

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(FAMILY DIVISION)
CIVIL SUIT NO. 267 OF 2017**

FRED SEKINDI PETITIONER

VERSUS

EMILY KAUMBA RESPONDENT

Before: Lady Justice Ketrah Kitariisibwa Katunguka

Judgment

Introduction;

1. This suit was filed by Fred Sekindi (herein called the Plaintiff) for a declaration that; he is entitled to sever and/or sell his registered interest in the Property comprised in Block 318 Kyeyitabya; an account for rental proceeds to date from the Defendant; general damages and costs of the suit.

Background;

2. In 1999 the Plaintiff and the Defendant (his wife then) jointly purchased property comprised in **Block 246 Plot 318 situate at Muyenga** (the suit property) valued at UGX 50,000,000/= (Uganda Shillings Fifty Million only). Following the said purchase, the Plaintiff claims to have registered the suit land in his and his wife's names on 22nd January, 1999, as joint tenants; subsequently, the parties erected villas on the property which generate a significant income solely collected by the Defendant;

3. The Plaintiff's marriage to the Defendant broke down due to irreconcilable differences and the couple divorced on 8th February, 2012; the Plaintiff has lost any desire to jointly own the suit property with the Defendant and requested her, as a joint owner thereof, to consent to the severance or valuation and sale of the same in order to split the proceeds of the sale equally; the Defendant rejected his proposal and has excluded him and his attorney, Kenneth Ngobi Wambi, from accessing the suit property; the severance of his proprietary interest from that of the Defendant in the suit property would not extinguish the Defendant's own interest; the Defendant's

refusal to sever the plaintiff's interest in the suit property is unreasonable, unjustified and an infringement of his constitutional right;

4. The Defendant, on the other hand, denies the Defendant's allegations and avers that whereas the suit land is registered in both hers and the Plaintiff's names, she acquired the same with her own money on 19th August, 1998, from the late Kate Ruharo at a purchase price of UGX 10,000,000/= (Uganda Shillings Ten Million only) and not UGX 50,000,000/= (Uganda Shillings Fifty Million) as alleged by the Plaintiff; to protect her interest in the suit property, she caveated the same before the transfer of the title;

5. She entrusted the Plaintiff, with whom she was in a relationship, to carry out the transfer of the suit property to her name as she was residing in the United Kingdom at the time; the Plaintiff instead registered the property in both his and the Defendant's names despite the fact that, at that time, they were not married; all developments on the suit property were funded by her, and the Plaintiff only played a supervisory role during the development of the same since he was in the country while she was in the United Kingdom;

6. Throughout the construction on the suit property, she made frequent trips to and from Uganda to design the project, ensure smooth progress and deliver some construction materials from the United Kingdom; the suit property is not rented out as it was poorly maintained by the Plaintiff who was not remitting rent to the Defendant; the Plaintiff was in fact instead receiving money from her under the guise of maintaining the property and paying utility bills; she has, since her divorce from the Plaintiff, remarried and resettled in Uganda with her family;

7. She denies the allegations that the Plaintiff's alleged attorney (Kenneth Ngobi Waibi) had powers of attorney; and asserts instead that the said attorney forcefully entered the suit property and destroyed, stole and converted property including a vehicle (registration number UAH 279Y), a generator, an inverter, gym equipment and assorted personal effects valued at GBP 13,000 (Great Britain Pounds Thirteen Thousand only); the Plaintiff claims to have opened a police case against the said Mr. Waibi vide police case No. GEF 830/2011 for his actions; and denied him access on grounds of failing to avail a copy of the said powers of attorney.

8. This suit was consolidated with **Civil Suit No. 499 of 2011** which the Defendant had filed to claim her share of the matrimonial property comprised in other

properties that were not the subject of the Plaintiff's suit. She claims interest in matrimonial property that was acquired by the Plaintiff during the subsistence of their marriage (property comprised in Block 481 Plot 1 at Luwero) where they established a dairy farm, house, staff houses, a borehole and other moveable properties.

9. The Defendant filed a counterclaim seeking a declaration that she is entitled to; sever and/or sell her share in property comprised in Block 481 plot 1 at Luwero, special damages amounting to UGX 99,000,000/= (Uganda Shillings Ninety Nine Million only) arising from income lost when the Plaintiff sold off livestock at their farm, an account of rent proceeds for 4 years, costs of the divorce proceedings, general damages for inconvenience, suffering and unlawful impounding of the motor vehicles, costs of this suit and any alternative remedy as this honourable court may deem just.

Representation;

10. The Plaintiff was represented by Counsel Herbert Kiggundu Mugerwa of M/S Kabayiza, Kavuma, Mugerwa & Ali Advocates; while the Defendant was represented by Counsel Richard Omongole of M/S Omongole & Co. Advocates. The agreed Issues are:

i. Whether the suit property is jointly owned, and if so, if the parties are entitled to equal shares?

ii. Whether the property comprised in Block 481 Plot Luwero is subject to sharing?

iii. Whether the Plaintiff is entitled to share the property situate at Mawanda Road?

iv. The available remedies.

Both parties filled written submissions which I have considered.

Preliminary objection.

11. Learned Counsel for the Plaintiff raised a preliminary objection regarding the Defendant's counterclaim in which she asserts that she is entitled to a share of the Plaintiff's land comprised in Block 481 Plot 1 land at Bulemeezi, because it forms part of matrimonial property. He contends that the above claim having been previously tried before a court of competent jurisdiction between the same parties, litigating under the same title is res judicata under **section 7 of the Civil Procedure Act, Cap 71;**

12. Counsel cited **Boutique Shouzim Ltd. Vs. Narattim Bhatia and another, Civil Appeal No. 36/07** and **Lt. Kabarebe Vs. Major Prossy Nalweyiso CACA No.** 

34/03 for the proposition that the issue of sharing matrimonial property had been put before the court that handled the divorce in the United Kingdom and could therefore not be raised and entertained in a subsequent suit as it would be res judicata. He prayed for the dismissal of the claim for matrimonial property.

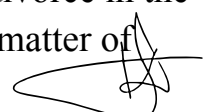
13. Counsel for the Defendant, on the other hand, submitted that the issue of matrimonial property was never decided by the court in the United Kingdom as that court only awarded a decree absolute and informed the Defendant that the courts there had no jurisdiction over property matters in Uganda; he relied on **John Semakula Vs. Pope John Paul IV Social Club Ltd. C.A No. 67/04** in which Justice Byamugisha JA, citing section 7 of the Civil Procedure Act, stated that the operative words in the section are “*heard and finally determined by that court*”; he then maintained that the subject matter raised in the Defendant’s written statement of defence and counterclaim were never decided by a court on merit and prayed that these issues not be affected by the principle of res judicata;

Resolution:

14. **Black’s Law Dictionary, 2nd Edition** defines res judicata as: *Latin for “a thing adjudicated”; Once a lawsuit is decided, the same issue or an issue arising from the first issue cannot be contested again.* Section 7 of the Civil Procedure Act provides that no Court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try the subsequent suit or the suit in which the issue has been subsequently raised and has been heard and finally decided by that Court (emphasis mine).

15. A dispute brought before court has to be determined in total before it can be said to have been disposed of; for litigants come to court in order for court to resolve whatever it is they are disagreeing upon; technicalities that seek to dispose of the case without resolving the gist of the conflict can not and should not be allowed (see article 126 of the Constitution of Uganda); In **John Semakula Vs. Pope John Paul IV Social Club Ltd;** (supra); as cited by counsel for the Defendant Justice Byamugisha JA in referring to section 7 of the Civil Procedure Act, emphasized that “the operative words in that section are “heard and finally determined by that court””.

16. I have examined the ruling of the court that handled the parties’ divorce in the United Kingdom (**Exhibit D39**); and whereas the Defendant raised the matter of



being entitled to a share in the matrimonial property, nowhere did the court hear, address and finally dispose of this issue. The court granted a decree nisi and subsequently a decree absolute but said nothing on the issue of matrimonial property. I agree with counsel for the Defendant that the court in United Kingdom did not address the issue of property;

17. Counsel for the Plaintiff correctly cited **Lt. Kabarebe Vs. Major Prossy Nalweyiso** (supra) in which it was held that to give effect to the plea of res judicata the matter directly and substantially in issue must have been heard and finally disposed of in the former suit. It is important that the matter one is attempting to qualify as res judicata is one that was heard and disposed of; merely raising the issue in a previously adjudicated matter does not suffice; for court's judgments can not be implied unless it is so stated in the judgment itself; The parameters for res judicata have not been met by the counsel for the plaintiff; the preliminary objection is over ruled.

I shall now proceed to resolve the issues as framed.

Issue 1. Whether the suit property is jointly owned, and if so, if the parties are entitled to equal shares?

I shall split this issue in 2 parts; a) Whether the suit property is jointly owned; and b) if the parties are entitled to equal share;

a) Whether the suit property is jointly owned.

18. In his submissions, learned Counsel for the Plaintiff contends that the suit property is jointly owned by the parties to this suit; he made reference to Pexb.19, a copy of the Certificate of Title to the suit property where the parties are the registered proprietors; he cited **section 59 of the Registration of Titles Act, Cap 230** that a Certificate of Title shall be conclusive evidence of ownership of the property in question; that the parties jointly purchased the suit property and executed a sale agreement as witnessed by the Defendant's brother, one Patrick Kaumba.

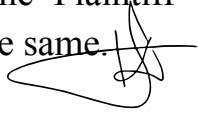
19. The Plaintiff further referred to the caveat filed following the purchase of the suit property in which the Defendant states in her affidavit that she and the Plaintiff committed themselves to purchasing the suit property; he made reference to email exchanges between the parties in which he and the Defendant deliberated matters concerning the suit property including sharing the proceeds from the property equally or selling it, renting it out, having it valued, among others. Counsel for the Defendant in opposition, submitted that the suit property was not jointly owned by the parties

and that instead the Plaintiff was fraudulently included on the Certificate of Title by the Plaintiff's sister who admitted to fraud in the process of registration; that the initial documents connected to the purchase of the suit property showed that she was the sole purchaser but that on the date of paying the last installment, the Plaintiff's sister Innocent Ngobi Ndiko, a lawyer (PW2), included her brother in the sale agreement and transfer form;

20. Counsel referred to the transfer form (**Dexb3**) which according to him, was altered to include the Plaintiff without the Defendant's knowledge; the Defendant pleaded innocence due to her young age at the time of these land transactions (17 years) and her lack of knowledge of the implications of the same which the Plaintiff and his sister who were both lawyers took advantage of; counsel submitted that it was not until after their marriage that the parties came back to Uganda with joint funds which they invested in the farm which the Defendant claims constitutes matrimonial property;

21. Counsel for the Defendant cited **Ambayo Joseph Waigo Vs. Aserua Jackline Civil Appeal No. 0100 of 2015** for the proposition that spousal contribution is a question of fact in each case; that while the Defendant adduced evidence of financing the purchase of the suit property, the Plaintiff had not, and had only occasionally supervised the construction of the same; the Plaintiff failed to recall how much he had contributed to the suit property; he was only employed as a volunteer at the Uganda Human Rights Commission which position paid only UGX 300,000/= (Uganda Shillings Three Hundred Thousand) as reimbursement for travel expenses; the said amount could not have afforded him the ability to contribute to the purchase of the suit property as it was meager. Further reference was made to the Plaintiff's witness statement (**paragraphs 54 and 57**) in which he stated that the parties agreed that the Defendant should return to the United Kingdom and work to raise money they would use towards the construction of the property as they had run out of money;

22. Counsel further submitted that the Plaintiff had admitted to having fraudulently accessed and altered the sales agreement without the Defendant's knowledge; the actions of **PW2** are imputed on the Plaintiff as they were carried out for his benefit; certificate of title can not be impeached save for fraud under **section 176 (c) of the Registration of Titles Act, Cap 230**;; that since the Plaintiff was fraudulently registered on the title, he cannot claim equal share in the same.



Resolution:

23. I have found it pertinent to consider the matter of the emails relied upon by the plaintiff. During cross examination the defendant sought to cast doubt on the authenticity of the email communications because they were not dated;(admitted in evidence as Pexb 1; she however never denied that emilywjk@supanet.com was her email address or that she communicated with the plaintiff by email; or that the divorce referred to in the emails occurred;

24. Admissibility of electronic evidence is governed under the Electronic Transactions Act No. 8 of 2011;section 5(1) provides that Information shall not be denied legal effect, validity or enforcement solely on the ground that it is wholly or partly in the form of a data message; section 2(1) (d) provides that “data” means electronic representations of information in any form;“data message” means data generated, sent, received or stored by computer means and includes—(a)voice, where the voice is used in an automated transaction; and(b)a stored record;“electronic communication” means a communication by means of data messages;“electronic record” means data which is recorded or stored on any medium in or by a computer system or other similar device, that can be read or perceived by a person or a computer system or other similar device and includes a display, printout or other output of that data;(emphasis supplied);“originator” means a person by whom or on whose behalf, a data message is sent or generated prior to storage..’

25. Section 7(1) provides that where a law requires information to be presented or retained in its original form, the requirement is fulfilled by a data message if— (a)the integrity of the information from the time when it was first generated in its final form as a data message or otherwise has passed assessment in terms of subsection (2); and(b)that information is capable of being displayed or produced to the person to whom it is to be presented;

26. Section 7(2) provides: ‘for the purposes of subsection 1(a), the authenticity of a data message shall be assessed (a)by considering whether the information has remained complete and unaltered, except for the addition of an endorsement and any change which arises in the normal course of communication, storage or display;(b)in light of the purpose for which the information was generated; and(c)having regard to all other relevant circumstances.

27. Section 8(4) provides: ‘When assessing the evidential weight of a data message or an electronic record, the court shall have regard to

(a)the reliability of the manner in which the data message was generated, stored or communicated;(b)the reliability of the manner in which the authenticity of the data message was maintained;(c)the manner in which the originator of the data message or electronic record was identified; and(d)any other relevant factor.:

28. By its nature electronic evidence must pass the test of who originated it, how it was transmitted, how it was stored and the connection it brings or maintains between the originator and the recipient; otherwise data may simply be prepared and not transmitted which has no connection to past relationship/history with/between the originator and purported recipient;(see **Nakayiwa & 2 Ors v Attorney General () [2018] UG Comm C 13 (23 May 2018)**); where justice Wangutusi stated; ‘The test which identifies the true origin of this communication is indispensable;’

29. I have considered the emails relied upon and to me they tell a story which is in the pleadings; the relationship of the parties; their plans and activities; their emotions including statements not necessarily flattering to either of them; for example the defendant sent an email on 5/4/2022 copy attached to the plaintiff’s trial bundle at page 9, through her email emilywjk@supanet.com wrote to the plaintiff stating; *“Throughout the 1990’s until 2000 when you started working for the refugee counsel-when you were studying law, working as a cab driver, Chinese food delivery man...” confirmed the plaintiff’s claims; In one of the emails on page 47 of the plaintiff’s trial bundle, the defendant wrote to the plaintiff stating that; “...so now you claim to have paid for my land I purchased using my life savings...in Muyenga in 1998 (then helped you by putting your name on the deed because you had nothing and I only ever did because you said you would afford me the same with the Luwero land. I also put a lot of my hard earned money in Luwero land and helped to make it a farm of which the law entitles me to my share of the increased value in the land.”*

30. At paragraph 76 of his witness statement, the plaintiff admits that in 2009 he decided to return to London to find work as he was penniless; this is confirmed by the email dated 25 October 2009 which he sent to the defendant stating that he was homeless and jobless; the extract of the email message is marked as Exb D.25;this rhymes with the defendant’s claim and no way does it flatter him, so I believe it is authentic;

31. The defendant did not deny that emilywjk@supanet.com is her email address or that she could have sent the messages or that she did not respond or receive responses thereto; the originators of the emails are identified and in my considered




opinion the emails are a conversation between the parties on the subject matter some of the aspects having been before this case was filed; so I find them a relevant factor so I shall consider them as part of the evidence.

a) Ownership of land at Block Block 246 Plot 318 situate at Muyenga;

32. The Plaintiff in his witness statement contends that the purchase and development of the suit property was financed through several rounds of re-mortgaging his and the Defendant's property, and withdrawals from his bank account. He however did not adduce evidence to back up his claims and claimed to have forgotten the exact sums he paid towards the suit property during his testimony. He did, however, adduce evidence (**Exhibit P1**) in which the Defendant emailed him about addressing maintenance issues on the suit property and sharing the suit property; the certificate of title (Exb. P3) is registered jointly in the names of both the plaintiff and defendant with words joint and equal shares. The parties were registered on 22/1/1999 under instrument number KLA201812; Exb.D21 is a letter of offer of appointment dated 23/7/2007 to the plaintiff from Uganda Human Rights Commission with an allowance of 300,000/=; at page 72 of the plaintiffs' trial bundle is a copy of termination letter dated 3/8/2009;

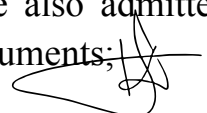
33. The land in question was acquired in 1998; the plaintiff during cross examination stated that between 1995 -2003 he was studying his LLB and LLM; that between 1992 and 1998 he was involved in odd jobs such as a cab driving and delivering Chinese food in East London; he did not present any documentary proof that he had an income by 1998 when the land was purchased; On the other hand in her witness statement at paragraphs 2-29, the Defendant gave a history of her employment; that in 1997 she worked as an auxiliary nurse in Newham hospital; as proof of her financial capability, she presented a copy of her NatWest bank statement dated 30/6/1998 with an account balance of 9,648.93 pounds admitted in evidence and marked as EXb. D2; the agreement was executed on 19/8/1998, within the period that the property was stated; the parties by then were not married; the defendant has proved financial capacity; she also acknowledged that the plaintiff was doing odd jobs at the time; no documentary evidence was presented on how much the plaintiff could have been earning; this however is not proof that he could not have contributed; however since he who wants to be believed must prove (section 101 of the Evidence Act); that the plaintiff had income has not been sufficiently disputed; that he could have contributed towards purchase of land comprised in **Block 246 Plot 318** situate at Muyenga has not, on a balance of probability been proved;



34. The above notwithstanding, the certificate of title shows that the property is jointly owned; it is contended for the plaintiff that he is entitled to an equal share; the Defendant contends that she was duped into including the plaintiff on the title by him and his sister Innocent Ngobi Ndiko both lawyers and it was submitted for her that she was only 17 years of age and did not know the law; The marriage certificate adduced in evidence and admitted as Dexb. 8 shows that in 1998 when the land in Muyenga was bought the defendant was 25 years having been born on 20/09/1973; in any case if she was 17 years she could not have had legal capacity to transact and sign a land purchase agreement; I do not believe the allegation that the defendant was 17 years of age in 1998 when the land was purchased;

35. On the plaintiffs's being registered on the title as having equal shares, I note the land purchase agreement was signed by both parties; it was submitted for the defendant that since the plaintiff admitted to have taken the sale agreement out of the defendant's bag he went and changed it; a look at the Purchase agreement shows that both parties signed as purchasers in presence of a one Patrick Kaumba whom the defendant during cross examination admitted to be her brother; she never called him to confirm that the agreement exhibited could not be the one he witnessed; also according to the affidavit in support of the caveat lodged by the defendant dated 24/8/1998, at paragraph 5 she states; *"That at the execution of the agreement, Fredrick Derek Sekindi and myself made a part payment to Kate M. Ruharo."* (see Exb. P32); there is therefore no proof that the plaintiff changed the agreement if the fact of payment is acknowledged by the defendant; in her testimony the defendant acknowledged that they are joint owners; her contention is that they are not equal owners; she acknowledged offering to buy the plaintiff's share; that she does not consider the plaintiff as an equal owner but equates his entitlement to 10%;

36. Counsel for the defendant submitted that the registration of the plaintiff on the title deed was fraudulently procured by the plaintiff's sister who testified as PW2; court has considered the testimony of **PW2 Innocent Ngobi Ndiko**, the Plaintiff's sister; she confirmed having advised the parties during the process of purchase and transfer; she could not recall the contributions each party made, or whether the Defendant's intentions were to jointly own the suit property with the Plaintiff; she also admitted to not being sure whether the Defendant at the time understood the implications of her inclusion of the Plaintiff on the transfer documents; she further confessed to having included her brother on the title deed with equal shares when the words 'equal shares were not on the transfer form(Dexb 3); she also admitted to having falsely entered the wrong purchase price on the transfer documents;



37. On page 47 of the plaintiff's trial bundle, the defendant wrote to the plaintiff by email stating that; *"...so now you claim to have paid for my land I purchased using my life savings...in Muyenga in 1998 (then helped you by putting your name on the deed because you had nothing and I only ever did because you said you would afford me the same with the Luwero land;*

38. The defendant is found to have willingly allowed the plaintiff to be on her title as a gift to him; when the title came out she acknowledged it and never disowned it; in fact when her lawyers wrote a letter Pexb. 23 on 8/7/2011 they indicated that the property was jointly owned; during cross examination the defendant attempted to disown the lawyers' letter on the pretext that the property was not acquired during their marriage so it could not be jointly owned and the lawyers' statement is not correct; yet she admitted she had instructed them; she had acknowledged that she and the plaintiff had paid for the land; she had no proof of having raised the issue of the plaintiff not being an equal owner and she could not confirm it;

39. Joint ownership of land is not a preserve of married people or a married couple; it just describes ownership of property by any two or more persons; when one is married one has a choice to buy property as an individual while another may invite the other person to be joined as a co- owner; where the person does not specify what the shareholding is to be then court would look at circumstantial evidence to glean the intention of the inviter; the intention of the defendant in this case is in her statement that she never challenged the land title; she accepted that she had allowed the plaintiff onto the title; she stated that payment was made by both of them; and agreed that the plaintiff contributes towards the construction on the land; the magnanimity of the gift was in even acknowledging that the plaintiff contributed to the purchase price;

40. PW2 testified and admitted that she did not have instructions to include the plaintiff on the transfer form and what she did was wrong; that there is no joint tenancy with equal shares because of the illegalities and that in law that is called fraud; PW2 testified that the defendant had not instructed her to make the title in joint ownership with equal shares; and that she did it because they were in love! In my view transfer of property into a person's name is based on clear intention and instruction of the owner and it can not be derived from appearances and perception of a lawyer doing the transaction: clearly that two people are in love does not justify for determining land ownership;



41. The position of the law on fraud is known; that it must be specifically pleaded and proved is a requirement; PW2 having admitted that the defendant had not instructed her to process the title in joint ownership and equal shares; court is invited to consider that what PW2 did was fraudulent because she did not have instructions to process the title the way she did; courts have over time cited The Supreme Court of Uganda in **Fredrick Zaabwe Vs. Orient Bank Ltd & Others Criminal Appeal No 04/2006**, in defining fraud, as- "*Fraud, according to Black's Law Dictionary, means an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by a concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury...*";

42. It is my considered view that had the defendant not acknowledged that she paid the purchase price with the plaintiff and that the property was jointly owned and that she put the plaintiff on the title, the actions of the advocate PW2 may have amounted to fraud albeit unpleaded for that is the law; the intention of the defendant to gift half of the land to the plaintiff was confirmed; although the lawyer acknowledged that she did not have instructions to process the title in both the plaintiff's and the defendant's name, the defendant owned her actions till the marriage went wrong; gifting of land among right thinking adult individuals can not turn on account of change in relationship; the defendant can not approbate and then reprobate; (see **Seruwagi Kavuma vs. Barclays bank (U) Ltd miscellaneous application number 634 of 2010 cited in Ken Group Of companies Ltd v Standard Chartered Bank (U) Ltd & 2 Ors (Civil Suit 486 of 2007) [2013] UGCommC 171 (11 October 2013);**) where it was stated that the principle of approbate and reprobate is based on the doctrine of election; that nobody can accept and reject the same instrument and that a party cannot say at one time that a transaction is valid and thereby obtain some advantage from it to which it could only be entitled on the footing that it is valid and then turn round and say it is void for purposes of securing some other advantage; a certificate of title is a notice to the whole world; which can only change when the individuals/parties concerned agree or for fraud;

43. The defendant testified that her instructions were not for her lawyers to object to joint ownership; she has never objected to joint ownership; the caveat confirms joint ownership and that her lawyers wrote confirming joint ownership; that the facts would come out at trial yet the letter of her acknowledging joint ownership was dated



8/7/2011 before this matter was filed in court; during re-examination the defendant testified that when it occurred to her that the plaintiff had been registered on her title, she asked him and he told her that and I quote: *'we were together; that since we are together everything we had was for both of us- since then we purchased property together.'* The defendant did not contest this action until this suit.

In the result I find that the plaintiff is entitled to an equal share in the land at Muyenga; it having been gifted to him by the defendant who at the time was a girl friend.

44. Before I take leave of the matter I shall consider the role and effect of the actions of the advocate for the parties during the transfer;

PW2 as counsel for the parties during the transfer of the property admitted to have breached her duty to her client by indicating instead of the purchase price which according to the purchase agreement was UGX 10,000,000/=; she declared UGX4,000,000/=thereby denying the government due revenue; In **Makula International Vs. His Eminence Cardinal & Another [1982] HCB 11**, it was held that; *" a court of law cannot sanction what is illegal once brought to the attention of court, it overrides all questions of pleadings including admissions made thereon."*; This court finds PW2's conduct to have been unprofessional;

45. The Supreme Court in ***Betty Kizito V. David Kizito Kanonya and Others SCCA No.8 of 2018***; held that the law requires that true consideration in land transfers must be declared in view of Section 92(1) of the Registration of Titles Act; that a buyer is not a bonafide purchaser where he inserts a lesser figure on the transfer form as consideration when he actually paid more in order to defraud government of revenue and that by public policy, any transaction designed to defraud the government of its revenue is illegal and therefore a title deed acquired in such circumstances would be void for fraud; in this case the issue is not whether the registered proprietors are bonafide purchasers in which case then title would have reverted to the original owner; in this case the owner was paid; and there is no contention on the purchase agreement; what is in issue is the wrong declaration;

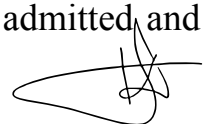
46. **Rule 2(2) of the Advocates (Professional Conduct) Regulations S.I No.267-2**; requires an advocate to conduct business on behalf of clients with due diligence; **Rules 11** provides: *"An advocate shall not exploit the inexperience, lack of understanding, illiteracy or other personal shortcoming of a client for his or her personal benefit or for the benefit of any other person."*(underlined for emphasis);PW2 Innocent Ngobi Ndiko testified that she was a young lawyer who did

not know better; an illegality is an illegality unless one perpetuates it on account of insanity or legal incapacity; clearly there is a difference between 10,000,000/= and 4,000,000/= even for a 27 year old advocate; as an advocate Innocent Ngobi Ndiko should have known better; having said that however she stated that she had been practicing for three years at the time so may have taken issues flippantly; however in the interest of justice for the public I hereby exercise this court's power under section 98 of the Civil Procedure Act to order that she personally makes good the loss she occasioned the government by paying the tax on the 6,000,000/= as shall be assessed by the Revenue Authority;

b)What is each party's contribution towards the development of the Villas at Muyenga;

47. Having determined that the plaintiff is entitled to an equal share of the land; according to the defendant the plaintiff is only entitled to 10% of the developments; the parties did not adduce evidence on the indicative value of the property although each claimed to have contributed in specific way so the evidence presented shall guide court on the indicative level of contribution; according to paragraph 25 of the plaintiff's witness statement they mortgaged and re mortgaged their London property three times; the plaintiff did not lead evidence for the 2 remortgages; both agree that out of the proceeds of mortgaging their house in London, they utilized 25,000 pound Sterling to commence construction of the property; the plaintiff testified that he withdrew 10,000 pound sterling from his credit card at Barclays Bank to buy tiles from Kajansi for the suit property but he did not adduce any evidence to this effect although the defendant did not prove that the plaintiff could not have withdrawn the said money; the evidence shows that between 2000 and 2006 the plaintiff was in full time employment; such contribution therefore may not be far fetched;

48. Evidence was led by the plaintiff that together with the defendant, the parties ventured into commercial farming on the plaintiff's family land in Kyabazala where they planted approximately 10 acres of Matooke, 5 acres of cabbage and started a piggery; earned about UGX 10,000,000/= from the piggery and plantation; he sold his land at Najjanankumbi at UGX 60,000,000/=and used the proceeds towards construction of the villas; sold about 70 cows; in an email from the defendant to the plaintiff dated 5/4/2011; on page 9-10 of the plaintiff's trial bundle; the defendant states; *"Now I know we both worked hard and either sold some cows, sold the Najja land etc to fund the villas..."*; The evidence of the sale of the Najjanankumbi land by the plaintiff to a one Sirajje Kakembo in 2009 is by a sale agreement admitted and



marked Exb.P12; that he gave up his job to stay in Uganda for 2 years to supervise the projects.

49. For the Defendant in her witness statement she contends that in 2003 they mortgaged their home in London and borrowed 40,000 GB sterling; out of which 20,000 pounds was utilized to fund their traditional marriage and wedding ceremonies; the balance of 10,000 Pound Sterling was invested in the villas; they sold their property in London at 30 Holt Road and the amount due to the parties was 36,000 Pound Starling; she relied on Completion Statement of sale as of 5/5/2006 admitted and marked **Exb. D11**; so in February 2007 they came to Uganda with a total of 30,000 Pound Sterling and restocked the farm(10,000 pounds); and 7000 was injected in the Villas;

50. She used her life savings to the tune of 925.08 pounds from the stock and shares investments from 'Virgin Money' and ABBEY ISA to inject into the building of the villas; she relied on annual investor statement from Abbey issued on April 2007 and a letters dated 3/4/2006 from the Virgin Money Uk Managing Director informing her about her cheques amounting 775.99 pounds and 4,149.17 pounds; she did not attach the said cheques; She bought plumbing materials worth 420 pounds (the invoice is Exb.D19) and spent shipping fees of 174 pounds; she shipped the materials to the plaintiff; she sent UGX 21,506,700/=to the plaintiff between 2008 and 2009 for the construction of the villas; she relied on remittances (Exb.D17); and she would send to the plaintiff UGX 250,000/=weekly;

51. The plaintiff at paragraph 62 of his witness statement stated that the defendant would at least come twice to Uganda every year and bring with her at least British Pounds 2000;but the defendant claims she would come every 3 to 4 months and she would come with at least 3,000 pounds for buying construction materials; she relied on copies of receipts admitted as Exb D22; that in 2013 she travelled back to Uganda with her now husband with a total of 20,000 pounds which was used to renovate the villa which was in a state of despair; together with her husband, they have spent over 30,000 pounds to renovate and fully furnish all the 8 villas; no evidence was presented of her husband's contribution; she purchased_razor wiring over the whole perimeter wall on the property; she attached a receipt for UGX 4,220,000/ dated 20/4/2012;

52. I have considered the evidence of the parties' contributions; according to the plaintiff he contributed 10,000 pounds from his credit card; and the 5,000 pounds that



remained from the wedding; the UGX 60,000,000(approximately 12,997 Pounds) from sale of Najanankumbi land ; 3,500 pounds of the 7,000 pounds injected in the villas;(approximately 7,500 pounds)(for 35 cows);the plaintiff's contribution from the piggery would be UGX 5,000,000/=(approximately 1,083 pounds);

53. The defendant contributed 5,000 pounds of the total that remained from the wedding; 3,500 pounds (half of the 7000 pounds) injected in the Villas; (approximately 7,500 Pounds) from the cattle;1,083 from the piggery; her **life savings of 925.08 pounds**;(cheques of **4,149.17**;(there was no proof of whether she used the money on the construction));plumbing materials worth 420 pounds;174 pounds spent on shipping; she sent UGX 21,506,700/=(4,658 pounds) sent to the plaintiff ,UGX 250,000/=weekly;(12 million UGX)(approximately 2,599 pounds) ; 2000 pounds; twice a year(according to the plaintiff) so 4,000 pounds a year; 12,000 to 16,000 pounds a year(according to the defendant; here since no evidence was adduced I shall take the average of at least 2,500 pounds 3 times a year making it 15,000 pounds for the two years 2008 and 2009;

54. The plaintiff's indicative approximate contribution towards construction of the villas would therefore be 10,000 pounds plus 5,000 pounds; plus 12,997 pounds; plus 3,500, plus 7,500 pounds plus 1,083 pounds; Total approximately 40,080 pounds ; while the defendant's indicative approximate total contribution would be 5000 pounds plus; 3,500 pounds plus 1,083 pounds plus 925 pounds, plus 7,500 ; plus 4,500 pounds; plus 2,599 pounds); plus 15,000 pounds.; total approximately 40,107 pounds; it being understood that when people are married they do not always keep all receipts of purchases; and some receipts presented by the parties were not in their names therefore court cannot rely on them.

55. Evidence was led to show that the plaintiff was supervising the construction while the defendant was in the United Kingdom while the defendant was earning and sending the money; in **Rwabinumi Vs. Bahimbisomwe Civil Appeal No. 10 of 2009 citing with approval the authority of Kagga Vs. Kagga (High Court Divorce Cause No.11/05)**, the Supreme Court did recognize the demonetized contribution of a wife where Justice Mwangusya observed that, *"Our courts have established a principle which recognizes each spouse's contribution to acquisition of property and this contribution may be direct, where the contribution is monetary or indirect..."*. As such, any supervisory efforts that the Defendant contributed may be quantified as spousal contribution and should be considered. Since one was earning the money



while the other was supervising the utilisation of money towards the project of building villas; the plaintiff's contribution is deemed non monetary;

56. The emails (Pexb. 1) at page 28 show that the parties intended and knew they were expected to share the villas or proceeds therefrom equally to wit: *'I propose that you decide which of the 4 villas you want so that I can take the other that belong to me.....'* then at page 3 *'I would however do the necessary work to hire them out...and hopefully make money which we can both share equally..'*; at page 6 to wit: *'..any proceeds from the villas should be equally shared'*; I have taken the liberty to find rough and approximate indicative contribution by each party to see whether it is lopsided but I find it generally balanced; both parties therefore equally contributed towards the construction of the villas;

Counsel for the plaintiff prays that the property be declared condominium and shared equally; I agree.

57. In the result I find that each of the parties is entitled to 50% of the land and the developments at Muyenga comprised in Block 246 plot 318 land at Kyeyitabye;

Issue 1 as to whether the suit property is jointly owned, and if so, if the parties are entitled to equal shares is answered in the affirmative.

Issue 2. *Whether the property comprised in Block 481 Plot Luwero is subject to sharing?*

58. The defendant claims that she is entitled to land at Luwero; the plaintiff does not agree; he contends that he inherited the land from his father so it is not matrimonial property; he relies on a copy of the deceased's will dated 12/4/1996 marked as Exb.P10; the land is registered in the names of the plaintiff according to the Certificate of title marked Exb. P20; and a statement of search marked as Exb D.9; The defendant under paragraph 44 of her witness statement mentions that; *"the plaintiff had acquired then registered land comprised in Block 481 plot1 Buwanuka into his names on 7th May 2004, we were married in 2003 and he promised to register my names on the title but never did."*

59. The position of the law is that titles of 'Mr' and 'Mrs' in marriage per se do not lead to automatic entitlement to property; one must prove that one contributed towards acquisition or improvement of the property or deserves compensation for other hidden contribution; "In ***Muwanga versus Kintu High Court Divorce Appeal No. 135 of 1997, (Unreported)***, Bbosa J and I quote: 'The property to which each



spouse should be entitled is that property which the parties chose to call home and which they jointly contributed to”;

60. Inherited property in my considered view is unique because it comes with emotional, historical, lineal (see section 27 and 28 of the Succession Act); and sometimes cultural ties; it is intended for the beneficiary alone otherwise if one is married the testator, if he/she intended that the spouse should benefit would have given the bequest to the couple and not to one of them; spouses of lineal descendants are not listed by the Succession Act as beneficiaries; if the spouse may benefit it would be at the let of the beneficiary and not by right except when such bequest becomes part of the estate of the spouse at his/her death; the types of property as far as a married couple is concerned was also described in the Muwanga case (supra); it includes clan land, inherited land, land acquired before marriage, land acquired during marriage by the couple and land acquired individually during marriage and property the couple calls home which both have contributed to; (see **Julius Rwabinumi Vs. Hope Bahimbisomwe** (supra);

61. The defendant therefore while she is not entitled to the inherited land; subject to proof of her contribution; she is entitled to that extent; (see **Ambayo Vs. Aserua Civil Appeal No.0100 of 2015, UGCA 272 (15 November 2022)** where court held that, *“Spousal contribution is a question of fact. Courts recognize that the evaluation of each spouse’s contribution is no mean task. The House of Lords in the case of Pettitt Vs. Pettitt [1969] 2 ALL ER 385 (HL) stated that the extent of the share of each spouse is a question of fact in each case and the mere fact that the evaluation of the respective shares may be difficult for want of clear evidence does not justify the wholesale application of the maxim “equality is equity”.*

62. Paragraph 51 of the plaintiff’s witness statement shows that he together with the defendant on their return to Uganda in 2007 worked tirelessly at the apartments, farm and plantations and also set up a piggery; During cross examination, the plaintiff told court that the defendant would send him money every week to supplement activities on the farm; which he would use to buy drugs; evidence shows that the plaintiff and the defendant on the 10th day of February 2004 had engaged a one Umar Batte for purposes of surveying this property; None of the parties presented documentary evidence as proof of their contribution towards the purchase of animals on the farm or of its running; but the plaintiff testified that they both got 10,000 pounds which they injected in the farm; so I find that they both contributed; in absence of proof to the contrary it is the finding of this court that the parties jointly

developed the farm and are entitled to equal shares of the developments thereon as at the time of the divorce;

Issue 2 is majorly answered in the negative; Only the developments on and not the land comprised in Block 481 Plot Luwero are subject to equal sharing by the parties; the land belongs to the plaintiff as his inheritance.

Issue 3. Whether the Plaintiff is entitled to share the property situate at Mawanda Road?

63. Counsel for the Plaintiff stated that the Plaintiff no longer claims an interest in the property situate at Mawanda Road and as such this issue was abandoned.

Issue 4. Remedies.

64. The plaintiff seeks an order for the defendant to give an account for rental proceeds to date; general damages and costs of the suit;

65. It was submitted for the plaintiff that since the defendant at her paragraphs 99 and 100 of her witness statement, states that by 2013 she was advised that rent per month per 1 bedroom villa was UGX 150,000- 250,000 and maximum of UGX 400,000/= they are agreeable to a round figure of UGX 450,000/= per month for each villa and assuming that there was no increase for the 10 years; I find that fair; the rent of UGX 450,000 per month x 8 villas x 12 months x the number of years; that is from 2013 when the defendant took over the villas up to the time of judgment shall be shared equally by the parties.

66. Counsel for the defendant proposed that the farm by 2007 was worth 1,143,750,000/= so the defendant is entitled to half of that; the plaintiff claims that by then the animals were very few; the defendant attempted to present an over all minimum projection based on what she called log record of life stock which was not proved for the authors did not testify about how often animals produce in a year; no expert was called to help court determine the trends; for the plaintiff to claim that the cattle were about 20 and leave it there is not sufficient; the defendant ratios per year were not scientifically proved; in 2009 the defendant stated that the sheep were 50 each valued at 150,000/=: the goats were 200 each valued at 200,000/= while the cows were 120 each valued at 700,000/= the total value of the animals was UGX 131,000,000/=:

67. 

68. The ages of the animals were not given; According to www.bovinegenetics.co.uk; the gestation period of a cow is 283 days; the gestation period of a goat is 150 days while that of a sheep is 152 days; assuming that at least 50 of the cows produced once a year for 14 years(between 2009 and 2022) the cows would be 700 plus 120(820) valued at 574,000,000/= ; the goats would have increased to 700 plus 200,(900) valued at 180,000,000/= and the sheep if at least 20 produced once every year for 14 years they will have increased by 280 from 50 (344) valued at 51,000,000/=making a total of approximately UGX 805,000,000/= the ratios are based on the approximation proposed by the defendant and not sufficiently disputed by the plaintiff; a figure of UGX 805,000,000/= as the value of the animals on the farm or profits there from is fair; The same shall be shared equally between the parties;

General damages

69. A Plaintiff who suffers damage due to the wrongful act of the Defendant must be put in a position he or she should have been in had she or he not suffered the wrong; (see **Kibimba Rice Ltd v Umar Salim, S.C.C.A of No. 17 of 1992**); since the plaintiff is willing to take half of the rent collected at the rate of 450,000= per villa per month for the 8 villas since 2013 till payment; I have not been convinced that he is entitled to any damages considering that the defendant has been managing the villas and also renovated them to make them habitable; the same principle would apply for the farm which has been in the hands of the plaintiff;

Costs

70. I have considered how long this matter has been in the system and the fact that the nature of the decision of this court is a win win I shall not award any costs;

In the final result, the suit majorly succeeds; I hereby make the following orders;

1. The parties are entitled to equal shares to the land and property(villas) comprised in Kyadondo **Block 246 Plot 318** land at Kyeitabye;
2. The plaintiff is entitled to half the rent collected from the villas at the rate of UGX 450,000/= per month per unit for each of all the 8 units ; from July 2013 till payment in full;
3. Since the villas are separate the property comprised in Kyadondo **Block 246 Plot 318** land at Kyeitabye shall be shared equally by the parties;

4. The defendant is entitled to 50% of UGX 805,000,000/= (Uganda Shillings Eight hundred and five million);being the approximate value of the developments on the farm on land comprised in Block 481 Plot at Luwero but she is not entitled to the land;
5. Counsel Innocent Ngobi Ndiko shall personally make good the loss occasioned to government by paying tax on UGX 6,000,000/= (Six Million only) as shall be assessed by Uganda Revenue Authority;
6. Each party shall bear their own costs.



Ketrah Kitariisibwa Katunguka.

Judge

27/03/2023.

Delivered by email to:mugerwa203@gmail.com,omongole@yahoo.com

The dissatisfied party may appeal to the Court of Appeal of Uganda within 14 days of this judgment.

