

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**LAND DIVISION**  
**HIGH COURT CIVIL SUIT NO. 291 OF 2021.**

- 1. WALUSIMBI JENNIFER:.....: PLAINTIFFS**
- 2. AGNES NABAGALA.**
- 3. WALUSIMBI HANNINGTON.**
- 4. DEBORAH BABIRYE WALUSIMBI (Administrators of the estate of the late Ssendendo Walusimbi Robinson).**

**VERSUS**

**BULEZI ALI :.....:DEFENDANT**

**BEFORE:HON. MR. TADEO ASIIMWE**

**JUDGEMENT**

The Plaintiffs as administrators of the estate of the late Ssendendo Walusimbi Robinson sued the Defendant for trespass on the land comprised in Kyadondo Block 227 Plot 57 at Bweyogerere belonging to the estate of the late Ssendendo Walusimbi Robinson and sought for orders of eviction, general damages, permanent injunction, interest on general damages and costs of the suit.

The plaintiffs claim against the defendant is that the late Ssendendo Walusimbi Robinon was the registered proprietor of the suit land and lived thereon with his children and grandchildren for a long period of time uninterrupted until his demise.

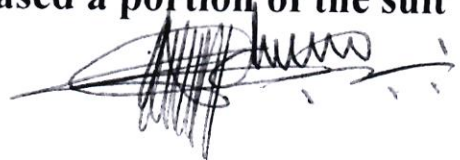


That the late Ssendendo passed away in 1990 and the plaintiffs subsequently applied for letters of administration which were granted in 2015. That the plaintiffs and other members of the family of the Late Ssendendo Walusimbi Robinson have been peaceful and quiet possession of the suit land until 2020 when the defendant purported to have bought part of the suit land from one Andrew Kyogereko who was one of the administrators of the late Ssendendo Walusimbi Robinson but has since passed on. That the defendant and his agents have been interfering on the suit property while intimidating, harassing and evicting the occupants on part of the suit land. That the defendant went ahead to forging the signatures of the plaintiffs and claimed that the plaintiffs signed on the transfer forms of the suit land.

The defendant in his defence denied all the allegations in the plaint and stated that he purchased part of the suit land comprised in Kyadondo Block 227 Plot 57 at Bweyogerere which he bought from a one Andrew Kyogereko being one of the administrators of the late Ssendendo Walusimbi Robinson in 2019. That the land he bought measures 36.5 decimals and the plaintiff's at all material times were aware of this purchase. That the defendant took possession on only part of the suit land which he bought where after the plaintiffs signed on transfer forms. That unfortunately the said Andrew Kyogereko passed on before muting off the defendant's portion. That after the death of the said Andrew Koygereko, the plaintiffs fully recognised the interest of the defendant in an agreement dated 19<sup>th</sup> July 2020. That indeed to date he enjoys quiet possession on part of the land he bought.

The following issues were agreed upon by the parties in a joint scheduling memorandum;

- 1. Whether the defendant lawfully purchased a portion of the suit land.**

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## 2. What remedies are available to the parties.

At trial, the plaintiffs were represented by Counsel Timothy Isiko while the defendant was represented by Counsel Asuman Nyonyintono.

### LAW

The general rule is that he or she who asserts must prove and the burden of proof therefore rests on the person who must fail if no evidence at all is given on either side. The standard of proof required to be met by either party seeking to discharge the legal burden of proof is on a balance of probabilities.

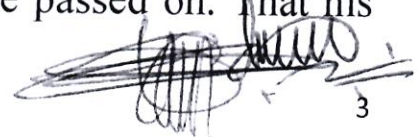
In **Miller V Minister of Pensions [1947]2 ALL E R 372** Lord Denning stated:

*“That the degree is well settled. It must carry a reasonable degree of probability but not too high as is required in a criminal case. If the evidence is such that the tribunal can say, we think it more probable than not, the burden of proof is discharged but if the probabilities are equal, it is not.”*

*It is also the position of the Law that the evidential burden does not shift to the defendant unless there is cogent and credible evidence produced on the issue for determination.*

In a bid to prove their case, the plaintiffs led evidence of 1 witness while the defendant led evidence of 2 witnesses. Counsel for both parties made written submissions which I will consider in this Judgment.

PW1 Walusimbi Jennifer Nabbosa testified that she is one of the administrators of the estate of the late Sengendo Walusimbi Robinson together with the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs. That the late Sengendo Walusimbi Robinson was the registered proprietor of the suit property where he lived with his family until 1990 when he passed on. That his



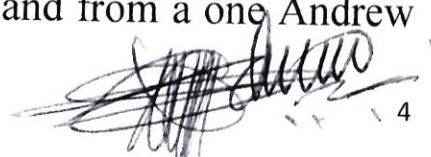
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family stayed on the land after his demise lived thereon peacefully until 2020 when the defendant trespassed on the same claiming that he had bought part of the suit land from one of the administrators the late Andrew Kyogereko. That as administrators of the late Sengendo Walusimbi Robinson they have never sold the suit land or any part of it to the defendant and that therefore the defendant doesn't have any claim of right on the suit land and as such a trespasser. She further testified that she has never signed any consent forms and the ones presented to Court with her signature are forged. And that neither did she ratify any purchase of the suit land. The actions of the defendant have exposed her and the other administrators to hardships, mental anguish, loss and inconvenience.

In cross-examination she confirmed to this Court that the defendant put two structures on the suit land and cut down the matooke that were on the suit land in 2021. That the defendant was reported to police and several meetings were convened but the matter was not resolved. That meetings offered the defendant 10 decimals out of Andrew Kyogereko's land and rejected it. She confirmed that the alleged transfer forms were a forgery although no case of forgery was reported to police. That there are 7 beneficiaries of Walusimbi's estate and the same was never distributed and no inventory has been filed in this Court. She further testified that none of the other administrators signed the sale agreement and that none authorised the said sale.

At locus, she confirmed that the plaintiff had piggery structures at the suit land and that the size is unknown. She stated that there are rentals on the suit land and that Andrew Sengendo occupies Walusimbi's house. That however he was initially staying in his father's rental number two.

On the other hand, DW1 Bulezi Ali the defendant in this matter testified that in 2019 he purchased two vacant pieces of land from a one Andrew



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Kyogereko measuring about 36.5 decimals forming part of land comprised in Kyadondo Block 227 Plot 57 at Bweyogerere. That he purchased the same from a one Andrew Kyogereko a co-administrator of the plaintiffs who showed him the boundaries of the suit land and handed over land transfer forms signed by other administrators. That he took possession until Andrew passed on in 2020 without muting off the pieces of land sold to him. That after the death of Andrew, his co-administrators recognized his interest as one that he had got from the co-administrator Andrew until there was a twist of events and the plaintiffs reported him to police for trespass. He further stated that the plaintiffs freely signed the agreement of ratification and there was no forgery over transfer forms.

In cross-examination, he testified to this Court and confirmed that he inquired about the suit land before purchase and found out that the owner was Kyogereko who was given the same by his late father. That however, no document of deed was given to him and that he did not bother to find out other beneficiaries and administrators. That he purchased the legal interest from Andrew Kyogereko although the land was still in father's name. He bought an interest which was a gift to the said Andrew by his father. He confirmed that he was not present when the transfer forms were signed and no document was signed by all five administrators. He also confirmed that he bought the land which is being cultivated by the defendant.

At locus, he confirmed that the late Andrew was staying in the 2<sup>nd</sup> rental house and that the suit land has piggery structures by the plaintiff and one roomed brick house belonging to the defendant. He further confirmed that at the time of purchase the land was vacant as there was no structure or house and that he only bought because of Kyogereko's gardens.

DW2 Wambewo Nelly testified in this Honorable Court and stated that he is a neighbour to the defendant and that he knows plaintiffs as

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administrators of the estate of the late Sengendo Walusimbi Robinson. That he is aware that in 2019 the defendant purchased two vacant pieces of land from a one Andrew Kyagoreko. That the said Andrew Kyogereko used to stay on part of the land comprised in Kyadondo Block 227 Plot 57 at Bweyogerere. That the defendant paid for the said land to completion, was given transfer forms by co-administrators of Andrew but unfortunately Andrew died before mutation.

In cross-examination he confirmed that the defendant bought vacant land occupied by grass and trees. That the boundaries in the 1<sup>st</sup> agreement start from Andrew's house going upwards and then the boundaries of the 2<sup>nd</sup> agreement continued upwards.

### **RESOLUTION**

#### **Issue No. 1: Whether the defendant lawfully purchased a portion of the suit land.**

From the evidence on record it is clear that the said Andrew Kyogereko sold the suit land as an owner who got it from his father. However the defence evidence and pleading is a mixture of a claim of gift intervivos and a share of the estate. Therefore the legal questions to answer are whether there is sufficient evidence on record to show that the said Andrew Kyogereko was given the suit land as a gift and if not, whether the said Andrew kyogereko sold his share in the estate as a sole administrator.

To begin with, the defendants did not plead a gift intervivos. The issue of gift intervivos came through the defendant's evidence. In fact, it came as an afterthought. Ideally this would amount to departure from pleadings which this Court would ordinarily not tolerate.



Secondly, the defendant's claim of purchase is based on two fronts. The first being a sale as an owner of the suit land and the second being a sale of his share from the estate of the late Sengendo walusimbi Robinson.

I shall proceed to determine the argument on gift intervivos.

In the case of **The Registered Trustees of Kampala Archdiocese v Nabitete Nnume Mixed Co-operative Farm Limited (HCCS NO. 1559/2000) [2017] UGHCLD 4**; It was held that a gift intervivos is defined in Black's Law Dictionary 8th Edition at page 710 as;

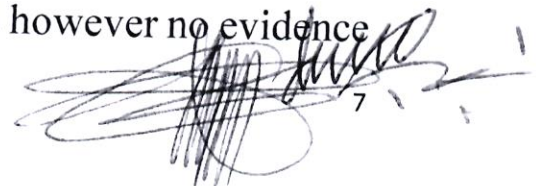
*"...a gift of personal property made during the donor's life time and delivered to the donee with the intention of irrevocably surrendering control over the property."* Following the decision in **Joy Mukobe vs. Willy Wambuwu HCCA No. 55 of 2005**, the Court held that;

*"...for a gift intervivos to take irrevocable root, the donor must intend to give the gift, the donor must deliver the property, and the donee must accept the gift."*

*Delivery of the gift must be actual or constructive made during the donor's lifetime in a manner that depicts that the donor has stripped themselves of all dominion over the gift. And to illustrate that point further, Todd & Watts In Cases & Materials on Equity & Trusts 3rd Ed at 130 states as follows;-*

For a gift to be perfect, the donor must actually complete the disposition of the subject matter in favour of the intended donee or execute a formal "deed of gift". Only then can a volunteer or donee enforce it. Intention not to be mistakenly inferred, must be joined by action.

In this case it was the defendant's evidence as DW1 that he bought the suit land from the late Andrew Kyogereko who had obtained the same from his father as a gift intervivos. He further stated that the suit land was occupied by Andrew Kyogereko's gardens. There is however no evidence



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to show that indeed the gardens belonged to the said Andrew Kyogereko. It is not automatic that gardens being in front of Andrew Kyogereko's house meant that they belonged to him. Besides both DW1 and DW2 in cross examination confirmed that the defendant bought vacant land.

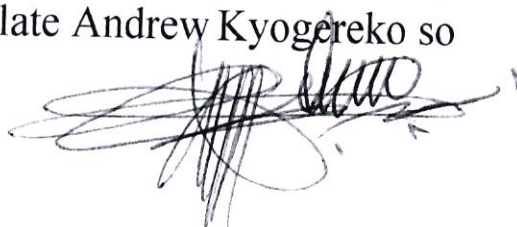
What is clear is that all beneficiaries of the Late Ssendendo Walusimbi Robinson stayed on their father's land including the suit land. There is no evidence on record that the defendant inquired from any of them to confirm Andrew Kyogereko's gift.

In the absence of a deed to prove a gift to the said Andrew Kyogereko, there is no evidence to show that there was someone who saw the Late Ssendendo Walusimbi Robinson giving late Andrew Kyogereko the suit land. This land cannot have been given in secrecy. This Court cannot assume that the purported donor intended to unequivocally pass on his interest in the suit land to the said Andrew Kyogereko.

Suffice to say, gifting of titled land can never be treated like gifting a kibanja interest. For the donor to demonstrate his intention of irrevocably surrender control over the property, he must have at least taken steps to transfer title in to the donee's name. Ordinarily, such evidence would be signed transfer forms duly executed by the parties.

In this case, there is no evidence on record to show that at least the alleged donor gave the late Andrew Kyogereko transfer forms to facilitate him to acquire title over the suit land.

Be that as it may, in the absence of a gift deed or transfer forms in favor of the late Andrew Kyogereko, there is no basis for Court to believe that the late Ssendendo Walusimbi Robinson had the intention to irrevocably surrender control over the suit property to the late Andrew Kyogereko so as to amount to a gift *inter vivos*.

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I therefore find that the defendant failed to lead evidence that the suit land was given to the said Andrew Kyogereko as a gift *inter vivos*. It therefore goes without saying that the suit land belongs to the estate of Ssendo walusimbi Robinson.

Is shall now proceed to resolve the question of whether a single administrator can act self-regulating of the other co- administrators.

The defendant in his evidence stated that the suit land is not in the estate of the late Sengendo walusimbi Robinson. However, he stated that he bought from a one Andrew Kyogereko one of the administrators of the estate of the late Sengendo Walusimbi and the sale was ratified by the co-administrators.

**In SILVER BYARUHANGa vs FR. EMMANUEL RUVUGWAHO and RUDEJA civil appeal no 09 of 2014. Court stated as follows; -**

*However, in the case of executors or administrators who have jointly applied for Probate or Letters of Administration and obtained 10 the grant simultaneously or all together, they must act jointly at all times because Section 272 of the Succession Act does not allow them to act singly. Otherwise it would defeat the purpose for appointing joint executors or administrators.*

*Appeal for Eastern Africa, in the lead judgment which all the members of the Coram agreed with, Sir Alistair Forbes, VP, held: "There is no evidence whatsoever that that Mr. G.B. Talbot joined Mrs. Talbot in depositing the duplicate certificate of title with the appellant with intent to create security thereon. In my opinion unless both executors joined in such deposit, the deposit would be ineffective to create an equitable mortgage. Reference was made to s.274 of the Succession Ordinance (Cap 34). Under section 134 of the Registration of Titles. Act, it is mandatory for joint executors or administrators to work together.*



From the holding of the above cited case, it is very clear that where there are joint administrators, they must act together. Actions of a single administrator independent of co-administrators are void.

In this case, the defendant entered in two purchase agreements DE1 and DE2, for the purchase of two pieces of land forming the suit land with one of the administrators of the estate of the late Ssendendo Walusimbi, a one Andrew Kyogereko.

As per PEX1, the letters of administration to the estate of the late Sengendo walusiimbi Robinson were granted to 5 administrators namely, Walusimbi Jennifer Nabbose, Nabagala Agnes, Andrew Kyogereko, Walusimbi Hannington and Walusimbi Babirye Debora.

However only one administrator, Andrew Kyogereko transacted with the defendant for the purchase of the suit property and did not involve the other co administrators to sign on the purchase agreement.

Ideally the purchase was bad perse. However, it is the argument of the defendant's counsel that the purchase transaction was ratified by all other administrators in DE8.

Perusal of DE8 was an agreement promising the defendant that he would be shown the late Andrew Kyogereko's share which he bought. However, the same was not signed by all administrators as was confirmed by the DW1 himself.


In essence, DEX8 Cannot be said to be a ratification by the co-administrators to validate the said purchase. However no explanation is given as to why at this stage when the documents were signed the defendant and the seller were never sued or reported to police. In my view it is an indication that the co- administrators were aware of the subject sale/purchase and attempted to ratify the same. The other administrators gave no explanation as to why they had to wait for their brother's death to

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start resisting the interest of the defendant. Equity aids the vigilant evidence on record shows the plaintiffs were not vigilant and are only seeking to take advantage of their brother's absence to defeat the defendant's interest in the suit land. Therefore they cannot turn around to completely deny the transactions between Andrew Kyogereko and the defendant.

Further the defendant exhibited a transfer form signed by all co-administrators marked PEX4. Although the plaintiffs denied the signatures thereon arguing that their signatures had been forged, they led no evidence of a hand writing expert to prove the same. Even if it were true that the transfer form was not signed by the co-administrators in the presence of the defendant as stated by DW1, it is not enough to take away the fact that the co-administrators attempted to ratify the purported sale and are therefore estopped from denying the same. At locus, PW1, Walusimbi Jennifer showed Court a small piece of land which was offered to the defendant as Andrew Kyogereko's share in the estate. That the defendant refused it for being small.

The conclusion which can be derived from the documentary evidence and the conduct of the plaintiffs towards the defendant's claim is that the surviving administrators and family members were agreeable to handing over a share of their brother to the defendant. Since the estate has never been distributed for a period of 8 years now, I believe Andrew Kyogereko's share still exists since it was confirmed by the witness that the entire estate consists of two acres and it has never been distributed. It is in the interest of justice that the defendant's claim of 36.5 decimals as contained in the agreements between him and the late Andrew Kyogereko should constitute part of that share.

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Therefore, it is the finding of this Court that the transaction between late Andrew Kyogereko and the defendants were validated by the plaintiffs and therefore valid.

Therefore, this issue succeeds.

## ISSUE 2 WHAT REMEDIES ARE THE PARTIES ENTITLED TO.

The plaintiffs sought for a number of remedies which cannot be granted since their case has not succeeded. However, the defendant is entitled to some remedies as will be highlighted in the final orders.

### **Costs**

Ordinarily costs follow the event. The plaintiffs' case has not succeeded, the defendant would be entitled to costs. However, this case relates to an estate which needs to be preserved for the beneficiaries.

Accordingly, each party shall bear its costs.

In conclusion, the suit fails with the following orders; -

1. The defendant is entitled to part of Andrew Kyogereko's share in the estate of the late Ssengendo Walusimbi Robinson measuring 36.5 decimals.
2. New administrators shall sign transfer forms in favor of the defendant for land measuring 36.5 decimals.
3. Each party to bear its own costs.

I so order



TADEO ASIIMWE

**JUDGE**

30/06/2023