THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: ***HON. LADY JUSTICE A.E.N.MPAGI-BAHIGEINE,JA***

HON.LADY JUSTICE C.N.B.KITUMBA,JA

HON.LADY JUSTICE C.K.BYAMUGISHA,JA

CIVIL APPEAL NO. 95 OF 2003

BETWEEN

JULIET KALEMA :::APPELLANT

AND

1. WILLIAM KALEMA
2. RHODA KALEMA :::RESPONDENTS

[Appeal from the Ruling and Orders of the High Court of Uganda sitting at Kampala (**Atima-Okello J)** ***in Miscellaneous Application No.442/03 arising out of HCCS No.1474/2000].***

JUDGEMENT OF BYAMUGISHA, JA

This is an appeal from the ruling of the High Court of Uganda dated 12th November 2002 wherein the respondents' application for judgement on admissions was partly allowed.

The background to the matter in dispute as can be gathered from the pleadings filed herein can be summarised as follows: The appellant is the widow of the late Martin Kalema who died intestate on the 7th August 1993. The appellant and the two children, Rhoda Nabadda (daughter) and Martin Ntale (son) survived him. The respondents are brother-in-law and mother-in-law of the appellant respectively. The parties to the

dispute are also administrators of the estate of the deceased. Letters of administration (exhibit D.7) were granted to the trio by the High Court on 8th November 1993 vide Administration Cause No.523/93. Sometime in October 2000, the appellant filed High Court civil suit No.1474/2000 against the respondents. She was seeking a declaration that property known as Plot 22B Nakasero Road, Kampala and comprised in Leasehold Register Volume 2805,Folio 7(hereinafter called the suit property) is her matrimonial home and that the respondents have no right to alienate it from her late husband's estate by evicting her and letting it out to other people. She was also seeking a permanent injunction, general damages and costs of the suit. Prior to his death, the second respondent had donated the suit property to the deceased to construct a house thereon for purposes of generating income for his family. The property is registered in her names. The deceased constructed two double- storeys, semi-detached houses on the plot.

On completion in 1991, the property was let out to the American Peace Corps and the rent was shared between the late Martin and the appellant. After his death, she continued to rent out the premises keeping all the rent to herself until September 1999 when she decided to occupy the suit property. At the time of his death, the deceased was occupying rented premises on Plot No.2457A Block 244 Mbogo Road, Kisugu, belonging to the second respondent. The appellant continued to occupy this house as a tenant at a monthly rent of *shs* 350,000/= payable one year in advance.

In their application for letters of administration (exhibit P.7) dated 11th October 1993, the applicants in paragraph 5 thereof stated the following properties as belonging to the deceased:

1. Block 255 Plot 280 land at Munyonyo.
2. Bock 273 Plot 1333 land at Konge Buziga.
3. Plot 22B Nakasero Road.

In the plaint, the appellant contended that her late husband constructed the suit property and the respondents have no right to dispossess her of the same.

The respondents filed a joint written statement of defence and counter-claim. In it they denied that the deceased constructed the suit property as a matrimonial home. They averred that the second respondent has at all material times been and still is the

registered proprietor of the suit property and that she allowed the deceased to carry on real estate business on the said land by constructing thereon two semi-detached up-market houses for letting out. It was further averred that the deceased furnished no consideration for the offer, and that the entire transaction was intended and understood by both parties to give the deceased a source of income rather than to bestow on him real property.

It was contended that the deceased never had or claimed any legal interest in the suit property and it was never his matrimonial home. On the appellant's decision to occupy the suit property, they contended that it was wasteful of the estate assets, unjustified, and unreasonable and it amounts to intermeddling in the estate. There were other allegations against the appellant such as fraud, trespass and her failure generally to co-operate with co-administrators in the management of the estate.

As a result of the acts complained of, it was averred that the respondents as representatives of the estate have suffered general and special damages for which the appellant was liable. The particulars of special damages contained in the counter-claim include mesne profits and US $3,500 per month or its equivalent in Uganda shillings from September 1993 till the appellant surrenders the property to the administrators of the estate.

In reply to the written statement of defence and counter-claim, the appellant averred that the respondents are estopped from denying the late Martin Kalema's ownership of the property. She also denied the allegation of fraud and intermeddling with the suit property. She reiterated her right to occupy the suit property as her full time matrimonial home.

At the trial, the following issues were framed for court's determination: -

1. **Whether the plaintiff is entitled to occupy the suit property as her matrimonial home.**
2. **Who is the owner of the suit property?**
3. **Whether the plaintiff has intermeddled and continues to intermeddle in the estate of the late Martin Kalema.**
4. **Whether the plaintiff has trespassed onto the suit property.**
5. **What remedies are available to the parties.**

The appellant gave evidence as the first witness and after she had been cross-examined by counsel for the respondents, the hearing was adjourned to the 12th and 13th November '02 for further hearing. Before that date, the respondents filed Miscellaneous Application No.442/02 under the provisions of **Orders 11(6), 13(2), 48(1)(2)** of the **Civil Procedure Rules** and **section 98** of the **Civil Procedure Act** seeking the following orders: -

(a) That the plaintiff's claim in HCCS No. 1474 of 2000 be dismissed with costs and judgement be entered for the defendants for the prayers set out in the counter-claim or such other orders as the court may deem fit, on the basis of admissions made by the plaintiff in her pleadings and evidence when she testified during the hearing of the suit on the 27th day May 2002.

(b) In the alternative but without prejudice to the foregoing, the plaintiff's claim in the suit be disposed of by determining the point of law of whether the plaintiff can claim the suit property as her matrimonial home when she 2nd applicant, and not her deceased husband, was the registered proprietor thereof.

(c) That the honourable court does proceed to hear the defendants' counter- claim only.

(d) That the costs of the application be provided for.

The application was premised on the following grounds: -

1. That both in her reply to the defendants' counter-claim and her testimony in court on the 27th May,2002, the respondent admitted:
    (i) that the certificate of title, occupation permit and architeral plans for the property comprised in Plot 22B Nakasero Road (the suit property) have at all material times been and still are in the 2nd applicant's names.
    (ii) That accordingly, the deceased Martin Kalema was never the registered proprietor and /or legal owner of the suit property.
    (iii) That the respondent moved into the suit property on 6th September 1999, she did so without informing the applicants whom, together with her, are administrators of the estate of Martin Kalema.
    (iv) That she hitherto never accounted to the applicants, her co-administrators of Martin Kalema's estate, for the rental income received from the suit property from 1993 to 1999.

2. By reason of the admissions aforesaid, it is not within this honourable court's power to grant the prayers set out in the respondent's plaint and that to dispose of the case, it is no longer necessary to determine all the issues initially framed.
3. That it is in the interest of justice to determine the suit or, in any event, the respondents' claim, by determining the question of law of whether the respondent can claim as her matrimonial home, property of which a person other than her deceased husband was the registered proprietor.

The above grounds were supported by the affidavit of the second respondent dated 28th June 2002. The appellant opposed the application by deponing an affidavit dated 28th August 2002. In the said affidavit, the appellant stated that during the hearing of the suit she was shown an application for letters of administration signed and filed by the applicants and herself in which it was stated that the suit property belonged to her late husband. She also averred that after the death of her husband, she continued dealing with the property for six years including the signing of tenancy agreements without objection from the respondents

The learned trial Judge in her ruling the subject matter of this appeal found that there was overwhelming evidence to show that there was no underlying understanding between the 2nd respondent and the deceased, that he should construct his matrimonial home on the suit land. She further held that there no understanding that the legal estate in the premises would be conveyed to the deceased or his successors in title. She gave the following reasons for her findings: -

1. The evidence before her showed that the deceased owned undeveloped plots of his own in Buziga and Munyonyo. That if he had he wanted to develop a matrimonial home for his family; he would have picked one of his own plots for development.
2. The deceased instead developed the second applicant's plot in Nakasero (the suit land) with the apparent intention conceived together with the second applicant to tap economic benefits that would arise from the premises so located.
3. The size of the property-said to be semi-detached, which can be converted into two residences, tend to suggest that it was not intended to be used as the deceased matrimonial home. Evidence so far adduced in the main suit show that the deceased has small family-2 children and a wife. He did not therefore need a matrimonial home of the size of the suit premises.

4. Immediately on completion on construction, the premises were occupied not as a matrimonial home but as an income-generating asset.
5. The certificate of title, architectural plans and occupation permits are all in the names of the second applicant. It is apparent that the deceased and his mother had discussions before the documents were issued in the form in which they were issued.

As to whether the appellant could occupy the premises under **section 26(2)** of the **Succession Act,** the learned judge answered the question in the negative stating that it was not constructed for that purpose. It is against the above findings that the instant appeal has been preferred under the following grounds set out in the memorandum of appeal.

1. **The learned trial Judge erred in law in holding that the suit property is not the appellant's matrimonial home because her late husband owned undeveloped plots in Buziga and Munyonyo which could have been developed into a matrimonial home if he has so wished.**
2. **The learned trial judge erred in law and fact in holding that the suit property was not the appellant's matrimonial home because her late husband developed the suit property with the apparent intention conceived together with the second respondent to tap economic benefits that would arise from the premises.**
3. **The learned trial judge erred in law in basing her decision that the suit property was not the appellant's matrimonial home on the size of the suit property and the number of children that the appellant and her late husband had.**
4. **The learned trial Judge erred in law in holding that the suit property was not the appellant's matrimonial home because immediately on its completion it was not occupied as a matrimonial home but as an income-generating asset.**
5. **The learned trial judge erred in law in holding that the suit property was not the appellant's matrimonial home merely because the certificate of title, architectural plans and occupation permit were in the names of the second respondent.**
6. **The learned trial judge erred in law in deciding the issue of whether the suit property was the appellant's matrimonial home before the respondents gave their evidence and were subjected to cross-examination.**

The appellant sought the following orders:

(a) The learned trial judge's ruling and orders be set aside and the appeal allowed.

(b) The entire suit be heard and determined on merits.

(c) The respondents pay the costs of this appeal and the court below in miscellaneous application No.442/02 to the appellant.

I shall deal with the 6th ground of appeal first. Although it was badly framed, I think it should have stated that the learned trial judge erred in entering judgement on alleged admissions and declaring that the suit property was not the appellant's matrimonial home before all the evidence had been heard. In submitting on this ground, Mr Walubiri, learned counsel for the appellant, stated that there was need to record evidence from the second respondent to prove the avernments in the written statement of defence and counter-claim. He stated that the respondents claim to have suffered damage not as owners of the property but as administrators of the estate. He claimed that this was a recognition by the respondents that the property does not belong to them but to the estate. Learned counsel submitted that under **order 11 rule 6** and **order 13 rule 2(**supra) judgement cannot be based on the judge's inferences of fact but must be based on facts unequivocally admitted by a party or a witness.

While responding to the above above submissions, Mr Tusasirwe, learned counsel for the respondents, supported the orders made by the trial judge. He stated that the admissions made by the appellant when considered together with the facts in the case as a whole, were sufficient to enable the trial judge to reach the conclusions she reached. He claimed that it was obvious that the property was not a matrimonial property.

The provisions of the **rule 6** of **order 11** under which the learned trial judge entered the judgement provide as follows: -

"Any party may at any stage of the suit, where admissions of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give judgement, as the court may think just".

The object of this rule as I understand it, is to enable a party to obtain judgement speedily at least to the extent of the admissions. Such admissions can be made on the pleadings or verbally because of the use of the word "otherwise" in the rule. The rule is for the benefit of both parties. However, before the court can act under the rule to enter judgement, the admissions of the claim must be clear and unambiguous. In a case involving complicated questions, which cannot be disposed of conveniently, the court should decline to exercise its discretion against the party who is seeking judgement on admissions. The power given to court to enter judgement on admissions is a discretionary one that must be exercised judiciously and circumspectly.

In the instant appeal, the alleged admissions made by the appellant that were used by the respondents to apply for judgement under the rule I cited, were that the certificate of title, the architectural plans, the occupation permit of the suit property were in the names of the second respondent. The other admissions were that the late Martin Kalema was not the registered proprietor or the legal owner of the property; that the appellant moved into the suit property without informing the respondents as her co-administrators; and that she had never accounted for the rental income she collected from the suit property from 1993 to 1999 to the respondents.

The above facts should have been recorded by the learned trial Judge when she conducted a scheduling conference before the trial. Moreover the appellant's claim as a widow was not based on her late husband's registered interest. The way I understand her claim, is that the suit property belonged to her late husband by virtue of the fact that he constructed it using his own resources; he collected rent which he shared with her; the property was declared by the administrators of the estate as one of the properties of the deceased and after his death, she continued to collect rent for a period of six years without any interference or complaint from the co- administrators. It was, therefore, her case that as a widow, she is entitled to occupy the suit property being the only residential holding he left behind. I think the use of the words "matrimonial property" in the pleadings was a misnomer. It is misleading and partly explains perhaps why the trial judge found that the suit property was not constructed to be a matrimonial home. The law is not concerned with matrimonial property but with residential holdings.

On the other hand, the case for the respondents was that the suit property was never intended to be occupied either by the deceased or the widow because it was constructed as a money-generating asset for the deceased and his family.

Therefore, at the heart of the conflict between the parties to this case is whether the suit property should remain a money generating asset for the family of the deceased or it should be occupied by the widow under the provisions of the Succession Act. My understanding of this case is that the second respondent is not challenging the appellant's occupation as the registered proprietor but as one of the administrators of her son's estate and the one who had donated the land in question. In other words her complaint is that the house was constructed for the purpose of generating income for the deceased's family and therefore the appellant has no right to change that arrangement. The alleged admissions by the appellant were not as clear cut and unambiguous to entitle the respondents to judgment. She did not admit that she was intermeddling in the affairs of the estate. She did not admit that she had committed fraud or that she was trespassing on the suit property. She did not admit that her occupation of the house is wasteful of the estate, unjustified, unlawful and unreasonable. The learned judge, with respect failed, to exercise her discretionary powers judiciously in this matter when she entered judgement in favour of the respondents. Accordingly ground six would succeed.

I shall deal with the rest of the grounds together since they are interrelated.
There is no dispute that the deceased died intestate, I shall try to examine the relevant provisions of the Act and determine whether they apply to the suit property. **Section 24** governs the property of a person who dies intestate to mean property, which has not been disposed of by a valid testamentary disposition. Such property, according to the provisions of **section 25** devolves upon the personal representative of the deceased upon trust for the people entitled to the property under the Act. According to the application for letters of administration, a widow and two children survived the deceased. The property left behind by the deceased including the suit property had to be administered for the benefit the three people. Under **section 27** a residential holding is not part of the property that can be distributed among the beneficiaries. **Section 26** governs the devolution of a residential holding. For purposes of clarity I shall reproduce them in full.

(1) ***The residential holding normally occupied by a person dying intestate prior to his or her death as his or her principal residence or owned by him or her as a principal residential holding, including the house chattels therein, shall be held by his or her personal representative upon trust for his or her legal heir subject to the rights of occupation and terms and conditions set out in the Second Schedule to this Act.***

(2) ***Any other residential holding possessed by the intestate at his or her death shall be held by his or her personal representative upon trust and, subject to the rights of occupation and terms and conditions set out in the Second Schedule to this Act, shall be dealt with in accordance with the remaining provisions of this Act".***

My understanding of this section is that it envisages three types of residential holdings. The first is a residential holding normally occupied by an intestate prior to his or her death as his principal residential holding. The second is one that is owned by him or her as a principal residential holding. The third is any other residential holding possessed by the intestate at his or her death.

The Second Schedule to the Act lays down rules of how residential holdings may be occupied and by who can occupy them. The rules are titled "Persons entitled to occupation". They state as follows:

(1) ***In the case of a residential holding occupied by the intestate prior to his or her death as his principal residence, any wife or husband, as the case may be, and any children, under eighteen years of age if male, or under twenty-one years of age and unmarried if female, who were normally resident in the residential holding shall be entitled to occupy it.***

(2) ***In the case of a residential holding owned by the intestate as a principal holding but not occupied by him or her because he or she was living in premises owned by another person, any wife or husband, as the case maybe, and any children, under eighteen years of age if male, or under twenty-one years of age and unmarried if female, who were normally resident with the intestate prior to his death, shall be entitled to occupy it.***

(3) ***In the case of any other residential holding owned by the intestate, any wife, or children under eighteen years of age if male, under twenty-one years of age and unmarried if female, who were normally resident in the residential holding shall be entitled to occupy it."***

The provisions of this rule are clear in themselves and are couched in mandatory terms.

In the matter now before us, there is no doubt in my mind that the deceased had only one principal residential holding at the time of his death-the suit property. Although the title deed, the architeral plans and occupation permit are in the names of the second respondent, the suit property was rented out by the deceased and he shared the rent with the appellant. After his death, the administrators declared the suit property as the property of the deceased. The rule has long been established that a party is bound by declarations and recitals in a document which are certain, precise and unambiguous. The third indicator is that the appellant, as the widow entered into and renewed tenancy agreements and collected rent from tenants for a period of six years with the tacit approval from the respondents. The fourth indicator is a letter dated 17th March 1993(Exhibit D.3) addressed to the Town Clerk Kampala City Council. It states in part as follows:-

" ***Re: <u>Plot 22A Nakasero Road- Kampala.</u>***

I refer to the above property whose initial lease extension will expire on 31st October 1994

However, this property was completed towards the end of last year and I have been requesting for an Occupation Permit.

The inspection has been done and I understand they are nearly completed. I would request that the Occupation Permit be issued in the names of <u>Martin Peter Kalema</u> also of P.O.Box 4483 Kampala.

Yours faithfully,

Sgd.

RHODA N. KALEMA (MRS)"

The author is none other than the second respondent. In the letter she was requesting the Town Clerk to issue the occupational permit for the suit property in the names of her late son. Apparently this was not done. Be that as it may, the suit property in my humble opinion was *possessed* and *owned* by the deceased and therefore the appellant would be entitled to occupy the same under the provisions of the law I have cited. He had an equitable interest in the suit property capable of being registered as a charge on the suit property. Moreover **rule 7** of the Second Schedule makes the occupation of a residential holding an interest in land capable of registration. It provides as follows:

"(1) Occupancy of a residential holding hereunder shall be deemed to be an interest in land capable of protection by a caveat under the Registration of Titles Act, and the interest of any other person in the residential holding shall be subject to that interest and shall be incapable of alteration subject to that interest, but the occupancy shall not be a tenancy.

(2) The occupancy referred to in subparagraph (1) shall not prevail against a mortgagee under a mortgage created before the death of the intestate."

The rules have provision for termination of occupancy on the happening of certain events and the observance of covenants, conditions and encumbrances to which the residential holding or any part of it was subject at the death of the intestate.

Mr Tusasirwe submitted that the appellant knew her husband's intention of the promise he apparently made to the second respondent to keep the house as a money-generating project. He cited the case of **Jones v Jones [1977] W.L.R 438.** The brief facts of the case were that a father bought a house for his son who moved in with his family. The son gave his father sum money amounting to one quarter of the purchase price of the house. The son understood from his father that the house was his. When his father died, the house vested in his widow who demanded rent from the stepson who refused to pay the same. The widow commenced proceedings for possession of the house. At the trial, the judge held that the son had a one-quarter equitable interest in the house and declined to make a possession order. The widow took out further proceedings claiming that the house be sold or in the alternative, for payment of rent.

The judge ordered the son to pay three-quarters of a fair rent for the house to the widow or if he failed to do so, the house should be sold. On appeal, the court held that the widow was estopped from turning the son out of the house by his father's conduct which had led him to believe that the house would be his for the rest of his life. The gist of this decision is that the intention of the donor had to be respected. I do not find the facts and the holding in this case helpful to the respondents' case. The reason for my saying so is that the widow in the case was trying to assert he share in the property of her late. In this appeal, the respondents or at least the second respondent is not asserting he rights to share in the property. As stated elsewhere in this judgement, the intention of the deceased as to how the suit property should be utilised after his death is unknown. He left no valid testamentary disposition.

The dispute in this appeal is between administrators of an estate and how it should be administered and not between the beneficiaries. The exception being the appellant who are a beneficiary and an administrator. The other administrators are supposed to assist her in carrying out her duties. I have noticed from the record of the proceedings that at the time of the grant, no directions were made as to how the powers of the administrators were to be exercised. The administrators themselves appear not to have taken any steps after the grant to agree on how they should administer the estate and generally to operationarise the grant. The first meeting of the administrators was held on the 11th August 2000 in the absence of the appellant. The minutes of the meeting appear on page 10 of the record of appeal. Among the items for discussion at the meeting was an inventory of the deceased's estate. The suit property was mentioned and the complaint raised by the two administrators was that the occupation of the house by the appellant had greatly affected the income of the estate. The absence of any direction as to how the administrators were to exercise their powers gave the appellant a leeway to act the way she did in occupying the house. Under **section 272** of the Act where there are several administrators the powers of all of them can be exercised by one of them. The section states as follow:

"Where there are several executors or administrators, in the absence of any direction to the contrary, the powers of all of them may be exercised by anyone of them who has proved the will or taken out administration."

There is no doubt in my mind that this section gives the appellant as the widow to make decisions concerning her late husbands estate for her own benefit and those of her children. The deceased having left no valid testamentary disposition as to how the suit property should be administered, I think it would be wrong to fault the appellant's decision to occupy the house. Her occupation of the house does not take away the second respondent's proprietary interest.

Regarding the reasons given by the learned trial judge in entering judgement, I think with respect, they were irrelevant. They have no scientific basis. The size of the house, the architectural plans etc had nothing to do with the intention of the deceased since he made no will to make those intentions known. The rest of the grounds would succeed.

In the result, I would allow the appeal. The orders of the trial court would be set aside. I would remit the file back to the trial Judge to do the needful. The costs of the appeal would abide the outcome of the suit in the court below.

Dated at Kampala this……16th …..day of……August…..2004.

C.K.Byamugisha

Justice of Appeal