

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CIVIL APPEAL NO. 141 OF 2016**  
**ARISING OUT OF CIVIL SUIT NO. 262 OF 2012**

**BARBRA BATESAKI :::APPELLANT**

**VERSUS**

**MADAM SAIDA a.k.a ASIMWE MARGRET::::::::::::::::::::::::::::::::::::: RESPONDENT**

**BEFORE: LADY JUSTICE LYDIA MUGAMBE**

**JUDGMENT**

1. This is the judgment in civil appeal No. 141 of 2016. The Appellant framed 3 grounds of appeal. These are:
  - i. The learned trial magistrate erred in law and fact when she failed to properly evaluate and consider the whole evidence on record thus reaching a wrong conclusion.
  - ii. The learned trial magistrate erred in law and fact when she failed to properly evaluate the evidence on record and declared that the suit property is not the Appellant’s matrimonial home.
  - iii. The learned trial magistrate erred in law and fact when she ruled that the Respondent is the rightful owner of the suit kibanja and is legally in possession.

2. The Appellant prays for orders that the judgment and orders of the trial magistrate be set aside with costs here and in the lower court.
3. The Appellant is represented by Mr. Julius Galisonga of M/s. Galisonga & Co. Advocates and the Respondent is represented by Ms. Janet Nakakande of M/s. Kigozi & Partners.
4. The Appellant filed civil suit No. 262 of 2012 in the Chief Magistrates Court at Makindye for orders and a declaration that; (a) the Appellant and her husband are the rightful owners of the suit land; (b) an order that the Respondent's continued occupation of the suit premises is unlawful; (c) an order that the Respondent vacates and/or be evicted from the suit premises; (d) an order for payment of rent arrears; (e) general damages; (f) cost of the suit and (g) interest thereon on (d) and (e) at the rate of 25% from the date of issue of the notice of intention to sue till payment in full.
5. It was the Appellant's case that she together with her husband Nsibambi Peters a.k.a Sserwambala Peters owned the suit premises located at block 253 Kyandondo as their matrimonial home. That while she and her husband both live in Holland, she had contributed to the construction of the suit premises and they shortly lived in the suit premises from December 2005 to January 2006. Further that the Appellant together with her husband had agreed to rent out the suit premises while in Holland but on her return to Uganda in mid 2011, she attempted to access the suit premises and was denied access by the Respondent who informed her that she owned the suit premises and was not a tenant.
6. In her written statement of defence, the Respondent averred that she is legally in occupation of the suit premises since 2001 with the authority from the lawful owner Sserwambala Peter and has never been a tenant. Further that the suit premises was bequeathed to her as a gift by the said Sserwambala Peter to provide shelter for the Respondent and their children.

7. At trial, the Appellant gave evidence and called two other witnesses. The Respondent also gave evidence and called one witness. In her judgment of 14<sup>th</sup> June 2016, Her Worship Kamasanyu Gladys Musenze found that the suit premises did not qualify as a matrimonial home and the Appellant and her husband never intended the same to be their home. That the Appellant failed to adduce evidence to prove that she contributed to the construction of the suit premises, the Respondent is in lawful occupation of the suit premises and dismissed the suit with costs. It is this decision that the Appellant is appealing.

### **The Law**

8. In **Mulindwa Janies v. Uganda SCCA No. 23 of 2014**, the Supreme court quoted **Nomensio Tiberanga SCCA No 17 of 2007** and held that “it is a well settled principle that on first appeal the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as law. Although in case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witness. It must weigh the conflicting evidence and draw its own inference and conclusion.”
9. The Constitution of the Republic of Uganda, 1995 provides for equality in marriage encapsulated in **Article 31 (1)** which is to the effect that men and women are entitled to equal rights in marriage, during marriage and at its dissolution.
10. The property a couple chooses to call a home will be considered joint matrimonial property. This together with the property either of the spouses contributes to is what is matrimonial property.
11. In **Muwanga v. Kintu High Court Divorce Appeal No. 135 of 1997, (Unreported)**, Bbosa J noted that matrimonial property to which each spouse should be entitled is that property which the parties chose to call home and which they jointly contribute to.

12. Lady Justice Esther Kisakye in **Rwabinumi v. Bahimbisomwe Civil Appeal No. 10 of 2009** cited with approval the case of **Muwanga v. Kintu (supra)** in which Bbosa J observed that;

*“matrimonial property is understood differently by different people. There is always property which the couple chose to call home. There may be property which may be acquired separately by each spouse before or after marriage. Then there is property which a husband may hold in trust for the clan. Each of these should in my view be considered differently. The property to which each spouse should be entitled is that property which parties chose to call home and which they jointly contribute to.”*

13. Where a spouse makes a substantial contribution to the property, it will be considered matrimonial property. The contribution may be direct and monetary or indirect and non-monetary. In **Muwanga v. Kintu, (supra)**, Bbosa, J, adopted a wider view of non-monetary indirect contributions by following the approach of the Court of Appeal of Kenya in **Kivuitu v. Kivuitu, (1990 – 19994) E.A. 270**. In that case, Omolo JA found that the wife indirectly contributed towards payments for household expenses, preparation of food, purchase of children’s clothing, organizing children for school and generally enhanced the welfare of the family and that this amounted to a substantial indirect contribution to the property.

### **Analysis**

14. From the record, the marriage between the Appellant and DW2 appears to be shaky, almost broken. It is therefore difficult to know if either of them is exaggerating or telling lies in their testimonies. In the same way the Respondent who was allegedly gifted the suit property by DW2;- the husband of the Appellant is most likely an untruthful witness in this suit concerning ownership of the said property where she resides. It is also came out of the testimony of the DW2 and PW2 who are brothers that they have some kind of grudge. Because of these issues, I will deal with these witnesses with extra caution and only rely on them where they are corroborated.

15. The witness I find neutral and credible in this case is PW3. According to his testimony, he was the Respondent's landlord from January 2006 till April 2007. The Respondent's counsel cross examined him extensively on this issue and he was consistent and elaborate on the Respondent having been his tenant during this time. In cross examination he also tendered cross examination Exh D1;- a letter he wrote for the Appellant demonstrating that the Respondent was his tenant during that time. Without any credibility issues, I believe PW3.
16. If the Respondent was a tenant of PW3 from January 2006 till April 2007, then her testimony and that of DW2 that she lived in the suit premises from 2001 is not possibly true. PW1 and PW2's testimony that PW1 contributed to the construction of the suit house before and after their wedding in December 2015 becomes more believable in the circumstances of this case as it is corroborated by this testimony of PW3.
17. I am inclined to consider that DW1 and DW2 connived to tell the lie that the Respondent was resident in the suit premises as far back as 2001 whereas not. For if this was the case then there would have been no need for DW2 and the Appellant to be constructing a house there in 2015. I am inclined to consider also that the Respondent's counsel cross examination of PW3 on the lines of the possibility of one living in two homes at a time did not undo the tainted credibility of DW1 and DW2.
18. The Appellant's contribution to the house is also corroborated by the counter book tendered in court by PW2. In this book PW2 who was the supervisor and manager for the construction of the suit house, listed expenses incurred in the construction of the house. I view the claims of the Respondent and DW2 that the Respondent moved into the house in 2001 and DW2 gifted the house to her in 2003 as well calculated lies to defeat the Appellant's claim to the suit property.
19. After exercising added caution, I am more inclined to believe PW2's corroborated testimony that although DW2 bought the suit land in 2000, the Appellant contributed

to the construction of the house thereon from around 2015 onwards. The Appellant paid off a debt in PW2's hardware shop arising from supply of building materials that were used to construct the suit house. He also explained that the Appellant sent other money on different occasions for the construction of this house. I also believe the Appellant's testimony that DW2 convinced her that they put the suit house up for rent since they were living in Holland.

20. In the grand scheme of things, DW2 was in fact telling the Appellant lies. It is easily inferable from the evidence that instead he allowed the Respondent, another woman he had a relationship with to move into the house. This was unfair considering that the Appellant had contributed to the construction of the house. This makes it matrimonial property because both the Appellant and DW2 contributed to its construction during the pendance of their marriage. They called it home and jointly contributed to its construction as such.
21. Clearly the Appellant contributed on the understanding that they were building their matrimonial home or property they held in common. It was therefore unfair for her husband- DW2 to gift or otherwise hand it over to the Respondent ;- his side lover. DW2 unfairly took advantage of their residence in Holland to gift this matrimonial property to another lover in Uganda. DW2 could not lawfully do this without the consent of the Appellant his wife.
22. This property remains matrimonial property until the marriage between DW2 and the Appellant is dissolved in law. On dissolution, matters of who takes it or how to divide it can be determined between them. Even though their marriage may not be well, they have not divorced, they are still married.
23. Both the Appellant and Respondent have at least one biological child with DW2. This issue of children cannot be used to favor either of them to the detriment of the other in regard to the suit property. DW2 as the father of all these children remains with the responsibility to care for them. It is a requirement of the law.

24. Based on the above, I am satisfied that the trial magistrate did not evaluate the evidence on record properly and as a result reached wrong and unfair conclusions. However to avoid acrimony between the parties, I'm disinclined to award rent arrears to the Appellant.

25. Grounds 1, 2 and 3 are allowed. The appeal succeeds, the trial judgement is set aside with the following orders and declarations:

- a. The Appellant and her husband (DW2) are the rightful owners of the suit property which is their matrimonial property.
- b. The Respondent's continued occupation of the suit premises without both of their consent is unlawful.
- c. The Respondent should vacate and/or be evicted from the suit premises within 30 days after the covid-19 lockdown is lifted.
- d. For the inconvenience, pain and suffering, the Appellant is awarded general damages of 25 million.
- e. No order for payment of rent arrears;
- f. The Appellant is awarded costs of this appeal and in the lower court;
- g. Interest on (d) above at 10 percent p.a from date of judgement till payment in full;
- h. No order for payment of rent arrears;
- i. Costs are awarded to the Appellant both here and in the lower court.

I so order.

**LYDIA MUGAMBE.**

**JUDGE.**

**11 JUNE 2020.**