

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**

**CIVIL APPEAL NO. 018 OF 2018**

**(Arising from FPT – 00 – CV – LD – Civil Suit No. 88 of 2015)**

5 **PAUL KASAANDE NYAKANA.....APPELLANT**

**VERSUS**

**ESTHER BAGUMA.....RESPONDENT**

**BEFORE: HIS LORDSHIP HON. MR. WILSON MASALU MUSENE**

10 **Judgment**

The Appellant, Paul Kasaande Nyakana, being aggrieved and dissatisfied by the Judgment and orders of the Chief Magistrate made on the 2/10/2018, appealed to this Court. The Respondent is Esther Baguma.

**Brief background facts:**

15 The Appellant on the 14<sup>th</sup> February 2014 purchased land at Mbuzi, Fort Portal measuring 107 x 122 meters with an incomplete residential house which upon completion the two parties started cohabiting there in and they have a child together. The parties eventually fell out and on the 8<sup>th</sup> January 2015, executed a memorandum of understanding by which the suit property valued by them at UGX 55,000,000/= was agreed to either be sold jointly and the proceeds  
20 shared or for the Appellant to pay half of that amount to the Respondent and retain the property.

In terms of that agreement, on the 18<sup>th</sup> March 2018, the Appellant deposited UGX 27,500,000/= (being half the value) on the Respondent's account which she acknowledged but refused to render vacant possession of the suit property as agreed. Following that refusal,  
25 the Appellant sued the Respondent seeking an eviction order among other reliefs. The trial Magistrate found that the Appellant had bought the suit land for the Respondent and her son who took possession and ownership thereof as per the Respondent's claim. The Appellant

was found to have unlawfully executed the 8<sup>th</sup> January 2015 agreement with the Respondent. The Appellant being dissatisfied with this decision lodged the instant appeal whose grounds are as follows;

- 5 1. The learned Chief Magistrate erred in law and fact when he held that the agreement dated 8<sup>th</sup> January 2015 was no lawfully executed.
2. The learned Chief Magistrate erred in law and fact when he held that the Appellant beached the agreement of 14<sup>th</sup> December 2014.
- 10 3. The learned Chief Magistrate erred in law and fact when he awarded general damages to the Respondent as against his resolution that there was no breach of a promise to marry.
4. The learned Chief Magistrate erred in law and fact when he awarded general damages to the Respondent as against his findings that neither of the parties was a legal guardian to the child Kasaija Nelson Kelly.
- 15 5. The learned Chief Magistrate erred in law and fact when he unjustifiably awarded UGX 20 million to the Respondent, a sum which is excessive in the circumstances.
6. The learned Chief Magistrate erred in law and fact when he failed to address the issue of UGX 27,500,000/= received by the Respondent as against his finding that the agreement dated 8<sup>th</sup> January, 2015 was invalid and of no legal effect.

20 M/s Wetaka, Kibirango & Co. Advocates represented the Appellant and M/s Kayonga, Musinguzi & Co. Advocates represented the Respondent. By consent both parties filed written submissions.

**Grounds 1 and 2:**

- 25 **1. The learned Chief Magistrate erred in law and fact when he held that the agreement dated 8<sup>th</sup> January 2015 was no lawfully executed.**
- 2. The learned Chief Magistrate erred in law and fact when he held that the Appellant beached the agreement of 14<sup>th</sup> December 2014.**

Counsel for the Appellant submitted that the suit land was bought by the Appellant and the trial Magistrate in reaching his decision relied on the minutes of the meeting held on 14<sup>th</sup> December 2014 as an agreement between the parties which was not right because it not form  
30 a contract as defined in **Section 10** of the Contracts Act 2010. The agreement had no

consideration and nor was it signed by either of the parties so there is no way that the suit land could have been a gift from the Appellant to the Respondent.

Counsel for the Respondent on the other hand submitted that the suit property was passé don to the Respondent and her son in the presence of six witnesses and a deed was executed and  
5 witnesses. That DW4 Idrisa Nyakairu who sold the suit property to the Appellant was present when the Appellant gave the sale agreement to the Respondent upon which she even knelt down in appreciation and the Appellant said that he would transfer into the Respondent's names upon completion of the loan that he had obtained to buy the property. Counsel for the Respondent concluded that, the suit land was a gift inter vivos and cannot be revoked once  
10 fully executed by the donor and witnessed and any dealing in the suit land with the exclusion of Kasaija Nelson Kelly was null and void and thus the second agreement was unlawfully executed.

Secondly, that the agreement dated 14<sup>th</sup> December 2014 is valid and the consideration on the part of the Respondent is her acceptance to give her consent of the Appellant to another  
15 woman which was the precondition given by the church and it was for the same reason that there was a representative of the church present during the meeting a one Father Udaliko Nyakatura. Therefore, the house was meant to provide shelter and maintenance for the Respondent and her son Kasaija Nelson Kelly who is still a minor given the fact that the Appellant was marrying another woman and has another home.

20 This Court has considered the submissions on both sides as far as grounds 1 and 2 are concerned. I have also studied the proceedings and judgment of the lower Court. The case for the Respondent in the lower Court was stated in the Counter-Claim where she had sought declarations that the land and house at Mbuzi belongs to her and her son and that the memorandum of understanding of 8/1/2018 and 18/3/2015 were obtained through duress and  
25 coercion. However, Section 10 of the Contracts Act 2010 outlines all the essential elements of a valid contract.

A contract is defined as an agreement made with the free consent of the parties to contract, for a lawful consideration and with the intention to be legally bond.

In the present case, it is not in dispute that the Appellant was the one who purchased the suit  
30 land on 14/2/2014 at UGX 32,000,000/=. The testimony of the Respondent on page 137 of the record of appeal confirms the fact of purchase by the Appellant. I therefore agree with

Counsel for the Appellant's submissions that the trial Magistrate erred when he relied on the minutes of a meeting held on 14/12/2014 as an agreement between the parties. That document falls short of what constitutes a valid contract in that there was no consideration and it is not signed by either the Appellant or Respondent as parties to it.

5 PW4, Kabagambe Adyeeri who was the author of those minutes of the parties was among the many other persons whereby the aim was to permit the Respondent to temporarily occupy the suit property. And during cross-examination, the Respondent admitted that the document dated 14/12/2014, by which she was claiming to have been given the suit land as a gift was not signed by her and neither was it signed by the Appellant. The trial Magistrate therefore  
10 erred when he referred to those minutes of 14/12/2014 as an agreement that gave the suit land to the Respondent as a gift to her and her son. The said document or minutes were not made by the Appellant as the Respondent herself conceded during cross examination. This is on page 137 of the record of appeal where the Respondent stated:-***"This is the minute of the meeting. Nobody signed DE5 as a recipient and giver."***

15 This Court is as well surprised when the trial Magistrate on page 2 of his judgement referred to the Appellant as a stranger to the property in dispute. How could the person who bought the suit property be referred to as a stranger? I therefore agree with the Submissions of Counsel for the Appellant that it was on 8/1/2015 when the parties executed their first agreement and by then the suit property was for the Appellant who lawfully transacted over  
20 it.

It was in the circumstances greatly erroneous for the trial Chief Magistrate to conclude that the Appellant breached the agreement of 14/12/2014 by entering in a memorandum of understanding of 8/1/2015. There was no shifting of goal posts by the Appellant for selfish interests under the circumstances. So Grounds No. 1 and 2 of appeal are resolved in the  
25 affirmative.

#### **Grounds 3 and 4:**

**3. The learned Chief Magistrate erred in law and fact when he awarded general damages to the Respondent as against his resolution that there was no breach of a promise to marry.**

**4. The learned Chief Magistrate erred in law and fact when he awarded general damages to the Respondent as against his findings that neither of the parties was a legal guardian to the child Kasaija Nelson Kelly.**

Counsel for the Appellant defined damages as per the definition in Black's Law Dictionary and submitted that in the instant case the general damages sought by the Respondent were in respect of her counter claim where she alleged that the Appellant breached the agreement dated 14<sup>th</sup> December 2014, and the promise to marry her whereof the trial Magistrate found that the agreement was unlawfully made and so there was no basis for awarding the general damages.

Counsel for the Respondent on the other hand submitted that the award of general damages was based on the inhuman treatment and inconveniences which the Respondent was subjected to by the Appellant and thus the trial Magistrate was justified in awarding the general damages.

I have equally considered the submissions by both sides on the two grounds of appeal above.

In the case of **The Editor of Sunday Vision & Another versus Difasi Murialo, Court of Appeal Civil Appeal No. 11 of 2005**, it was held that an Appellate Court will not usually interfere with the award of general damages except where it is shown that the award is so inordinately high or low as to represent an entirely erroneous estimate. It was further held that it must be shown that the trial Court applied a wrong principle or that it misapprehended the evidence in some material respect and arrived at a wrongful figure.

In the present case, Counsel for the Respondent submitted that the Appellant's superiority complex and chauvinistic acts occasioned great inconvenience and suffering for which any prudent trial Magistrate would award general damages. However, and as submitted by Counsel for the Appellant, the Chief Magistrate in his judgment found that the Appellant did not breach any promise to marry the Respondent. And indeed the very Chief Magistrate found that neither of the parties was a guardian to the child Kasaija Nelson Kelly. The trial Chief Magistrate's findings were a contradiction and could not justify the award of general damages.

Secondly, Grounds 3 and 4 should not be taken together with Ground 5 which Counsel for the Respondent was pursuing in his submissions. Ground 5 is a separate one. But with regard

to Grounds 3 and 4, the findings of the trial Chief Magistrate contradict the same and so they are hereby allowed.

**Ground 5: The learned Chief Magistrate erred in law and fact when he unjustifiably awarded UGX 20 million to the Respondent, a sum which is excessive in the circumstances.**

Counsel for the Appellant submitted that there was no justification for the award of UGX 20,000,000/= to the Respondent since there was no loss occasioned to her and she was the one actually in occupation of the suit property.

Counsel for the Respondent on the other hand submitted that the Appellant forced the Respondent into entering the agreement dated 8<sup>th</sup> January 2015 when he was aware that he had given the property the subject of that agreement intervivos to the Respondent and their son Kasaija Nelson Kelly but used his superior position to unduly influence the Respondent. He added that the “Contraproferantum Rule” is to the effect that if a stronger party induces by undue influence another party who is weaker to enter into a contract, the terms of that contract will be strictly interpreted against the superior party relying on those terms. Therefore, the trial Magistrate was right in awarding the 20,000,000/= to the Respondent and such award was not excessive given the suffering and exploitation the Respondent underwent at the hands of the Appellant.

As far as Ground 3 of appeal is concerned, Counsel for the Respondent raised the issues of the Respondent being forced out of her job and the fact that the Appellant has abdicated his responsibility to maintain his child, whereby the Respondent has been maintaining the child single handedly. The above concerns are valid but they did not arise during the trial of the case in the lower Court. And there is a pending issue as to whether the Respondent will continue having custody of the child now that he is said to be 8 years old or whether the Appellant as the father of the child should take over the parental responsibilities as outlined under the law? For how long can the child continue to be under the custody and maintenance of the mother when the Appellant as a father is there and no doubt able and capable of looking after his own child?

The other bigger question is whether the continued stay of the Respondent in the suit property which this Court has decreed to the Appellant after allowing Grounds 1 and 2 of appeal, be turned into a permanent solution as property of the child **Kasaija Nelson Kelly**?

What is the future of the child born of the Appellant and the Respondent? Should the issue of the child Kasaija Nelson Kelly not be resolved now other than postponing it? What is the role of the Courts of law as far as the Courts of law as far as such complex situations as has arisen now in the course of handling this appeal? The welfare and future of the child Kasaija Nelson  
5 Kelly cannot be ignored.

**Section 98** of the Civil Procedure Act provides for the inherent powers of this Court to make such orders as may be necessary for the ends of justice or to prevent abuse of Court process.

Furthermore, **Section 33** of the Judicature Act provides;

10 *“The High Court shall, in the exercise of the jurisdiction vested in it by the Constitution, this Act or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided.”*

15 So, although I have decided that the house and property in dispute belongs to the Appellant, I shall exercise this Court’s powers under **Section 98** of the Civil Procedure Act and **Section 33** of the Judicature Act that, the said property in dispute be transferred from the names of the Appellant to the names of their son **Kasaija Nelson Kelly**.

As for the award of 20 million, and considering the fact that the Respondent has all along  
20 been staying on the suit property, then I find and hold that no inconvenience or disturbance was occasioned to her. She has till up to now been the beneficiary of the lower Court judgment. Matters of custody of the child which Counsel for the Respondent was bringing in will be sorted out in a custody application. As of now, I agree with Counsel for the Appellant that *In pari delicto* was the Respondent when she refused to vacate the disputed premises as  
25 per their agreement and payment. The award of UGX 20,000,000/= was not only excessive but since the Respondent was equally to blame, the same is rejected. So Ground 5 of appeal is upheld.

**Ground 6: The learned Chief Magistrate erred in law and fact when he failed to address the issue of UGX 27,500,000/= received by the Respondent as against his finding that the  
30 agreement dated 8<sup>th</sup> January, 2015 was invalid and of no legal effect.**

Counsel for the Appellant submitted that the Respondent was paid for her share in the suit property so the trial Magistrate ought to have ordered for specific performance or a refund of the UGX 27,500,000/= to the Appellant since a valid contract involves payment of consideration and this was never done by the Respondent.

5 Counsel for the Respondent on the other hand submitted that the Respondent in her witness statement expounded how she utilised the UGX 27,000,000/= and this included paying the loan that had been obtained while buying the suit property, payment of school fees and maintenance for their son Kasaija Nelson Kelly, renovation of the house and other requirements the Appellant neglected to provide since 2014. That this evidence was not  
10 controverted by the Appellant. Thus, the Magistrate concurred with the Respondent that the said money be treated as expenses she incurred and therefore there was no miscarriage of justice occasioned to the Appellant.

As far as this Ground is concerned, I agree with Counsel for the Respondent that the Respondent expounded on how she utilised the UGX 27,000,000/=: particularly when she  
15 paid a loan and school fees plus maintenance of their son Kasaija Nelson Kelly. In the circumstances, I find that there was no miscarriage of Justice occasioned to the Appellant. So Ground 6 of appeal fails.

In conclusion therefore, and having allowed Ground 1-5 of appeal, save for Ground 6, the appeal on the whole is allowed. The judgment and orders of the lower Court is hereby set  
20 aside, and the house and property in dispute decreed to the Appellant who will in turn transfer it to the names of their son Kasaija Neslon Kelly. I shall exercise this Court's discretion to order that each side meets their own costs in the interest of their child, Kasaija Neslon Kelly.

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25 **WILSON MASALU MUSENE**

**JUDGE**

**03/10/2019**