THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA
AT KAMPALA

CORAM:HON.JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ
HON. JUSTICE C.K. BYAMUGISHA, JA
HON. JUSTICE S.B.K. KAVUMA, JA

CIVIL APPEAL NO. 37 OF 2008

MAYI BINT SALIM & 10 OTHERS …… APPELLANTS

VERSUS

HAJJI SULAIMAN MAYANJA……RESPONDENT

(Arising from the judgment of the High Court sitting at Kampala, given by Lady Justice C.A. Okello, on 3rd July 2006 in Civil Suit No. 617 of 2000)

JUDGEMENT OF L.E.M. MUKASA-KIKONYOGO, DCJ

Mayi Bint Salim & 10 others, the appellants were found liable to the respondent by the High Court of Uganda at Kampala and ordered to pay costs. They appealed to the Court of Appeal of Uganda at Kampala against the decision of the trial court. At the close of the hearing on 21/09/2009, the appeal was adjourned for judgment on notice which we are doing now.

Background

Haji Sulaiman Mayanja, the respondent, in this appeal was allegedly married to the late Hajati Masitula Nabukenya Mayanja, hereinafter to be referred to as the deceased or the respondent's

late wife. At her death, the respondent as her spouse and next of kin applied for letters of administration in respect of the suit property which formed part of the deceased's estate.

This appeal arises from a land dispute comprising of two parcels of property namely block 15, plots 515 and 920 Kibuli, Mengo. According to the respondent he paid for the plots whilst his deceased wife paid for the mailo interest in both plots in 1986 from the then-mailo land owner Mulangira Kakungulu. At the time, the respondent was operating a petrol station on the premises and wanted title to the land. As the respondent noted, he "built the petrol station on the suit premises." He, funded the entire purchase price from his earnings but both plots were registered in the deceased's name. The respondent's name "didn't appear on certificate of title because the deceased was running the petrol station." Thereafter, the deceased erected four homes on Plot 15, and one home on Plot 920, all of which were rented out to tenants.

On the contrary, the appellants contended that the land was inhabited by the late Basisa Matovu, the deceased's father, who constructed residential homes thereon prior to his demise. Although the appellants conceded Masitula had two houses on the land, only one was hers, the second house was left in her custody to rent for their father's children, all for her brothers and sisters.

Another claim, over the disputed property yet made by the appellants was that one Kadija Nabukera and two other family members, following the offer by the landlord, Mulangira Kakungulu to sitting tenants to purchase the plots they were occupying. In a meeting subsequently attended by the family, Masitula was appointed a care-taker or trust of the suit property for Matovu's children. However, it was registered in her name to hold in trust for the family, but not donated to her. Before any measures were taken to protect the family interest in the suit property, Masitula fell sick and died. After Masitula's death, her husband, the respondent sold some of the houses. He also applied for Letters of Administration in respect of the estate of the deceased, in administration cause 116/1999. When served with notice, all the 11 appellants lodged a caveat while the respondent filled civil suit no. 617 of 2000 and applied for an order to vacate the caveat and obtained Letters of Administration. Judgment was entered for the respondent in the following terms: -

a) that the caveat be removed

b) that letters of administration be granted to respondent
c) that the appellants pay costs of the suit to the respondent.

Aggrieved by the decision of the court the appellants appealed to this Court on the six grounds stated in the memorandum of appeal below, and reading as follows: -

1. **THAT the learned trial judge erred in law and fact when she held that there was a valid subsisting marriage between the Respondent and the deceased, the late Masitula.**
2. **THAT the learned trial judge erred in law and fact when she held that the land registered in the late Masitula's names passed onto the Respondent after the demise of the late Masitula.**
3. **THAT the learned trial judge erred in law and fact when she relied on fanciful theories and held that the interest in the late Masitula's land passed on to her husband, the Respondent herein.**
4. **THAT the learned trial judge erred in law and fact when she held that the late Masitula was not appointed as trustee or caretaker of the suit land.**
5. **THAT the learned trial judge erred in law and fact when she placed heavy reliance on the evidence of PW1.**
6. **THAT the learned trial judge erred in law and fact when she failed to evaluate evidence thereby arriving at an erroneous and unjust decision.**

Court was prayed to allow the appeal, set aside the judgment of the High Court, and award costs to the appellants.

The appellants were represented by Mr. J.M. Mugisha, whilst Mr. P. Ayiguhugu appeared for the respondent, Counsel for the appellants grouped the six grounds of appeal into four issues to be decided by the Court. Counsel for the respondent apparently adopted the same approach.

On the evidence on record, it appears there are two main issues for this Court to determine. Firstly, whether the learned trial judge rightly entered judgment in favor of the respondent in respect of the deceased's estate on the ground that there was a valid subsisting marriage between them.

Secondly, whether the part of the suit property registered in Masitula's name properly passed to the respondent upon her death and that did not form part of the inheritance of the appellants.

Submissions

For the reasons stated below, it was submitted by counsel for the appellants that the burden of rebutting the presumption of marriage had been discharged. The "**rites and observance"** of proper Mohammedan marriage were not followed. **See Marriage and Divorce of Mohammedans Act, Section 2.**

Firstly, on brief recitation of the facts, counsel faulted the learned trial judge for finding that there was a valid subsisting marriage between the respondent and the deceased. He argued that the validity and other requirements including attendance of witnesses, issue of certificate, payment of mahare (bride price) and introduction ceremony were not complied with.

Secondly, relying on authority in the conferencing notes **Paul Vs Muhammed 1968 E.A.** pg. 111, the appellants conceded that there was cohabitation between the respondent and the deceased. However, merely cohabiting and producing offspring did not constitute marriage.

Thirdly, it was contented that the learned trial judge erred when she held that land registered in the name of the deceased passed to the respondent.

Fourthly, the issue was whether the deceased had been appointed trustee of the suit property. DW1, DW2, DW3, and DW4 testified that Masitula was appointed trustee of the property. The learned trial judge improperly evaluated such testimonial evidence that showed Masitula was holding the suit property in trust for the appellants.

Fifthly, counsel submitted that the learned trial judge failed to evaluate the evidence as a whole. The court was referred to the case of **Kifamunte v. Uganda SCCR A No. 10/1997,** for the premise that the Court of Appeal had a duty to reappraise the evidence, especially given the learned trial judge's failure to properly do so.

Sixthly, on the above stated six grounds, the appeal be allowed.

In reply, Mr. P. Ayiguhugu opposed the appeal because it had no merit. The learned trial judge properly evaluated the law and the evidence in coming to a correct decision.
The learned trial judge properly held that there was a valid marriage between the respondent and the deceased. Additionally, long cohabitation which was not rebutted raised the presumption of marriage. Several witnesses gave evidence to the occurrence of the marriage and payment of mahare to the respondent. As for the authorities cited it was submitted by counsel that they were inapplicable as they did not concern the Islamic marriage. Finally the Marriage and Divorce Act is not specific on the requirements of a valid Islamic marriage.

On the second and third issues, learned counsel for the respondent stated that the learned trial judge properly concluded that there was no evidence that the deceased was a trustee. The mailo interest in the real property in dispute did not belong to her father, Matovu, but to the deceased herself. Referring to page 10 of the High Court judgment, Mr. P. Ayiguhugu contended that the learned trial judge properly evaluated the evidence of DW1, DW2, DW3, and DW4, and still found that there was no evidence to show that Masitula was appointed trustee.

As to the fourth issue, counsel for the respondent submitted that the learned trial judge properly evaluated the evidence and came to a correct decision. Accordingly, learned counsel for the respondent prayed that the court dismiss the appeal.

In rebuttal, counsel for the appellants argued that they had discharged their burden of rebutting a presumption of marriage. The “rites and observances” of a proper Mohammedan marriage were not followed. See Marriage and Divorce of Mohammedans Act, Section 2.
Furthermore, the appellants contended that the history of the land at issue had to be considered. The learned trial judge wrongfully held that the respondent was a beneficiary in a non-existent marriage. Besides, there was evidence of the appointment of the deceased’s appointment as a trustee for her family.

Basing myself on the submissions of both Mr. J.M Mugisha, and Mr P. Ayiguhugu, the arguments advanced before the court as well as the relevant provisions of law and authorities I

now proceed to evaluate the evidence adduced before court with the view of determining the appeal.

Consideration by Court

As the first Appellate Court, I note that the duty of the court under **rule 30 of the Judicature (Court of Appeal Rules) Directions** is well settled. It is to evaluate all the evidence which was adduced before the trial court and to arrive at its own conclusions as to whether the findings of the trial court can be supported" **Fredrick J.K. Zaabwe vs Orient Bank Ltd and 5 Others (Civil Appeal No. 4 of 2006), [2007] UGSC 21; see also Pandya Vs. R. 1957 E.A. LR pg. 336.**

Mindful of the voluminous citations, cited by the learned counsel in support of the appellants' case I will now proceed to evaluate the evidence before Court. I propose to start by examining the relevance of the definition of marriage and the Act in this appeal.

The Marriage and Divorce of Mohammedans Act (1906) is pertinent to this dispute, particularly as to whether there was a valid marriage between the respondent and the late Masitula. It states that "[all marriages between persons professing the Mohammedan religion and all divorces from such marriages celebrated or given according to the rites and observances of the Mohammedan religion customary and usual among the tribe or sect in which the marriage or divorce takes place, shall be valid and registered as provided in this Act."

Clearly the respondent adduced convincing evidence to support the finding of the learned trial judge, that there was a valid marriage between the parties.

Firstly, he gave detailed testimony of the ceremony stating for example who married them, people who were present including relatives.

Secondly, his testimony was corroborated by that of PW2 who testified that the respondent and deceased at first they were friends (lovers), then they went through Moslem religious marriage ceremony. Other guests who were present included his brothers." **R.,p. 35. Mohammed Lubowa (PW3).**

Thirdly, the "Kiganda traditional ceremony to introduce the respondent to the family was held and mahare paid. In any case as testified by PW2, there would not be much excitement being a second introduction marriage.

On the documentation of the marriage, it would be appreciated that in those days marriage was a simple ceremony which could even be conducted in the house without taking photographs.

The argument, therefore, concerning the absence of a marriage certificate has no substance in view of the … Act, High Court Judgment, P. 7.

In further support of a valid marriage between the respondent and the deceased is their conduct. Despite the nature of their employment, which required them to live in various places in Uganda which included Kasese, Mbale and Jinja, they produced five children and purchased land.

Against the strong evidence adduced by the respondent is the contradictory and inadequate testimony by the appellants witnesses. For example DW1 testified "I am not aware that the two celebrated marriage under Islamic religion since I was not there." She further testified that "I was not around when the respondent and Masitula married." DW2 stated that the "marriage wasn't official, as there was no ceremony in a mosque," but also stated that the Respondent "married Masitula but I can't recall when." As detailed above, DW4 twice-referred to the respondent and the deceased as "married." Such scanty evidence against the occurrence of a valid marriage ceremony does not sway this court from finding that the respondent and the deceased validly married.

The aforesaid not withstanding, we must further examine the evidence in light of the numerous authorities citied by the appellants in arguing that even if such a marriage ceremony occurred between the respondent and the deceased, such a service did not create a valid marriage.

I accept the submission by counsel by appellant that "it is settled law that cohabitation alone in Uganda does not amount to a marriage.

On the requirement for registration of customary marriage, I agree like any other must be proved by evidence of certificate of registration. It is the law requiring customary marriages to be registered was not made in vain." **Stephen Bujara v. Polly Twegye Bujara (Civil Appeal No. 81 of 2002), [2004] UGCA.** However, the issue in this case as noted by learned trial judge was not whether the marriage was registered or not but whether there was evidence of marriage including a marriage certificate." **Stephen Bujara v. Polly Twegye Bujara (Civil Appeal No. 81 of 2002), [2004] UGCA.**

The fourth issue, the appellants contends that a valid Islamic marriage ceremony requires both "a witness and the person who gives or hands over the bride to the groom." The requirement to organize introduction was complied with as the deceased was given away in marriage by her half-brother Jumaine Salim. The deceased was properly given away. In addition to his late mother and two other relatives on the deceased's side, her late mother attended, as well a sister, a half-sister, and a half-brother. The appellants did not adduce any credible evidence suggesting there was anything near a lack of witnesses to validate the ceremony. As such, I find that the 1964 ceremony validly complied with witnessing requirements.

In the light of the evidence adduced, I am in agreement that the learned trial judge "I am therefore prepared to believe that the simplest ceremony suffices to bring into being an Islamic marriage. In this respect I believe the respondent's evidence that he and his late wife went through a marriage ceremony, I further believe his evidence, corroborated by the evidence of Mr. Joloba (PW2), that the ceremony was conducted in a Mosque at Kibuli by Sheikh Mnem and was witnessed by Joloba and others."

I further find, similarly to the learned trial judge, that the respondent oversaw the burial of the deceased in his capacity as her husband. She stated in her judgment at page 8 that – (**"I believe that the plaintiff took that decision in his capacity as a husband.").**

The court, moreover, notes the difficulty of determining with precision that a marriage occurring approximately forty-six years ago, in actuality, did not conform to the requirements of a valid

Mohammedan marriage. The respondent and the deceased lived together as husband and wife from 17/02/1964 until the deceased's death on 15/07/1999 – approximately thirty-five years. There is no evidence whatsoever that the respondent and the deceased did not think they were married. There is zero evidence that either of them had any uncertainty as to whether they were legally married. Furthermore, the memories of those witnesses and participants still living has grown dim. I am, therefore, reluctant to so many years later reach back and disturb the validity of the marriage without compelling evidence that such a ceremony either did not take place or did not comply with the minimum requirements of an Islamic marriage ceremony. I conclude, in conformity with the learned trial judge, that the marriage ceremony did occur and did meet the requirements of a valid Islamic ceremony.

Next, I examine the question of whether the learned trial judge properly concluded that the land at issue, registered in the deceased's name, properly passed to the respondent upon Mastula's death. The answer to this question is not hard to find, I have already narrated the controversy over the suit land and its acquisition. The respondent claims to have funded the entire purchase from his earnings, however, although registered in the deceased's name.

As an initial matter, I concur with the learned trial judge that the burden of proving that the deceased, Masitula, was not the legal owner of the mailo interest in the two plots falls on the appellants. **See High Court Judgment, p. 9** ("There is no dispute between the parties that the certificate of title to the two plots of land are in the name of the late Masitula, I therefore agree . . . that the burden of proving that Masitula was not the legal owner of the plots is borne by the defendants.").

Moreover, as DW1 testified, the late Matovu "migrated to [Buwama] when left Kibuli." Accordingly, he died in Buwama. It is understandable that consequently, the learned trial judge was skeptical that Matovu retained title to the land and his wives remained behind on the suit land subsequent to his departure to Buwama. See High Court Judgment p. 10 ("I am not convinced that Matovu owned the suit land when he left for Bundibugyo, nor do I believe that his wives remained behind in Kibuli residing on the suit land.").

Accordingly, I further concur with the learned trial judge's conclusion that there is "no evidence proving that the money used to purchase the mailo interest in the land was raised from the estate of the late Matovu." High Court Judgment, p. 9. DW1 testified that rent proceeds from the structures on the land were used for school fees ("Masitula had two houses on that land, one was hers, but 2nd one was in respect of which she was supposed to collect rent for school fees for children.").

I also give weight to the observations made by the learned trial court judge upon her visit to the land in dispute. She noted that "on my visit to the locus in quo, . . . apart from the houses the appellants conceded were built by [the deceased], the rest of the structures are dilapidated temporary ones." **High Court Judgment, p. 11.** In my opinion, the learned trial judge was in a better position to comment on the status of the structures, High Court Judgment, p. 11. In the premises, I reject the appellants' contention that the deceased was to hold the land in trust until all of Matovu's children reached the age of majority.

Conclusion

On the aforesaid reasons, from the submissions of both counsel for the appellants and the respondent, 1 find no merit in any of the grounds of the appeal. I would, therefore, dismiss the appeal and uphold the judgment and orders of the lower court. Since Steven Kavuma J. A. agrees, the appeal is dismissed with costs. The judgment and orders of the lower court are upheld.

Dated at Kampala this….***04th*** ……day of….***October***…, 2010

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L.E.M. Mukasa-Kikonyogo

DEPUTY CHIEF JUSTICE

JUDGMENT OF HON JUSTICE S.B..KAVUMA, JA

I have had the benefit of reading, in draft, the judgment prepared by the Hon. Lady Justice L.E.M.Mukasa-Kikonyogo, DCJ.

I agree with the reasoning for the decision and orders she makes I have nothing useful to add.

Dated at Kampala this ….***4th***….day of …***October***…2010

S.B.K.Kavuma
JUSTICE OF APPEAL