

IN THE HIGH COURT OF UGANDA AT KABALE

CIVIL APPEAL NO. 034 OF 2023

(ARISING OUT OF LAND CLAIM NO. 14 OF 2017)

1. SEMAJERI STEPHEN

2. SEHUKU JOHN

3. NIYONZIMA TOM APPELLANTS

VERSUS

1. NYIRAMFABAKUZE NORAH

2. CYIZANYE JELORINA RESPONDENTS

JUDGMENT OF HON. JUSTICE KAROLI LWANGA SSEMOGERERE

This is an appeal from the decision of the learned Chief Magistrate Mr. Komakec Kenneth in Land Claim No. 14 of 2017 in a claim for trespass by the respondents against the appellants; to land situated in Kashejesha village (the “suit land”), Kisoro Municipality, Kisoro district. I have intentionally omitted the land descriptions, that use the conventional method of neighbors as they are not essential to consideration in disposal of this appeal. The description “Suit land” is sufficient.

Brief Facts:

Respondents brought an action for trespass against the appellants in the Chief Magistrate’s Court at Kisoro. The respondents sought the following orders;

- (a) They were bona fide and lawful owners of the suit land which they acquired as a gift from their father in 1978;
- (b) A declaration that the appellants were trespassers on the land;



- 5 (c) Eviction against the appellants, their agents, assignees or any person claiming under the appellant's title to the land;
- (d) Demolition of all the illegal structures erected on the suit land;
- (e) Punitive and general damages;
- 10 (f) An award of mesne profits for losses sustained by the respondents for loss of use of the suit land from 2017 when the cause of action arose;
- (g) Interest on general damages, mesne profits and costs of the suit.

The respondent's claim was to the effect that their late father Migusa on August 1st, 1978 called a meeting of his relatives and told them he wanted to give land to his daughters who included the respondents who were also
15 present in the meeting.

The land was subsequently was inspected and boundary marks erected in the in the presence of his relatives. An agreement was made by a one Rwhindagaza and dated August 1st, 1978 in the presence of his relatives. The land was handed over to the 1st respondent for safe custody. That since
20 1978, the respondents enjoyed quiet possession and use of the suit land, using the same for agricultural purposes till 2017 when they were violently evicted by the first appellant who claimed to be the owner of the land. In 2017, the respondents brought a suit to recover the land. During the pendency of the suit, 2nd appellant sold part of the suit land to the third
25 appellant with full knowledge that it was still subject to a dispute.

The appellant's case was to the effect the first appellant bought the suit land on January 27th, 1981 from the same owner, the respondent's father and (his grandfather) for UGX Shs 11,000/= [Eleven thousand shillings only], which was paid in cash. His claim was that he took possession of the suit land. That
30 in August 2001, he sold the suit land to a one Kabera for consideration of UGX 500,000 (Five hundred thousand shillings only) of which he paid UGX 400,000 (Four hundred thousand shillings only), leaving a balance of UGX 100,000 (One hundred thousand shillings only). Further that Mr. Kabera died in the month of September 2001, without paying the outstanding
35 balance, whereupon Mr. Kabera's relatives summoned him and informed him the widow could not afford to pay the balance, he was asked asked to refund the UGX 400,000 (Four hundred thousand shillings only) within 6 months and receive the land, which was put in writing.

5 Thereafter the 1st appellant sold the suit land to the 2nd appellant, who took immediate possession of the suit land. He enjoyed quiet possession until 2016, when the 1st respondent confronted the 1st appellant as to why he had sold their land. That subsequently the 2nd appellant sold the suit land to the 3rd appellant at a consideration of UGX 12,000,000/= (Twelve million
10 shillings only). The purchase price was paid fully and a sales agreement was executed and thereafter the third appellant took possession and undertook construction works.

At trial, three issues were framed for determination by court, at page 3 of the judgment of the Chief Magistrate's Court, these were:

- 15 1. Whether or not the suit land is land the late Migusa sold to the 1st appellant;
2. Whether or not the respondents are trespassers on the land;
3. What remedies were available to the parties.

At trial, testimony led by the respondents was to the effect that PW1, the
20 first respondent was the sister to the second respondent, PW2. That PW1 and PW2 cultivated seasonal crops interchangeably. PW1 also stated that the first appellant was her half brother from a different mother. PW1 also stated that the first appellant without their consent and knowledge sold the suit land to the 2nd appellant, and she only got to know that in 2016.
25 Subsequently the 2nd appellant sold the suit land to the 3rd appellant. She controverted the 1st appellant's claim that he bought the suit land from their father in 1981, since their father had already given the first and second respondents, the suit land. Under cross examination, she admitted she was still young and didn't sign the agreement. She was only 15 years old. She
30 also admitted that her father sold some land to the first appellant.

Testimony by the first appellant was to the effect that the respondents were daughters of the late Migusa, and were suing him over a different piece of land. He maintained he purchased the land in 1981, and that the late Migusa was his grandfather. He further testified that the deceased never left a will
35 but left his property to his wife called Nyirabacyaba, and was not aware of any gifts to his daughters during his lifetime. He further testified that he was not aware if any of the children of his grandfather obtained Letters of Administration to administer his estate. Other defence witnesses, namely

5 DW5 denied that the late Migusa ever gave land to the appellants, and that the suit land was the land sold to the first appellant. The third appellant in his testimony said he only learnt that the suit land was subject of a gift in 1978 after he bought the land.

10 Court admitted in evidence, as PEX 1, the copy of the gift dated August 1st, 1978, on which her mother Nyirabacyaba now deceased signed. Locus established that the land was once one parcel of land but had undergone numerous subdivisions of land at page 8 of the judgment. Court found that the third appellant had full knowledge that the suit land was subject of a pending suit. In evaluating the appellants' collective testimony, court refused
15 to believe the 2nd appellant's testimony to the effect that he did not know the history of the suit land, and had made inquiries and found out the suit land belonged to the first appellant. Court also refused to believe 3rd appellant's testimony that he only heard after purchase that the land he had purchased was distributed in 1978.

20 Court held that there was a failure of due diligence on the part of the second and third appellants, the lack of prior consultation and make reasonable inquiries, or ignorance or negligence were part of the particulars of the offence of fraud. Court also noted that the standard of due diligence to be higher on a purchaser of unregistered land, than that of registered
25 land. Court made a finding that the suit land was gift of personal property made in the lifetime of the owner to the respondents, and was delivered to the données with the intention of irrevocably surrendering control over the property. Court found that there was a gift inter-vivos from the donor to the donnees. As a further finding of fact, court found that the description of
30 land sold, to the first appellant was outside the disputed portion of land. Court disbelieved the appellant's testimony that the respondent's father had sold all his land and remained with nothing. It also believed that respondent's testimony that they had cultivated the land until the first acts of trespass in 2017 when they were violently evicted from the land.

35 Court upheld the respondent's claim of ownership, arising from a gift inter-vivos at page 9; and distinguished the parcel of land the same owner sold to the first appellant. Having found that the appellants were not owners of the land, the learned Chief Magistrate declared the respondents owners of the

5 suit land and granted the orders requested, awarded general damages of UGX 5,000,000 (Five million shillings only) and costs of the suit, hence this appeal.

Representation:

10 The appeal was argued by M/S Bikangiso and Co Advocates, for the appellants and M/S Alice Namara and Co Advocates for the respondents. At a hearing on May 13, 2025, parties adopted their submissions, including the submission in rejoinder filed on May 2, 2025, which Counsel for the appellants served on the respondents on Counsel for the respondents.

Grounds of Appeal:

The Appellants framed three grounds of appeal. These are:

1. The learned Chief Magistrate erred in law and fact when he failed to evaluate the evidence thus reaching the wrong decision;
2. The learned Chief Magistrate erred in law when he considered extraneous matters thus reaching the wrong conclusion;
3. The learned Chief Magistrate erred in law when failed to consider the law of limitation;

Discussion and Analysis:

25 The thrust of the appeal, invited Court to consider the same facts, depart from the conclusions of the Chief Magistrate. In short, their case was this fell in the powers of the High Court in exercise of its appellate jurisdiction under **Order 43, Rule 27 of the Civil Procedure Rules, 5-1-71-1, (the "Civil Procedure Rules")**. The appellants invited the court to subject the evidence before the trial court to fresh and exhaustive scrutiny before coming to its own conclusion citing the Supreme Court's decision in **Father Nanensio Begumisa v Tiberage, Supreme Court Civil Appeal No. 17 of 2002**.

5 The duty of the first appellate court has been laid out in many cases, *Kifamunte v Uganda Supreme Court Criminal Appeal No. 10, 1997* being the foremost, which emphasized the duty of the first appellate court to consider the evidence in the trial court on its own, and make its own views on it known. I need not reproduce this reasoning, which is captured in detail
10 in the decision of this court, *Margret Kemitare & Another v Kanyaraju John, Land Civil Appeal No. 26 of 2023*, reported at 2025 UGHC at 316. In civil matters, the principles are the same. In *John Kafeero v Peterson Sozi, Civil Appeal, No. 173 of 2012*, cited in the Kemitare decision (op cit), the Court of Appeal emphasized as follows:

15 “It is the obligation of the appellate court to appraise inferences of fact.” [emphasis mine].

The decision of the learned Chief Magistrate and this Court turns on inferences of fact from the testimony led by the parties at trial. In short, the facts as will be seen in this decision are abundant. It is the interpretation of
20 the facts on which determination of this appeal lies.

The appellants sought to argue the first two grounds together;

1. The learned Chief Magistrate erred in law and fact when he failed to evaluate the evidence thus reaching the wrong decision;
2. The learned Chief Magistrate erred in law when he considered
25 extraneous matters thus reaching the wrong conclusion.

In support of their position Counsel for the appellants faulted the Chief Magistrate for finding that the land the late Migusa sold to the first appellant was different from the land he gifted to the first and second respondents. Counsel argued that the respondents failed to discharge the
30 evidentiary burden of proof under **Sections 101 and 103 of the Evidence Act, Cap 8, (the “Evidence Act”)** noting the following major contradictions in the evidence. These are: (i) that the father of the first appellant, Segatwa Andereya witnessed both the gift deed in 1978 and the sale agreement in 1981; (ii) second that the court admitted both the gift deed and the sale
35 agreement in evidence, and in one agreement, used a thumb-print in 1978 and in the second agreement in 1981, wrote his name; (iii) that the evidence the first respondent gave at the locus contradicted her testimony in court; at

5 the locus she stated she abandoned the land after getting married while in court she stated she had cultivated crops seasonally continuously until 2016 when she was violently evicted from the land;

10 Counsel for the respondents opposed the appeal in toto, noting that no extraneous matters framed in the second ground were cited in their submissions. Counsel for the respondents noted that the appellants failed to impeach the validity of the gift deed, or the fact that the respondents' mother Nyirabacyaba signed the deed. Counsel for the respondents also attacked a contradiction in the appellant's evidence, which are: (i) the first appellant's description of the suit land was different from the findings of
15 court at locus; specifically, that the land bought by the first appellant had a banana plantation while the suit land had eucalyptus trees. Counsel for the respondent denied the assertion by the Counsel for the appellant that the first respondent had last cultivated the land in 1985, this probably being the basis for the claim of limitation in the third ground of appeal.

20 I turn to the record, for substantiation of the claims of either party as to the non-use of the land by the first respondent. The first respondent's testimony, PW1 is at page 4 of the record of proceedings. First respondent challenged First Appellant's cross examination at page 5, when she stated, that at the time the gift agreement was made, the first appellant was in Kampala. This is
25 where preparation of the record of proceedings left a lot to be desired. The entire record, lacks pages numbering, let alone paragraph numbering, making it impossible for Court and the parties to make efficient use of a long and copious record.

30 On this finding alone, where the gift agreement by incontrovertible evidence was corroborated by the first respondent's unchallenged evidence at pages 4 and 5 of the record, I find it imprudent to depart from the learned Chief Magistrates' conclusions having observed the witnesses in court. Nsenga Migusa, the witness to both agreements; 86 years old and DW1, the brother to the respondents made a blank statement at page 9 of
35 the record, when he made a statement to the effect that their late father never gave his sisters any land. In cross-examination, he did not attack the genuineness of the gift deed, and ended stating he shared the same mother with the respondents. At that point, his testimony was beyond repair !

5 Counsel for the appellant passed on the re-examination, as both the evidence in chief and cross examination had failed to shift the evidentiary burden back to the respondents.

Ugandan jurisprudence is settled on the legal and evidentiary burden to prove the existence of a fact on which a party seeking to give judgment as to any legal right depends. Sections 101 and 102 provide for the legal burden. **Section 101 of the Evidence Act**, provides as follows:

“(1) 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.

(2) 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 provides as follows:

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

On the other hand, **Section 103 of the Evidence Act**, provides for the evidentiary burden. Section 103 provides as follows:

“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 the proof of that fact shall lie on any particular person.

Unlike the legal burden, which rests on the plaintiff or claimant, the evidentiary burden can shift. Wagona J., in *Margaret Nsemere and others v Isebo Moses*, HCT-00-LD-0042-2021, reported at *2023 UGHHC 112*, stated:

“Therefore, whereas the legal burden solely lies upon the plaintiff and does not shift, the evidential burden keeps shifting depending on the facts alleged by either side.”

In the instant case, the respondents discharged their evidentiary burden that they had acquired the suit land by a gift inter vivos, then the burden shifted to the first appellant. The first appellant proved he had purchased land, but failed to satisfy court that the land he purchased was the suit land by

5 offering differing descriptions of the land. I find no reason to interfere with the finding of the Chief Magistrate on this point.

In the instant case, it is the respondents who had to prove lawful possession based on ownership in order to sustain a cause of action for trespass.

10 A cause of action in trespass occurs when a person's lawful possession of land is unlawfully interfered with. Justice Mulenga, J.S.C., stated this position in *Justine E.M.N Lutaaya v Stirling Civil Engineering Company Limited, Civil Appeal No. 11 of 2002*, at page 7:

15 "Trespass to land occurs when a person makes an unauthorised entry upon land, and thereby interferes, or portends to interfere, with another person's lawful possession of that land. Needless to say, the tort of trespass to land is committed, not against the land, but against the person who is in actual or constructive possession of the land."

20 From the review of the evidence, the learned Chief Magistrate, concluded that the respondents had discharged the legal burden by the uncontroverted evidence of their gift deed. The submissions by Counsel for the appellant to the contrary cannot override the certified copy of proceedings of court.

Grounds 1 and 2 accordingly must fail.

25 **Ground 3: The learned Chief Magistrate erred in law when failed to consider the law of limitation.**

30 This ground fails as a matter of law for two reasons. First, the defence of limitation, under **Section 5 of the Limitation Act, Cap 290** (the "Limitation Act") was not raised as an issue in the trial before the Chief Magistrate. Second, limitation in an action for trespass, which is an action over possession is a continuing tort, as opposed to a single event, see the decision of *Lutaaya v Stirling* (op cit).

Ground 3 fails.

5 **Comment:**

This appeal highlights the urgent need to extend services of the Ministry of Lands and Housing to all areas of Kigezi region, especially Kisoro. The MZO in Kabale in the nearby precincts of this honourable court has been of great assistance in resolving land disputes. However, the scope of its work is limited to the territory of registered land and applications for such registration from decisions of bodies like the District Land Boards, or conversion from customary tenure to freehold land.

The limited availability of land and its sky-rocketing values have contributed to the rise of land disputes. Registration of land will avail vulnerable owners, a more certain way of ascertaining ownership of land rather than in this case, a nearly 50-year-old deed, where all but one of the witnesses were dead. It is a precarious situation for property rights especially for vulnerable populations like women, the elderly and children.

20 **Findings and Conclusion:**

An action for trespass does not require proof of actual damages. I don't find any reason to interfere with the award of UGX 5 million.

The appeal fails.

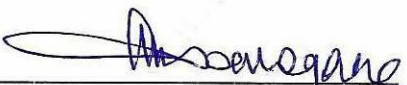
The Judgment and orders of the learned Chief Magistrate are upheld.

25 Costs are awarded to the respondents.

I SO ORDER,



DATED AT KABALE THIS 12th DAY OF JUNE 2025

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SSEMOGERERE, KAROLI LWANGA
JUDGE.