

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
MISCELLANEOUS CIVIL CAUSE No. 0059 OF 2016
(Arising from High Court Civil Appeal No. 0022 of 2013)

KANA RICHARD **APPLICANT**

VERSUS

EZATIRU AGNES **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

RULING

This is an application made under the provisions of section 98 of *The Civil Procedure Act* and Order 52 rules 1, 2, and 3 of *The Civil Procedure Rules*. The applicant seeks orders from the respondent to account for all money received in respect of rental property, the respondent remits half of that money to the applicant and that the tenants are stopped from paying rent to the respondent. In the affidavit supporting the application, the applicant deposes that he and the respondent contracted a monogamous marriage during the year 2000 but due to irreconcilable differences, obtained an order of divorce from the Chief Magistrates Court of Arua on 21st Day of March 2013. Before that divorce, they had acquired a plot of land at Onzivu village, Oluko Sub-county Arua District and constructed three permanent houses thereon which they let out to tenants. That court decided that the land did not constitute matrimonial property as a result of which the applicant appealed to the High Court which reversed that finding and made an order that the property be shared equally. The respondent has nevertheless not remitted any money to the applicant despite the fact that she collects Shs. 250,000/= per month, recently increased to Shs. 500,000/= per month, hence the prayer for the orders sought.

In her affidavit in reply, the respondent denies the claim that the three houses were constructed jointly with the applicant. She instead contends that the dispute between her and the applicant was in respect of the land and a residential house which the Chief Magistrates Court decided did not constitute matrimonial property. The appeal was restricted to that property and did not include the three rental houses. The decision of the High Court declared that the two parties held equal shares in the residential house but the applicant had extracted a decree which is inconsistent with that finding by including the three rental houses, which had never been the subject of any court proceedings, on which basis the applicant is now making the current application. The applicant by his conduct had forced the tenant of the residential house to leave during Mid 2014 and it has remained vacant since then as a result of which no income is being generated from the house that the court declared they own jointly.

At the hearing of the application, the two parties appeared in person, unrepresented and made submissions elucidating their respective grounds in support and opposition to the application as outlined above. I have had occasion to peruse the record of proceedings of court during the divorce proceedings and the subsequent appeal there-from. In his divorce petition dated 18th May 2012 and filed in court on the same day, it is apparent in paragraphs 5 and 8 that the grounds advanced by the applicant for seeking divorce was desertion and cruelty, on the allegation that the respondent had denied him conjugal rights for one year and eight months, and later declared she would not return to his home. One of the orders sought was “to divide the jointly owned property.” N here reply to the petition dated 19th September 2012 and filed in court on the same day, the respondent, the respondent alleged cruelty, physical and psychological abuse on the part of the applicant as the reasons that had forced her to desert the home and live in separation from the applicant. She blamed the separation on the applicant. In paragraph 10 of her affidavit in reply, she contended that “the grounds advanced by the petitioner seeking for an order of divorce are not sufficient grounds in law for the grant of the said order.” She denied having acquired any property jointly with the applicant during the subsistence of their marriage nor having taken any of his personal effects when leaving the home.

The Chief Magistrate did not hear or record any evidence from the parties but nevertheless went ahead to grant a Decree Nisi. The relevant part of the record of proceedings on 20th September 2012, reads as follows;-

Both parties before Court.

Both parties represent themselves.

Petitioner: - I would like to (sic) this petition.

Respondent: - As per my affidavit in reply, I do not intend to live as husband and wife with the petitioner.

Court: - Upon perusal of the documents in this case, I find sentiments are high and there is no opposition to the dissolution of the marriage. Court hereby issues a Decree Nisi and in six months if the parties do not reconcile, a Decree Absolute dissolving this marriage shall be issued. Hearing adjourned to 20/3/2013.

On appeal to the High Court, the then Resident Judge in his judgment commented on the propriety of those proceedings as follows; -

I find that the procedure adopted by the trial magistrate in handling this matter was irregular and erroneous for the following reasons: - all the facts before court ought to be proved by way of evidence adduced before court. Apart from the respective affidavits filed by each party, the court did not treat the information court was receiving from each party as evidence at all that is why the court did not take address by such address by the parties before the trial court as evidence otherwise such information from the parties herein should have been received by the court after each party was sworn / or affirmed before the court as a witness to satisfy the requirement of the Evidence Act (Cap 6). Even during the subsequent proceedings and hearing regarding the ownership of the residential house at Onzivu village, Oluko Sub-county, in Arua District, the trial magistrate did not take the parties' evidence in accordance with the requirement of section (sic) of the Evidence Act which requires that all evidence before court must be taken on oath and affirmation as the case may be.

Furthermore, a petitioner in a divorce cause has to prove to the satisfaction of the law the specified ground of divorce before the petition can be granted. Whether there is no opposition to the petition or not, the burden is still on the petitioner to prove the grounds that entitle him to the grant of the orders petitioned under the Divorce Act. Instead the trial Chief Magistrate in effect treated the petition as a separation agreement and not a divorce petition.

Despite the observation that before the Chief Magistrate, the grounds of divorce had not been proved and that the parties had not submitted evidence in accordance with the procedural requirements regarding the disputed residential house, on appeal his Lordship went ahead and decided in favour of the applicant and declared that the parties had equal shares in that disputed property. Sanctity of finality is, no doubt, attached to a judgment passed by this Court in exercise of its civil appellate jurisdiction but I find myself unable to agree with, follow and sustain this finding. To me it is an error apparent on the face of the record which this court has inherent powers under section 98 of *The Civil Procedure Act*, to correct. Under that provision, the court has inherent power “to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.” Inherent jurisdiction has been defined as “a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them.” (See *Halsbury's Laws of England, Fourth Edition, page 374*). The High Court under its inherent power can review or recall its judgment or order if found to have been passed without jurisdiction, without adjudication on merits, in violation of any law or obtained by playing fraud on the Court. It is only in the interest of justice that I resort to this power to redress grievances of the parties before me for which no other procedure is available. By virtue of that provision, this court possesses all such powers, which would be necessary to do right and undo a wrong in the course of administration of justice. This is the power I have chosen to invoke in order to correct the error and in order to address the grievances of the parties before me.

It is a rule of practice that has the force of law that evidence in civil trials is taken upon oath or affirmation of the nature provided for in *The Oaths Act*. The effect of evidence not given on oath

is that it amounts to no more than a mere statement of no probative value to the case (see the High Court of Kenya decision of *Consolata Hospital Mathari v. Dr. Bianka Matens Nyeri HCCA No. 17 of 2004* and *Musikari Kombo v Royal Media Services Ltd [2014] eKLR*). Since during the divorce proceedings and the subsequent hearing leading to the determination by the learned Chief Magistrate of the status of the disputed residential house as not constituting matrimonial property, none of the parties gave evidence on oath and none was afforded the opportunity to test the veracity of that evidence by cross-examination, their statements to court could have had no probative value and could not be the basis of any finding of fact let alone a valid decision of court. The proceedings were fundamentally flawed as to constitute no trial at all. The proceedings could not be used as a valid basis for the determination of the rights and status of the parties. They did not have a fair trial before the court of first instance.

Therefore, when the applicant appealed the decision, the appeal had not been preceded by a valid trial at first instance since the decisions of the court below were not founded on evidence. The learned Judge of the High Court in entertaining the appeal, even in the face of that glaring anomaly, with due respect, misdirected himself. Since the matter has now been brought to the attention of court, such an error cannot be allowed to continue but has to be corrected for purposes of ensuring the observance of due process of law, and in order to do justice between the parties and to secure a fair trial between them. I must take effective steps to safeguard the parties' legal rights, and especially the right to a fair trial, and for the protection of the integrity of system of justice as regards divorce proceedings.

During the submissions before me, the applicant contended that the Chief Magistrate's Court and this Court on appeal had misconstrued the scope of his claim over matrimonial property in excluding the three rental units. On her part the respondent contended that the land on which these units are built together with the residential house declared to be matrimonial property, was procured by proceeds of gratuity paid in respect of the death of her father, a former soldier in the armed forces. She contended that the rest of her siblings had interest in the property and therefore it cannot constitute matrimonial property.

There is no basis upon which this issue may be decided one way or the other by this court in exercise of its appellate jurisdiction since no evidence was properly taken by the court of first instance. I find myself unable to receive evidence on this point under the provisions of section 80 (1) (d) of *The Civil Procedure Act*, which empowers this court in exercise of its appellate jurisdiction to take additional evidence or to require such evidence to be taken, because the very foundation of the divorce; the Decree Absolute, was issued without a proper trial and proof of the grounds of divorce.

In the circumstances, having found that the entire proceedings were fundamentally flawed as to constitute a mockery of a trial in divorce proceedings, I hereby set aside the Decree Absolute, the Decree Nisi and the order declaring the parties hereto as having equal shares in the residential house at land at Onzivu village, Oluko Sub-county Arua District. I order instead that the file be remitted back to the Chief Magistrate's Court with directions that the entire petition be heard de-novo. There is no order as to costs.

Dated at Arua this 10th day of November 2016.

.....
Stephen Mubiru,
Judge