

UGANDA / JUDGMENT

Nakyomu and 4 Others v Namukwaya and 2 Others (Civil Suit 1036 of 2020) [2024] UGHCLD 254 (25 October 2024) [2024] UGHCLD 254

COURT

HC: Land Division (Uganda)

BEFORE

Byaruhanga immaculate, j

CASE / FILE NUMBER

Civil Suit 1036 of 2020

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5 THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA CIVIL SUIT NO. 1036 OF 2020

- 1. NAKYOMU ROBINAH
- 2. KABANDA STEVEN
- 10 3. SANDE HENRY WALAKIRA
- 4. MUDUSE GEORGE
- 5. NYANZI ERISA ALEX ::::::::::::::::::::::::::::::::::: PLAINTIFFS

VERSUS

- 1. NAMUKWAYA EDITH
- 15 2. ROBERT PHILIMEON YAWE
- 3. COMMISSONER LAND REGISTRATION ::::::::::::::::::: DEFENDANTS BEFORE: HON. LADY JUSTICE IMMACULATE BUSINGYE

BYARUHANGA

JUDGMENT

- The plaintiffs brought this suit against the defendants on 11 20 th December 2020 for the following orders;

- a) A declaratory order that the plaintiffs are the lawful owners of land comprised in Kyadondo Block 216 plot 752 land at Kigowa- Ntinda measuring approximately 0.12 hectares (hereinafter referred to as 'the suit land') by 25 virtue of being beneficiaries to the estate of the late Mawejje Elia Zali.
- b) A declaratory Order that the purported transfer of the suit land into the 2nd defendant 's names was fraudulent, null and void abinitio.
- c) An order directing the 3rd defendant to cancel out the 2nd defendant's names on the certificates of title to the suit land and register the plaintiff's name 30 thereon.
- d) An order directing the 1st and 2nd defendants to handover the certificates of title to the suit land to the plaintiffs.
- e) A permanent injunction.

Page 1 of 28

- 5 f) General, punitive and exemplary damages.
- g) Interest on prayer f
- h) Costs of the suit.

Background

The facts constituting the plaintiff's cause of action as alleged in the plaint are that the plaintiffs and the 1st and 2nd 10 defendants are the biological children and beneficiaries of the estate of the late Mawejje Elia Zali to which the suit land comprised in Kyadondo Block 216 plot 752 land at Kigowa Ntinda measuring approximately 0.12 hectares belongs. The plaintiffs contended that their late grandfather (Semu Kiiza Kyalema) during his lifetime bequeathed the suit land to 15 their late father (Mawejje Elia Zali) as a gift inter *vivos*, where their father latter constructed a residential house thereon where he lived with his entire family including the plaintiffs.

The plaintiffs averred that the late Mawejje died before the late Semu Kizza Kyalema could transfer the suit land into the former's names. The plaintiffs claim that after 20 the demise their father, the plaintiffs and the deceased's other children continued to live and utilize the suit land. The plaintiffs claim that after the death of their late grandfather, the 1st and 2nd defendants connived with the late Kiyangi Kulumba to falsely claim ownership of the same and fraudulently transferred the said estate into the 2nd defendant's names in his personal capacity to the detriment of all the other

25 beneficiaries of the estate of the late Mawejje Elia Zali on the baseless allegations that the same was given to the 2nd defendant by the late Semu Kiiza Kyalemu as a gift inter *vivos*.

The plaintiffs averred that the 1st and 2nd defendants in connivance with the 3rd defendant used transfer forms that were expired to transfer the suit land into the

Page 2 of 28

- names of the 2 nd 5 defendant that's to say the purported transfer form was signed in 1986 yet the transfer was effected in 2002. The plaintiffs contended that they were raised on the suit land and they are entitled to their share. The plaintiffs averred that they tried to secure letters of administration for the estate and a certificate of no objection, however, the same was frustrated by the defendants' ill intentions.
- 10 On the other hand, the defendants filed a joint written statement of defence wherein they strongly denied the contents of the plaint. The defendants contended that at the commencement of the suit, they would raise preliminary points of law to the effect that the suit is barred by the statute of limitation, that the same does not disclose a cause and that it is incompetent in as far as the plaintiffs do not bear any locus standi.
- The defendants averred that without prejudice to the above contentions, the 2nd 15 defendant acquired the suit land on 20th August 1986 as a gift inter *vivos* from his late grandfather Semu Kidza Kyalema who was very literate and had professional legal representation from his longstanding lawyer the late David Kulumba Kiingi and the same transaction was witnessed by his grandson Livingstone Ssentamu.
- 20 The defendants further averred that the suit land did not feature in the late Semu Kidza Kyalema's purported will as the same had already been gifted. The defendants averred that at all material times and without any color of right, the plaintiffs have intermittently commenced bogus claims against the defendants.

Court directed the parties to file a joint scheduling memorandum, trial bundles and witness statements and the same was done on 21st 25 September 2023. At the scheduling, the parties agreed on facts and issues for determination as follows;

Among the agreed facts, it was contended that the plaintiffs and the 1st and 2nd defendants are biological children and beneficiaries to the estate of the late Mawejje Elia Zali.

5 Issues for determination:

- *1. Whether the plaint and counterclaim disclose a cause of action against the defendants and counter-defendants.*
- *2. Whether the suit land forms part of the estate of the late Mawejje Eriyazali.*
- *3. Whether the 1st and 2nd defendants fraudulently transferred the suit land into the 2nd* 10 *defendant's names.*
- *4. Whether the late Semu Kyalema gave the suit land to the 2nd defendant as a gift inter vivos.*

- *5. Who is the rightful owner of the suit land.*
- *6. What are the remedies available to the parties.*
- 15 The plaintiffs adduced evidence from two witnesses Nakyomu Robinah (PW1) and Nathan Kaasakwa Kaabunga (PW2), while the defendants also adduced evidence from two witness Namukwaya Edith (DW1), and Ssekabira Moses (DW2).

The parties also relied on documentary evidence which was marked and exhibited. The plaintiffs relied on the following documents;

- 20 *a) Will of the late Semu Kidza Kyalema marked as exhibit PEx.1*
- *b) Letter from Administrator General's office dated 23rd February 2011 marked as PEx.2*
- *c) Letter from Kulumba- Kiingi & Co Advocates dated 30th March 2010 marked as PEx.3*
- *d) Letter from Kulumba- Kiingi & Co Advocates dated 14th* 25 *April 2011 marked as PEx.4*
- *e) Certificate of No. objection marked as PEx.5*
- *f) Letter from Kulumba- Kiingi & Co Advocates dated 26th March 2013 marked as PEx.6*
- 5 *g) Caveat and affidavit in support marked as PEx.7*
- *h) Photograph of the suit land marked as PEx.8*

On the other hand, the defendants relied on the following documents;

- *a) Birth certificate marked as DEx.1*
- *b) Duplicate certificate of title marked as DEx.2*
- 10 *c) Search statement from Ministry of lands marked as DEx.3*
- *d) Letter from M/s Kafeero & Co Advocates dated 11th August 2020 marked as DEx.4*
- *e) Letter from M/s Kiingi & Co Advocates dated 18th August 2020 marked as DEx.5*
- *f) Letter to Musoke Tom dated 21st* 15 *September 2020 marked as DEx.6*
- *g) Mutation form marked as DEx.7*
- *h) White page of the certificate of title marked as DEx.8*
- *i) Transfer forms marked as DEx.9(a)*
- *j) Application for consent to transfer marked as DEx.9(b)*
- 20 *k) Removal of charge marked as DEx.10.*
- *l) Caveat dated 20th July 2012 marked as DEx.11*

Representation

At trial, the plaintiffs were represented by the **Counsel Nyamate Anita** from M/s Kafeero & Co Advocates while the 1 st and 2nd defendants were represented by

25 **Counsel Eric Kiingi** from M/s Eric Kiingi & Co Advocates.

Locus visit

- On the 19 5 th August 2024, while in the presence of both Counsel, the plaintiffs and the 2nd defendant, Court visited locus in quo pursuant to **Practice Direction No. 1 of 2007** which requires that courts handling land matters should as so far as possible, interest themselves in physically visiting properties under dispute before pronouncing themselves on the proprietary rights of the parties.
- 10 The purpose of visiting the *locus in quo* in a nutshell, is to clarify on evidence already adduced in court thereby enabling the trial court to understand the evidence better. It is also intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of oral testimony and therefore must be limited to an inspection of the specific aspects of the case as canvassed during the oral testimony
- 15 in court and testing the evidence on those points only. *(See Odongo Ochama Hussein versus Adul Rajabi HCCA No. 119 of 2018)*

Burden and standard of proof in Civil Cases

In civil matters like the instant case, the burden of proof rests on the plaintiff and in the counterclaim, on the counterclaimant. The standard of proof is on a balance of

20 probabilities.

According to Section 101(1) and (2) of the Evidence Act Cap.6 Laws of Uganda,

"*Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he or she asserts must prove that those facts exist".*

25 When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. **Section 102 of the Evidence Act** goes on to provide that;

> *"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side and Section*

> > Page 6 of 28

5 *103 provides that "the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law that proof of that fact shall lie on any particular person".*

Parties' submissions

10 As directed by court bot counsel filed written submissions and I shall put the same into consideration before arriving at my decision.

Regarding the first issue on whether the plaint and counterclaim disclose a cause of action, it was counsel for the plaintiff's submission that the plaint clearly indicates that the plaintiffs are the biological children and beneficiaries of the late Mawejje

- 15 Elia Zali who was the rightful owner of the suit land and as such they are entitled to their share on the said land. Counsel for the plaintiff further submitted that the suit land was bequeathed to the plaintiffs' late father by their late grandfather Semu Kizza Kyalema, where the plaintiffs' late father lived and built a residential house thereon without any claims from the late Kyalema and the 1st and 2nd defendants.
- Counsel for the plaintiffs argued that the 1st and 2nd defendant connived with the 3rd 20 defendant and used transfer forms that were signed in 1986 to effect a transfer in 2002, and thereafter, the 1st and 2nd defendants proceeded to demolish the plaintiffs' residential house on the suit land. Counsel for the plaintiffs also averred that the 2nd defendant went ahead to exhume the late Mawejje's remains without the consent of 25 the rest of the family. Counsel concluded that all these actions coupled with the
- above indicated ill intention of depriving the plaintiffs of their land and the same is proof that the plaintiffs have a cause of action.

In reply, it was counsel for the defendants' submission that in order to prove their claim over the suit land, the plaintiffs referred to the purported will and testament of

30 the late Semu Kidza Kyalema marked PE1, however, during cross examination,

- 5 Nakyomu Robinah admitted under oath that the purported will did not make mention of the late Mawejje among his four sons. Furthermore, counsel submitted that the purported will never made mention of the suit land and secondly, it did not mention the fact that the suit land was bequeathed to the late Mawejje and neither was one of the witnesses to the said will still being alive produced in court as a witness to attest
- 10 to the authenticity of the will.

Counsel for the defendants also argued that during cross examination, the plaintiffs admitted that they never resided on the suit land after the death of their late father and neither did their mother. Counsel also argued that PW1 admitted that the 1st and 2 nd defendants were minors when the 2nd defendant acquired the suit land by bequest

- 15 from his late grandfather and neither did the plaintiffs bring any claims against the defendants during the lifetime of the late David Kulumba Kiingi (the former advocate of the late Semu Kidza Kyalema) whom they allegedly claim to have connived with the 1st and 2nd defendants to transfer the suit land into the 2nd defendant's names.

- Counsel for the 1st and 2nd 20 defendants relied on the case of **Mpugu Ronald & 5 ors versus Damulira Abdu & 3 ors HCCS No. 73 of 2018** wherein Hon Justice Wilson Musalu Musene held inter alia that, "...*However, I have already alluded to neither the plaintiffs nor anyone challenged the alleged misuse and abuse of power of Administrators by Ntabade and Nabbosa had died and then 20 years later came up*
- 25 *with the present case. The plaintiffs have not come to court with clean hands and court holds that they have no bonafide interest in the Estate of the Late Susana Ntambi. The 1st defendant is therefore a lawful and bonafide holder of the mailo interest in the suit land."*

Counsel for the 1st and 2nd defendants submitted that conclusively the plaintiffs have failed to discharge their burden of proving they have a cause of action against the 1st 30

Page 8 of 28

- defendant who is the caretaker of the suit land as appointed by the 2nd 5 defendant. In conclusion, counsel submitted that the 2nd defendant who was a minor aged 14 years in 1986 lawfully acquired the suit land from his late grandfather Semu Kiiza Kyalema and all the due legal processes were followed.
- On the second issue relating to whether the suit land formed part of the estate of the 10 late Mawejje, it was counsel for the plaintiffs' submission that the late Semu Kiiza Kyalema bequeathed the suit land to his late son Mawejje Elia Zali. Counsel further submitted as the owner of the suit land, the late Mawejje occupied and utilized the same by constructing a residential house without any claims from any third parties. Counsel for the plaintiffs further submitted that the late Mawejje died before his late
- 15 father could transfer the suit land into the late Mawejje's names. In addition, counsel for the plaintiffs submitted that the late Mawejje was buried on the suit land, however, his remains were exhumed by the 1st and 2nd defendants without the knowledge of the plaintiffs who are also children of the late Mawejje Elia.
- In reply, counsel for the 1st and 2 nd defendants submitted concurrently on the second 20 and fourth issue as the same are related. It was his submission that there is no known estate of the late Mawejje Eria Zali as what the plaintiffs attempted to acquire was letters of administration for the estate of their late grandfather Semu Kiiza Kyalema but the same was never completed. In conclusion, counsel submitted that the plaintiffs failed to adduce evidence to support their claim that the late Semu Kiiza 25 Kyalemu had bequeathed the suit land to the late Mawejje Eria Zali.

On the issue of fraud, counsel for the plaintiffs submitted that the 2nd defendant is currently registered as the proprietor of the suit land alleging that the same was bequeathed to him by their grandfather (the late Semu Kiiza Kyalema), however, during cross examination, the DW1 admitted that their late father lived on the suit

Page 9 of 28

5 land wherein he constructed a residential home and lived in the same with his children.

Furthermore, counsel for the plaintiff submitted that the 1st and 2nd defendants used transfer forms that were signed in 1986 to have the 2nd defendant registered on the certificate of title of the suit land in 2002. In addition, counsel for the plaintiffs also 10 submitted that the plaintiffs tried to obtain letters of administration for the estate of

the late Mawejje Elia Zalia, however, the same was frustrated by the 1st and 2nd defendants due to their ill intentions of defrauding the plaintiffs of the suit land.

Counsel for the plaintiffs also submitted that the 1st and 2nd defendants demolished the residential house where the plaintiffs stayed and also exhumed the remains of 15 their father without the knowledge and the consent of the plaintiffs. In conclusion,

- counsel for the plaintiffs submitted that the evidence presented to this court indicates that the 2nd defendant was illegally and fraudulently registered on the suit land at the detriment of the plaintiffs
- In his response, counsel for the 1st and 2nd respondents submitted on the third and 20 fifth issues concurrently as well. Counsel argued that the standard of proof of the alleged fraud committed by the 1st and 2nd defendants has not been made out. Furthermore, counsel also submitted that the plaintiffs miserably failed to strictly prove the allegations of fraud against the 1st and 2nd defendants especially in the acquisition of the suit land by the 2nd who therefore lawfully owns the suit land.
- Counsel also submitted that the suit land was transferred into the names of the 2nd 25 defendant by his late Grandfather Semu Kidza Kyalema and as such counsel prayed that this court find that the suit land belongs to the 2nd defendant.

Decision

5 With this background, I shall proceed to evaluate the evidence on record and resolve the issues raised by the parties.

Before, I resolve the issues before hand, I shall deal with a preliminary point of law raised by counsel for the 1st and 2nd respondents in relation to the cause of action being limited by the statute of limitation. In paragraph 1 of counsel for the 1st and 2 nd 10 respondents' submissions, counsel argued that the plaintiffs lack locus standi arising from the fact that their cause of action is barred by the statute of limitation.

In reply, counsel for the plaintiffs submitted that **Section 25 of the Limitation Act** provides that where an action is based on fraud of the defendant or his or her agent or any person through whom he or she claims or his or her agent, the period of 15 limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable due diligence have discovered it. Furthermore, counsel for the plaintiffs submitted that the plaintiffs have locus

standi to institute this suit against the defendants a children and beneficiaries of the late Mawejje Elia Zali having discovered fraud on the part of the 2nd defendant in 2020.

- 20 In the decision of **Tororo Cement Co. Ltd versus Frokina International Ltd Supreme Court Civil Appeal No. 2 of 2001**, the term 'locus standi' was defined relying on the case *Njau & ors versus City Council of Nairobi (1976-1985)* 1 RA 397 at 407 as cited in **Dima Domnic Poro versus Inyani Godfrey & Anor HCCA No. 17 of 2016**, as a place of standing. Court went ahead to state that it means a right
- 25 to appear in court, and conversely to say that a person has locus standi means that he has a right to appear or be heard in a specified proceeding.

According to paragraph 5 (a) of the plaint, the plaintiffs instituted this suit against the defendants in their capacity as the beneficiaries of the late Mawejje Elia Zali. It was an uncontested fact that the late Mawejje Elia Zalia was a son to the late Semu

- 5 Kiiza Kyalema, the former registered proprietor of the suit land. It is the plaintiffs' contention that their late grandfather Semu Kiiza Kyalema bequeathed the suit land to their late father Mawejje Elia Zalia as a gift inter **vivos**. The plaintiffs further contended that they lived on the suit land during their father's lifetime wherein the late Mawejje built a residential house for his family.
- 10 The issues relating to the validity of gift inter **vivos** and whether the suit land formed part of the Late Mawejje's Estate are substantive issues before this court and the same shall be resolved after establishing whether there is a cause of action or not.

The law provides that actions for recovery of land must accrue within twelve years' least they are time barred as stipulated in **Section 5 of the Limitation Act, Cap 290**

15 (Revised Laws of Uganda, 2023) stipulates as follows;

Limitation of actions to recover land

"No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or, if it first accrued to some person through* 20 *whom he or she claims, to that person".

However, the cause of action at hand in the instant case is fraud and as cited by Counsel for plaintiffs, **Section 25 of the Limitation Act** stipulates that the time of limitation for actions based on fraud does not start to run until the plaintiffs discover the said fraudulent action. In reply, counsel for the plaintiff submitted that that the 25 plaintiffs lived on the suit life all their lives until 2005 when they were chased away from the same by the 1st and 2nd defendants, 19 years after their father's death. According to paragraph 15 of PW2's (Nathan Kaasakwa Kaabunga) witness statement, it was stated that the suit property was fraudulently transferred into the 2 nd defendant's names in 2002.

Page 12 of 28

In paragraph 5 (g) of the plaint, the plaintiffs contended that the 1st and 2nd 5 defendants connived with the 3rd defendant by using transfer forms which were executed in 1986 to transfer the suit land in the 2nd defendant's names in 2002.

During cross examination, PW1 testified that she got to know about the transfer in 2005. Furthermore, PW1 (the 1st plaintiff) testified that she only filed this case in 10 2020 because she had already involved the Minister and other authorities. In addition, PW1 testified that she even approached the Administrator General who advised her to bring a case to court and the same is corroborated by PEx2 wherein the plaintiffs approached the Administrator General's office in 2011.

- I therefore, conclude that the plaintiffs' claim of fraud as against the defendants was discovered in 2005 after the said transfer of the suit land into the 2nd 15 defendant's names and subsequently in 2005 when they were allegedly chased away from the suit land. However, the plaintiffs waited for 15 (fifteen) years to institute this suit in 2020. Therefore, in accordance with **Section 5 and 25 of the Limitation Act (supra)**, it is my finding that the plaintiffs' claim is barred by the statute of limitation
- 20 for having been filed over 12 (twelve) years from the date of discovery of the alleged fraud. Therefore, this point of law is answered in the affirmative. **********

Given the nature of reliefs prayed for it is very important that I should proceed to resolve the issues on their merits so as to ensure that the ends of justice are met.

Issue No. 1: Whether the plaint and the counterclaim disclose a cause of action 25 *against the defendants and the counter-defendants?*

It is trite that a cause of action is disclosed when it is shown that the plaintiff had a right and the right was violated resulting into damages and the defendant is liable. In the decision of **Tororo Cement Co. Ltd versus Frokina International Ltd S. C. Civil Appeal No. 2 of 2001**, Justice Oder (JSC) stated that,

Page 13 of 28

- 5 "A cause of action means every fact held that which is material to be proved to enable the plaintiff to succeed or every fact which, if denied, the plaintiff must prove in order to obtain judgment. The Hon. Justice went ahead to say that "what is important in considering whether a cause of action is revealed by the pleadings are the questions whether a right exists and whether* 10 *it has been violated. The guidelines were stated by the Court of Appeal for East Africa in *Auto Garage versus Motokov* no.3 1971 EA 514. They are;*
- *a. The plaint must show that the plaintiff enjoyed a right.*
- *b. That right has been violated; and*

- *c. That the defendant is liable.*
- 15 Justice Oder went ahead to suggest that if all three elements are present, then cause of action is disclosed and any defect or omission can be put right by amendment.

In the instant case the plaintiffs' basis of their claim is that their late grandfather Semu Kiiza Kyalema gifted their late father Mwanje Elia the suit land and as such they are entitled to their share which was taken over by the 2nd defendant when the 20 suit land was registered in the latter's names. During cross examination by Counsel for the 1st and 2nd defendants, it was PW1 (Nakyomu Robinah)'s testimony that her late grandfather Semu Kidza Kyalema gave her father the suit land as a gift. PW1 further told court that she was born on the suit land and that her father Mawenje was buried on the sameland in 1986 as well as some other children. PW1 testified that

25 the remains of her late father Mawenje were exhumed and shifted to Bulemezi. PW1 also testified that the plaintiffs were chased away from the suit land in 2005 by the 1st and 2nd defendants.

In corroboration, during cross examination by counsel for the 1st and 2nd defendants, PW2 testified that he is the elder brother to the late Mawenje and a biological son of

Page 14 of 28

- 5 the late Semu Kidza Kyalema. PW2 also testified that the suit property belonged to the late Mawenje. During cross examination by Counsel for the 3rd defendant, PW2 testified that his late father Semu Kyalema specifically bequeathed the suit property to Mawenje Elia Zali. However, when asked whether he understood the meaning of bequeath as referred to in paragraph 10 of his witness statement, PW2 testified and
- 10 I quote, "*By bequeathed, I do not understand what I meant.*". PW2 further testified that he built a house for the late Mawenje on the suit land.

In further corroboration, during cross examination by counsel for the plaintiffs, DW1(Namukwaya Edith) told court that the late Mawenje used to live on the suit land before he died. DW1 also testified that her grandfather, the late Semu Kidza

15 Kyalema was still alive when her father was on the suit land. DW1 equally testified that the late Mawenje was first buried on the suit land since there was a war in 1986 and his body could not be taken to the village, but later the graveyard was shifted.

It is an uncontested fact that the plaintiffs and the 1st and 2nd defendants are biological children of the late Mawenje Elia Zali and as such they are siblings. It is also an admitted fact by both the plaintiffs and the 1st and 2nd 20 defendants that the late Mawenje used to live on the suit land until his demise in 1986.

Since the plaintiffs are biological children of the late Mawejje who used to occupy the suit land with his family, I am satisfied that the plaintiffs are beneficiaries of the deceased and have the right to claim for the suit land where their late father lived as

against the 2nd defendant who is the registered proprietor and the 3rd 25 defendants as the authority responsible for effecting land transfers and registration.

Whether the cause of action can successfully be sustained, is an issue for determination in the subsequent issues, however, at this point in time, I am satisfied that the plaintiffs have a valid cause of action against the defendants thought brought

5 out of time as already indicated above. Regarding the issue whether the counterclaim discloses a cause of action against the counter defendants' counsel for the plaintiffs did not submit on this issue and I will not go ahead to resolve the same.

Issues No. 2 and 4: Whether the suit land forms part of the Estate of the late Mawejje Elia Zali AND Whether the late Semu Kidza Kyalema gave the suit land to the 2nd

10 *defendant as a gift inter vivos.*

In order to avoid repetition, these two issues shall be resolved concurrently since the same are related. The resolution of issue 4 shall ultimately resolve issue 2.

In the instant case, the plaintiffs contended in their pleadings that the late Semu Kidza Kyalema bequeathed the suit land to their late father Mawejje Elia Zali. It is 15 very important to first determine what amounts to a gift inter vivos.*

The **Blacks' Law Dictionary (8 th Edition)** page 2058, defines a gift inter vivos* as a *gratuitous as an act done or performed without obligation to do so, given without consideration in the circumstances that do not otherwise impose a duty.* Following this definition, it is my understanding that a gift inter vivos* must be given 20 unconditionally without any requirement of any consideration. In the case of **Arthur Ssajjabi versus Catherine Namutebi Muyizzi & Anor** **Court of Appeal Civil Appeal No. 25 of 2017**, Hon. Justice Christopher Madrama Izama (JA) as he then was, conclusively discussed the meaning of a gift inter vivos and stated as follows;

25 "The term inter vivos is defined by the Blacks' Law Dictionary to mean in latin "between the living" of or relating to property conveyed not by will or in contemplation of an imminent death, but during the conveyor's lifetime.*

5 *The Oxford Dictionary of law further defines a gift to mean: A gratuitous transfer or grant of property. A legally valid gift must normally be effected by deed, by physical delivery in the case of chattels or by donation mortis causa; the donor must intend ownership to pass a gift. However, an imperfect gift (i.e. one for which the legal* 10 *formalities have not been observed) may be treated as valid in equity in certain circumstances. A gift by will takes effect only on the death of the testator.*

In determining whether the deceased created a gift **inter vivos** in respect of the disputed land, court has to ascertain the intention of the donor, and then examine whether the formal requirements of the method of disposition which he attempted to make have been satisfied. Mellows in **The Law of Succession 5th Edition, Butterworth 1977** pages 9 to 10 states as follows; regarding gifts **inter vivos**:-

**"Various formalities are necessary for gifts inter vivos. Thus, a gift of land must be by deed; a gift of land where the title is registered, a deed 20 of transfer must be executed.*"*

In the case of **Joy Mukobe versus Wambuwu HCCA No. 55 of 2005**, court laid down the salient features of a gift *inter vivos*;

- **a) A donor must intend to give a gift**
- **b) The donor must deliver the property**

25 **c) The donee must accept the gift.**

A gift made between living persons (**inter vivos**) is a transfer of property from one person to another gratuitously while the donor is alive and not in the expectation of death. In this case, property is voluntarily transferred from the true owner in possession to another person with the full intention that the property shall not return

Page 17 of 28

- 5 to the donor. (See **Kalimba versus The Registrar of Titles & Anor HCCS No. 20 of 2024**) It has been said that there must be an intention on the part of the recipient to retain the property entirely as his own without restoring it to the giver. But it is sufficient for the donee to take the property, keep it and knowing he has done so. (See **Halsbury's Laws of England, Vol. 52, 5th Edition at Page 1.**) Making a gift **inter vivos** may take three basic forms;
- **a) By executing a deed or other instrument in writing**
- **b) By delivery of the subject to the gift (more applicable to moveable property)**
- **c) By declaration of a trust, which in essence is the equitable equivalent 15 of a gift.**

The Court of Appeal in the case of **George William Kalule versus Norah Nassozi and Another CACA 29 of 2014** made reference to Odunga's Digest on Civil Case Law and Procedure volume III page 2417 paragraph 5484 to hold that there are only three conditions necessary for a gift *inter vivos* to be valid and there are; the donor must intend to give the gift, the donor must deliver the property to the donee and the donee must accept the gift and take possession of it. The Court of Appeal went on to hold that;

"where the donor has done all in his power according to the nature 25 of the property given to vest the legal interest in the donee, the gift will not fail even if something remains to be done by the donee or some other person".

5 It is my understanding that an estate in land must be granted by deed or other written instrument which makes the parties' intentions clear.

As earlier stated, during cross examination by counsel for the 1st and 2nd defendants, PW1 testified that the suit land was gifted to their late father Mawejje Elia Zali by their grandfather the late Semu Kidza Kyalema. This evidence was corroborated by

10 PW2's testimony during cross examination by Counsel Eric Kiingi. During reexamination, PW2 testified that his father (the late Semu Kyalema) never gave land to Mawejje but rather asked him to build a house for Mawejje which was done.

During cross examination by Miss Arinaitwe Sharon, counsel for the 3rd defendant, PW1 testified that she did not have any document to show that her grandfather had 15 given the suit land to her father. Similarly, PW2 also testified during cross examination that he had evidence that the suit property belonged to the late Mawejje however, the same was not written. In cross examination PW2 stated "I do not have documents/proof that my father gave land to my brother (Mawejje)". In paragraph 8 of her witness statement, PW1 testified that the late Mawejje died before the late 20 Semu Kyalema could transfer the suit land in the former's names.

I have critically studied exhibit DE8 (certificate of title for Kyadondo Block 216 plot 752) which is proof that the suit land was originally owned by the late Semu Kidza Kyalema who was registered on the certificate of title on the 18th day of September 1973 at 10:20 am vide KLA7088. This is proof that the suit land is 25 registered land. In addition, it was an admitted fact by the plaintiff witnesses that there is no documentary evidence to prove that the late Semu Kidza Kyalema granted a gift inter vivos to the late Mawejje.

Whereas, it was admitted by the 1st defendant during cross examination that the late Mawejje Elia occupied the suit land and was even buried on the same in 1986 before

Page 19 of 28

- 5 his remains were exhumed and transferred to the family burial grounds in Buleemezi Nakaseke District, the plaintiffs did not adduce any cogent evidence to prove that the late Semu Kidza Kyalema had transferred any proprietary interest to his son the late Mawejje Elia. Basing on the above mentioned authorities, in order to prove a gift, inter *vivos*, a deed in writing must be executed in favour of the donee by the
- 10 donor and in cases of registered land, a transfer instrument should be executed to complete the process of a gift inter *vivos*. In the instant case, the same was not done in favour of the late Mawejje.

The plaintiffs contended that their late father passed away before the late Semu Kyalema could execute the transfer instrument in favour of the late Mawejje. It was

- the plaintiffs' witnesses' testimony that the late Mawejje passed away on 26th 15 October 1986 from the suit land where he was living. According to exhibit DE8, the late Kyalema was registered on the suit land in 1973 hence making him the registered proprietor, a fact which was not contested. If indeed the late Semu Kidza Kyalema had intended to transfer the suit land into the late Mawejje's names as stated by the 20 plaintiffs, there was ample time between 1973 and 1986 to execute the said transfer
- instruments, however, the same was not done.

On the other hand, the defendants/ counterclaimants contended that the suit land was gifted to the 2nd defendant (Robert Philimeon Yawe) by his grandfather the late Semu Kidza Kyalema and a transfer instrument was executed. I have critically reviewed

exhibits DE9 (a) which is a transfer instrument executed in favour of the 2nd 25 defendant and exhibit DE9 (b) which is an application for consent to transfer or sublease.

According to DEx9 (a) the late Semu Kidza Kyalema executed a transfer instrument in favour of the 2 nd defendant Robert Firimoni Yawe on 20th August 1986 for land 30 comprised in Kyadondo Block 216 plot 752 (the suit land herein) as a minor and a

Page 20 of 28

- 5 consent for transfer was given per exhibit DEx9 (b). PW1 testified during cross examination that the 2nd defendant was 13 years in 1986 and equally PW2 testified during cross examination by counsel for the 1st and 2nd defendants, that in 1986 the 2 nd defendant (Yawe) was aged around 12-14 years. This evidence is proof that the 2 nd defendant was gifted the suit land in 1986 while he was a minor.
- It is the plaintiffs' contention that the late 1 st and 2nd 10 defendants used expired transfer forms to transfer the suit land into the 2nd defendant's names. However, according to paragraph 8 of the DW2 (Ssekabira Moses (Registrar of titles)'s witness statement, it was stated that there is nothing wrong or illegal to rely on a transfer form that was signed on 20th August 1986 to transfer the suit land in the 2nd defendant's names on 28 15 th August 2002 since transfer forms can never expire. Furthermore, during cross examination, DW2 testified that land conveyancing can be done through a transfer in form of a gift deed. In addition, during re-examination DW2 testified that the 3rd defendant relied on the transfer form (DEx9 (a) and the
- 20 In light of the above evidence, it should always be noted that he who alleges must prove on the set standard of proof. In the instant case, the plaintiffs claim that their late father was gifted the suit land by his late father Semu Kidza Kyalema, however, they did not adduce any sufficient evidence to prove this fact. The fact that the late Mawejje Elia lived on the suit land is not sufficient to prove that the former was 25 gifted the suit land as a gift inter *vivos*. In the instant case transfer forms were not

consent to transfer) DEx9 (b) to register the suit land in the 2nd defendants' names.

signed in favor of the late Mawejje but rather the same was done in favour of the 2nd defendant.

Therefore, consequent to the above findings, I am convinced that the plaintiffs have failed to discharge their burden in proving that suit land was bequeathed to the late

5 Mawejje Elia Zali as a gift inter vivos and as such, I am satisfied that the same did not form part of the late Mawejje Elia Zali's estate.

Issues No. 3 and 5: Whether the 1st and 2nd defendants fraudulently transferred the suit land into the names of the 2nd defendant AND Who is the rightful owner of the suit land.

- The Plaintiff pleaded that the 1st and 2nd defendants in connivance with the 3rd 10 defendant transferred the suit land into the 2nd defendants' names. It is trite that fraud must be specifically pleaded and proved. Fraud has been defined in a plethora of authorities but I shall rely on the Supreme Court land mark authority as cited by counsel for the plaintiffs of **Fredrick Zaabwe versus Orient Bank & 5 ors SCCA**
- 15 No. 4 of 2006 wherein fraud was defined *as the intentional perversion of truth to part with some valuable thing, a false representation of a matter of fact, whether by words or by conduct, by false misleading allegations, anything calculated to deceive, whether by a single act, combination, a generic term embracing all multifarious means which human ingenuity can devise and which are resorted to by an individual*
- 20 *to get advantages over another by false suggestion or by suppression of truth and includes all surprise, trick, cunning, dissembling and any unfair way by which another is cheated. It comprises all acts, omissions and concealments involving a breach of legal or equitable duty.*

It should be noted that the standard of proof in fraud cases is slightly higher than on 25 a balance of probabilities but not beyond reasonable probability as was held in *Kampala Bottlers Ltd vs Damanico (U) Ltd, SCCA No.22 of 1992*, where it was held that;

> "*Fraud must be strictly proved, the burden being heavier than one on balance of probabilities generally applied in civil matters*. It was

> > Page 22 of 28

- 5 further held that; *The party must prove that the fraud was attributed to the transferee. It must be attributable either directly or by necessary implication, that is; the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act*".

- During cross examination, PW1 testified that the 1st and 2nd 10 defendants together with their mother connived with the Commissioner Land Registration by using expired transfer forms to transfer the suit land into the 2nd defendants' names. During cross examination by counsel for the 3rd defendant, PW1 affirmed that she was not aware whether transfer forms expire. PW1 (1st plaintiff) also testified that she has never
- 15 challenged the signature of the late Semu Kidza Kyalema on the transfer form (DEx9 (a)).

Section 95 of the Registration of Titles Act (revised laws of Uganda) stipulates as follows;

"Every transfer or other instrument shall be deemed of the same* 20 *efficacy as if under seal, and when signed by the proprietor and registered shall be as valid and effectual to all intents and purposes for conveying, passing or conferring the estates, interests or rights expressed to be thereby transferred, leased or created respectively, as a deed duly executed and acknowledged by the same person would have* 25 *been under any law heretofore or now in force, or as any other form of document would have been either at law or in equity".*

During cross examination by counsel for the 1st and the 2nd defendants, PW2 testified that he was not around when the late Semu Kidza Kyalema executed the transfer instrument in favour of the 2nd 30 defendant. It is trite that fraud must be imputed directly on the defendants. I have observed from exhibits DE7, DE9 (a) and DE9 (b), that these documents bear the same signature of the late Semu Kidza Kyalema. Secondly, I have also observed that the said transfer form was executed in favour of

Page 23 of 28

the 2nd 5 defendant while he was minor, a fact that was confirmed by the plaintiff witnesses who testified that in 1986 when the transfer forms were executed, the 2nd defendant was about 13 years.

Whereas, it is true that the suit land was registered in the 2nd defendant's names on 28th August 2002, 16 (sixteen) years after the transfer forms were executed in 1986, 10 the law does not disqualify the said transfer forms as there is no stipulated expiry

- date for transfer forms. Once transfer forms are lawfully executed and the requisite fees are paid, the land or property is vested purchaser. Before the land is finally registered in the purchaser's names, the vendor merely holds the land in trust for the purchaser.
- 15 In the instant case, as the registered proprietor, the late Semu Kidza Kyalema was free to gift the suit land to anyone he so wished which in this case was his grandson (the 2nd defendant). It should be noted that the plaintiffs have failed to discharge their burden to impute any kind of fraud on the defendants. According to DEx9 (a) and (b), the late Semu Kidza Kyalema executed the transfer instruments in favour of the

- 2 nd 20 defendant while he was a child and the third defendant premised on the said documents to transfer the suit land into the 2nd defendant. Therefore, I am not convinced that the plaintiffs have adduced any cogent evidence to impute fraud on the defendants.

The plaintiffs also contended that the 1st and 2nd defendants frustrated their process 25 of obtaining letters of administration for the estate of the late Mawejje. Apart from the averments, the plaintiffs have not proved their case on a balance of probabilities.

In light of the above, it is my finding that the transfer instrument exhibited as DE9 (a) and (b) executed by the late Semu Kidza Kyalema was valid and as such the 3rd defendant lawfully registered the suit land in the 2nd defendant's names on 28th

Page 24 of 28

5 August 2002 vide instrument number KLA240249. Therefore, I find that the suit land belongs to the 2nd defendant Robert Philimone Yawe.

Issue No. 6: What are the remedies available to the parties.

Pursuant to my resolution of the issues above, this suit fails. The 1st and 2nd defendants counterclaimed wherein they sought several prayers. The counterclaimants sought court to vacate the caveat that was lodged by the 2nd 10 counter-defendant.

According to exhibit DE11, the 2nd plaintiff/ 2nd counter-defendant lodged a caveat on the suit land 30th July 2012. The primary objective of a caveat is to give the caveator temporary protection. It is not the intention of the law that the caveator

15 should relax and sit back for eternity without taking steps to handle the controversy so as to determine the thoughts of the parties affected by its existence** (See; **Boynes Versus Gather (1969) EA 385**) It is a well settled principle of law that a caveat acts as a statutory injunction which fetters a registered proprietor from dealing with his property and exercising all the rights conferred upon him because of its far-reaching 20 effect, it is vital that claims made by the caveator are enforced by action without

In the instant case, apart from lodging a caveat, the plaintiffs instituted this case. Following the results above and having found the suit land lawfully belongs to the 2 nd defendant/ counterclaimant, I find that the caveat no longer serves any interest

25 and the same should be vacated.

Special damages

undue delay.

It is trite law that special damages must not only be specifically pleaded but they must also be proved (see **Borham Carter v. Hyde Park Hotel [1948] 64 TLR**). In

Page 25 of 28

5 the case of **Attorney General vs. Lutaaya Supreme Court Civil Appeal No. 16 of 2007**, *the Supreme Court held that special damages may only be awarded if they have been specifically pleaded and strictly proved by the plaintiff.*

In their counterclaim, the counterclaimant sought court for special damages, however, no evidence in proof of the same was produced in court. If anything, during 10 cross examination, DW1 testified that the counterclaimant has tenants on the suit land who pay him rent. This was equally observed by court at during the locus in quo proceedings.

Therefore, the prayer for special damages fails.

General damages

In regards to general damages, **Vol. 12 Halsbury's Laws, 4th 15 Edition, para. 1202** states that the rationale for general damages was expounded as follows:

> **"Damages are pecuniary recompense given by process of law to a person for the actionable wrong that another has done to him."**

In the case of **Luzinda v. Ssekamatte & 3 Ors (Civil suit -2017/366 [2020] 20 UGHCCD 20 (13 March 2020)**, *this court held that as far as damages are concerned, it is trite law that general damages be awarded in the discretion of court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued because of the actions of the defendant. It is the duty of the claimant to plead and prove that there were damages, losses or injuries suffered as a result of the* 25 *defendant's actions*.

During the locus in quo proceedings, court observed that the counterclaimant is currently in occupation of the suit land wherein the suit land is being used by his tenant and the former is realizing rent. Similarly, during cross examination, DW1

Page 26 of 28

testified that she takes care and manages the 2nd 5 defendant's property (suit land) since he resides in the United States of America. Therefore, I am not convinced that the 1st and 2nd defendants have not suffered any physical or emotional distress.

This prayer equally fails.

Costs

- **10 Section 27(2) of the Civil Procedure Act Cap 71** provides that the effect that costs shall be in the discretion of the court and shall follow the event unless for good reasons court directs otherwise. According to the record on 19th August 2014 court directed counsel for the plaintiffs to file written submissions by 18th September 2024, Counsel for the defendants reply by 3rd October 2024 and rejoinder by 14th October

- 15 2024. According to the court receiving stamps the plaintiffs' counsel submitted on 27th September 2024, Counsel for defendants replied on 8th October 2024 and rejoinder was filed on 21st October 2024. None of the advocates followed the schedule set by court. According to the case of *Patrick Mukasa versus Andrew Douglas Kanyike SCCA No. 13 of 2022* when the advocates fail to adhere to 20 schedules set by court, costs are denied. In this case, the advocates failed to adhere to the schedules of court, therefore, each party shall bear its own costs.

In conclusion, I order as follows;

- 1. This suit is dismissed.
- 2. The suit land comprised in Kyadondo Block 216 Plot 752 at Buye Kigowa Ntinda lawfully belongs to the 2nd 25 defendant.
- 3. An order doth issue to the 3rd defendant to vacate the caveat dated 30th July 2012 lodged by Kabanda Steven on the suit land comprised in Kyadondo Block 216 Plot 752 at Buye Kigowa Ntinda.
- 4. Each party shall bear its own costs.

Page 27 of 28

5 I so order.

Judgment delivered at High Court, Land Division via ECCMIS this 25th day of October 2024.

Immaculate Busingye Byaruhanga Judge

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Prepared on 13 October 2026 · Esheria