

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

CIVIL SUIT NO. 0166 OF 1992

TEOPISTA MUGENZIPLAINTIFF

versus

1. PASCAL BYRON MUGENZI

2. M/S KYAMENGERE COOP SOCIETY
DEFENDANTS

3. REG OF TITLES

BEFORE: HON. MR. JUSTICE V. A. R. RWAMISAZI -KAGABA

JUDGMENT

This Judgment Arises from the above-quoted civil suit in which the plaintiff, the wife of the defendant, sued the defendants for the recovery of or a share in the proceeds from the sale of the property listed in paragraph 4(h) (I) to (IV) of the plaint. M/s Nyanzi-Nsibambi and Mbabazi appeared for the plaintiff while and M/s Matovu, Kamugunda & Co. Advocate appeared for the first defendant. It seems the second and third defendants though served, did not file any defence. The case proceeded ex-parte against all the defendants suit as the first to attend court on the day the suit was fixed for hearing. In his defence the first defendant denied all allegations raised in the plaint and prayed court to dismiss the suit with costs.

The plaintiff and the first defendant wedded under the marriage Act on the, 13/1/1969 cohabited in different places in Uganda at produced eight children between 1968 and 1984. During their marriage and cohabitation the first defendant acquired the property listed in paragraph 4 of the plaint. These properties included land on which the matrimonial home was erected.

It was the evidence of the plaintiff that she contributed financially towards the acquisition or purchase of these properties and is entitled to own this property jointly with the first defendant. Where she did not inject in financial contribution, that property was acquired

when she was wife and hence, a joint owner of all the property acquired when the defendant herself were husband and wife. As a wife, she permitted to the first defendant register the properties as the husband, head of the family and trustee of the family property.

She disclosed some of the sources from where she got the money that she gave in the husband to purchase the property above- mentioned or operate businesses referred to in the plaint. The plaintiff contended that the first defendant held all the matrimonial property in trust for the plaintiff and the children.

In 1985, after NRM took over power of the government s the defendant started to sell all the property, one by one, without accounting for the proceeds from such sales to the plaintiff. He did this without consulting the plaintiff and the children. Finally, in the course of such selling, the plaintiff was dispossessed of the matrimonial home.

The purchaser of the property on which the matrimonial home was situated was, the second defendant whose purchase of the property tried to block by registering a caveat against the sale and transfer of **“her property”** with the Registrar of Titles.

Notwithstanding her presence, on the land where their home was the second defendant proceeded to purchase the property. Similarly the third defendant transferred the property to the second defendant despite the caveat lodged by plaintiff, which caveat had not been vacated.

After the sale of the property complained about, the plaintiff and her children were evicted from the family house, the first defendant deserted his home permanently. The plaintiff and her siblings had live in rented premises. The plaintiff claims:

- (a) the return of the property comprising of her matrimonial home i.e. plots I4 and 16.
- (b) a share of the proceeds from the sale of motor vehicles and other properties.

The suit raises issues pertaining to family and property. But I will first deal with application of family law in as far as it applies to the facts of this case.

In these commentaries — Blackstone said “By Marriage, the husband and wife are one person in law. Upon this principle of union of person in husband and wife, depend almost all legal rights, duties and disabilities that either of them acquires by marriage”. “As a consequence of marriage, the husband and wife are entitled to consortium which includes a

duty to cohabit together and share all the facilities, rights and obligation that go with it. Consortium connotes as far as possible the sharing of a common home and a common domestic life. Besides being one person, Consortium involves sharing a common home”.

The old concept of “husband and wife are one but the husband is the none” has been overtaken by modern thinking where both wife and husband have to agree on how and where the matrimonial home shall be. Each has an equal share in that home unless there is evidence to the contrary, such as by agreement.

See: Dunn vs. Dunn (1949) p. 98, 103-(1948) 2 A11E. R. 822 C.A.

Both in law and in most Uganda customs, a man (husband) has a legal duty to provide a home for his wife and children. He cannot take this facility from them because it is their right and he becomes a trustee for and on behalf of the wife and the children. A wife is thus entitled to be provided a house by her husband and she can obtain an injunction stop him from interfering with her right.

See: (1) National Provincial Bank Limited vs. Ainsworth 1965 AC 1175

(2) Lee vs. Lee [1952] 2 Q.B. 489

(3) Joseph Semasaka vs. Gatarin Nyiransabimana H.C. Civil Appeal 102/93

Where the wife is the innocent party in matters of divorce or judicial separation, she should remain in the matrimonial home.

See: Edita Nakiyingi vs. Merekicadeki (1978) HCB 107.

On thy basis of what I have stated above, the plaintiff was legally entitled to stay in the matrimonial home after the first defendant deserted her and her children and relocated to Kampala.

But the plaintiff in this case was not merely exercising a common law right over the property. She said she raised money from her uncle, her salary and Late Cardinal Nsubuga and handed that money to the first defendant. It was that same money which was used to purchase the land plots, put up their home and Fund their businesses which included a petrol station.

It was therefore irregular and inequitable for the first defendant to chase the plaintiff (by selling to the second defendant) from the house/home and land whose purchase and

construction the plaintiff has contributed substantially and lived on the property in issue for nearly twenty years.

As observed by **Ssekandi J in the case of Edita Nakiyingi vs. Merekicadeke** (supra), doctrine of equitable estoppel may apply if a wife has incurred expenditure on the property in belief “encouraged by her husband” that she already owned or will be given some proprietary interest in it. The court may impose a trust whenever it would be equitable for the estate owner to claim the property as his own. It is not necessary to establish any express or implied agreement or common intention that the wife made contributions to the family property with a view to acquiring an interest.

See: Heseltine vs. Heseltine (1971) 1 ALL-E.R. 774

Where the matrimonial home is beneficiary owned by the husband and wife jointly, in equity or other shares under the trust of sale neither party was entitled as of right, to expel the other and thus deprive him or her of his or share.

I will adopt the words used by Sekandi J in the case of Edita Nakiyingi where he stated:

“in the circumstances of the instant case therefore the house and the kibanja owned by the plaintiff and defendant under a trust for sale having arisen out of the substantial contribution by the wife to the development of the kibanja and the building of the house and thus the plaintiff could not exclude the defendant from the enjoyment of their joint endeavours”.

The facts and circumstances in the above-quoted case fit squarely with the facts this case where the plaintiff contributed a substantial amount of money towards the purchase of vehicles land and other properties which the first defendant assumed and registered as a sole proprietor without regard to the equitable and beneficiary interest of his wife and children in that property.

The first defendant was not entitled to sell the plot where the matrimonial home stood. He could only sell with the consent of his wife. His act of selling the matrimonial home was unequitable and so was his conduct of chasing the plaintiff from that home. The wife and children as beneficiaries of the trust had a right to be consulted before the sale. They were entitled to the proceeds from the sale of the family property which included the land, the house, the business and the motor vehicles.

Was the first defendant, second and third defendants fraudulent in the selling buying and transfer of the property to the second defendant?

Section 184 of the Registration of Titles Act reads:

“No action of ejectment or other action for the recovery of any land shall be sustained against the person registered as a proprietor under the provisions of this Act, except in any of the following cases:

(c) The case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud or against a person deriving otherwise than a transferee bona fide for value from or through a person so registered through fraud.

See (1) Kazora J. W vs. M Rukuba — G. Appeal 13/1992 (S.C.)

(2) Williams & Glyn’s Bank Ltd. vs. Boland & another (1981) A.C. 487

“Fraud is defined as an act or conduct of obtaining a material advantage by unfair or wrongful means. It involves moral obliquity. It must be proved to sustain the common law of deceit. Fraud is proved when it is shown that a false representation has been made (a) knowingly or (b) without belief in its truth or (c) recklessly, careless whether it be true or false.

See (1) Imelda Ndiwalungi Nakedde vs. Roy Busulwa Nsereko & anor Civil Suit 1974/1999-(1997) HCB 73.

(2) Shokatah Abdul Dhalla vs. Sadrudin Meralli — C A. 32/1994(S.C.)

In order to succeed the party pleading it on the part of the other must plead it expressly and prove it with facts/evidence. It must be attributable, either directly or by necessary implication, that is, the transferee or purchaser/vendor must be guilty of some fraudulent act, or must have known of such act by somebody else and taken advantage of such act.

See (1) Kampala Bottlers Ltd. vs. Damanico (U) Ltd. C.C. 22/1992 (S.C.)

(2) Israel Kahwa vs. Martin Banoba Musiga C.A. 59/1995 (S.C.)

I have already held that the plaintiff had both a legal and equitable interest in the land plots and other properties acquired by her and the first defendant during their marriage. I have also found that the plaintiff was staying on the land on which their matrimonial home stood. It has also come out in the plaintiff’s evidence that the second defendant was aware of the plaintiff’s existence on the suit land. Could it, therefore, be said:

(1) that the first defendant was not acting fraudulently when he sold the family lands and other properties without their consent or consultation?

(2) that the second defendant was a bona fide purchase for value without notice when he was well aware that the property he was buying was matrimonial property in which the plaintiff had an equitable and beneficiary interest?

See: Katarikawe vs. Katwiremu & others (1977) HCB 187

(3) the second defendant was not acting fraudulently when proceed to transfer the property to his names when he knew the property was in dispute and was incumbered by the plaintiffs caveat?

(4) that the third defendant was not acting fraudulently when transferred the contested property by lifting the caveat without notice the plaintiff?

See (1) section 149 of the R.T.A. — cap 205

(2) Jovanis Nyeishokye vs. Erieza Basheka — H.C.C.S. 96/2000 Mbarara

Evidence has been led by the plaintiff on the above questions (1) to (4) and he answer is that the second defendant was not a bona fide purchaser as he was aware of the plaintiff's equitable interest in the property

See: Sempa vs. Kidza (1985) HCB 46.

The first defendant as the seller, the second defendant as the purchaser and third defendant as the transferring officer of title, all acted fraudulently in one transaction of depriving the plaintiff of her land.

Section 185 of the R.T.A. empowers the High Court make any order affecting the title in order to rectify any irregularity affecting the same. It (High Court) may direct the Registrar to cancel any certificate of title or instrument or any entry or memorial in the Register Book relating to such land. Since I have found that the plaintiffs land was sold under fraudulent circumstances, I will direct the Registrar of Title to cancel the name of the second defendant from the title comprising Plot 14 Buddu Block 278 at Kibubu Estate, Masaka.

The plaintiff has prayed this court to award her a share in the vehicles and the domestic properties sold by the first defendant. Although the award of damages is in the discretion of the court, the party seeking those damages must provide court with evidence to support his/her loss. The plaintiff has given no evidence as to what amount of money was realised from each or all the properties sold by the first defendant including the land in Plot 16 Buddu Block 278 — Masaka.

I do accept as fact that the plaintiff and her children have been put to considerable inconvenience through his fraudulent disposal of the family property which included the very roof under their head. Taking into account the period of over ten years during which the plaintiff has been traumatised by lack of a home and the expenditure she may have incurred to get alternative accommodation for the family, I think an award of Shillings ten million, Shs. 10,000,000/=) as general damages would be just and reasonable.

Consequently judgment is entered for the plaintiff with the following orders:

A: that the property comprising of Plot 14 Buddu Block 278 is given to the plaintiff and the children of their marriage with the first defendant.

B: the Registrar is directed to cancel the name of the second defendant in the title relating to Plot 14 Buddu Block 278 and transfer the same to the names of the plaintiff and her children, if need be

C: general damages of Shs. 10,000,000= to be paid by the defendants in equal shares.

D: costs of the Suit.

Dated this 22nd day of July 2003.

V.A.R. Rwamisazi-Kagaba

Judge

2/4/2004