THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: ***HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ.***
HON. JUSTICE A.TWINOMUJUNI, JA.
HON. JUSTICE C.N.B.KITUMBA, JA.

CIVIL APPEAL No.18 OF 2009.

1. ENGINEER EPHRAIM TURINAWE]
2. DEWARK LIMITED] :::::::::::::: APPELLANTS

VERSUS

1. MOLLY KYALIKUNDA TURINAWE]
2. FIONA TURINAWE]
3. BERNES ANKUNDA]:::::::::::: RESPONDENTS
4. ROBIN TURINAWE]
5. DAVIS TURINAWE]

[Appeal from the judgment of the High Court sitting at Kampala (Maitum, J), dated 19/9/2007 in HCT – CS.881 of 2004]

JUDGEMENT OF KITUMBA, JA.

This is an appeal from the judgment of the High Court, whereby the learned trial judge allowed the plaintiffs'/respondents' suit with costs against the respondents/appellants.

The following are the back ground facts to the appeal.

Engineer Ephraim Turinawe, the first appellant and Molly Turinawe, the first respondent started co-habiting in 1974.

During that time, they produced the following children.

1. Fiona Turinawe born - 1975.
2. David Turinawe born - 1977.
3. Robin Turinawe born - 1978.
4. Barnes Akinda Turinawe born - 1979 and
5. Orlando Murungi Turinawe born - 1990.

The five children were acknowledged by the first appellant as his children.

The couple stayed in Nairobi until they returned to Uganda. In 1989 the first appellant was employed by Kampala City Council (K.C.C.) as an assistant city engineer and surveyor. He lived with his family in the house at Plot 27 Nyonyi Gardens, Kololo belonging to his employer and paid rent to KCC for the same.

On 11/8/1999, Kampala City Council gave the first appellant the option to purchase the house in which he was staying.

A purchase agreement Exhibit P.3 was made between the 1st appellant and KCC on 10/11/1999. The first appellant did not have capacity to pay for the house. He assigned his offer to one Elizabeth Kabutiti for a consideration of Ug. Shs 70,000,000/=. The agreement for sale of the offer was made on 26/11/1999 and was admitted in evidence as exhibit P.5.The purchase price for the suit property was paid by two bank drafts from Barclays bank from the account of one Elizabeth Kabutiti by her sister Joyce Lynn Kabutiti, who testified as DW 2 at the trial. She was acting as agent of her sister Elizabeth Kabutiti. The first bank draft was No.205042 made on 9/11/1999 for Uganda shillings 9,750,000/=. The second bank draft No.205386 was made on 3/12/1999, for the sum of Uganda shillings 55,250,000. The payments totaled to shs 65,000,000/= which was the purchase price required by KCC.

The first appellant was paid by Kabutiti a sum of Uganda shillings 70,000,000/= as consideration.

The receipts for the purchase of the suit property were issued in the names of the first appellant by Nakivubo Channel Rehabilitation Project on behalf of KCC. On the 3rd January 2001, the suit property was registered in the names of the first appellant. On the 25th January 2001, the suit property was transferred into the names of Dewark Limited, the second appellant, a company that was owned by Elizabeth Kabutiti, her son and husband. By that time Elizabeth Kabutiti has passed away and her sister had obtained letters of administration of her estate.

The respondents filed HCCS No.881 of 2004, against both appellants. Their case was that when the suit property in which they were residing was offered to the first appellant for purchase and as he was head of the family it became the family residence. The first appellant's sale of the property Elizabeth Kabutiti and subsequent transfer to second appellant without the consent of the respondents was null and void. The respondents sought for the following declarations from the court.

1. That the sale of the suit property to the second appellant by the first appellant without their consent was null and void,

2. That the respondents were entitled to occupy the suit property,

3. That the first respondent is entitled to a share in the family property and that for easy management the residential house should be registered in the name of the first respondent.

They sought for general damages, costs of the suit and any other reliefs as the court would deem fit.

During the trial in the High Court the first respondent testified as PW1. The substance of her testimony was that she was married to the first appellant under Kikiga custom. The suit property was their family home. She had contributed Ug. Shs 10,000,000/= towards the purchase of the suit property. An affidavit exhibit P1 was admitted in evidence in proof of their marriage.
Odongo Bigwera, PW3, who is the brother of the first respondent, testified that the first appellant went to their home at Nyabushabi, Kabale and married his sister by paying the dowry to their father.

The 1st appellant testified as DW1. He denied marriage to the first respondent and payment by her of Ug. Shs 10,000,000/= as contribution to the purchase price of the suit property.

During the trial the following issues were framed for determination.

"1. Whether at the material time the 1st plaintiff and 1st defendant were spouses:

2. ***Whether the 1st plaintiff contributed shs 10,000,000/= ten million) towards the purchase of the suit property from Kampala City Council.***

3. ***Whether the 1st defendant acquired propriety rights in the suit premises and if so, whether the property was subject to the written consent of the plaintiff's before sale.***

4. ***Whether or not the sale and subsequent transfer of the suit property to the second defendant was void.***

5. ***Remedies, if any."***

The learned trial judge answered all the first four issues in the affirmative.

Regarding the 5th issue, he ordered that the suit property to be returned to the respondents as a family home. He made an order in the alternative that if the suit/property had been rendered inhabitable the first appellant should buy an alternative suitable accommodation and the first respondent should be a co-owner. Costs of the suit were awarded to the respondents.

The appellants were dissatisfied with the High Court judgement and orders and have filed their appeal to this Court on the following grounds.

1. ***The learned trial judge misdirected herself on the law and fact when she entertained a suit filed on 23/11/2004 by the 5th Plaintiff Denis Turinawe, an infant aged 14 years.***

2. ***The learned trial judge misdirected herself on the law and facts and as a result reached a wrong decision that there was customary marriage between the 1st plaintiff and the 1st defendant relying on.***
   (a) ***An affidavit that contravened the laws of Uganda.***
   (b) ***The evidence of PW3 Odongo Bigwera who did not turn up for cross examination.***

3. ***The learned trial judge erred in law and fact when she failed to properly evaluate the evidence and as a result reached wrong conclusions.***
   (a) ***That the property was family property, the sale of which required consent of the spouse, the 1st plaintiff/respondent.***

(b) ***The 1st plaintiff/respondent contributed Ug. Shs 10,000,000/= towards the purchase of the property.***

(c) ***That the sale agreement between the 1st defendant/appellant, Elizabeth Kabutiti of Plot 27 Nyonyi Gardens was null and void for lack of the consent of the spouse, the 1st plaintiff/respondent.***

(d) ***That the transfer of the suit property to the 2nd defendant/appellant was null and void, for lack of consent by the spouse, the 1st defendant/appellant.***

They prayed court to allow their appeal with costs in this Court and below.

The respondents filed the following grounds for affirmation of the decision.

1. ***That the learned trial judge should have found and should have held that at the time of the transactions complained of, that is in 1999 and 2000, prior consent of respondent's No. 2 – 5 who are children of the 1st appellant was also required.***

2. ***That the learned trial judge should have and should have held that the sale and transfer of plot 27, Nyonyi Gardens by the first appellant was null and void for lack of consent from the first respondent and from the 2nd – 5th respondents as well.***

They prayed for an order affirming the decision of the trial judge.
They prayed, further, for costs in the High Court and in this Court.

On 24th September 2009 when the case came up for hearing. Mr. Bamwite, learned counsel for the respondent, was absent and Mr. Luzige who was holding brief applied to court to file written submissions. Mr. Blaze Babigumira, learned counsel for the appellant, drew the court's attention to the fact that according to their joint scheduling memorandum, counsel for both parties had agreed to rely on their conferencing notes. The court ruled that judgment will be given on notice, since the parties had agreed to rely on their conferencing notes.

The conferencing notes for the appellants were filed in court on 8th July 2009 by M/s Bamwe & Co. Advocates whereas those of the respondents were filed in court by M/s Bamwite & Kakuba Advocates, on 16th July 2009. On 17th July 2009, counsel for the appellants filed conferencing notes in rejoinder to the respondent's conferencing notes. The above three lots of notes will be considered in this judgment.

In his conferencing notes, counsel for the appellants abandoned the first ground of appeal. He thereafter argued the rest of the grounds consecutively starting with ground 2. The respondents' counsel argued the grounds of appeal in the same order. In this judgment, I will handle the grounds of appeal in a similar manner.

The complaint by appellants' counsel on ground 2 is that the learned trial judge was wrong in law and in fact when he relied on the affidavit that contravened the laws of Uganda and the evidence of PW3 Odongo Bigwera, who did not turn up for cross examination, to hold that the first appellant was married to the first respondent according to Kikiga custom.

Learned counsel contended the affidavit which was sworn by the first appellant, Exhibit P1, at Nairobi on 10th January 1985 before a commissioner of oaths was not admissible in evidence because of the following reasons. Firstly, it was not authenticated by a Notary Public a Magistrate or Head of Government Department contrary to section 84 (c)of the Evidence Act. Secondly, it does not show the name and address of the drawer contrary to section 67 of the Advocates Act.

Counsel argued that in his evidence, the first appellant (DW1) explained that he swore the affidavit in order to secure his daughter a place in school while they were in Nairobi. DW1 clarified that the affidavit was not sworn as proof of marriage.

Submitting of the testimony of Odongo Bigwera, counsel argued that as the witness failed to return to court for cross examination, his evidence should have been expunged from the record. In support of this submission, he relied on **Pte Jowet Kalamowo and 3 others Vs Uganda, Criminal Appeal No.3 of 1984 C.A.** In that case, this Court found that the trial judge was wrong to take into consideration the evidence of a witness who disappeared when he was still giving evidence in chief. His evidence was incomplete and was not subjected to cross examination.

Appellant's counsel contended, therefore, that there was no proof of customary marriage. He urged this Court not to believe the first respondent's testimony that she was married to the first appellant according to Kikiga custom.

In reply, counsel for the respondents did not agree. He submitted that all the legal provisions quoted did not render the affidavit, exhibit P1, in admissible. He argued that PW.3 Odongo Bigwera was cross-examined by counsel for the first appellant. He argued that counsel for the second appellant exempted himself from cross-examining the witness. He urged court to believe the evidence of PW1 that she was married to the 1st appellant.

I have carefully perused the record, authorities quoted and the submissions by counsel.

I am of the considered view that the affidavit exhibit P1 should not have been admitted in evidence. Section 84 of the Evidence Act provides-

> ***"84. Presumption as to private documents executed outside Uganda.***
> ***The court shall presume that private documents purporting to be executed out of Uganda were so executed and were duly authenticated if –***
>
> ***(b)……***
>
> ***(c) in the case of such a document executed in any country of the Commonwealth in Africa, it purports to be authenticated by the signature and seal of office of any notary public, resident magistrate, permanent head of a government department, or resident commissioner or assistant commissioner in or of any such country; and, in addition, in the case of a document executed in Kenya, it purports to be authenticated under the hand of any magistrate or head of a government department."***

I agree with the submissions of appellants' counsel that Exhibit P1 does not fulfill the requirements of section 84 of the Evidence Act.

The affidavit also offends the provisions of section 67 of the Advocates Act. It does not bear the name and address of the person who prepared it.

According to the record of appeal, PW3 Odongo Bigwera was cross-examined by counsel for the first appellant and what was left was for him to bring photographs of the customary wedding ceremony.

The record of proceedings at P.109 shows what was said regarding cross-examination of PW3.

Counsel for 2nd appellant stated: -

"Mr. Kwesiga

When I looked at the evidence of PW.3 and 4 who testified in my absence, I found no need to cross examine them. They don't need to be recalled."

Counsel for the first appellant stated: -

"Mr.Tebyasa

We had not completed the cross-examination of PW3. This witness was to collect photographs of the traditional marriage"

Counsel for the respondent's informed court that the photographs were lost and therefore not available. He closed the plaintiff case.

Mr. Tebyasa who was counsel for the appellant told court, he was ready to open the defence case. Counsel proceeded to open the defence case by calling the first appellant to testify.

I am of the considered view that if the appellant's counsel wanted PW.3 for further cross-examination, he would have said so. It is obvious that when the photographs of the traditional marriage ceremony were not available, he had no further questions for PW3.

The instant appeal is distinguishable from the authority of **Pte. Jowet Kalamowo and 3 Others Vs Uganda** (supra) where the witness disappeared before completing his examination in chief.

The first respondent testified that the first appellant went to her father and paid the dowry, necessary for Kikiga customary marriage. Odongo Bigwera PW3 her brother corroborated her evidence. Both

witnesses testified that the first appellant paid shillings 700,000/= and 5 cows at her father's home at Nyabushabi, Kabale. That after paying the dowry the marriage was complete.

I am of the considered opinion that the first appellant was married to the first respondent according to Kikiga custom and was, therefore, his spouse.

Ground 2 of appeal succeeds in part.

I now consider ground 3.

On this ground counsel for the appellants argued that the learned judge, erred when she applied section 39 (1) of the Land (Amendment) Act 2004 which came into force on 18th March 2004 to an agreement that was entered into between the first appellant and Elizabeth Kabutiti, DW 2, on the 26th November, 1999, long before the said law came into force.

Counsel for the appellant argued that the suit property was not family property under section 39 of the Land (Amendment) Act 2004.

Appellant counsel submitted that the first appellant was an employee of KCC and was given an option to buy the house which he had been renting from his employer. The purchase price was paid by bank draft from the account of one Elizabeth Kabutiti.

Counsel argued further that since payment for the suit property had been paid by Elizabeth Kabutiti, she has acquired an equitable interest in the property. Registration of the property into the appellant's name was merely a condition which had to be fulfilled in order to give legal title to the buyer. Counsel contended further that the first respondent had not proved her claim that she contributed ten million shillings to the purchase of the property, in order to claim any interest in the suit property.

He criticized the learned trial judge for holding that the transfer of the suit property to the second appellant was null and void for lack of consent of the respondents. He further argued that the learned judge was wrong to hold that agreement between the first appellant and one Elizabeth Kabutiti was null and void because of clause 13 of the agreement between the first appellant and KCC which barred the transactions in the property by the first appellant with third parties.

He submitted that the respondents were strangers to the contract between the first appellant and KCC.

In support of these submissions, he relied on the following authorities: **Manzoor Vs Serwan Sing Baram Civil Appeal No.9 of 2001 S.C.**

Dr. Kaijuka Mutabaazi Emmanuel Vs Fang Min Civil Appeal No.23 of 2007. He prayed court to allow the appeal on this ground.

Counsel for the respondents supported the decision of the learned trial judge. He conceded that the law applicable to the instant appeal was not the Land (Amendment) Act 2004 because it was not in existence.

He submitted that the law applicable was section 40 (1) of the Land Act 1998, (i.e. section 39 (1) Cap 227 Laws of Uganda revised Ed. 2000) which too required written consent from a spouse and children of majority age before selling land on which one ordinarily resides.

Counsel contended that all available evidence show that the first appellant ordinarily resided on the suit property with the respondents. However, he never sought the required written consent before the transactions complained of were entered into. He contended that the first appellant paid the purchase price to KCC and all receipts were made in his names. He argued that neither Elizabeth Kabutiti nor the second appellant was introduced to KCC. He supported the learned judge for relying on the case of **Patel Vs Registrar of Titles [1949] 16 EACA 46,** where the transaction which required the consent of the administrator but was entered into without the prior consent was held to be void.

In her judgment, the learned trial judge found that the suit property was family property which was sold without prior written consent of the respondents. She based her decision on the Land (Amendment) Act 2004 which was not in existence at the time the agreement was made. I appreciate the argument by counsel for the respondent that S.40 (1) of the Land Act 1998 required prior written consent of the spouse and children of majority age before the sale of land where one is ordinarily residing could be sold.

Be that as it may, the issue before court is whether from the evidence on record, the suit property qualifies as family property/land where one ordinarily resides with his spouse and children of majority age.

The evidence on record shows that the first appellant was a tenant of KCC and paid rent. He was given the offer to buy the suit property because he was the sitting tenant. He could not pay for the property and searched around for a buyer, who would be able to pay him some difference. He found the buyer. The payment of the purchase price was paid by bank drafts from the account of Elizabeth

Kabutiti. She was the actual buyer of the suit property. The suit property did not become family property, simply because it was registered in his names. I appreciate the submission by appellants' counsel that when one Kabutiti paid the purchase price she acquired an equitable interest in the suit property. The first appellant had to transfer the property into his names before it could be transferred to the buyer. The learned trial judge's holding that section 59 of the Registration of Title Act that provides that a certificate of title is conclusive proof of proprietorship unless obtained by fraud is applicable to the instant appeal was, with due respect, incorrect. In my view it would be dishonest to allow the respondents and the first appellant to retain ownership of the suit property after the first appellant had already accepted and received a consideration of Ug. Shs. 70,000,000/= to sell his offer, simply because the suit land was registered in his names. Section 59 of the Registration of Titles Act was not intended by legislature to cover such situation like the one in the appeal before court.

The first respondent claims to have given to the first appellant ten million shillings to pay the initial deposit. However, there is no convincing evidence on record that she ever did so. Her assertion that she paid is denied by the first appellant. Besides, she did not produce any documentary evidence to back up her claim. In her evidence she stated that she obtained the money from the business she was doing with her brother. However, her son, PW.4 testified that she borrowed the money from her friend. This evidence is not convincing. However, even if she had made any contribution, this would not make her a co-owner of the property because the first appellant had made an agreement selling the property to Elizabeth Kabutiti. It was a contract that had to be specifically performed. He could not wriggle out of it.

The respondents are indeed strangers to the agreement between KCC and the first appellant. They are not supposed to plead that there was breach of that agreement by the first appellant. In any case a breach of a covenant of agreement between private parties is not an illegality that renders a contract null and void. It was held so by the Supreme Court in **Dr. Kaijuka Mutabazi Emmanuel Vs Fang Min** (supra)

With due respect, the learned judge was wrong to hold that the transfer of the suit property to the second respondent was null and void because of the breach of clause 13 of the agreement between the first appellant and KCC. It should have been KCC to complaint and not the respondents.

Joyce Lynn Kabutiti as administrator of the estate of her deceased sister Elizabeth Kabutiti had the power to transfer the suit property in the names of the second appellant.

Ground 3 succeeds.

This disposes of the whole appeal.

I will not consider ground 4 of the appeal and the reasons for affirming the decision,

I would allow the appeal with costs to the appellants in this Court and below.

Dates at Kampala this……20th ….day of…November…..2009.

C.N.B.Kitumba

JUSTICE OF APPEAL

JUDGMENT OF HON. L.E.M.MUKASA-KIKONYOGO, DCJ

I read in draft the judgment prepared by Hon. Justice Kitumba, JA and I agree with the reasons for the conclusion she recorded in her lead judgment.

As Justice Twinomujuni, JA also concurs, the appeal is allowed with costs to the appellants in this Court and below.

Dates at Kampala this……**20th** ….day of…**November**…..2009

L.E.M.MUKASA KIKONYOGO

DEPUTY CHIEF JUSTICE

JUDGMENT OF HON. JUSTICE TWINOMUJUNI, JA

I have had the benefit of reading the judgment, in draft, of Hon. Justice C.N.B.Kitumba, JA. I agree with the reasons and conclusions and I have nothing useful to add.

Dates at Kampala this……**20th** ….day of…**November**…..2009

HON JUSTICE A.TWINOMUJUNI
JUSTICE OF APPEAL