

UGANDA / JUDGMENT

Mawejje v Makumbi Banalya Yawe and Another (Civil Suit No. 299 of 2014)

[2021] UGHCLD 150 (29 October 2021)

[2021] UGHCLD 150

COURT

HC: Land Division (Uganda)

BEFORE

Cornelia Kakooza Sabiiti, J

CASE / FILE NUMBER

Civil Suit No. 299 of 2014

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA [LAND DIVISION]

CIVI SUIT NO. 299 OF 2014

FREDRICK MAWEJJE :::::::::::

VERSUS

MOSES MAKUMBI BANALYA Yawe MARY BANALYA
NALUNGA :::::::::::

BEFORE: HON. LADY JUSTICE CORNELIA KAKOOZA SABIITI

JUDGMENT

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The Plaintiff's cause of action is for a declaration that the defendants do not have any caveatable interest in the property, an order that the caveat lodged but the Defendants on Kibuga Block 10 Plot 917 at Bukesa, Nakulabye vide instrument No. KCCA-00000001 of 18th April 2-13 and KCCA -00003964 of 13th January 2014 be de-registered, an order that the defendants pay general damages for inconvenience suffered as a result of the lodging of the said caveats and cost of the suit. The plaintiff is the registered proprietor of the suit land and claims to be the sole owner ship over the suit property.

The Defendants averred that the Plaintiff is not the sole owner of the suit property. It formerly belonged to the Late Eryeza Ssebowa Yawe (E. S Yawe), the biological father of the Plaintiff and the 1st Defendant and now to the Estate of the Late E. S Yawe. The suit land is registered in the name of the Plaintiff as a result of the decision made by the Late E. S. Yawe during his lifetime to register some of the properties in the names of his children. The Plaintiff went ahead and lodged a caveat on the suit property which was never challenged to present day. Before his demise, the Late Yawe in a will bequeathed the rooms on the suit land for rent collection for the benefit of the Defendant and the Plaintiff as a care taker. The Plaintiff evicted the Defendants from the suit land and wants to sell the suit property.

The Defendants raised a Preliminary objection to the effect that the Plaintiff has no cause of action and that his claim against the Defendants is frivolous, vexation devoid of merit and misconceived by reason of which the Defendants shall move court to dismiss it with costs.

Issues

- 1. Whether the plaintiff is the sole owner of the property;
- 2. Whether the defendants have any interest in the property; and
- 3. What remedies are available to the parties.

Representation

The Plaintiff was represented by M/s Musiime Muhebwa & Co Advocates. The Defendants were represented by Mr. Moses Makumbi Bnalya Yawe.

Issue No.1: Whether the plaintiff is the sole owner of the property. In ascertaining ownership of land, the law provides under Section 176) of the **Registration of Titles Act** that; -

> "No action of ejectment or other action for recovery of any land shall lie or be sustained against the person registered as proprietor under the provisions of this ^{*}Act, except in any of the following cases; -^{*}

a) to ^(e)\$

In any case other than the aforesaid the production of the registered certificate of title or lease shall be held in every court to be an absolute bar and estoppel to any such action against the person named in such document as the grantee, owner, proprietor or lessee of the land therein described, any rule of law or ^{*}equity to the contrary notwithstanding.^{*}"

The plaintiff averred in paragraph 4 (a) of the Plaint that he is the lawful owner and registered proprietor of the suit property. The defendants in their written statement of defense in paragraph 5(b) admitted plaintiff's being the registered proprietor, and yet disputed the fact of plaintiff being the "owner" of the property. The plaintiff tendered a certified copy of the certificate of title to the property which was admitted as Exhibit P2, and PW1, PW2 and PW3 all testified to the fact

that the plaintiff was the registered proprietor. This evidence was never rebutted by the defendants. Section 56 of the Registration of Titles Act provides, inter alia, that: -

"... and every certificate of title issued under the provision herein contained shall be received in all courts as evidence of the particulars therein set forth and of the entry thereof in the Register Book, and shall be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in the land therein described in is seized or possessed of such

Sees sestate or interest..."
In Kampala Bottlers Ltd. vs. Damanico (U) Ltd. SCCA No. 22 of 1992 at page 2-3, it was observed by Wambuzi, C. J; in reference to that provision (then Section 56) that:

> "the production of the certificate of title in the names of the appellant is sufficient proof of ownership of the land in question unless the case falls within the provisions of section 184 of the Registration of Titles Act."

Section 36(1) of the Succession Act states that every person of sound mind and not a minor may by will dispose of his or her property. The key words in this provision is "his or her property" once this can be established, then the issue of sole ownership will be ascertainable.

In cases where the parties applied for probate like the case at hand, the grounds upon which such a grant of probate may be revoked are under section 234 (1) (b) and (c) of *The Succession Act*, include concealing from the court something material, and making an untrue allegation of a fact essential in point of law to justify the grant, even though such allegation is made in ignorance or inadvertently. Such concealment or untrue allegations made with intention to deceive the court into granting the letters of administration, when discovered, will result in rejection of the application.

In the case of *Hellen Okello Vs Akello Jennifer Ochan* Civil Appeal No. 0084 of 2019; the Court stated that: -

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"A gift is a transfer of property without any monetary consideration by one person in favour of another and accepted by him or her or by a person on his or her behalf. At common law, property that is transferred from a parent to a child, or spouse to spouse, is presumed to be a gift and would defeat any presumption of a resulting trust (see *Waters' Law of Trusts*, at p. 378; *Hyman v. Hyman*, [1934] 4 D. L. R. 532 (S. C. C.), at p. 538 and *Gascoigne v. Gascoigne* [1918] 1 KB 223). The presumption of advancement is a presumption of law that a spouse who purchases property and puts it in the other spouse's name or voluntarily transfers property to the marriage partner

intends to make a gift and it is for the spouse making the transfer to the other spouse to prove there was no such intention."

The presumption provides a guide for courts in resolving disputes over transfers where evidence as to the transferor's intent in making the transfer is unavailable or unpersuasive. The presumption of advancement applies in regards to any purchase of property made in the name of the child or spouse of the purchaser. The burden of proving that the transfer was not intended to be a gift, is on the challenger to the transfer. Assuming that by writing the will and bequeathing the suit land earlier gifted to the Plaintiff shows that the testator had no intention of gifting the suit land, he still created a "trust" over the same property for the plaintiff when he stated in his will that after the death of his wife the property should revert back to the Plaintiff meaning the wife had no right to bequeath that property in her will.

The presumption is based on the concept that where a property is transferred to a person to whom the transferor has an obligation to support, it is presumed to be an advance of the interest the dependent might reasonably expect to receive on the death of the transferor. In the absence of evidence to the contrary, property bought by a

If would conclude that in the present case, the suit land was a gift to the Plaintiff since it there was no coercion made to the text. of title was completed and the plaintiff became the Registered Proprietor. This gift is revoked on any of the grounds on which it might be rescinded had it been a contract. At common law, where consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, it is voidable at the option of the party whose consent was so obtained. Thus, where the gift is not made voluntarily because

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of any of the factors mentioned above, the gift may be revoked by the donor (see for example Arthur Sajjabi v. Catehrine Namutebi Muyizzi and another, C. A. Civil Appeal No. 25 of 2017). A gift can be revoked when still incomplete or imperfect; when title still remains with the donor (see S. Sarojlni Amma v. Velayudhan Pillai reekumar, AIR 2018 SCC5232; JT 2018 (10) SC 488).

When a gift is absolute and not conditional, as the case is from the present facts, the donee acquires absolute title upon perfection of the gift which would speak to the absoluteness in title of the plaintiff over the suit land. Acceptance of the gift and delivery of the property together make the gift complete. The donor is divested of his or her title and the donee becomes absolute owner of the item. The subsequent conduct of the donee is not a ground for rescission of a valid gift (see the Supreme Court of India case of Asokan v. Lakshmikutty, (2007) 13 SCC 210 at para 31). Once a gift has been perfected, it cannot be revoked by the mere fact that the donor's feeling towards the recipient have changed.

Therefore, this court finds that the suit land belonged to the Plaintiff solely as the testator intended that the suit property perfected the gift by registering it in the name of the Plaintiffs. Since no proof has been adduced by the Defendant to prove the contrary intention of the testator of not gifting the Plaintiff with the suit property.

$\frac{1}{2}$ Since 2: Whether the defendants have any interest in the property.

After resolving the first issue in favor of the Plaintiff as he is the rightful owner of the suit property, the court goes to hold that the defendants have no interest in the property as evidenced paragraphs 4 (c) and 5 of the plaint.

For the case of the 1st defendant, he averred that he is a beneficiary of his later father's estate. It is true that even though plaintiff's late father, Erieza Sebowa Yawe, had transferred the property inter vivos to the plaintiff sometime in January 1985, he made a bequest of the property in his will dated 30th November 1996 on pages 17-18 of the Trial Bundle.

Section 36(1) of the Succession Act provides that "Every person of sound mind and not a minor may by will dispose of his or her property". This provision has been interpreted to mean that "... the testator should dispose of property or an interest in property belonging to him at the time of his or death... any attempt to dispose of property not belonging to him will pass no bequest to the person bequeathed, as no one can give away what does not belong to him." Rev. James Kyomukama & Anor vs. Catherine Zaribwende & Anor. HCCS 1144 of 1997, at page 8.

Counsel for the plaintiff submitted that the 1st defendant has any interest in the suit property since their claims are based on the alleged late Erieza Sebowa Yawe's interest in the property. Without prejudice to the afore-going submission, plaintiff contends that even if this Honourable Court were to find that Erieza Sebowa Yawe had an interest in the property at the time of his death, the defendants would still have no interest under the terms of the bequest of the suit property under his Will since no interest in the suit property was ever bequeathed to him as per the will.

It was the testimony of PW1, fully corroborated by PW2 and PW3 that the bequest of the suit property was to seven individuals namely, Erieza Kaddu, Alice Kisakye, the plaintiff, Ronald Kirabira, Sam Kyagulanyi, the late Mrs. Florence Yawe and PW1. This is clearly what is provided for in the Will as per the English translation (pages 28 and 29 of the Trial Bundle). 1st defendant testified that he was not listed among the beneficiaries to the suit property under the Will.

Therefore, this honourable court finds that the 1st defendant has no interest in the land whatsoever as no part of the suit land was ever bequeathed to him by the testator.

For the case of the 2nd defendant as per a testamentary bequest made by her late mother-in-law. Counsel for the plaintiff submitted that having proved that he is the registered proprietor, the onus is on the defendants to prove their interest in the property within the exceptions provided for by law and this the plaintiff submits they have clearly failed to do.

counsel further submitted that upon further examination,² defendant admitted that her mother-in-law was only given two rooms by Erieza Sebowa Yawe and these were the same rooms that were bequeathed in turn to her. She admitted that neither she nor st defendant was listed as beneficiaries to the suit property under her father-

Section 160 of Succession Act permits creation of an annuity for the life of a legatee. It provides that "Where an annuity is created by will, the legatee is entitled to receive it for his or her life only, unless a contrary intention appears by the will; and this provision shall not be varied by the circumstance that the annuity is directed to be paid out of the property generally or that a sum of money is bequeathed to be invested in the purchase of it.

"the bequest was to a wife for her use during her natural lifetime...she to have the control management of the same, and at her death all of the said personal estate remaining shall go to...". It was held that; "One to whom property is bequeathed for her "use" during life is not clothed with power of disposition; for the word "use" during lifetime confines the estate to the to the first taker, since one having a right to use cannot possess absolute power of alienation."

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> Section 61 of the Succession Act provides that "It is not necessary that any technical words or terms of art shall be used in a will, but only that the wording shall be such that the intentions of the testator can be known from the wording." Section 74 of the same Act provides that "The intention of the testator is not to be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible."

Therefore, a bequest to any person for a lifetime of that person, grants an estate or interest for life only of the legatee. And upon death of the legatee, the bequest reverts to the testator's estate or the beneficiary named in the will. This is in effect what the late Erienza Sebowa Yawe intended by his words in his will tha; "Upon the death of my wife F. M. N. Yawe, the rooms that have been bequeathed to her on the property, shall devise to Fred Mawejje." There was no uncertainty or ambiguity in the testator's Will, the intention was clear. The plaintiff was the remainder man, upon Florence Nambwayo Yawe's death, her life tenancy was to terminate and the property would revert to the plaintiff.

In reply, counsel for the 2nd Defendant relied on S. 38A and 39 of the Land Act Cap 227 as amended in 2010 and the Case of Kolya Vs Kolya /2020/ UGHCFD 4 in which Justice Namundi presiding over the Family Court held that on Death of a Spouse, all Matrimonial Property is inherited absolute by the surviving Spouse. Similar Principle was held in *Katuramu v Katuramu [2018/UGHCLD 55* and Tumwebaze Vs Mpeirwe & Or [2013] UGHCLD. Justice Namudi stated that: -Men and women are entitled to equal rights in marriage, during marriage and at its dissolution. See Article \$31(1)\$ of the constitution. Furthermore, Article \$21(2)\$ of the Constitution forbids discrimination on grounds of sex. Discrimination is defined under Article 21(3) as follows, "To give different treatment to different persons *attributable only or mainly to their description by sex...*"

Counsel further submitted that it was held in the case of *Adong Simon and others Vs Opolot David, Soroti Civil Appeal No.46 of 2013* that the Widow had a right to dispose of the land she inherited from her deceased husband as surviving spouse in light of Article 31 (1) of the Constitution that confers on men and women equal rights at marriage, during marriage and at its dissolution and that as death leads to dissolution of marriage, a surviving Spouse has a right to inherit from her Husband

and She's entitled to benefit from her late Husband's Estate. It was unlawful for the late E. S Yawe to bequeath the matrimonial property to the Plaintiff upon the Death of the Widow without his Spouse's permission and the same could not devolve to the Plaintiff when the widow survived him.

In the case of **Makula International Ltd Vs His Eminence Cardinal Nsubuga** [1982] HCB 11 Court held, inter alia, that: - "A court of law cannot sanction what is illegal. An illegality once brought to the attention of Court, overrides all questions of pleading, including any

admission made thereon." It is thus settled law that an illegality supersedes everything else raised by the parties, even in the instant case.

In addition, counsel submitted that from the foregoing, all that Property which the Testator used to let out when still alive was Family Land from which together with his Wife they derived Sustenance. On the Death of our Father the Testator all that Property devolved absolute to his Wife Florence Nambwayo. The Wife accordingly deals with all Matrimonial Property in her Will in the fairest way to all her. The Rooms comprised in the Suit Property, which our late Mother in her Will bequeathed to the Second Defendant and her Children, on the death of our Father became hers absolute as the surviving Spouse, since they formed part of Land from which the Family derived sustenance as provided in S38A (4) (d) and 39 of the Land Act.

> The Testator, legally had no right to include these Rooms in his Will as his property as Cleary provided in S.38A and 39 of the Land Act since the Testator in his Will, gave his Wife these Two Rooms for Life only, it means they were for her Sustenance. The Testator then has no Right according to Section 38A and 39 when his no longer

living, to assume that he can be queath the same Rooms to the Plaintiff. This being Land from which the Widow derives a Living, they belong to her absolute.

This court therefore finds that both defendants have no interest in the suit property as the 1st defendants was never bequeathed any part of the suit and the 2nd defendants could not clam an interested in the suit land derived from the late Florence Nambwayo as she had not right to pass any interest in the suit property under her will.

Issue 3: Remedies are available to the parties

Counsel for the plaintiff submitted that the plaintiff submits that having proved that he is the registered proprietor to the suit property and also being entitled to the interest given to his late mother for her life, the plaintiff has discharged his burden, whereas the defendants have not. Accordingly, we submit that plaintiff's prayers in (a) and (b) above be granted and a specific consequential order be issued to the Commissioner for Land Registration to de-register the caveats lodged by the defendants.

The plaintiff is also entitled to general damages. Section 142 of the Registration of Titles Act provides that "Any person lodging a caveat with the registrar, either The plaintiff is also entitled to general damages. Section 142 of the Registration of against bringing land under this Act or otherwise, without reasonable cause, shall be liable to make to any person who may have sustained damage by the lodging of the caveat such compensation as the High Court deems just and orders. "The amount to be awarded is a matter of discretion of the trial court which must be exercised judicially per Paulo Kaweesa, supra at page 1.

In the instant case the defendants lodged these caveats 7 years ago. As a result, the plaintiff has been greatly inconvenience by having to deal with the buyer who still awaits a transfer. Plaintiff has had to undergo the rigors of litigation of defendants' frivolous claims which the defendants have always known to be without merit. It is my considered opinion given the facts of this case that an award of UGX. 25,000,000 (twenty five million only) as general damages would be reasonable in the

With regard to costs the rule applicable as held in the case of **Francis Butagira* Versus Deborah Namukasa* (1992-1993) H. C. B 98 At 101 that: -

"The general rule is that costs shall follow the event and a successful party" should not be deprived of them except for good cause. This means that the successful party is entitled to costs unless he is guilty of misconduct or there is some other good cause for not awarding costs to him. The court may not only consider the conduct of the party in the actual litigation but matters which led up to the litigation."

The Defendant's case is dismissed for having failed to establish any claim of right or interest to the suit property. Judgment is accordingly entered in favour of the plaintiff and the following Declarations and orders are made accordingly:

- a) A declaration that the Defendants have no caveatable interest in the suit land.
- b) An order for de-registration of the caveats lodged by the defendants:
- c) The Defendants to pay the Plaintiff General damages of UGX 25 million; and
- d) Costs of the suit.

It is so ordered.

offered up

CORNELIA KAKOOZA SABIITI JUDGE

Date: 29th October 2021

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