

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT MASAKA  
CIVIL APPEAL NO. 43 OF 2020  
(ARISING FROM CIVIL SUIT NO. 16 OF 2017)

MUGERWA PASCAL :::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

1. KIGGUNDU FRANCIS
2. KIGGUNDU MICHAEL :::::::::::::::::::::::::::::::::::::: RESPONDENTS

*Before; Hon Lady Justice Victoria Nakintu Nkwanga Katamba*

**JUDGMENT**

The Appellant/Plaintiff instituted Civil Suit No. 16 of 2017 against the Respondents/Defendants seeking a declaration that he is entitled to benefit from his father's estate, a declaration that he is the rightful owner of the land comprised in Kibona Cell, Lwengo Sub-county, a permanent injunction restraining the Defendants/Respondents from trespassing on the suit land, an eviction order, general damages and costs of the suit.

The Plaintiff's case is that he is the only biological child of the late Mugerwa Fabian who died intestate on the 4<sup>th</sup> day of April, 1991, and he is the Administrator of the estate as per the grant dated 11<sup>th</sup> October 2016. Upon his father's demise, the estate was entrusted to one Rose Nabayinda and when the Plaintiff became of age, it was resolved that the estate is handed over to him but at the time the Defendants were occupying the suit land and they denied him possession of the same.

The 1<sup>st</sup> Defendant in his Written Statement of Defence denied the claim and averred that he obtained the suit kibanja at Kibona from his late father Andrea Ssali in 1992 and that the Plaintiff was given a different kibanja. The 2<sup>nd</sup> Defendant denied the claim in toto.

In his evidence PW1 the Plaintiff/Appellant Pascal Mugerwa stated that the Defendants came onto the suit land as squatters and refused to leave. The Plaintiff relied on an agreement dated 25/10/2015 to prove that the land was given to him by the clan members. He also stated that the land belonged to his father Mugerwa Fabiano who inherited from his father Paskal Kigundu. The suit land borders Nabayinda Rose, Kiggundu, and measures approx. 7.5 acres.

PW2 Nabayinda Rose stated that the 2<sup>nd</sup> Defendant refused to leave the Plaintiff's land, which land belonged to the late Mugerwa Fabiano. The land borders Simon Ssali on the right, Kiggundu Michael on the left, Ndereya Ssali on the upper and south sides.

PW3 Kayinga John Mary stated that the Plaintiff got the land from his late father and the Defendants have been using it forcefully.

PW4 Paulo Rukindu stated that the kibanja was for the late Mugerwa Paskali who died and the Plaintiff was introduced by the clan. The defendants were told to leave and they refused.

That was the Plaintiff's case.

DW1 Kigundu Francis the 1<sup>st</sup> Defendant stated that he got the suit kibanja from his father Andrea Ssali. A document dated 17/01/2016 confirming his ownership was executed.

DW2 Kigundu Michael stated that the suit kibanja belongs to the Plaintiff which he received from his father Paskali Kiggundu.

DW3 Emmanuel Jumba stated that the suit land belongs to the 1<sup>st</sup> Defendant having received it from his father Andrea Ssali. A document was signed giving the Plaintiff his land and the land given to him was not inclusive of the 1<sup>st</sup> Defendant's land in question.

DW5 Mutesasira Francis stated that the suit land belongs to the 1<sup>st</sup> Defendant and he has been therein for over 20 years.

DW6 Kasumba Deo stated that the suit land belonged to Mugerwa but currently belongs to Kigundu Francis, the 1<sup>st</sup> Defendant. The Defendant came onto the land in 1990's.

DW7 Semwogerere Achileo Salongo stated that the suit land belongs to the 1<sup>st</sup> Defendant who got it from his father Andre. The 1<sup>st</sup> Defendant's father told him that he gave the suit land to the 1<sup>st</sup> defendant in the 1990's and the 1<sup>st</sup> Defendant took possession. The Plaintiff's father's land is different.

That was the Defendant's case.

The trial court conducted a locus visit at which the Parties described the boundaries of the land. A sketch map of the disputed land was also adduced showing the 1<sup>st</sup> Defendants house.

In his judgment, the trial Magistrate relied on the evidence that the 1<sup>st</sup> Defendant has been in occupation of the suit land since the 1990's and that the Plaintiff is a neighbor to the 1<sup>st</sup> Defendant to observe that there is no way the Plaintiff came to recognize the 1<sup>st</sup> Defendant as a neighbor to his land yet he disputed ownership. The trial Magistrate also found that the suit is time barred considering that the Plaintiff became of age in 2001 and filed the suit sixteen years later in 2017. The suit was dismissed with no order as to costs.

Being dissatisfied with the judgment of the trial Magistrate, the Plaintiff/Appellant filed this appeal on the following grounds;

1. The learned trial Magistrate erred in law and fact when he failed to evaluate the evidence of the 2<sup>nd</sup> Defendant who admitted that the land in dispute belongs to the Appellant, thereby arriving at a wrong decision;
2. The learned trial Magistrate erred in law and fact when he drew an inference that the land belonged to the respondent simply because the Appellant recognized the Respondent as his neighbor;
3. The learned trial Magistrate erred in law and fact when he held that the case was barred by law thereby failing to administer justice without undue regard to un due technicalities;

The Appellant prays for the appeal to be allowed and an order that the suit land belongs to the 1<sup>st</sup> Respondent be issued.

The Parties did not file written submissions.

**Determination of the appeal:**

The duty of this court, as a first appellate court, is to re-evaluate the evidence adduced at the trial and subject it to a fresh and exhaustive scrutiny, weighing the conflicting evidence and drawing its own inferences and conclusion from it. In so doing, however, the court has to bear in mind that it has neither seen nor heard the witnesses and should, therefore, make due allowance in that respect. *See: Fredrick Zaabwe v. Orient Bank & 5 O'rs, S.C.C.A. No. 4 of 2006 Kifamunte Henry v. Uganda, S.C.C.A No 10 of 1997; Banco Arabe Espanol v. Bank of Uganda, S.C.C.A No. 08 of 1998.* With this duty in mind, I proceed to consider the grounds of appeal.

I will resolve the grounds of appeal concurrently.

The Appellant's claim is that the suit kibanja located at Kibona belongs to him and that he inherited from his late father who received it from his father. His evidence is that when his father died, the estate was entrusted with one Rose Nabayinda and when the Appellant became of age in 2001, it was resolved that he received his father's property and in 2015 it was resolved that he receives the suit land which was at the time occupied by the 1<sup>st</sup> Respondent. He holds the letters of administration for his father's estate and the Respondent has refused to vacate the suit land.

*Section 191 of the Succession Act* provides for the requirement of having letters of administration before dealing in the estate of a deceased person. The Appellant has adduced evidence of the letters of administration granted by the Chief Magistrates Court of Masaka at Masaka on the 11<sup>th</sup> day of October, 2016.

The 1<sup>st</sup> Respondent's case is that he received the suit land from his father Andrea Ssali in 1992 and has been in occupation ever since. His case is that the suit land was therefore received as a gift *inter vivos* from his father.

A gift *inter vivos* is defined in *Black's Law Dictionary 8th Edition at page 710* 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.”***

The law, as it relates to the issue of gifts *inter vivos*, is well established. In the case of *Joy Mukobe vs. Willy Wambuwu HCCA No. 55 of 2005 (cited in Trustees, Kampala Archdiocese v Nabitete Nnume Mixed Co-operative Farm Limited (Civil Suit-2000/1559) [2017] UGHCLD 4 (14 June 2017)* relying on other decided cases, the court held that;

***“...for a gift *inter vivos* to take irrevocable roots, the donor must intend to give the gift, the donor must deliver the property, and the donee must accept the gift.”***

In the instant case, the 1<sup>st</sup> Respondent has adduced evidence that he received the suit land from his father and thereafter took possession of the same to this date. His evidence was corroborated by DW7 who stated that the 1<sup>st</sup> Respondent's father told him that he gave the suit land to the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent also testified that his father died in 2006.

On the other hand, the Appellant claims to have inherited the suit land from his father who died in 1991 and left the suit land under the care of a one Rose Nabayinda. The Appellant's evidence is that one Rose Nabayinda was entrusted with his father's estate including the suit land until such time as the Appellant became of age. Rose Nabayinda testified and corroborated this evidence and this was further corroborated by all the Appellant's witnesses as well as the 2<sup>nd</sup> Defendant.

Furthermore, the Appellant adduced evidence of clan meeting minutes dated 15-10-2001 in which it was stated that the Appellant was given part of the land that belonged to his grandfather which had been under the care of Rose Nabayinda who had been cultivating it. It was also resolved in paragraph iii) of the minutes that the land occupied by Kigundu and Paulo should be shared with Mugerwa Pascal the Appellant and the two could not be chased away since they had occupied the land for such a long time. This further corroborates the evidence that the suit land was left under the care of Rose Nabayinda and that the

Respondents came onto the land without a claim of right. The Respondents did not challenge this evidence. It was also the 1<sup>st</sup> Respondent's evidence that when the land was given to the Appellant, he asked why it was so yet '**he had been in occupation**'. I find it suspicious that if he indeed inherited the land from his father as he claims, why is it that he did not challenge the said distribution on that basis but rather sought to rely on his occupation of the suit land? This was an admission of his occupancy of the land well knowing that it belonged to someone else.

Ownership of land can be either by acquisition, inheritance, donation of by a gift inter vivos. Occupation only creates ownership through adverse possession or lawful and bonafide occupation under **Section 29 of the Land Act Cap 227**. In the instant case, the 1st Respondent has not raised any of these instances but rather seeks to rely on mere occupation which does not create an interest or a claim of right.

The Appellant further adduced clan minutes dated the 25-10-2015 in which it was stated that the Appellant was given his land at Mutala Kibona that belonged to his father which had been taken by Kigundu Francis, the 1<sup>st</sup> Respondent. The said land was stated to boarder Rose in the east side, Kakooza in the west side, from the road up to his grandfather Ndereya, the 1<sup>st</sup> Respondent's father.

From the above evidence as compared to the sketch drawn from the locus proceedings, the land in dispute hosts two houses and boarders the land for Andrea and the road on the opposite side which corresponds with the evidence of the Appellant.

The Appellant faults the trial Magistrate for relying on the evidence that the Appellant recognized the 1<sup>st</sup> Respondent as his neighbor to conclude that he is the true owner of the land. With due respect to the learned Magistrate, I find that this was insufficient to enable that conclusion. The 1st respondent clearly stated that he received his land from his father Andrea Ssali and it has been clearly established from the Appellant's evidence and the evidence at locus that Andrea Ssali's land boarders the disputed land. I find that recognizing the 1st Respondent as the Appellant's neighbor did not amount to acknowledgment that he

owns the suit land but rather, it corroborated the evidence of the Appellant that the land he received borders the land of the 1st Respondent's father.

The 1st Respondent in his evidence testified that the matter in contention was cleared when people from FIDA came to the land and resolved that he is the rightful owner of the suit land. I find it hard to believe that FIDA resolved that the suit land belonged to the 1st Respondent and yet represented the Appellant in the lower court.

It is no wonder that in cross examination, the 1st Respondent changed his evidence and stated that it was not FIDA who came onto the land but rather CDO.

I also have to note that 2nd Defendant/Respondent Kigundu Michael stated in his evidence that the land belongs to the Appellant corroborated the Appellant's evidence as well as the Appellant's witnesses.

I have also carefully perused and considered the evidence of both Parties' witnesses and established that the Appellant's witnesses are closely related to both Parties. PW2 Rose Nbayinda is the grandmother to the Plaintiff/Appellant and the mother to the 1st Defendant/Respondent. PW4 Paulo Rukindu is the 1st Respondent's biological brother. DW3 is a brother to the 1st Respondent. All the Parties and their witnesses are closely related and neither Party has raised any allegation of wrangles within the family. I have not observed any forms of bias or partiality in the evidence given and to that end, nothing raises suspicion to this court that the witnesses are lying and yet most of them testify to the suit land belonging to the Appellant and corroborate each other's evidence including the 1st Respondent's witnesses.

I have also observed that the 1st Respondent's witnesses in their evidence supporting the allegation that he owns the suit land rely on his occupation of the same to support the ownership. The 1st Respondent stated that when the land was given to the Appellant, he asked why yet he had been in occupation. DW3 stated that he does not know how the 1st Respondent acquired the suit land but when he grew up, he found him there. DW6 stated that the land belongs to the 1st Respondent because he came onto the same when he was 18 years

and settled on the land by planting trees, plantation and a home. DW6 contradicted himself in his evidence when he stated that the land first belonged to the Appellant, then in cross examination stated that it first belonged to the 1st Respondent's father.

I have carefully considered the evidence and found the Appellant's evidence more reliable as it clearly provides the history of the land and how he came to own the same which evidence was corroborated by the 1st Respondent's witnesses who stated that indeed Rose Nabayinda was caretaking the Appellant's land. I find the 1st Respondent's evidence unreliable in proving the ownership of the land as they mainly relied on his occupation of the same to prove that he owned the suit land yet I have clearly stated herein that occupation of the land does not give rise to an interest in the same save for instances described herein.

The Appellant further faults the trial Magistrate for holding that the suit was time barred. In his judgment, the trial Magistrate relied on evidence that the Appellant became of age in 2001 and the 1<sup>st</sup> Respondent had been in possession of the suit land since 1992. It was his resolution that the period of limitation ceased six years after the Appellant had become of age and as such filing the suit in 2017, 16 years later was past the limitation period.

Section 20 of the limitation Act provides that actions for recovery of land acquired under a deceased person's estate shall be brought within 12 years. In the instant case, the Appellant's father died intestate in April 1991 and that is when his right to the estate accrued in 1991. He was under age until 2001. The action for recovery of land would therefore be time barred by 2013.

However, although the action is framed as a recovery of land, it possesses elements of trespass as in the evidence adduced by the Parties showing that when the Appellant came of age in 2001, the land was handed over to him and the 1st respondent refused to leave. I further rely on the evidence of the family meeting minutes dated 15-10-2001 in which it was clearly stated that the Respondents had come onto the land as trespassers. This was therefore a continuing trespass for which the laws of limitation do not apply in the strict sense.



In the result, I find that the Appeal bears merit and it is hereby allowed. The Appellant is the rightful owner of the suit land.

Judgment of the trial Court is hereby set aside.

No order is made as to costs.

I so order.

Dated at Masaka this 22nd day of October, 2021.

**Signed;**

A handwritten signature in blue ink, appearing to read 'Victoria Nkwanga', with a horizontal line underneath.

**Victoria Nakintu Nkwanga Katamba**

**Judge**