THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

CIVIL APPEAL NO. HCT-12-LD-0054-2015

(ARISING OUT OF HOIMA CHIEF MAGISTRATES COURT AT KAGADI CIVIL CASE NO. 15 OF 2013)

MWESIGYE ROBERT ::APPELLANT

VERSUS

1. **NYAMAZI FAITH**
2. **IRUMBA EDWARD::RESPONDENTS**

JUDGMENT BY JUSTICE GADENYA PAUL WOLIMBWA

1.0 Introduction

Briefly, the Respondents, a mother and son sued the Appellant who is a brother in law to the 1st Respondent and an uncle to the 2nd Respondent for recovery of their piece of land in Kitegwa parish, Kagadi town council. The Respondents alleged that the disputed piece of land was given to them by the late Ruhweza Wilson having divided it equally between the Respondents and the Appellant.

The Appellant told court that the disputed land belongs to him having obtained it from the late father Ruhweza Wilson before he died. He denied liability but however admitted that the late Ruhweza Wilson had distributed portions of land to his children but not the disputed land.

In the court record an amiable settlement started but yielded nothing as they could not agree. The defendant(Appellant) had the intention of giving the Respondents a different portion of land besides the disputed land but the plaintiffs/Respondents refused saying it was not equivalent to what they were entitled to as of right. The court established that

the two bipandi's referred to by the defendant/Appellant was disputed to by his own sister, a one Aliganyira.

The trial magistrate gave judgment in favour of the Respondents and ordered that the suit land be handed back to the Respondents immediately.

The Appellant being aggrieved with the decision of the Magistrate Grade 1, filed the present appeal. The grounds of appeal are: -

1. That the learned trial Magistrate erred in law and fact when he found that the suit land was given intervivos by the late Ruhweza Wilson to the Respondents (Plaintiffs) as a share of his late son Berunga Samuel husband and father to the 1st and 2nd Plaintiffs respectively.
2. That the learned trial Magistrate erred in law and fact when he disregarded the defendant's/Appellant's evidence and exhibits at trial without assigning any reason thereby occasioning a miscarriage of justice to the Appellant.
3. The learned trial Magistrate erred in law and in fact when he failed to address himself as to the correct procedure to be followed at locus in quo, totally disregarding the evidence and made no observations on visiting locus in quo.

As the first appellate court, it is my duty to subject the evidence to fresh evaluation but bearing in mind that I never had the opportunity of seeing and experiencing the witnesses. See; Uganda Revenue Authority versus Rwakasaija & 2 others No. 08 of 2007.

2.0 Representations

Mr. Simon Kasangaki represented that Appellant whereas Mr. Tiyo Jonathan from Justice Centres Uganda, represented the Respondents.

3.0 Considerations of the Appeal

During the hearing of the appeal, both Counsel submitted orally in regards to the grounds of appeal. They proposed to argue grounds 1 and 2 together.

4.0 Arguments for the Appellant

Counsel for the Appellant, Mr. Simon Kasangaki submitted that the Respondent did not provide proof to court by deeds that the suit land had been given to them by the late Ruhweza Wilson. He further stated that it was not proved in evidence by either PW1 or other plaintiffs' witnesses that the Appellant had acquired land from Ruhweza Wilson.

Counsel Kasangaki for the Appellant further submitted that in the absence of a deed of grant intervivos and other independent evidence proving that on 5th May 2008, Ruhweza Wilson gave land to the 1st and 2nd Respondents before he died as a share for his late son Berunga Samuel who was a husband and father to the 1st and 2nd plaintiffs respectively, the trial magistrate wrongfully so found.

On the second ground, Counsel for the Appellant stated that the Appellant testified as DW1 stating that he knew the plaintiffs/Respondents very well as they were related to him. That he was given the suit land by the late Ruhweza Wilson in 1988 when he wanted to marry. That he even built a house on that same land.

Further to that, Counsel submitted that the Appellant called witnesses DW2, DW3 and DW4 who corroborated his testimony. That all the witnesses confirmed that the land had been always occupied by the Defendant/Appellant.

Learned Counsel further submitted that the Plaintiffs (Respondents) did not indicate to court clearly which land they claimed to have acquired from the late Ruhweza and which, land belonged to the Defendant/Appellant and where exactly they neighboured. That in the absence of clear evidence they did not discharge their burden that the suit property belonged to them or it had been given to them by late Ruhweza on 5/4/2008.

Prayed that the 1st and 2nd grounds be in the affirmative.

4.1 Arguments for the Respondent

Mr. Tiyo Jonathan, Counsel for the Respondent submitted that from the record, a document which stood as a proposed deed was attempted to be tendered in but it was a photocopy and hence could not tender it in court as it was also opposed to by the Appellant. However, he referred court to page 9 of the record, where during cross examination of PW2 by the Appellant, he asked whether PW2's grandfather had been forced to grant the said land to the Respondents which can be inferred to mean that he was aware of the land which was granted as a gift only that he felt that his father had been forced to grant that land to the Respondents. He invited court to consider that as evidence enough to prove that there was a grant in the presence of the deed.

He further stated in his submissions that there was sufficient evidence on the record to prove that the Appellant suggested that he could not share land with his dead brother and that is the father to the 2nd Respondent and husband to the 1st Respondent. Further, he stated that this indeed showed there was land that was granted to the Respondents only that the Appellant felt that since his brother was dead he had a right to take over the land and that a dead man could not own land at that moment. That this too points also to evidence to show that the grant was made.

Further to that, the Respondent Counsel stated that the dispute arose when the Appellant started clearing a certain area of land which the Respondents claimed to have been granted to them by the late Ruhweza Wilson. That the grant was clear and known by the Appellant.

On description of the land, Counsel for the Respondent submitted that the land was clearly described on the record as the land which the Appellant claimed that he could not share with a dead brother. That it is the land which the Appellant started to clear and it that very land which is described by the 1st and 2nd Respondents in their testimonies and the subsequent witnesses who testified and it is that very land which was described in

the plaint. Invited court to look at the plaint. That there is no doubt as to whatever land that was in contention.

Counsel for the Respondent further directed court to the record of proceedings at page 6. To this he stated that court made observations about the evidence of the Appellant. That an observation was made that the children of the late Ruhweza had agreed that the children of their late brother Sam Berunga and their mother be given a portion of the farm and that they be given two bipandis. Court noted from the record that one Aliganyira, sister to the defendant had rejected the proposal. To this he was saying that the Appellant had offered alternative land to the Respondents in alternative to the land which was a subject in dispute to this suit and court made all these observations.

Counsel for the Respondents further submitted that there was no decree served upon him while being served with the record of proceedings and this could be fatal because the law requires that a decree first be extracted before an appeal of this nature is filed. He referred to S. 220 of the magistrate's court Act cap 16 and Order 43 rule 1, 2 and 3 CPR which requires that before this nature of appeal is filed there should be a decree because appeals arise from decrees and orders. He Invited court to look at the record and law to see if there is a proper appeal before court.

Last but not least, counsel submitted that the procedure adopted by the Trial Magistrate at the locus in qou was proper as the court made observations about its findings. Counsel then invited the court to dismiss the appeal with costs.

4.2 Appellant's Rejoinder

With regard to the deed granting the suit land to the Respondents, Counsel for the Appellant in rejoinder submitted that where a fact is reduced in writing only the writing can prove it. That the Respondents did not produce the grant notwithstanding that they stated that the land was given to them in writing *inter vivos* on 5th April 2008. That Counsel

for the Respondent conceded to the fact that it was not tendered in court and therefore, it was not proved on the balance of probabilities. That they failed to prove ownership and court was to dismiss their case which was not done

Counsel further stated that the Appellant did not know of the grant and that no satisfactory evidence was available to prove that fact. He denied accepting by agreement that the plaintiffs were granted land but that after the death of his brother he refused to share with the children of his brother and the widow of his late brother. That it was not true and further stated that he refused to share with them the portion of land given to him in 1988 by his father which he lawfully possessed and utilised.

On the issue of filing the appeal before extracting the decree, Counsel for the Appellant submitted that earlier decisions of this court had the position of law that an appeal from Chief Magistrate court required a formal decree to be extracted, that the latest liberal decisions contain a different position. He promised to avail authorities indicating that expression of a formal decree is not an essential step in a commencement of an appeal and that absence or omission to do so is not fatal to an appeal. He prayed that court over rules the point of law raised.

On the issue of offering alternative piece of land, the Appellant stated that if if it were true, it would have no effect of proving that the plaintiff had an interest in the suit land. That more to that, the Respondent could not prove if the alternative land offered was in exchange of the suit land. Prayed that they dismiss their suit in the lower court with costs here and in the court below.

4.3 Determination of the point of Law

Counsel for the Respondent raised a pertinent issue of law that the Appellant did not extract a decree while filing the appeal which to me is an important issue which ought to be resolved first in light of order **15 rule 2 of the civil procedure rules SI 71-1.**

Section 220 of the Magistrate's court Act Cap 16 provides for civil appeals as follows;

Civil appeals.

(1) Subject to any written law and except as provided in this section, an appeal shall lie—

(a) from the decrees or any part of the decrees and from the orders of a magistrate's court presided over by a chief magistrate or a Magistrate grade I in the exercise of its original civil jurisdiction, to the High Court;

In the Case of **Artmon Sabika versus Zekereya Luganda Civil Appeal no.55 of 1999.** Justice Mugamba held that no appeal is competent until a formal decree or order embodying the decision complained of comes into existence. See also; The New Vision and another Versus Luka Bamiango Fort Portal High Court Civil Appeal MFP 2/95 reported in [1995]11 KALR 121 and the Commissioner of Transport Versus the Attorney General of Uganda and another [1959] E.A 328.

There are however, other decisions that have held that failure to extract a decree before filing an appeal is not fatal. In **John Byekwaso and 2 Others vs. Yudaya Ndagire Civil Appeal number 78 of 2012**, Justice Percy Night Tuhaise decided not a extracting a decree before filing an appeal is a mere technicality that can be cured by article 126(2)(e) of the Constitution that requires that substantive justice shall be administered without undue regard to technicalities. Likewise, in **Standard Chartered Bank Uganda Limited vs. Grand Hotel (U) Limited, Civil Appeal Number 13 of 1999**, it was held that extraction of a formal decree embodying the decision being appealed against is no longer a requirement in the institution of an appeal.

In the instant appeal, it is clear that the Appellant filed this appeal without extracting a decree and the Respondent's Counsel in rejoinder argued that it was no longer a requirement for a decree to be filed before commencement of an appeal he promised to avail court with relevant authorities which he did not.

Although the law is couched in mandatory terms and makes it a must for a decree to be part of papers to commence an appeal, the law has to be read within the prism of article 126 (2) (e), of the Constitution, which requires that substantive justice be prioritized over technicalities especially if over reliance on technical rules is likely to result into injustice. the Appeal before me falls in this category and I will in the spirit of article 126(2)(e) of the Constitution overlook the procedural error and proceed to deal with the merits of the appeal.

4.4 The merits of the Appeal

I will delve into resolving this appeal on its merits.

I remind myself of the duty of the first appellate court, which is well stated in **Father Nanensio Begumisa and three others vs Eric Tiberaga SCCA 17 of 2000**, where the supreme court held that;

It is well settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and its own and conclusions.

Both Counsel for the Appellant and the Respondent discussed grounds 1 and 2 together and so will court.

The Appellant stated that the learned trial magistrate erred in law and fact when he found that the suit land was given to the Respondents *inter vivos* by the late Ruhweza Wilson and that he also disregarded the defendant's evidence and exhibits at trial thereby occasioning a miscarriage of justice to the Appellant.

The definition of "gift inter vivos" 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.

In the case of **Ovoya Poli vs Wakunga (Civil Appeal No. 0013 of 2014) [2017] UGHCLD 46** court observed that at common law, the essential requisites of a valid gift are; capacity of the donor, intention of donor to make gift, absence of consideration, completed delivery to or for the donee, and acceptance of gift by the donee. The donor of the gift must have had a present intent to make a gift of the property to the donee and a transfer of the gift must be delivered to the donee and the donee must accept the gift in order for the property transfer to take place (see *Re Cole [1964]1 Ch 175)*

In the instant case, the Appellant's argument is that the Respondents did not furnish court with the written grant of *inter vivos* and that on that basis did not prove ownership of the suit land. Of course, the justice of this case would have been served well if the Respondents had managed to produce the original deed under which the later Ruhezwa is said to have given them the land but for reasons I am not able to tell, the respondents only produced a photocopy of the deed, which the court admitted for identification pending the production of the original document. But not withstanding this default, it should be noted that at common law, oral words coupled with delivery, and gift by deed are the only modes for an *inter vivos* grant of a gift.

The Respondents notwithstanding not producing the written grant, availed the court with credible witnesses including DW3, DW4 and DW5 all who were the brothers of the late Ruhweza Wilson to prove that the deceased divided the suit land between the family of the late Sam Barunga and the Appellant. Besides, the Respondents took possession of

the land during the lifetime of the donor without any restraint from either the donor or the Appellant, who claimed possession of this land after the donor's death.

The trial magistrate in his judgment relied on the credible evidence by the plaintiff witnesses to the extent that they were family members with history of the clan of the late Ruhweza Wilson and that they participated in the measurement of the suit land and divided it between the Appellant and the Respondents. As for the Appellant's evidence, he stated that the defendant witnesses avoided the real issue in regards to the will and that somewhere not around at the time of distribution of the estate of the late Ruhweza Wilson. The trial magistrate evaluated the evidence properly in this regard.

From the foregoing, I find ground 1 and 2 have no merit because there is sufficient evidence to prove that;

- The late Ruhweza Wilson gave the suit land to the Respondents as an *inter vivos* gift, the Respondents accepted it and took possession of the same hence fulfilling the terms of an *inter vivos* grant.
- There was credible independent evidence from the brothers of the deceased who participated in the measurement and division of the suit land for the benefit of both the Appellant and the Respondents.
- The quality of evidence as presented by the Respondents was more believable as they reliably informed court that indeed the Appellant had grabbed the land belonging to the Respondents.
- There was the alternative land that the Appellant suggested to give to the Respondent which in a way was an exchange with the suit property which the Respondents rejected.

Briefly on the 3rd ground that the learned trial Magistrate erred in law and in fact when he failed to address himself as to the correct procedure to be followed at locus in quo, totally disregarding the evidence and made no observations on visiting locus in quo.

Counsel Kasangaki for the Appellant submitted that a judicial officer who visits a locus in quo should draw a sketch, make his observations or findings at the locus in quo especially where the matter has to do with boundaries and different features separating. He criticised the Trial Magistrate for not drawing a sketch map of the land. however, when the sketch was availed to him by the court, Counsel objected that it did not indicate the separating features between the portion which the Respondents/plaintiffs claimed to that of the family land.

Further to that, counsel submitted that court did not take into consideration that the Appellant was in possession of that land and the fact that the developments thereon belonged to him. He submitted that overlooked these facts and the trial magistrate did not rely on them in deciding the matter and prayed that this ground be found in the affirmative.

In reply, learned Counsel for the Respondent submitted during the locus in quo visit, court made the observation that the defendant and the children of late Ruhweza had agreed that the children of their late brother Sam Berunga and their mother be given a portion of the farm and that they were given two bipandis. Court noted from the record that one Aliganyira sister to the defendant had rejected the proposal. He concluded stating that the procedure at locus was proper, and prayed that the appeal be dismissed with costs.

On perusal of the file, there is a sketch map that was drawn by the court to ascertain the boundaries. Order 18 rule 14 of the Civil Procedure Rules empowers courts at any stage of a trial to inspect any property or thing concerning which any question may arise. The practice of visiting the locus in quo is to check on the evidence by the witnesses, and not to fill gaps in their evidence for them or lest court may run the risk of turning itself a witness in the case as was stated in the case of **Yeseri Waibi v Edisa Byandala [1982] HCB28.**

It is not in contention by both Counsel for the Appellant and for the Respondent that court visited the locus in the presence of both parties and their witnesses. The proceedings of what transpired at locus are *also* on record and a sketch plan attached there to.

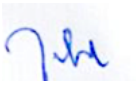
In the case of **Badru Kabalega versus Sepriano Mugangu (1992) KARL 265**, Court inter alia stated that:

The purpose of visiting locus in quo is for each party to indicate what he is claiming and each party must testify on oath and be cross examined.

In line with this case and what is on record, in my opinion, the procedure was followed as each party was given opportunity to present their case. As for the allegations made by Counsel for the Appellant, there is no evidence on record to prove them. If there was a mistrial at locus then the parties and their advocates ought to have addressed the same to the trial Magistrate. This ground therefore fails.

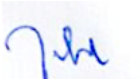
5.0 Decision

I have not found merit in all the grounds of appeal presented by the Appellant. The appeal is accordingly dismissed with costs.



Gadenya Paul Wolimbwa
JUDGE
1st June 2020

I direct the Registry of the court to email the decision to the parties on 2nd June 2020.



Gadenya Paul Wolimbwa
JUDGE
1st June 2020