THE REPBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA (COA) AT KAMPALA.

CIVIL APPEAL NO. 29 OF 2014.

GEORGE WILLIAM KALULE ========== APPELLANT

VERSUS

1. **NORAH NASSOZI**
2. **THOMAS KALINABIRI ==========RESPONDENTS**

CORAM: HON. JUSTICE RICHARD BUTEERA, JA

HON. JUSTICE KENNETH KAKURU, JA

HON. JUSTICE BARISHAKI CHEBORION, JA

THE JUDGMENT OF COURT.

This is a second appeal in respect of dispute over a piece of land comprised in Kyadondo Block 230 plot 35 at Kamuli. The original suit was filed in a Grade One Magistrates' Court. The trial magistrate found for the plaintiff now appellant. The respondent, being dissatisfied with the Judgment appalled to the High court. The appeal was allowed. The judgment and orders of the magistrate grade were set aside and substituted with an order dismissing the suit. The appellant being dissatisfied with the High Court decision filled this appeal.

According to the memorandum of appeal the grounds of appeal are the following:

1. **That the learned appellate Judge erred in law and fact when she held that the appellant has no equitable interest in land comprised in Kyadondo Block 230 Plot 35 at Kamuli.**
2. **That the learned appellate Judge erred in law when she held that the respondent did not acquire interest in land by virtue of staying and developing land for a long period of time.**
3. **The learned appellate Judge failed to properly evaluate evidence and thus reached a wrong decision.**
4. **The learned appellate Judge erred in law when she held that the award of general damages and costs were erroneous.**

The appellant proposed to ask the Court for the following orders;

(a) That this appeal be allowed

(b) That the judgment of the High Court be set aside and Judgment of the Magistrates Court is restored.

(c) That costs of this appeal be provided for.

Background facts of the appeal.

The appellant and the second respondent are brothers. Their father, Daudi Banalikaki, was husband to the first respondent. He was the registered proprietor of two pieces of land in Kamuli- Kireka- Kyadondo. One was registered as Block 230 Plot 35 measuring 2 acres where the respondent built his home and lived in the deceased fathers' life time. Another piece of land was registered as Kyadondo Block 230 Plot 42 measuring 3 acres where appellant's deceased father lived and had built his home. Daudi Banalikaki died intestate in 1978. Upon his death the administration of his estate was vested in the Administrator General as the Public Trustee. The appellant sued the

Administrator General in respect of 2 acres of land that the Administrator General had included in the estate of their deceased father. The Administrator General had distributed that land as part of the estate when, according the appellant, the same had been given to him by the deceased as a gift *inter vivos,* and as such could not have formed part of the estate. At the commencement of the suit the Administrator General never filed a defense. The respondents applied to be added as parties to the suit which application was allowed by the court.

From the evidence on record it is not disputed that the late Banalekaki, had allowed the appellant to settle on and use the disputed two acres of land when he was still alive. The appellant is still settled and he has been using the same land since 1945. The appellant was in possession of the Title Deed to the disputed land. The appellant never effected transfer of the land to his names till after their father was dead. When he attempted to transfer the land into his name after the death of his father he found out that the Administrator General had distributed the land as part of the deceased's estate. He then sued the Administrator General. The trial court decided in his favor but the High Court on appeal found against him, hence this appeal.

Legal Representation.

Learned counsel, Mr. Mooli Albert appeared for the appellant. The respondent was represented by learned counsel, Mr. Kwizera Dennis.

Submissions of counsel for the appellant.

Counsel abandoned ground one of the appeal. He submitted only on grounds 2, 3 and 4.

Ground 2

Counsel submitted that the appellant is the owner of the disputed two acres of land having received the same as a gift *inter vivos* from his father. Further that his father gave the land to the appellant when he was 7 years old. He stayed on the land since 1945 and continued to use the same as the owner when his father was still alive. The father died in 1978 and the appellant continued to use the land without anyone claiming it until 1996 when he initiated the process of acquiring a certificate of title. It is then that the respondents objected and they referred the matter to the Administrator General who took over the estate and distributed the land in issue as part of the deceased's estate.

Counsel contended that the appellant having been in occupation of the land since 1945 as a donation from his father, the owner of the land, had acquired a right of occupancy as well as ownership of the land. According to counsel, the ownership of the land passed on to him before the death of his father and the 2 acres of land therefore did not form part of his deceased fathers' estate.

Counsel contended further that, it was an error for the appellate judge to hold that the appellant did not acquire beneficial interest in the land by virtue of his long stay on the land, because the intention of their deceased father was to give the land to him.

Counsel also submitted that the land was given to the appellant who lived on the land with the consent of the father from 1945 up to the time of the latter's death in 1978 without any objection from anybody. He has a home on the land

and still lives on the same land. Counsel argued that the appellant is a *bona fide* occupant and enjoys protection of section 29 of the Land Act.

Ground 3

Counsel submitted that, the learned trial Judge failed in her duty as a first appellate judge to evaluate the evidence and thus reached a wrong decision. Further that, she did not properly evaluate the evidence of elders who testified that the appellant had been given the land in issue by his deceased father during his life time. The Judge failed to evaluate the evidence on court record that the appellant and his mother, grandmother, brother and sisters used and lived on the land and some of them were buried on the suit land during the life time of their father. Their deceased father, according to counsel, was buried on a different piece of land and not on the disputed land indicating that the land in dispute belonged to the appellant and not to him. He also allowed him to bury his own grandmother on the disputed land for the same reason. In conclusion counsel submitted that the deceased had given the land to the appellant and it belonged to him.

Ground 4

Counsel submitted that the learned appellate Judge erred in law when she awarded general damages to the respondents and interfered with the trial magistrates' award of damages when the trial magistrates' award was not shown to have been based upon a wrong principal nor was it shown to have been too high or too low.

Submissions of counsel for the respondent.

Counsel submitted that, the appellant would not acquire ownership of the land merely by living on the land for a long time as a son of his deceased father.

He submitted further that for the appellant to acquire ownership of the land as a gift *inter vivos* the instrument of transfer must have been registered during the deceased's life time which was not the case. According to counsel a gift of an interest in registered land can only be effected by registration of a transfer of the land.

Counsel contended that the learned trial Judge properly considered the law and came to the right conclusion that there was no gift of land to the appellant *inter vivos.* According to counsel, the deceased Daudi Banalekaki, who was the registered proprietor of the suit land did not execute a transfer in accordance with section 92 of the Registration of Titles Act and therefore no interest in the suit land was passed to the appellant. Counsel contended further that the Administrator General was right to have distributed the disputed land as part of the intestate estate of the deceased.

Ground 3

Counsel submitted that, the learned trial Judge properly evaluated the evidence and came to the right conclusion.

According to counsel, the appellant had not demonstrated what evidence the appellate Judge had failed to evaluate.

Ground 4.

Counsel submitted that, the learned appellate Judge was correct to have awarded damages to the respondent since that was the only reasonable thing to do after dismissing the suit and allowing the appeal.

The decision of Court.

We find it appropriate to remind ourselves of our duty as a second appellate Court. This duty was elaborately stated by the Supreme Court in **Kifamunte Henry Versus Uganda Sc. Cri. App. No. 10 of 1997** when it held:-

> **"once it is established that there was some competent evidence to support a finding of fact, it is not open, on a second appeal to go into the sufficiency of that evidence or the reasonableness of the finding.**
>
> **Even if a court of first instance has wrongly directed itself on a point and the court of first appellate Court has wrongly held that the trial Court correctly directed itself, yet, if the Court of first appeal has correctly directed itself on the point, the second appellate Court cannot take a different view *R. Mohammed All Hasham vs. R. (1941) 8 E.A.C.A.93.* On second appeal the Court of Appeal is precluded from questioning the findings of fact of the trial Court, provided that there was evidence to support those findings, though it may think it possible, or even probably, that it would not have itself come to the same conclusion; it can only interfere where it considers that there was no evidence to support the finding of fact, this being a question of law."**

We shall in the resolution of this appeal fulfill our duty on the principals above stated.

Grounds one and two

We find that grounds two and three are so intertwined that it is only convenient for us to handle them together.

From the evidence on record, the appellant is a son of the late Daudi Banalekaki born out of wedlock.

It is not contested that, the appellants' deceased father had put him in effective occupation of the disputed 2 acres land in Kamuli village in Kireka while the said father and the rest of the family lived on another piece of land measuring 3 acres which was on the same village. The father gave him the land when he was 7 years old and he took possession in 1945. The deceased father also gave him the certificate of title to the land. The appellant lived on the land and used it since then for all the time when his father was alive. The father died in 1978. He continued to live on the land after his father death and use it without any interference from anybody until 1996 when he initiated the process of effecting transfer and was blocked by the respondents through the office of the Administrator General.

The issue at the trial court and at the first appellate court was whether the appellant who had lived on the land for more than 50 years had been given the land by his father as a gift *inter vivos* and whether he had acquired title to the land in which case it should not have been distributed by the Administrator General as part of the estate of his deceased father.

The trail Magistrate found that, the appellant occupied the suit land and enjoyed exclusive possession of the land for over 48 years. Further that he was given the land title by the owner who was his father. The trial Magistrate found from the evidence on record the deceased gave the suit land to the appellant *inter vivos*

and the appellant thus acquired the same and equitable rights were conferred upon him. The trail magistrate held:-

> **"although the appellant had not registered the suit property in his names, the rights he acquired in equity are good against the whole world."**

The appellate Judge did not agree with the trial magistrate. According to the appellate Judge,

> **"The question to answer here is purely one of law. Was Banalekaki's divesting himself of the title to the land during his lifetime and living it to the respondent for use good enough to be recognized by law as a way of transferring title to land which is registered?**

The appellate Judge answered that question in her Judgment as follows:-

> **"In Uganda, the law in does not recognize a verbal gift of land. Regarding registered land, a gift *inter vivos* of the same is completed when the donor signs the transfer forms in favour of the donee."**

We have examined the court record and considered the available evidence.

With all due respect, we find that, the appellate Judge did not give due consideration to the evidence available on record and the applicable law when she came to the conclusion that she did.

We therefore find that, this case falls in the rare category of cases where a second appellate court has to reappraise the evidence itself because that was not done by the 1st appellate court, since the 1st appellate court failed to properly re-evaluate the evidence on record, we as a second appellate court we

are duty bound to do so. See: **Bogere Moses vs. Uganda – Supreme Court Cr. App. No.1 of 1997.** We shall proceed to do so.

The appellant was given the disputed land by his deceased father in 1945. His father gave him a title to the land. The appellant lived on the land with his family. The deceased father lived on another piece of 3 acres of land he had on the same village with his wife and other children.

The deceased had another piece of land measuring 40 acres in Gomba.

The appellant had to live separately from his father apparently because he was a child of the deceased born outside wedlock. The father gave him 2 acres of land away from his home and separate from other family members but in the same locality. There is clear evidence of these facts on court record.

The trial Magistrate properly considered the above evidence when in his judgment he stated as follows:-

> **"It is at this point that court is prompted to believe the evidence of PW3 Joseph Turinye who told court that upon being fetched by the deceased's daughters namely Nalukenge, Nakabuye and Namusisi who wanted a share on their fathers land that him together with the head of the Siga-Kisiro went to Kamuli and that the children took them moving showing them the portions given out *inter vivos* by the deceased to some people who had already developed their portions including building houses. That they gave some portions of the remaining land to Nalukenge, Nakabuye and Namusisi and planted "Mpinyi" and that they did not distribute the acres of land given many by the deceased *inter vivos* and that the same applied to the plaintiffs land. And that there**

was no complaint by the anybody about the pieced of land occupied by the plaintiff.

That it was upon the same strength that he wrote a letter to the Administrator General forwarding the plaintiff to enable him get letters of succession and eventually register the said piece of land into his names.

Further evidence in support of the plaintiff was that when the plaintiff's grandmother died and her relatives wanted to take her body for burial that the deceased objected reasoning "that he had bought that land for the plaintiff and his mother in law who should therefore be buried there" and that with that pleas the witness said her relative gave in and she was buried in the suit land.

After looking at all the evidence and the submissions of both counsel the balance of probabilities sits in favour of the plaintiff more so the cogent and contradictory by evidence given the plaintiff PW3 Joseph Tukinye & PW Tumlwanga the deceased. The plaintiff occupied the suit land and engaged its quiet permission for a period from 1945 when the deceased constructed a house and moved him there with his grandmother up to 1978 when the deceased's death up to 1993 15 years when he sought letters of succession from the 1st defendant.

In all the plaintiff enjoyed exclusive possession of the suit land for 48 years.

Counsel for the defendants submitted that in case the plaintiff was given the gifts *inter vivos* then the same would have been in writing.

However to those other people given *inter vivos* by the deceased in his 3 acre plot produced no documentary evidence to that effect but relied only on their physical possession of their respective plots and their proprietorships was automatically occupied by the distributions of the intestate estate of the deceased no explanations was given for the distributions treatment of the plaintiff claim to the 2 acre plot, differently and discriminatively.

The only apparent reason in courts opinion on to which the objection would have been that the plaintiff was given a whole share by the deceased. However as far as this was concerned this was purely and the total discrimination of the deceased.

Basing on the above till the plaintiff also provided a certificate of tittle to the suit plot which he claimed to have been given to him by his father.

And since no evidence was given by to the contrary as to how he acquired it.

Then court hereby holds that the deceased Banalekaki gave the suit property to the plaintiff *inter vivos* and by the plaintiff acquiring the same then equitable rights were confirmed upon him.

In this regard though the plaintiff had not acquired legal estate in the suit property by having it registered in his names, the rights he acquired in equity are good against the whole world.

It is for the above that I will resolve the 2nd issue in the affirmative and the late Daudi Banalekaki gave the suit land comprised in Block 230 plot 35 to the plaintiff *inter vivos* and by the 1st defendant inclusion and distribution of the said land in the late Banalekaki estate violated the plaintiff rights."

We find that the trial Magistrate gave due consideration and analysis to the evidence adduced in Court.

The late Banalekaki gave the disputed land to his son the appellant who was born outside wedlock. He made this clear in his lifetime, that is why when the appellant's mother and grandmother died, he allowed them to be buried on that land because it belonged to the appellant. This evidence is on Court Record and its not contested.

His deceased father had explained to members of his family that he had given the land to the appellant. His intention was therefore clear and he no longer regarded the land as his property in his lifetime. On the facts of this case and in the circumstances above described, we do not find that the learned appellant Judge was justified to find as she did that the late Banalikaki had not given the disputed 2 acres of land to the appellant *inter viros*.

The Law in our view, must be applied to the facts in conformity with the Provisions of Art.126 (2)(e) of the Constitution which requires us to administer substantial justice without undue regard to technicalities.

Would the Court be administering substantive justice without undue regard to technicalities to state that what had been offered to him by his late father is no longer his property because his late father did not sign transfer forms and the land was not transferred into his names.

The law on gifts *inter viros* is stated in Odunga's Digest on Civil Case Law and Procedure Volume III page 2417 paragraph 5484 as follows:-

> "[c] **Generally speaking the moment in time when the gift takes effect is dependent on the nature of the gift: the statutory provisions governing the steps taken by the donor to effectuate the gift. See *In Re Fry Deceased* [1946] CH.312; *E Rose: Midland Bank Executor and Trustee Company Ltd v Rose* [1949] CH *78; Re Rose: Rose v Inland Evenue Commissioners* [1952] CH *499; Pennington v Waine* [2002] *1* WLR *2075; Macedo v Beatrice Stround* [1922] AC 330.**
>
> [d] **Equity will not come to the aid of volunteer and therefore, if a donee needs to get an order from a court of equity in order to complete his title, he will not get it. If, on the other hand, the donee has under his control everything necessary to constitute his tittle completely without any further assistance from the donor, the donee needs no assistance from equity and the gift is complete. It is on that principal that in equity it held that a gift is**

complete as soon as the donor has done everything that the donor has to do that is to say as soon as the done has within his control all those things necessary to enable him, the donee has within his control all those things necessary to enable him, the donee to complete his tittle. See *Rose v Inland Evenue Commissioners [1952) CH.499; Pennington v Waine [2002] 1 WLR 2075; Mascall v Mascall [1984] 50 P and CR 119.*

[e] Where the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person. Likewise a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the done has not yet been registered as proprietor. See *Snell's Equity (29 ED) page 122 paragraph (3).*"

On the facts of this case we find that the late Benalikaki had given as a gift *inter viros* the two acres of land to the appellant, long before he died and as such it could not have formed part of his estate upon his death.

We find that, the learned trial Magistrate had properly evaluated the evidence on record and had come to the correct conclusion, that, the land no longer belonged to the estate of the deceased by the time of his death. Further the deceased had done all that he thought was sufficient for the ownership of the land to shift to his son, the appellant.

We agree with the learned trial Magistrate that the appellant had acquired an equitable interest in the property, through advance possession, as a gift *inter viros* and by virtue of possession of the title deed to the land.

Our humble view is that a person who had acquired an equitable interest in the land, registered under the RTA but is unable to have the same transferred into his names as proprietor, has a right to apply to the Commissioner for Land Registration under section 167 of the RTA to have such land vested in his or her name.

Section 167 provided as follows:

> **"167. <u>Power of registration to make a vesting order in cases of completed purchase.</u>**
>
> **If it is proved to the satisfaction of the registrar that land under this Act has been sold by the proprietor and the whole of the purchase money paid, and that the purchaser has or those claiming under the purchaser have entered and taken possession under purchase, and that entry and possession have been acquiesced in by the vendor or his or her representatives, but that a transfer has never been executed by the vendor and cannot be obtained by reason that the vendor is dead or residing out of the jurisdiction or cannot be found, the registrar may make a vesting order in the premises and may include in the order a direction for the payment of such an additional fee in respect of assurance of title as he or she may think it, and the registrar upon the payment of that additional fee, I any, shall effect the registration directed to be made by section 166 in the case of the vesting orders**

mentioned there, and the effecting or the omission to effect that registration shall be attended by the same results as declared by section 166 in respect of the vesting orders mentioned there."

'The whole purchaser money has been paid' in the above section refers to full consideration. A person to whom land has been given as a gift *inter viros* ranks in *pari passu* with a purchaser, under this section.

It is trite law, that, for gift of personal property to be complete and irrevocable, the following conditions must exist:- The donor must intend to give the gift, the donor must deliver the property to the donee, the donee must accept the gift and take possession of it. In this case all the above conditions were satisfied. We find, that the appellant had the same right as a purchaser under Section 167 of the Registering Titles Act CAP(230).

We find that, the trial Judge erred when she held that in the absence of duly signed transfer forms in the possession of the respondent, the legal interest in registered land could not be vested in the *donee*.

Section 92 referred to in the appellate Judges' judgment does not concern a situation where land given as gift *inter vivos* is required to be transferred to the donee after the death of the donor, as it is in this case.

It would be unjust to interpret the Provisions of section 92 of the Registration of Titles Act to deny the appellant the right to be registered as proprietor of land that was donated to him 55 years ago and on which land he has lived since.

Having found as we have that, the land in dispute belongs to the appellant, this Court will go ahead to exercise the powers of the High Court, under section 11 of the Judicature Act, to vest the legal title of the disputed land into the appellant's names.

As already stated above, the High Court has the power under section 177 of The Registration of Titles to do so. That section provides:-

> **"177. <u>Powers of High Court to direct cancellation of certificate or entry in certain cases</u>.**
>
> **Upon the recovery of any land, estate or interest by any proceeding from the person registered as proprietor thereof, the High Court may in any case in which the proceeding is not herein expressly barred, direct the registrar to cancel any certificate of title or instrument, or any entry or memorial in the Register Book relating to that land, estate or interest, and to substitute such certificate of title or entry as the circumstances of the case require; and the registrar shall give direct to that order."**

We find merit in this appeal which is hereby allowed.

In the result, we would set aside the judgment of the High Court and substitute the same with that of this Court.

We now make the following orders and declarations:-

(1) The disputed land, Kyadondo Block 230 Plot 35 at Kamuli was given to the appellant, George William Kalule by his father Banalekaki as a gift *inter viros* and therefore does not form part of the estate of his deceased father.

(2) The appellant is entitled to be entered in the Register as proprietor of the said land.

(3) The Commissioner for land registration is hereby ordered to enter the name of the appellant on the register of titles as proprietor of Kyadondo Block 230 Plot 35 at Kamuli.

(4) In view of the fact that this is essentially a family dispute over family property, we order that each party bear their own costs in this Court and the courts below.

Dated at Kampala.....15th.....this day of.....September.....2017.

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Hon. Justice Richard Buteera
JUSTICE OF APPEAL

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Hon. Justice Kenneth Kakuru
JUSTICE OF APPEAL

.....

Hon. Justice Barishaki Cheborion
JUSTICE OF APPEAL

15/9/2017
Mbabazi Mesha holding brief for Mooli for ~~Respondents~~ Appellant
Amin c/c
Appellant present
Ch: Judgment read in Court