

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

FAMILY DIVISION

DIVORCE CAUSE NO. 22 OF 2011

CHRIS BAKIZA.....CROSS

PETITIONER/RESPONDENT

VERSUS

ESTHER NAFUNA

Alias ESTHER JOGIANA

Alias ESTHER DOMBODO.....CROSS

RESPONDENT/PETITIONER

BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

JUDGMENT

This is a cross petition for divorce filed by the cross petitioner against the cross respondent for a decree for dissolution of the marriage, an order for the cross respondent to make an accountability for the family property in Uganda and the United Kingdom, an order for striking off the names of Esther Bakiza from the leasehold register volume 1774 folio 25 plot 5 Semawata Road Ntinda, costs of the petition and such further and other reliefs court may deem fit.

The background is that the cross petitioner was married to the cross respondent on 09/07/1988 at All Saints Cathedral Kampala Uganda. The marriage was dissolved in a consent judgement of 20/08/2012. In the same consent judgement, the parties agreed to place the issue of distribution of the matrimonial home at Plot 5 Semawata Road Ntinda before an Arbitrator. The cross respondent's claim was dismissed with costs due to her failure or neglect to comply with the

terms and conditions of the Arbitrator. The Arbitrator did not determine the substantive issue of the distribution of the matrimonial home which made the cross petitioner to resort to this court.

The case was initially dismissed by this court when both parties and their counsel failed to turn up at the hearing scheduled for 05/05/2015 despite being served. However the cross petitioner later turned up in court and successfully applied for reinstatement of the cross petition. The court also granted the cross petitioner's prayer to amend the pleadings to reflect the names currently used by the cross respondent and the children, and to proceed *ex parte* on the amended cross petition.

The law, however, is that whether a suit proceeds *ex parte* or not, the burden on the part of the plaintiff to prove the case to the required standards remains, as was held in **Yoswa Kityo V Eriya Kaddu [1982] HCB 58**. The cross petitioner filed sworn witness statements and his Counsel filed written submissions within time schedules set by this Court.

The cross petitioner's case is that he purchased the matrimonial home located at Plot 5 Semawata Road, Ntinda, comprised in leasehold register volume 1774 folio 25 from a one Francis Kakumba before he got married to the cross respondent. The property was later registered in the joint names of the cross petitioner and the cross respondent after the two were married. The cross petitioner states on oath that the cross respondent borrowed a mortgage loan using the matrimonial home as security. She later relocated to England, changed her names, and cut off her known phone numbers. That the cross petitioner had to eventually redeem the matrimonial home by himself.

The issues to be determined are:-

- 1. Who is entitled to the matrimonial home comprised at plot 5 Semawata Road, Ntinda comprised in Leasehold Register Volume 1774 Folio 25?**
- 2. What other remedies is the cross petitioner entitled to?**

Issue 1: Who is entitled to the matrimonial home comprised at plot 5 Semawata Road, Ntinda comprised in Leasehold Register Volume 1774 Folio 25?

In **Julius Rwabinumi V Bahimbisomwe SCCA No. 10/2009** the Supreme Court adopted the holding by Bbossa J, as she then was, in **Muwanga V Kintu High Court Divorce Appeal No.**

135/1997, that “*matrimonial property is understood differently by different people. There is always property which the couple chooses to call home. There may be property which may be acquired separately by each spouse before or after marriage. Then there is property which a husband may hold in trust for the clan. Each of these should, in my view, be considered differently. **The property to which each spouse should be entitled is that property which the parties choose to call home and which they jointly contribute to.***” (emphasis mine)

In the same case, the Supreme Court went on to hold, *inter alia*, that the court should determine the ownership or sharing of property in issue basing itself on the Constitution of Uganda, the applicable marriage and divorce laws in force as to whether such property should be divided either in equal shares or otherwise as the facts of each case would dictate.

The cross petitioner’s evidence is that by the time he wedded the cross respondent he had already acquired the matrimonial home, having purchased it from a one Francis Kakumba; and that the property was registered in their joint names after he wedded the cross respondent. He states on oath that in 2000 the cross respondent registered a business name Lady Cecilia Enterprises using false names of Esther Nafuna instead of Esther Bakiza; that she later registered a business company called Lady Cecilia (U) Ltd where the cross petitioner was neither director nor promoter; and that she borrowed Uganda Shillings 40,000,000/= (forty million) from Bank of Baroda using the land title of the matrimonial home as collateral security purportedly for investment in her business. It is the cross petitioner’s evidence that upon obtaining the loan, the cross respondent went back to the United Kingdom, changed her telephone contacts and physical address cutting off communication between herself and the cross respondent.

There is evidence that the cross petitioner at one time wrote to the cross respondent explaining that the matrimonial property was up for sale due to the unpaid overdraft loan of over Uganda Shillings 50,000,000/= (fifty million) in debt but she did not respond. That in the meantime the cross respondent changed her names to Esther Georgiana and decided to settle in the United Kingdom. The cross petitioner was left with no option but to redeem the matrimonial home by settling the outstanding loan facility himself. In 2011 petitioner/cross respondent filed a divorce petition against the respondent/cross petitioner where the main claim was the distribution of the matrimonial property.

The cross petitioner contends that the cross respondent came to court in bad faith with tainted hands seeking to take advantage of her own wrong doing, and that, having redeemed the property which is his current home with his other children, the cross respondent should not claim legitimate interest to it, and that the names of Esther Bakiza should be struck off the leasehold register. In his written submissions, learned counsel John Mary Mugisha reiterated the cross petitioner's prayers. He cited various authorities and argued that the cross respondent who had committed illegalities and frauds on the matrimonial property has not come to equity with clean hands and should not be allowed to benefit from her own wrong.

In the instant case, in line with the above case decision definitions of matrimonial property, it is not in dispute that the property at Plot 5 Semawata Road, Ntinda, comprised in leasehold register volume 1774 folio 25, was the matrimonial home for the cross petitioner and the cross respondent. The issue at stake however, is on who is entitled to the matrimonial home.

The cross petitioner adduced evidence on oath that he purchased the property from a Francis Kakumba. There is a purchase agreement, Annexure **E** to the cross petitioner's sworn witness statement, showing that the cross petitioner purchased land comprised in Leasehold Register Volume 1537 Folio 18 known as Plot No. 5 Semawata Road, Ntinda Kampala District from Francis Kakumba on 22nd February 1987. The certificate of title to the land, annexed as **D** to the cross petitioner's witness statement, shows that leasehold land comprised in leasehold register Volume 1774 Folio 25, described as land comprised in Plot No. 5 Semawata Road, Kampala, was registered in the joint names of the cross petitioner and the cross respondent.

There is nothing on record, or in the adduced evidence, or in the submissions of Counsel to indicate whether the land comprised in Leasehold Register Volume 1537 Folio 18 known as Plot No. 5 Semawata Road, Ntinda Kampala District, which was purchased by the cross petitioner as per **Annexure E**, has a nexus with, or is the same as that comprised in leasehold register Volume 1774 Folio 25, also situate at Plot 5 Semawata Road, Kampala. So this court could not make a finding as to whether or not it is the same land, though it is clear that both are situate on Plot No. 5 Semawata Road.

Nonetheless, the pleadings and the adduced evidence reveal that the property at Plot 5 Semawata Road, Ntinda, comprised in leasehold register volume 1774 folio 25, was the matrimonial home

for the cross petitioner and the cross respondent. Annexure **D** shows that the two parties were registered on the said property as tenants in common in equal shares on 30/08/1989, vide Instrument 240975. The cross petitioner states that this was done after the two had got married. This, on the face of the record, would suggest that the two held equal shares on the property, in which case each would claim legitimate interest in the property.

The cross petitioner adduced evidence, however, as revealed by annexure **F3**, that the cross respondent later put up the matrimonial home as security to secure overdraft facilities for 35,000,000/= (thirty five million) and demand loan of 4,300,000/= (four million three hundred thousand) from Bank of Baroda. She got the loan through her company Lady Cecilia (U) Ltd basing on a resolution signed by herself as Chairman/Managing Director, together with Elizabeth Namuhenge as Director, and Maureen Amooti as Secretary. Annexure **F2** shows that Lady Cecilia (U) Ltd was incorporated as a company with limited liability on 6/1/2000.

The cross petitioner also adduced evidence that the cross respondent had no intentions to pay back the mortgage loan. It is his sworn evidence that on obtaining the loan, the cross petitioner went back to the United Kingdom, changed her known telephone contact and physical address and cut off the cross petitioner from further communication. There is evidence on record, in form of annexures **G1** and **G2** that Bank of Baroda resorted to demanding the cross petitioner through their lawyers for payment of the loan after failing to get response from the cross respondent. Annexure **I** shows that the cross petitioner wrote to the cross respondent a letter dated 4th May 2001, which he sent by registered mail on 7th May 2001 to her last known address, informing her that the matrimonial property was up for sale following her failure to repay the loan. It is the cross petitioner's evidence that the cross respondent did not respond; that in the meantime she changed her names from Esther Nafuna Bakiza to Esther Jogiana; and that the cross petitioner eventually paid the debt himself, as shown by annexures **J** and **M** to his sworn witness statement.

The evidence adduced by the cross respondent is not denied or rebutted by the cross respondent. In **Habre International Co Ltd V Ebrahim Alakaria Kassam & Others SCCA 4/1999** the Supreme Court held that whenever an opponent has declined to avail himself of the opportunity to put his essential and material case, in cross examination, it must follow that he believed that

the testimony given could not be disputed at all. The petitioner's case has been subsequently proved before me to the required standard by the cross petitioner.

It is my opinion that the property's being registered in their joint names of the cross petitioner and the cross respondent would entitle both parties to a legitimate claim over the matrimonial property, as a joint proprietors of the property which the two chose to call home. In this case however, there is evidence which is not rebutted, that the cross respondent intentionally mortgaged the matrimonial property with no intention of redeeming it, and the cross petitioner had to redeem it all by himself. The cross respondent then came forward to reclaim her interest after the property had been redeemed.

It is a time tested doctrine, expressed in the maxim *nullus commodum capere potest de injuria sua propria* (no man can take advantage of his own wrong). This doctrine has been applied by the courts of law and equity in Uganda and elsewhere. In **James Bahinguzza & Others V The Attorney General Court of Appeal Miscellaneous Application No 269/2013** the Court of Appeal held that a respondent who wrongly allowed an employee to receive and acknowledge receipt of correspondence on the respondent's behalf cannot at the same time claim that the service in question does not bind them, as it would amount to a traversity of justice, or gaining out of their own wrongdoing.

I am inclined to agree with the cross petitioner that the cross respondent came to court in bad faith and with tainted hands seeking to take advantage of her own wrong doing. The cross respondent soiled her hands when she mortgaged the matrimonial home, in which she had a legal interest by virtue of her being a joint proprietor, with the intention of not redeeming it, leaving it to the risk of foreclosure by the bank, or to the burden of her then spouse the co proprietor to redeem the same. To turn around and claim interest in the property she had abandoned to foreclosure by the bank and/or redemption by her spouse would, in my opinion, tantamount to taking advantage of her own wrong. This court cannot turn a blind eye to that, basing on the principle in **Makula International Ltd V His Eminence Cardinal Nsubuga & Another [1982] HCB 11** that a court of law cannot sanction what is illegal and illegality once brought to its attention overrides all questions of pleading, including any admissions made.

Thus, on basis of the applicable laws referred to above, the adduced evidence, and the facts of this case, it is my considered opinion that the cross respondent in this situation is not entitled to the matrimonial home, by reason of the illegalities she committed on the property, and on grounds that she should not benefit from her own wrongs proven before this court. The cross petitioner is, in my opinion, entitled to the matrimonial home, having redeemed the same after the co proprietor mortgaged it with no intention of paying back the loan mortgage. The property is his current home with his children.

Issue 2: What other remedies is the cross petitioner entitled to?

It is a finding of this court in issue 1 that cross respondent is taking advantage of her own wrong by claiming interest in a house she had deliberately put as security for a bank loan mortgage with no intention of paying back the loan.

Section 33 of the Judicature Act empowers this court to grant absolutely or on such terms and conditions as it thinks just all such remedies as any of the parties to a cause or matter is entitled to in respect of a legal or equitable claim properly before it, so that all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings avoided.

In **UBC V SINBA (U) Ltd & Others Miscellaneous Application No 12/2014**, it was held by the Court of Appeal that a Registrar of Titles can under section 91 of the Land Act cancel a certificate of title if it is, among other things, illegally or wrongfully retained; that courts can similarly order cancellation, registration and transfer of titles on account of illegalities; and that this was also the gist of the court decision in **Makula International Ltd V His Eminence Cardinal Nsubuga & Another**, already cited.

In that respect, based on the foregoing legal authorities and the findings of this court, the names of Esther Bakiza should be struck off the leasehold register to the property at Plot 5 Semawata Road, Ntinda, comprised in leasehold register volume 1774 folio 25.

I so order.

Dated at Kampala this 20th August 2015.

Percy Night Tuhaise

Judge.