THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

CIVIL APPEAL NO. 0025 OF 2022
(ARISING FROM CIVIL SUIT NO. 0015 OF 2015)

TUMUSIIME JACENTA::**APPELLANT**

VERSUS

1. **MUBANGIZI STEPHEN**
2. **OIJUKYE MOSES**::**RESPONDENTS**

JUDGMENT

This appeal arises from the Judgment delivered by His Worship Rukundo Isaac Magistrate Grade one sitting at Kabale Chief Magistrates Court in Civil Suit No.0057 of 2015 wherein he dismissed the Appellant's suit with costs.

The brief background to this appeal is that the Appellant/Plaintiff sued the Respondents/Defendants for the following orders:

i) The suit land is family land.
ii) The land sale transaction between the 1st and 2nd Defendant was null and void for lack of spousal consent.
iii) A permanent injunction.
iv) An eviction order.
v) Damages and costs of the suit.

It was the Plaintiff's allegation that she got customarily married to the 1st Defendant in early 1988 after payment of bride price and later the marriage was

solemnized at the Christ the King Church in 1989. That at the time of marriage the Plaintiff found the 1st Defendant with a piece of land that he had obtained in 1986 situate at Nyakabungo "A" Cell, Bugarama Parish, Buhara Sub County in Kabale District.

The Plaintiff further alleges that they lived as husband and wife in the said property and in 1992 the Plaintiff and Defendant jointly purchased a piece of land from Nyamba Karama to add on the land the Plaintiff found the 1st Defendant with and jointly planted bananas on the same. That around 1993 the couple shifted their matrimonial home to a new place within Nyakabungo Cell "A" and demolished the old house and used the entire land for banana plantation. That in 1994 the couple jointly purchased a piece of land from Enderieki at the new site where the matrimonial home was relocated and around 1998 the couple jointly exchanged the old land turned banana plantation with a one Katabazi who gave them land adjacent to the new matrimonial home which was added to the land purchased in 1994 from Enderieki. Further that around March 2013 the Plaintiff found workers on the suit land obtained from the exchange with Katabazi and the land purchased from Enderieki who informed her that they were under instructions of the 2nd Defendant and that is when the Plaintiff learnt that the 1st Defendant had sold the suit land to the 2nd Respondent without her spousal consent hence the suit.

The first Defendant on the other hand while acknowledging his marriage to the Plaintiff in 1989 denies buying the Suitland or any part of the suit land with the Plaintiff. The first Defendant avers that his late father Bakeibika had given him a small piece of land in 1984 where in he constructed a house and in 1986 before

marrying the Plaintiff he bought land comprising of a banana plantation neighbouring that given to him by his father from on Nyamba Karama and that upon marriage both parties agreed that the said land be "Engaragazi" i.e be used by the 1st Defendant to the exclusion of others including the Plaintiff and that no other property was purchased from Nyamba Karama by the 1st Defendant.

That the land the 1st Defendant exchanged with Katabazi comprised of the 1st Defendant's land acquired in 1986 and that which his father gave him in 1984 and this land was exclusively owned by the 1st Defendant. That the land that the 1st Defendant exchanged with Katabazi is not adjacent to the matrimonial home but rather 200 metres away and that the land that Katabazi gave in exchange to the 1st Defendant remained personal land of the 1st Defendant. The 1st Defendant also avers that after his marriage with the Plaintiff broke down irretrievably and the Plaintiff was left with one big banana plantation, 9 strips of land for cultivation and a shamba of trees as per the distribution/sharing agreement. The 1st Defendant therefore denies the claims of the Plaintiff.

The 2nd Defendant avers that he exercised due diligence before purchase of the suit property and found that the suit land was exclusive property of the 1st Defendant and that the Plaintiff has no interest in the suit land hence there was no need for her consent to the sale between the Defendants and prays for dismissal of the suit.

The trial Magistrate on the 08/09/2022 delivered his Judgment declaring that the suit property is not family land and that the sale of the suit property by the 1st Defendant to the 2nd is valid and lawful. The Plaintiff's case was dismissed with costs.

The Appellant/Plaintiff being dissatisfied with the decision appealed to this Court on the following grounds:

1. That the learned trial Magistrate erred in law and fact when he held that the suit land is not family land thereby arriving at a wrong conclusion hence occasioning a miscarriage of justice.
2. The learned trial Magistrate erred in law and fact when he failed to properly evaluate evidence on record as a whole thereby arriving at a wrong conclusion.

At the hearing of this appeal Messrs Bikangiso & Co. Advocates appeared for the Appellant while Messrs Beitwenda & Co. Advocates represented the Respondents.

This Court being the first appellate Court has got the duty to re-appraise the evidence on record and come up with its own conclusions bearing in mind that it did not have the opportunity to observe the demeanor of witnesses.

(See Active Automobile Spares Ltd versus Crane Bank and another SCCA No. 0021 of 2021.)

Ground 1 and 2.

The Appellants Counsel in his written submissions addressed grounds 1 & 2 jointly submitting that it was the evidence of PW1 that in 1998 she and the 1st Respondent exchanged land with Katabazi and he gave them land nearer their new home where they still live todate and that the suit land became one bigger portion of land on which PW1 feeds her 7 children. Counsel further submits that her evidence was corroborated by that of PW2 the biological child of the Appellant and 1st Respondent who testified that it is the Appellant using the suit land.

According to Counsel the 1st Respondent as DW1 testified and told Court that he and the Appellant have never shared any properties through Court and no complaint has ever been filed in Court to allow them share their properties.

Counsel for the Appellant therefore contends that the suit land is family land within the meaning of **Section 38A (4)** of the **Land Act** since it is where the ordinary residence of PW1 and DW1 is located and the family derives sustenance therefrom.

Counsel faults the learned trial Magistrate for finding that the suit land was individually acquired by the 1st Respondent before marrying PW1 whereas not and that Exhibit DEX1 relied on by the learned trial Magistrate is in respect of a different piece of land and not the suit land. Counsel also attacks the trial Magistrate for relying on the sharing agreement executed between the Plaintiff and 1st Defendant in which the Plaintiff received 8 pieces of land and the 1st Defendant took the remaining including the suit land on the basis that the same is against the provision of **Article 31(1) (b)** of the **Constitution** that provides for equality of rights in marriage, during marriage and at its dissolution. It is the argument of Counsel that the marriage of the Appellant and 1st Respondent still subsists and that it is trite law that distribution of matrimonial property can only be done at dissolution of marriage that is either at divorce, judicial separation or by a formal separation argument endorsed by a competent Court. Counsel for the Appellant therefore faults the trial Magistrate for erroneously relying on the purported sharing agreement to hold that the suit land was property of DW1 yet matrimonial property can only be distributed through the said formal mechanisms cited above during dissolution of marriage. To buttress his case

Counsel relied on the decision in **Balfour versus Balfour [1919] 2 KB 571** in which the Court held that the agreement for maintenance between the couple was purely a social and domestic agreement and therefore it was presumed that the parties did not intend to legally be bound by the same. It is therefore Counsel's submission that the sharing agreement between PW1 and DW1 is a social and domestic agreement and not legally binding and therefore unenforceable at law.

Counsel for the Appellant further faults the trial Magistrate for erroneously holding that the sale of the suit property to the 2nd Defendant without the consent of the Plaintiff was lawful and that the 2nd defendant obtained a good title to the suit land.

Counsel relies on the provisions of **Section 39 (1)** of the **Land Act** that provides that no person shall sell any 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.

It is the submission of Counsel that the 1st Respondent did not seek the consent of the Appellant before selling the suit property to the 2nd Respondent and as such the sale was illegal, null and void.

Counsel also faults the 2nd Respondent for not carrying out any due diligence before purchasing the property. Counsel for the Appellant therefore prays that this Court finds merit in the appeal and allows the same.

Counsel for the Respondents in his written submissions contends that PW1 testified that she acquired the suit land jointly with the 1st Defendant upon several purchases and exchange and that the suit land houses their matrimonial home

yet throughout the entire evidence it was the plantation that was referred to be on the suit land. According to the Respondents' Counsel the allegation that the Appellant jointly acquired the suit land with the 1st Respondent is an outright perversion of the truth and that this was rebutted by the 1st Respondent that the suit land was his personal property that he acquired from his late father in 1984 way before marrying the Appellant in 1989.

Counsel also argues that the Appellant failed to produce any agreement in proof of her assertion and yet the 1st Respondent presented a purchase agreement of 1986 which was admitted as DEX1 and that even PW3 confirmed that the land was purchased by the 1st Respondent alone in 1986 and not 1992.

Counsel submits that the suit land was indeed exclusive property of the 1st Respondent even when the two were sharing all their properties subject to Annex C/DEX1 which agreement was authored by DW2 upon mutual separation of the Plaintiff and 1st Respondent. Counsel also stresses that by virtue of DEX1 the Appellant got 15 pieces of land and she is using them exclusively while the 1st Respondent remained with only 8 pieces including the suit land. Both PW1 and PW2 Counsel submits equally admitted in Court during cross examination that the suit land was exclusive property of the 1st Respondent and accordingly he had all the rights and authority to deal with the same as he pleased, including selling the same to 2nd Respondent without spousal consent.

It is also the argument of Counsel that the suit land was not family land neither was the ordinary residence of the Appellant on the suit land nor did the family derive sustenance from the suit land at the time of sale and thus the Appellant

failed to prove under **Section 38A** of the **Land Act** that the suit land was family property.

On the issue of separation of the couple and the distribution of properties Counsel submits that mutual separation is permitted by the law and whether or not the Appellant and 1st Respondent were separated or married was irrelevant in as far as proving that the suit land was family land within the confines of **Section 38A** of the **Land Act**.

Counsel for the Respondents therefore prays that the Appeal is dismissed with costs and the decision of the lower Court is upheld.

Counsel for the Appellant in rejoinder submits that the matrimonial home of the Appellant and 1st Respondent is located on the suit property and that it is therefore misleading for the Respondent to assert a different position that there is only a banana plantation there on whereas not. Counsel therefore contends that it was illegal for the 1st Respondent to sell the suit property to the 2nd Respondent without the consent of the 2nd Respondent as per the provisions of **Section 39(1)** of the **Land Act.**

The 2nd Respondent Counsel maintains did not carry out due diligence when purchasing the suit property from the 1st Respondent and to this effect Counsel relies on the decision in **Sir John Bageire versus Ausi Matovu CACA No. 0007** of **1996** where the Court held that:

"Lands are not vegetables that are bought from unknown sellers. Lands are valuable properties and buyers are expected to make thorough investigations not only of the lands but of the sellers before purchase"

Counsel for the Appellant therefore prays that the Appeal is allowed.

Determination.

The trial Magistrate in his Judgment resolved the following 4 issues.

1) Whether the suit land is family land.
2) Whether the spousal consent was necessary in the matter.
3) Whether the transaction between the 1st and 2nd Defendants was valid.
4) Remedies.

The minimum requirements of evaluation of evidence are met where the decision demonstrates on the face of it the following:

i) **A discussion of the evidence in favour of the claim.**
ii) **A discussion of the evidence against the claim.**
iii) **A reasoned explanation as to why one set of evidence outweighs the other set.**

The entire process entails assessing the credibility and probative value of evidence before weighing the evidence in order to arrive at the decision.

(See Oryema Mark versus Ojok Robert HCCA No. 0013 of 2018. [Stephen Mubiru J)

In determining what constitutes family land ordinary residence and land from which a family derives sustenance the trial Magistrate rightly cites the provisions of **Section 38(A) (4)** and **39** of the **Land Act** which I shall reproduce hereunder for ease of reference.

"`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) and (b) or*
d) *Which the family voluntarily agrees shall be treated to qualify or*
e) *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 from 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."*

It is an admitted fact that the Appellant and 1st Respondent are lawfully spouses having contracted their marriage first customarily in 1988 and later solemnized the same at the Christ the King Church in 1989. It's not disputed that prior to marrying the Appellant the Respondent owned a piece of land in Nyakabungo. It

is also not in dispute that the suit land in issue was one that was exchanged with one Katabazi. It is the chronology of events leading to the exchange of this property that the parties appear to disagree upon.

The Appellant in her witness statement avers that at the time of marrying the 1st Respondent she found him with a piece of land at Nyakabungo A where they stayed as a family until 1992 when they purchased a piece of land from the 1st Respondent's uncle one Ntamba to add on their already existing land and that in 1993 they constructed another house within Nyakabungo and shifted there by leaving their first home as *"etongo"* of the family and that in 1998 they exchanged with Katabazi and he gave them land nearer their new home where they reside to date. While on the other hand the 1st Respondent in his written statement avers that before marrying the Appellant his late father gave him a small piece of land in 1984 where he constructed a house and that in 1986 before he married the Appellant he bought land comprising a banana plantation from one Nyamba Karama and the same was neighbouring his piece of land. The 1st Respondent denies purchasing any land from Nyamba Kamara in 1992 together with the Plaintiff and that in 2005 he exchanged his land with Katabazi and the land he used in exchange was what he acquired in 1986 by purchase and the small piece of land that was given to him by his father in 1984 that was exclusively used by him and Katabazi gave him what is now the suit land.

The 1st Respondent also avers that the land he exchanged with Katabazi is not adjacent to the matrimonial home where the Plaintiff is staying but rather it is about 200 metres away.

The evidence of the 1st Respondent that in 1986 he purchased a piece of land neighbouring that given to him by his father in 1984 that belonged to one Nyamba Kamara appears to be truthful. PW3 the spouse of the late Nyamba Kamara in her witness statement avers to selling land to the 1ST Respondent together with her late husband in 1986 because he (1st Respondent) had identified it as ideal for putting up a house.

PW3 however further testified that she and her late husband in 1992 further sold another piece of land to the couple on top of where his house was and they merged the two pieces of land to form a bigger stretch of land. That they stayed on it and later exchanged it with Katabazi for a new piece of land with banana near their home.

The 1st Respondent admits purchasing a 2nd piece of land from Nyamba Karama but that this was in 1995 with the Appellant and that it's next to the homestead of the Appellant and she is still utilizing the same.

The Responses of PW3 under cross examination would appear to suggest that the evidence of the 1st Respondent is the true version of events because PW3 testifies that she sold land to the 1st Respondent in 1986 and an agreement was executed

She admits that at the time of this sale the 1st Respondent wasn't married yet to the Appellant. She further testifies that in 1992 they sold another piece of land to the 1st Respondent and the land is located in Nyakabungo 'A'. PW3 also states that she can't remember the years well because she is now old.

Under re-examination she maintains that they sold the land to the 1st Respondent before he married the Appellant.

The 1st Respondent's sale agreements were all collectively admitted as D.EX1 with one of them dated 03/01/1995 indicating the 1st Respondent as the purchaser of a piece of land from Karama and the same was witnessed by the Appellant amongst others. The evidence of the 1st Respondent that this piece of land did not form part of the land he exchanged with Katabazi was not at all challenged in cross-

examination moreover with the assertion that it was next to the homestead of the Appellant and being utilized by her. I am therefore persuaded that the property exchanged with Katabazi consisted of the piece received by the 1st Respondent from his late father in 1984 and that purchased in 1986 from Karama.

I however do not believe the claim of the 1st Respondent that the suit property is 200 metres away from where the Appellant is resident. It would appear from the locus visit and the sketch plan drawn by the trial Magistrate that the land exchanged with Katabazi is indeed adjacent to the piece of land on which the Appellant is presently resident and in which indeed the 1st Respondent also resided with his family.

The above fact notwithstanding the piece(s) of land used in the exchange were the sole properties of the 1st Respondent to which he lays claim.

This now brings me to the sharing agreement alluded to by the parties and Counsel. It is not in dispute that the Appellant and 1st Respondent are living separately despite still being husband and wife.

The distribution/sharing agreement in DEX1 as referred to by the 1st Respondent is dated 11/09/2011 and it shows that distribution gave the Appellant 9 strips of land for cultivation and a shamba of tress while the 1st Respondent took 7 pieces including the suit property that is specifically mentioned as the 1st Respondent's personal property. DEX1 was authored by DW2 and signed by the Appellant as the spouse of the 1st Respondent. The Appellant under cross-examination admitted to sharing properties with the 1st Respondent and taking 9 pieces of land out of the available 16.

The Appellant however claims that she was forced by the 1st Respondent to sign D.EX1. I do not believe this to be true. This assertion was never put to any other witness including the 1st Respondent and DW2 the author of the same. I will dismiss this as an afterthought. PW2 a daughter to the Appellant and 1st Respondent corroborates the evidence of the 1st Respondent that the suit property was part of the 7 pieces retained by the 1st Respondent.

The arguments of Counsel for the Appellant that the distribution of property can only be lawful when it is at the dissolution of a marriage or by Judicial separation in my view is a blanket statement that must be qualified by the unique facts of each case. The facts **in Balfour versus Balfour [supra]** cited by Counsel was later distinguished in **Merrit versus Merrit [1970] EWCA Civ6**. By Lord denning when he held thus:

"... I do not think that those cases have any applications here. The parties were living together in amity. In such cases their domestic arrangements are ordinarily not intended to create legal relations. It is altogether different when the parties are not living in amity but are separated or are about to separate. They then bargain keenly. They do not rely on honorable understandings. They want everything cut and dried. It may be safely presumed that they intend to create legal relations..."

The facts of this case in the words of the 1st Respondent were that his marriage with the Appellant had broken down irretrievably hence leading to the distribution/sharing agreement of the 11/09/2011. The document in DEX1 was deliberate on the property distribution and recognized that the suit property is the personal property of the 1st Respondent. It was unambiguous in this regard.

Lord Denning in Merrit [Supra] further made this observation:

"... in all these cases the Court does not try to discover the intention by looking into the minds of the parties. It looks at the situation in which they were placed and asks itself: Would reasonable people regard the agreements as intended to be binding?"

I have no doubt looking at the situation in which the parties signed the distribution agreement that they had every intention of being bound by the same in regard to the personal property of the 1st Respondent.

The trial Magistrate therefore correctly relied on DEX 1 to come to the finding that the suit property was personal property and not family property.

The evidence on record from PW2 also points to the fact that the Appellant only began to utilize the suit property after the sharing/distribution agreement ostensibly in abid to lay claim to the same. This move comes too late.

It therefore follows that the 1st Respondent did not require the consent of the Appellant when selling off the suit property to the 2nd Respondent.

In the final result this Appeal fails and is hereby dismissed with costs to the Respondents.

Before me

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SAMUEL EMOKOR
JUDGE.
27/03/2024