

UGANDA / JUDGMENT

Katuramu v Katuramu (Hct – 01 – Cv – Ma No. 026 of 2017) [2018]

UGHCLD 55 (10 September 2018)

[2018] UGHCLD 55

COURT

HC: Land Division (Uganda)

BEFORE

Masalu Musene, J

CASE / FILE NUMBER

Hct – 01 – Cv – Ma No. 026 of 2017

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – CV – MA NO. 026 OF 2017

(Arising from HCT – 01 – CV – CS – NO. 0019 of 2014)

KATURAMU ROBERT..... APPLICANT

VERSUS

ELIZABETH KATURAMU..... RESPONDENT

BEFORE: HIS LORDSHIP HON. MR. WILSON MASALU MUSENE

Ruling

This is an application by Notice of Motion under **Section 33** of the Judicature Act, **Sections 82 and 98** of the Civil Procedure Act, **Order 46 Rules 1, 2 & 8** and **Order 52 Rules 1 & 2** of the Civil Procedure Rules seeking for orders that; the consent judgment in HCT – 01 – CV – CS No. 0019 of 2014, Elizabeth Katuramu versus Katuramu Robert & Another, given on the 27th day of August 2015 be reviewed and set aside or varied or vacated and costs of the application.

The Application is supported by the affidavit sworn by Katuramu Robert and the grounds there under are briefly as follows;

1. That the Applicant and the Respondent were lawfully wedded at Butiti Church of Uganda in October 1990 which marriage was blessed with two issues who are now adults.

2. That the Applicant before his marriage had already acquired land at Rwenkuba Zone which land was not utilized until 2010 and also acquired some other land at Katumba Zone part of which was developed with a matrimonial house, tea gardens, plantation and farm.
3. That the parties developed irreconcilable differences as a result of which they separated in 2010.
4. That the Respondent sued the Applicant in the Chief Magistrates Court of Fort Portal at Kyenjojo under FPT – 21 – CV – CS – LD No. 28 of 2012 for a declaration that the land at Rwenkuba Village is family land and an order was duly issued to that effect.
5. That the Respondent again sued the Applicant in the High Court of Fort Portal under HCT – 01 – CV – CS No. 0010 of 2011 and again under HCT – 01 – CV – CS No. 0019 of 2014 also claiming the land at Katumba Zone as family land and a consent judgment was accordingly entered in the latter matter on August 27, 2015.
6. That the Applicant together with one Agaba John entered into a consent judgment with the Respondent in which the suit land as described in clause 2 thereof was declared to be family land.
7. That the Respondent never contributed to the purchase of any portion of the land at Rwenkuba Zone or at Katumba Zone but is now claiming both pieces of land as family land as a result of the misapprehension of facts by the various Courts.
8. That the said consent judgment was signed under a mistake of the fact without providing sufficient material facts to the Court and in ignorance of the fact that the Chief Magistrates Court of Fort Portal at Kyenjojo under FPT – 21 – CV – CS – LD No. 28 of 2012 had already decreed other land at Rwenkuba L. C.1 as family land.
9. That the consent judgment had the effect of indirectly varying, altering, changing and setting aside the Kyenjojo Magistrates Court's order which therefore rendered it an illegality and was contrary to the policy of Court.
10. That the Applicant is aggrieved by both decisions which caused a substantial miscarriage of justice on his part in as far as they interfered with his constitutional right to property and as to what constituted family land.
11. That the consent order was executed without giving sufficient material facts and misrepresenting the facts therein and its effect upon the Applicant yet there was already an order from the lower Court defining and giving to the Respondent family land at Rwenkuba.
12. That the Respondent's continuous acts aimed at depriving the Applicant of his hard earned property using the Court process is an abuse of Court process.
13. That there is now an apparent confusion because the intention of this Court and the lower Court is not clear with respect to what constituted family land where both the Applicant and Respondent are concerned.

14. That the Applicant is aggrieved by the said consent order which caused a substantial miscarriage of justice on his part in as far as it deprives him of his property whereas family property had been earlier given to the Respondent by the Grade 1 Magistrate at Kyenjojo.
15. That it is therefore necessary, just, fair and equitable and in the interest of justice that the consent judgment in HCT – 01 – CV – CS No. 0019 of 2014 be reviewed and set aside or varied or vacated.

The Application was opposed by the affidavit in reply sworn by the Respondent and the Applicant made a rejoinder there to.

Brief facts:

The Applicant and Respondent were legally married in 1990 and had two children who are now adults. The Applicant before his marriage had already acquired land at Rwenkuba Zone in Kasina Ward, Kyenjojo Town Council which remained vacant until 2010. He also acquired some other land at Katumba Zone part of which was developed with a matrimonial house, tea gardens, plantation, and farm. The parties developed irreconcilable differences and separated in 2010.

The Respondent sued the Applicant, Rwabataizibwa and Bakaya Emmanuel in the Chief Magistrates Court of Fort Portal at Kyenjojo for declaration that the land at Rwenjuba Zone was family land and an order was duly issued to that effect. The Applicant sold a portion of the land at Katumba Zone to one Agaba Balla and leased a tea shamba on another part to one Mugisa Julius where upon the Respondent again sued the Applicant and the said Agaba and Mugisa in the High Court claiming that the land at Katumba Zone was family land and a consent judgment was subsequently entered and the land was declared family land. That the Respondent did not contribute to the purchase of any portion of the land at Rwenkuba Zone or Katumba Zone but claimed both pieces of land as family land. The Applicant being aggrieved by the said consent order which caused him a substantial miscarriage of justice by depriving him of his property sought to have it reviewed since the Chief Magistrates Court at Kyenjojo had already declared the land at Rwenkuba Zone as family land.

The Respondent on the other hand averred that the Applicant was selling their properties one by one which forced her to seek redress from Court by having some properties declared as family land in order to restrain the Applicant from selling them. That the land at Rwenkuba was declared family land after the Applicant had conceded and given the two co-defendants then alternative land. That the Respondent later sued the Applicant also in the High Court of Uganda at Fort Portal, vide HCT – 01 – CV – CS No. 0019 of 2014 for a declaration that land at Katumba Zone also be declared family land. By the time of filing the suit, the greatest part of the land had already been sold by the Applicant yet the family derived sustenance from it. That the parties consented that the same was actually family land and a consent judgment was entered into and the parties were both represented by advocates.

Representation:

M/s KRK Advocates represented the Applicant and M/s Mugabe, Luleti & Co. Advocates represented the Respondent. By consent both parties filed written submissions.

Counsel for the Applicant submitted that the trial Magistrate wrongly entered a consent judgment without material facts being provided to Court and in ignorance of the fact that the Chief Magistrates Court of Fort Portal at Kyenjojo under FPT – 21 – CV – CS – LD No. 28 of 2012 had already decreed other land at Rwenkuba LC I as family land. That the consent judgment was indirectly varying, altering, changing and setting aside the earlier lower court order and therefore rendering it an illegality and contrary to the policy of Court. That the unavailability of this material fact when the consent in the High Court was executed went to the merit of the case at the time and as such the Applicant is vested with sufficient reason that warrants review.

Further, that the Applicant in his affidavit paragraphs 3 & 4 stated that he acquired land in both Rwenkuba and Katumba. It was agreed that the Applicant and the Respondent's family land would constitute the land at Rwenkuba Zone which was accordingly developed. That the Respondent later sued the Applicant in 2012 at the Chief Magistrates Court of Fort Portal at Kyenjojo. The lower Court made orders on 20th September 2012 declaring the land at Rwenkuba Zone as family land in the absence of the Applicant who was unrepresented. The applicant came to know about the order on 30th May 2016 long after it had been made and decreed that the land was not his but was family land.

Furthermore, that the Respondent later filed a High Court Civil Suit No. 0019 of 2014 against the Applicant and another claiming the land at Katumba Zone was family land. A consent judgment was entered and it was agreed that the land at Katumba Zone was also family land. That the Applicant entered into the consent with ignorance of the material facts and was unaware that the Chief Magistrates Court had decreed the land at Rwenkuba as family land.

Counsel for the Applicant added that the Applicant was unrepresented and ignorant about Court procedure and it is trite law that ignorance of an unrepresented litigant amounts to sufficient cause. That existence of the lower Court order was not brought to the attention of the High Court when the consent was being entered into. Thus, the Applicant's ignorance of the fact that family land had previously been decreed to be the land in Rwenkuba Zone mistakenly executed the consent to the effect that family land was that at Katumba Zone. That this interfered with the Applicant's right to own property and ought to be set aside, rescinded and vacated as the family land can only be either at Rwenkuba or Katumba Zone but not both.

Secondly, that the Respondent filed two suits with the intention of defrauding the Applicant of his property and this is an abuse of Court process and contrary to Court's procedures of policy. That the Respondent ought to have disclosed what happened in the lower Court when filing a fresh suit but did not. That allowing the consent judgment to stand, amounts to amending the lower court's order and this is not the procedure therefore an illegality which cannot stand once brought to the attention of Court.

Counsel for the Respondent on the other hand submitted that the Applicant was at all times aware of the lower Court case and much as he was unrepresented he made appearance in Court. That by the time judgment was passed the Applicant had allowed to give his Co-Defendants alternative land. That it was also the Applicant's duty to find out how the matter was concluded and in that case it is only him to blame for his negligence and besides equity aids the vigilant.

In regard to the issue of the land at Rwenkuba as having being declared family land, Counsel for the Respondent submitted that the parties were aware of the order and the consent judgment was entered into by the parties themselves and endorsed only by Court. That both parties in reaching the consent were guided by their respective advocates and if the lower Court order was a pertinent issue then the Applicant would have made inquiries as to the status of the case.

Secondly, Counsel for the Respondent submitted that it was not true that the Applicant had some properties before the parties got married in 1990, because the Respondent in her affidavit in paragraphs 3, 4, and 7 stated that the properties were acquired between 1988 when she started staying with the Applicant to 2010. That the Respondent would at times attest as a witness, or not at all, although at times hers was not a direct financial contribution, the Applicant would sale livestock or tea from their shamba which the Respondent worked on to acquire other pieces of land. That much as the two parties were married the Applicant would alienate the Respondent as a co-purchaser.

Further, that calling one piece of land as matrimonial property does not mean the other cannot be matrimonial property. Rather, it is property that the parties call home and/or to whose acquisition both contributed to as per the case of **Julius Rwabinumi versus Hope Bahimbisomwe**, SCCA No. 10 of 2009, citing the case of **Kagga versus Kagga**, High Court Divorce Cause No. 11 of 2005. That filing of two separate cases seeking to declare two pieces of land to be family land is not an abuse of Court process since the two cases were filed at a two year interval and under different circumstances. That though the parties are separated they are still legally married and neither can sell their property without the consent of the other that is why the Respondent sought Court intervention. Therefore, the consent judgment had no effect of amending the lower Court order.

Thirdly, that an application for review must be made without unreasonable delay when Court's memory is still fresh in order to correct any errors or mistakes. That the instant application was made two years after the consent judgment was entered. That the Applicant at all times was aware of the case before the Chief Magistrates Court and he was represented by Counsel by the time the Consent judgment was entered into in the High Court. Thus, there was no mistake or ignorance as alleged by the Applicant to warrant review of the consent judgment.

Counsel for the Applicant submitted in rejoinder that the properties acquired between 1988 and 1990 do not fall in the ambit of matrimonial property and that is the time the property at Rwenkuba Zone was acquired and there was no evidence to effect that there was an agreement that the land should be treated as family property.

In respect to land at Katumba zone it was acquired after the parties' marriage in 1990, it is trite law that even in marriage the right to own property individually is constitutionally preserved. That the Respondent never adduced any evidence to show her contribution save for the fact that she signed as a witness on some sale agreements.

Counsel for the Applicant added that this is neither a divorce or matrimonial cause therefore the Respondent cannot make claims in respect to matrimonial property and her intention is to defraud the Applicant. Thus, in the interest of justice the consent judgment should be reviewed.

I have carefully considered the submissions on both sides.

The law under which review is provided is **Section 82** of the Civil Procedure Act and **Order 46** of the Civil Procedure Rules. The grounds for review are clearly outlined in the case of **FX Mubwike versus U. E. B, HCMA No. 98 of 2008** as follows;

* That there is a mistake or error apparent on the face of the record.

* That there is discovery of new and important evidence which after exercise of due diligence was not within the Applicant's knowledge or could not be produced by him or her at the time when the decree was made.

* That any other sufficient reason exists.

An error apparent on the face of the record was defined in the case of **Batuk K. Vyas versus Surat Municipality AIR (1953) Bom 133** where it was stated that;

“No error can be said to be apparent on the face of the record if it is not manifest or self evident and requires an examination or argument to establish it...”

Counsel for the Applicant in the instant application argued that the Applicant in consenting to the declaration of the land at Katumba Zone as family was ignorant of the fact that the land at Rwenkuba zone had already been declared as family land in the Chief Magistrates Court of Fort Portal at Kyenjojo. Therefore, this is a mistake apparent on the face of the record.

Counsel for the Respondent on the other hand submitted that the Applicant who was at all times aware of the suit in the Chief Magistrates Court and ought to have been vigilant and found out how the matter was determined before agreeing to execute the consent.

In my view the order before the Chief Magistrates Court at Kyenjojo where land at Rwenkuba was declared family land was made in the presence of all the parties, and the Applicant inclusive though unrepresented. The Applicant ought to have followed up and also gotten a copy of the order as opposed to him waiting for it to be served on him in 2016. This therefore in my view does not constitute to a mistake on the face of the record that warrants review of the consent judgment. The order in the lower Court and the consent judgment declared different pieces of land as family land and each was under different circumstances therefore the consent judgment does not vitiate or vary the lower Court order. The Applicant was also aware of the lower Court suit which he ought to have brought to the attention of his advocate if he thought it would

occasion a miscarriage of justice on his side but did not.

In regard to more than two pieces of land being declared as family land in my view is not depriving the Applicant his right to own property if the family derived their sustenance from both of them. The Applicant in his affidavit stated that land at Rwenkuba was never developed and was purchased by him before marriage to the Respondent and nor did the Respondent contribute anything towards its purchase.

In the consent judgment he agreed to Katumba Zone part of which was developed with a matrimonial house, tea gardens, plantation, and farm to be to be family land.

I have studied the consent judgment complained of dated 27.8.2015. The same was signed by all the parties, Elizabeth Katuramu, Katuramu Robert and Agaba Balla. It was also endorsed by Mr. Kwikiriza Habert of L. D. C Legal Clinic for Elizabeth Katuramu and Babukiika Regina Tronera of Justice Centre Uganda for Katuramu Robert and Agaba John. Finally, it was endorsed by the Deputy Registrar. For all practical purposes and intents, the consent judgment was properly endorsed and therefore legally binding on all the parties, it has not been submitted that the applicant was mad or insane at the time.

Furthermore, this Court cannot accept the submission that the Applicant was ignorant of material facts and existence of the lower Court order. The Applicant was all along around ad it has not been submitted that he had gone abroad or out of the country.

So, having signed the consent judgment which was also properly and legally endorsed by his Advocate, the Applicant cannot be allowed to make a U turn under the pretext of Review. One cannot eat his own cake and have it at the same time.

The Constitution of the Republic of Uganda, 1995 provides for equality in marriage encapsulated in **Article 31 (1)** which is to the effect that men and women are entitled to equal rights in marriage, during marriage and at its dissolution.

The property a couple chooses to call a home will be considered joint matrimonial property. This together with the property either of the spouses contributes to is what is matrimonial property.

In the case of **Muwanga versus Kintu High Court Divorce Appeal No. 135 of 1997, (Unreported)**, Bbosa J noted that matrimonial property to which each spouse should be entitled is that property which the parties chose to call home and which they jointly contribute to.

Where a spouse makes a substantial contribution to the property, it will be considered matrimonial property. The contribution may be direct and monetary or indirect and non-monetary.

In **Muwanga v. Kintu, High Court Divorce Appeal No. 135 of 1997, (Unreported)**, Bbosa, J., adopted a wider view of non-monetary indirect contributions by following the approach of the Court of Appeal of Kenya in **Kivuitu versus Kivuitu, [1990 – 19994] E. A. 270**. In that case, Omolo JA found that the wife indirectly contributed towards payments for household expenses, preparation of food, purchase of children's clothing, organizing children for school and generally

enhanced the welfare of the family and that this amounted to a substantial indirect contribution to the property.

‘Family land’ within the premise of **Section 38A (4)** of the Land Act is defined as;

“Family land” means land –

1. *On which is situated the ordinary residence of a family;*
2. *On which is situated the ordinary residence of the family and from which the family derives sustenance;*
3. *Which the family freely and voluntarily agrees shall be treated to qualify under paragraph (a) or (b);*

Or

1. *Which is treated as family land according to the norms, culture, customs, traditions or religion of the family;*

In the instant case from the Court record it is evident that the Applicant acquired properties during the subsistence of the marriage between him and the Respondent among which is the Katumba Zone land from which they derive sustenance and have their matrimonial home and the land at Rwenkuba Zone is where the Respondent cultivates to date for the livelihood of the family.

In regard to the Respondent having not contributed monetarily, this is not tenable because contribution does not only have to be monetary but can be in other forms. These include cooking, opening the gate, caring for children, attending to the sick, receiving visitors, fetching water, making tea and washing clothes, tiling land, grazing animals and above all making love, which is the climax of a man’s happiness on earth.

In conclusion, I find that the Application has no merit and the consent judgment was not entered into under a mistake of fact because at all times the Applicant was aware of the lower Court case and the two pieces of land that were declared as family land are pieces of land that the family derives its sustenance from and should remain as such.

The Application is accordingly dismissed with costs.

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WILSON MASALU MUSENE

JUDGE

10/9/2018

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