

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

HCT-00-CC-CS-292-2016

SHEILA BUTSYA LUBEGA ::
PLAINTIFF

VERSUS

1.PERCY PAUL LUBEGA
2.CENTENARY RURAL DEVELOPMENT BANK
LTD:::::DEFENDANTS

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

JUDGMENT:

The Plaintiff, Sheila Butsya Lubega sued Percy Paul Lubega and Centenary Rural Development Bank Ltd, hereinafter referred to as the 1st and 2nd Defendant respectively for;

- (a) A declaration that the mortgage of property comprised in Kyadondo Block 185 Plot 9624 and Busiro Block 349 dated 2nd March 2015 is null and void.
- (b) A declaration that the 1st Defendant is solely liable to repay the outstanding loan.
- (c) An order directing the Commissioner Land Registration to cancel the impugned mortgages from the certificates of Title.
- (d) An order directing the 2nd Defendant to deposit the Certificates of title for Kyadondo Block 185 Plot 9624 and Busiro Block 349 Plot 544 into the Court where the Divorce Cause between the Plaintiff and the 1st Defendant shall be heard.

- (e) An injunction restraining the Defendants from undertaking any further dealings in the suit property without the mandatory consent of the Plaintiff.

The facts which are not in dispute are that in 2010 the Plaintiff and the 1st Defendant got married and became husband and wife.

The husband had bought a few pieces of land which included Kyadondo Block 185 Plot 9624 and Busiro Block 349 Plot 544.

A house was constructed on Block 185 Plot 9624 and on completion, the Plaintiff and the 1st Defendant occupied it and lived there as husband and wife.

It is worthwhile mentioning that before the house was built the 1st Defendant sought a loan and used the land as security. It is also necessary to say here that spousal consent was sought, and in fulfilment of that requirement, the Plaintiff made a statutory declaration stating that the land was not a matrimonial home. She declared thus;

“That the land described in paragraph 2 above is not a matrimonial home and is hereby not governed by the provisions of the Mortgage Act relating to mortgage of matrimonial homes.”

As fate would have it, the two were not destined to stay together for long and in 2014 the two had misunderstandings which led to their separation.

In 2015 the 1st Defendant sought and obtained a loan. He used the same property as security. He did not seek spousal consent and

reasoned that since the Plaintiff and him were separated, her consent was not necessary.

Contending that her leaving the house was through eviction by the Defendant, she maintained that the property was a matrimonial home and so any loan based on it as security without her spousal consent was illegal. When the 2nd Defendant therefore, tried to recover her money based on the “mortgage” she filed this suit.

The issues agreed upon by the parties were;

- a) Whether spousal consent was required for the mortgage of the suit property.
- b) Remedies available.

The Plaintiff prayed for a declaration that spousal consent was required before a mortgage could be obtained based on the securities of Block 185 Plot 9624 and Busiro Block 349.

The Plaintiff conceded that she had in respect of earlier loans given her consent through declarations in respect of the property in question. She further stated that those loans were however cleared before the Defendant obtained the loan of 2015.

In this she used exhibit P12 the bank statement to support her position. Exhibit P12 showed that as at 25.02.2015 the bank debt balance was at zero.

It also shows that on 05.03.2015 the 1st Defendant got a fresh loan of Shs. 346,000,000/= which together with mortgage stamp duty, insurance fees and other charges came to Ushs. 352,000,000/=. She argued that the loan of March 2015 was a new loan.

The 1st Defendant in reply stated that there was never a new loan. He contended that the loan of 2015 was a continuation of the earlier loan to which the Plaintiff had consented, since some of the money was used to clear the earlier loan.

The 1st Defendant also contended that spousal consent was not necessary since they were living separately.

A look at the Mortgage Deed shows that the Plaintiff did not participate in it and that it was in any case never registered. It is also worth noting that by the time the alleged mortgage was being executed, the Plaintiff had lodged a caveat and when the 2nd Defendant attempted to register the mortgage it was rebuffed. Interestingly by that time the 2nd Defendant had already given the loan.

On whether the bank knew that the property was a matrimonial home, the Defendants contended that the Plaintiff had herself declared that it was not. In that Statutory Declaration of 31st October 2012 she declared;

"That the land described in paragraph 2 above is not a matrimonial home and is hereby not governed by the provisions of the Mortgage Act relating to mortgage of matrimonial homes."

That because of this Declaration, it was not necessary to seek spousal consent. The Plaintiff in return argued that she had declared so because at that time the house was still a shell and they were not staying there. But that in 2014 the user of the house changed when they entered it.

That the user of the house changed to that of a matrimonial home is admitted to by the 1st Defendant. Infact the 1st Defendant in evidence stated that even the second Defendant knew they were staying there. He said under cross-examination;

"I did not inform the Bank in writing but they knew that I was staying in Kiira because I told them where I was staying."

Later he added;

"I told them afterwards and they also came and visited the property sometime when I was staying in it."

DW.2 in his testimony makes it clearer that the 2nd Defendant knew that the status of the property declared as not matrimonial home had changed and that the 1st Defendant was obliged to inform the bank that it was now where he stayed with his family.

DW.2 stated:

"We got to know during the processing of the loan of 2015 when we again wanted spousal consent."

This evidence brings out two things, firstly that the 2nd Defendant knew that this was a matrimonial home, and secondly that a spousal consent was required.

Since the Defendants were aware of the need for spousal consent, they had to get it or the mortgage was a nonstarter.

In the present case, the Defendant having waived what they were incapable of waiving leaves this mortgage unenforceable. The property was matrimonial home and in fact the decision in Divorce

Cause 042 of 2016 in which the Plaintiff and Defendant were parties, makes it more clearer where the Learned Judge of the Family Division held in these words;

“The Petitioner himself under paragraph 8 of his petition for divorce filed in Nakawa Chief Magistrate Court vide DC No. 023 of 2014, referred to it as a matrimonial home. The Respondent did not occupy the home under any other capacity other than that of a wife to the petitioner. Thus as per the principle highlighted under Kintu v. Kintu, it was the place that they both decided to call home!”

Lastly counsel for the Defendant in his submission conceded that it was a matrimonial home.

The sum total is that the property Block 185 Plot 9624 being a matrimonial home, a loan obtained by the 1st Defendant could only be lawfully got with the spousal consent of the Plaintiff.

As regards Block 349 Plot 544, the Plaintiff did not lead evidence to show how it was a contributor to the family’s livelihood and whether interference with its ownership would alter the family’s wellbeing.

For all we know it was property acquired by the 1st Defendant before the Plaintiff came into the picture.

The Plaintiff failed to prove any interest in the property Busiro Block 349 Plot 544 and the declaration sought is denied. No order is made to the Commissioner Lands in this regard.

Concerning the injunction to restrain the Defendants from undertaking any further dealings in the suit property, the Learned Judge in the Divorce Cause 042 of 2016 has dealt with the percentage of ownership and this Court finds no reason to give other orders.

Turning to damages, the Plaintiff prayed for Exemplary/Punitive damages, and General Damages.

The award of damages under the head of punitive and or exemplary is guided by the conduct of the Defendant. If the Defendant, has acted oppressively with impunity.

Apart from the Plaintiff showing that the Defendants did not seek renewal of her spousal consent, she did not prove any high handedness, impunity or oppressive conduct as would lead court to grant that prayer. For that reason the prayer for punitive/exemplary damages is denied. Award of general damages is in the discretion of court. It is presumed to be the natural consequence of the Defendants' acts or omission. ***Nsubuga v. Attorney General SCCA 13 of 1993.***

General damages are intended to give the Plaintiff compensation for damage or loss or injury occasioned by the Defendants' conduct.

The value of the subject matter under this lead is important as such a Plaintiff must be put in the position he or she would have been had the act complained of not taken place.

In the present case, the Defendants put the matrimonial home on the auction line when they took it as security to a loan the Plaintiff had not consented to. She saw herself homeless with children to

look after. It must have caused a lot of mental anguish. Taking into account the case as a whole, I find an award of 10 million shillings as damages appropriate. It is so awarded.

In conclusion judgement is entered in favour of the Plaintiff in these terms;

- a) The property Block 185 Plot 9624 is matrimonial home and therefore spousal consent was required.
- b) The 1st Defendant is solely liable to pay the loan obtained March 2015.
- c) The Defendants to pay General damages of ten million Uganda shillings.
- d) Costs of the suit.

Dated at Kampala this 6th day of June 2018

**HON. JUSTICE DAVID WANGUTUSI
JUDGE**