

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
FAMILY DIVISION

HIGH COURT CIVIL SUIT NO. 121 OF 2012

EMMANUEL NYABAYANGO.....PLAINTIFF

VERSUS

- 1. MARGARET KABASINGUZI**
- 2. PROF. GILBERT BUKENYA BALIBASEKA.....DEFENDANTS**

BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

RULING ON PRELIMINARY OBJECTION

When this suit came up for hearing, learned senior counsel Macdusman Kabega for the 2nd defendant raised a preliminary objection (PO) in various areas. First, he submitted that the plaintiff has no cause of action against the 2nd defendant, that the case is bad in law and that it should be struck out. He alluded to paragraph 3 of the plaint where the plaintiff is seeking a declaration that the plaintiff's desertion by the 1st defendant as a result of the 2nd defendant's action be declared unconstitutional. He submitted that the said declaration can only be sought from the Constitutional Court which is seized with power to interpret an act as unconstitutional.

He also submitted that the acts complained of, that is, that the 2nd defendant had an extra marital relationship with the plaintiff's wife resulting into an issue (child), if true, are actions that would have been taken out to divorce proceedings. Further, he submitted that the plaintiff accepts receiving compensation from the 2nd defendant under an agreement to the tune of Uganda Shillings 150,000,000/= (one hundred and fifty million). In that agreement the plaintiff received the money in full and final settlement between him and the 2nd defendant, and that the matter now in court shall never be raised again by him. He maintained that the plaintiff's action of signing the agreement and taking the money but going ahead to bring this action can only be termed as his attempts to unjustly enrich himself or use it as a ransom against the 2nd defendant. He prayed that the plaint be struck out as it does not disclose a cause of action.

The objection was opposed by learned counsel Ambrose Tishekwa for the plaintiff. He submitted that the matters raised by the 2nd defendant's counsel were peripheral to the spirit of the law under which the case is brought. He submitted that it does not require a constitutional court to pronounce the family rights the plaintiff enjoyed with the 1st defendant which rights were shattered and destroyed by the 2nd defendant to the point of fathering a child. He contended that the institution of marriage to which the plaintiff and the 1st defendant belonged is protected by the Uganda Constitution under Article 31 and the case is properly before this court. He maintained

that the plaintiff is not seeking a declaration that marriage is constitutionally protected, but simply praying court to declare the 2nd defendant's act of seduction unconstitutional, which does not require a Constitutional Court to pronounce on it.

He also submitted that the plaint discloses a cause of action against the 2nd defendant who does not deny a subsisting marriage between the plaintiff and the 1st defendant which he destroyed. He maintained that a plaintiff has an option of choosing the nature of case to be filed against which party and it is upon court to adjudicate over the same. He submitted that the assertion by the plaintiff that the 2nd defendant enticed his lawfully wedded wife (1st defendant) is actionable as a tort, and people like the plaintiff need to be protected by the law. He further submitted that restitution of conjugal rights is one of the prayers sought in the plaint, meaning the plaintiff wants his wife back and does not want divorce, which was the reason he did not petition for divorce.

On the plaintiff's bringing the action against the spirit of the agreement signed between him and the 2nd defendant, counsel submitted that it was not a clause in the agreement that the plaintiff would allow the 2nd defendant to continue snatching his lawfully wedded wife, and that the receipt of the money does not negate the case. Secondly, he submitted that the Contracts Act prohibits contracts intended to oust the jurisdiction of court, that such contracts are null and void, and further, that if they were allowed courts would be at the mercy of such void contracts made to oppress people. He maintained that the case is simply to have the 2nd defendant answer for his civil wrongs. He prayed that the objection be overruled and dismissed such that the matter is fully heard.

The defendant's counsel submitted in rejoinder that the allegations in the plaint are the same matters that formed the subject of the agreement, and the plaintiff was compensated for them. He reiterated his submissions that prayer (a) of the plaint seeking a court declaration of the 2nd defendant's act of seducing the plaintiff's wife as unconstitutional cannot be handled by this court. He also added that a prayer for restitution of conjugal rights is a prayer made in vain, and he doubted that this court can grant such prayer. He reiterated his earlier prayer to strike out the plaint with costs.

I have carefully addressed the objection, the submissions of both counsel and the law applicable. There are four questions for determination. I will address each of them separately, beginning the question touching the issue of which court has jurisdiction to declare the acts complained of as unconstitutional.

The legal position is that every court in Uganda is vested with jurisdiction to construe, apply and enforce the provisions of the Constitution in relation to any dispute before it. However, where any matter requires interpretation of the provisions of the Constitution, it is only the Court of Appeal, sitting as a Constitutional court, which can interpret such provision of the Constitution. This is a provision contained in Article 137(3) of the Constitution of Uganda.

Cambridge International Dictionary of English, page 657 states that the word “interpret” means to decide what the intended meaning of something is. *Black’s Law Dictionary, 8th edition, pages 837 & 838* defines the word “interpretation” as the process of determining what something, especially the law or a legal document, means, or the ascertainment of meaning to be given to words or other manifestations of intention. The word construe, on the other hand, is defined in the same *Black’s Law Dictionary, page 333* as meaning to analyze and explain the meaning of a sentence or passage, like a court construing the language of a statute.

In **Charles Kabagambe V Uganda Electricity Board Constitutional Petition No. 2/1999** the petitioner prayed the Constitutional Court for, among other things, a declaration that the dismissal of the petitioner violated Article 42 of the Constitution. In upholding a PO that the court had no jurisdiction in the matter, the Constitutional Court held that it is now settled once and for all that if the matter does not require an interpretation of a provision of the Constitution, there is no juristic scope for the invocation of the jurisdiction of the Constitutional Court; that such a matter dealt with by specific laws can be enforced by a competent court; and that a person who seeks a right or freedom guaranteed under the Constitution, by claiming redress for the infringement but whose claim does not call for interpretation to the Constitution, has to apply to any other competent court. The said court concluded that there was no constitutional issue requiring interpretation by it.

In the same case, Wambuzi CJ, as he then was, had the following to say:-

“In my view for the Constitutional Court to have jurisdiction, the petition must show, on the face of it, that interpretation of a provision of the Constitution is required. It is not enough to allege that a constitutional provision has been violated. If therefore rights have been violated as claimed, these are enforceable under Article 50 of the Constitution by another competent court.”

In the instant case, the question to ask is whether the rights sought to be relied on as a basis for seeking the declaration are already spelt out under the Constitution, such that this court merely applies them, or they are not so spelt out such that it will require interpretation of the Constitution to determine whether or not the act complained of is unconstitutional.

The prayer which is the subject of the PO in this suit is that the plaintiff is seeking judgment to be entered against the 1st and 2nd defendants severally and jointly for;

“a declaration that the 2nd defendant’s act of seducing the plaintiff’s wife (1st defendant) to desert him or her husband in their matrimonial home is unconstitutional barbaric, oppressive, inhuman and unlawful.”

Article 31 of the Constitution of Uganda provides for the rights of the family including rights to marry and found a family, and to enjoy equal rights in marriage. This is in addition to other provisions on fundamental and other human rights under chapter 4 of the same Constitution. The

specific rights and obligations of married persons are set out in the various marriage and divorce laws of this country. The plaintiff in the instant case, on the face of the record, seeks to enforce rights spelt out in the Constitution and marriage and divorce laws of this country. This court can, on basis of the cited authorities, apply what is already spelt out in the Constitution plus existing marriage and divorce laws to the circumstances of a case, as opposed to interpreting the Constitution, and declare whether or not the act complained of violates the Constitution. In my opinion, there is no issue in this case which calls for interpretation of the Constitution, as to require this court refer the matter to the Constitutional Court.

The second question for determination is whether the plaint discloses a cause of action. A cause of action means every fact which is material to be proved to enable the plaintiff to succeed. In order to prove there is a cause of action, the plaint must show that the plaintiff enjoyed a right; that the right has been violated; and that the defendant is liable. If the three elements are present, a cause of action is disclosed and any defect or omission can be put right by amendment. See **Tororo Cement Co Ltd V Frokina International Ltd Civil Appeal No. 2/2001**.

In determining whether or not a suit discloses a cause of action, court looks, ordinarily, only at the plaint and assumes that the facts alleged in it are true, without going into extrinsic evidence. See **Mukisa Biscuit Manufacturing Co V West End [1969] EA 696**. The principle, as I understand it, is that court will use its inherent powers to strike out a plaint (or written statement of defence) where the defect is apparent on the face of the record and where no amount of amendment will cure the defect. The procedure is intended to stop proceedings which should not have been brought to court in the first place and to protect the parties from the continuance of futile and useless proceedings.

Applying the foregoing legal provisions to the instant case, I find that paragraph 4(a) of the plaint pleads the **plaintiff enjoyed a right** when it states that the plaintiff and 1st defendant were married in church. Secondly, I find that the plaint pleads **the right has been violated** by the 1st and 2nd defendants in paragraphs 4(b), (c), (f) & (g) of the plaint where it states, in brief, that the 2nd defendant seduced the plaintiff's wife into an extra marital affair and continued the said relationship despite the plaintiff's protests and interventions. Thirdly, I find that the same foregoing paragraphs, in addition to paragraphs 8, 9, 10 & 11 of the plaint plead **the defendant is liable** in that they specifically state the 2nd defendant's acts or conduct alleged to have violated the plaintiff's rights. Thus, in my opinion, the plaint discloses a cause of action against the 2nd defendant.

The third question for determination is whether the plaintiff is barred from bringing an action against 2nd defendant since he received money from him and signed an agreement not to bring further actions against him on the matter. I have looked at a copy of the agreement annexed to the plaint as annexure **E**. The agreement was signed by the plaintiff and M/S Ndozireho & Co Advocates on behalf of the 2nd defendant. In the agreement, the plaintiff (referred to as a 1st party) irrevocably undertook to withdraw all allegations on the 2nd defendant (referred to as the 2nd

party) which had been a subject matter of the press/media in consideration of which the 2nd defendant paid various amounts of money as acknowledged by the plaintiff in the agreement.

It is apparent from the face of the agreement that a total of U.Shs.85,000,000/= (eighty five million) was acknowledged by the plaintiff as having been received, that it was paid in instalments of 35,000,000/= (thirty five million) and 50,000,000/= (fifty million) respectively. The agreement further states that the U.shs.5,000,000/=(five million) was payable to M/S Ndozireho & Co Advocates upon the execution of the agreement, and a further sum of Uganda Shillings 20,000,000/= (twenty million) was to be paid to the same counsel/firm by two equal instalments. In the same agreement the plaintiff acknowledged and agreed, among other things, that, in signing the agreement, “...no matter whatsoever shall be raised by the first party on the second party in future.”

The essence of the agreement, on the face of it, is that the plaintiff undertook not to raise the matter whatsoever against the 2nd defendant in future. It was submitted for the 2nd defendant that the said clause in the agreement barred the plaintiff from bringing this action against the 2nd defendant.

Section 22(1) of the Contracts Act 7/2010 provides that an agreement which restricts a party absolutely from enforcing his or her rights or in respect of a contract, by legal proceedings, or which limits the time within which a party may enforce his or her rights is void to that extent. Section 22(2) of the same Act sets out exceptions, which are that such agreements are not illegal if it is such that the dispute is to be referred to arbitration and that only the amount awarded in the arbitration shall be recoverable; or where such agreements refer to arbitration any question which has already arisen between them; or any reference to arbitration under the law.

In my opinion, having applied the foregoing provisions to the instant case, I find the aspect of the agreement prohibiting the plaintiff from raising the matter whatsoever against the 2nd defendant in future is void. I agree with the submissions of the plaintiff’s counsel that such contract is intended to oust the jurisdiction of court, and to that extent, it is void. If it was allowed, courts would be denied to adjudicate on contracts which deny a person the right to enforce their rights. In that regard, I do not, with respect, agree with the submissions made for the 2nd defendant that the plaintiff is barred from bringing this action against the 2nd defendant because he signed an agreement not to.

With respect, I also do not agree with the submissions made for 2nd defendant that this was compensation of the plaintiff for what the 2nd defendant is alleged to have done, There is no such statement in the agreement. The specific clauses in the agreement show that the plaintiff irrevocably undertook to withdraw all allegations to the 2nd defendant which had been a subject matter of the press/media in consideration of which the 2nd defendant paid the money to the plaintiff.

Finally there is the question of whether the plaintiff should have petitioned for divorce rather than suing for restitution of conjugal rights. It arises from the 2nd defendant's counsel's submissions in rejoinder that a prayer for restitution of conjugal rights is a prayer made in vain. Counsel doubted that this court can grant such prayer. This, in my opinion, should not be a point of objection. A plaintiff chooses the nature of case to be filed against which party, depending on the nature of injury he/she has suffered and what available legal remedy he/she wishes to pursue.

In the instant case the plaintiff opted to file a case (plaint) for restitution of conjugal rights rather than petitioning for divorce. The remedy of divorce and restitution of conjugal rights are both provided under the divorce laws, particularly section 20 of the Divorce Act. Courts award remedies after interpreting the relevant applicable laws and applying them to the facts and circumstances of each case. The fact that the plaintiff opted to seek the remedy of restitution of conjugal rights rather than divorce infers he desires the continuation of the marriage rather than ending it. As to whether he will eventually prove his case to the required standards to get the remedy is a different matter to be determined when the case is heard on the merits. It would only be speculative and pre-emptive at this stage to state whether or not this court will grant the remedy.

In the circumstances, for reasons given, I overrule all the aspects of the preliminary objection with costs.

Dated at Kampala this 1st day of July 2014.

Percy Night Tuhaise

Judge