

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
MISCELLANEOUS APPLICATION NO.2762 OF 2023
(ARISING FROM CIVIL SUIT NO.084 OF 2023)

SSEKAMWA SANDE **APPLICANT**
(Administrator of the Estate of the Late Nadduli Keresipo)

VERSUS

MUKAAYA WILLIAM **RESPONDENT**

BEFORE: HON.LADY JUSTICE NALUZZE AISHA BATALA

RULING

Introduction:

1. This is an application brought under Section 33 of the Judicature Act Cap.6, Section 98 of the Civil Procedure Act Cap. 71, Order 6 Rule 29, Order 52 Rules 1 & 3 of the Civil Procedure Rules (SI 71-1) seeking for orders that;

- i) Civil suit No.084 of 2023, Mukaaya William vs Ssekamwa Sande be dismissed on grounds that the purported gift inter vivos upon which the respondent’s cause of action is solely founded /rests does not satisfy the legal requirements of a gift inter vivos, there by making the plaintiff’s/respondent suit incompetent and not maintained at law.
- ii) Costs of the application be provided for.

Background:

2. On the 31st of January 2023 the respondent/plaintiff sued the applicant/defendant vide Civil Suit No.084 of 2023 seeking among others for declarations that the respondent/plaintiff is the rightful owner of the 10.15 acres of land comprised in Busiro Block 40 Plot 50 land at Lutisi, Namayumba Town Council, Wakiso District, an order compelling the applicant/Defendant to survey off 10.15 acres of land comprised in Busiro Block 40 plot 50 land at Lutisi Namayumba Town Council, Wakiso District and handover the certificate of title to the respondent/plaintiff, an order directing the applicant/defendant to effect a transfer of the said suit land into the names of the respondent/plaintiff, Permanent injunction restraining the applicant or anyone claiming on their behalf from selling, evicting, transferring or interfering with the peaceful and quiet possession of the land and costs of the suit.

Applicant's evidence:

3. The application is supported by an affidavit deposed by **Mr. Ssekamwa Sande** the applicant which sets out the grounds of the application including the following;
 - i) That the applicant is the defendant vide Civil Suit no.084 of 2023 before this honorable court where the respondent is the plaintiff.
 - ii) That after the death of the Late Nadduli Keresipo the father of the applicant, the applicant together with Nabiddumu Catherine applied for letters of administration of the Estate of the Late Nadduli Keresipo and they were granted the same by court.
 - iii) That the respondent claims that the applicant refused to survey off his share till date.
 - iv) That the respondent claims that he was given the said share as a gift inter vivos from the estate of the Late Nadduli Keresipo.

- v) That as a fact the respondent was never given any land by the late Nadduli Keresipo as gift inter vivos.
- vi) That the pleadings of the respondent which include the plaint do not satisfy the legal requirements of a gift inter vivos thereby making the respondents suit incompetent and not maintainable at law.

Respondent's evidence:

4. The application is responded to by an affidavit in reply sworn by **Mr. Mukaaya William** which states the following among others;

- i) That around the 1980's the Late Nadduli Keresipo gifted him land measuring 10.15 acres off the land comprised in Busiro Plot 50 block 40 at Lutisi Namayumba Town Council, Wakiso district as a gift inter vivos.
- ii) That he is among the administrators of the Late Nekemeya Kibuuka who is the father of the Late Nadduli Keresipo.
- iii) That the applicant till date has refused to survey off the Respondents land which was given to him by the late Keresipo Nadduli as a gift inter vivos.
- iv) That he took active possession of the land immediately it was given to him as a gift inter vivos and he has been in continuous possession of the same land for a period of more than 30 years free from any interruptions from the late and the beneficiaries.
- v) That the plaint in Civil Suit No.084 of 2023 is not solely based on the claim of a gift inter vivos as alleged by the applicant.
- vi) That the said gifted land does not form part of the estate of the Late Nadduli Keresipo since it was given to him as a gift inter vivos.

- vii) That its in the interest of substantive justice and equity for this honorable court to dismiss the application with costs.

Representation:

5. The applicant was represented by Mr. Aggrey Bwire of Bwire & Waiswa Co. Advocates while the respondent was represented by Mr. Damulira Pius of MBS Advocates. Both parties filed their submissions which have been considered in the determination of this application.

Issues to be determined by court:

6. The main issue for determination is whether civil suit No.084 of 2023 should be dismissed on grounds that the purported gift inter vivos upon which the respondent's/plaintiff's claim rests does not satisfy the legal requirements of a gift inter vivos thereby making the respondent's suit incompetent and not maintainable at law.

Resolution of the issue:

7. Before dwelling into the resolution of the issue, this honorable court will first ascertain the law on dismissal of suits based on preliminary objections premised on points of law as stated under Order 6 rule 29 of the Civil Procedure Rules.
8. The Oxford Law Dictionary defines a preliminary point of law as a question of law ordered to be tried before the facts of the case are determined. The law to take into consideration regarding an application for dismissal of a suit based on a point of law is Order 6 Rule 29 of the Civil Procedure Rules which states that if, in the opinion of court, the decision of the point of law substantially disposes of the whole suit or of any distinct cause of action, ground of defence, set off, counterclaim or reply there in, the court may thereupon dismiss the suit or make such other order in the suit as may be just.

9. It is well established that in considering applications under Order 6 rule 29 the court only considers the pleadings alone and any annexures thereto not any subsequent affidavits or evidence. A point of law is urged on the assumption that all facts pleaded by the other side are correct and that it cannot be raised if any fact has to be ascertained. (*See; Libyan Arab Bank Vs Intrepco ltd (1985) H.C.B 73.*)
10. Where preliminary points of law are raised, they should be capable of disposing off the matter preliminarily without court having to resort to ascertaining the facts from elsewhere, apart from looking at the pleadings alone this is because a good case is always one where the parties are given the opportunity of being heard and not driven away from the court unless it its extremely necessary to do so on the facts which are very clear.
11. Anything that purports to be a preliminary objection premised on point of law must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tasted by normal rules of evidence. Where a point of law raises issues of evidence which require proof, it is to be overruled. (*See; Yaya Farajalla Vs Obur Ronald & 3 Others, CA No.0081 of 2018 and Robert A.lusweswe Vs G.W Kasule & anor (1987) HCB 82 before Justice Ouma*)
12. Having dicussed the law on preliminary objections premised on points of law, this honorable court will now proceed to resolve the main issue and ascertain the applicant's claim.
13. A gift intervivos is defined as a gift of personal property made during the donor's life time and delivered to the donee with the intention of irrevocably surrendering control over the property. (*See; Black's Law Dictionary 8th Edition at Page 710*).
14. The same has been defined to mean the transfer of any property from one person gratuitously while the donor is alive and not in expectation of death, its an act whereby something is

voluntarily transferred from the true possessor to another person with full intention on the part of the receiver to retain the thing as his own without restoring it to the giver. (*See; Sajjabi John vs Zaiwa Charles, Civil Appeal No.50 of 2012*). Further For a gift intervivos to take irrevocable roots, the donor must intend to give the gift, the donor must deliver the gift and the donee must accept the gift.

15. Where the claim of a gift intervivos is based on registered land, various formalities ought to have been completed for the said gift to be irrevocable. The gift is complete as soon as the donor has done everything that the donor has to do, that is to say as soon as the donee has within his control done all those things necessary to enable him, the donee to complete his title. Thus, a gift of registered land becomes effective upon execution and delivery of the transfer even though the donee has not yet been registered as the proprietor. (*See; George William Kalule vs Norah Nasozi and another, Court of appeal Civil appeal No.29 of 2014*)
16. In the instant case, counsel for the applicant in his submissions cited various decisions of court where he mainly relied on the celebrated decision of **George William Kalule Vs Norah Nasozi & Anor** (*supra*) where the court of appeal stated that *“the late Banalekaki gave the disputed land to his son, the appellant and he had made it clear during his life time and that the land no longer belonged to the estate of the deceased by the time of his death, further the deceased had done all that he thought was sufficient for the ownership of the land to shift to his son and that the appellant had acquired an equitable interest in the property as a gift inter vivos and by virtue of possession of the title deed to the land”*
17. Further counsel for the applicant stated that the facts in the above referred case are distinguished from the facts in the instant case since the respondent did not attach any deed on his plaint to prove that indeed there was a gift inter vivos regarding the registered land. The

respondent did not prove that indeed the Late Kesepiro Nadduli had done all what was required of him to have the ownership of the land shift to the respondent as per his pleadings.

18. Counsel for the respondent in his submissions cited various English decisions to include; *Re Freeland(1952)Ch.110* where court held that there must be an intention to give and not the giving, counsel further relied on the case of *Re McArdle(1951)1 Ch 669*.

Determination of court:

19. In determination of the application, this honorable court will only consider the pleadings of the parties and the law regarding the claim.
20. Having read the pleadings and considered the cited authorities by both parties to this application, the point of law rests on the fact that the purported gift inter vivos does not satisfy the legal requirements of a gift inter vivos.
21. The principle of law that equity will not aid a volunteer and therefore if a donee needs to get an order from a court of equity in order to complete his title, he will not get it. If, on the other hand the donee has under his control done everything, necessary to constitute his title completely without any further assistance from equity, the gift is complete.
22. It is on that principle that in equity a gift is complete as soon as the donor has done everything that he has to do that is to say as soon as the donor has within control done all the necessary things to enable him to complete the title.
23. Where the donor has done all in his power according to the nature of property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person.
24. Likewise, a gift over registered land becomes effective upon execution and delivery of the transfer instruments, the same cannot be recalled there after even though the donee has not yet

been registered as the proprietor. (*See; George William Kalule Vs Norah Nassozi & Anor, supra*).

25. By the look at the respondent's/plaintiff's plaint in Civil Suit No.084/2023 Page 1, its inferred that the suit land is registered land (land in Busiro Block 40 Plot 50 at Lutisi Namayumba Town, Wakiso District.
26. Further the respondent/plaintiff seeks declaratory orders from court that he is the right full owner of the said land, an order directing the applicant/defendant to effect a transfer of the said 10.15 acres of land and the applicant/defendant handover the certificate of title of the said land to the respondent.
27. This court proceeding to grant the above orders will be perfecting an imperfect gift, something that is contrary to the law and the intentions of the Late Kesepiro Nadduli. If the late Kesepiro Nadduli really intended to give the land to the respondent as a gift inter vivos he would have effected the transfer of the said land into the names of the respondent and executed a deed to the same effect, mere taking possession of the said land is not enough to claim under the notion of a gift inter vivos. Further by looking at the plaint, the donee did not do anything within his control to complete his title instead he is asking court to do that which he ought to have done to have his gift irrevocable.
28. The plaint does not disclose anywhere that a transfer was effected and that the late Kesepiro Nadduli gave the land to the respondent as a gift inter vivos, the same plaint only speaks to the fact that the respondent was given the land around the 1980's.
29. That being the case, if the respondent/plaintiff desires to protect his interest in the said land let him bring a suit as a beneficiary to the Estate of the Late Kesepiro Nadduli but not under the

claim that he was given the land as a gift inter vivos because his pleadings do not satisfy the legal requirements for a gift inter vivos over registered land.

30. The respondent further alleges in his submissions that his claim does not only rest on the gift inter vivos and he argues that he has been in possession of the said land for a period of more than 12 years uninterrupted by the beneficiaries and the Late Kesepiro Nadduli making him an adverse possessor, however the same is not reflected any where in his pleadings. This means the respondent is departing from his pleadings, it's an established principle of law that parties are bound by their pleadings at all times.

31. Accordingly, it is the finding of this court that the application has merit and the point of law is sustained with the following orders;

- i) That Civil Suit No.084/2023, Mukaaya William Vs Ssekamwa Sande be dismissed on grounds that the purported gift inter vivos upon which the respondents cause of action is solely founded does not satisfy the legal requirements of a gift inter vivos.
- ii) Costs of the application be provided for.

I SO ORDER.



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NALUZZE AISHA BATALA

JUDGE

10th/10/2023

