

UGANDA / JUDGMENT

Kigongo v Kigongo (Civil Suit 295 of 2015) [2017] UGHCLD 369 (27 April 2017)

[2017] UGHCLD 369

COURT

HC: Land Division (Uganda)

BEFORE

Namundi, J

CASE / FILE NUMBER

Civil Suit 295 of 2015

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

CIVIL SUIT NO. 295 OF 2015

PLAINTIFF HAJI MUSA KIGONGO-----

VERSUS

-DEFENDANT OLIVE KIGONGO-----

JUDGMENT

The plaintiff brought this suit against the defendant at seeking for the following orders;

- a) Declaration that the defendant's continued stay in the suit premises is unlawful.
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- b) An order for vacant possession.
- c) General damages for trespass and inconvenience.
- d) Interest on any pecuniary award.
- e) Costs of the suit.

The gist of this matter is that the plaintiff and the defendant have been living together for nearly 26 years and have had two children together. They have lived together in the suit property since about 1992 and it was their residential home until recently when the plaintiff withdrew from the home citing irreconcilable differences. The defendant is still in occupation of the suit property which she refers to as her matrimonial home.

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She claims there was a customary marriage celebrated between the two in 1992 at her parents' home in Mbarara.

The plaintiff however denies ever marrying the defendant. He sought the eviction of the defendant from the suit property. To him, the two were only cohabiting. He merely invited the defendant to live with him in the suit house and they never agreed that they would co- own any of the properties he acquired. The suit property which is the centre of controversy is registered in the names of the plaintiff as the proprietor.

The defendant in turn filed a counter claim against the plaintiff seeking the following orders;

- a) A declaration that the defendant/ counter claimant is a co owner of the land comprised in plot 29 Kololo Hill Drive Kampala.
- b) An order that the commissioner Land Registration registers the suit property in the names of the plaintiff/ counter- defendant and the defendant/ counter claimant as tenants in common in equal shares.
- c) In the alternative but without prejudice to (a) and (b) above, a declaration that the land comprised in Plot 29 Kololo Hill Drive, Kampala is matrimonial property to which the defendant is entitled to quiet possession.
- d) A permanent injunction restraining the plaintiff / counter defendant whether by himself or through agents, servants, contractors, workmen and all persons claiming under him from evicting the defendant/ counterclaimant from the suit property, alienating the suit property whether through selling, mortgaging, leasing or otherwise interfering with the defendant's / counterclaimant's right to title, use and quiet enjoyment of the suit property.
- e) An order for payment of general damages and interest thereon at a rate of 25% p.a from the date of judgment till full payment.

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- f) An order for payment of costs of the suit and the counterclaim.

In her counter claim, she contended that for the last 26 years she had relied on the plaintiff's representation and assurance that the suit property was jointly owned and that she was entitled to title for the suit property by operation of the doctrine of proprietary estoppels and partnership. Further and without prejudice that the suit property was matrimonial property in which they both resided since 1992 when they got married and that she had an equal share in it.

The parties and their witnesses filed witness statements and were cross examined on their evidence. Both the plaintiff and defendant brought 2 witnesses each in support of their cases.

PW1; Haji Musa Kigongo, the plaintiff, led evidence that he had never made any written or oral agreement with the defendant stating that he would co- own any of the properties that he would acquire. He denied the fact of marriage but admitted that he only cohabited with the defendant. Further that even though the defendant had been using his name, it did not signify a marriage. He produced evidence to prove that he was the registered proprietor of the suit property

PW2; Asiimwe Joseph testified on how marriage is celebrated in Ankole culture.

PW3; Haji Ali Sendagire a cousin to the plaintiff testified to the fact that he was not aware of any marriage between the plaintiff and the defendant and that the plaintiff only introduced him to her as the mother of his children.

For the defence, DW1; Olive Kigongo led evidence that she and the plaintiff in 1987 entered into an oral partnership to stay as husband and wife. She oversaw the construction of the suit house since they agreed that they would live in it. In 1990 they moved into the suit house and on 14. 03. 1992 they customarily got married at her parents' home in Mbarara. They agreed to a low key customary

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marriage ceremony without payment of bride price and gifts. They also agreed that the suit house would be their matrimonial home.

She adopted the surname of the plaintiff and for the last 26 years she relied on the plaintiff's assurance that the suit property was jointly owned and the plaintiff had never indicated otherwise. She brought evidence of photographs together with the plaintiff at various functions as a couple. She also produced evidence to prove that at all times she was referred to as the plaintiff's wife.

DW2; Ernest Sunday an elder brother to the defendant testified to the fact that a traditional marriage ceremony under the Ankole customs was held between the plaintiff and the defendant at his home in Biharwe around March 1992. He also testified that their father did not ask for dowry for his daughters and that it was acceptable in their family not to ask for bride price. Further that his sister adopted the defendant's name after the ceremony. He had been a regular visitor at their home in Kololo and the two parties had attended several family functions together where they had been addressed as husband and wife.

DW3; Patrick Tumwesigye a cousin to the defendant affirmed that he knew the plaintiff in 1987 when the defendant introduced to him as her partner. He similarly testified to the fact that the parties got customarily married in 1992 in a traditional marriage ceremony under the Ankole custom in Biharwe Mbarara and that no dowry was asked for. He had been a regular visitor at their home in Kololo and the two had attended several functions together as husband and wife.

The agreed issues were;

- 1. Whether the defendant has any interest in the suit property?
- 2. Whether there was a legal marriage between the plaintiff and the defendant and, if so, whether the suit property is matrimonial property.
- 3. What remedies available to the parties?

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Resolution of the issues

I will resolve issue 2 then 1 and lastly 3.

Issue 2.

2. Whether there was a legal marriage between the plaintiff and the defendant and, if so, whether the suit property is matrimonial property.

It was the defendant's contention that she was customarily married to the plaintiff under the Ankole custom in March 1992. The law of evidence under Section 103 of the Evidence Act is that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence. The standard of proof is on a balance of probabilities.

A customary marriage is unique and peculiar to the practices of a certain society. I take note of the evidence adduced by DW3 on the form and nature in which customary marriages are celebrated in ankole.

A customary Marriage can be proved by tendering a Marriage Certificate; Ref: S.75 of the Evidence Act and S. 6 & 7 of the Customary Marriage (Registration) Act. If there is no marriage certificate by proof of a marriage ceremony according to the customs and laws of a given tribe or by evidence that according to the customs and laws of a given tribe, a marriage exists. Ref: John Tom Kintu Muwanga Vs Myllious Gafabusa Kintu High Court Divorce Appeal No. 135 of 1997.

In the instant case, the defendant testified that she got customarily married to the plaintiff at her parents' home in Mbarara around March 14 1992. She produced DW2 and DW3 who testified to the fact that there was a customary marriage celebrated between the plaintiff and the defendant in March 1992 at the home of DW2 and all cultural norms were observed under the Ankole customs. It was also their evidence that no bride price or dowry was paid since in their family it was a practice not to ask for dowry for daughters.

Bride price is just one of the incidents of marriage under a customary law. Ref: Francis v Boniface (1969) 1 EA 146

It is my view therefore that with or without the payment of bride price, a traditional marriage can still be celebrated if it is a fact agreed upon by the clan or community where the marriage is celebrated.

The plaintiff on the other hand rebutted the evidence adduced by the defendant when he testified that he had never formally visited or customarily married the defendant or held any traditional ceremony to celebrate any form of marriage. His evidence was that he was cohabiting with the defendant and that her unilateral use of the name Kigongo did not amount to a marriage. PW3 a cousin brother to the plaintiff led evidence that he had never witnessed any marriage of the plaintiff and the plaintiff had never told him that he married Olive. He did not know any of the defendant's brothers or sisters and that the alleged customary marriage in Biharwe Mbarara never took place as none of their family members ever attended.

Apart from the testimony of her brother DW2 and cousin DW3, the defendant did not produce any cogent evidence of the alleged customary marriage between herself and the plaintiff. The defendant was able to produce photographs in evidence to prove the fact that indeed the two parties had for a long time enjoyed an affair and lived happily as husband and wife. But no photographs were produced to show proof of celebration of the alleged customary ceremony.

Such photographs would ordinarily back up an allegation of celebration of a marriage. The fact that she was referred to as the plaintiff's wife or that she changed her name to 'Mrs Olive Kigongo' is not sufficient proof of marriage especially considering the fact that the marriage is denied by the plaintiff.

In the absence of any other tangible evidence, this court is left in doubt as to whether there was a customary marriage on the basis of the defendant's word as against the plaintiff's. In my view, it remains speculative as to whether there was a marriage celebrated between the parties. The evidence of her two witnesses

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was contradictory as to who attended and what occurred at the supposed ceremony. There is no explanation why the said marriage if at all was never registered.

I find that the defendant has not produced sufficient evidence to convince court on a balance of probabilities that indeed the plaintiff and the defendant were customarily married in March 1992.

It is my finding that there was no legal marriage between the plaintiff and the defendant and hence the suit property cannot be matrimonial property.

Issue 1

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1. Whether the defendant has any interest in the suit property.

The suit property is registered in the names of the plaintiff who is seeking an order of vacant possession against the defendant.

The defendant averred in paragraph 5(a) of her written statement of defence that in 1987 she started cohabiting with the defendant. In 1989 he requested her to oversee and monitor the construction of the residential house on the suit property. In due course she contributed financial resources and committed much of her time to the construction since the defendant was very busy with official government duties. That the plaintiff assured her that when the house was completed they would occupy it, use it and own it as tenants in common in equal shares. She went on in paragraph 5 (b) that she relied on this assurance and gave up her search for a plot of land to buy and build her own residence in an up market location in Kampala and concentrated all her skills, time and effort on overseeing the construction of the house until it was completed in 1990.

Further that when the house was completed in 1990, the plaintiff requested the defendant to move into the suit property and assured her that it would be their home for the rest of their lives.

Indeed she moved into the house and resided there with the plaintiff and their children until recently when he left the suit property.

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In paragraph 13 of the Counter Claim, the defendant averred that for the last 26 years, the defendant relied on the plaintiff's representation and assurance that the suit property was jointly owned and thus was entitled to title for the suit property by the operation of the doctrine of proprietary estoppels and partnership. The defendant affirmed to the same facts in her witness statement.

The plaintiff on the other hand totally denied the claims by the defendant and affirmed that he had never made any direct or indirect representation to the defendant that the suit property would be jointly owned. And that even though he stayed with and co- habited with the defendant on the suit property, he harbored no intentions of ever owning the property jointly with the defendant and that is why he applied and obtained the certificate of title to the suit land in his names.

The defendant seeks to rely on the doctrine of proprietary estoppels and partnership to claim an interest in the suit property.

Proprietary estoppel is one of the forms of estoppel by representation and it may arise where a person has by word or conduct made to another a clear and unequivocal representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon, or has

so conducted himself that another would, as a reasonable person, understand that a certain representation of fact was intended to be acted upon, and the other person has acted upon such representation and thereby altered his position. In such circumstances an estoppel arises against the party who made the representation, and he or she is not allowed to aver that the fact is otherwise than he represented it to be. Ref: paragraph 1075 Halsbury's Laws of England, Vol. 16(2).

An estoppel may also arise by convention; where the parties have agreed between themselves to act on a common assumption whether or not it is in fact true. Ref: paragraph 1065 Halsbury's Laws of England, Vol. 16(2).

Proprietary estoppel is an equitable doctrine which only involves the promise of interest in land, and it arises when the representation consists of a promise of an interest in land. Ref: paragraph 1089 Halsbury's Laws of England, Vol. 16(2).

Three factors are required to establish a proprietary estoppel:

an assurance;

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- (2) a reliance; and
- (3) change of position or detriment.

An estoppel in equity will only arise if these three elements are proved. Unconscionability is also an essential element in proving proprietary estoppel. Therefore, the elements of assurance, reliance and detriment, and **unconscionability must be present for the equitable doctrine to come into play.**

It is sufficient if the party, to whom the assurance is given, acts on the faith of it, in such circumstances that it would be unjust and inequitable for the party making the assurance to go back on it. Ref: Greasley and others v Cooke All ER 1980 Volume 3

In Greasley & Others V Cooke, the facts were that in 1938 the defendant, then aged 16, was employed as a maid in the house of a widower and his four children. In 1946 one of the sons, Kenneth, became attached to the defendant and they lived in the house as man and wife. Two years later the widower died and the defendant remained in the house with Kenneth and acted as an unpaid housekeeper for his brothers Hedley and Howard for a short time until they left the house, and then looked after his mentally ill sister until she died in 1975. By his will the widower left the house equally to Kenneth and Howard, and on their respective deaths Kenneth left his share to Hedley, and Howard's share passed on intestacy to his two daughters. In possession proceedings brought against her by Hedley and Howard's daughters, the defendant Counter Claimed for a declaration entitling her to remain in the house rent free for the rest of her life. The trial Judge found that the defendant's belief that she could remain in the house for as

long as she wished had been induced by assurances and the conduct of Kenneth and Hedley, but that she had failed to prove that she had acted to her detriment in relying on those assurances. Accordingly he refused to grant the declaration. The defendant appealed.

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On appeal it was held by Lord Denning MR that the assurances given by the representors, Kenneth and Hedley that the defendant could remain in the house for as long as she wished raised an equity in the defendant's favour and it was to be presumed that the defendant had acted on the faith of those assurances. The burden of proof was therefore on the plaintiffs to establish that the defendant had not acted to her detriment or her prejudice by remaining there. The equity having thus been raised in her favour, an order was made by court allowing the defendant to stay on in the house for as long as she wished.

In the instant case, both parties have lived in the suit property as man and wife for almost 26 years until recently when the plaintiff withdrew from the home. The two have 2 children together. The defendant produced in court evidence which proves that the defendant was referred to as the plaintiff's wife. There is also on record evidence of official documents that referred to the defendant as 'Mrs. Olive Kigongo' as way back as 1997. These include the forms of annual returns for Mosa Courts Apartments of which both parties are share holders, the Memorandum and Articles of Association of Bulangiti Farm Ltd of which both parties are share holders, and correspondences in which the defendant is recognized as the plaintiff's wife. To buttress her point, the defendant further produced in court several photographs in which both parties attended functions together. This fact was affirmed by the evidence of both DW2 and 3.

Save for the lack of sufficient evidence to prove the fact that the two were legally married; the defendant claimed that the two were customarily married in 1992 at her home in Mbarara. She consequently moved into the home, bore children and even changed her name to Olive Kigongo. She was assured of a marriage to the plaintiff and a home in which she would live in for the rest of her life with the plaintiff.

During cross examination, she stated; 'we entered into an oral partnership as adults, to stay as husband and wife. We agreed that we would live in the house being built. Otherwise we were free to have other properties. It was an important oral agreement.'

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I am in no doubt that the two parties despite the fact that they were not legally married, held out and lived as such. The defendant relied on the assurances by the plaintiff that she was his wife and that she had a home for life.

In fact it was her statement that she relied on this assurance and gave up her search for a plot of land to buy and build her own residence in an up market location in Kampala and concentrated all her skills, time and effort on overseeing the construction of the house until it was completed in 1990.

Until the relationship took another turn, there is no evidence that the plaintiff ever objected to the fact that the defendant was his wife. The two parties behaved and intended to live like a married couple. They shared the suit property as their 'matrimonial home'. The plaintiff is therefore estopped now from disputing that fact. The plaintiff has not produced any evidence to establish that the defendant had not acted to her detriment or her prejudice by taking the suit property as her home.

The defendant has come to court in equity. Section 14 of the Judicature Act allows this court to apply the principles of equity, where no express law or rule is applicable to any matter in issue before the High Court, in conformity with the principles of justice, equity and good conscience. One of the maxims of equity is that it looks on that as done which ought to be done.

In the instant case, I find that equity is in favour of the defendant. It is only fair that the defendant is entitled to an interest in the suit property which has been her 'marital home' with the plaintiff for nearly 26 years and is still living there.

The defendant was assured that she had a home for life and it did not matter whether she made any financial contributions to its construction; for as long as she lived on the assurance by the plaintiff that she was a wife and that she had a security of tenure.

It is my conclusion therefore that the defendant has an interest in the suit property.

Issue 3

Remedies available to the parties.

From the evidence on record, it is clear that the plaintiff has failed to prove his claims against the defendant. He is not therefore entitled to any remedies he claims in his plaint.

The defendant in her counter claim sought

A declaration that the defendant/ counter claimant is a co owner of the land comprised in plot 29 Kololo Hill Drive Kampala,

An order that the commissioner Land Registration registers the suit property in the names of the plaintiff/ counter- defendant and the defendant/ counter claimant as tenants in common in equal shares,

- In the alternative but without prejudice to (a) and (b) above, a declaration that the land comprised in Plot 29 Kololo Hill Drive, Kampala is matrimonial property to which the defendant is entitled to quiet possession,

A permanent injunction restraining the plaintiff / counter defendant whether by himself or through agents, servants, contractors, workmen and all persons claiming under him from evicting the defendant/ counterclaimant from the suit property, alienating the suit property whether through selling, mortgaging, leasing or otherwise interfering with the defendant's / counterclaimant's right to title, use and quiet enjoyment of the suit property.

An order for payment of general damages and interest thereon at a rate of 25% p.a from the date of judgment till full payment, and

- An order for payment of costs of the suit and the counterclaim.

From the evidence on record, it is clear that the Defendant/Counter claimant failed to establish her claims of the existence of a legal marriage. The property cannot therefore be declared matrimonial property within the marriage laws of this country.

Similarly her claims for general damages and interest are not supported by evidence of injury or damage incurred. This is especially so due to her continued occupation of the suit property, a fact that is not disputed.

This court is mindful that each case must be decided on its own peculiar facts and that it has a very wide discretion in satisfying an equity arising under the doctrine. In this case, the relationship between the plaintiff and defendant has broken down. The plaintiff moved out of the home and the defendant is in its occupation. It is fair in the circumstances that the defendant is entitled to a 50% share in the suit property.

I accordingly enter judgment and order as follows;

- 1) The Plaintiff's claims against the Defendant are dismissed for lack of merits.

- 2) Judgment is entered in favor of the Defendant Counter Claimant in the following terms;

- a) It is declared that the Defendant/ Counter Claimant is a co-owner of the

land comprised in plot 29 Kololo Hill Drive Kampala due to the interest established under the doctrine of proprietary estoppel;

- b) An order that the commissioner Land Registration registers the suit property in the names of the Plaintiff/Counter-Defendant and the Defendant/ Counter claimant as tenants in common in equal shares;

- c) A permanent injunction restraining the Plaintiff/Counter Defendant whether by himself or through agents, servants, contractors, workmen and

persons claiming under him from evicting the defendant/ all counterclaimant from the suit property, alienating the suit property whether through selling, mortgaging, leasing or otherwise interfering with the defendant's / counterclaimant's right to title, use and quiet enjoyment of her interest in the suit property as decreed under (b) above;

- d) An order for payment of costs of the suit and the counterclaim by the Plaintiff/Counter Defendant to the Counter Claimant.

I so order.

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GODFREY NAMUNI

JUDGE DATE \$27/04/2017\$

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