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of the suit property; general damages, interest on the general damages from date of judgment till payment in full and for costs of the suit.

- [2] The background of this suit is that Ali Lubega, now deceased, obtained a loan from the then Commercial Microfinance Limited which was later taken over by Global Trust Bank Limited and is currently DFCU bank and mortgaged land comprised in Kyadondo Block 250 Plot 118 as security for the said loan. The plaintiff however asserts that the said land is matrimonial property and the same was mortgaged without her consent. She further asserts that her and her late husband were blessed with three issues namely Lubega Sulaiman aged 21, Sandaha Namatovu aged 18 and Nadia Namatovu aged 16 and the plaintiff has lived on the suit land with her children her entire life.
- [3] Perhaps I should note that the record herein manifested that the defendants did not defend the suit despite various attempts to have them appear before court for the same cause. What appears on the record is a written statement of defence from the 2nd defendant which was consented to by the plaintiff but never signed by the Registrar. As such this matter was heard exparte. The following three issues as were framed for consideration:

- 1. Whether the suit property constitutes family land within the meaning of Section 38A of the Land Act Cap 227 as amended***
- 2. Whether the suit property was subject to the requirement of spousal consent at the time it was pledged as security for a loan***
- 3. If two above is in the affirmative, whether spousal consent was obtained***
- 4. What remedies are available to the plaintiff?***



Issue one: Whether the suit property constitutes family land within the meaning of Section 38A of the Land Act Cap 227 as amended

- [4] Counsel relied on Section 38A (4) of the Land Act to define Family Land. That the term ordinary residence was further defined in the same section to mean "a place where a person presides with some degree of continuity apart from accidental or temporary absences and a person is ordinarily resident in a place when he or she intends to make it his or her home for an indefinite period." Counsel further relied on the case of **Yayeri Musaija Vs Musaija Gideon and Ors Civil Appeal No.0078 of 2016** where court citing the case of **Muwanga Vs Kintu High Court Divorce Cause No. 135 of 1997** stated that; *"matrimonial property is understood differently by different people. There is always property which the couple chooses to call home. There may be property which may be acquired separately by each spouse before or after marriage. Then there is property which a husband may hold in trust for the clan. Each of these in my view should be considered differently. The property to which each spouse should be entitled is that property which the parties chose to call home and they jointly contribute to."* That though the above case was not on all fours with the facts before us, the same clearly portrayed the meaning of matrimonial property.
- [5] That it was the evidence of the plaintiff that the 1st defendant purchased the land comprised in Mailo Register Mengo, Kyadondo Block 250 plot 112 land at Bunga Hill developed with a residential house. That they moved in with their children into the suit property as their family home in

the year 1999 where they continued staying peacefully and uninterrupted until 2009 when some persons unknown to her came to their home and told them that the first defendant had mortgaged the land to a financial institution and that he was in default despite notice and that the land was being sold to recover the funds. That the plaintiff has been in occupation of the suit property for ten years uninterrupted and the same was considered their family home at the time of occupation. As such it can be concluded that it is the place where the ordinary residence of the family is situated and the family has stayed there with some degree of continuity.

[6] Section 38A(4) of the Land Act as amended is to the effect that;

"(4) In this section— "family land" means land—

(a) on which is situated the ordinary residence of a family;

(b) on which is situated the ordinary residence of the family and from which the family derives sustenance;

(c) which the family freely and voluntarily agrees shall be treated to qualify under paragraph (a) or (b); or

(d) which is treated as family land according to the norms, culture, customs, traditions or religion of the family;

"ordinary residence" means the place where a person resides with some degree of continuity apart from accidental or temporary absences;

and a person is ordinarily resident in a place when he or she intends to make that place his or her home for an indefinite period;

"land from which a family derives sustenance" means—

(a) land which the family farms; or

(b) land which the family treats as the principal place which provides the livelihood of the family; or



(c) land which the family freely and voluntarily agrees, shall be treated as the family's principal place or source of income for food"

- [7] **Section 2 of The Mortgage Act, Act 8 of 2009** defines matrimonial home as;

" a building or part of a building in which a husband and wife or, as the case may be, wives, and their children, if any, ordinarily reside together and this includes-

(a) where a building and its curtilage are occupied primarily for residential purposes, that curtilage and outbuildings on it; and

(b) where a building is on or occupied in conjunction with agricultural land or pastoral land, any land allocated by one spouse to his or her spouse or in the case of a husband, to his spouses for his or her, or their exclusive use."

- [8] Mubiru, J, in **Lanyero Ketty Vs Okene Richard & Hellen Abwola Civil Appeal No. 0029 of 2018** stated;

"The "ordinary residence" of a family therefore may include the "matrimonial home" as well as the "habitual home," places where both spouses take steps to set up a regular household together with a shared, settled, mutual intent that the stay lasts indefinitely, the period need not be long. As the saying goes, home is where the heart is. It is quite possible to participate in all the activities of daily life in a new place while still retaining awareness that one has another life to go back to. In such instances one may be acclimatized in the sense of being well-adjusted in one's present environment, yet not regard that environment as one's ordinary residence. A person is deemed to be ordinarily resident at such a place where in the settled routine of his or her life, he or she regularly, normally or customarily lives. It is contrasted with special or occasional, casual residence or deviatory residence. It is determined by the degree to which a person in mind and fact



settles into or maintains or centralizes his or her ordinary mode of living with its accessories in social relations, interests and conveniences at or in the place in question. The court looks primarily to whether the spouse has acclimated to his or her surroundings and formed a settled intent to remain. A person can be absent for significant periods and still be ordinarily resident so long as he or she maintains some tie or connection with the place. A person absenting himself or herself temporarily from his or her place of ordinary residence cannot by reason thereof cease to be ordinarily resident thereat."

- [9] In the instant case, the plaintiff intimated to this court that her husband Ali Lubega(now deceased) purchased the said property comprised in Mailo Register Mengo, Kyadondo Block 250 plot 112 land at Bunga Hill developed with a residential house. That they moved in with their children into the suit property as their family home in the year 1999 where they continued staying peacefully and un interrupted until 2009 when certain people came threatening eviction because her husband had defaulted on a loan. It is apparent from the plaintiff's testimony that until 2009, they had lived on the suit land and enjoyed quiet possession. Therefore in the circumstances and in the absence of any evidence to the contrary I find that this land is indeed family land.

Issue: 2 Whether the suit property was subject to the requirement of spousal consent at the time it was pledged as security for a loan

- [10] It was submitted for the plaintiff that a transaction involving transfer of family land shall be void where spousal consent was not obtained. That Article 26(2) of the Constitution of the Republic of Uganda 1995 provides

that “every person has a right to own property either individually or in association with others”; Section 38(A) of the Land Act provides that “every spouse shall enjoy security of occupancy on family land”. Subsection 2 of Section 38 provides that “the security of occupancy means the right to have access to and live on family land”. Further subsection 3 is to the effect that “a spouse shall in all cases have the right to use family land and give or withhold his or her consent to any transactions referred to in Section 39 which may affect his or her rights”. That there must be valid spousal consent before family land is sold or mortgaged. See Alice Okiror and Anor Vs Global Capital Save and Anor Civil Suit No. 149 of 2010 and Section 5(1) (a) and (b) of the Mortgage Act. That it is the plaintiff’s evidence that she and the 1st defendant being muslims celebrated their marriage at Mawanga mosque on 25/09/1987 and were issued a marriage certificate No.009 dated 18/03/1998. See PEXh1. The two were further blessed with three issues see PEXh2, 3 and 4 respectively. That the plaintiff further asserts that the 1st defendant purchased the suit property with a residential house which they later moved into as a family home in 1999.

- [11] Section 39(1)(a) of the Land Act is to the effect that no person shall sell, exchange, mortgage, pledge or lease any family land except with the prior consent of his or her spouse. In Wamono Shem Vs Equity Bank and Constance Wakyemba HCMA No. 600 of 2012 it was held that section 39(1) of the Land Act imposes a duty on the family members not to carry out the prohibited transactions without having sought and obtained the requisite consent and the consent had to be given in a form and manner prescribed by the regulations. Having answered issue number one in the affirmative, it is therefore important to note that the

deceased (Ali Lubega) ought to have sought consent of his wife before transacting using the same land. Furthermore, it was incumbent on the bank to do further due diligence and ensure that there was spousal consent. See Section 5(1) (a) and (b) of the Mortgage Act. See also Regulation 3 of the Mortgage Regulations. That apart from a statement and introduction letter that the deceased was a resident of Nantabulirwa Mukono, there was no further evidence disputing his marriage to the plaintiff. This then leaves this court wondering who actually gave the spousal consent for the mortgage of the land. This court therefore finds that, since this is family land, spousal consent ought to have been obtained before mortgaging the suit land.

Issue Three: If issue two was answered in the affirmative, whether spousal consent was obtained?

- [12] It was submitted for the plaintiff that a mortgagee must take all reasonable steps to ascertain whether an intending mortgagor is married so as to obtain the requisite spousal consent. That "reasonable steps" is not defined in the law but the test is what a reasonable man would have done in the circumstances. That whereas the Land Act provides for spousal consent it does not provide for reasonable steps of acquiring the spousal consent. That the Mortgage Act 2009 provides for the steps which a mortgagee must take. See Section 5(2)(a),(b),(3) and Regulation 3 of the Mortgage Regulations. That the required spousal consent was not obtained from the plaintiff by the defunct Commercial Microfinance limited which could have discovered that the suit property was family land. Further that the signatories to the agreement are



Lubega Ali and Ojera Jimmy. There is no statutory declaration declaring the marital status of the 1st defendant and no further evidence of his said marriage to Nansamu Teddy. That surprisingly the due diligence was purportedly done in Nantabulirwa in Mukono while the suit property is situated elsewhere and not Mukono. Counsel while concluding relied on **Enid Tumwebaze Vs Mpeirwe Stephen and Anor HCCA No. of 039 of 2010** where it was stated that the requirements of Section 39 of the land Act are mandatory and cannot be circumvented to state that there was no spousal consent and as such the mortgage between the defendants should be declared null and void.

- [13] The intending mortgagee ought to take the necessary steps to ascertain whether an intending mortgagor is married and whether or not the property to be mortgaged is a matrimonial property. See Section 5(2)(a) of the Mortgage Act. It was the plaintiff's evidence that she was never at any one time informed about the transaction with Commercial Microfinance Limited but otherwise they would have found out that the suit property was family land. Considering that the plaintiff was not aware of the transaction, it is then safe to state that there was no spousal consent obtained by the 2nd defendant before the said mortgage transaction was entered into.

Issue 4: What remedies are available to the plaintiff?

- [14] **Review of the mortgage** and declaration that the mortgage is null and void. See Sections 34 and 35, 36 of the Mortgage Act.
- [15] **34. Power of court to review certain mortgages**

"Where a mortgage has been obtained—(a) through fraud, deceit, or misrepresentation by the mortgagor; or (b) in a manner or containing a provision which is unlawful; the court may review the



mortgage on application by the persons mentioned in section 35 in the interest of justice."

[16] **35. Application to court to exercise powers under section 34**

(1)An application to the court to exercise any of the powers conferred upon the court by section 34 may be made—(c) by a spouse or spouses of the mortgagor;

An application under subsection (1) may be made—at any time before the mortgagor has obtained a discharge of the mortgage; or

[17] **Release of Title to Suit Land.** The plaintiff submitted that having satisfied the court that the mortgage is null and void it is in the interest of justice that the defendant be ordered to release the certificate of title to the plaintiff as the same is being held illegally.

[18] **Permanent injunction;** a permanent injunction should be made restraining the defendants or their agents or any person deriving interest or authority from them from interfering with the quiet possession of and enjoyment of the suit land by the plaintiff. In **Akena Christopher & 9Ors Vs Opwonya Noah Civil Appeal No. 0035 of 2016**, Mubiru, J, stated that;

"It is settled law that a permanent injunction is a remedy for preventing wrongs and preserving rights so that by single exercise of equitable power an injury is both restrained and repaired, for the purpose of dispensing complete justice between the parties. Permanent or final injunctions are granted as a remedy against an infringement or violation which has been proven at trial. Such an injunction will be granted to prevent ongoing or future infringement or violations."

In the premises therefore, a permanent injunction is granted restraining the defendants from trespassing on the suit land.



[19] **General damages;** the plaintiff proposed general damages of Ugx 70,000,000/= for the mental and psychological anguish suffered as a result of the defendant's actions. Further that the plaintiff incurred a lot of expenses while moving from one office to another over the matter now before court.

[20] It should be noted that general damages are compensatory in nature in that they should restore some satisfaction, as far as money can do, to the injured plaintiff. See. Takiya Kashwahiri & Anor Vs Kajungu Denis, C.A.C.A No. 85 of 2011. From the record, the plaintiff has suffered enormous inconvenience and suffering due to the actions of the defendant. In light of the applicable principles of law, I shall award Ugx 10,000,000/= general damages as a suitable and sufficient sum to atone for the injury and inconvenience occasioned to the plaintiff. I believe this will restore to the plaintiff some satisfaction.

[21] **Costs of the suit;** the plaintiff prayed for costs of the suit.

Section 27 (1) of the CPA is instructive on the matter and states:

"(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of the incident to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent those costs are to be paid, and give all necessary directions for the purposes aforesaid"

Accordingly, the plaintiff having succeeded on all the issues is also awarded costs of the suit.

[22] **Resultantly,** upon the plaintiff proving her case on a balance of probabilities, judgment is accordingly entered against the defendant and



the court hereby makes the following **declarations (i&ii)** and **orders (iii to vi)**:

- (i) that the property comprised in Kyadondo Block 250, Plot 112 land at Bunga Hill (hereinafter referred to as the suit property) is family land
- (ii) that the mortgage in the suit property is null and void
- (iii) a permanent injunction doth issue restraining the defendants, their agents or any person deriving interest or authority from them from interfering with the plaintiff's quiet possession and enjoyment of the suit property.
- (iv) that the 2nd defendant releases the certificate of title of the suit property to the plaintiff free of any encumbrance
- (v) that the 2nd defendant pays general damages of Ugx 10,000,000/= (Uganda shillings ten million)
- (vi) that the 2nd defendant pays the costs of this suit.

Dated, signed and delivered at Kampala this 17th day of September,
2021


Duncan Gaswaga

JUDGE