

**THE REPUBLIC OF UGANDA**

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

**CIVIL APPEAL NO. 46 OF 2012**

**(ARISING FROM KUMI CLAIM NO. 22 OF 2010)**

**ASIO JESCA .....APPELLANT**

**V**

**OCHEGER CHARLES OKELLOTO.....RESPONDENT**

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

**JUDGMENT**

The appellant being dissatisfied with the decision of the grade one magistrate , Kumi , delivered on 2<sup>nd</sup> November 2011, appeals to this court. The appellant who was not represented filed a memorandum of appeal the gist of which is that the trial magistrate failed to properly evaluate the evidence and hence arrived at an erroneous conclusion. The respondent was represented by Mr. Erabu .

The undisputed facts before the magistrate's court are that the appellant holds letters of administration to the estate of her late father Okwere Christopher who passed away in 2004. Her late father owned some six gardens. Prior to his death, the respondent lived in the home of the appellant's father.

The disputed facts are as follows. The respondent asserts that he purchased the six gardens from the Okwere, plaintiff's father. Three agreements were presented as proof of purchase. Two agreements are dated 12<sup>th</sup> July 1997 for purchase of four gardens and a third agreement dated 12<sup>th</sup> February 2009 for purchase of one garden .

The appellant's witnesses assert that there was no sale and that the respondent merely took refuge at Okwere's home during insurgency.

I have carefully listened to submissions of counsel for the respondent.

It is trite law that the duty of an appellate court is to re-appraise the evidence and draw its own inferences of fact bearing in mind that the trial court had an opportunity to observe the demeanour of witnesses. These principles were restated in *Rwakashaija Azarious and others v URA* Supreme Court Civil Appeal No. 8 of 2009.

I note that the trial magistrate based himself on the agreements to dismiss the appellant's claim. On a closer scrutiny of the agreements, none of the witnesses to the purchase were called as witnesses. Only DW5 Apolot Helen witnessed the 2009 sale although her evidence is in respect of the 1997 sale.

The appellant had a duty to prove her case on a balance of probability. She asserted that the respondent encroached on her father's land to which the respondent raised a claim of right. There is evidence that the appellant did not live with her father most of the time as she was married in Pallisa. It is possible she may not have known of the transactions between the respondent and her father. I will therefore not upset the finding of the magistrate that the 1997 agreements are evidence of purchase of five gardens.

I am however constrained to arrive at a different finding with regard to agreement of 2009 between Omuna Ramasani, and the respondent. The seller in that agreement is not Okwere father of the appellant but Omuna, paternal uncle to the appellant. By 2009, Okwere was deceased as he died in 2004. The appellant secured letters of administration to the estate of her late father in 2010, therefore Omuna did not have legal authority to sell Late Okwere's land. Interestingly, Omuna who was DW 4 made no mention of the 2009 sale to the respondent.

In the premises, as sale was a nullity in law, the sixth garden remains the estate of the late Okwere and under the control of the appellant who has letters of administration.

With regard to the 9,000,000/ that the respondent agreed to compensate the appellant in the presence of clan leaders, this arrangement cannot be enforced by this court.

With regard to the appellant's statement that the respondent's daughter , Rose, was court clerk when judgment was delivered, the record shows that the judgment was read in the presence of Akia Anna Grace and not Rose. I therefore will not dwell on this statement.

In the result, the appeal is allowed in part with the following orders:

1. The sixth garden, subject f the agreement dated 12<sup>th</sup> February 2009 is part of the estate of late Okwere and will be controlled by the appellant who holds letters of administration.
2. The respondent to deliver vacant possession of the sixth garden to the appellant within three months from delivery of this judgment.
3. Each party to bear own costs.

**DATED AT SOROTI THIS 21<sup>ST</sup> DAY OF OCTOBER 2013.**

**HON. LADY JUSTICE H. WOLAYO**