

UGANDA / JUDGMENT

Musoke v Nakku (Civil Appeal 15 of 2019) [2023] UGHC 364 (9 May 2023)

[2023] UGHC 364**COURT**

High Court of Uganda

BEFORE

Katamba Nkwanga, J

CASE / FILE NUMBER

Civil Appeal 15 of 2019

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT MASAKA****CIVIL APPEAL NO. 15 OF 2019****(ARISING FROM DIVORCE CAUSE NO. 09 OF 2018)****MUSOKE STEPHEN BRIAN :: APPELLANT****VERSUS****NAKKU ALICE :: RESPONDENT*****Before the Hon. Lady Justice Victoria N. N. Katamba*****BACKGROUND**

The Appellant Instituted Divorce Cause No. 09 of 2018 against the Respondent for dissolution of marriage. The marriage was dissolved by consent of the parties and the trial Magistrate, HW. Tindyebwa Kingi Adyeeri Christopher found that both parties had made a contribution towards establishment of a property in Kirumba B, Katwe - Butego in Masaka district.

The trial magistrate decreed that the petitioner who had made a greater contribution is entitled to a 70% share while the Respondent is entitled to take 30% of the property as her share on dissolution of the marriage.

The Petitioner/Appellant who stated on oath in his petition that the Respondent deserted the marriage in 2011, now submits that by the time he acquired the suit property in 2008, she had long deserted the marriage, 10 years earlier. He further submits that the Respondent only re – appeared when she got wind of the Petitioner's intention to purchase the suit property. That the Respondent only appeared to witness the purchase.

The Petitioner maintains that the Respondent who bore no children in the marriage and according to him, made no contribution towards the purchase of the suit property should walk away empty handed as she came.

Representation

The Appellant is represented by M/s Xander Advocates.

The Respondent did not enter physical appearance nor filed written submissions as directed by this court.

At institution of the Appeal, the Appellant raised two grounds of appeal to wit;

- **1. That the learned Trial Magistrate erred in law and fact in holding that the Appellant's property in Kirumba B, was matrimonial property whereas not and thus reached a wrong decision**
- **2. The learned Trial Magistrate erred in law and fact when he ordered that the Respondent is entitled to 30% share in the Appellant's property, which decision occasioned a miscarriage of Justice.**

APPELLANT'S SUBMISSIONS

On ground one, the Appellant submitted that he solely bought a plot of land in Kirumba B in 2008 at UGX 5,000,000/=. At the time of execution of the agreement, the Respondent had already deserted the Appellant in 1999. That the Respondent only returned to witness the sale agreement. The Appellant also relied on testimony of his other witnesses who stated that he was the owner of the suit land, the references are in the submissions on the record of this file.

The Appellant also submitted that the Respondent testified that her plot is different from the Appellant's and that the one for the Appellant is more developed than hers.

The Appellant further submitted that the Respondent filed Civil Suit No. 112 of 2018 for eviction of the Appellant from the Kirumba B property but she later withdrew it.

To buttress his submissions, the Appellant cited the authority of *Julius Rwabinumi vs. Hope Bahimbisomwe SCCA No. 10 of 2009, and stated that therein, it was held that where a spouse makes a substantial contribution to a property, it will be considered matrimonial property. That the contribution may be direct and monetary or indirect and non-monetary.*

In conclusion, the Appellant submitted that the Respondent did not make any contribution to the Kirumba B property and that as such, this court should find that the learned Trial Magistrate erred when he declared it to be matrimonial property.

Ground two; the Appellant reiterated his submissions on ground one that the Kirumba B property solely belongs to him to the exclusion of the Respondent. The Appellant also quoted excerpts from

the trial Magistrate's Judgment which he disagrees with. I have not found it necessary to reproduce them here.

In conclusion, the Appellant prayed that the appeal be allowed with costs to him.

DETERMINATION OF COURT

I am alive to, and I have discharged the duty of this first appellate court which is to re-appraise the evidence and subject it to an exhaustive scrutiny and come to its own conclusions was as stated in a plethora of authorities like *Uganda Revenue Authority versus Rwakasanje Azariu & 2 Ors; CACA No. 8/2007; Fr. Narsensio Begumisa and 3 Ors versus Eric Tibebaga; SCCA No. 17 of 2002 and Banco Arabe Espanol versus Bank of Uganda; SCCA No. 08 of 1998.*

As earlier noted in the background, the Respondent did not appear to defend this appeal. I have perused the record of this appeal and found two affidavits of service to the Respondent deponed to and filed by Ivan Kyeyune. One was filed on 26/08/2022 and the other on 08/09/2022.

I am convinced that the Respondent was notified of the appeal and I order that this appeal shall proceed ex parte against the Respondent.

Ground one; That the learned Trial Magistrate erred in law and fact in holding that the Appellant's property in Kirumba B, was matrimonial property whereas not and thus reached a wrong decision.

The Appellant contradicted himself when he stated that the suit property in Kirumba B was acquired solely by himself in 2008 when the Respondent had already deserted him in 1999. This submission is a grave contradiction to his averment on oath in paragraph 5(b), 2nd last line in which the Appellant stated that the Respondent deserted him in the year 2011.

This court finds the above contradiction a deliberate attempt to mislead it into believing that the property was acquired when the parties were living apart. This is untruthfulness on the Appellant's part and lends credence to the Trial Magistrate's findings that the property was acquired during the subsistence of the marriage to which both parties made a contribution for its establishment.

Moreover, the Appellant/Petitioner, also stated on oath in paragraph 4 of his petition for dissolution of marriage filed on 01/11/2018 that upon solemnizing their marriage, the duo lived together at Kirumba B Lc1 Katwe- Butego Div in Masaka District.

All the above statements in his Petition support the Trial Magistrate's findings that the parties occupied and used the suit property as their matrimonial home.

In conclusion, this ground fails and is hereby rejected and answered in the negative.

Ground two; The learned Trial Magistrate erred in law and fact when he ordered that the Respondent is entitled to 30% share in the Appellant's property, which decision occasioned a miscarriage of Justice.

Having correctly found that the suit property was matrimonial property, all that the Trial Magistrate was left with to determine was to assess contribution of the parties as to come up with a plausible distribution scheme.

The Respondent testified as DW1 that she used to dig in Villa, that she used to make chapatti. That the Petitioner and Respondent used to save and borrow money jointly from a Centenary Bank account up to when they separated. That even the car they owned together was acquired from money that that the duo borrowed together. That she used to fry eats and distribute them to shops for sale.

The Respondent further testified that they acquired the land in Kirumba during the subsistence of the marriage. That the Petitioner put a school on one part of this land and teachers on the other side which she claimed belonged to her.

PW5, Mukwaya Charles Kabunga testified for the Appellant/Petitioner and stated in cross examination that he used to see the Respondent as the Petitioner's wife. That indeed the Respondent used to work in a shop at Ssaza. That the Respondent looked after the Petitioner's first children for a short time. That the Respondent looked after the Petitioner's child who was 1 and half to 2 years old because the Petitioner produced children with other women while the marriage of the parties was subsisting.

Article 31(1) of the Constitution of Uganda 1995 as amended guarantees women's equal rights upon, during and after marriage with their counter parts/partners

In *Paul Kaggwa vs. Jackline Muteteri (Matrimonial Cause No. 23 of 2005), it was held by Mwangushya, J that there seems to be no contention that at the termination of marriage, including cohabitation, neither spouse walks out of the marriage empty handed. This is in*

In light of the above evidence on the record of the trial court and the position of the law in statute and earlier decided cases, I find that the learned Trial Magistrate properly evaluated the evidence on the Respondent's contribution towards establishment of the Kirumba B property and arrived at the correct conclusion vis a vis the law. This contribution was both direct through her industrious activities of frying eats which she sold/distributed to shops, as well indirect in easing the Appellant's life by looking after his children that he begot with other women during the subsistence of the couple's marriage.

Orders:

- Dated and delivered electronically this 9th day of May, 2023.

JUDGE

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