

UGANDA / JUDGMENT

Bwebale v Bwebale and 2 Others

(Civil Suit No. 855 of 2016) [2022]

UGHCLD 193 (30 September 2022)

[2022] UGHCLD 193

COURT

HC: Land Division (Uganda)

BEFORE

Keitirima, J

CASE / FILE NUMBER

Civil Suit No. 855 of 2016

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

CIVIL SUIT NO. 855 OF 2016

AGNES BWEBALE::::

VERSUS

- 1. BWEBALE BONNIE
- 2. JAMES YIGA

3. VIVO ENERGY UGANDA LTD t/a SHELL (U)

LTD::::

JUDGMENT

The Plaintiff's case against the defendant jointly and severally is for a declaration that the lease / sublease between the \$1^{st}\$, \$2^{nd}\$ and \$3^{rd}\$ defendants on land comprised in Kyadondo Block 207 Plots 1921 and 1039 Land at Kanyanya is illegal, null and void for lack of the Plaintiff's consent, an order releasing the land title for Kyadondo Block 207 Plots 1921 and 1039 Land at Kanyanya from any encumbrances by the \$2^{nd}\$ and \$3^{rd}\$ defendants, an order for payment of general damages for inconvenience, interest and costs of the suit.

The Plaintiff's cause of action as stated in his Plaint is as follows;

- The Plaintiff was customarily married to the 1st defendant in 1979. \$i)\$
- The Plaintiff and the 1st defendant were dully wedded on the 21st day of ii) August 1999. A copy of the marriage certificate was attached to the Plaint and marked as Annexure "A".
- iii) That during the subsistence of the marriage, the Plaintiff and the 1st defendant acquired land comprised in Kyadondo Block 207 Plots 1921

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and 1039 land at Kanyanya. A copy of the land title was attached to the Plaint and marked as annexure "B".

- iv) That the Plaintiff and the 1st defendant agreed that the suit property was family land and would be used for the benefit of the entire family and with her consent and involvement.
- v) That the Plaintiff was running and managing the suit property as a car washing bay and paying all the utilities in her name and using the money to maintain the entire family. A copy of all utility bill was tendered in Court and marked as Annexure "C".
- vi) That the Plaintiff was shocked to learn that the 1st defendant and 2nd defendant executed a lease agreement for thirty years in respect of the suit property naming her and Carolyn Ilwobale as agents of the 1st defendant without her knowledge /Consent on signature on the lease agreement. A copy of the lease agreement was attached to the Plaint and marked as annexure "D".
- vii) That the Plaintiff was shocked to see the suit property being occupied and utilized by the 3rd defendant as a Petrol Station with the name Shell without her knowledge and consent and to the detriment of the entire family of the Plaintiff.
- viii) The Plaintiff contends that she was not a party or aware of any lease or sublease transaction between any of the defendants and that the said transaction was null and void since she has a legal and equitable interest in the suit property.
- ix) The Plaintiff contends that the 1st defendant was at all material times aware that this is the property from which rent for maintenance of the family was derived and this was the only source of income.
- x) The Plaintiff further contends that she has suffered grave inconvenience, ridicule, loss of business and embarrassment as a result of the defendants' illegal alienation of her interest in the suit property.

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for such a long period of time for which she seeks general damages and compensation.

The Plaintiff is seeking for the following remedies;

- A declaration that the lease /sublease between the \$1^{st}\$, \$2^{nd}\$ and \$3^{rd}\$ \$ \$i)\$ defendant on the suit land is illegal, null and void for lack of the Plaintiff's consent.
- An order releasing the land title for the suit land and from any ii) encumbrances by the \$2^{nd}\$ and \$3^{rd}\$ defendants.
- An order for payment of general damages for inconvenience. iii)
- Interest on awards in (iii) above. \$iv)\$
- Costs of the Suit. \$v)\$
- Any other relief that this Court deems fit. \$v_i\$)

The \$1^{st}\$ defendant never filed a defence.

In his written Statement of defence James Yiga herein after referred to as "the second defendant" Stated inter alia;

- That the properties comprised in Kyadondo Block 207 Plots 1921 and i) 1039 at Kanyanya were registered in the names of the 1st defendant who was entitled to do whatever he pleased with the same not being family land in so far as;
- a) The suit property is not the ordinary residence of the Plaintiff.
- b) The suit property is not both an ordinary residence and from which they derive sustenance.
- That the \$2^{nd}\$ defendant immediately upon entering in to a lease ii) agreement with the 1st defendant constructed a Petrol Station where the Plaintiff and the 1st defendant regularly fuelled their car and shopped from the supermarket being neighbours to the said station.

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- The 2nd defendant stated that the lease agreement between the 1st and iii) \$2^{nd}\$ defendant was entered on 1st February, 2005.
- That it was a condition that the 2nd defendant could assign, sublet and \$iv)\$ or transfer without prior written consent of the lessor and the lessee was to use the property as a Petrol Station or in any way he wished.

- That sometime in 2015, the \$2^{\text{nd}}\$ defendant sublet the station to M/S Vivo \$v\$) energy (v) limited and when the \$1^{\text{st}}\$ defendant who routinely fuelled at the Station noticed the dealership had changed to Shell, he rang the 2nd defendant and asked him why he had transferred the lease to Shell without his consent and the clause permitting assignment, Subletting was brought to his attention.
- That after the said conversation the Plaintiff who resides with the 1st defendant about 600 meters from the suit property wrote to the 2nd defendant demanding that he vacates the land within 14 days.
- \$vii\$) That the Plaintiff was at all material times aware of the lease to the 2nd defendant and was always fuelling and shopping from the said station for the 10 years the 2nd defendant operated a service station under the name and style of Kanyanya Service Station.
- That the Plaintiff's action was actuated by malice, envy, jealousy and is viii) in connivance with the \$1^{\text{st}}\$ defendant.
- That the lease is not a gratuitous one but rather one where the \$2^{\text{nd}}\$ \$ix\$) defendant pays annual rent of four million two hundred thousand shillings (4, 200,000/=) which is still income to the \$1^{\text{st}}\$ defendant and if he also wishes to his family just as the washing bay was generating income.
- That the Plaintiff has no legal or equitable interest in the suit property \$\mathbf{x}\$) and the lease agreement is valid and enforceable against the 1st defendant.

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- The \$2^{\text{nd}}\$ defendant contended that he pays rent to the 1st defendant and \$xi\$) the Plaintiff therefore tacitly admitting that the said rent paid is for his use by the family considering that a washing bay was being operated on the suit land which did not fetch rent.
- The 2nd defendant denies that the Plaintiff has suffered inconvenience \$xii\$) ridicule, loss of business or embarrassment as the transactions between the defendants were lawful and the Plaintiff has no cause of action whatsoever.
- The \$2^{\text{nd}}\$ defendant prays that the suit be dismissed with costs. xiii)

In their written statement of defence the 3rd defendant states inter alia;

- i) That it is a bonafide sublease for value without notice of any third party claim.
- That the suit land is not family land as alleged. ii)
- That the suit should be dismissed with costs. iii)

In their joint scheduling memorandum, the following were agreed as facts:

- 1. The second defendant leased the two Plots of land from the first defendant for a period of thirty years commencing 1st February 2005.
- 2. The 2nd defendant subleased the Plots to the 3rd defendant.
- 3. That the said Plots are now being occupied and utilized as a Petrol Station by the third defendant.

The issues that were raised for determination are:

1. Whether the land comprised in Kyadondo Block 207 Plots 1921 and 1039 land at Kanyanya was family land requiring the consent of the Plaintiff before the 1st defendant leased it to the 2nd defendant.
- 2. Whether the Plaintiff's consent before subletting the property to the 3rd defendant was required.
- 3. The remedies available to the parties.

The parties proceeded by way of witness statements from which they were cross examined. The detail of their evidence is on record.

Counsel for the Parties then filed written submissions the details of which are on record and which I have considered in determining this matter.

I will resolve issue one and two concurrently.

Issue one: Whether the land comprise in Kyadondo Block 207 Plots 1921 and 1039 land at Kanyanya was family land requiring consent of the Plaintiff before the 1st defendant leased it to the 2nd defendant.

Issue 2: Whether the Plaintiffs consent before subletting the property to the 3rd defendant was required.

Section 39 of the Land Act (as amended) provides that "a sell exchange, transfer, Pledge, Mortgage or lease of family land entered in to without the prior consent of a spouse is void."

Section 38 A of the said Act defines Family land as one;

- a) On which is situated the ordinary residence of a family.
- b) On which is situated the ordinary residence of the family and from which the family derives sustenance.
- c) On which the family freely and voluntarily agrees shall be to qualify under Paragraphs (a) or (b) or;
- d) Which is treated as family land according to the norms, culture, customs, traditions or religion of the family.

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In her evidence, the Plaintiff stated that she had agreed with the 1st defendant that the suit land was family land which would be used for the benefit of the entire family.

It is my considered view that for land to qualify as family land it must strictly fall within the definition of Section 38 A of the Land Act (as amended).

It must fulfil two conditions;

- One which the ordinary residence of a family is situate and \$i)\$
- \$ii)\$ On which the family derives sustenance.

The party seeking to rely on subsection 38 (4) (b) of the Land Act (as Amended) must satisfy both requirements.

The evidence adduced on record does not show that the plaintiff and the 1st defendant's ordinary residence is situate on the suit land.

The security of occupancy given to the spouse in respect of family land under Section 38 A \$(2)\$ of the Land Act is in having access to and being able to live on the land.

There was therefore no requirement for the Plaintiff to consent to the subletting of the suit land by the 2nd defendant to the third defendant since the Suit land did not fall within the ambit of Section 38 A of the Land Act (as amended).

The above notwithstanding the Plaintiff testified that the 1st defendant had misled her by telling her that he was entering into a business venture with the 2nd defendant where both parties would benefit from the venture. This implies that the Plaintiff "consented" to the initial joint venture that had been entered into by the \$1^{st}\$ defendant and \$2^{nd}\$ defendant.

In the lease agreement that was entered into by the \$1^{st}\$ and \$2^{nd}\$ defendant it was agreed in Clause 2 (i) of the lease agreement that the lessee (\$2^{nd}\$ defendant) could

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sublet, assign and or transfer the suit premises without written consent of the lessor (\$1^{st}\$ defendant).

Therefore, the second transaction between the 2nd and 3rd defendant did not require any consent either from the Plaintiff nor the 1st defendant.

In my view the resolution of the above disposes off the entire case.

I find no merit in the Plaintiff's case which I will dismiss with costs to the \$2^{nd}\$ and \$3^{rd}\$ defendants.

Hon. Justice John Eudes Keitirima

30/09/2022

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