THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

MISCELLANEOUS APPLICATION NO. 0039 OF 2016

(Arising from HCT – 01 – CV – CA – 002 OF 2004)

(Arising from FPT – 00 – CV – CS – 082 of 2001)

NYAKAKE HARRIET.....APPLICANT

VERSUS

KISEMBO ELIJAH.....RESPONDENT

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE.

Ruling

This is an application by Notice of Motion under **Article 2** and **126(2)(e)** of the Constitution of the Republic of Uganda, 1995, **Section 18(1)(b), 83(c)** and **98** of the Civil Procedure Act, **Section 17(1)**&**(2)** of the Judicature Act, and **Order 52 Rules 1,2**&**3** of the Civil Procedure Rules.

The Application is for orders that;

1. A Consent Oder in HCT – 01 – CV – CA – 002 of 2004 (Elijah Kisembo versus Harriet Nyakake) entered on 18th day of August 2015 be set aside.
2. Proper orders of that case be extracted as directed by the trial Judge as the parties do not have locus standi.
3. Costs of the Application.

The Application is supported by an affidavit sworn by the Applicant whose grounds are;

1. That the HCT – 01 – CV – CA – 002 0f 2004 (Elijah Kisemebo versus Harriet Nyakake) was an appeal arising from the original suit of 082 of 2001 and no such order for sharing the house was made by the trial Judge.
2. That the Deputy Registrar in collusion with the Counsel for the Respondent confused me since I had no lawyer to enter a consent for sharing of the house at 50/50 claiming it was the Judge's directive whereas not which has occasioned injustice to me.
3. That the Applicant presents sufficient reason to revise the consent order of the Deputy Registrar.
4. That the 50/50 referred to was the Judge's view when inquired by the Appellant whether the Respondent has a share in the then suit property, which he ruled in affirmative and it can only be executed when the family is distributing property upon

dissolution of their marriage by His Lordship Justice Rugadya Atwooki of 20/08/2009.

5. That it will be in the interest of natural justice that this Court grants the Application and sets aside the consent order to avoid abuse of Court process.

The Application was opposed by Affidavit in reply sworn by the Respondent.

M/S BKA Advocates appeared for the Applicant and Counsel Bwiruka Richard for the Respondent. By consent both parties agreed to file written submissions.

Background

The Applicant filed a Civil Suit against the Respondent in the Chief Magistrate's Court at Fort Portal for a declaration that she was a joint owner of the suit property (house and land). The trial Magistrate found that the suit land was acquired by the Respondent before his marriage to the Applicant and also found that the Applicant contributed towards the construction of a house thereon and therefore the Applicant's interest was on the house.

The Respondent being dissatisfied with the trial Magistrate's decision appealed against it and the Learned Judge found that the Applicant had made a substantial contribution to the suit property, however, it was difficult to ascertain it in terms of quantity.

The Learned Judge made reference to the equitable principle which Lord Diplock advised as the way out of this kind of dilemma and that is 'equality is equity' which finds its way into our Constitution in **Article 31(1)(b)** that provides that a man and woman are entitled to equal rights in marriage, during and at its dissolution.

The Learned Judge, found and held that the Applicant was entitled to a share of 50% of the suit property.

In a bid to have his share, the Respondent and the Applicant appeared before the Deputy Registrar where they made a consent which was to the effect that; the Applicant would pay the Respondent half of the value and remains in the suit house, both parties would appoint each a valuer to guide Court on the value of the suit house, and the valuers identified would be notified to Court, so that Court could issue them with instructions to value the suit property.

The Law

The principle upon which the court may interfere with a consent judgment was laid down in the case of **Attorney General & Another versus James M Kamoga & Another, S.C.C.A, N0. 8 0f 2004, Reported in (2008) KALR 249**, which quoted what was outlined by the Court of Appeal for East Africa in **Hirani versus Kassam, (1952) E.A at 131** which approved and adopted the following passage from **Seton on Judgments and Orders,** 7th Ed., Vol. 1 p. 124:

"*Prima facie, any order made in the presence and with consent of counsel is binding on all parties to the proceedings or action, and cannot be varied or discharged unless obtained by*

fraud or collusion, or by an agreement contrary to the policy of the court … or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable a court to set aside an agreement."

Further that;

"*Subsequently, that same Court reiterated the principle in* ***Brooke Bond Liebig_(T) Ltd. versus Mallya (1975) EA 266*** *and the Supreme Court of Uganda followed it in* ***Mohamed Allibhai versus W.E. Bukenya & Another, Civil Appeal No.56 of 1996*** *(unreported). It is a well settled principle therefore, that a consent decree has to be upheld unless it is vitiated by a reason that would enable a court to set aside an agreement, such as fraud, mistake, misapprehension or contravention of court policy. This principle is on the premise that a consent decree is passed on terms of a new contract between the parties to the consent judgment. It is in that light that I have to consider the consent decree in the instant case."*

It is essential therefore to emphasise that a consent judgment derives its legal effect from the agreement of the parties, and may only be set aside on the same grounds upon which a contract may be set aside or rescinded because it is governed by the ordinary principles that govern a contract. Such grounds include collusion, fraud and any other reason that would enable the court to vary or altogether rescind the contract.

Submissions

Counsel for the Applicant submitted that the judgment from which the impugned consent arises is a declaratory judgment delivered by His Lordship Hon. Rugadya Atwooki where at Page 6 Paragraph 4 of his judgment stated as follows;

"The claim therefore was simply one for a declaration that the suit house was jointly owned by the husband and wife of an estranged marriage arising from her contributions towards its construction."

In his judgment at Page 13 Paragraph 2 & 3, he held as follows;

"The equitable principle which Lord Diplock advised as the way out of this kind of dilemma which this Court finds itself in that 'equality is equity' finds its way into our Constitution in Article 31(1)(b) which provides that a man and woman are entitled to equal rights and in marriage, during and at its dissolution."

In the premises I find and hold that the Respondent is entitled to a share of 50% of the suit property."

Counsel noted that it was from the above judgment that the notice to show cause was obtained and a consent order extracted. The question that the Applicant seeks Court's intervention is whether the Respondent could enforce a declaratory judgment?

Black's Law Dictionary, 9th Edition defines a declaratory judgment as;

"A binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement."

In the case of **Guaranty Trust Company of New York versus Hanny & Co. Ltd, Bankes L.J [1915] 2 K.B 536**, at **Page 571,** it was held that;

"A Declaration of right in that rule must be read in the sense in which it has always previously borne, that is to say, a declaration of some right which the Plaintiff maintains that he has against the person or persons whom he has made parties to his suit..." At Page 474 it was held that*;*

"... the claim for a declaration is not in itself a claim for relief."

Thus, from the foregoing the Respondent could not apply for execution of a declaratory judgment that stated that both parties had an equal interest in the suit property without having obtained consequential relief from Court.

The Applicant submitted that in the circumstances, the appropriate course of action, for the Respondent was to file a new suit, where Court would make orders as to the distribution of the suit property.

Secondly, the Applicant in her supplementary affidavit stated that the second order as extracted by the Respondent in regard to valuation of the suit property was unknown to her and the same was never served to her and also contradicts the impugned consent. The order was to the effect that if the Applicant failed to indulge a valuer then the Respondent's valuation report would be relied upon. The consent required that a joint valuer be appointed by the parties and in any case the valuer as used by the Respondent was never brought to the attention of Court.

Further that as a result of the second order marked R7, the Applicant was served with a Notice to show cause, why the consent order, should not be executed. Counsel for the Respondent submitted that there is no longer a consent order to be enforced since the original terms of the agreement of the impugned consent no longer stand and the Respondent was trying to enforce a declaratory judgment without supplementary action.

Thirdly, that both parties in the instant application have parental responsibilities to provide for the issues of their marriage and therefore the purported orders in the consent would affect not only the Applicant but the children as well. Thus, in the absence of matrimonial proceedings ordering the distribution of the suit property then no execution or distribution can be done.

Finally, that the Applicant states that the suit property was sold to several individuals and is subject to multiple proceedings in Court which makes the impugned consent incapable of enforcement.

Counsel for the Respondent on the other hand submitted that the judgment was not a declaratory judgment but rather a determination of the Applicant's share in the suit house.

That the Applicant subsequent to the judgment continued in possession of the suit and on 24/9/2014 the Respondent wrote to her asking her to allow a surveyor to survey 50% share in the suit house. The Applicant never responded to the request prompting the Respondent to write to Court seeking a notice to show cause why execution should not issue. The parties then appeared in Court on 18/8/2015 where they made a consent.

Further, that from the consent the valuer each party appointed was to be notified to Court so that instructions are issued to enable the respective valuer value the suit house. Only the Respondent adhered to the consent and a valuation Report was made on 28/10/2015. The Respondent then wrote to the Deputy Registrar inquiring if the Applicant had complied with the consent and if not that she be given a deadline to do so. Another notice to show cause was issued but the Applicant did not comply with the consent. Court then ordered that the Respondent's valuation Report be relied upon and the Applicant should pay half of the value to the Respondent. That when the Applicant was issued with a notice to show why execution should not issue if half of the value of the suit house is not paid, the Applicant filed the instant Application to set aside the consent order.

Counsel for the Respondent went to submit that the consent order can only be interfered with if it was obtained by fraud, mistake, collusion, or by an agreement contrary to the Policy of Court if it was made in circumstances that would vitiate an agreement. **(See: Attorney General & Another versus James Kamoga & Another, (Supra).**

Furthermore, that the claim by the Applicant that the judgment were declaratory is not tenable because the Learned Judge clearly set out the Applicant's entitlement as 50% of the suit house. That the parties did appear in person before the Deputy Registrar and agreed to the consent on their own terms and no evidence by the Applicant has been produced to back up her allegation of collusion.

Counsel for the Respondent also submitted that the ground raised by the Applicant that the distribution can only be done on dissolution of the marriage is unfounded and not tenable in view of the findings of the Supreme Court. That the parties can even own distinct property even during the subsistence of their marriage as per the case of **Julius Rwabinumi versus Hope Bahimbisomwe, SCCA 10/2009** where it was held that;

*"In my view the Constitution of Uganda (1995) while recognising the right to equality of men and women in marriage and at its dissolution also reserved the constitutional rights of individuals be they married or not to own property either individually or in association with others under **Article 26(1)** of the Constitution of Uganda (1995). This means that even in the context of marriage, the right to own property individually is preserved by our Constitution as is the right of an individual to own property in association with others, who may include a spouse, children, siblings, or even business partners. If indeed the framers of our constitution had wanted to take away the right of married persons to own separate property in their individual names they would have explicitly stated so."*

It was Counsel for the Respondent's submission that the judgment of Justice Rugadya Atwoki confirmed that the relationship between the parties was highly acrimonious and

consequently they could not live under one roof. That given the circumstances the only workable execution of the decree was or one of the parties to buy the other out and that was agreed in the consent order. Thus, it is unfounded for the Applicant to submit that because the marriage between the two parties is still subsisting then they cannot share property.

The Respondent also submitted that the consent order was properly made, is valid, and there are no grounds to set it aside. Therefore, the Application is unfounded and should be dismissed with costs due to the Applicant's non-compliance with Court orders.

Resolution

In the instant Application the Applicant averred that the HCT – 01 – CV – CA – 002 of 2004 was an appeal arising from the original suit of 082 of 2001 and no such order for sharing the house was made by the Judge. That the Deputy Registrar in collusion with the Counsel for the Respondent confused her into entering a consent to share the house at 50/50 claiming it was the Judge's directive whereas not. The 50/50 referred to was the Judge's view when inquired by the Appellant (Respondent in the instant Application) whether the Respondent (Applicant in the instant Application) had a share in the suit property, which he ruled in affirmative. The Applicant further averred that the 50/50 can only be executed when the family is distributing property upon dissolution of their marriage.

The instant Application arise from a Civil Suit in the Chief Magistrate's Court where the Applicant sought for a Declaration that the suit property was jointly owned by both parties. The trial Magistrate in the Original suit found that the Applicant's interest was only in the suit house and not in the suit land. The Respondent appealed to the High Court and the Learned Judge held that the two parties were entitled to a 50/50% share of the suit house given the fact that the Applicant had substantiality contributed the same. Given that background, it is crystal clear that the impugned consent order was extracted from a declaratory judgment which is unenforceable without consequential orders. The judgment as passed by the Learned Judge only emphasised the fact that the Applicant was entitled to 50% of the suit property upon dissolution of the subsisting marriage since proof had been adduced to the effect that the customary marriage between the two parties had never been dissolved and the parties had merely separated.

Counsel for the Respondent submitted that the two parties can own distinct property even in the subsistence of their marriage which is true as per the case of **Julius Rwabinumi versus Hope Bahimbisomwe, (Supra)**where it was held that a married person can hold property in their individual capacity however, this is distinguishable for the instant case. In the instant case the property subject to distribution and is matrimonial property that is jointly owned as opposed to property owned individually that would ordinarily not be subjected to distribution upon dissolution of marriage. The suit property in the instant matter cannot be subdivided without the dissolution of the subsisting marriage and putting into consideration that the parties have children whose interests have to be put into consideration.

In regard to the consent that was reached by the two parties, I find this was illegal and void *ab initio*, though the Applicant led no evidence proving collusion between the Deputy

Registrar and the Respondent's Counsel as per her allegations. It is however, the duty of Court to guide litigants who are usually lay persons educated or not on the right course of procedure and not glide along. The impugned consent was extracted out of a declaratory judgment that merely stated the entitlement of the Applicant but was not derived from the final disposal/order of the matter. The two parties are thus advised to file a matrimonial cause that will enable them have their marriage dissolved and proper orders made in regard to the sub-division of their matrimonial property.

In the case of **Makula International Ltd versus His Eminence Cardinal Nsubuga & Another [1982] HCB 11** it was held that;

"A court of law cannot sanction what is illegal, an illegality once brought to the attention of court, overrides all questions of pleading, including any admission made thereon."

This Court will therefore not pay a blind eye to an illegality once it has been to its attention and that would amount to abuse of Court process.

Section 98 of the Civil Procedure Act provides for the inherent powers of the High Court and states that;

"Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

Black's law_dictionary, 8th edition at Page11 defines abuse of process or abuse of legal process to mean;

'*The improper and tortuous use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope*.'

It is therefore, the duty of this Court to ensure that it exercises its inherent jurisdiction judiciously to have the ends of justice met.

In a nutshell, it is my considered opinion that the impugned consent order was illegal and void *ab initio,* the declaratory judgment from which it was extracted is unenforceable without consequential orders.

I therefore allow this Application without costs given the nature of the case which involves a husband and wife and the need to promote harmony that should be in their best interest.

Right of appeal explained.

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OYUKO. ANTHONY OJOK

JUDGE

30/03/2017

Judgment read and delivered in open Court in the presence of;

1. Counsel Bwiruka Richard for the Respondent
2. James – Court Clerk
3. Applicant

In the absence of the Respondent who was sick, and Counsel for the Applicant who was before the Court of Appeal.

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OYUKO. ANTHONY OJOK

JUDGE

30/03/2017