

UGANDA / JUDGMENT

Okurut Emmanuel v Katooko Dinah (Civil Appeal No. 87 of 2016) [2019] UGHC 100 (12 April 2019) [2019] UGHC 100

COURT

High Court of Uganda

BEFORE

Okalany, J

CASE / FILE NUMBER

Civil Appeal No. 87 of 2016

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA OF MBALE

HOLDEN AT MBALE

CIVIL APPEAL NO. 87 OF 2016

(ARISING FROM CIVIL SUIT NO. 32 OF 2013)

OKURUT EMMANUEL :: APPELLANT

VERSUS

KATOOKO DINAH :: RESPONDENT

BEFORE: HON JUSTICE SUSAN OKALANY

JUDGMENT

INTRODUCTION

1. This is an appeal from the judgment of His Worship Paul Kedi delivered on 14th September 2016.
2. The background of this case is that the Respondent sued the Appellant for recovery of land measuring approximately three acres situate at Omesura village, Boliso Parish, Kamuge sub-county, Pallisa District.

According to the lower court record, Katooko Dinah (Respondent) was married to Francis Emuron Adengel. In 1997, she and her husband bought land measuring 3 acres from a one Okurut Alex. They built a matrimonial home on the said land and also cultivated it. In 2001, Adengel married another wife by the names of Achola Eruta who also lived on the same land. In 2008, the Respondent's husband developed a mental illness and started moving from place to place. The Respondent had a misunderstanding with the said husband in 2010. She left her husband's home and went to her parents' home. The Appellant in 2010 purchased the suit land from the late Adengel Francis without the knowledge or consent of the Respondent. According to Achola the Respondent's co-wife, she was forced to sign the sale agreement. The said agreement was also signed by children below the ages of 18 years. Adengel later died in Serere-Mpnigire landing site in 2013. When the Respondent took the body home for burial, the Appellant became hostile towards her claiming that he had bought the suit land including the Respondent's home. She sued the Appellant and prayed for a declaration that the sale between her late husband Adengel Francis and the Appellant was a nullity and a permanent injunction, general damages, an order of eviction as well as costs of the suit.

Okurut Emmanuel (Defendant/Appellant) on the hand stated in his Written Statement of Defence that he bought the suit land from the late Adengel. According to him, the respondent was not a party to the said transaction because she had divorced with the late. This is why the co-wife Achola signed the said sale agreement. He also stated that the late was never mentally ill.

1. The judgment was passed in favour of the Respondent hence this appeal.
2. The Grounds of Appeal are that:
3. The learned Trial Magistrate erred in law and fact when he failed to judiciously scrutinize, evaluate and appraise the evidence before him and as a result reached a wrong conclusion;
4. The learned Trial Magistrate erred in law and fact when he formed an unbalanced view of the case by accepting the respondent's case without giving sound reasons; and
5. The decision of the Trial Magistrate is tainted with fundamental misdirection and non-direction in law and fact, as a result has led to a miscarriage of justice.

REPRESENTATION

1. The Appellant was represented by Mr. Dennis Mugoda while the respondent was represented by Mr. Emmanuel Ochieng.

SUBMISSIONS OF COUNSEL

1. Counsel for the Appellant argued grounds 1 and 2 together and ground 3 independently. The Respondent on the other hand argued all grounds independently.

Arguments for the Appellant

Grounds 1 and 2

1. Mr. Mugoda faulted the Trial Magistrate for holding that the Respondent was still married to Adengel at the time of the sale of the land and that Adengel ought to have sought her consent at the time of the sale since they were merely separated but not divorced. He submitted that the Appellant clearly testified during trial that at the time of the said sale, the late Adengel only had one wife (Achola Esther) who was present during the sale and even signed the sale agreement. The Respondent was not present during the sale because she had separated from him and he did not know her whereabouts. This evidence was corroborated by that of the defence witnesses who testified to the same effect.
2. Counsel also faulted the trial court for holding that the consent of the first wife was mandatory and that of the second wife was invalid since she was married later and therefore had no locus to consent. He submitted that it is the second wife's consent that was required being the only spouse at the time of the sale and she was the one deriving sustenance from the suit land. According to Counsel, the first wife has no claim on the suit land because she was neither residing on it nor deriving sustenance from it at the time of the sale for it to be declared family land.
3. Citing section 30 (1) of the Succession Act, Mr. Mugoda submitted that the respondent cannot be seen to claim interest as a beneficiary of the estate of the late Adengel because she was separated at the time of his death.
4. Counsel further submitted that the trial court formed an unbalanced view of the case since it only considered the evidence of the respondent and ignored that of DW1- Achola Esther who was co-wife of the respondent. That the Trial Court also did not evaluate the evidence of appellant and his witnesses hence causing a miscarriage of justice.
5. Additionally, Counsel submitted that there was no evidence led to prove that the late Adengel was mentally sick for the Trial Magistrate to conclude at page 3 of his judgment that the late Adengel was not understanding the effects of the sale of the suit land. He faulted the Trial Magistrate for basing on the same to nullify the sale transaction. Further, he contended that there is also no evidence on record to prove that actually the Respondent was legally married to the late Adengel in any form of marriage apart from a mere allegation by the Respondent in her evidence in the lower court.

Ground 3

1. On this ground, Mr. Mugoda submitted that a miscarriage of justice was occasioned to the Appellant when the Trial Court nullified the sale transaction between the Appellant and the late Adengel on unfounded and unproved reasons. Further, he stated that by upholding a marriage which was not proved, decreeing the suit land to the Respondent and allowing her to benefit from the estate of the late Adengel whom she had been separated from at the time of his death, the learned Trial Magistrate occasioned a miscarriage of justice.

Arguments for the Respondent

Ground 1

1. Mr. Ochieng on the other hand submitted that the Trial Court rightfully exercised its duty in scrutinizing evidence and held that the sale agreement was between the Appellant and the late husband Adengel was invalid for lack of spousal consent. This is evidence from page 3 paragraph 2 of the judgment where the trial court quoted the Respondent's averments that she got married to the late Adengel in 1992 and that they bought the suit land, built a house where they stayed together with their seven children and she had not consented to the sale of the said suit land.
2. Further, counsel submitted that it was also observed during trial that DW1-Achola Esther and the children of the Respondent were ineligible to validate a sale of family land. DW1 was also held not to be the wife or the late Adengel. That in reaching his decision, the Trial Court addressed its mind to the sections 38 and 39 of the Land Act (as amended).
3. It was also submitted for the Respondent left her home upon having marital misunderstandings with her husband the late Adengel but did not dissolve their marriage. This was corroborated by DW1-Achola Esther who testified to the same effect.

Ground 2

1. In respect of this ground, Counsel submitted that the Trial Court had the discretion to listen to all witnesses produced by the parties but rely on evidence adduced in proving either's case before arriving at an appropriate decision. That it cannot therefore be faulted for relying on the specific witnesses in determining the suit. Citing different paragraphs of the judgment, counsel submitted that the Trial Court throughout its judgment gave reasons for its decision. That this is reason enough to justify the judgment read by the court.
2. Counsel also submitted that in the absence of evidence to prove the contrary, the Respondent proved on a balance of probabilities that she was married to the late Adengel and this was not challenged during trial.

Ground 3

1. Mr. Ochieng submitted that the trial court directed itself on the provisions of the Land Act as amended specifically relating to spousal security of occupancy and spousal consent to validate sale, mortgage or lease of family land. That it also took into consideration the sale agreement which was exhibited in Court and the fact that the respondent and the late Adengel were only separated due to marital misunderstandings at the time of the sale. It also relied on the evidence of DW1 which corroborated that of the respondent. That the children of the deceased were minors and were found incapable of understanding what it meant to transfer family property.

2. He concluded that the Trial Magistrate rightfully arrived at the decision he made upon scrutiny and evaluation of the evidence adduced by both parties and what he found when he visited locus.

DETERMINATION

1. I have considered both counsel's submissions as well as the record of proceedings and the judgment. I shall adopt the method used by the counsel for the Appellant in discussing the grounds of appeal.

GROUNDS 1 & 2:

1. The Learned trial magistrate erred in law and fact when he failed to judiciously scrutinize, evaluate and appraise the evidence before him and as a result reached a wrong conclusion;

2. The Learned trial magistrate erred in law and fact when he formed an unbalanced view of the case by accepting the respondent's case without giving sound reasons;

1. Regarding the contention by Mr. Mugoda that there was no legal marriage between the respondent and the late Adengel, section 103 of the Evidence Act provides that the burden of proof of any particular fact lies on the person who wants to believe its existence. The standard of proof is on the balance of probabilities. In Uganda, there are five recognized types of marriages. These are: Customary marriages, Civil marriages, Church marriages, Mohammedan marriages and Hindu marriages. Evidence of existence of any of these marriages is a marriage certificate. The law requires registration of all marriages with the Registrar of marriages.

2. The Respondent during cross examination on page 6 line 4 of the lower court record stated:

"I was married to Adengel and dowry was paid, 2 head of cattle, some money and other things paid. That was in 1994."

1. This testimony points to existence of a valid customary marriage. According to section 75 of the Evidence Act and sections 6 and 7 of the Customary Marriage (Registration) Act, customary marriage can be proved by tendering a Marriage Certificate. However, in the absence of a marriage certificate, then the customs and the law of the tribe will take force. This was reechoed in the case of ***Haji Musa Kigongo versus Olive Kigongo Civil Suit No. 295 of 2015****. The facts of this case are that the parties lived together for 26 years and had two children. They lived together in the suit property which was their residential home since about 1992 until when Mr. Kigongo withdrew from the home citing irreconcilable differences. Mrs. Kigongo stayed in occupation of the suit property which she referred to as her matrimonial home having celebrated a customary marriage between the two in 1992 at her parent's home in Mbarara. The plaintiff denied ever marrying her and sought for her eviction from the suit property. According to him, they were only cohabiting he having merely invited her to stay with him and they never agreed to co-own the house. One of the issue for resolution was whether or not there was a legal marriage between Mr. Kigongo and

Mrs. Kigongo. In resolving this issue, Honourable Justice Godfrey Namundi stated that if there is no marriage certificate to prove the existence of customary marriage, the customs and laws of a given tribe will be used to prove the existence of the said marriage.

“If there is no marriage certificate by proof of a marriage ceremony according to the customs and laws of a given tribe or evidence that according to the customs and laws of a given tribe.”

1. In the case before this court, the respondent did not adduce evidence to prove that there was a legal marriage between her and the late Adengel. However, it is trite law that payment of bride price validates a customary marriage and from the above testimony, bride price was paid in respect of respondent. No evidence was adduced to refute the fact that the Respondent was married to the late Adengel or prove that there wasn't an existing marriage between the Respondent and the late Adengel by the appellant or witnesses. All witnesses continuously acknowledged the Respondent as the first wife to the late Adengel. It is therefore my finding that there was a valid marriage between the Respondent and the late Adengel.
2. Regarding whether the consent of the respondent (who was separated with the late Adengel at the time of the transaction between Adengel and the Appellant) was necessary, from the evidence of both the Appellant and Respondent's witnesses and the respondent herself, the Respondent left her husband's house in 2010 for her parents' house upon having marital understandings with the deceased husband. On 14th October of the same year, the late Adengel allegedly sold the suit land to the Appellant who took possession of the same. There has been no evidence adduced that to show that the said marriage was dissolved. All the witnesses have said is that there was a misunderstanding between the two and the Respondent moved back to her parent's home. In my view, separation does not necessarily mean that the marriage is dissolved.
3. This now leaves for determination, the question as to whether her consent was required. It is not disputed that the Respondent and her husband bought the suit land in 1997, built their matrimonial home on it and also cultivated on it. This means that the said land was family land within the definition of section 38A (b) of the Land Act as amended. The late Adengel therefore ought to have sought the Respondent's consent before selling it as provided for under section 39 (1) (a) of the Land Act as amended.
4. I will now address Mr. Mugoda's submission that the Respondent cannot be seen to claim interest as a beneficiary of the estate of the late Adengel because she was separated at the time of his death as per section 30 (1) of the Succession Act. Section 30 (1) of the Succession Act provides that

“No wife or husband of an intestate shall take any interest in the estate of an interest if, at death of the intestate, he or she was separated from the intestate as a member of the same household.”

1. In the case of ***Elizabeth Nalumansi Wamala versus Jolly Kasande and 2 others Civil Appeal No. 010 of 2015***, the appellant (Nalumansi) and the deceased got married in the United Kingdom in 1992 and obtained a marriage certificate. The couple begot one child but subsequently the man returned to Uganda while the Appellant remained in the U. K. In 1999, the deceased entered into a “customary marriage” with the 1st Respondent (Jolly Kasande) and four children were born to the couple. The couple settled in Muyenga - an affluent suburb of Kampala. Following a brief return of the appellant to Uganda in 2010, the deceased and the appellant renewed their marriage vows at Namirembe Cathedral and were issued with a marriage certificate. Thereafter, the appellant went back to the UK and only returned after the death of the deceased. The appellant petitioned for Letters of Administration of the estate of the deceased on 13th March, 2012. However, the 1st respondent, the 2nd respondent (daughter of the deceased) and the 3rd respondent (brother of the deceased) jointly lodged caveats against the petition alleging that the appellant was not the right person to apply for the grant of Letters of Administration. On 1st June 2012, the appellant instituted a suit against the respondents for orders that the caveats lodged by the respondents be removed and Letters of Administration be granted to her as the widow. One of the issues for determination was whether the appellant was eligible to get letters of administration having not been a member of the same household with the deceased at the time of his death.

While interpreting section 30 (1) of the Succession Act, Hon Justice Faith Mwendah in her dissenting judgment opined that:

“As highlighted herein above, section 30 of the Succession Act apparently negates a surviving spouse's interest in the deceased's property and this is inconsistent with Article 31 (I) of the Constitution. I would therefore construe it in such a manner and declare it null and void.”

1. I am persuaded by reasoning that the said section negates the contribution of a spouse to the properties acquired during marriage. Further, it is trite law that at the termination of marriage, a spouse is entitled, to the extent of his or her contribution, to a share in the property ***(**See Julius Rwabinumi Vs Hope Bahimbisomwe Civil Appeal No.10 of 2009**)***. In the facts of this case, the appellant during examination in chief on page 4 paragraph 3 line 1 states that she bought the suit land with her husband in 1997. She further confirmed the purchase of the suit land on page 6 line 2 during cross examination. This fact is not disputed by anyone. This evidence was also corroborated by the evidence of PW2 (Emesu John Peter), the LC1 chairman on page 7 paragraph 2 line 2 of the lower court proceedings who testified that he met the respondent and her deceased husband in 1997 when they went to his village looking for land to settle on. It is therefore my opinion that the appellant in this case is entitled to the suit land as to the extent of her contribution to the suit land.

2. The other issue for this court to address is whether there was a valid sale agreement between the appellant and the late Adengel. According to the evidence of the Appellant and that of his witnesses, the appellant bought the suit land from the late Adengel. A sale agreement in that respect was adduced during trial and it was admitted in evidence by the trial court. This means that there was a contract between them. Section 10 (1) of the Contracts Act provides that:

“A contract is an agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound.”

1. A person is considered to have the capacity to contract if the person is eighteen years and above, is of sound mind and is not disqualified from contracting by any law to which he or she is subject *(See: Section 11 (1) of the Contracts Act)*.
2. On perusal of the lower court record, it is established the land sale agreement marked PEX II among others was signed by Achola Esther (the second wife) and the sons Adengel Timothy and Otuke Joseph. In page 13, last paragraph of the lower court record, Adengel Timothy aged 13 years and Otuke Joseph aged 10 years denied signing the sale agreement. At this point, the burden of proof shifted to the Appellant to prove that the children actually signed the said agreement. He did not do so. Even if they had agreed to sign the said sale agreement, they did not have capacity to contract since they were below eighteen years of age. I therefore agree with the finding of the trial court on page 3 of the judgment, in the last paragraph where it was stated that:

“Minors could not in any way have understood what they were signing, witnessing or the effect of appending their signatures to the said sale which implied total transfer of their family property.”

1. DW1- Achola Esther testified as recorded at page 14 line 4 of the record that she was legally married to the late Adengel. She testified further that the late Adengel paid her dowry which included two cows, two goats and an amount of money she did not recall. Considering that the late Adengel had earlier on contracted a customary marriage that is potentially polygamous, there is no doubt that she was validly married to him. This evidence was not contested.
2. She however also testified court at page 15 paragraph 2 of the lower court record that she was forced to consent the said sale. She stated that:

“I was staying on the suit land with him. I did not allow him sell off the land. I tried to resist but he over powered me. He forced me to sign on the agreement.”

1. This means that she entered into the land sale contract due to undue influence or coercion. That contract is void ab-initio. Under section 14 (1) of the Contracts Act:

“A contract is induced by undue influence where the relationship subsisting between the parties to a contract is such that one of the parties is in a position to dominate the will of the other party and uses that position to obtain unfair advantage over the other”

1. Further, section 14 (2) (a) of the Contracts Act, a party is taken to be in a position to dominate the will of the other if the party holds a real or apparent authority over the other party. In the given circumstances, the late Adengel was the husband and clearly had real authority over Achola's will in respect of the sale of the suit land. This evidence was not rebutted by anyone. In my view, the said sale null and void.
2. It is true as submitted by Mr. Mugoda that there was no medical evidence produced to prove the late Adengel's state of mind by the appellant. The Respondent in her plaint stated that her husband had a mental illness in 2008 and used to move from place to place. During the trial, the appellant made no mention of the fact that her husband was mentally ill. However, on page 5, paragraph 3 and line 7 of the lower court record, the Respondent stated that her husband was suffering from Aids so he was not in the proper state of mind. This was corroborated by PW5- Okello John Robert who made mention of the fact that the late Adengel was of unsound mind. The trial court relied on the same evidence to nullify the contract.
3. In view of the above, it is my holding that the learned Trial Magistrate judiciously scrutinized, evaluated and appraised the evidence before him and as a result reached a right conclusion that the Respondent's consent was needed and that the sale agreement was null and void. He also gave sound reason for his judgment. Ground 1 and two hereby fail.

GROUND THREE*: *The proceedings, judgment and decision of the trial magistrate is tainted with fundamental misdirection and non-direction in law and fact, as a result has led to a miscarriage of justice.

1. A decision is said to have occasioned a miscarriage of justice if there has been misdirection by the trial court on matters of fact and law relating to the evidence tendered as where there has been unfairness in conduct of the trial court resulting to an error being made. *(****Handoli Daniel vs Yolamu Engangi CACA No. 67* and *Matayo Okumu vs Fransiko Amaudhe and 2 others [1979] HCB 229****)*.
2. In the instant case, the Trial Court rightly found that the marriage between the Respondent and the late Adengel was still in existence at the time of the said sale of land. A mere separation does not necessarily mean that the marriage is dissolved. The Trial Court properly directed itself on the law on matrimonial property and found that the Respondent's consent ought to have been sought before her late husband sold the suit land to the Appellant. It also properly directed itself on the law governing contracts and found that the said sale agreement was null void because of the reasons discussed above. The Respondent ably discharged her burden of proof. This ground of appeal also fails.

3. Consequently, this Appeal is dismissed and the orders of the lower court are upheld. Each party shall bear its costs of the appeal.

I so order.

Susan Okalany

JUDGE

12/04/2019

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