THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT SOROTI

HIGH COURT CIVIL APPEAL 44 OF 2010

(Arising from CS 50 of 2008 Kumi Magistrate's Court.)

1.OMONGOLE PETER

2. KEDI RICHARD.....APPELLANTS

V

OKURUT VICENT.....RESPONDENT

JUDGMENT

In this appeal, the appellant appeals the decision of the magistrate grade one Opio Belmos Ogwang dated 27.10.2010. The grounds of appeal are as follows:

1. The trial magistrate erred in law and in fact in holding that the sale of the suit property to the appellants by the late Otai Yowana without the defendant's consent was null and void.
2. The trial magistrate erred in law when he issued a permanent injunction .
3. The trial magistrate failed to properly evaluate the evidence on record thereby arriving at a wrong decision.

Ms Omongole & co advocates for the appellant filed written submissions that i have studied and considered. Mr. Erabu appeared for the respondent and did not file written submissions within the time stipulated by court. Latest date for filing was 20.11.2013 according to the schedule.

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

The appellants (plaintiffs) sued for a declaration that three gardens they bought from Otai Yowana belong to them, and for orders of vacant possession and permanent injunction. In his written statement of defense, the defendant averred that the three gardens belong to him as they were given to him by his father Otai Yowana.

It is not in dispute that Otai , uncle of the respondent, entered into sale agreements for three gardens with the plaintiffs on diverse dates between 2001 and 2007. Agreements of sale are not disputed. The respondent contended that there could be no sale because his uncle Otai Yowani gave him the gardens during his life time when the uncle anointed him as heir in 1998 . He was supported by his uncle Okolimong Stanley DW 2.

The issue before the trial court was whether the sale agreements tendered in court conferred proprietary rights on the buyers therein. A closer scrutiny of the agreements is necessary.

The agreement dated 13.4.2001 is for sale of land at 130,000/ to Omongole., 1st appellant. The witnesses to this agreement are not indentified by relationship to the seller or by official title. Indeed the LC officials were merely informed of the sale as indicated in their letter dated 24.8.2007, some six years after the transaction. The reason for involving the LC III Chairman was to give the sale some semblance of legitimacy.

In the agreement dated 13.4.2001, Otai reiterates, and i quote,

'i will not redeem again redeem it back'.

The implication of this statement is this was not the first time Otai and Omongole were transacting over the land. The location of the land and its boundaries are not described. The defence case suggested that all the transactions between Omongole and Otai were loan transactions and not sales. I tend to agree with position on the basis of the statement i have quoted above.

In his evidence in court, PW1 Omongole attempts to give oral evidence of location of land but this is unacceptable as description of land sold is required to be in writing.

The sale of 30.12.2003 to Kedi Richard was for one cow and two goats . Osire Richard nephew of the seller witnessed this sale together with 14 other persons whose addresses or relationship with the seller are not disclosed. Osire testified as PW3 .

The location of the garden sold is not indicated neither are the boundaries described. This renders the sale void because land is not a chattel. It must be clearly described in the sale agreement. While there is proof that Otai received consideration, the purpose of the consideration is not clear.

The sale of 20.7.2007 was to Omute who bought land for 550,000/. In the same agreement, Omute acknowledges that he has sold the same land to Omongole for 650,000/. The witnesses to this sale are identified as clan members of Ikomolo Idwaramug clan and LC officials . A sketch map shows boundaries of land sold.

I find this the only transaction that can pass for a sale of land. The subject matter is clear , and clan members and LC officials witnessed the sale.

An agreement for the sale of land is a contract which must meet essential requirements., i.e, description of the parties, property, and consideration. See Cheshire and Burn's Modern Law of Real Property, 15th edition, page 110-113, Butterworths 1994.

From the evidence, it appears the appellants have never entered possession of some of the land. PW1 Omongole Peter admitted that Otai was occupying a house on part of the land he allegedly bought. PW2 Kedi second plaintiff, testified that was he not occupying the land he bought from Otai by agreement dated 30.12.2003.

Turning to the first ground of appeal, the magistrate held that the sales by Otai were void ab initio because family members did not consent to the sale. He cited section 39 of the Land Act. Section 39 envisages spouses and children as family members . The defendant is a nephew so strictly speaking , he is not a family member unless of course he was adopted customarily by Otai. The defence case contends that the defendant was appointed heir by Otai .

Counsel for the appellants submitted at length about this point. While i agree with him that section 39 of the Land Act does not apply to the respondent, strictly speaking, it ought not to have been the only basis for resolving the dispute. Ground one of the appeal succeeds.

Nonetheless, i re-evaluated the evidence and found that the transactions of 13.4.2001 and 30.12.2003 to Omongole and Kedi respectively cannot pass for contracts in law. These two transactions are void.

Counsel for the appellants submitted at length that the constitutional right to own property by Otai underpins the transactions between the parties. He also referred to the testimony of PW5 Otai Yowani, the seller who died before cross examination. PW5 maintained that there was a sale but i have found that the sales on two occasions were void as the agreements did not describe the property even by location.

While the trial magistrate dismissed the plaintiffs' claim on an erroneous principle, i evaluated the evidence and the law and found that the plaintiffs' claim on two gardens ought to be disallowed on the ground that the sale agreements between the seller and buyer was void for failure to describe property sold. As ground two and three have been disposed off by ground one, i allow the appeal in part and make the following orders:

1. The sale of 20.7.2007 to Omute and later to Omongole was a valid sale consequently, that sale is upheld. The Ist appellant is therefore entitled to possession of this piece of land. An order for vacant possession will issue in three months time if the occupier fails to deliver vacant possession.
2. The sales of 13.4.2001 and 30.12.2003 to 1st and 2nd appellants respectively are declared void. This land reverts to the estate of Otai .
3. To avoid protracted litigation, the consideration paid to Otai under agreements of 13.4.2001 and 30.12.2003 be recovered from the estate of Otai.
4. The appellants will pay one quarter of both costs of the appeal and costs of the lower court .

DATED AT SOROTI THIS…….06……DAY OF……February……2014.

HON. LADY JUSTICE H. WOLAYO