

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT SOROTI**

**CIVIL APPEAL NO. 46 OF 2011**

**ARISING FROM KUMI CLAIM 15 OF 2006**

**ESAETE ABISAKI.....APPELLANT**

**VERSUS**

**OMUTOJO CHARLES.....RESPONDENT**

**BEFORE HON. LADY JUSTICE H. WOLAYO**

**JUDGMENT**

In this appeal, the appellant appeals the judgment of HW Opio Belmos Ogwang sitting at Kumi and dated 2<sup>nd</sup> November 2011 on the following grounds.

1. The trial magistrate erred when he failed to hold that the disputed land was bought by the appellant's father in 1981 and thereafter built a home on it in 1984 and buried family members on the said land.
2. The trial magistrate erred in law and in fact to hold that the suit was res judicata.
3. The decision of the trial magistrate occasioned a miscarriage of justice.

The appellant prayed for judgment to be entered against the respondent.

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

Both parties appeared in person at the hearing of the appeal.

The appellant filed a claim in trespass to land measuring three gardens located at Olupe village, Kumi district. In defence, the respondent filed a written statement of defence in which he claimed the land was inherited from his late grandfather who gave the appellant's husband temporary permission to cultivate the land.

The appellant's case is based on a purchase by her late husband Wilson Omilo from Nasoni Omutoj at a price of four cows and 100,000/= in 1981. She inherited the land in 1987 from her late father. PW3 Ineget Isaih put the price paid as 100,000/ and four head of cattle and that he witnessed the sale that was reduced into writing.

The appellant did not produce any document in proof of her claims.

The respondent on the other had averred that the transaction between the appellant's father and his grandfather Omutoj Nasoni was a pledge and not a sale. His grandfather died in 1986 and in 2006, he began using the land. He filed a claim in the LC courts and was declared rightful owner.

All respondent 's witnesses are in agreement that the transaction was a pledge and not a sale and that efforts by the respondent to return the cows to the appellant have failed.

Proof of purchase of land must be in writing and under no circumstances will a court of law accept oral testimony.

A further scrutiny of the evidence shows that from 1987 to 2006 when the respondent forcefully began using the land, the appellant was in possession and she has continued in possession of two gardens. This means she was disposed after 19 years of quiet enjoyment. This long possession vests an interest in the

land on the appellant and especially with regard to two gardens she currently occupies.

Under section 5 of the Limitation Act,

‘ no action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her, or if it first accrued to some person through whom he or she claims..’

The respondent and his predecessors sat on their rights and did not bring an action within 12 years from the time the appellant entered possession. The respondent cannot bring an action long after the twelve years lapsed. The trial magistrate ought to have allowed the claim on this basis.

However, with regard to the one garden the respondent is using, as the respondent is a nephew to the appellant and in the interests of peaceful co-existence, he will continue using that one garden .

I note that the magistrate dismissed the suit because the LC1 of court of Olupe determined the case and the appellant did not appeal to the next level. However, I find that the record of the LCI court is only a half page record with no proceedings recorded. The trial magistrate should have determined the case on the merits and ignored Dexh. 2 referred to in his judgment.

In the premises, I allow the appeal in part and vary the orders of the trial magistrate as follows.

1. The appellant to continue cultivating the two gardens which are decreed to her .

2. The respondent to continue cultivating the one garden which is decreed to him.
3. Each party to bear their own costs both here and the court below.

**DATED AT SOROTI THIS 10<sup>TH</sup> DAY OF JULY 2014.**

**HON. LADY JUSTICE H. WOLAYO**