

IN THE HIGH COURT OF UGANDA AT SOROTI

CIVIL APPEAL NO. 46 OF 2013

(ARISING FROM NGORA CIVIL SUIT NO. 7 OF 2012)

1. ODONG SIMON PETER

2. OPIO JOHN

3. AMUNAUM SAM.....APPELLANT

V

OPOLOT DAVID.....RESPONDENT

JUDGMENT

The appellants through their advocates Omongole & Co. Advocates appealed the judgment of HW Okumu Jude Muwone dated 18th August 2013 sitting at Ngora on six grounds of appeal that i will revert to later in the judgment.

Both Omongole & Co. Advocates for the appellants and Legal Aid clinic for the respondent filed written submissions that i have carefully considered.

The duty of the appellate court is to re-evaluate the evidence adduced in the trial court and arrive at its own conclusions bearing in mind that the trial court had an opportunity to observe the demeanour of the witnesses.

I have studied the proceedings of the lower court. While the evidence is well documented, the exhibits were not handled properly. They are not marked although they are referred to in the proceedings. This notwithstanding, i endeavoured to make sense out of the exhibits tendered by the respondent and the appellants.

The respondent sued the appellants in trespass to land located at Okapel village, Kobwin sub-county, Ngora district. The basis of his claim is that he holds letters of administration to the estate of his late mother Alupo Faith from whom he derives title.

Although the plaint puts date of her death as 2009, PW1 Opolot the respondent says she died in 1998 and that is when he inherited her land. At one point, he said she died in 1988. It is this land that is in dispute.

From evidence of respondent's witnesses, Alupo purchased land from Yowani Etobait and inherited another portion from the same person who was her paternal uncle.

The respondent in his evidence puts the total size of land Alupo purchased and inherited at 17 acres. It is PW3 Peter Omuria who puts the respondent's case in perspective. His evidence shows that the land given to Alupo by Etobait is seven gardens but after her death, the 3rd appellant sold this land to the 1st and 2nd respondent.

PW3 Omuria and PW4 Ewanu testified that they were witnesses when Etobait declared in writing that Alupo would inherit his land after the 3rd appellant declined to be heir to Etobait.

According to PW4, Etobait predeceased Alupo.

While there are inconsistencies in respondent's case on size of disputed land, the appellants put the size at four gardens. With regard to 1st and 2nd respondent, their main defence is that they bought the land from Amoding Maliam widow of Etobait and 3rd appellant in 1991. The two appellants had been looking for land to purchase and it was after they heard that Amoding

was selling land that they went in for a purchase at 375,000/ and three head of cattle. Thereafter, they constructed homesteads and started cultivation. According to DW1 Odong, he grew up in the area and he knew the land originally belonged to Yowana Etobait. DW1 did not know that Alupo mother of the appellant had inherited the land.

That it was in 2012 that the respondent claimed the land as his.

The second respondent (DW 2) confirms the 1st respondent's evidence that they jointly purchased four gardens from Amoding , Amunaun Samson 3rd appellant and Aujo Mary.

The 2nd appellant learnt of the claim by the appellant in 2010 and previously, he had never seen the appellant.

The 3rd appellant's defence is that it is Amoding widow of Etobiat who sold the four gardens to the 1st and 2nd appellants. As for DW4 Amoding, she confirms she is the widow of Etobait and that her husband did not produce children. Her evidence also shows that Alupo predeceased Etobait whose dates of death she did not reveal.

Amoding DW 4 confirmed she sold land to the 1st and 2nd appellants with assistance of the 3rd appellant.

As for DW 6 Okwalinga, he too confirms Amoding inherited land from her husband Etobait . This witness clarifies that Alupo was given 3 gardens by Etobait and that this land is not in dispute. That what is in dispute is the land inherited by Amoding from Etobait.

At the trial, the magistrate framed the following issues.

1. Whether DW3 , Amoding and Maria Aujo had a right to sell land to 1st and 2nd defendants.
2. Whether the defendants are trespassers
3. Remedies

These issues as framed did not bring out the substantive issues in controversy.

The dispute as i understand it revolves on whether the respondent 's mother Alupo acquired land by outright purchase and some by inheritance from Etobait. If in the affirmative, does Amoding have any interest in the land left by her deceased husband Etobait?. Lastly, are the 1st and 2nd appellants bona fide purchasers for value without notice?

As a i observed at the beginning, the marking of the respondent's exhibits by the court leaves much to be desired. The respondent tendered letters of administration but i have failed to locate the copy tendered in court. Be as it may, there is one attached to the plaint that i have marked Pexh. 1. The other document tendered by the respondent concerned a purchase by Alupo from Etobait of three gardens dated 1984 . Although the testimony of the respondent is not clear about which land is in dispute, DW 6 who Okwalinga who was conversant with the dispute , clarified that the three gardens purchased by Alupo in 1984 from Etobait are not in dispute and that the respondent is using this land.

I find it disturbing that the respondent in his evidence bundled all the land together in spite of the exhibit dated 1984 that i marked Pexh. 2 for

convenience, which clearly shows that his mother purchased four gardens at 4,000/ form Etobait.

I accordingly find that the three gardens as per Pexh .2 are not in dispute.

What is in dispute are the seven gardens that the respondent claims where bequeathed to his mother by will . The respondent tendered two documents in support of this assertion I have marked this document Pexh. 3 for convenience. The document was witnessed by 6 people including Odeke sub-county chief of Oikoba and dated 26.9.1984.

I reproduce the translated version:

‘ i Yoana Etobai together with my wives, have given my land to my daughter Fais Alupo to take care of as heiress. Even when i die, she will be my heiress . There are seven gardens . This is because the clan rejected me. The one to whom i have given the land is a member of the clan. My boys (sons) have rejected me completely, saying that i was not their father. That is why i decided to give the land to the girl (daughter).

Even if any problems arise regarding that land , they will not defeat that girl, Alupo whom i have given the land’

Another document with similar content was endorsed by the same sub-county chief on 10 .9.1984. This document confirms the appointment of Alupo as heir to Etobait and that she will keep his wives his seven gardens and also confirms he sold her three gardens.

Both counsel dwelled on the existence of these two document s and interpreted them variously as gifts inter vivo and Wills. A care full examination

will show that the documents that are documented in the exercise books were written in a different handwriting although the contents are the same as in Pexh. 3. It seems someone went out of his or her way to reproduce the alleged will and the agreement of purchase by Alupo in the exercise book.

The existence of different versions of the intentions of Etobait brings into question their authenticity.

The respondent testified that the documents were given to him by his mother. None of the witnesses to this alleged Will testified. PW 4 Ewanu Moses who claimed to have witnessed the Will is not named as a witness to the alleged Will.

In light of my finding that there are different versions of the alleged Will, they are ruled unreliable.

Even if I were to believe that Alupo was appointed heiress, she would inherit subject to the equitable interest of the widow Amoding. Having survived her deceased husband, she remained on the land and was for all intents and purposes in control. Alupo died in a year that is not clear but possibly 1988, according to the respondent. It was in 2012 that the respondent sued the appellants who purchased land in dispute in 1991. An agreement of sale dated 3.11.1991 is marked Dexh. 1 for convenience.

Having found that Amoding had an equitable interest in the land, she was entitled to sell her interest to a third party.

Under the article 31 (1) of the Constitution as amended, men and women shall have equal rights at marriage, during marriage, at its dissolution.

Constitutional court petitions 13 of 2005 and 5 of 2006 between Law and

Advocacy for women in Uganda v AG puts women and men at par in as far as succession is concerned. Therefore no court of law, will give effect to an alleged Will that dispossesses a widow without justifiable reasons. To declare that because Alupo was appointed heiress, and therefore the widow is dispossessed would amount to a miscarriage of justice.

Amoding therefore had a right to dispose of the land she inherited from her deceased husband as surviving spouse . Accordingly, the 1st and 2nd appellant lawfully purchased four gardens from Amoding.

The above finding notwithstanding, the 1st and 2nd appellants could not have had constructive notice of Alupo's appointment as heiress especially when the widow Amoding was on the land. Indeed DW6 Okwalinga was the author of Dexh.1 and he made it clear that Ekobait left no Will and that the land belonged to her as widow of Ekobait. The community could not have known of a Will that dates back to 1984 and that has had never been proved before a court with competent jurisdiction.

I therefore find that the trial magistrate erred in law and in fact when he entered judgment for the respondent.

Turning to the grounds of appeal, the first ground is that the trial magistrate erred in law and in fact when he held that the respondent's late mother Alupo acquired the suit land from late Yowana by gift inter vivo thereby occasioning a miscarriage of justice.

I have found that Pexh. 3 , although it would pass for a Will because it is witnessed, its authenticity is questionable in light of the different versions of the same document , i.e one is dated 10.9.1984 and another is dated 26.9.1984 . Secondly, the alleged Will has never been proved before a court

with competent jurisdiction as a valid Will. Lastly, this court cannot give effect to an alleged Will that dispossesses the widow.

The document is definitely not a gift inter vivo, going by the authority supplied by counsel.- **Mbale HC CA 55 of 1995 Joy Mukobe v Wambuwa** where Justice Wangutusi gives three essential requirements of a gift inter vivo:

The donor must intent to give the gift, it must be delivered and the donee must accept.

There is no evidence that Alupo took possession of Etobait's land during her lifetime save from the three gardens, not in dispute, she purchased from him.

Ground one succeeds.

Ground two is that the trial magistrate erred in law and in fact when he held that the sale of the suit property to the respondent was null and void.

I have found that Amoding had an equitable interest in the suit land and she was entitled to dispose of it by sale. Ground two succeeds.

Ground three is that the trial magistrate erred in law and fact when he held that the appellants are trespassers. I have found that the 1st and 2nd appellants lawfully acquired four gardens from Amoding by purchase. I also found they are bona fide purchasers for value without notice. They are accordingly not trespassers. Ground three succeeds.

Ground four is that the trial magistrate erred while at the visit to the locus in quo, failed to differentiate between the land that the late Alupo bought and the portion allegedly acquired by gift inter vivo.

I have found that the three gardens Alupo purchased from Etobit by an agreement dated 1984 were not in dispute as testified by DW6 Okwalinga. I observed earlier that the respondent was not clear in his testimony about the size of the land in dispute. He actually made reference to acres when the common reference to purchase of customary land is in gardens. The respondent did not state whether the appellants had trespassed on the three gardens. It is DW6 who made the clarification.

The trial magistrate erred by not clearly stating that the three gardens purchased by Alupo were not part of the suit land. Ground four succeeds.

Ground five is that the trial magistrate erred in law and fact when he disregarded the evidence of DW3 Amoding. I have found that Amoding has an equitable interest in the suit land as widow of Etobait. Ground five succeeds.

Ground six is that the trial magistrate failed to properly evaluate the evidence. This ground has been canvassed under the first five grounds.

I find that it was unnecessary for the respondent to drag the 3rd appellant to court when he should have sued Amoding.

I accordingly allow the appeal, set aside the judgment and order of the lower court and substitute with the following orders.

1. The three gardens purchased by Alupo are part of her estate
2. The 1st and 2nd appellant are entitled to quiet enjoyment of the four gardens they purchased from Amoding who will continue to enjoy undisturbed the remainder of the suit land.
3. Costs of this appeal and the lower court to the appellants.

DATED AT SOROTI THIS 26TH DAY OF SEPTEMBER 2014.

HON. LADY JUSTICE H. WOLAYO