IN THE HIGH COURT OF UGANDA AT SOROTI

CIVIL APPEAL NO. 40 OF 2010

(ARISING FROM KUMI CIVIL SUIT NO. 6 OF 2008)

1.OSAKUTU SIMON..........................APPELLANTS

2. ATWAMAR JOSEPH

V

1.OLIAM JAMES PATRICK

2. AMUKUN ROBERT........................RESPONDENTS.

BEFORE HON. LADY JUSTICE H. WOLAYO

JUDGMENT

The appellants, through their advocates Omongole & Co. appealed the judgment of HW Belmos Ogwang dated 17th September 2010 sitting at Kumi on three grounds of appeal that i will revert to later in the judgment.

Counsel for the appellants filed written submissions that i have carefully considered.

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

The respondents Oliam James Patrick and Amukun Robert sued the appellants Osakutu Simon and Atwamar Joseph for recovery of two gardens located at Tididiek village, Ngora , Kumi district .

Their case was that the 1st appellant Osakutu is their elder brother. According to PW3 Olupot Obella, the two respondents inherited the land from their late uncle Oliam while PW1 Oliam James testified that the land was handed to him

and his brother on 13.7. 1981 by the clan chief late Omoding Paulo. From the testimony of PW4 Monika Justine, the 1st appellant inherited land from his father while the respondents were given their late paternal uncle's land in 1981. Further testimony from PW2 Amukun Robert shows that while the 1st appellant stayed in the original family home, the respondents were allocated their late uncle's land, who , according to PW4 Monika Justine, died childless.

An examination of the document dated 13.7.1981 entitled

> ‘ giving away of gardens by Oliam –Igulu ‘
>
> The contents of the document are reproduced below:
>
> ‘ i Oliam Igulu has given away to the family of nAtim Elizabeth who is wife of my brother called Ekoru Gearge William my (5) five gardens which i have specifically given to two boys called Oliam James and Amukun R.
>
> Two gardens are where my home is , then two are towards the swamp and one is at the boundary with Aata and Yowani which i had previously given to Isakut S'.

An analysis of this document shows that in effect, the 1st and 2nd respondent were given two gardens each, while the 1st appellant got one garden.

The 2nd appellant was sued when the 1st appellant sold the suit land to the 2nd appellant.

The appellants case was that in 2008, the six gardens belonging to late Oliam, their paternal uncle were divided by the clan meeting among the brothers with each getting two acres including the 1st appellant. It is after this division

that the 1st appellant sold his portion to the 2nd appellant at 1,300,000/. The 1st appellant was supported by DW3 Okiror Lawrence clan chief between 1993 to 2009. DW3 clarified that Okoroi father of the parties, had two wives and that while Opio James was heir to Ekoroi's estate, Atino mother of the respondents was heir to Oliam.

According to DW3 Okiror, although he witnessed the sale of land to the 2nd appellant, he does not have documentary proof that the sale was conducted with approval of the clan members.

The 1st appellant's case is further that as eldest son, he was heir to Oliam's estate who did not have children.

I have examined the sale agreement dated 27.1.2008 and observed that none of the respondents were present during the sale . While Okiror DW3 was present, it is one Aedeke Joseph who is cited as clan leader and not Okiror .

The trial court was called upon to determine whether respondents proved their claim on a balance of probabilities. Two issues were apparent.

1. Whether the 1st appellant was entitled to a share in the land gifted by a deed inter vivo dated 13.7.1981.
2. Whether the sale of two gardens in dispute by the 1st appellant to the 2nd appellant was in consultation with clan members as required by custom.

From the foregoing analysis of evidence, it is apparent that the respondents claim is premised on a gift inter vivo . The document that was not marked as an exhibit by the trial magistrate clearly is a donation of land during the lifetime of the donor, Oliam Igulu. From the testimony of DW1 Osakutu, Oliam

died in 1986 when the respondents were minors. This explains why the donor hands the land to Atim Elizabeth ,mother of the two respondents.

With regard to the 1st appellant, the donor has this to say

> 'Two gardens are where my home is , then two are towards the swamp and ***one is at the boundary with Aata and Yowani which i had previously given to Isakut S'***.

Prior to the death of Oliam in 1986, he had already divested himself of four gardens and handed them to the mother of the two respondents . Prior to the donation to the two respondents, the donor had previously given one garden to the 1st appellant.

All parties lived peacefully together from 1981 until 2008 when the 1st appellant effected a sale of two gardens to the 2nd appellant. From the deed made by Oliam , the 1st appellant was given one garden yet he purports to sell two gardens. The issue therefore is which are these two gardens?

The 1st appellant claims he was automatically heir to Oliam as eldest son. Counsel for the appellant, argued at length that the appellant was entitled to inherit land from his uncle as the customary heir.

While this may be the case, Oliam divested himself of his estate during his lifetime , therefore, there was nothing for the 1st appellant to inherit as customary heir.

Secondly, the 1st appellant's contention that it is the clan that divided the land in 2008 among all the three brothers is not credible. Firstly, the minutes of the clan meeting were not produced as is the practice in this part of the

country. I cannot therefore accept a non –documented clan decision as a legitimate basis for the 1st appellant's claim to the land in dispute.

Second, the deed donating land to the brothers is self explanatory. The 1st appellant was given one garden long before the donation to the two respondents. I therefore cannot understand the purpose of a clan meeting in 2008 to re-distribute what had already been given out by Oliam in his lifetime. The only conclusion i can reach is that the 1st appellant sold land that was not his.

Consequently, i find that the 1st appellant has no right to the two gardens in dispute having secured his share of one garden in 1981 . The claim to the two gardens which he then sold to the 2nd appellant was without any basis.

The other issue was whether the 1st appellant complied with the custom regulating the community on sale of customary land.

I have found that the 1st appellant had no right to the two gardens in dispute, therefore the second issue does not call for a resolution.

Consequently, i find that the trial magistrate properly evaluated the evidence and arrived at a correct conclusion.

Turning to the grounds of appeal, ground one is that the trial magistrate failed to properly and exhaustively examine and evaluate the evidence before him and therefore arrived at a wrong conclusion.

Ground two

The trial magistrate handled the case perfunctorily and made serious omissions and misdirection.

Ground three

The decision has occasioned a miscarriage of justice.

Counsel argued the three grounds together.

The thrust of Counsel's submissions is that the 1st appellant was heir to late Oliam and therefore entitled to sell to 2nd appellant the two gardens. Counsel argued that the gift inter vivo was not proved by the respondents as no document was tendered to that effect.

While the document dated 13.7.1981 on donation of land was not marked as an exhibit, PW1 Oliam James at page two of typed proceedings states,

> *' i was given suit land in 1981 by clan chief late Omoding Paulo. See clan agreement dated 13.7.81'*

The deed by Oliam donating land to the two respondents is therefore genuine even though Oilam says it was the clan that gave them the land. I attribute this inconsistency to the peasant background of the respondents. Otherwise, the deed is self explanatory.

Likewise, the sale agreement dated 27.1.2008 referred to by appellant and his witnesses was not tendered as an exhibit. This can be attributed to the fact that both parties appeared in person during the trial. I fault the trial magistrate for not guiding parties on tendering of exhibits .

I found translated copies and the copies in Iteso language on the record and i could not ignore them. Indeed the deed donating land to the respondents was received by Kumi magistrate's court on 16.7.2009, while the sale agreement

between the 1st appellant and 2nd appellant was received by the Land Tribunal on 27.1.2008.

I therefore find no merit in counsel's argument.

With regard to the appointment as heir of the 1st appellant to Oliam, i have found that this had no consequences because Oliam divested himself of his gardens during his lifetime.

In the premises, i dismiss this appeal and confirm the judgment and orders of the trial court with costs to the respondents both here and the court below.

DATED AT SOROTI THIS 10TH DAY OF DECEMBER 2014.

HON. LADY JUSTICE H. WOLAYO