THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CV-CA-0002-2019

(Arising from DIVORCE CAUSE NO. 0006 OF 2016)

BUSINGYE PENINAH :::::::::::::::::::::::::::: APPELLANT

VERSUS

SAM MUKISA :::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON LADY JUSTICE JOYCE KAVUMA

JUDGMENT

Introduction.

[1] This is an appeal against the orders and decree of the learned Magistrate Grade One sitting at the Chief Magistrate's Court of Bushenyi at Bushenyi delivered on the 30th/08/2019.

[2] The background of the appeal, according to the pleadings on the lower court record is that the Appellant and Respondent were lawfully married on 9th September 1979 at the Bugongi Church of Uganda.

It was the Petitioner's case that sometime in 1998, the Respondent deserted her and left for an unknown place following a long history of insults, harassment and physical harm upon her. She sought for dissolution of their marriage, share of property and costs of the petition.

In his reply, the Respondent denied all the Petitioner's allegations and averred that the reason he left the matrimonial home was for his own safety, the Petitioner and one of their children having connived to kill and hurt him. He cross-petitioned and averred that it was the Petitioner that was cruel to him during the subsistence of their

marriage. He also sought for dissolution of the marriage, an order barring the sharing of property and costs of the cross-petition.

[3] After full trial, the learned trial Magistrate observed that the parties agreed to the dissolution of their marriage and the only remaining issue between them was whether and what property ought to be shared.

On this issue, the trial Magistrate found that the parties could share two properties to wit; land measuring approximately 8 acres situated at Rutooma village and land comprised in FRV MBR 161 FOLIO 6 also known as Block 10 Plot 690 in the sole names of the Respondent. It was the trial Magistrate's finding that owing to the fears expressed by the Petitioner in settling on any of the two properties, the Respondent was ordered to buy land elsewhere equivalent to not less than three acres and hand it over to the Petitioner.

The grounds of appeal.

[4] The Petitioner feeling dissatisfied with the above orders of the learned trial Magistrate preferred the instant appeal on the following grounds;

1. *The trial Magistrate erred in law and fact when he totally failed to evaluate the evidence on record hence reaching a wrong decision.*
2. *The trial Magistrate erred in law and fact when he based his decision on fanciful theories, personal imaginations and extinueous matters, which were not raised at trial.*

The Appellant prayed that this court allows the appeal, sets aside the orders and judgment of the trial Magistrate and enter judgment in his favour with costs herein and in the lower court.

Representation.

[5] According to the submissions on the court record, the Appellant was represented by *M/s Ahimbisibwe & Agaba Co. Advocates* while no submissions were filed on behalf of the Respondent. I will therefore consider the appeal on its merits while taking into regard the Appellant's submissions.

The duty of this court.

[6] This being a first appellate court, it is duty bound to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see Father Nanensio Begumisa and three others vs Eric Tiberaga SCCA 17of 2000, [2004] KALR 236). In a case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see Lovinsa Nankya vs Nsibambi [1980] HCB 81).

In its appellate jurisdiction, this court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular, this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally. (See Nyero vs

Olweny and Ors (Civil Appeal 50 of 2018) and Kaggwa vs Ampire (Civil Appeal 126 of 2019) per Mubiru J.)

I shall determine this appeal with the above principles in mind.

Ground 1: The trial Magistrate erred in law and fact when he totally failed to evaluate the evidence on record hence reaching a wrong decision.

[7] Counsel for the Appellant submitted that the learned trial Magistrate grossly erred when he ordered for purchase of only three acres to be given to the Appellant yet the two properties that were found to belong to the parties were bigger than this. That had the trial Magistrate properly evaluated the evidence on record, he would have ordered the Appellant to take either land at Rutooma or land at Karukwereza or even in the alternative he would have ordered purchase of land equivalent to land at Rutooma or Karukwereza which was more than twenty acres.

That by ordering the Appellant to be given only two acres out of about sixty acres that the parties had was not only unfair but also discriminatory to the Appellant.

Counsel prayed that this court reverses the decision of the learned trial Magistrate and orders that the appellant be given land situate at Rutooma or in the alternative if this court maintains purchase of land for the Appellant, this should be increased to 25 acres which was equivalent to land at Rutooma and less than land at Karukwereza.

[8] From counsel's submissions on this ground, the inference this court draws from them is that according to counsel, the Appellant was awarded less land as compared to the sum total of the two properties that the court found to be owned by both parties. That in

arriving at the size, the trial Magistrate acted unfairly and discriminatorily.

The impugned portion of the learned trial Magistrate's decision reads as follows at **pages 4 and 5** of his ruling;

> *"I note that, as clearly stated, the only properties in issue are two lands, one at Karikwereza and that at Rutooma. The land at Karukwereza would be fit for the petitioner, but considering the way it was acquired-a fact not disputed by the Petitioner herself and the fact that the same is solely registered in the name of the Respondent, I decline to find it fit to be taken by the Petitioner as her share. This is land acquired by the Respondent solely from the proceeds of his children's bride price. It would be unfair for those children to hear that such property was taken away from their family by the Petitioner.*
>
> *The land that remains is that at Rutooma village. It's the one on which the matrimonial home is situated. On record, it is clear that the Petitioner's children requested her to come back and stay at the new home now on that land but she refused. Nevertheless, I find this is the land on which the Petitioner can get some share.*
>
> *However, in his submissions, counsel Agaba for the Petitioner rose an issue about this land at Rutooma to the effect that it still has the Respondent's sister's share, and that the Petitioner's in-laws who are close neighbours to it are a threat to her. This means the Petitioner cannot comfortably utilize her share out of this land at Rutooma.*

> *I must also point out that even the land at Karukwera is just about two kilometers away from that at Rutooma. It therefore follows that if the petitioner cannot comfortably stay on the land at Rutooma, then it is not also possible that she will be secure on the land at Karikwerezera which is just two kilometers away from these persons who threaten her…Having stated that, and considering the fears of counsel for the Petitioner in relation to the Petitioner's stay on the land at Rutooma,* ***this court has no option but to order that the Respondent should buy some land elsewhere equivalent to not less than three acres*** *and hand it over to the Petitioner so that she can also settle on them comfortably and leave the streets as she has been praying."* [Emphasis mine]

From the above excerpt of the learned trial Magistrate's ruling, it is worth noting from the onset that, contrary to counsel for the Appellant's submission, nowhere in the said ruling did the learned trial Magistrate order that the Appellant be given only two acres or three acres of land.

The trial Magistrate's words were very clear and unambiguous as I have pointed out above, he stated that, *"this court has no option but to order that the Respondent should buy some land elsewhere equivalent to not less than three acres".* Equivalent to not less than three acres would in my view mean more than three acres but not less than three acres or two acres as alleged by the Appellant.

[9] From counsel's submissions I also note that an issue of which of the two properties were available to be shared by the parties seems

to emerge. Counsel for the Appellant stated that both properties had to be shared. This I believe led to the Appellant's assertion that she deserved over twenty acres.

[10] However, according to the learned trial Magistrate, only the property at Karukwera could be shared.

The law regarding which properties can be the subject to sharing by parties at the dissolution of their marriage has now been settled by superior courts. This court, according to superior courts has jurisdiction to share property that constitutes part of matrimonial property and not personal property of the parties to the marriage upon divorce. This is so because even during the subsistence of a marriage, parties in the marriage can legally own property exclusive from their spouses. (**See** Rwabinumi vs Bahimbisomwe (Civil Appeal 10 of 2009) [2013] UGSC 5 per Kisaakye JSC and Article 26(1) of the 1995 Constitution of Uganda).

Matrimonial property is understood differently by different people. There is always property which the couple chose 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 should be considered differently. The property to which each spouse should be entitled is that property which the parties chose to call home and which they jointly contributed to.(**See** Muwanga vs Kintu High Court Divorce Appeal No. 135 of 1997 per Bbosa J quoted with authority in Rwabinumi (supra)).

[11] The evidence on court record regarding the property was as follows;

According to **PW1, Peninah Busingye**, in her evidence in chief, she testified that during the continuance of her marriage with the Respondent, the two acquired land situate at Karukwerezi, Kyamurani, Bugongi Sheema district comprised of a banana plantation and eucalyptus trees which the two had purchased jointly from Steven Nkuhe and land situate at Rutooma central Bugongi Sheema district where the matrimonial home was. During her cross examination, she maintained that they bought the land at Karukwerezi at UGX 1,000,000/= from Stephen Nkuuhe of which she contributed UGX 500,000/= and that her matrimonial house was housed on the land at Rutooma, Central Cell.

PW3, Tumwine Victor, testified in his evidence in chief that the parties owned two pieces of land one situate at Rutooma Central where there is a matrimonial home and the 2nd one situate at Karukwereza Cell, comprised of eucalyptus trees and banana plantation. When cross-examined, he maintained that the parties had two pieces of land but didn't know how they were acquired.

According to **DW1, Sam Mukisa**, during the subsistence of his marriage with the Petitioner, they acquired land situate at Karukwereza, Kyamurari South Ward, Bugongi Town Council, Sheema District and land situate at Rutooma having inherited it from his father. During cross-examination, DW1 told court that if he would give the Petitioner any land, it would be that at Rutooma.

DW2, Kakooza Elly, testified in his evidence in chief that the Petitioner and Respondent acquired a number of properties during their marriage which included land with coffee and banana plantation in Rutooma and a filling station in Bugongi. In cross-examination, he contradicted himself when he testified that the parties acquired only the land at Karukwereza and that the land at Rutooma was inherited by the Respondent and shared it with him.
DW3, Kakooza Elly, in chief corroborated **DW2's** testimony in chief. His evidence was never challenged in cross-examination.

[12] From the above, it is clear from her evidence that the Petitioner contributed to the acquisition of the land at Karukwerezi. This evidence was never challenged during cross-examination.
It is now trite that an omission or neglect to challenge the evidence-in-chief of an adversary during trial, on a material or essential points by cross-examination would lead to the inference that the evidence is accepted subject to its being assailed as inherently incredible or probably untrue. (**See** Uganda Revenue Authority vs. Mabosi (Civil Appeal 26 of 1995) [1996] UGSC 16 per Karokora JSC (RIP)).
It is therefore the conclusion of this court that the land at Karukwerezi was matrimonial property.

[13] In relation to the land at Rutooma, the evidence as laid out above indicates that it housed the matrimonial home of the parties to this appeal. However, just like the evidence of the Petitioner, the evidence of the Respondent regarding the mode of acquisition was never challenged in cross-examination. It was the Respondent's evidence that he acquired the land through inheritance from his

father and that the property was family property with different equitable interests of his brothers. One of his brothers, **DW2**, testified that he shared the land with the Respondent.

[14] As I have already pointed out earlier in this judgment, there is a rebuttable presumption that the property which the parties chose to call home will be considered joint matrimonial property. In the instant case, the presumption was extinguished by the Respondent's evidence as to the mode of acquisition of the land at Rutooma which the Respondent stated was through inheritance and that it had other equitable interests of the Respondent's brothers.
When the trial Magistrate visited locus in quo, he did not indicate the specific properties he visited in his locus report. All he did was to tag the different properties as **"1st land"** and **"2nd land"**. This court cannot draw any inferences from the locus report as it is not clear about the descriptions of the land the trial Magistrate visited.

[15] From the evidence on court record, it showed that the property that was liable to being shared was that located at Karikweza. This is so owing to the Petitioner's unchallenged evidence of contribution to its purchase.
This finding is contrary to the findings of the learned trial Magistrate who found that that the said land was acquired by the Respondent solely from the proceeds of his children's bride price and that it would be unfair for those children to hear that such property was taken away from their family by the Petitioner. The findings of the learned trial Magistrate were not supported by the evidence on the court record. The evidence that the land was bought out of the

proceeds of the bride price from his other daughters was first brought up by the Respondent at the locus in quo.

A visit to the locus in quo by a judicial officer is only meant for the court to check on the evidence already given by the parties in court and not to substitute that evidence or add to it. It is a visual demonstration of the evidence already on the court record. It is for this case that no new witnesses are allowed to testify at the locus in quo save for those that already did so in court. (**See** William Mukasa vs Uganda (1964) EA 698, 700 per Sir Udo Udoma CJ [as he then was]). Visits to the locus in quo are not meant to fill in the gaps in witnesses' evidence in court but are meant to check on the evidence already given in court and, where necessary, and possible, to have such evidence ocularly demonstrated. Where a court, in its discretion, decides to visit the locus in quo, it must do so properly and in line with the established guidelines as laid out in **Practice Direction No. 1 of 2007** and case law. Failure to do so will lead to a miscarriage of justice which would entitle an appellate court as this to order a retrial. (**See** Bangole Geofrey & 4 Ors vs Agnes Nakiwala Civil Appeal No. 076/2015 and David Acar & 3 Ors vs Alfred Acar Aliro (1982) HCB 60).

It was an error for the learned trial Magistrate to rely on such evidence to arrive at the above findings when the record specifically at **page 8** had evidence of how the land was acquired.

[16] I also found issue with the following passage in the way the learned trial Magistrate decided that the Respondent should purchase

for the Petitioner land elsewhere. At **page 4** of his ruling, the learned trial Magistrate stated as follows;

> *"I must also point out that even the land at Karukwera is just about two kilometers away from that at Rutooma. It therefore follows that if the petitioner cannot comfortably stay on the land at Rutooma, then it is not also possible that she will be secure on the land at Karikwerezera which is just two kilometers away from these persons who threaten her…"*

This conclusion was based on counsel for the Petitioner's submissions which were not part of the evidence on the court record. The inferences made by the learned trial Magistrate from the submissions of counsel could not be sustained by the evidence on the record.

In **Daniel Toroitich Arap Moi and another v. Mwangi Stephen Murithi and another [2014] eKLR** the Court of Appeal of Kenya persuasively held that:

> *"Submissions cannot take the place of evidence…Submissions are generally parties' "marketing language", each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."*

Similarly, the findings of the learned trial Magistrate on this were based on assumptions and conjectures as drawn from the submissions of counsel of which no evidence that was ever produced in court.

What the court ought to have done was to order for a sharing of the property based on any formula it found worth in its discretion and

left the Petitioner decide on what to do with her share in the property. (**See for example Ambayo Joseph Waigo vs Aserua Jackline CACA no. 100 of 2015 per Kibeedi JA**)

This ground of appeal therefore succeeds.

[17] It is my finding that my resolution of the first ground of appeal has fully resolved the second ground of appeal. Having decided issues 1 and 2 in the affirmative, this appeal therefore succeeds. The ruling and orders of the learned trial Magistrate are set aside and substituted for the following orders;

1. **The land to be shared by the parties to this suit is that situate at Karukwerezi, Kyamurarani, Bugongi Sheema district.**
2. **The land shall be shared in a ratio of 50% with each party taking an equal share of it.**
3. **This being a family matter, each party shall bear their own costs for the appeal and in the lower court.**

I so order.

Dated, delivered and signed at Mbarara this 31st August 2023.

Joyce Kavuma

Judge