THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA, AT MASAKA

CIVIL SUIT NO.0018 OF 2005

LAMULATI SSANYU NAKANWAGI :::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

1. HAJI ASUMANI JJUMBA
2. PETER TABUKIIKA ... DEFENDANTS
3. GERALD SSEMWOGERERE

BEFORE: HON. JUSTICE V.F. MUSOKE KIBUUKA

JUDGMENT

INTRODUCTION

The Plaintiff sued the three defendants jointly and severally. Her prayers for reliefs from this honourable court are set out in her amended plaint dated 29th April, 2005. They are:-

- a declaration that the suit land is a family land to which the plaintiff is a beneficiary as a spouse to the first Respondent;

- a declaration that the sale of the suit land by the first defendant to the second defendant was null and void for lack of the statutory consent by the Plaintiff as spouse to the first defendant;
- a declaration that the transfer of the suit land by the first defendant to the third defendant was null and void for luck of statutory consent from the spouse, the Plaintiff;

- an order against the Commissioner of land registration requiring him to cancel the registration of the third defendant as proprietor of the suit land and restore the names of the first and second defendants as proprietors;

- a permanent injunction restraining the defendants or their agents from evicting the plaintiff from the suit land;

- an order awarding general damages to the Plaintiff; and

- an order awarding the costs of this suit to the plaintiff.

The background to the institution of this suit is that the plaintiff is wife to the first defendant. They got married under Islamic law in February, 1967. At first they resided at the first defendant's principal home at Mbulire in Masaka District where the first defendant had two other wives whom he had married earlier. Later the plaintiff appears to have either moved to stay upon the suit land, where also two other wives of the first plaintiff stayed, or merely would occasionally visit the suit land from the first defendant's home at Jjingo. The first defendant has about seventy children in all. Out of those, thirteen children were born by the plaintiff. Two out of the thirteen children born by the plaintiff carried out some activity on the suit land but had their respective bibanja and homes at Mbulire where their father also had his principal home.

The suit land is a farm land situated at a place called Kyakajwiga also in Masaka District. It comprises Leasehold Register Volume 2180, Folio 15 or Buddu, Block 914 (Kalungu) Plot 9. It measures approximately 128 hectares. The leasehold was jointly held by the first defendant and one Muhamadi Lubuuka. They got registered, as tenants in common, on 19.10.1993, as exhibit D1, the Certificate of Title shows. The lease was to run with effect from 1st July, 1976, for a period of 49 years.

On 30.10.2000, the first defendant borrowed some money from the second defendant. The amount was shs.1,750,000/=. The written agreement, exhibit D2 stipulated that the money was to be repaid not later

than 30.11.2000. The first defendant pledged his share in the leasehold (suit land) as the security for the land.

Upon failure to clear the debt with the second defendant, the first defendant entered another agreement with the second defendant, exhibit D3, dated 1st December, 2000. In it, the first defendant agreed to sell his share in the leasehold to the second defendant at the cost of the debt of shs.1,750,000/= which the first defendant owed the second defendant. The first defendant handed over the certificate of title to the second defendant.

Subsequently, however, the first defendant instituted Civil Suit No. 173, of 2001, in the Chief Magistrate's Court at Masaka, against the second defendant challenging the second defendant's claim of ownership of the title deed in respect of the suit land. The first defendant, however, withdrew the suit. The following consent judgment was entered by the Court. It is exhibit P1 and it reads:-

"CONSENT JUDGMENT"

By consent of Counsel for both parties in the presence of both parties, it is by consent agreed that judgment be entered in the following terms:

1) **The defendant shall pay shs.3,000,000/= to the Plaitniff as full and final payment for his portion of the land comprised in leasehold Register Volume 218, Folio 15 and known as Plot No.9 Block 914, Kalungu, land at Kyakajwiga, approximately 128 hectares.**
2) **Upon payment of the said shs.3,000,000/= the plaintiff shall execute the necessary instruments of transfer of the land into the names of the defendant or of such other person as the defendant shall state.**
3) **The plaintiff shall vacate the land with all the dependants, agents, and squatters and hand over vacant possession of the same not later than 31st March, 2005.**
4) **Each party shall bear its own costs.**

Dated this 13th day of January, 2005.

……. **……**

Haji Asumani Jjumba **Tabukiika Peter**

(Plaintiff) **(Defendant)**

…….. **……..**

Counsel for Plaintiff **Counsel for Defendant**

…….

(Magistrate Grade I)"

The second defendant, agreed with the third defendant to sell the first defendant's interest in the suit land to the third defendant. The third defendant also agreed with Mr. Lubuuka Muhamadi to purchase Mr. Lubuuka's interest in the suit land as well. As a result, both the first defendant and Mr. Lubuuka executed a transfer in favour of the third defendant. He was duly registered as proprietor of the suit land on 9th March, 2005, vide instrument No.351,621.

ISSUES

The issues for determination, as agreed upon by all counsel, are:-

a) Whether the suit land is a family land within the meaning of the provisions of the Land Act;

b) If so, whether consent by the plaintiff was requisite before the sale of the 1st defendant's interest in the suit land;

c) Whether the plaintiff is wife to the first defendant;

d) Whether the plaintiff is entitled to the remedies she seeks in the plaint.

Court will resolve issue number three first. That is whether the plaintiff is wife to the first defendant. Then it will resolve the remaining three issues in the order in which they are listed.

WHETHER THE PLAINTIFF IS WIFE TO THE FIRST DEFENDANT

Both in her pleadings, in paragraph 4 of the amended plaint, and in her evidence on oath as PW1, the plaintiff stated that she was married to the first defendant on 25th February, 1967, and she had lived with the first defendant ever since. In his defence filed on 5th May, 05, the first defendant admitted the contents of Paragraph 4 of the amended plaint. In his evidence in Court, the first defendant who appears on the record

as DW1, Stated "the plaintiff is my wife. I recall I married her a long time ago. I have 13 children with her. They are all alive."

It is, therefore, not in dispute that the plaintiff is wife to the first defendant. She is one of her five wives.

There is, of course, the evidence of DW4 to the effect that the plaintiff had separated with the first defendant some five years or so earlier and that she was residing alone and elsewhere other than at the first defendant's home at Jjingo where she used to reside.

Court believes the evidence of DW4. Mr. Lubuuka, about the separation of the plaintiff and the first defendant and about the plaintiff residing at Jjingo.

Counsel for the first defendant did not cross examine Mr. Lubuuka on those two pieces of evidence. Whenever the opponent declines to avail himself of the opportunity to put his essential and material case in Cross-examination it must follow that he believes that the testimony given could not be disputed at all. The court draws the inference that the evidence is accepted subject to its being assailed as inherently incredible. ***See; Kabenge Vs. Uganda Court of Appeal Criminal Appeal No. 19 of 1977. and James Sserubiri And Another Vs. Uganda, SCCR. Appeal No.5 of 1990 (unreported).***

However, mere separation in itself does not amount to termination of marriage. There is no evidence that the marriage was divorced in the legal sense. The marriage between the plaintiff and the first defendant is, therefore, still subsisting in law.
Accordingly, the third issue is answered in the positive.

WHETHER SUIT LAND WAS FAMILY LAND

Exhibit D2, shows that the first defendant pledged the suit land to the second defendant on 30.10.2000. Exhibit D3 shows that the first defendant sold his interest in the suit property to the second defendant on 1st December, 2000. The law applicable at the time, therefore, was found in Section 39, of the Land Act (See Section 39 of Land Act, Cap.227, Laws of Uganda, Revised Edition 2000). The Land Amendment Act, 2004, only came into force on 18th March, 2004. That Amendment Act introduced the new Section 38A and

also substituted the then existing Section 39. In short, the law applicable to this case is Section 39, of the Land Act as it existed before the 1994 Amendment.

Section 39, of the Land Act, as it stood at the time, prohibited, the sell, exchange, transfer, pledge, mortgage or lease any land, **inter alia, land on which the person ordinarily resides with his or her spouse and from which they derive their sustenance, except with the prior written consent of the spouse.** The prohibition did not apply to any transfer of land by a mortgagee in exercise of powers under the mortgage.
The question to answer in respect of this issue is whether the first defendant ordinarily resided with the plaintiff on and derived their sustenance from the suit land, during the year 2000 when the first defendant pledged and finally sold the suit property to the second defendant, who subsequently sold it to the third defendant.
The plaintiff testified that she was residing on the suit land with the first defendant and two of her grown up sons namely, PW2 Baker Ssekabira and PW3, Bashir Kawuki who claimed to have grass thatched houses on the suit land. She said that after marriage in 1967 she stayed with the first defendant at Mbulire where the principle home of the first defendant was but later she moved to stay on the suit property. She stated that two other wives of the first defendant also stayed on the suit land while two others stayed at Mbulire. Her evidence was more or less confirmed by her two sons, PW2 and PW3 as well as by the first defendant himself. However, court did not consider these witnesses to be all together truthful on that particular account.

The plaintiff, in both her plaints which are on record, describe the first defendant as a resident of Mbulire village, Kalungu, Masaka. The third defendant, who is neighbour also testified that he had never seen the plaintiff residing on the suit land. DW4, Mohamadi Lubuuka, who was a tenant with the first defendant in respect of the suit land, denied that the plaintiff was residing or had ever resided on the suit land or deriving her livelihood from there. He was emphatic that the plaintiff had not been residing on the suit land but had, all along, been residing in the first defendant's home at Jjingo. He testified that the plaintiff separated from the first defendant from Jjingo about five years earlier and not from the suit land. He testified, however, that there had been a wife of the first defendant who had been residing on the suit land. But that wife was not the plaintiff. There was also no evidence before court that other wife was a legal wife to the first defendant.

DW4 also testified that both PW2 and PW3 had their own principles home, (bibanja) at Mbulire. They were neither residing nor deriving their livelihood from the suit land although they used to obtain some fees from people who sought to graze animals on the suit land.
The impression court had of DW4 was that he was a respectable and truthful witness. He had already sold his interest in the suit land and he stood in the position of a disinterested witness unlike the plaintiff and her two sons as well as the first defendant who appeared to be labouring against some hope of somehow recovering the suit land as his own property.

In those circumstances, therefore court finds that the evidence produced by the plaintiff and her two sons does not, upon the balance of probabilities, prove that the plaintiff and the first defendant, **although they were spouses, ordinarily resided and derived their sustenance from the suit land**. Issue number one is, therefore, answered in the negative.

WHETHER CONSENT BY THE PLAINTIFF WAS REQUISITE

In view of the conclusion I have made with regard to the first issue, it logically follows that this issue is answered in the negative too.

However, there appear to be some other important legal aspects or reasons which, in the view of this court, would have negated the plaintiff's consent in this matter even if court had found that the suit land was family land.

The first reason is that the sale was, by virtue of the consent judgment, ordered or sanctioned by court through the consent judgment. Although the original sale of the first defendant's interest in the suit property, as exhibit D3 shows, was originally agreed upon on 1st December, 2000, it was subsequently approved and finalized and ordered by court, through the consent judgment, on 13th January, 2005. The transfer of the suit land to the 3rd defendant was also the subject of a court order as clearly shown by the consent judgment.

The logical question that would arise out of that set of circumstances would be; does the restriction on the sale or transfer of family land under Section 39 of the Land Act affect the jurisdiction of the court to order a sale or transfer of family land without the consent of a spouse?

Indeed, the principle, which courts have followed and which appears in several authorities, is that where, in any legislation Parliament intends to oust the jurisdiction of the court, it mut state so in clear and uncertain terms to that effect. In the case of **David B. Kayondo Vs. The Co-operative Bank (U) Ltd., SCCA No.10 of 1991** (unreported), Manyindo DCJ, had the following to say:-

> **"For a statute to oust the jurisdiction of the court, it must say so expressly. Of course, ouster may be inferred from the words of the statute if such inference is irresistible."**

Had Parliament intended to prohibit Courts from ordering the sale or transfer of family land without the consent of spouses it would have stated so in Section 39 of the Land Act. It is also a very well known Principle in law, which Principle is found in Section 41 of the Interpretation Act to the effect that no Act of Parliament does in any manner affect the rights of Government, unless it is expressly provided so in that Act or unless it so appears by necessary implication. In other words an Act of Parliament does not bind the government unless it expressly provides so. In a similar manner, it does not bind courts unless it specifically says so.

From the evidence before court, it is clear that the sale of the interest of the first defendant in the suit land to the second defendant was ordered or at least sanctioned by Court through the consent judgment. In the same way, the transfer of the interest of the first defendant in the suit land to the third defendant was also ordered by court through the consent judgment. The third defendant was named by the second defendant as the consent judgment required. In either case, court is of the view that no consent of the spouse would have been required as Section 39, of the Land Act does not affect the jurisdiction of the Court to make an order for the sale or transfer of family land under appropriate circumstances.

The last aspect to consider is whether the Provisions of Section 39, of the Land Act applies to instances where the land sold or transferred is already registered in the names of the Purchaser or Transferee. In the instant case, the land by the time of the suit was registered in the names of the third respondent who purchased it from the second defendant to whom the first defendant sold it and from the co-tenant, Mr. Lubuuka.

Learned Counsel Mr. Kawanga did submit that the remedy of cancellation of the Certificate of title of the third defendant could not be granted by Court.

Relying upon Section 176 of the ***Registration of Titles Act, Cap.230, and the authorities in Robert Lusweswe Vs. Kasule And Another, HCCS No.1010 of 1983 (unreported) David Ssejjaaka Vs. Rebecca Musoke C of Civil Appeal No. 12 of 1985 (unreported and Kampala Bottlers Ltd. Vs. Damanico (U) Ltd, SC Civil Appela No.22 of 1992 (unreported),*** Mr. Kawanga submitted that as it had been consistently held by the courts, an action for recovery of land upon cancellation of a certificate of title, can only lie or be sustained only by a person deprived of any land against the person registered as proprietor of such land through fraud.

To that extent court duly agrees with learned counsel Mr. Kawanga. It also agrees that that position of the law has been more recently re-stated by the Supreme Court of Uganda in ***Kampala District Land Board And Another Vs. National Housing And Construction Corporation SC Civil Appeal No.2 of 2004.***

Mr. Ssensuwa, Learned Counsel for the plaintiff was of the view that court would have jurisdiction to cancel the certificate of title of the third defendant. He cited the provisions of subsection (4) of Section 39, of the Land Act and submitted that court should read it in conjunction with Section 176, of the RTA and come to the conclusion that it has jurisdiction to cancel the certificate of title of the third defendant.

With all the respect to learned counsel, court thinks that that submission was not well founded. Section 39(4) of the Land Act appears exclusively to be dealing with recovery of purchase price by the purchaser of land sold in contravention of the restriction on family land. It has nothing to do with cancellation of the Certificate of title of such purchaser. If Parliament had intended to link Section 39(4) of the Land Act to Section 176, of the RTA, it would have stated so. The Land Act is a later land in time. Parliament was aware of the existence of Section 176 of the RTA when it enacted the Land Act, and in particular Section 39(4) of that Act. The policy on family land was also new. It was introduced in the Land Act for the first time. The drafts person should have foreseen the necessity to link the provisions of Section 39(4) of the Land Act and Section 176 of the RTA. In the alternative, Section 39, of the Land Act should have been made comprehensively self-contained by specifying the consequences and remedies in cases of non-compliance expressly and exhaustively. As it stands, the provisions of Section

39(4) tend to suggest that the restriction on family land under Section 39, of the Land Act is limited only to land held under customary tenure. There is nothing to suggest that a certificate of title would be cancelled to the detriment of a third party or even a direct purchaser who is registered.

Court shall not go beyond what is stated above on that matter since it is not extremely pertinent to the resolution of this case after. Court has held that the land in question was not family land within the meaning of the law.

REMEDIES:

Since the Plaintiff has not proved her case upon the balance of probabilities, she does not merit any of the remedies she sought in the plaint.

RESULT

The plaintiff's case is dismissed against all the three defendants. Since the matter was a family one and considering the position of the plaintiff who sued among others her estranged husband, court orders that each party shall bear its own costs.

`V.F. Musoke Kibuuka
Judge
27.01.09