

UGANDA / JUDGMENT

Namatovu v Jjagwe and 2 Others (Misc Cause 51 of 2020) [2023] UGHCFD 51 (21 January 2023) [2023] UGHCFD 51

COURT

HC: Family Division (Uganda)

BEFORE

Katunguka Kitariisibwa, J

CASE / FILE NUMBER

Misc Cause 51 of 2020

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

FAMILY DIVISION

MISCELLANEOUS CAUSE NO. 0051 OF 2020

REGINA NAMATOVU JJAGWE:..... APPLICANT

VERSUS

- 1. HERBERT JJAGWE
- 2. NABISUBI JACINTA RENIA
- 3. NASEJJE OLIVIA FRANCES:..... RESPONDENTS (Administrators of the estate of the late Emmanuel Jjagwe)

Before: Lady Justice Ketrah Kitariisibwa Katunguka

Judgment

Introduction:

- 1. This application is brought by way of Notice of Motion under Article 50 of the Constitution of Uganda 1995, section 98 of the Civil Procedure Act, Order 52 rules 1 and 2 of the Civil Procedure Rules, section 4 of the Human Rights(Enforcement) Act 2019, Rules 8 and 11 of the Judicature (Fundamental & Other Human Rights & Freedoms)) Enforcement Procedure) Rules 2019); seeking:
 - a. A declaration that property comprised in Block 244 Plot 2815 Muyenga is matrimonial property.
 - b. A declaration that the Applicant is entitled to property comprised in Block 244 Plot 2815 Muyenga following the demise of her husband, the late Emmanuel Jjagwe.
 - c. An order directing the Respondents to transfer property comprised in Block 244 Plot 2815 Muyenga into the names of the Applicant.
 - d. An order for costs.
- 2. The grounds of the Application are in the affidavits in support and affidavit in rejoinder deposed by Regina Namatovu Jjagwe (the Applicant); and briefly are that; the Applicant was married to the late Emmanuel Jjagwe on the 20th of July 1978 under customary law and gifts were exchanged as per culture and her father gave her consent in writing; she and the late Emmanuel Jjagwe lived together on property comprised in Block 244 Plot 2815 Muyenga(herein called the suit property), until his demise on the 23rd day of November 2013; the said property comprised in Block 244 Plot 2815 Muyenga being matrimonial property should have reverted to the Applicant upon the demise of her husband; she has requested the Respondents who are the Administrators to the estate of the late Jjagwe's estate to transfer the said property into her names to no avail; the conduct of the Respondents is a violation of the Applicant's Constitutional rights to property comprised in Block 244 Plot 2815, it is in the interest of justice that this Application and reliefs sought be granted.
- 3. The Application is also supported by the affidavit deposed by John Jjumba to the effect that he as a relative of the late Emmanuel Jjagwe attended the 'kwanjula', customary marriage ceremony.

- 4. There are also documents in support to wit: a copy of a letter given to the applicant's late husband by her late father acknowledging compliance with all marriage customary norms, a copy of the certificate of title, a copy of the Will of the late Emmanuel Jjagwe, a copy of a letter dated 25th June 2020 from Kabayiza, Kavuma Mugerwa & Ali Advocates to the Respondents, a copy of a letter dated 7th August 2020 from J. L. Oulanyah & Co. Advocates to Counsel for the Applicant, a copy of a letter dated 27th August 2020,.
- 5. On 14/10/2022 when the matter came up Nabisubi Jacinta the 2nd respondent informed court she does not oppose the application so this matter is only opposed by Herbert Jjagwe and Nasejje Olivia both co administrators with Nabisubi Olivia Jacinta;
- 6. Herbert Jjagwe the 1st respondent in his affidavit in opposition of the application states that the applicant is his stepmother; to the best of his knowledge she was never married to the late Emmanuel Jjagwe; he was informed by his aunt that the alleged Kwanjula ceremony referred to by the Applicant never took place; having seen the title the property comprised in Block 244 Plot 2815 Muyenga was registered in his late father's names Emmanuel Jjagwe who left a valid Will stating that the suit property shall be kept and looked after by the Respondents, Robert Jjagwe and Ssebugwawo; the said persons have responsibility to look after the Applicant who will be living in the said property for the rest of her life; the late Emmanuel Jjagwe did not recognise the said property as matrimonial property since he was never married to the Applicant; however he willed some property to her which was dully relinquished;
- 7. The property forms part of the estate of the late Emmanuel Jjagwe in accordance with his Will; the Applicant has not presented any valid proof of her alleged marriage to his late father Emmanuel Jjagwe; the letter presented by the Applicant as evidence of marriage is unknown and its authenticity is doubted so inadmissible and shall be objected to; they intend to cross examine the Applicant and require her to avail the original copy;
- 8. John Jjumba who deposed the additional affidavit in support of the application is not known to the Respondent as a relative but as a friend to the late Emmanuel Jjagwe; he does not mention the name of his alleged maternal grandfather whom he alleges was a brother to the Respondent's grandfather Adulfu Ssebidde Kiwanuka; John Jjumba's name does not appear anywhere in the family tree of the late Emmanuel Jjagwe; the additional affidavit of John Jjumba is full of falsehoods and should be struck off;
- 9. The Application was served out of time prescribed under the law and a preliminary objection will be raised for the same to be dismissed with costs; the Applicant has not set out any justification for the orders prayed for and it is in the interest of justice that the application be dismissed with costs;

The same averments were repeated by Nasejje Olivia Frances the 3rd respondent in her affidavit;

10. Agatha Najjalwambi and Modesta Nabwami deposed affidavits to the effect that they are sisters to the late Emmanuel Jaggwe and the said Jjagwe was never married to the applicant although he produced three children with her; that as sisters they did not know about the alleged introduction yet they would attend and participate in the preparations or at least be informed about the functions all their siblings' marriage functions;

Representation;

11. The Applicant was represented by Counsel Kavuma Terence while the 1st and 3rd Respondents were represented by Counsel Afwoyo Christine.

Both filed written submissions.

The Case:

12. The Applicant was married to the late Emmanuel Jjagwe by customary law; they lived together in their matrimonial home at Muyenga Block 244 plot 2815 (herein called the suit property); when he died in 2013 he left a will and stated that the applicant stays in his home

being looked after by the respondents and others till she dies; the applicant has asked the respondents who are administrators to the estate to transfer the suit property to her which they have declined; the Respondent's conduct in refusing to transfer the said property into the applicant's names contravenes her rights to the said property under the Constitution;

13. The respondents contend that the applicant is not a widow so the property is not matrimonial property and so none of her rights have been infringed;

The respondents never pursued their intention of seeking leave to cross examine the applicant on the letter allegedly written by the applicant's father to her husband; they also abandoned the issue of service.

14. Counsel for the applicant framed the following issues:

- i. Whether the Applicant was married to the late Jjagwe;
 - ii. Whether the suit property is matrimonial property
 - iii. Whether the applicant is entitled to the suit property following the demise of the late Emmanuel Jjagwe
 - iv. Remedies available;
- 15. Counsel for the respondent raised a preliminary objection on the propriety of the application being brought under Article 50 of the Constitution of Uganda, section 4 of the Human Rights (Enforcement) Act 2019, the Judicature (Fundamental and Other Human Rights and Freedoms) Enforcement Procedure) Rules 2019; to enforce a human right which is not within the scope of the instant application;

- 16. He argued that the applicant concedes that the property is registered in the names of the late Jjagwe who did not state that the said property is matrimonial property yet she claims that her right to property has been violated; that the constitution does not provide that on the death of a person the surviving spouse should automatically have property transferred to her or him; the applicant has not demonstrated how her fundamental right has been infringed under Article 50 of the Constitution;
- 17. That the matter does not relate directly to fundamental rights and freedoms guaranteed under the Constitution; counsel cited Abokena Micheal and Anor. Vs Attorney General (MISC. Cause No. 386 of 2018[2019] UGHCCD 188; and Pastor Martin Sempa vs Attorney General HCMA No. 71 of 2002 where court held that it is not enough to assert the existence of a right without the pleadings setting out existence of a right, its breach and the relief

sought; he then argued that the issue of whether the applicant was married to the late Jjagwe could have been raised in an ordinary suit; that as such the application is misconceived and should be dismissed with costs;

- 18. In reply counsel for the applicant contends that the application is properly brought under article 50 of the Constitution in view of the applicant's matrimonial claim to property and her right to own property under article 26 of the Constitution; that section 5 of the Human Rights Enforcement Act bars technicalities of the nature as is raised by the respondents;
- 19. I shall consider whether the application is properly before court; Article 50(1) of the Constitution is here under reproduced:

'Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation'

Section 4 (1) of the Human Rights(Enforcement) Act 2019 provides: '*The High Court shall hear and determine any application relating to the enforcement or violation of - (a) non derogable rights and freedoms guaranteed in article 44 of the Constitution; (b) other rights, duties, declarations and guarantees relating to fundamental and other human rights and freedoms envisaged in article 45 of the Constitution...;'

- 20. *Section 6 (5) provides that no suit instituted under this Act shall be rejected or otherwise dismissed by the competent court merely for failure to comply with any procedure, form or on any technicality;*
- 21. It is the applicant's case that as a widow she has the right to the matrimonial home which right was ignored by her husband when he stated in his will that his home(which, according to the applicant he shared with her) should only continue to be occupied by her and not owned; according to the applicant this is an infringement of her constitutional right; it is contended for the respondents that ownership and transfer are two different things; the suit property was in the names of the deceased so the applicant who is not a widow can not claim any constitutional right over it; it is contended for the respondents that the

determination of whether the applicant is a widow or not could be determined through an ordinary suit and not under article 50 of the constitution;

- 22. Counsel cited cases which were brought in public interest I believe under article 50(2) of the Constitution and were struck out because there was no demonstration of infringement; in the case at hand the applicant in her claim to be a widow claims her home was not left to her but

only offered to occupy till death; she believes her constitutional right to the matrimonial home under article 26 of the Constitution after her 'husband's' demise, has been infringed;

- 23. I find the facts of this case distinguishable from those cited by counsel for the respondent; the demonstration of alleged infringement is in the claim to being a widow; the property being in the deceased's name; it being left not to her yet she has an interest and having unsuccessfully asked that it be transferred into her names; if the matter is brought by way of normal suit then the determination would be on ownership yet as the counsel for the respondent correctly pointed out ownership and transfer are two different things;
- 24. Article 45 of the Constitution provides; *"The rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned"*. It is the view of this court that the applicant seeks determination on whether a 'widow' owns the matrimonial home although it is in the names of her deceased husband but who willed it otherwise; I would find that article 26 is specific to those who are declared owners either by registration, purchase or otherwise; the right of a widow to a home not in her names but in the names of the deceased 'husband willed otherwise would, in my view be rightly investigated under article 50 and article 45 of the Constitution; the rest would, in my view be a detail and as such a technicality; this application is therefore properly before court.

The preliminary objection fails.

Determination of the merits of Application.

Issue No. Whether the applicant was legally married to the late Emmanuel Jjagwe;

- 25. The applicant relied on a letter dated 20/07/1978 showing that the late Jjagwe was introduced to the applicant's parents and the required gifts were received so she was married to the deceased Emmanuel Jjagwe so a widow; this is collaborated by the affidavit deposed by John Jjumba who states that he attended the function; the evidence is contested by the respondents who rely on the affidavits deposed by Modesta Nabwami, Agatha Najjabwami sisters to the deceased who stated that if the introduction had taken place they would have known so there was none;

- 26. In rejoinder the applicant states that she said the Agatha Najjalwambi, Eurelia Namagga and Modesta Nabwami were never invited to the introduction so never attended; that her late husband in his will stated his sisters and the three were never indicated as his sisters; the husband came with Maria Nasseje a biological sister, Mrs Nora Tomusange the wife of the late Emmanuel Jjagwe's brother, Joachim Nkalubo a brother and Batulumaayo Ssebugwawo

both brothers to the late Jjagwe, John Jjumba a relative, and Leo Mukas who was the spokes person; and they brought gifts which were duly accepted by her family thereby confirming that the ceremony constituted a marriage according to the Kiganda culture; to which she - the applicant subscribes;

- 27. It was submitted for the applicant that in the application for Letters of Probate the Applicant was stated as a widow by the executors of Emmanuel Jjagwe's will; so she should be found so having undergone customary marriage in accordance with the Kiganda culture; for the respondents it was submitted that just because the applicant was referred to as a widow by the executors does not make her one; that Emmanuel Jjagwe was an educated man and if he wanted he would have indicated the applicant as a widow, in his will; that John Jumba is not indicated in the clan book as a relative so his evidence that he was a relative of the late Jjagwe should be considered with caution.
- 28. Section 1 of the Customary Marriages(Registration) Act defines a **customary marriage** as a marriage celebrated according to the rites of an African community and one of the parties to which is a member of that community, or any marriage celebrated under Part III of this Act; the applicant claims that she was married under the Kiganda culture; the respondents contest this because the sisters of the deceased did not attend and did not know about the introduction so the marriage could not have taken place; the letter presented by the applicant is not authentic and they shall seek to cross examine her on it; (they never did); the alleged sisters who deposed affidavits in support of the respondents' claim were not stated as sisters in the late Jjagwe's will; the applicant states they were not invited so they could not have attended;
- 29. A look at the late Jjagwe's will shows that his sisters were stated as the late Margaret Nabankema, late Maria Nasseje and late Thereza Nabwami; none of Agatha Najjalwambi, Eurelia Namagga and Modesta Nabwami is mentioned as sisters; I have also not seen evidence that none attendance of a groom's sister at the cultural marriage invalidates a marriage;
- 30. Customary marriage under the Kiganda culture was discussed in *Mifumi va Attorney General Const. Pet. No 12 /2007* as a very private ceremony where a girl introduces or shows to her parents the boy she has chosen to marry and the exchange of intrinsically unique gifts which are merely symbolic as a sine quo non of a marriage; a form of appreciation to the bride's parents/guardians for her nurturing and upbringing;

- 31. There is the caution to which counsel for the respondents invites this court to exercise while considering the evidence of Jjumba John who states he is a relative of the late Emmanuel Jjagwe without stating the names of his ancestors; The 1st respondent in his affidavit at

paragraph 10 refers court to a document attached to the 1st Respondent's affidavit marked 'C' purportedly a clan book'; the author of the document or its authenticity are not proved so court shall not consider it;

- 32. The matter of the relationship John Jumba had with the late Emmanuel Jjagwe- whether a relative or a friend, (the latter is not denied by the respondent) in my view is not key; what is key is whether he knew the late Jjagwe and could have attended the marriage ceremony; I find it probable that as a friend he could have attended; I likewise have no basis to doubt that the applicant's father wrote the letter to the late Emmanuel Jjagwe confirming the marriage.
- 33. The 1st respondent at paragraph 3(a) of his affidavit in reply states and I quote: 'That the Applicant is my step mother and to the best of my knowledge the applicant was never married to the late Emmanuel Jjagwe...'
- 34. The dictionary definition of the term 'step-mother'; is 'a woman who is the wife or partner of one's parent after the divorce or separation of the parents or the death of one's mother'.
- 35. The respondents have not proved that the applicant could not have been married to the late Emmanuel Jjagwe; it is my considered view that where a deceased person leaves out a detail from his/her will, evidence can be brought to show the existence of such a detail; There is also the fact that the executors of the will- Jaberu Bidandi Ssali, Valentine Byansi Mwase, John Matovu, Nicholas Byengoma and Batulumayo Ssebugwawo (also stated at page 8 in the will) while petitioning for probate in Masaka High Court Probate Cause No. 0001 of 2013; stated, among others, 'Regina Jjagwe (widow)';
- 36. It is presumed that the executors having been stated by the deceased in the will knew his affairs, including that the deceased was married and had left widows including Regina Jjagwe the applicant.

In the premises I find that the applicant was legally married to the late Jjagwe. Issue 1 is answered in the affirmative.

Issue 2. Whether the suit property is matrimonial property

37. It was submitted for the applicants that the applicant and the late Jjagwe lived together at the suit property so it is matrimonial property. He cited Herbert Kolya vs Ekiriya Mawemuko Kolya HCCS No. 150/2016 for the proposition that the home where a couple lives irrespective of when it came into existence is matrimonial property; John Kintu Muwanga vs Myliious Gafabusa Kintu Divorce Appeal No. 13/1997 that the property to which each spouse is entitled is that property which the parties choose to call home and which they

contribute to. Counsel argued that the suit property is what the deceased called home so it is matrimonial property;

- 38. That since the late Jjagwe obligated the respondent and others to look after the applicant in that property until her demise it implies that he confirmed what the applicant states at paragraph 3 of her affidavit in support, that she and the deceased lived together at the suit property when the property- home to both of them; that the above is confirmed by the 2nd respondent when she stated at paragraph 3 of her affidavit that she and the 1st respondent were raised together by the late Jjagwe and the applicant at the suit property and that evidence was not rebutted so the respondents are bound by it; Counsel cited Lutaaya Ababaker vs Kanyoro Hassan MA. No. 220/2020;
- 39. In rebuttal counsel for the respondents submitted that the applicant did not contribute anything to the property which is registered in the deceased's name having bought it way before the alleged marriage to the applicant; the deceased clearly stated it to be his home so it is his alone; that the applicant concedes at her paragraph 4 of the affidavit in support that the late Jjagwe left a will stating how his estate should be distributed but did not recognise that it was matrimonial property in which she has vested interest; that according to the case of Beatrice Asire Malinga vs Jonathan Obukunyang Malinga HCT-04 CV-CS 13 of 2013, the wishes of the deceased expressed in a will are paramount and can not be abrogated save for where it is illegal; that the authorities cited by counsel for the applicant are distinguishable and inapplicable because they relate to distribution of property during divorce proceedings; He submitted that the suit property is not matrimonial property;
- 40. I have considered the submissions of counsel and the authorities provided; it is not contested that the suit property was registered in the deceased's names on 24 th March 1976; it is also not contested that it was the home of the deceased in Kampala; and that he willed that the 1 st Applicant, Robert Jjagwe, Jacinta Nabisu and Victor Sebugwawo take care of the house; and they take care of their mother as she stays in the house till she dies; the facts show that the said mother is the applicant;
- 41. The said mother now wants the house transferred into her names because she is the widow of the late Jjagwe; I agree with counsel for the respondent that most of the case law cited by the applicant applies to distribution of property on divorce except the Kolya case(supra).

- 42. The principles discussed in Tom Kintu Muwanga case (supra) (supra) apply to distribution of property by a divorcing couple. Distribution of property when one spouse has died is governed by the Succession Act;
- 43. Since the applicant was married to the deceased her rights to the matrimonial home did not change simply because her husband died; while the case law cited by counsel for the applicants applies to when the couples are divorcing; the definition of matrimonial home/ property should not in my view be discriminatory against the surviving spouse in case of death; Article 21 of the Constitution provides: (1) *'All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law. (2) Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.'* (highlighted for emphasis); a widow/ widower is socially so recognised. In fact in some cultures a widow is referred to as widow so and so. The social status has changed from married to widowed; one therefore should not be discriminated against on account of having lost a spouse to the extent that even her/ his established rights to the marital home shift.
- 44. Matrimonial property is where the couple choose to call home and to which they have both contributed (see John Kintu Muwanga supra); that the deceased and the applicant lived together in the suit property is not disputed; The applicant got married to the late Jjagwe in 1978 but he had acquired the property in 1976 two years before; he died in 2013; as was held in Basheijja vs Basheija & Anor. D. C No. 12/2005(2013); irrespective of when the property was acquired if the couple calls it home then it is matrimonial property; The suit property is therefore matrimonial property; I shall consider the degree of contribution (if any) to determine issue 3.

Issue 2 is answered in the affirmative.

45. Issue 3. **Whether the applicant is entitled to the suit property following the demise of the late Emmanuel Jjagwe.**

Counsel for the applicant cited section 36(2) of the Succession (amendment) Act which provides that a spouse may during the subsistence of a marriage hold property in his or her name and may by will, dispose of such property."; section 36(6) provides that: 'notwithstanding subsection (2), where a person making a will is married or has children, the residential holding normally occupied by that person as a principal residence or owned by him or her as a principal residential holding or any other residential holding possessed by that person, including the chattels therein, shall not form part of the property to be disposed of in the will and shall be held by his or her personal representative upon trust for his or her spouses and lineal descendants subject to the rights of occupation and terms and conditions set out in the Second Schedule to this Act.

46. Paragraph 1(1) of the third schedule(as amended) provides that *"... the following categories of persons, who were normally resident in the residential holding shall be entitled to occupy it- (a) the spouse of the intestate person till she remarries or mismanages the estate or leaves the estate; (b) a minor child of the intestate person, and where the child attains eighteen years of age, he or she shall be eligible under paragraphs (c), as may be applicable; (c) a lineal descendant who is above eighteen years of age, who is undertaking studies till he or she turns 25 years; and (d) a lineal descendant who is, by reason of mental or physical disability, incapable of maintaining himself or herself, upon the cessation of the disability, whichever comes first."*
47. The intention of section 36(2) and 36(6) is in my view to ensure that the surviving spouse, the lineal descendants who are minors, or disabled or are still pursuing education are not thrown out of the home; once the lineal descendants are no longer minors and the disabled are no longer disabled then they can leave the home to the widow to occupy till death except if she remarries or voluntarily leaves the principal residence or missuses it and puts it in disrepute; the property in this case is matrimonial property; there are no lineal descendants who are vulnerable at the risk of having nowhere to go;
48. Having found that the suit property is matrimonial property it is important to determine whether it can also be termed residential holding to qualify under section 36 of the Succession Amendment Act; since a matrimonial home is a joint venture it can not be handled as if it only belonged to the deceased spouse; Counsel for the respondent argues that the case of Herbert Kolya vs Ekiriya Mawemuko Kolya HCCS 150/2016 where court decided that the matrimonial property passed on to the widow upon the death of her husband, is not applicable because the widow in that case had contributed to the construction of the house;
49. Each spouse's contribution towards matrimonial property has been recognised by courts as direct(monetary) or indirect(non monetary); see Rwabinumi vs Bahimbisoomwe SCCA No.10/2009;it can vary from taking care of the home, and children or nursing sick relatives while the other spouse is earning money for the construction of the home; in Ambayo v Aserua (Civil Appeal 100 of 2015) [2022] UGCA 272 (15 November 2022), court stated that spousal contribution is a question of fact;
50. I have not seen any pleading or evidence by the applicant showing her contribution, monetary or otherwise; it is therefor not possible to determine how much she contributed; I would therefore agree with counsel for the respondents that this case is distinguishable from Ekriya Mawemuko Kolya(supra); only to the extent that in that case the widow's contribution could be established; the principle however is the same.
51. Having stated as above however, the respondents did not dispute the fact that the 1st and 2nd respondent were raised together by the applicant; the 1st respondent referred to her as his step mother; the deceased in his will stated that the applicant lives in the house till death

and referred to her as the mother of the 1st respondent, Robert Jjagwe, Jacinta Nabisubi and Victor Ssebugwawo; and the mother of his children his children of Muyenga; she is deemed to have contributed to the matrimonial home by raising the children, running the homestead, ensuring that the husband now deceased comfortably went out to work in order to build the home; the evidence shows that the title was transferred into the deceased's name 1976 and he got married to the applicant in 1978 and it is not stated that by the death of Mr. Jjagwe she had left the home; if she had, he would not have willed in 2010 that she stays in the home till death; the contribution towards the home although not necessarily 50% can not be ignored.

52. The deceased willed that the applicant stays in the house till she dies; the same is deemed to have been his entitlement to the home; on top of her entitlement therefore the interest of justice would call for this court to hold that the applicant is entitled to the matrimonial home following the death of her husband who relinquished his rights to her. Counsel for the applicant submitted that children of the late Jjagwe are all above 45 years of age with their own homes; this is not substantiated, but clearly the children stated in the will with responsibility to look after the home and the respondent are all adults; a deceased spouse has no right to will the matrimonial property in disregard to the surviving spouse's rights to the matrimonial home.

Issue 3 is also answered in the affirmative.

53. In summary the applicant was married to the late Jjagwe Emmanuel; the property comprised in Block 244 plot 2815 land at Muyenga is matrimonial property; I find that it is discriminatory and unconstitutional to treat surviving spouses as if the equal rights accorded to man and woman on marriage, during marriage and at its dissolution cease when the marriage ceases on account of death; allowing a testator spouse to treat a matrimonial home as if it is solely his or hers in total disregard to the surviving spouse's rights is contrary to article 31(1), article 21(1) and (2) and article 26 of the Constitution;
54. It was illegal for the late Emmanuel Jjagwe to treat the matrimonial property comprised in Block 244 Plot 2815 land at Muyenga/Kisugu, as if it was simply his residential holding whereas not; Counsel for the respondent cited section 36(2) of the Succession Amendment Act and argued that the suit property is not subject of distribution since it is a residential holding in the names of the deceased; I do not agree; the deceased was married and was living with the applicant in the suit property which is a matrimonial home;
55. I have not found evidence that the suit property could be described as a family home where all the children of the deceased used to gather; in fact the will states the family home to be

in Bweyo; there is no evidence that there are lineal descendants entitled to occupancy pursuant to section 36(2) and the 3rd schedule to the Succession (Amendment) Act; in the result it is in the interest of justice that the applicant's share to the matrimonial property added onto the deceased's share which he bequeathed to her in form of lifetime occupancy entitles her to the suit property.

The application succeeds and it is ordered and declared as follows:

- i. The applicant was married to the late Emmanuel Jjagwe under customary law;
- ii. The property comprised in Block 244 Plot 2815 Muyenga is matrimonial property.
- iii. The Applicant having been married to the late Emmanuel Jjagwe is entitled to property comprised in Block 244 Plot 2815 Muyenga following the demise of her husband, the late Emmanuel Jjagwe.
- iv. The Respondents are directed to transfer property comprised in Block 244 Plot 2815 Muyenga into the names of the Applicant within 45 days from this judgment;
- v. The estate of the late Emmanuel Jjagwe shall bear the costs of this application.

Ketrah Kitariisibwa Katunguka

Judge

21/01/2023

Delivered by email to: tkavuma@kma.co.ug, afwoyo@gmail.com, colefayid@gmail.com

A party not satisfied with this judgment may apply to the Court of Appeal of Uganda within 14 days from date of this judgment.

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