

THE REPUBLIC UGANDA
IN THE HIGH COURT OF UGANDA AT NAKAWA
CIVIL APPEAL NO. 47 OF 2008
[ARISING FROM CIVIL APPEAL NO. 42 OF 2006]
[ALL FROM FAMILY CAUSE NO. 30 OF 2002]

**NAKALULE
CHRISTINE:.....APPLICANT/APELLANT**

VS

**KAKOOZA HERBERT:
.....RESPONDENT/DEFENDANT**

Before: HON JUSTICE WILSON MASALU MUSENE

JUDGMENT

This is an appeal from the judgment of the Chief Magistrate's Court at Nakawa by His Worship Deo Nizeyimana in Civil Appeal No. 42 of 2006 delivered on 17/09/2008 in Nakawa wherein the Chief Magistrate dismissed the appellant's appeal brought on grounds that the trial magistrate erred in fact and law when he disregarded the welfare principle and ordered the Respondent's children and their mother to vacate the family home at Kawaala and relocate to a house in Wakiso. The second ground was that the Chief Magistrate erred in law and fact when he relied solely on the testimony of the Respondent thereby arriving at an unfair decision to the detriment of the children. The third ground was

that the trial magistrate erred in law and fact when he ordered the appellant to find alternative accommodation thereby relieving the Respondent of his duty to provide his children with shelter.

The 1st appellate court, the Chief Magistrate Court observed that the court of 1st instance had rightly observed that the appellant is not a legally wedded wife of the Respondent. That what the Respondent needs is accommodation for the children and therefore she cannot dictate where the children should live. Court further stated that if the father wants them to be in Wakiso and he uses the rent from the house at Kawaala (family home) to cater for other financial needs of the children, so let it be.

The present appeal is a second appeal from the Chief Magistrate Court to the High Court. This appeal is premised on the following grounds as stated in the amended memorandum of appeal:-

1. The learned Trial Magistrate erred in law and in fact when he made findings that the Respondent had a House in Wakiso.
2. The learned Trial Magistrate erred in law and in fact when he concluded that the appellant was not legally married to the Respondent.
3. The learned Trial Magistrate erred in law and fact when he disregarded the evidence of the appellant and failed to evaluate the little he adopted.
4. The learned Trial Magistrate erred in law and fact when he concluded that shifting the children of the Respondent and the appellant to Wakiso was in their best interest.

The appellant Nakalule Christine was represented by M/S Kakooza & Kawuma Advocates, while the Respondent, Kakooza Herbert was represented by M/S Kikabi and Co. Advocates.

According to the submissions of Counsel for the Appellant, the roles of the 1st and 2nd Appellate Courts is not to interfere with the concurrent findings of fact of the trial Court and 1st Appellate Court except where it is satisfied that a miscarriage of Justice has occurred. They referred to the Supreme Court cases of **Henry Kifamunte Vs Uganda, Criminal Appeal No. 10 of 1997** and **Bogere Moses & Another Vs Uganda, Criminal Appeal No.1 of 1997.**

They added that indeed there was a miscarriage of Justice, hence this appeal.

Counsel for the Respondent on the other hand agreed with the proposition that this Court has a duty to re-evaluate the evidence to avoid a miscarriage of Justice. They referred to the case of **Banco Arab Espayol Vs Bank of Uganda, Supreme Court Civil Appeal No.8 of 1998.**

However, their contention was that there was no substantial miscarriage of Justice as there was no misdirection by the lower courts or unfairness in the conduct of the trial.

The powers of the High Court as an appellate Court subject to such conditions and limitations as may be prescribed are stipulated in Section 80 of the **Civil Procedure Act Cap 71.** The

High Court accordingly has power to determine the case finally, to remand the case, to frame issues and refer them for trial, to take additional evidence or to require such evidence to be taken and to order a new trial. According to Section 80 (2) of the Civil Procedure Act, the High Court has the same powers and nearly the same duties as are conferred on courts of original jurisdiction in respect of suits instituted in it.

I shall now proceed to consider the grounds of appeal as set out in the Memorandum of Appeal.

The first ground was that the learned trial Magistrate erred in law and in fact when he made findings that the Respondent had a house in Wakiso. Counsel for the Appellant's submissions were that, it was incumbent on the second Appellate Court, notably the Chief Magistrate's Court to re-evaluate the evidence in a case. They added that from the proceedings in the 1st Appellate Court, the Chief Magistrate failed to get proof as to the existence of a house at Wakiso. They added that the learned Chief Magistrate only alluded to the Respondent's claims in his judgment and not appellant's assertion which was neither denied nor accepted. Their contention is that, that was an error on the part of the Magistrate. Counsel for the Respondent on the other hand submitted that the issue of whether the Respondent has a house or not in Wakiso arose in the Trial Court in Misc. Application No.3 of 2006. And that the appellant now never disputed the existence of the house in Wakiso, but rather stated under paragraph 16 of her affidavit in reply that the offer of the house at Wakiso is not

convenient and affordable as the distance to her place of work in Owino was far. Counsel for Respondent concluded that the Appellate Court was alive to its duty and properly applied the law and did not error at all in its finding as a fact that the house at Wakiso did exist. I have considered the submissions of both sides on the first ground of Appeal. I don't agree with Counsel for the Respondent that the finding on the existence of a house at Wakiso was enough. In my view, given the paramount consideration of the welfare of the children under whose care the Appellant was given, then she was entitled to a suitable and convenient place. The Appellant's evidence that the house at Wakiso was too far and not affordable in terms of transport to and fro her place of work at Owino Market should have been evaluated and considered by the Chief Magistrate. I therefore agree with Counsel for the Appellant. I find that the Chief Magistrate erred in law and in fact when he disregarded the evidence of the Appellant in that regard and failed to evaluate the same. The first ground of appeal accordingly is hereby allowed.

The second ground of appeal was that the Trial Magistrate erred in law and in fact when he concluded that the Appellant was not legally married to the Respondent. According to Counsel for the Appellant's submissions, the position for the Appellant remains that she and her husband are married under customary law, in this case according to Kiganda customs. It was the Appellant's testimony that she and the Respondent visited her parent's home in May 1990 and the Respondent thereafter paid bride price to

the Appellant's parents. The parents in addition asked for a Bible as "**Omutwalo**" which item the Respondent happily brought and gave to the parents.

It was further submitted that during the Court proceedings, the 1st Appellate Court sidelined the evidence of the Appellant's mother and uncle who could have shed light on the existence of the customary marriage between the Respondent and the Appellant. Counsel for the Appellant added that this was improper and amounted to a miscarriage of justice.

Counsel for the Respondent on the other hand urged that the issue of whether the Appellant was legally married to the Respondent was never raised at the trial or the 1st Appellate Court. And that it was an invention of the Appellant's Counsel and not adduced anywhere on record. Counsel for the Respondent added that the Appellant never sought leave to adduce additional evidence of the uncle and her mother. He concluded that there was no way the trial court, and the 1st Appellate Court could consider evidence that was not adduced.

What is surprising this Court is that the very Counsel for the Respondent, who claimed above that the issue of marriage never arose, under paragraph 5 of his written submissions states:-

"Be that as it may, the evidence clearly on record shows that the appellant has never been a legally married wife to the Respondent but rather concubined and had the three issues."

Counsel for the Respondent is therefore contradictory in his submissions as far as the second ground of appeal is concerned. This Court cannot therefore take Counsel for the Respondent seriously. And this is even stated in the Judgment of the Chief Magistrate His Worship Deo Nizeyimana, on page 3 under paragraph 5 as follows:-

“The fact that it is occupied by his mother cannot be brought as an excuse for the Appellant not to occupy it. The Respondent knows how he will relocate his mother. More to this as the trial Magistrate rightly observed the Appellant is not a legally wedded wife to the Respondent. What she needs is accommodation for her children and she cannot dictate where the children should be.”

Given the above passage from the Judgment of the Chief Magistrate, Counsel for the Respondent’s submission that the issue of whether Appellant was legally married to the Respondent was never raised in the lower courts is hereby rejected.

A married woman was defined in **Alai Vs Uganda [1967] E.A. 596** to mean any woman married to any man irrespective of the form of marriage provided such form of marriage is recognized by the people of Uganda. A customary marriage is among the forms of marriages recognized in Uganda. S.1 (b) of the customary marriages (Registration) Act, Cap 248 refers. Also relevant is the decision of **Sekandi J. in Uganda Vs Peter Kato and 3 Others**

[1976] HCB 204, where he held that the test of determining the existence of a marriage is whether the union is treated as a marriage by the laws or customs of the nation, race or sect to which the parties belong. From the records, the facts clearly indicate that there was a valid customary marriage as between the Appellant and the Respondent. The said marriage having been celebrated according to Kiganda customs to which the parties belong. I therefore entirely agree with the submissions of Counsel for the Appellant that the 1st Court failed to properly exercise its discretion and refused the Appellant's evidence. The learned Chief Magistrate therefore erred in law and in fact in finding that there was no valid marriage between the Appellant and Respondent. It is not only wedded marriages that are recognized under the laws of Uganda. The second ground of appeal therefore succeeds and is hereby allowed.

The third ground of appeal is that the learned Chief Magistrate erred in law and fact when he disregarded the evidence of the appellant and failed to evaluate the little he adopted.

Counsel for the Appellant submitted that it is incumbent on the second Appellate Court to re-evaluate the evidence in a case. He quoted **Banco Arab Espanol Vs Bank of Uganda, Supreme Court Civil Appeal No. 8 of 1998**, where the Supreme Court held that the court of Appeal failed in its duty as the first appellate court to subject the evidence to fresh scrutiny.

Counsel for the Respondent on the other hand reiterated that the trial Court and 1st appellate court both properly evaluated the evidence and concluded rightly. In my view, the lower court disregarded the evidence which was to be proved by Appellant's witnesses, notably the uncle and mother with regard to the legality of her marriage to the Respondent. This led to the erroneous decision that the Appellant was not legally wedded to the Respondent. That was grave injustice to the Appellant as she was never given an opportunity to prove that she was married to the Respondent under Kiganda customs, which is a valid marriage under the laws and customs of Uganda.

The third ground of Appeal therefore succeeds.

The fourth and last ground of Appeal was that the learned Trial Chief Magistrate erred in law and in fact when he concluded that shifting the children of the respondent and the appellant to Wakiso was in their best interests.

The Advocates on both sides referred to the welfare principle in their submissions. Counsel for the Respondent submitted that the welfare of the children is not only dependant on accommodation in the city centre, but in an environment fit and suitable for minor's upbringing as responsible and healthy children. He added that the trial Magistrate rightly found that a permanent house with two bedrooms with a compound is suitable for the children and that the house at Kawala was more of a commercial viability

to raise fees and other financial obligations to satisfy the best interests of the children.

Counsel for the Respondent further submitted that the trial Magistrate and the 1st Appellate Court were alive to the welfare principle set out in **Section 3, 5 and 6** of the children's Act, when they held that the house in Wakiso was conducive for the welfare of the children.

Counsel for the Appellant on the other hand submitted that the children in this case are **Tonny William Miwanda and Kakooza Edger Christopher**, now aged 18 years and 16 years respectively. They particularly emphasized **Guiding Principle No.3, first schedule of the children's Act** to the effect that Court shall have regard in particular to:-

“(a) The ascertainable wishes and feelings of the child concerned considered in the light of his or her age and understanding.”

They added that the children in this Appeal are not children of tender years whose wishes or interests could not be ascertained. And that the Trial Court and first appellate Court in their judgments made no references of having asked the children what they wanted or whether it was in their best interest to be moved to a house in Wakiso not substantiated and whether that would impact or affect their education and welfare. They concluded that the first appellate Court left the housing needs or accommodation of the Appellant and her children to fate.

I have considered the submissions summarized above in light of the **first schedule of the children's Act, Cap. 59, Laws of Uganda**. The first guiding principle provides that whenever the State, a Court, a Local Authority or any person determines any question with respect to upbringing of the child, the child's welfare shall be the paramount consideration. That is the position of the law as was emphasized in the case of **Karanu Vs Karanu [1975] E.A 18**.

In my humble view, the Trial Court and the 1st appellate Court considered only the wishes of the Respondent to prevail, irrespective of whether they were prejudicial or detrimental to the interests of the children. The lower courts should not have left the welfare of the children at the mercy of the Respondent, to dictate on where the children and their mother should stay without due regard to their interests and rights. Counsel for the Respondent has submitted that the essence of this appeal is not necessary for the best interest of the children but more centered for the convenience of the Appellant.

I respectively disagree with the above proposition. And my reasoning is that welfare of the children cannot be considered while disregarding the wishes of their mother, with whom they were going to stay with in this case. The children will be psychologically and mentally tortured and may not even concentrate on their studies if their mother is uncomfortable or miserable. That is the reality of life which Courts in this country must be alive to. I therefore agree with the submissions of

Counsel for the Appellant that the Chief Magistrate erred in law and fact when he concluded that shifting the children of the Respondent and Appellant to Wakiso from Kawala, was in their best interest. It is not only the issue of raising school fees for the children by renting the house at Kawala that should have been considered, but also other relevant factors about the welfare of the children such as whether the proposed house at Wakiso was conducive or proper for the upbringing of the children as opposed to Kawala where they have been all along. What the comfort and satisfaction of their mother. That cannot be isolated from the welfare of the children.

Children are at their best where both their mother and father are together and happy. But in the non-recommendable circumstances of separation or disagreements as is apparent in this case then it is better that the children are closer to their mother whereas both parents play a crucial role as far as the welfare of the child is concerned, there are certain nitty gritty detailed roles of their mothers which cannot be ignored or taken for granted. I find the reasoning of the Grade II Magistrate indeed very absurd and in total disregard of Gender Policy and generally the law with equality of men and women, husbands and wives as enshrined in the Constitution of this country and other enabling laws.

The Magistrate concluded as follows:-

“The Appellant was given a house to stay in not as a wife but as someone with custody of children and that she was not entitled to choose where she should stay.”

The above statement in my view is not only derogatory and deaminging of women in society but unexpected from a Court of Justice. It is not proper to refer to appellant, who is customarily married to the Respondent as someone having custody of children. In the first instance whose children are they? Don't they belong to both the husband and wife, in this case Appellant and Respondent? Did the Respondent produce those children alone without the natural and inevitable and enjoyable input of the wife? How can the wife then be referred to as “someone”, when she is the natural mother of the children in question. This Court, as a Court of record and exercising its appellate Jurisdiction in conformity with the Principles of law, Justice, Equity and good conscience as spelt out under Section 2(a) and (c) and Section 15(1) of the Judicature Act, shall and will not be derailed by such naïve and 14th century reasoning of reference to **a wife as someone, contrary to Article 33 of the Constitution of this country.**

In view of what I have outlined above, I find and hold that ground No.4 of appeal succeeds.

Having allowed all the four grounds of appeal, I do hereby enter judgment in favour of the Appellant and order that the Appellant

and her Children be allowed to remain in the Matrimonial and family house at Kawaala.

I also award costs to the Appellant.

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WILSON MASALU MUSENE

JUDGE

07/02/2014