tying the Gomasi, plus two basins of millet and shs. 70,000 to the vendor, a one Eburnia Evalina. The latter, from the testimony of witnesses, was also known as Eburnia Lakot.

PW2 further stated that the purchaser (Lalam Rose) stayed on the suit land for two years and left for Mbale, for work, leaving PW2 to care-take it. PW2 stated she allowed some body to stay in the daughter's house but that person left because of war in the region. PW2 said Eburina Lakot was the owner of the suit land. According to PW2, Lalam Rose went with the (sale) agreement to Mbale. PW2 also stated that when some lady (the trial court merely described the person as a 'she') went back to the suit land (I think the witness meant Lalam Rose/ the alleged purchaser), the Appellant had already built thereon. PW2 also

stated that PW2 decided to vacate the land and went to Pamodo. That, she (PW2) however left the land in (the care of) the mother of Owacki (in Acholi language written 'min' owacki). PW2 stated she left the land because the Appellant said the land was theirs (for the family) and PW2 had no one who could help her (support her to claim it).

PW3, a neighbor to the suit land, testified that a one Aneno informed the Respondents' mother that land was available for sale. This bit of the testimony was of course hearsay. PW3 stated the vendor was Ivenina Lakot. PW3's husband, the then local chief in charge of land, inspected the (suit) land, with the buyer, and being found available, the buyer paid for it worth shs. 70,000 (seventy thousand shillings), plus a basin of millet, a Gomasi and a tying belt/cloth. According to PW3, the witnesses to the sale/purchase were Mario Nyuba, Becencio Aleg, and Anek Cenina, all deceased as at the time PW3 was testifying. According to PW3 the land is approximately two acres, and two grass thatched houses were built on it by the purchaser. The purchaser (Lalam Rose) lived on the suit land for two years and left for work in Masindi leaving PW2 (mother to Lalam) to care-take it.

According to PW3, after two years of PW2 (Lalam's mother) staying on the suit land, the Appellant asked PW2 to leave, claiming it, prompting PW2 to vacate. PW3 claimed that PW2

sued (the name of the defendant is not stated) before LCII Court but there was no judgment as the parties allegedly fought. PW3 stated that the land the Appellant claims was sold to the Appellant's father by PW3's brother in law and it is the very land PW3 lived on for 20 (twenty) years before Lalam Rose purchased. The Appellant allegedly lived on the western side of the suit land. PW3 claimed the part bought by Lalam belonged to Lakot Everina. According to PW3, the Appellant and Everina co-existed for 30 years, until Everina sold the part to the Respondents' mother. In cross examination, PW3 stated she was married in itar village of Pem, and found the Appellant's father already there. That, Lakot Everina had her own land, and so was the Appellant's father. PW3 stated the husband of Lakot was buried on the suit land and that the land is customary land.

In his testimony, the Appellant (DW1) denied knowing Lalam Rose (the Respondents' late mother). DW1 however conceded knowing Evalina Lakot, the alleged land vendor. According to DW1, the suit land is approximately three (03) acres. DW1 stated that his father (Otto Gabriel) gave the land to his Nephew (husband of Evalina), a one Barakiya (the same person described as 'Bai'). According to DW1, the father's Nephew (Barakiya/ Bai) was to stay on the land as he worked with the (Uganda) Railways. DW1 testified that the Nephew died in **1976** and was buried on the suit land, and Evalina was inherited by an in-law and left the land in **1979** for Pajimo. DW1 further

testified that at the time the land was given, DW1 was working in Gulu but would stay on the suit land whenever he would visit the village, but would also stay on a piece of land in Gangdyang, close to the suit land.

DW1 further stated that none of his parents were buried on the suit land. The father died in 1988 and was buried at a Church Cemetery, while the mother was buried in a village eight miles away from the suit land. DW1 stated that when he lost his second spouse, she was buried on the Appellant's land (not the suit land). On the day he testified (1st July, 2013), DW1 stated he was coming from Gangdyang to attend Court. DW1 stated that the Respondents' mother was not buried on the suit land either. The suit land, according to DW1, was empty and he started digging it.

DW2 (Otira John), a cousin to the Appellant's father testified that PW1 (the 1st Respondent) had inquired from DW2 whether DW2 was aware about the land purchased by PW1's mother (Lalam). DW2 testified the suit land was for the Appellant's father. DW2 denied that Evalina Lakot sold the suit land, although the late husband (Barakiya) was buried there. DW2 stated that Evalina was inherited by a brother in law who took her to Pajimo, and had no property in the suit land. DW2 claimed the body of Evalina's husband was later removed and reburied elsewhere. DW2 also stated that the Respondents'

mother (Lalam Rose) was buried at the home of her cousin in Pader. DW2 also asserted that a child of the Appellant was buried on the suit land in 1983 and it was DW2 who buried (literally meaning DW2 dug the child's grave). DW2 stated that Evalina left the suit land in 1980, after Barakiya died in October 1979 and was buried on the suit land, although another funeral function was done in Pajimo. DW2 stated that the Appellant planted mango trees on the suit land from 1980- 1986, and the Appellant's father cultivated it during the same period when the Appellant was staying in town. DW2 stated the Appellant used to stay on the suit land during burial. He asserted that the Appellant took over the suit land in **1986 on the death of his father**. That, the Appellant was the one who decided that the father be buried in town (Kitgum) due to insecurity.

DW3 (Obonyo Alfred) who testified as a member of the Appellant's (extended) family stated he only got to know the 1st Respondent in the year 2010. That the 1st Respondent (PW1) inquired from DW3 regarding the mother's purchase of the suit land. According to DW3, Evalina Lakot was only given the land and could not sell. DW3 claimed Evalina Lakot left the land for the Appellant's father. DW3 said the Appellant's father was buried in town because of his (Anglican) faith.

Burden of proof

I find contrasting versions by the two sides to this litigation. In their submissions, there are competing arguments, going into evaluation of evidence. However, both Learned counsel, with respect, selectively evaluated evidence each felt favour their case theory, without attempting to show why the opponent's case should be disbelieved. In this matter, therefore, I begin with the discussion of the law on the burden of proof.

It is common knowledge that the burden of proof lies on that who is desirous of having the court render judgment in their favour. In this case, it is the Respondents. The Respondents had the onus of discharging the burden on the balance of probability as required by sections 101, 102 and 103 of the Evidence Act, Cap.6

In **JK Patel Vs. Spear Motors Ltd, SCCA No. 4 of 1991** the Supreme Court of Uganda held that the burden of proof rests before evidence is given on the party asserting the affirmative. It then shifts and rests after evidence is given on the party against whom judgment would be given if no further evidence is adduced.

Thus, when a party adduces evidence sufficient to raise a presumption that what he/she asserts is true, he/she is said to shift the burden of proof, that is, his/her allegation is presumed

to be true, unless his/her opponent adduces evidence to rebut the presumption. See: **Manson (Uganda) Ltd Vs. Century Bottling Co. Ltd & 2 others, Civil Suit No.597 of 2001 (Yorokamu Bamwine, J, (as he then was)**

In **Sebuliba Vs. Co-operative Bank Ltd [1982] HCB 129**, Kato, Ag. J (as he then was) held that the burden of proof in civil matters lies upon the person who asserts or alleges, and that a party can be called upon to disprove or rebut what has been proved by the other side.

Turning to the grounds of appeal, I note that the relevant pieces of evidence summarized herein show that both sides had some deficiencies in their account of what each knew about the ownership of the suit land. This could be explained by the fact that the suit was lodged in 2011, about twenty-two years from the time the Appellant is alleged to have taken possession of the suit land to the prejudice of the Respondents (1989). There are also instances where witnesses either lied or exaggerated their accounts. Although my observation about the delayed lodgment of the suit has no bearing on the issue of limitation which was resolved by the trial court and has not informed this appeal, the length of time taken before the Respondents could sue, in my view, possibly contributed to the lapses in the memory of witnesses.

I note from PW2's testimony that Lalam Rose (the alleged land purchaser) is said to have gone back to the suit land, only to find the Appellant in possession. It was thus not explained why Lalam did not sue at the time. I also note the evidence by PW2 which was supported by PW3 that PW2 was asked by the Appellant to vacate the suit land, claiming to be theirs, which PW2 obliged. PW2 claimed she had no one to support her (possibly to challenge the Appellant's claim). I find PW2's explanations not convincing. This is because PW1 contradicted her. PW1 also contradicted PW3, stating that it was on the contrary, the father of the Appellant who sued the grandfather of the Respondents before the Local Council I court in 1992. PW1 however stated that the said dispute was not resolved due to some circumstances between the years 1989 to 1991, which the witness did not explain.

In their plaint, the Respondents averred that their mother purchased approximately ten (10) acres of the land in dispute. This court is cognizant of the fact that the suit land was not titled so the parties could at best, give only approximations. However, considering the evidence as a whole, the Respondents' approximation is so wide from what their witnesses and the Appellant's told the trial court. For starters, PW2, a mother to Lalam Rose did not speak about the land size. However, PW3 stated that the suit land is approximately two (02) acres. In his defense, the Appellant (DW1) testified that the suit land

measures approximately three (03) acres. I find PW3's and DW1's approximation fairly close. The trial court however appeared not to have believed any witness, and decreed six (06) acres of land to the Respondents. With respect, I find this finding erroneous and unsupported.

In his address, learned counsel for the Respondents' conceded that there was a problem with the finding of the trial court regarding the size of the suit land. Learned counsel alluded to the contradiction between the Respondents and their witnesses in that regard. Learned Counsel was however quick to argue that witnesses who testified about the suit land were not experts and could not speak to its exact size. Counsel also submitted that the land was not measured. He asserted that the trial court failed to ascertain the actual size of the suit land, whilst at the *locus*, and so the Respondents should not be punished for it. Counsel asked this Court to order that the actual land size be established. He relied on section 98 of the Civil Procedure Act, and Order 43 rule 22 (1) (b) and rule 23 of the CPR, which provide for the adducing of additional evidence on appeal and the mode for doing so.

With respect, the arguments are attractive but untenable. First, the Respondents did not purport to appeal the particular finding. Second, the invitation at the submission stage that leave to adduce additional evidence be granted, is not available

at law. Third, no formal motion was lodged. Fourth, this court does not require any additional evidence to be able to pronounce judgment in this matter. Fifth, there is no substantial cause for this court to yield to the Respondents' prayer. On the contrary, the Respondents ought to have proved the exact size of the land since they alleged ten acres in their plaint. Thus, the finding by the trial court that the suit land was six acres and decreeing the same to the Respondents, lacked basis.

However, for a fuller appreciation and resolution of the whole issues in controversy, I proceed to consider the argument that the suit land was purchased by the Respondents' late mother.

In the plaint, the Respondents averred that their late mother acquired the suit land in the year 1986 from a one Evaline. They also averred that the vendor was already deceased at the time the plaint was lodged on 28/06/2011. In my view, the year of the alleged acquisition and the date of the alleged death of the vendor, ought to have been supported by evidence but none was adduced. No one testified that Evaline was deceased. It seems to me Evaline is the lady who was variously described by the witnesses as Eburnia, Evalina Lakot/, Ivenina Lakot/, Evarina Eburnia, etc. Having pleaded it, the Respondents should have proved their allegations. See: **Ms Fang Min Vs. Belex Tours and Travel Ltd, Civil Appeal No. 06 of 2013, consolidated with civil Appeal No. 01 of 2014: Crane Bank Ltd Vs. Belex**

Tours and Travel Ltd (SCU) in which the Supreme Court of Uganda underscored the requirement that a party proves the case pleaded.

That said, the Respondents still had the burden of proving that Evaline or whoever the vendor was, did in fact sell the suit land to the Respondents' mother. The witnesses for both sides appear to have agreed that Evalina Lakot had shifted to Pajimo upon the death of her husband, and had since moved on with a brother in law. No witness to the purported sale testified in the trial court. It was alleged the witnesses were all deceased. That would be understandable, given the Respondents took several years before suing. In such a case, at least a sale agreement would have cleared the doubts. However, none was adduced in evidence. Interestingly, PW2 and PW3 claimed to have known about the sale transaction yet they were not among those pleaded as having witnessed the alleged sale/purchase transaction. They did not state the basis of their knowledge. Having initially stated that PW1 and PW2 did not know how the Respondents' mother acquired the suit land, PW2 and even PW3 could not later purport that they knew about the transaction. The shift in position by PW1 and PW2 that the mother of the Respondents bought the suit land from Evalina Lakot, is not convincing. That is taking two inconsistent positions with regard to a controversial fact, which is unacceptable. I find that PW1 and PW2 were contradictory in material respect. The two

wanted to be believed without explaining away their material shift in positions. Having not stated the year of the alleged land purchase, the year 1986 remained a pleaded matter, devoid of evidence. It is trite law that grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected. Minor inconsistencies unless they point to deliberate untruthfulness will be ignored. See: **Alfred Tajar Vs. Uganda, EACA Cr. Appeal No.167 of 1969**.

In this case, I find that PW2 and PW3 were contradictory, just like PW1, in material respect. They could not purport to know about the alleged sale transaction which they had earlier admitted they knew nothing about. They had also admitted they did not know how the mother of the Respondents acquired the suit land. So their altered positions were acts of deliberate untruthfulness.

As none of the Respondents and witnesses spoke about the year of the alleged land purchase, even if this Court were to go by the pleaded year 1986, which is not evidence, the unchallenged evidence given by DW1 and DW2 were that Evalina Lakot (the alleged vendor) had already shifted from the suit land in 1979/1980, for Pajimo, upon the death of her husband, Barakiya *alias* Bai, who died in about the years 1976/1979. Although I find some difference in year the vendor's husband is

said to have died, I hold the contradiction to be minor, as is not very material in the determination of the controversy. What however is material is that the departure of the alleged vendor followed the husband's death. What is also material is that, the alleged purchase happened 6-7 years when the alleged vendor had left the suit land. In my view, DW1 and DW2 created serious doubt in the Respondents' plea, especially the claim that Evalina Lakot sold the suit land in 1986, yet by then, the alleged vendor had already moved out of the suit land with a new lover. The Respondents did not rebut the Appellant's evidence in this respect.

The Respondents' purchase narrative were further impugned by the absence of a sale agreement. The Respondents' version was that a sale agreement remained with their mother who unfortunately passed away whilst in custody of it, in Mbale.

The law places a contract of sale of land in a special category. To be enforceable, such contract must be in writing, or the person relying on it must have taken possession of the land with the vendor's consent. See: **Stanley Beinababo Vs. Abaho Tumushabe, Civil Appeal No. 11 of 1997**, per G.M Okello, J.A (as he then was), with whom the rest of the court agreed. See also **R.E Meggary and H.W.R Wade, the Law of Real Property, 4th Ed. Page 542** which underscore the importance of having a written contract for sale of land, for its enforceability.

In the instant case, the Respondents sought to rely on the fact of acquisition of the suit land by purchase by their mother, to found a cause of action against the Appellant. In my view, the failure to adduce the written contract weakened the basis for the Respondents' claim, moreover in the absence of proof of possession of the suit land with consent of the alleged vendor. The Respondents did not demonstrate efforts taken to trace the alleged sale agreement. In the absence of the land sale agreement and the eye witnesses to the alleged transaction, and in the further absence of proof of possession by the Respondents with the consent of the alleged vendor, the Respondents failed to discharge the burden cast on them.

In this matter it is even not clear how PW1 knew about the witnesses to the alleged sale transaction since he was young at the material time (about 5 years old). In my view, by pleading that all the witnesses were dead, the Respondents wanted Court to believe the fact of the alleged sale/ purchase transaction without proof. The Respondents also wished to rely exclusively on parole oral evidence of sale of the suit land, without more, an untenable course at law. **In the Stanley Beinababo case *(supra)***, and **Halsbury Laws of England, 3rd Ed. Vol 36, page 297**, it was observed that payment in whole or in part, of the purchase price is not an act of part performance which entitles the purchaser to enforce a parole contract of sale of land. It was emphasized that an alternative way of ensuring the

enforceability of a parole contract of sale of land is to show clear evidence of transaction regarding the land, for instance, taking possession by the purchaser with the vendor's consent, to fulfill the requirement of part performance.

Whereas the present case is not about enforcement of a sale of land contract, I find the principle in the above judicial precedent, and the legal writings, of assistance in dealing with the matter. Here, the Respondents rested their case on the alleged purchase of the suit land by their mother, and sought to found their cause of action against the appellant. There is no evidence that at the time of suing, the Respondents were in possession or at all, with the consent of the alleged vendor.

The above aside, relatedly, the Respondents' witnesses testified that the suit property had been permanently gifted to the husband of Evalina Lakot (alleged vendor) by the Appellant's father. On his part, the Appellant asserted that the gifting was temporary, to accord the beneficiary (the Nephew to the Appellant's father) a place to stay, as he worked with the Uganda Railways Corporation. Whereas the Nephew died and was buried on the suit land, in my Judgment, I find nothing more to show that the land had been permanently given to the deceased by the Appellant's father. It appears the relationship between the Nephew and the uncle was that of a licensee/ licensor. This is buttressed by the fact that the Appellant's late

son was also buried on the same land in 1983, according to DW3 (Otira John). That account dispels the narrative of exclusive gifting of the suit land to the deceased Nephew. The want of exclusivity is demonstrated by PW3's concession that the widow of the deceased co-existed with the Appellant for over thirty years, on the suit land. I, therefore, find that the fact of burial of a person gifted land by a relative for temporary use *per se*, without more, is no proof of ownership of the land by the beneficiary. In my view, the Appellant's father welcomed his Nephew onto the suit land, allowing him and his wife (Evalina Lakot) to stay, as the Nephew worked at the Uganda Railways Corporation, thus the magnanimity of the Appellant's father towards the Nephew could not be said to have divested the Appellant or his late father, of the land completely, when facts inconsistent with the allegation of exclusivity is apparent on the court record.

In **Odur David Vs. Ocaya Alphonse, H.C Civil Appeal No. 34 of 2018** Mubiru, J. cited **Ovoya Poli Vs. Wakunga Charles, H.C Civil Appeal No. 0013 of 2014**, and held that a gift *inter vivos* may be established by evidence of exclusive possession and user of the gift by donee during the lifetime of the donor. A gift is perfected and becomes operative upon its acceptance by the donee.

In this case, there was no exclusivity on the part of the husband of the alleged vendor, regarding the suit land. On the contrary, upon the death of Barakiya/ Bai, the conduct by his widow (Lakot Evalina) of moving away from the suit land and not returning and not acting in a manner consistent with her claim thereto, lends credence to the Appellant's claim that the donee of the land had indeed been gifted it temporarily by an uncle. The temporary gifting of course did not preclude Lakot from staying on the suit land, temporarily gifted to her spouse, had she wanted. She was not chased from it. She obviously could not purport to sell it, if at all, as I will expound more.

Having, therefore, found that Barakiya *alias* Bai was not exclusively gifted the suit land by his uncle, his widow (Lakot Evalina) could not purport to sell without the consent of the family of the benefactor, such as the appellant, if at all. Moreover, the Respondents did not prove that the suit land was part of the estate of the deceased Barakiya/ Bai. It was not shown to have been bequeathed to the widow (Evalina Lakot), so that she could sell or that she applied for letters of administration, to be able to administer and sell it.

In **John Kafeero Sentongo Vs. Peterson Sozi, Civil Appeal No. 173 of 2012,** the Court of Appeal (per the lead Judgment of Musota, J.A, as he then was) held that sale of land of a deceased without letters of administration is invalid.

In the instant case, the suit land was not shown to have constituted part of the estate of the vendor's husband, thus the purported sale would, in my view, not stand. The fact of coexistence of the Appellant and Evalina Lakot on the suit land for over thirty years (as at 30th April, 2013) and the fact of burial of the Appellant's son on the suit land, militate against the Respondents' ownership theory. I accordingly hold that the suit land was not was available for sale if at all, by Evalina, to the Respondents' mother. I also accept the Appellant's testimony that the suit land was not completely divested by the Appellant's father (Gabriel Otto) to the exclusive benefit of the beneficiary (Bakayira/ Bai) and his spouse Evalina Lakot. In the circumstances, Evalina Lakot could not purport to dispose of the property, if at all.

For the reasons given, I allow grounds 1, 3 and 4 of the appeal which succeed. Consequently, I make the following orders;

1. The Appeal is allowed and the findings, the Judgment, decision and the decree of the trial Court are set a set aside in their entirety.

2. Civil Suit No. 031 of 2011: Akena Kristy Ross & 3 others Vs. Ocan S.K is dismissed.

3. The costs and damages awarded by the trial Court to the Respondents, conceded to have been part paid by the Appellant to the Respondents, in the sum of Ugx 4,000,000, shall be paid back by the Respondents to the Appellant.

4. The Appellant shall keep possession of the suit land given he has not been evicted following the decree of the trial court.

5. The Respondents shall bear the costs incurred by the Appellant in the trial court.

6. Each party shall bear its own costs incurred in the High Court.

Before I take leave of this matter, I noted with concern the manner in which the trial Court conducted the proceedings at the *locus in quo*. The trial Court allowed witnesses who never testified in Court to testify at the *locus in quo*. The Court, with respect, also descended into the arena of the case and appears to have been on an investigation mission, allowing the Respondents to fill gaps in their case. In her own words, the learned trial Magistrate Grade One asked the people gathered at the *locus* if they knew names of persons who allegedly witnessed the land sale transaction. The Learned trial

Magistrate also inquired about the location of the homes of the alleged witnesses to the sale transaction, and whether there were any neighbors to the Appellant's home. The Advocates for the parties allowed the procedural lapses to go unabated, without offering to assist or guide the trial Court, as officers of court. The Advocates purported to cross examine 'witnesses' identified by the trial Magistrate at the *locus in quo*. The accounts by the *locus in quo* 'witnesses' were contradictory, replete with hearsay material, yet the trial Court believed those who appeared to have supported the Respondents' claims. Naturally the locus 'witnesses' were not sworn. With respect, the entire material gathered from the *locus in quo* could not be used in this appeal determination. I urge trial Courts to acquaint themselves with the correct procedure for conduct of proceedings at the *locus in quo* as laid down in the Practice Direction No. 1 of 2007 and a plethora of case law. This kind of situation should attract the keener interest of the Judicial Training Institute, going forward.

Delivered, dated and signed in Chambers this 24th day of April., 2023.

24/4/2023

George Okello

JUDGE HIGH COURT

Judgment read in Chambers in the presence of;

2:10pm

24th April, 2023

Attendance

Mr. Louis Odongo, Counsel for the Appellant.

The Appellant in court.

The Respondents are absent.

A representative of the Respondents, Okema John Bosco, in Court.

Counsel for the Respondents, Ocorobiya Lloyd absent.

Mr. Abala Robert, Court Clerk.

Hand Down. 24/4/2023

George Okello

JUDGE HIGH COURT