THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

DIVORCE APPEAL NO. 01 OF 2019

(ARISING FROM DIVORCE CAUSE NO. 009 OF 2017)

1. WAKABI HORACE
2. NALUGGWA ROSE MARY ========== APPELLANTS

VERSUS

NAMALE EDITH ========== RESPONDENT

JUDGMENT

BACKGROUND OF THE APPEAL

The Respondent filed Divorce Cause No. 9/2017 in the lower Court against the Appellants in which she sought for dissolution of the marriage with the 1st Appellant, equal distribution of property, Custody of the children, maintenance, damages and costs of the Petition. The 1st Appellant filed a cross-petition and the mater proceeded for mediation. During mediation, the Parties consented to dissolution of marriage, custody of the children and maintenance leaving the issue relating to possession of the matrimonial home and commercial houses contentious. The parties then proceeded for hearing before the trial Magistrate to determine the same. The trial Magistrate determined this issue and held that the possession of the matrimonial home be granted to the Respondent and ordered the 1st Appellant to sign a transfer of the property in favor of the Respondent.

The Appellant being dissatisfied and aggrieved with the judgment and orders of His Worship Ssejjemba Deogratius, Chief Magistrate Masaka, delivered on 11th day of September 2019 now appeals against the whole judgment on the following grounds;-

1. The learned Magistrate erred in law and fact when he failed to properly evaluate the evidence thereby reaching a wrong conclusion.

He prayed that;-

a) the appeal be allowed
b) the judgment of the lower court be set aside

Parties filed written submissions.

Submitting in support of the Appeal, Counsel for the Appellant stated the duty of the first appellate court which is to re-evaluate the evidence and reach its own conclusion as stated in ***Fr. Narsensio Begumisa vs. Eric Kibebaga SCCA 17 of 2002.***

Counsel then proceeded to argue his single ground of appeal which is;-

The learned magistrate erred in law and fact when he failed to evaluate the evidence as a whole thereby reaching a wrong conclusion.

In arguing the ground of appeal Counsel raised two preliminary points of law the first being that the matter in the lower court in relation to the property in the decree, was res-judicata as the property had already been decreed to a one Lubega David in Civil Suit No. 129 of 2017. He argued that he informed the trial Magistrate that the property intended to be adjudicated upon was decreed to a one Lubega David and the trial Magistrate did not investigate into the allegation.

Based on the above he submitted that the trial Magistrate ought to have conducted an investigation and find out whether the matter was res judicata. He made reference to Section 7 of the Civil Procedure Act provides that;-

> "***No court should try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the***

issue has been subsequently raised and has been heard and finally decided by that court.

Counsel referred to the case of ***Lt. DAVID KABAREBE VS MAJOR PROSSY NALWEYISO CACA No. 34/03*** it was held that to give effect to the plea of res judicata the matter directly and substantially in issue must have been heard and finally disposed of in the former suit.

He also raised another point of law challenging the trial Magistrate's jurisdiction in ordering registration of the property into the names of the Respondent. He relied on Section 177 of the Registration of Titles Act which gives the High Court power to order for cancellation and registration of entries on the Certificate of Title and submitted that the trial magistrate had no such powers.

He then submitted that the trial magistrate failed to evaluate the evidence as a whole thereby reaching a wrong decision and prayed for the Appeal to be allowed with costs.

In response, Counsel for the Respondent reiterated the duty of the 1st Appellate Court which is to re-evaluate the evidence and arrive at its conclusion.

Counsel for the Respondent relied on the Respondent's evidence as submitted in the lower court to challenge the ground of appeal. He relied on evidence of the Respondent that the Respondent and Appellant built the contested property as their main house and lived in it for about 4years and that the property has never been sold. Counsel submitted that the learned trial Chief Magistrate properly appreciated the entire evidence and thereby arrived at fair and just conclusion in holding that the property in contest was matrimonial property and that it should be in the Respondent's possession. Counsel for the Respondent prayed to this Honorable Court to dismiss the appeal and make such orders as to vesting and transferring the matrimonial property into the names of the respondent and her children stated in the lower court judgment and a declaration that the sale of the suit property from the 1st Appellant to subsequently to one Lubega David was void ab initio.

From the foregoing, the only issue to be determined by this court is that of possession of matrimonial property.

This being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion. This duty is well explained in **Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000; [2004] KALR 236** thus;

It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.

I will now resolve the first preliminary point of law raised by Appellants' Counsel as follows: Res judicata means that once a matter has been determined by a competent court, a subsequent court does not have jurisdiction to try it afresh. Once a dispute has been finally adjudicated by a court of competent jurisdiction, the same dispute cannot be agitated again in another suit afresh (**see *In the Matter of Mwariki Farmers Company Limited v. Companies Act Section 339 and others [2007] 2 EA 185*).**

For the doctrine of res judicata to apply, it must be shown that; a) there was a former suit between the same parties or their privies, i.e. between the same parties, or between parties under whom they or any of them claim, or parties who claim through each other, litigating under the same title; b) a final decision on the merits was made in that suit, i.e. after full contest or after affording fair opportunity to the parties to prove their case; c) by a court of competent jurisdiction, i.e. a court competent to try the suit; and, d) the fresh suit concerns the same subject matter and parties or their privies, i.e. the same matter is in controversy as was directly and substantially in issue in a former suit **(see *Ganatra v. Ganatra [2007] 1 EA 76* and *Karia and another v. Attorney-General and others [2005] 1 EA* 83 at 93 - 94).**

In light of the above cited position, it is important to note that the matter before this court has different parties as were in civil Suit no. 129 of 2017 which Counsel is relying on to plead res judicata. However, the subject matter of that case is the same as the property contested in the instant Appeal.

I will therefore proceed to exercise the duty of this court as the 1st appellate court and re-appraise the evidence submitted in relation to this point of law.

As stated in ***Peters v Sunday Post Ltd [1958] E.A. 429,*** *If the conclusion arrived at by the trial court is only backed by assertions rather than by acceptable reasoning based on the proper evaluation of evidence and suffers from the infirmity of excluding, ignoring and overlooking material aspects of the evidence, which if considered in the proper perspective would have led to a conclusion contrary to the one taken by court, then the trial court would have failed in its duty to make a proper evaluation of the evidence. The appellate court will interfere with findings of fact if it is established that they were based on no evidence, or on a misapprehension of the evidence, or that the trial court demonstrably acted on the wrong principles in reaching those findings.*

The Respondent in her evidence testified that she got married to the Appellant on 29th December 2002 and they settled in Kijjabwemi for a period of one year. That was a Municipal Council house because her husband the 1st Appellant was an internal Auditor. They later moved to Kimanya B where they set up some boys' quarters. The boys' quarters are still in place. They worked together to build the main house. Part of the boys' quarters was rented out in that period and they lived uncomfortably. They proceeded to build a house in the same place. Construction started in 2010 and it took about three years to complete. The Petitioner/Respondents husband sold some of the land without her consent and donated another portion of it to the Seventh Day Adventist Church, Kimanya. She participated in the donation and does not contend it. The Petitioner/Respondent then lived in the matrimonial house from 2014 to 2017 when her husband pushed her out. To her knowledge, they never sold off the house at any point nor did they let it out. On being shown a decree dated 13th September, 2017, she denied being party to it and stated that at

the time it was extracted, she was not sleeping in the main house because her husband would come and assault her. To her knowledge, Lubega has never bought the house but was simply used to get her out of the house. She was evicted from her home on 29th September,2017 by the 1st Appellant and their step son. Upon eviction, she was taken to the Police Station and detained there for hours without an explanation until she was released to her lawyer that night. Her step son Murubya Kenneth moved into the house and in 2016, the title to the house was still registered in the 1st Appellant's name. A search conducted by the Respondent revealed that the property was never sold.

The Appellant called Lubega David as his witness and he testified that he bought the house in issue from a one Nandagire and has title to it. He also stated that Nandagire had not introduced him to tenants as the new landlord and that he did not bother to meet the tenants and never talked to the people in occupation during the purchase transaction.

He does not remember when he bought the house nor does he remember when he inspected the property. He could not tell the number of tenants in the house he bought. He admitted that the 1st Respondent was one of the tenants, but did not inquire whether the 1st Respondent was married with a wife in that house. He inspected the house by moving around it and never entered inside it during the purchase. He also did not remember the people he sued in court.

The 1st Appellant on the other hand testified that the Respondent/Petitioner is his wife and that he has never had a matrimonial home and is just planning to build one. When he married the Respondent, they lived in a government house and when he resigned from government, he moved to Kimanya B with the Respondent to one of his properties which he later sold to Nandagire Hellen.

He stated that there was no need for the Respondent to consent to the sell. He said the property was not a matrimonial home as they never bought the property together, and the Respondent had no agreement to prove that.

Counsel for the Appellant faulted the trial magistrate that he heard a matter that was already heard by court and the same was res judicata, he attached copies of the decree and return of warranties. He faulted the learned trial chief Magistrate for not investigating whether the suit was res judicata.

I have read the record and found that the said decree, warrant and all the documents pertaining to the previous matter were never tendered in evidence at the trial. DW1 Lubega when asked where the title and other court documents were, stated that he had left them at home. Counsel's conduct of attaching the said documents on the submissions and on Appeal amounts to giving evidence from the bar and this court cannot allow it. A party cannot fault a judicial officer on appeal over evidence he never presented during the trial in the lower court.

It is not the duty of court to look for evidence to prove what the parties are saying in court.

Section 101 of the evidence Act

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Section 102 of the evidence Act states that

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Additional evidence on appeal is taken in exceptional circumstances and usually where that evidence could not have been produced (even with due diligence) at the time of hearing the case in the lower court, or where the lower court has refused to consider or admit the evidence which ought to have been admitted especially if this evidence was brought to the attention of court.

Order 43 Rule 22 of the Civil Procedure Rules provides that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the High Court unless the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or the High Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the High Court may allow the evidence or document to be produced, or witness to be examined.

It was the duty of the Appellant to prove to court that the matter was res judicata and submit evidence to that effect. The Appellant in the lower court alleged that the land had been sold to a one Lubega who even testified to the same and only testified to the decree, as having arisen from an application for an eviction order. In the absence of such evidence in the lower court, I cannot fault the trial magistrate.

The exceptions to establish a balance between the need for litigation to end and meeting the ends of justice were re-stated by the Supreme Court in ***Makubuya Enock William T/a Polly Post v. Bulaim Muwanga Klbirige T/a kowloon Garment Industry, Civil Application No. 133 of 2014*** **and in** ***Hon. Bangirana Kawoya v. National Council for Higher Education Misc. Application. No. 8 of 2013*** where it was held that an appellate court may exercise its discretion to admit additional evidence only in exceptional circumstances, which include:

i. Discovery of new and important matters of evidence which, after the exercise of due diligence, were not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;

ii. It must be evidence relevant to the issues:

iii. It must be evidence which is credible in the sense that it is capable of belief;

iv. The evidence must be such that, if given, it would probably have an influence on the result of the case, although it need not be decisive;

v. The affidavit in support of an application to admit additional evidence should have attached to it, proof of evidence sought to be given;

vi. The application to admit additional evidence must be brought without undue delay.

I note that the Appellant did not apply to have the fresh evidence admitted to this court although he had not submitted the same in the lower court.

The evidence adduced by the Applicant to prove that the matter is res judicata is a decree of vacant possession. The matter proceeded before the lower court between 2017-2019 which was ample time for the Appellant to submit the evidence as to the decree. Therefore, I find that this evidence is not new to the Appellant and failure to adduce the same in the lower court was a laxity that should not submit this court to re-run a trial.

The parties agreed at mediation and left one issue to be resolved. The issue as to possession of matrimonial property. It was not raised at any time until the appeal that the property had been sold to a third party. Needless to mention, the Respondent submitted to the lower court that she never met the alleged buyer and the Appellant testified that he did not seek consent from the Respondent which in itself would make the sale illegal.

I find that, the matter before the lower court was not res judicata and the evidence adduced by the Appellant in that regard is not relevant to the issue to be determined on this appeal.

Considering the second point of law raised by the Appellant in support of the appeal as to the trial Magistrate's jurisdiction in ordering registration of the property into the names of the respondent, I do not see an order for cancellation of the certificate of title as, the submission and contention by counsel is not based on the evidence and judgment of the lower court which he seeks to appeal against.

Counsel for the Appellant relies on **Section 177 of the Registration of Titles Act** which gives High Court powers to order cancellation and substitution of entries following proceedings for recovery of land. The instant matter is not for recovery of land and neither was the interest in the property contested, the only issue to be determined by the trial

Magistrate was possession of the matrimonial home which he determined and ordered that the matrimonial home should be in the Respondent's possession to be held in the interests of the children.

The Respondent testified that she lived in the matrimonial home between 2014-2017 and that together with the Appellant, they built that home. A matrimonial home is the home of the couple. ***(see Basheija v Basheija and Another Divorce Cause No. 12/2005 (2013)***

It is important to note that the Respondent did not have to make any monetary contribution towards the property in order to benefit from it. Contribution may be pecuniary or non-pecuniary. The value of non-monetary contribution in providing primary gender needs as well as social gender needs may far outweigh the pecuniary contribution. In fact, the trial Magistrate found well when he stated that her interest in the property was evidenced by the fact that when it came to give the Seventh Day Adventist church part of the suit land and she signed as one of the donors.

I find that the suit land was family land as well as matrimonial property that was jointly owned by the Appellant and the Respondent and thus could not be sold without the consent of the Appellant as provided for in ***Section 39*** of the Land Act.

In that regard, the trial Magistrate was right to hold that the matrimonial home should be in the Respondent's possession for the interests of the children and further that the Respondent should be registered on the property as guardian of the children.

The trial Magistrate's order for registration of the Respondent on the certificate of title was not an order for cancellation of title or an entry resulting from a claim for recovery of land, but rather a determination as to possession of the property which was in contention, which right and interest (children's interest in the property) would be better protected by registration.

After scrutinizing the evidence on record, I fail to fault the trial Magistrate in any way. He rightly found that the alleged sales between the 1st Respondent/Appellant and Nandagire

then Nandagire and Lubega were a sham, illegal and a ploy to frustrate the Respondent/Petitioner and the children of their right to property which is her matrimonial home.

On the whole this appeal is dismissed with costs to the Respondent.

I so order.

Dated this 30th day at November, 2020

VICTORIA N. N. KATAMBA
JUDGE