

Nakanwagi v Sserwadda (Civil Appeal 2 of 2022) [2023] UGHC 390 (18 April 2023)

COURT
High Court of Uganda

BEFORE
Katamba Nkwanga, J

CASE / FILE NUMBER
Civil Appeal 2 of 2022

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

CIVIL APPEAL NO. 002 OF 2022

(ARISING FROM DIVORCE CAUSE NO. 004 OF 2020)

ROSEMARY NAKANWAGI :::::::::::::::::::::::::::::: APPELLANT

VERSUS

PETERO SSERWADDA :::::::::::::::::::: RESPONDENT

Before the Hon. Lady Justice Victoria N. N. Katamba

BACKGROUND

The Appellant instituted Rakai Divorce Cause No. 004 of 2020 against the Respondent for dissolution of the marriage and an order on distribution of the property alleged to have been acquired during subsistence of the marriage.

The dispute of the parties was partly resolved by way of a consent on 14/10/2021 in presence of the Petitioner, counsel for the Petitioner and the Respondent.

The Appellant later applied to have the consent set aside under M. A No. 026/2021 on the grounds that it did not reflect her intentions, was never translated to her in a language that she understands because she is an illiterate. The trial Chief Magistrate found no merit in her application, found it to be a waste of court's time and dismissed it, thus the instant appeal.

Representation

The Appellants were represented by M/s Kawanga & Kasule Advocates

The 2nd Respondent was represented by M/s Kaliba Associated Advocates

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

1. The Learned Trial Magistrate erred in law and fact when he failed to follow the proper procedure in handling divorce petitions thus reaching a wrong decision.

- 2. That the Learned Trial Magistrate erred in law when he failed to evaluate the evidence at hand, leading to a wrong decision.
- 3. That the Learned Trial Magistrate erred in law and fact when he failed to make decrees for dissolution of marriage thereby occasioning a miscarriage of justice.
- 4. The Learned Trial Magistrate erred in law when he relied on the Consent Judgment to make a final Order well aware that the same was obtained fraudulently and improperly and was being contested by the Petitioner.
- 5. That the Trial Magistrate erred in law and fact when he upheld the Consent Judgment as the sole ground for his judgment well knowing that it had no certificate of translation nor proof of the same but with an illiterate petitioner.

APPELLANT'S SUBMISSIONS

Ground 5; On whether the consent agreement could stand as a valid judgment in absence of a certificate of translation

The Appellant submitted that this issue must be resolved in line with **Illiterate Act – S. 5** which protects all *illiterates from being brought into contracts without them first being explained to what it is they are exactly they are signing.*

The Appellant submitted that **Para 5 of the Affidavit in support of Misc. App. No. 026 of 2021** demonstrates that the Petitioner was in transition of changing advocates having instructed **Mr. Ssemwanga Naswif** in **Para 9**, immediately after the Court Session on the **14th/10/2021**, the Clerk instructed her to sign and append a thumbprint on the same document. That it is further stated on record in a session on **29th/09/2021** that **"Ssemwanga Nasifa"** was holding brief for Counsel Christopher for the Petitioner.*

It is further submitted for the Appellant that the instructions were never confirmed since no notice of change of Advocates was ever filed.

It was also submitted that it is now trite law that where a party is presented with a consent agreement all the contents of the agreement are to be read to the party at a disadvantage and a certificate of translation is a mandatory attachment. That this was never done in the instant case. The Petitioner made the prayers below;

- 1. That Court passes a decree Nisi and sets aside the orders of the Trial Court.
- 2. That Court effects proper distribution of matrimonial property as it deems fit.
- 3. That the wife be entitled to alimony.

This appeal be allowed with costs in this court and in the court below.

RESPONDENT'S SUBMISSIONS

The Respondent submitted that the appeal was filed out of time and should be dismissed.

He cited *Section 79 of the Civil Procedure Act cap 71 which* **provides that** **"except as otherwise specifically provided in any other law, a) every appeal shall be entered within 30 days from date of the decree or order...."***

He submitted that the consent was signed by parties on 14/April /2021, on the 08/Dec/2021 vide Misc. Application No .026/2021 applied for setting aside of consent judgment entered into be reviewed or varied and the said application was dismissed with costs on the 31/03/2022.

The Respondent argues that the appellant had no right to appeal against the dismissal order and from the consent.

GROUND 5. That the learned trial Magistrate erred in law and fact when he held the consent judgment without certificate of translation well aware that the petitioner was illiterate.

The Respondent submitted that the appellant was well represented by an advocate during the proceedings before the trial Magistrate and the trial Magistrate in the presence of the parties and counsel for the appellant and court clerk who interpreted the same consent judgment was entered on court record and the same became a judgment of court.

It is presumed that the counsel for the appellant had explained the contents of the same before the appellant signed and therefore the appellant cannot claim that the same was not translated at the time of signing.

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.*

The Respondent raised a preliminary objection that the appeal was filed out of time. I am inclined to determine this objection first. I find that the Respondent has misconceived the Appellant's approach as being that she is appealing against the consent Judgment directly. The Appellant rightly applied to set aside the consent Judgment in the court that issued it when she was aggrieved by it and the Application was dismissed. It is only after the dismissal of her application to set aside the consent Order that she exercised her right to appeal against the dismissal and have an opportunity to be heard.

***Order 44 r1(t) An order made under 4 of Order XLVI granting an application for review shall lie as of right. Order XLVI is the order that creates a right to apply for review*.**

The above rule should be read together with *Article 28(1) of the Constitution of Uganda that enjoins courts to hear out both parties to a dispute. The fact that it creates a right of appeal from an order granting an application for review, by implication it also creates that same automatic right of appeal to a party that is aggrieved by a dismissal order against an application for review as is the case in the instant case*.

***Article 21 of our Constitution also requires equal treatment of all persons*.**

In the premises, I find that the appeal is properly before this court and was instituted well within time and the Respondent's objection is hereby dismissed.

Counsel for the parties ably and zealously submitted on all the grounds of appeal but I have found that this appeal rests on only ground five (5). I have thus not found it necessary to reproduce the otherwise great submissions on other grounds with proper provisions of the law on Divorce among others.

GROUND 5. That the learned trial Magistrate erred in law and fact when he upheld the consent judgment without certificate of translation well aware that the petitioner was illiterate.

The Appellant's contends that the parties consented to dissolution of property but disputes the orders on distribution of property.

It has emerged that the Appellant also contends that the Consent Order was never translated to her in the language that she understands. I have perused all the orders in respect to the consent and

none of them was ever translated to the Appellant contrary to Sections 2 and 3 of the Illiterates Protection Act Cap. 78. The above provisions require persons who draw up documents for illiterate persons should ensure that they have translated them to the illiterates in the language that they understand. Such documents must also bear a certificate of translation bearing the address, full names of the translator confirming that they were indeed interpreted to the illiterate persons.

I do not why His Worship Kitiyo Patrick did not forward the entire typed and certified record but only sent the record of M. A 26/2021. I have, however, carefully perused the legible handwritten record of His Worship Kitiyo Patrick dated 14/10/2021 on the main file from which the consent was drawn.

There is no record, in the said proceedings against which the parties were required to annex their thumb prints, that shows that the proceedings of the day were translated to the Appellant from the English language to the language she understands. I have not seen evidence of the clerk translating for the Appellant on record as alleged by counsel for the Respondent from the bar.

I am also not persuaded to believe the Respondent's counsel's argument that it should be presumed that Appellant's Advocate translated the contents of the Consent Judgment to her.

The consent ought to have been set aside in M. A No. 26/2021 for illegality. I therefore find that the learned trial Magistrate erred in law and fact when he upheld a consent Judgment drawn up in English for an illiterate litigant.

This ground succeeds. I have not found it necessary to delve into other grounds because whatever preceded from the illegal consent was void *ab initio*.

I will now turn to the reliefs sought by the Appellant which are:

- 1. Court passes a decree Nisi and sets aside the orders of the Trial Court.
- 2. That Court effects proper distribution of matrimonial property as it deems fit.
- 3. That the wife be entitled to alimony

The marriage of the parties remained in force and thus this court is unable to grant any of the reliefs sought in the absence of any evidence save for costs of the suit.

The suit is hereby referred back to the Chief Magistrates court for a re-trial before a different Judicial officer.

1. The parties remained married to each other.
2. The matter is hereby referred back to the Chief Magistrate's court for a re-trial before another Judicial officer.
3. The Appellant is awarded costs of this court.

[illegible]

JUDGE

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