

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA
(LAND DIVISION)
CIVIL SUIT NO.480 OF 2012**

RUTH LUNKUSE ----- PLAINTIFF

VERSUS

1.HENRY SSALI TAMALE

2.POST BANK UGANDA LIMITED ----- DEFENDANTS

BEFORE HON. LADY JUSTICE KANYANGE SUSAN
JUDGMENT

The plaintiff's claim against the defendants jointly is the;

- a. A declaration that the dealings of the defendants jointly and or severally in respect of land comprised in Kyaggwe Block 110 plot 1869 at Seeta without the consent of the plaintiff are illegal, null and void.
- b. An order to vacate the encumbrance noted as a mortgage on Kyaggwe Block 110 plot 1869 at Seeta
- c. A permanent injunction restraining the defendants or their agents, assignees or legal representatives from any further dealings on the suit land without the consent of the plaintiff
- d. Costs of the suit

Background

The plaintiff Ruth Lunkuse is customarily married to the 1st defendant Henry Ssali Tamale. That they acquired suit land comprised in Kyaggwe Block 110 plot 1869 at Seeta together but in completing the process of mutation and transfer the 1st defendant registered it in only his names. They built there six apartments and also lived there sometime. They derive their sustenance from there and it is a family land.

The 1st defendant dealt with the suit land and obtained a loan of Shs.90,000,000/= from the 2nd defendant Post Bank without her consent. That the 2nd defendant connived with the 1st defendant and failed to carryout due diligence as she was residing on the suit land and it was known to neighbours old Local Council Authorities. The 2nd defendant has fore closed and advertised the suit land for sale and threatens to evict the plaintiff and family.

The 1st defendant averred that though the suit property was jointly acquired, he was the registered proprietor and had authority to deal with the same. He failed to pay the loan because of business losses and the 2nd defendant refused to restructure his loan to enable him to pay.

The 2nd defendant Post Bank averred that it carried out due diligence and the 1st defendant mortgaged the suit property after getting spousal consent from his wife Nalunjogi Salima and thus it is a bonafide mortgagee of the suit property

Representation

Lin Advocates represented the plaintiff, **Stanley Omony** represented the 2nd defendant. The 1st defendant and plaintiff entered into a consent judgment in the matter.

Issues

1. Whether the suit land is a family property
2. Whether spousal consent was obtained prior to mortgaging the suit land if so, whether it was obtained from the right person
3. Whether the dealing of the defendants jointly and or severally in respect of the suit land are illegal, null and void
4. Whether the plaintiff is entitled to the remedies sought

Resolution

1. Whether the suit land is a family land

Family land under S.38 A (4) (S.39) of the Land Act is defined as land.

- a. On which is situate the ordinary residence of a family and from which the family derives sustenance
- b. On which is situate the ordinary residence of the family and from which the family derives sustenance
- c. On which the family freely and voluntarily agrees shall be treated to qualify under paragraph (a) or b or

d. Which is treated as a family land according to the norms, culture, customs, traditions or religion of the family.

See also case of **Tumwebaze versus Mpirirwe & Anor HCT 05-CV-CA 039 of 2010 (2013 UG HCL49**

counsel for the 2nd defendant raised a sub-issue – ***Whether the plaintiff is a legal spouse of the 1st defendant.***

Counsel for the 2nd defendant submitted that there is doubt to the admissibility of the consent letter written in vernacular and wonder how this was so if father knew how to read. Further to this that the said consent letter from PW1's father holds no probate value as far as proving a marriage as well as the actual celebration of the customary marriage. He referred to the cases of **Kampala District Land Board & Anor versus Venansio Babweyaka Civil Appeal No.2 of 2007** and **Baryamweeba James versus Kabakonjo Abwoli & 6 others CS No.20 of 2017.**

That the plaintiff is not a spouse to the 1st defendant.

In reply counsel for the plaintiff submitted that the father's letter was a first requirement and the 1st defendant with other people went to the plaintiff's parents which is the actual function and father was given a bicycle as 'Omutwalo' and it completed the marriage ceremony under the Kiganda customs. That thus the plaintiff and the 1st defendant were truly married.

PW1 – Ruth Lunkuse testified that the 1st defendant Tamale Ssali came for introduction at her parent's home Mubanda Kasawo Mukono District in 1995 on 11th December with 5 people. She tendered on a letter (PIA) from the father to her husband consenting to the marriage and letter from her aunt to the father

that Ssali wants to be introduced PIB. That the husband brought various gifts and also gave her father a bicycle as a 'Omutwato.' The plaintiff attempted to tender in a certificate of marriage registered on 02-05-2014 but it was ejected by court as it was got 19 years later and it was procured for the purpose of the case.

S.1 (b) of the customary marriage (Registration Act cap.248 Laws of Uganda) defines a Customary Marriage as follows "A marriage celebrated according to the rites of an African community and one of the parties to which is a member of that community on any marriage celebrated under part 111 of this Act".

In the case of **Steven Bujara versus Polly T. Bujara Civil Appeal 81 of 2002 (2001 – 2005) HCB Vol. 3** a customary marriage is complete if ;

- a. Customary practices of the community/tribe have been complied with or performed or if
- b. It does not offend the provisions of S.11 of cap.248 Laws of Uganda.

These are:-

- a. The female has not attained the age of 16 years (now 18 years).
- b. The male party has not attained the age of 18 years.
- c. One of the parties is of unsound mind.

- d. The parties are within the prohibited degrees of worship or the marriage is prohibited by the custom of one of the parties to the marriage.
- e. One of the parties have previously contracted a monogamous marriage which is still substituting.

Under S. 6(1) of the customary marriage registration Act, parties shall not later than six months, register details of their marriage and under S.7(1) a customary marriage certificate shall be issued. While under S.8 a customary marriage may be registered after the expiration of 6 months.

In the Kiganda custom, a letter is first got from an aunty written to the father stating the pending visit by the would be husband. This was done in the instant case (PEX1B) and plaintiff has proved that father wrote down consenting to the marriage in PEX1A. Plaintiff has also proved that bride price of a bicycle was paid and gifts exchanged.

I thereby find that plaintiff has proved there was a customarily marriage between her and the 1st defendant.

On whether the land is a family land

As I have discussed before, family land is defined as land on which a person ordinarily resides with his or her spouse and from which they derive their sustenance. See case of **Lamulate Ssanu Nakanwagi versus Haji Asumani Jjumba & 2 others – Masaka High Court Civil Suit No.18 of 2005.**

In instant case the plaintiff alleged that she was staying in one of the houses as her matrimonial home and derives sustenance from the other units by collecting rent, paying school fees and feeding, while the defendants witness Brendah Irene testified that she went to the property in issue and found there Salima Nalunjogi who was married to the 1st defendant, and there were rental units.

This evidence thus proves it was family land though there is a dispute as to which wife was residing there, the plaintiff Ruth Lunkuse or Salima ,and who gave the consent.

Issue 2 – Whether the spousal consent was obtained prior to the mortgaging of the suit land.

S.39 (1) of the Land Act provides that no sell exchange transfer pledge mortgage or lease any land

(i) 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.

S. 5 of the Mortgage Act also provides that notwithstanding S.39 of the Land Act, a mortgage of a matrimonial home is valid if, a document used to apply for the mortgage is signed by or assented to by the mortgager and his or her spouse or spouses of the mortgagor living in that matrimonial home.

The 2nd defendant contends he obtained spousal consent from Salima Nalunjogi while the plaintiff alleges she was the wife residing in that home and her spousal consent was not obtained.

The 1st defendant who introduced Salima Nalunjogi as his wife at the obtaining of the mortgage consent in this suit with plaintiff and stated that he did not obtain spousal consent.

Counsel for the 2nd defendant submitted that plaintiff did not provide evidence to show she contributed to the property and she failed to adduce evidence that she ordinarily resides there. She also did not furnish proof that she was deriving sustenance from there nor did she call any of the tenants to testify who collects rent.

That claims of contribution are an afterthought and there is collusion between her and the 1st defendant. He relied on case of **Olowo & 3 others versus Olowo & 2 others Civil Suit No.76 of 2012.**

While counsel for the plaintiff submitted that the purported consent by Salima does not indicate type of marriage alleged to have been contracted and the illegal witnessing by Bukenya Solomon was illegal, null and void since witness signed in absence of witness and it was got from a wrong person.

That the plaintiff has been in full physical and actual possession she relied on case of **Alice Okiror & Anor versus Global Capital Save & Anor Civil Suit No.149 of 2010.**

It was the duty of the mortgager in this case the 1st defendant to disclose truthfully his marital status and the correct spouse living in the home and it was also the duty of the mortgagee in this case the 2nd defendant to take reasonable steps to ascertain whether the 2nd defendant was married to the spouse who gave the spousal consent.

The plaintiff testified that she is the one residing in one of the units as her matrimonial home though sometimes the husband does not live with her.

That in 1996 they bought the suit land by an agreement from their Chairman the late Bukanja Solomon. That she sold part of her mother's kibanja and built rentals and they were living in one. That she signed on the agreement. That she collects rent from the houses and uses it for school fees.

Further to this that she came to hear of the mortgage when one of her tenants showed her a newspaper where the house was advertised for sale. She denied signing any of the mortgage documents and that she did not know Nalunjogi Salima to be a wife of her husband. She said Salima does not stay on those houses. She did not know whether the land had a title and also did not know if money borrowed from bank was used to construct the houses. She also did not know how many wives her husband has.

While DW1 Brenda Irene Nantaba a Credit Administration Officer in Post Bank Ltd testified that she interacted with the 1st defendant in respect of a different mortgage and they had spousal consent. That in all dealings Salima Nalunjogi consented as the spouse and she interfaced with her. That the Chairperson of the area Bukanja Solomon verified this. That they were living at one of the units on the suit property and there were photos of Salima in the house and mortgage shall be valid notwithstanding the prohibition of S.39(1) of the Land Act as amended if there was compliance with the provisions of section 5 of the Mortgage Act.

In the case of **Matty Ntare versus Equity Bank (U) Ltd Misc. Cause No. 16 of 2015 (2015) UG Comm. 200 (25th September 2015)**

Justice Madrama held that the duty to act in good faith cannot be over emphasized. It is the linchpin that assures that the transaction complies with the law and avoids breach of S.39 (1) of the land. It ensures that family land or matrimonial property can be mortgaged without controversy. It further protects a financial institution such as the 2nd defendant in this suit from fraud perpetuated by spouses.

In instant case, I find the 1st defendant presented Salima Nalunjogi as his spouse and spousal consent was obtained. The 2nd defendant contended they carried out due diligence and found she was the one living in the house as her photos were there and the LC.1 Chairman confirmed. This LC. Chairman is the one the plaintiff claimed to have bought from the land. The 2nd defendant thus complied with all the statutory provisions and did not commit an offence. If there was any offence committed it was by the first defendant.

The plaintiff Ruth Lunkuse was not registered on the title which is in the names of the 1st defendant and neither was there a caveat on the suit land to enable someone to know she existed as a spouse. The 2nd defendants witness found photos of Salima in the house and she is the one they interacted with in previous mortgages as the spouse.

The evidence I have on record is for plaintiff alone and one defence witness.

S103 of the Evidence Act provides that the burden of proof as to any particular facts lies on the person who wishes the court to

believe its existence unless it is provided that proof of that fact shall lie on a particular person.

S.101 of the Evidence Act also provides that whoever desires any court to give Judgment as to any legal right or liability depending on the existence of facts which he or she asserts, he or she must prove those facts exist.

The plaintiff in this case did not bring any other witness to buttress her case that indeed she living in that house. No neighbours nor relatives nor tenants were brought to court. Though court can depend on evidence of one witness, the evidence of the plaintiff in light of the 2nd defendants evidence leaves doubt in my mind as to whether she and not Salima was the one residing in that house. She admits her husband does not live there all the time, meaning he has other wives. The onus lay on her to prove her case on a balance of probability which she has failed and I'm more inclined to believe the 2nd defendant.

I thus find that spousal Consent was obtained from Salima Nalujongi prior to the mortgaging of the suit land.

3)Whether the dealings of the defendants jointly and severally in respect of the suit land are illegal, null and void.

I have found in issue 2 that spousal consent was obtained from Salima Nalujongi thus the dealings between the defendants' were lawful and not null and void. I have also looked at the Judgment in Civil Suit no 729 of 2016 between the defendants and it was for recovery of the debt as money had and received under the loan agreement. It was stated in that case, that this suit is ongoing. I thus do not agree with plaintiff's counsel that the mortgage itself was overtaken by events.

Therefore, I find that the dealings between the defendants were lawful.

In conclusion I find that the plaintiff has not proved her case. It is hereby dismissed with costs to the 2nd defendant.

DATED AT KAMPALA THIS ----31st-----**DAY** ----October-----**2023**

KANYANGE SUSAN
AG JUDGE LAND DIVISION.