THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CIVIL APPEAL NO. 50 OF 2017

(Arising from FPT – CV – CS – No. 32 of 2010)

ZERESIRE TEREZA.....APPELLANT

VERSUS

1. DAUDA RWAKASENYI
2. MUHUMUZA STEVEN .....RESPONDENTS

BEFORE: HIS LORDSHIP HON. MR WILSON MASALU MUSENE

Judgment

This is an appeal against the decision of Her Worship Agnes Nabafu Senior Magistrate Grade one of the Chief Magistrates Court of Fort Portal at Kyenjojo delivered on 9/12/16.

Brief facts:

The Appellant Tereza Zeresire instituted a Civil Suit against the Respondents, Dauda Rwakasenyi and Muhumuza Steven for a declaration that the land transactions on the suit land were null and void, an order for vacant possession against the 2nd Respondent, an order of a permanent injunction against the Respondents restraining them from any trespass on the suit land, an order for general damages, costs of the suit and other relief Court finds suitable. That there was a sale of land agreement entered into by the Appellant's husband and the 1st Respondent on 1/3/1998, while the Appellant was away from home to attend the funeral of a relative, the deceased (Husband of the Appellant Zeresire George William) is alleged to have sold the suit land to the 1st Respondent who in the forenoon on the same day sold the land to the 2nd Respondent. The Appellant adduced medical evidence of the mental illness of her husband and she premises her appeal on the fact that the deceased sold the suit land in her

absence and without her consent. And at the time of sale, the deceased was incapacitated to contract by reason of insanity.

The Respondents on the other hand denied all the allegations made by the Appellant and contested the contents of the plaint. The Respondents averred and contented that the Appellant had no cause of action against the Respondents and prayed that the suit be dismissed with costs. That the Appellant was not legally married to the deceased and the sale occurred before the enactment of the Land Act 227 and there was no need for her to consent.

The trial Magistrate found in favour of the Respondent and the Appellant being dissatisfied lodged the instant appeal whose grounds as per the amended Memorandum of appeal are;

1. That the trial Magistrate erred in law and fact when she did not properly evaluate the evidence on record and ended up giving a wrong decision in regards to the following particulars of the law;
    a) Medical evidence
    b) Spousal consent
    c) Locus visit

Representation:

Counsel Angella Bahenzire appeared for the Appellant and Counsel Ahabwe James represented the Respondent. By consent both Counsel agreed to file written submissions.

Preliminary Objections:

Counsel for the Respondents raised a preliminary objection to the effect that the Appellant filed an amended Memorandum of appeal without seeking leave of Court and the memorandum of appeal was filed after Court had given a schedule of filing submissions. Thus, it should be struck out for abuse of Court process.

Secondly, that the Appellant's submissions should be rejected based on the ground set forth in the amended Memorandum of appeal which offends **Order 43 Rule 2** of the Civil Procedure Rules.

Thirdly, that the appeal was filed out of time and thus incompetent and not properly before this Court and Court cannot endorse on an illegality. Therefore it should be dismissed with costs.

Counsel for the Appellant on the other hand in her reply to the Preliminary objection submitted that the law on amendment of appeals is settled in regard to the leave of Court that it is not a requirement to seek leave of Court to amend a memorandum of appeal. That the essence of the amendment was that the grounds contained therein conform to the provisions of **Order 43 Rules 1** and **2** of the Civil Procedure Rules. That the Respondents' objections are therefore over taken by events and their submissions should therefore be struck off for abuse of Court process.

In regard to the appeal being out of time Counsel for the Appellant submitted that an appeal is given a time frame of 30 days and the computation excludes days of preparing and delivering of the proceedings of the lower Court. That in the instant case the certified proceedings were delivered on the 23rd/10/2017 however prior to that on the 13th September 2017 the Appellant lodged the Memorandum of appeal and the amendment was made on 5/7/2018. That in the circumstances the appeal was made with in time and the amendment was necessary too.

Further, that the appeal came for scheduling and the Respondents did not raise their objections and the Appellant exercised her right to amend.

I have addressed my mind to both submissions and in regard to amendment of the Memorandum of appeal and the grounds there under **Order 43 Rule 2** of Civil Procedure Rules permits a party to seek court's leave to argue a ground on appeal not initially included on the memorandum of appeal in effect allowing an amendment of the memorandum of appeal.

Order 43 Rule 2 of the Civil Procedure Rules provides that;

"The appellant shall not, except by leave of the court, urge, or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule; except that the High Court shall not rest its decision on any other ground unless the party who may be affected by the decision has had a sufficient opportunity of contesting the case on that ground."

The provision of the law as cited above is very clear, that leave must be sought to amend the Memorandum of appeal. In my view, the law cannot be dispensed with to one's convenience; the law is put in place as a guiding tool on what the correct procedure in litigation is. One,

cannot choose when to follow the law and when not to, the law must be followed at all times. In the circumstances, I with all due respect disagree with Counsel for the Appellant that there was no need to seek leave to amend the Memorandum of appeal. The Amended Memorandum of Appeal is therefore struck off for non-compliance with the law and this preliminary objection is upheld.

In regard to the appeal being found incompetent for having been filed out of time, I find that the appeal was made on time considering the fact that the Memorandum of Appeal was filed even before the certified record of proceedings had been delivered to the Appellant.

Therefore this objection is overruled.

Counsel for the Respondent also objected to the two grounds of appeal in the initial Memorandum of Appeal stating that they were inconcise and did not state the specific pieces of evidence on record that the learned trial Magistrate failed to evaluate and the specific error in law and fact which the trial Magistrate made when allowing FPT – 21 – CV – CS – 32 of 2010 to succeed. That the grounds give Counsel an opportunity to go on a fishing expedition and offend the provisions of **Order 43 Rule 1** and **2** of the Civil Procedure Rules. That besides the suit did not succeed it was dismissed, he cited the case of **Mwanguhya Abiola versus Karamagi Fred, Civil Appeal No. 0028 of 2015**, and prayed that the ground be struck out.

I have read the submissions of both Counsel and I do agree with Counsel for the Respondents that the two grounds are too broad contravening the provisions of **Order 43 Rule 1** and **2** of the Civil Procedure Rules and give Counsel for the Appellant a chance to go on a fishing expedition.

In the case of **P. C. Wabwire Anthony versus Uganda, Criminal Appeal No. 0015 of 2009** it was held that;

"It is not a sufficient ground of appeal to allege that a conviction was bad in law, or that a conviction was against the weight of evidence, and where an Appellant is represented by Counsel, he will not be allowed to argue any point under a general ground of appeal".

In the present case, the ground that the trial Magistrate erred in law and fact when she failed to properly evaluate evidence on Court record is too generalised as to entitle Counsel to argue any point under it..."

Notwithstanding the above and even on the merits of the appeal, Counsel for the Appellant submitted that even though the Appellant was not lawfully married to the late George William Zeresire who sold to the Respondent that she ought to have consented to the sale.

Counsel for the Respondent on the other hand submitted that since the Appellant is not a lawful wife to late George William Zeresire, she could not challenge a land transaction between the late Zeresire and 1st Respondent.

I have studied the lower Court record and the submissions on both grounds of appeal. The Appellant testified in the lower Court as PW1, and called two witnesses, Mugisa Sylvester (PW2) and Dr. Kakibogo Isaac (PW3). The Respondents also testified as DW1 and DW2 and called one Rwamukole Wilson who testified as DW3.

The Appellant testified on page 4 of the record of proceedings that she got married to the late G. W. Zeresire in 1965 and found when her husband was already married to other women, one of whom was Felister Kahwa.

Section 36 of the Marriage Act provides;

"Any person who is married under this Act, or whose marriage is declared by this Act to be valid, shall be incapable, during the continuance of that marriage, of contracting a valid marriage under any customary law, but except as aforesaid, nothing in this Act shall affect the validity of any marriage contracted under or in accordance with any customary law, or in any manner applied to marriages so contracted."

Valid marriages under **Section 34(2) (a)** of the Marriage Act include wedded couples in a licensed place of worship and such marriages take precedence over customary marriages particularly when conducted first, as in the present case.

Counsel for the Appellant never the less submitted that the Appellant had a customary marriage certificate and a letter acknowledging payment of pride price and so her spousal consent before the sale on family land property was required.

Counsel for the Appellant faulted the trial Magistrate for confusing a wedded wife of the deceased who was not called as a witness. The finding and holding of this Court on the issue of spousal consent is that regardless of whether the Appellant was a legally married wife or not, the Law could not operate retrospectively. Spousal consent is provided for under **Section 39(1) (C) (i)** of the Land Act, Cap. 227 as follows;

"No person shall give away any land inter vivos, or enter into any other transaction in respect of land in the case of 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."

The date of commencement of that law was 2nd July 1998. And so I agree with Counsel for the Respondent that by the time the above law came into force, the land in question had already been sold by the late Zeresire to the 1st Respondent, Dauda Rwakasenyi, and then to 2nd Respondent, Muhumuza Steven, since the sale took place on 1. 3. 1998. The law could not be applied retrospectively and so the ground of spousal consent is rejected.

The other ground by Counsel for the Appellant was that the deceased had mental illness attributed to chronic alcoholism by the time of the sale of the land in question to the Respondents. Counsel for the Appellant faulted the trial Magistrate for the conclusion that the deceased was sane as per the testimony of the LCI Chair person.

Counsel added that the trial Magistrate erred in law when she did not consider the testimony of the medical expert and relied on the LCI chairperson. Counsel for the Respondent on the other hand submitted that the late Zeresire sold the suit land to the 1st Respondent in the presence of several witnesses including DW1, Mr. Rwamukole William who was the LCI Chairperson of the area. He added that the late Zeresire lawfully sold the land to the 1st Respondent on the 1st March 1998 when he was sober and the 1st Respondent acquired good title whereof he lawfully sold to the 2nd Respondent and the 2nd Respondent started building on the same even when the late George William Zeresire was still alive and by the time he died in 2004, the house on the suit land was almost complete and that the late Zeresire never complained about this sale between 1998 up to 2004 when he passed away.

I have considered the submissions on both sides on the issue of alleged insanity or mental incapacity. In my view, that issue should have been raised when the deceased, Zeresire was still alive and not after his death. Between 1998 when he sold and 2004 when he died was a period of 6 years and the Appellant did not raise the matter in any fora. Both the Appellant and PW2 were not present during the sale. And although PW3 testified on page 11 of the proceedings that he wrote a letter referring the late Zeresire to Butabika Hospital. However, annexture "C" attached was dated 20.4.2010 and written by Dr. Kakibogo M. I. (PW2). The same was written after the death of Zeresire and therefore not helpful to the Appellant's case.

In the premises, I reject the submissions by Counsel for the Appellant as far as mental incapacity at the time of the sale was concerned.

I shall not dwell on whether the locus in quo was properly conducted or not because the main issue was whether the land in question was properly and lawfully sold to the Respondents or not. I have resolved those issues in the positive.

Having so resolved, I do hereby dismiss the appeal and uphold the judgment and orders of the lower Court.

On the issue of costs I exercise Court's discretion to order that in view of the long time the case has taken and as the land in question passed from the deceased Zeresire , then the 1st Respondent, Dauda Rwakasenyi and to the 2nd Respondent, Muhumuza Steven, each party should meet their own costs.

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WILSON MASALU MUSENE

JUDGE

7. 9. 2018

M/s Angella Bahenzire for the Appellant present.

Both parties present.

Beatrice Court Clerk present.

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WILSON MASALU MUSENE

JUDGE