

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA**

CIVIL APPEAL NO. 103 OF 2013

5 **(Arising from Divorce Petition No. 001 of 2009, Njeru Court)**

NEGULU MILLY EVA ::::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

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DR. SERUGGA SOLOMON ::::::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: THE HON. JUSTICE GODFREY NAMUNDI

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JUDGMENT

This Appeal arises out of a Ruling of the Magistrate Grade I at Njeru Court delivered on 7/7/2011, in which he struck out the petition of the Appellant on grounds that it could not stand since the supposed customary marriage between the Petitioner and the Respondent was not registered under Section 6 of the Customary Marriages (Registration) Act Cap. 248 Laws of Uganda. That that being the case no rights and obligations arising therefrom can be enforced.

25 The background to this matter is that the two parties cohabited from 1996 up to 2009 when the relationship went sour and the Petitioner filed for divorce and other prayers arising therefrom.

30 She claimed that the relationship was a customary marriage, having been formalized when she introduced the Respondent to her parents in 2002.

It was during the hearing of the Petitioner's evidence that Counsel for the Respondent raised a preliminary point of law (which is allowed under Order 15 r.2 CPR).

- 5 Therein he claimed that the Petition was misconceived and unsustainable in its current form because the Petitioner was relying on a customary marriage which never was since it has never been registered as required by law.

The Magistrate upheld the objection and went further to state that the Petitioner having
10 failed to comply with one of the requirements of the Customary Marriages (Registration) Act, could not use the same Act to enforce rights arising out of an alleged marriage which had not been completed.

The Appellant through her counsel has raised four grounds of Appeal namely:

- 15 (1) That the trial magistrate erred in fact and law when he ruled that the Appellant had not mentioned the country where the marriage took place which was contrary to what the Appellant stated in Court.
- 20 (2) That the magistrate erred in law and fact when he ruled that the Petitioner could not enforce the obligations under the Customary Marriages (Registration) Act without having registered the customary marriage as required by law.
- 25 (3) That the trial magistrate misdirected and contradicted himself on the law that was applicable i.e. whether it was Kenyan Law or Ugandan Law relating to the registration of customary marriages.
- 30 (4) *That the trial magistrate erred in law and fact when he struck out the Divorce Petition prematurely, thus denying the Appellant the right to summon her witnesses to testify on her behalf.*

Both Counsel opted to file written submissions, arguing the grounds of Appeal.

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Ground No. 1:

That the trial magistrate erred in fact and law when he ruled that the Appellant had not mentioned the county where the marriage took place which was contrary to what the Appellant stated in Court.

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It was submitted for the Appellant that the Appellant testified that she is a Kenyan and that the customary marriage took place in Bukole village, Lumino Subcounty, Busia District Kenya.

15 She submitted that the trial magistrate did not record this piece of evidence which was crucial.

She pointed out that the trial magistrate in his Ruling specifically pointed out that the country where the ceremony took place was not mentioned leaving doubt as to whether
20 the said village and District happened to fall in Uganda or Kenya.

That the omission by the magistrate to record the country has caused a lot of inconveniences and injustice to the Appellant.

25 For the Respondent, it was argued that there is no record showing that the marriage was formalised in Kenya.

I have looked at the handwritten records of the trial magistrate. Indeed the said record does not show whether the ceremony took place in Uganda or Kenya.

30

I will accordingly not dwell on this ground. The allegation that the magistrate omitted to record the country is a matter of evidence.

5 In any case it is upon the Appellant to prove to Court that the places mentioned in the proceedings exist on both sides of the Ugandan and Kenya border. This Ground must fail.

I am sure this submission was aimed at evading the operation of section 20 of the Customary Marriage (Registration) Act of Uganda to bring the ceremony under the Kenyan Law relating to marriages which has no equivalent of section 20 of Cap. 248
10 Laws of Uganda.

Ground No.2:

***That the magistrate erred in law and fact when he ruled that the Petitioner could not enforce the obligations under the Customary Marriage (Registration) Act without
15 having registered the customary marriage as required by law.***

It was argued that under Section 6 (1) of Cap. 248 Laws of Uganda requires registration of a customary marriage within 6 months of the event/completion of the ceremonies of marriage. Section 20 of the same Act makes it an offence if the parties fail to register in
20 accordance with Section 6 (1) thereof.

It is submitted that there is no provision that renders a customary marriage illegal for failure to register and therefore making it illegal to enforce the obligations under the said marriage. The case of **Steven Bujara Vrs. Polly T. Buyara Civil Appeal 81/2002
25 (2001-2005) HCB Vol. 3 62-63** was cited. Therein, the Court of Appeal cited Section 11 of Cap. 248 where the circumstances that make a customary marriage void are laid out.

Further that failure to register a customary marriage does not make such marriage illegal.

It was also held that one can consider him/herself customarily married once the customary ceremonies of the community/tribe have been performed.

5 Counsel therefore summarized that failure to register a customary marriage is curable and it is not a procedural irregularity.

For the Respondent, it was submitted that a Court of Law should not be used to sanction an illegality once brought to its attention. Ref: **Cardinal Nsubuga Vrs. Makula International (1982) HCB 1.**

10

That once the Petitioner admitted that the marriage was not registered under section 6 (1) of Cap. 248, then it became an offence under Section 20 thereof and hence the Petition was not tenable in those circumstances.

15 The magistrate then had to decide that;

(a) There was no marriage accordingly or that

(b) There was a customary marriage but not registered, which was an offence under section 20 and hence it was not possible to seek reliefs of a Court of Law on an unregistered marriage.

20

It has also been submitted that there was no valid marriage due to the existence of a subsisting marriage of the Respondent under the Marriage Act. Cap. 251.

25 However, I hold that this was not the subject of the preliminary point of law on which the trial magistrate pronounced himself leading to this Appeal.

Within the terms of the holdings in the case **Bujara Vrs. Bujara (op cit)** a customary marriage is complete if;

(a) Customary practices of the community/tribe have been complied with or performed, or if

(b) It does not offend the provisions of section 11 of Cap. 248 Laws of Uganda.

5

These are:

(a) The female party has not attained the age of 16 years.

(b) The male party has not attained the age of 18 years.

10

(c) One of the parties is of unsound mind.

(d) The parties are within the prohibited degrees of kinship or the marriage is prohibited by the custom of one of the parties to the marriage.

15

(e) One of the parties has previously contracted a monogamous marriage which is still subsisting.

20 It would therefore seem that section 20 of Cap. 248 Laws of Uganda then becomes irrelevant in so far as the customarily recognised formalities have been complied with and that section 11 thereof is not offended/contravened.

25 The question then that begs an answer is what was the intention of the legislature in crafting section 20?

What is the position of couples who have gone through all the customary requirements mentioned above, are not in contravention of section 11 of Cap. 248 and have lived happily thereafter and produced issues?

30

Are those associations illegal or sinful or not recognised?

If section 20 is not redundant, then it was an administrative requirement, for purposes of keeping records, rather than a validation of the customary marriage. If it was the later,
5 then other laws on marriage in Uganda e.g. The Marriage Act Cap. 251 would have an equivalent to section 20 of Cap. 248.

I also take Judicial Notice of the fact that the Registrar General's Department has never provided Registers for Customary Marriages and they are non-existent in any part of this
10 country. That being the case, Section 20 of Cap. 248 becomes redundant. If it were to be enforced, then most if not all customary marriages in this country would be rendered illegal/invalid.

I accordingly hold that the omission to register the customary marriage does not
15 necessarily invalidate it.

I am fortified by Article 126 (2) of the Constitution which enjoins the Courts to administer substantive justice and without undue regard to technicalities.

20 Ground No.3:

That the trial magistrate misdirected and contradicted himself on the law that was applicable i.e. whether it was Kenyan Law or Ugandan Law relating to the registration of customary marriages.

25 I will not dwell on it having already held under Ground No.1 that there is nothing to show that the marriage was formalised in Kenya and not Uganda. In that respect I also agree with the submissions of Counsel for the Respondent on this ground. It accordingly fails.

Ground No. 4:

That the trial magistrate erred in law and fact when he struck out the Divorce Petition prematurely, thus denying the Appellant the right to summon her witnesses to testify on her behalf.

5 This ground to me was the most pertinent issue as far as this appeal is concerned.

10 It has been argued for the Appellant that by striking out the Petition, the Appellant was denied the right to bring her witnesses thus causing a miscarriage of justice. In effect, according to the petitioner, she was denied the right to be heard.

For the Respondent, it has been submitted that an incompetent Petition/Pleadings must be struck out.

15

I have noted that this matter has vacillated/bounced between the High Court and the Magistrates' Court mostly on technicalities leaving the rights of the parties not adjudicated upon.

20 The Supreme Court has held in **Re: Christine NamatovuTebajukira (1992-93) HCB 85** that the administration of justice should normally require that the substance of disputes should be investigated and decided upon on their merits and that errors and lapses should not necessarily debar a litigant from pursuit of his/her rights. The same position is echoed in Article 126 of the Constitution where the Courts are enjoined to administer
25 substantive justice.

A look at the Petition reveals that the Petitioner also had other prayers especially as regards to property acquired jointly during her time of cohabiting with the Respondent. Striking out the petition on grounds of a customary marriage which **"never was"** according

to the trial magistrate therefore bars the Petitioner from being heard as regards her rights to property if any.

5 The constitution Article 28 (1) thereof is very clear about the rights of a party to be heard and to be given a fair hearing.

It would have been pertinent for the magistrate to have heard the whole case and dealt with all issues raised therein.

10 Article 26 (1) of the Constitution lays down that a person is entitled to property even that acquired in association with other people.

The magistrate should have considered the period of cohabitation which is not denied, and determined whether during the said cohabitation the petitioner jointly acquired property with the Respondent within the provisions of Article 26 (1) of the Constitution. What therefore are her rights to such property?

15 According to the record, the Petitioner by the time of the case in the lower Court in 2009 was 39 years old having started cohabiting with the Respondent in 1996 when she must have been 25 years old.

20 According to her testimony, they jointly did business, acquired some buildings, some vehicles and did some farming together. Thus between 1996 and 2009 was a period of 14 years, the most productive age/era of the Petitioner's life. Should her 14 years of labour/toil just go to the winds because of technicalities?

Was she a sex slave, a porter or otherwise?

25 Did she not invest her efforts in the belief that she was married to the Respondent?

30

Did the lack of registration of the customary marriage bar her from providing conjugal and other rights and obligations in the relationship?

5 It is my finding that the petitioner was denied a fair hearing and the right to be heard in respect of her claim for a share of property acquired jointly during the association. I want to believe that this Court as are all other Courts, is a Court of justice which justice must be seen and done.

Ground No.4 accordingly succeeds and is allowed.

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I have not found it necessary to deal with submissions by Counsel for the Respondent that the record of the lower Court is not complete.

15 The said record was duly submitted to the High Court within the provisions of Order 43 rule 10 CPR and is available in its original form. Counsel was free to apply for and obtain copies thereof within the provisions of rule 10 (3) of the said Order.

In summary, I find that the Petitioner has made out a case requiring that this Petition should be heard on its merits. The following orders are made accordingly:

- 20 (1) The order striking out the petition by the trial magistrate is set aside.
- (2) The file is sent back to the lower Court for trial of the case on its merits.
- 25 (3) It is further ordered that Chief Magistrate re-allocates this file either to self or another magistrate to try the case de-novo.
- (4) The Respondent to pay the costs of these proceedings to the Appellant.

30 **Godfrey Namundi**
Judge

30/04/2014

30/04/2014:

Parties in Court

SekiddeSimmon Peter on brief for Nassiwa

- 5 Sekidde Simon Peter: Nassiwa is sick but I can receive the Judgment.

Godfrey Namundi

Judge

10 **30/04/2014**