



**IN THE HIGH COURT OF UGANDA SITTING AT GULU**

Reportable  
Civil Appeal No. 094 of 2018

In the matter between

1. KILAMA JAMES
2. KOMAKECH EMMANUEL
3. OKELLO ALLAN

**APPELLANTS**

And

**ABONYO VICKY**

**RESPONDENT**

**Heard: 22 March, 2020**

**Delivered: 22 May, 2020.**

**Civil Procedure** — Customary law — Article 37 of The Constitution of the Republic of Uganda, 1995 and Section 10 of The Magistrates Courts Act — empowers Magistrates courts to observe and to enforce the observance of, and not to deprive any person of the benefit of, any civil customary law which may be applicable that is not repugnant to justice, equity or good conscience or incompatible either in terms or by necessary implication with any written law for the time being in force.

**Family Law** — Succession — Section 28 (1) of The Succession Act — all lineal descendants are entitled to share their proportion of a deceased intestate's property in equal shares. A person absolutely entitled to a share of an un-administered estate does have an interest of a kind in the assets comprised in it — the dependency on the deceased must therefore immediately precede the death. For an adult offspring of the deceased who is able to earn, and earns, his or her own living there must be some special circumstance, typically a moral obligation of the deceased towards him or her, before he or she can be deemed a dependent relative — Gifts — If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property

*and which it was in his power to do. It is essential to the validity of a gift that the donor should divest himself or herself completely of all ownership and dominion over the subject of the gift before he or she can effect delivery of possession of the property gifted. Accordingly, a gift of land of which the donor is in actual possession is not complete unless the donee is given possession. However, the mere fact that donor reserves the right to take usufruct during his life time does not mean that possession is not given to the donee.*

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## **JUDGMENT**

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**STEPHEN MUBIRU, J.**

Introduction:

- [1] The appellants as joint administrators of the estate of the late Komakech Solomon sued the respondent seeking recovery of three plots of land measuring approximately 58 metres by 60 metres situated at Mican village, Kanyagoga "B" sub-ward, Bar-Dege Division, Gulu Municipality in Gulu District, a declaration that they are the rightful owners of the land in dispute, general damages for trespass to land, a permanent injunction restraining the respondent from further acts of trespass onto the land, and the costs of the suit.
- [2] The appellants' claim was that they inherited that land from their late father, Komakech Solomon who in turn acquired it from his own grandfather, the late Banya Yusuf. Before his death, the Komakech Solomon used to pay ground rent for the land to the Municipal Council. After his death, the appellants continued to live on and derive their sustenance from the land until 2<sup>nd</sup> February, 2017 when they were surprised to be served with an eviction notice arising from court proceedings between the respondents and a one Okello Polycarp, who has since vacated the land. The appellants contend that order was issued in error against them since they were not parties to those proceedings.
- [3] In her written statement of defence, the respondent refuted the appellants' claim. She averred instead that Banya Yusuf was her late brother who before his death occupied the Southern part of their late mother's land in Kanyagoga "C" sub-ward

while the respondent occupied the Northern part in Kanyagoga "B" sub-ward. On 12<sup>th</sup> May, 2009, the Clan elders established a boundary between the two parts of the land. She is the rightful owner of the land in dispute having acquired it by inheritance from her late mother Acan Maria. She has lived on the land undisturbed since the year 2002. She constructed three grass-thatched huts on the land and used part of it for cultivation of seasonal food crops. She subsequently caused a survey of the land. The appellants' father's land is located approximately 300 meters away from the land in dispute. The appellants sold the entire land and during the month of December, 2016 trespassed onto part of her land by the construction of huts and laying of bricks. The appellants claim under Banya Yusuf to whose estate Okello Polycarp is the duly appointed administrator and therefore the decision obtained against him is binding on the appellants. She therefore counterclaimed against them for a declaration that she is the rightful owner of the land in dispute, an eviction order, general damages for trespass to land, *mesne profits*, a permanent injunction restraining the appellants from further acts of trespass onto the land, and the costs of the counterclaim.

- [4] In reply to the written statement of defence, the appellants averred that the respondent owns a part of the land that is not disputed but has exceeded the boundaries to claim more land that she is entitled to, hence the counterclaim should be dismissed.

The appellant's evidence in the court below:

- [5] P.W.1 Atek Rose, testified that she is the daughter of Banya Yusuf who before his death in 1990 owned the land in dispute. Acan Maria was her grandmother. The appellants are borne of her late son, Komakech Solomon. Before his death, Banya Yusuf had placed Komakech Solomon in charge of the land. When he died the responsibility was taken over by his other son Okello Polycarp. It is only during the year 2002 with the permission of Komakech Solomon that the respondent came from Kitgum to occupy a portion of the land, to the North of the

land but separate from the part that is now in dispute, which was unoccupied until during the year 2014 the 1<sup>st</sup> appellant built a grass-thatched house on the land now in dispute but the respondent objected. It was occupied by Okello Polycarp nevertheless. Before that the respondent had been letting out parts of that land to divers persons for the cultivation of seasonal crops. The appellants were using only a small part of it for cultivation.

- [6] P.W.2. Okello Polycarp, the appellants are children of his late brother Komakech Solomon. It is Banya Yusuf who gave him the land. The land was originally 4 plots but half of one plot became a road reserve. The respondent is using most of the land which she has been occupying since the year 2003. She has a house on the land and lets out parts of the rest for farming. Before that it was occupied by Komakech Solomon and Buladina Abonyo, wife of Banya Yusuf. He lost the suit between him and the respondent because the land did not belong to the estate of Banya Yusuf. At the time he obtained a grant to that estate he was unaware that it had been transferred to Komakech Solomon. Banya Yusuf had told the Municipal Council that he had become too old and weak to pay ground rent and therefore Komakech Solomon was taking over the responsibility.
- [7] P.W.3. Kilara James, the 1<sup>st</sup> appellant, testified that the respondent is their paternal aunt. The land in dispute was the property of his late father Komakech Solomon but the respondent has since 2010, following the death of their father, stopped them from using it. It is Komakech Solomon who gave the respondent a small portion of the land, approximately a plot and a half, in 2003. She now lets out the land in dispute to divers persons for growing of seasonal food crops. Buladina Abonyo, wife of Banya Yusuf, used to occupy about half a plot of the land in dispute. P.W.1 Atek Rose did not sell their father's land but her own land situated in Kanyagoga "C" sub-ward, across the road, to the South of the land in dispute.

[8] P.W.4. Oyella Agnes testified that she is a land Supervisor working with the Municipal Council. She keeps custody of the ground rent payment register book. In that register Komakech Solomon is listed as No. 125 and paid from 1987 - 1990. It is indicated that the land is located at Kanyagoga but she did not know its exact location. The register does not indicate the size of the land nor the date Komakech Solomon took possession. Payments were made by persons in possession not necessarily the owners of the land. No. 125 was the Temporary Occupation Number and the last payment in respect of that number was in 1990.

The respondent's evidence in the court below:

[9] In defence of the respondent, D.W.1 Ocheng Richard Akena testified that the land in dispute originally belonged to Maria Acan the mother of Banyu Yusuf and the respondent. P.W.1 Atek Rose is the daughter of Banyu Yusuf. Komakech Solomon was the son of P.W.1 Atek Rose. The land in Kanyagoga "C" sub-ward was for residential purposes while that in Kanyagoga "B" sub-ward was for cultivation. The boundary between the two parts of the land is the planned Alex Ojera Road currently Mican Road. When Maria Acan died P.W.1 Atek Rose retained possession of the land at Kanyagoga "C" sub-ward. The appellants lived with their father Komakech Solomon in Limu. It is the respondent and Buladina Abonyo, the step mother of P.W.1 Atek Rose, who lived on the land in Kanyagoga "B" sub-ward, North of Mican Road. The dispute began when P.W.1 Atek Rose sold off most of the land in Kanyagoga "C" sub-ward and her children including P.W.2. Okello Polycarp moved to the land in dispute.

[10] A Clan meeting was convened by the clan on 12<sup>th</sup> May, 2009 to resolve the dispute. It resolved that P.W.1 Atek Rose and her children should return to the land at Kanyagoga "C" sub-ward. Litigation between P.W.2. Okello Polycarp and the respondent over the land ended in the respondent's favour and an eviction order was issued. It is at the time of eviction that P.W.2. Okello Polycarp then claimed that the land belonged to his brother Komakech Solomon yet it belongs

to the respondent and the late Buladina Abonyo. The Bwobo Clan resolved that P.W.1 Atek Rose takes her grandchildren to the land she bought at Patuda, Alokulum Parish in Ongako sub-county. Komakech Solomon and all his deceased children were buried at Kanyagoga "C" sub-ward. The clan meeting was convened to stop P.W.1 Atek Rose from selling off the land in at Kanyagoga "B" sub-ward after she had sold off that in at Kanyagoga "C" sub-ward.

[11] D.W.2 Banya Joyce Joan, daughter of the respondent testified that the appellants are the grandchildren of the respondent. The respondent inherited the land in dispute from her mother Maria Acan. Her son Banya Yusuf is the father of P.W.1 Atek Rose, mother of Komakech Solomon, the appellant's mother. The land at Kanyagoga "C" sub-ward was bigger and used for residential purposes. That at Kanyagoga "B" sub-ward was used for cultivation. When Maria Acan's marriage failed, her father gave her the land at Kanyagoga "B" sub-ward. When their mother died, the elders divided the land between the respondent and her brother Banya Yusuf. The land at Kanyagoga "C" sub-ward was given to P.W.1 Atek Rose as the direct descendant of Banya Yusuf and that at Kanyagoga "B" sub-ward was given to the respondent. The dispute began when P.W.1 Atek Rose and her son P.W.2. Okello Polycarp sold off the land at Kanyagoga "C" sub-ward. P.W.1 Atek Rose used part of the proceeds to buy land at Patuda, Alokulum Parish in Ongako sub-county and the other part she shared with her children. It is thereafter during the year 2016 that they began trespassing onto the respondent's land in Kanyagoga "B" sub-ward. They constructed three huts on the land and P.W.2. Okello Polycarp attempted to sell off part of the land but was stopped by the clan. Komakech Solomon has no land at Kanyagoga because his mother sold it off.

[12] D.W.3 Opjwiya James Okot, testified that he is the Clan Head of the Bwobo Paibwo Clan. Upon taking over responsibilities of that office on 16<sup>th</sup> September, 2018 documents were entrusted to his custody which included the record of a sub-division that took place on 12<sup>th</sup> May, 2009. They are in respect of the estate

of the late Maria Acan, daughter of Nikodemu Latigo into two; one part was given to the respondent together with Buladina Abonyo, wife of Banyu Yusuf at Kanyagoga "B" sub-ward and the other to P.W.1 Atek Rose, daughter of Banyu Yusuf at Kanyagoga "C" sub-ward. The respondent together with Buladina Abonyo, wife of Banyu Yusuf occupied the land in dispute.

- [13] D.W.4 Vicky Abonyo, the respondent testified that the land in dispute originally belonged to her grandfather Nikodemu Latigo. It is her grandfather that gave her mother Maria Acan that land to raise her children from, when her marriage failed. Her brother Banyu Yusuf had P.W.1 Atek Rose out of wedlock and she too had the appellants' father Komakech Solomon. P.W.1 Atek Rose occupied the upper part of the land with her children while the respondent lived on the lower part, separated by Gulu Road. Following the death of her mother in the 1980s, she inherited the land on the lower part that belonged to her. The clan sub-divided the land into two but P.W.1 Atek Rose sold off the part that was given to her. The grandchildren of P.W.1 Atek Rose, the appellants, are now claiming the respondent's part. They forcefully constructed grass-thatched houses on her land during the year 2015. She sued them before the L.C. court.

Proceedings at the *locus in quo*:

- [14] The court visited the *locus in quo* on 27<sup>th</sup> August, 2018 where it observed that the land is located at Kanyagoga "B" sub-ward and measures approximately 180 metres by 120 metres. P.W.1 Atek Rose admitted that she sold the land at Kanyagoga "C" sub-ward and bought land at Patuda where she now lives. The 1<sup>st</sup> appellant demonstrated to the court the boundary of the land she acknowledges as belonging to the respondent. Within that area the respondent has some huts. The 1<sup>st</sup> appellant has some huts on the land in dispute, but outside the area he acknowledges to belong to the respondent. The respondent has a cassava garden on the land in dispute. The court prepared a sketch of the land in dispute illustrating the key features observed thereon.

Judgment of the court below:

[15] In his judgment delivered on 9<sup>th</sup> November, 2018, the trial Magistrate found that the appellants' claim was that the land originally belonged to their grandfather Yusuf Banya who gave it to their father, Komakech Solomon, as a gift *inter vivos*. P.W.1 Atek Rose who testified as the only witness to this fact contradicted herself when she stated that Yusuf Banya appointed Komakech Solomon as caretaker as he had grown weak and old and later stated it was an outright gift. In any event, there is no evidence to show that there had been a distribution of the estate of Maria Acan on basis of which Yusuf Banya would have derived the capacity to give the land to his grandson, Komakech Solomon. The beneficiaries of Maria Acan are her two biological children, the respondent and Yusuf Banya, the third one Oola having died as a minor. It is on that account that P.W.1 Atek Rose, the only surviving child of Yusuf Banya, took what would have been his share. Since their mother P.W.1 Atek Rose is still living, the appellants cannot claim a direct interest in the estate of their grandfather. The land in dispute does not form part of the estate of the late Komakech Solomon. The appellants admitted that the estate of the late Maria Acan had two parts; one in Kanyagoga "C" sub-ward occupied by their mother P.W.1 Atek Rose, and the other in Kanyagoga "B" sub-ward occupied by the respondent. P.W.1 Atek Rose admitted that she sold off the part which she occupied and purchased land at Patuda, Alokulum Parish in Ongako sub-county where she now lives.

[16] The court went on further to state that the respondent was in possession of the land in dispute before the appellants entered thereon in 2015 and began constructing huts on it. During the visit to the *locus in quo*, the court found that it was the respondent tilling the land. The suit was dismissed and judgment was accordingly entered in the respondent's favour on the counterclaim with a declaration that the land in dispute belongs to her, an eviction order was issued against the appellants, a permanent injunction restraining them from further acts



of trespass on the land, general damages of shs. 5,000,000/= with interest at court rate from the date of judgment until payment in full and the costs of the suit and counterclaim.

The grounds of appeal:

[18] The appellants were dissatisfied with that decision and appealed to this court on the following grounds, namely;

1. The learned trial Magistrate erred in law and fact when he ignored the evidence of P.W.1, P.W.3 and P.W.4 when she held that the land in dispute does not form part of the estate of the late Komakech Solomon thereby reaching a wrong decision.
2. The trial Magistrate erred in law and fact when she ignored the evidence obtained at the *locus in quo* when she held that the late Yusuf Banya never owned the land thereby reaching a wrong decision.
3. The learned trial Magistrate erred in law and fact when she failed to evaluate the evidence on record thereby reaching a wrong decision.

Arguments of Counsel for the appellants:

[19] In their submissions, counsel for the appellants argued that the trial magistrate ignored the testimony of P.W.1 Atek Rose, who testified that before his death, her father Banya Yusuf had placed her son Komakech Solomon in charge of the land and it was him who thereafter was paying ground rent. P.W.2. Okello Polycarp testified that it is Banya Yusuf who gave the land to Komakech Solomon. P.W.3. Kilara James testified that it is Komakech Solomon who in turn gave a small part of it to the respondent. The appellants therefore derive their interest from their father who lived with their grandfather on the land until his death. The respondent had been married in 1969 and when she returned in 2003 after her marriage failed she found Komakech Solomon in possession of the land, together with the appellants. D.W.4 Vicky Abonyo, the respondent in her

defence acknowledged the fact that both Banya Yusuf and his wife Buladina Abonyo were buried on the land in dispute. The two graves as well as that of Komakech Solomon were found on the land during the visit to the *locus in quo*. The trial Magistrate ignored that observation and only commented on the fact that it was the respondent tilling the land. The trial Magistrate failed to take into account the fact that Komakech Solomon was raised by the respondents' brother Banya Yusuf and therefore had an equal right of inheritance with her to the estate of Maria Acan. Komakech Solomon grew up on the land, lived on the land for over 25 years, raised his family on the land, paid ground rent for it and was buried on that land when he died. He derived interest in the land following the death of his grandfather, Banya Yusuf. The appeal should therefore be allowed.

Arguments of Counsel for the respondent:

[20] The respondents' counsel did not file submissions in response.

Duties of a first appellate court:

[21] It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000; [2004] KALR 236*). In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*).

[22] In exercise of its appellate jurisdiction, this court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular, this court is

not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

Ground three struck out for being too general

[23] I find the third ground of appeal to be too general that it offends the provisions of Order 43 r (1) and (2) of *The Civil Procedure Rules* which require a memorandum of appeal to set forth concisely the grounds of the objection to the decision appealed against. Every memorandum of appeal is required to set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative, and the grounds should be numbered consecutively. Properly framed grounds of appeal should specifically point out errors observed in the course of the trial, including the decision, which the appellant believes occasioned a miscarriage of justice. Appellate courts frown upon the practice of advocates setting out general grounds of appeal that allow them to go on a general fishing expedition at the hearing of the appeal hoping to get something they themselves do not know. Such grounds have been struck out numerous times (see for example *Katumba Byaruhanga v. Edward Kyewalabye Musoke*, C.A. Civil Appeal No. 2 of 1998; (1999) KALR 621; *Attorney General v. Florence Baliraine*, CA. Civil Appeal No. 79 of 2003). The ground is accordingly struck out.

Grounds one and two; court's finding as to ownership of the suit land.

[24] In grounds one and two, the trial court is criticised for its failure to find that the land in dispute neither formed part of the estate of the late Komakech Solomon nor that of Yusuf Banya. It was common ground that the land in dispute originally formed part of land that belonged to Nikodemu Latigo. When the marriage of his

daughter Maria Acan failed and she returned to his home, Nikodemu Latigo gave the land in dispute to her to enable her raise her three children; Banya Yusuf, the respondent and a one Oola who unfortunately died during his childhood. She used part of it, now located in Kanyagoga "C" sub-ward for establishing her homestead and the other part now located in Kanyagoga "B" sub-ward, for cultivation.

[25] When she became of age, the respondent D.W.4 Vicky Abonyo was married off and resided with her husband in Soroti for the next over 25 years until the failure of her marriage during the year 2002. In the meantime, following the death of his mother Maria Acan, Banya Yusuf continued to occupy the part located in the current Kanyagoga "C" sub-ward and from there raised his own family, including Komakech Solomon, the son of his daughter P.W.1 Atek Rose. He too raised his family, the appellants, on that land. By the time the respondent D.W.4 Vicky Abonyo returned from her failed marriage, her bother Banya Yusuf had died and it was Komakech Solomon in possession of the part at Kanyagoga "C" sub-ward while the widow of her brother, Buladina Abonyo occupied the part at Kanyagoga "B" sub-ward. D.W.4 Vicky Abonyo joined her sister in law Buladina Abonyo and together they occupied that part. Whereas she claimed it as part of her inheritance from her mother Maria Acan's estate, it is contended by the appellants that by that time it formed part of land that her brother Banya Yusuf had during his lifetime given to Komakech Solomon and it is him who gave her a small portion of the land yet now she is claiming the whole of it.

[26] Exploring the late Yusuf Banya's claimed acquisition by inheritance, there are two general modes of acquiring title to real property, namely, by descent and by purchase. "Descent" in its technical legal meaning, denotes the transmission of real estate, or some interest therein, on the death of the owner intestate, by inheritance, to some person according to certain rules of law. Succession is the devolution of title to property from an ancestor to his or her immediate heir (see *In re Bradley's Estate*, 185 Wis. 393, 201 N. W. 973, 38 A. L. R. 1 (1925)). In order

to succeed to an estate by inheritance, the person claiming to be a beneficiary has to be related by blood or affinity to the ancestor leaving the estate.

- [27] Common law contains two different systems of transmitting the deceased's assets; real estate is vested in interest in the beneficiaries from the deceased's death, subject to the rights of creditors whereas personal property first goes to the personal representative, only after administration is finished is the net surplus distributed to the beneficiaries. Legal title to personal property is suspended between the time of the intestate's death and the granting of the letters of administration. The legal title to all the personal estate of a deceased vests at death in his legal representative or administrator of the estate for the benefit of the deceased 's beneficiaries and creditors.
- [28] Vesting occurs when an interest becomes an enforceable legal right. Property is vested in interest, if a "present right to future enjoyment" accrues. Although in general, an intestate interest vests upon death, that does not mean that the beneficiaries actually get anything at that moment. It just means that the time of death is the moment in time that the court looks at to see who gets what. On distribution, the title of the beneficiary relates back to the date of the intestate's death. Even though a beneficiary does not obtain full property, he or she acquires a "fixed and vested" hereditary right in the property (see *Re Achilopoulos [1928] Ch. 483*) subject to divestment by the appointment of an administrator of the estate. Upon the appointment of an administrator, the title to any interest in real property which survives the intestate deceased vests in the administrator for the benefit of the beneficiaries and creditors of the deceased, and title to such property does not re-vest in the beneficiaries until the administrator assents to such re-vesting at distribution of the estate. All property in an intestate estate devolves upon the personal representative of the deceased upon trust for those persons entitled to the property (see sections 25, 180 and 192 of *The Successions Act*).

- [29] A beneficiary has to survive the intestate in order to be entitled to share in the estate. If a beneficiary dies before the intestate, his or her rights to the intestacy lapse. However, if a person who is entitled as a beneficiary dies after the death of the intestate and before distribution, his or her share does not go to the other persons entitled as beneficiaries, but instead passes to his or her own estate for the benefit of his or her beneficiaries and be distributed according to his or her will or under the rules of intestacy.
- [30] According to section 28 (1) of *The Succession Act*, all lineal descendants are entitled to share their proportion of a deceased intestate's property in equal shares. A person absolutely entitled to a share of an un-administered estate does have an interest of a kind in the assets comprised in it (see *Re Leigh's Will Trusts; Handyside v Durbridge [1970] Ch 277*). Yusuf Banya and the respondent being the only two survivors of their mother Maria Acan, were therefore entitled to equal shares of her estate.

### Gift *inter vivos*

- [31] Exploring the late Komakech Solomon's claimed acquisition by gift, it was the appellants' evidence that during his lifetime, Banya Yusuf donated the land as a gift to his grandson Komakech Solomon. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do (see *Halsbury's Laws of England* (Fourth Edition Reissue) Vol. 20 pp 29 - 32).
- [32] For a gift to be effective the essential elements of a gift must be met, they are; - (i) the donor must be competent to make the gift. There will be no gift if the donor is not competent to give and / or the donee competent to receive; (ii) the donor must make a clear, unmistakable, and unequivocal intention on his or her part to make a gift of his or her property. The donor must intend to make a gift; it must

be demonstrated that the donor's objective was to make a gift when he or she transferred the property; (iii) there must be an absence of adequate consideration. A gift is the voluntary and gratuitous transfer of property. The donor must not draw any personal benefit, either directly or indirectly, in consideration for the transfer. The gesture must be entirely gratuitous and a reflection of liberal intent on the part of the donor in regard to the donee; (iv) there must be a conveyance, assignment, or transfer sufficient to vest legal title in the donee without power of revocation at the will of the donor; and (v) there must be an acceptance by the donee of the gift. The donee must have accepted the gift made to him or her; the donee must agree to the transfer of property that the donor made in his or her favour. The donee should take delivery of the possession of that property either actually or constructively. In general, such acceptance is presumed once the third condition is met; i.e. (vi) a relinquishment of dominion and control of the gift property by delivery to the donee; the delivery of the property that is the subject-matter of the transfer by the donor to the donee. This delivery confirms the donor's intent to make the gift.

- [33] The rules do not make writing essential to the validity of a gift; an oral gift fulfilling all the three essentials is complete and irrevocable. The burden of proof is on the person who sets up a gift to show that the essential elements stipulated by law have been complied with. Intention to give on the part of the donor must be expressed in most unequivocal terms. This is intended to avoid gifts that are vague, indefinite or incomplete. Subsequent conduct may be a relevant fact when the document evincing the gift is ambiguous or when it is difficult to gather the true intention of the donor from the document. From this court may determine whether or not the intention was attended by all honest efforts on the part of the donor to complete the gift by divesting himself of the control over the property in such a manner as would clearly imply his divestiture of dominion over it in the eye of the law.

[34] It is essential to the validity of a gift that the donor should divest himself or herself completely of all ownership and dominion over the subject of the gift before he or she can effect delivery of possession of the property gifted. Accordingly, a gift of land of which the donor is in actual possession is not complete unless the donee is given possession. However, the mere fact that donor reserves the right to take usufruct during his life time does not mean that possession is not given to the donee. Such a reservation is quite consistent with delivery of possession of the land to the donee. Such delivery as the subject matter would make it possible is sufficient. No physical departure or formal entry is necessary in the case of a gift of land on which the donor and the donee are both residing at the time of the gift, for as long as there is some overt act by the donor indicating a clear and complete divesture of all ownership, dominion and control over the subject of the gift. It is treated as a case where an absolute grant is made and thereafter conditions in derogation of the absolute grant is included, which may be treated invalid or void.

[35] Apart from the obligation to pay ground rent, there is no act evincing relinquishment of all proprietary rights immediately, inclusive of absolute dominion over the land, in favour of the donee. Once possession of the property is reserved with the donor, the gift is not complete. There is no evidence from which it can be state with any reasonable certainty that the donor divested himself completely of all ownership and dominion over the land, the subject of the gift.

[36] By remaining in possession, a donor is presumed to have reserved the right to enjoy the property, reserved the right of residence, they right to encumber the property to any extent and also to alienate it. All essential ingredients to constitute ownership and possession therefore are retained by the donor unless it is proved otherwise. Once there is no evidence of divesture of possession the presumption is that the donor retained control over the land. Payments made for the temporary occupation permit from 1987 - 1990 are not a sufficient proof of



divestiture of ownership and dominion completely over the property in favour of the donee. Komakech Solomon therefore did not acquire the land as a gift *inter vivos*.

- [37] Exploring the late Komakech Solomon's claimed acquisition by inheritance, according to section 28 (1) of *The Succession Act*, all lineal descendants are entitled to share their proportion of a deceased intestate's property in equal shares. P.W.1 Atek Rose being the only survivor of her father Banya Yusuf, was entitled to his estate accruing as his half share of the estate of his mother, Maria Acan. Being a grandson, Komakech Solomon could only claim direct access to the estate of Banya Yusuf as a dependant.
- [38] According to section 2 (g) (ii) of *The Succession Act*, "dependent relative" includes a grandchild who, on the date of the deceased's death, was wholly or substantially dependent on the deceased for the provision of the ordinary necessities of life suitable to a person of his or her station. The words "on the date of the deceased's death" cannot be construed literally as applying to the *de facto* situation at death, but refer to the general arrangements for maintenance subsisting at the time of death (see *In re Beaumont, Deceased; Martin v Midland Bank Trust Co Ltd* [1980] 1 Ch 444; [1980] 1 All ER 266). So that if for example the deceased had been making regular payments to the support of a grandchild, the claim would not be defeated if those payments ceased during a terminal illness because the deceased was too ill to make them.
- [39] The dependency on the deceased must therefore immediately precede the death. For an adult offspring of the deceased who is able to earn, and earns, his or her own living there must be some special circumstance, typically a moral obligation of the deceased towards him or her, before he or she can be deemed a dependent relative. If the facts disclose that the grandchild is adult, is in employment, with an earning capacity for the foreseeable future, it is unlikely he

or she will succeed in being classified as a dependent relative of the deceased without some special circumstance such as a moral obligation.

[40] The court has to consider whether the deceased, otherwise than for valuable consideration (and irrespective of the existence of any contract), was in fact making a substantial contribution in money or money's worth towards the reasonable needs of the grandchild on a settled basis or arrangement which either was still in force immediately before the deceased's death or would have lasted until his death but for the approach of death and the consequent inability of either party to continue to carry out the arrangement. For such a claim there must shown be some special circumstance, perhaps a moral obligation of the deceased towards the grandchild, before the question can be determined in his or her favour (see *Harlow v. National Westminster Bank Plc and Others; in re Jennings* [1994] Ch 286; [1994] 3 WLR 67; [1994] 3 All ER 27). It was not shown that the deceased Banya Yusuf wholly or substantially owed his grandson Komakech Solomon any moral or other obligation for his maintenance, and no other special circumstance was shown. Komakech Solomon did not qualify as a dependent relative.

[41] In considering whether a person is being wholly or substantially maintained immediately before the death of the deceased, it is the settled basis or general arrangement between the parties as regards maintenance during the lifetime of the deceased which has to be looked at, not the actual, perhaps fluctuating, variation of it which exists immediately before his or her death. It is not disputed that a relationship of dependence which has persisted for years will not be defeated by its termination during a few weeks of mortal illness (see *Jelley v. Illife* [1981] 2 All ER 29). However, in the instant case, although the appellants showed that Komakech Solomon had lived with Banya Yusuf they were unable to show that he was being wholly or substantially maintained by the deceased throughout the last years of his life up to the time immediately preceding his

death. He was therefore was not a dependant relative and could only lay claim to that estate of Banya Yusuf through his mother, P.W.1 Atek Rose.

[42] But even from that perspective, it must be observed that by law on inheritance cannot vest nor can any person be the actual complete heir of another, till the ancestor is previously dead (*Nemo est haeres viventis* - No one is heir to the living). According to section 28 (2) of *The Succession Act*, any child of a deceased lineal descendant, whose descent is not traced through any living lineal descendant and who survives the intestate, takes the share which the deceased lineal descendant would have taken under subsection (1) had he or she survived the intestate. Komakech Solomon and the appellants would be entitled to share in the estate of Yusuf Banya only upon the death of their mother and grandmother respectively, P.W.1 Atek Rose, if she were to die before distribution of the estate of Banya Yusuf.

[43] Based on the above exposition, this court considers that descent and kinship are the primary determinants of intestate inheritance under both the statutory and customary legal regimes. The common purpose of inheritance under both the customary and statutory legal regimes is that the property of the deceased intestate should be left to the use and benefit of his or her closest relatives or those who were dependent upon him or her during his or her lifetime. Determinations of descent and the manner of distribution are then guided by the relevant customary or statutory law.

[44] Section 10 of *The Magistrates Courts Act*, empowers Magistrates courts to observe and to enforce the observance of, and not to deprive any person of the benefit of, any civil customary law which may be applicable that is not repugnant to justice, equity or good conscience or incompatible either in terms or by necessary implication with any written law for the time being in force. Section 1 of *The Succession Act* provides that the Act is to apply, "except as provided by.... any other law for the time being in force." The phrase "by any other law for the

time being in force” should therefore be interpreted to include existing custom, which is not repugnant to natural justice, equity and good conscience and is not incompatible either directly or by necessary implication with *The Succession Act* (see *The Administrator General v. George Mwesigwa Sharp, C. A. Civil Appeal No. 6 of 1997*).

- [45] On the other hand, Article 37 of *The Constitution of the Republic of Uganda, 1995*, guarantees to every citizen, the right as applicable, to belong to, enjoy, practise, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others. Moreover, Article 247 of *The Constitution of the Republic of Uganda, 1995* requires courts to construe existing law with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution bearing in mind as well that Article 126 (1) thereof too requires such application to be in conformity with law and with the values, norms and aspirations of the people.
- [46] Customary laws and protocols are central to the very identity of many local communities. These laws and protocols concern many aspects of their life. They can define rights and responsibilities on important aspects of their life, culture, use of and access to natural resources, rights and obligations relating to land, inheritance and property, conduct of spiritual life, maintenance of cultural heritage, and many other matters. Determinations of transmission of rights to land held customarily should thus be undertaken within a framework of interdependence between customary law and statutory law rather than exclusively on the basis of statutory law.
- [47] Furthermore, section 299 (1) of *The Succession Act* empowers court, on application by a person beneficially interested in any immovable property vested in a personal representative for a partition of such property, to appoint one or more arbitrators to effect the partition if satisfied that the partition would be beneficial to all persons interested and would not be economically undesirable.

Moreover, according to section 88 of *The Land Act*, nothing in the Act prevents, hinders or limits the exercise by traditional authorities of the functions of determining disputes over customary tenure or acting as a mediator between persons who are in dispute over any matters arising out of customary tenure.

- [48] A claim by inheritance is proved by adducing evidence to show that the devolution was in accordance with the relevant law of descent and distribution under custom or enactment. The burden was on the appellants to prove that they acquired the land in dispute following rules that govern the devolution and administration of a deceased person's estate under the applicable customary or statutory law.
- [49] It was the testimony of D.W.2 Banya Joyce Joan that when their mother died, the elders divided the land between the respondent and her brother Banya Yusuf. The land at Kanyagoga "C" sub-ward was given to P.W.1 Atek Rose as the direct descendant of Banya Yusuf and that at Kanyagoga "B" sub-ward was given to the respondent. This was confirmed by D.W.3 Opjwiya James Okot, the Clan Head of the Bwobo Paibwo Clan, who testified that one part was given to the respondent together with Buladina Abonyo, wife of Banya Yusuf at Kanyagoga "B" sub-ward and the other to P.W.1 Atek Rose, daughter of Banya Yusuf at Kanyagoga "C" sub-ward. The respondent together with Buladina Abonyo, wife of Banya Yusuf occupied the land in dispute. D.W.4 Vicky Abonyo, the respondent testified that The clan sub-divided the land into two but P.W.1 Atek Rose sold off the part that was given to her. This distribution done under custom is consistent with an not repugnant to section 28 (1) of *The Succession Act*. Although the part given to P.W.1 Atek Rose was said to be bigger than that given to the respondent, she is not complaining. Clearly the appellants have no recourse to the part given t the respondents and are trespassers on her land.
- [50] It cannot be said that the court below had erred in any manner in coming to the conclusion that it did. The findings were essentially based on the evidence before

it and it could not be said that the interpretation given by the court was quite unwarranted or unjustified.

Order:

[51] In the final result, there is no merit in the appeal and it is accordingly dismissed.  
The costs of the appeal and of the trial are awarded to the respondent.

Delivered electronically this 22<sup>nd</sup> day of May, 2020

.....Stephen Mubiru.....  
Stephen Mubiru  
Resident Judge, Gulu

Appearances

For the appellant : M/s Donge and Co. Advocates.

For the respondent :