THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA; AT KAMPALA

(LAND DIVISION)

CIVIL SUIT No. 153 OF 2013

HELLEN KIPSOY WAFULA ..... PLAINTIFF

VERSUS

1. EQUITY BANK (U) LIMITED
2. WAFULA RENNY MIKE :: DEFENDANTS

BEFORE: - THE HON. MR. JUSTICE ALFONSE CHIGAMOY OWINY – DOLLO

JUDGMENT

In this suit, the Plaintiff seeks a declaratory order that the property comprised in LRV 2881 Folio 22 Plot 1 Mulamula Lane, Buziga Kampala (herein after the suit property), and is registered in the name of the 2nd Respondent, is her matrimonial home together with the 2nd Defendant. Accordingly, she pleads with Court to invalidate and vacate the mortgaging of this property by the 2nd Defendant to the 1st Defendant; and as well stop the threatened sale of the suit property by the 1st Defendant, on the grounds that her requisite spousal consent was not obtained for the mortgage. The 1st Defendant denied her claim; contending that the suit property is not matrimonial property, but it had nonetheless as a matter of prudence and good practice obtained spousal consent from the right person before executing the mortgage.

The 2nd Defendant however, despite the fact that he attended the Court proceedings all the time, for his part failed or declined to file any defence to the suit. This, I will shortly advert to. However, I should point out from the outset that since the Plaintiff's claim is not founded on a liquidated demand, or for pecuniary damages only, Court cannot pass judgment or enter an interlocutory judgment respectively, as provided for under the provisions of 0.9 rr. 6, 7, 8, and 9 of the C.P.R. Instead, the applicable rule is the provision of 0. 9 r. 10 of the C.P.R. which obliges the Plaintiff to proceed as if the 2nd Defendant had filed a defence. This means the Plaintiff is duty bound to adduce evidence in proof of her claim against both Defendants.

In the joint scheduling memorandum, filed by the Counsels for the Plaintiff and the 1st Defendant, the issues framed for Court's determination, which I hereby recast, are: –

1. Whether the Plaintiff is legally married to the 2nd Defendant.

2. Whether the suit property was a matrimonial home at the time it was mortgaged.

3. Whether the mortgaging of the suit property, without the Plaintiff's consent, was lawful.

1. Whether the Plaintiff is legally married to the 2nd Defendant.

Indeed, the Plaintiff's claim can only succeed upon proof that she was the lawfully married spouse of the 2nd Defendant at the time of the contested mortgage of the suit property. The burden to do so rested on her; and this, especially in keeping with the strict provision of section 106 of the Evidence Act (Cap. 6; 2000 Edn.) which is exclusive to civil proceedings, and places the burden of proving a matter regarding special knowledge of a fact as follows: –

"106. Burden of proving, in civil proceedings, facts especially within knowledge.

In civil proceedings, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon that person."

The fact of the Plaintiff's marriage is a matter especially within her knowledge; hence, the burden of proving it lay on her on the balance of probabilities. In the accompaniment to the plaint, the Plaintiff listed her marriage certificate amongst the documents she intended to rely upon at the hearing. However, the 1st Defendant in its written defence, and in the joint scheduling memorandum, consistently disputed the truth of the alleged marriage. In their witness–statements, filed long before that of the Plaintiff, and before the hearing, officials of the 1st Defendant deponed that the Plaintiff had first presented herself to the officials of the 1st Defendant as a potential purchaser of the 2nd Defendant's property in Nairobi; with no mention whatever of any marital relationship to the 2nd Defendant.

Most important is the deposition made by the 2nd Defendant's wife, Sarah Sheila Wanyoto, in her witness statement which was filed long before the hearing. She deponed at paragraph 17 thereof that in the over 25 years of her marriage to the 2nd Defendant, she had not been made aware that she has a co–wife. She was explicit that she had neither met the Plaintiff, nor been introduced to her as a co–wife. By letter dated the 11th of June 2013, which was copied to Court, and this was

before the hearing of the suit had commenced, Counsel for the 1st Defendant urged Counsel for the Plaintiff to avail the witness statements in support of the Plaintiff's case. Counsel for the 1st Defendant gave clear notice to the Plaintiff of what to expect; and concluded with the following explicit demand, which I quote in extenso: –

> *"Further, advise your client to attend Court with her original passport and other identification documents because we intend to cross examine her on the same. Further, we dispute the documents intended to be relied on by you during the trial and on that basis and we request you carry the originals of such documents."* (**emphasis is mine**).

In the light of the multiple expressions in contention of her claim of customary marriage to the 2nd Defendant, shown above, which amply forewarned her of what to expect at the hearing, the wise and advisable thing the Plaintiff ought to have done was to produce the documentary proof of her marriage. This evidence, unless it was impeached, would have provided conclusive proof of her claim. It was thus most surprising when, at the hearing, the Plaintiff claimed that she had left the certificate of marriage behind in Nairobi; and that the reason for this was that she did not consider it necessary in Court. It is utterly incredible for the Plaintiff to leave behind this certificate, which she had indicated she would rely on at the hearing; and which she had been duly warned to produce in its original form.

Much more conclusive proof of the customary marriage, than a certificate could offer, would have been the evidence adduced by the parents of the Plaintiff, that indeed the marriage of their daughter did take place. In the instant case there is, however, no oral or documentary evidence from the Plaintiff's parents in support of her claim of marriage to the 2nd Defendant. Other persuasive evidence could have been adduced by a close relative of the Plaintiff, or by a person knowledgeable in the custom of the Plaintiff's community, who had attended the marriage function. Any of these would have corroborated the Plaintiff's evidence regarding the marriage. There was unfortunately no such evidence presented in Court.

Instead, the Plaintiff called Mike Kabole (PW2), a cousin of the 2nd Defendant, to support her claim. PW2 testified that he was part of the team that accompanied the 2nd Defendant to Eldoret Kenya to pay dowry for the Plaintiff. He however revealed that at the home of the Plaintiff's parents, he was excluded from, and so did not attend the marriage discussions and payment of dowry that took place in a separate house; but instead relied on what the 2nd Defendant told him had transpired in the private sitting. His evidence, as to whether or not the marriage was in fact

concluded, was therefore hearsay; and thus unhelpful to the Plaintiff's case about the alleged marriage.

Proof of the Plaintiff's marriage to the 2nd Defendant could have been by the 2nd Defendant himself. Owing to the fact that his marriage to Sarah Sheila Wanyoto is admittedly a customary one, it is potentially polygamous; and so, proof of his marriage to the Plaintiff would have made it lawful. Surprisingly, there was not even a word from the 2nd Defendant to support this claim; and yet he attended Court for the full duration of the hearing. I take cognizance of a photocopy of a statutory declaration attached to the plaint, allegedly made by the 2nd Defendant; but neither marked as an annexture, nor referred to in the Plaintiff's list of documents she intended to rely upon at the hearing. It is only proper that I address myself about this strange document.

The document, which legally does not qualify to be part of the plaint, shows on the typed print that it was made in the year 2005. However, the figure 5 was crudely and noticeably altered by handwriting to read 6; and so, the year now reads 2006 and is therefore suspect. Its purpose was for obtaining a Ugandan certificate of customary marriage between the 2nd Defendant and the Plaintiff. No attempt was made to tender it in evidence; hence, it is of no probative value at all. Further, if indeed a certificate of marriage exists in Nairobi as is claimed by the Plaintiff, then the 2nd Defendant would have relied on it to apply for registration of the said marriage in Uganda. Otherwise, at the very least, this statutory declaration could have been made with the knowledge that there was something wrong about the alleged customary marriage in Kenya.

As is quite evident now, and this is not surprising, this declaration apparently did not achieve the purpose for which it had been made; namely, the registration of the alleged marriage in Uganda. Had it been otherwise, the Plaintiff would certainly have readily tendered a certificate of registration of this marriage in Uganda, at the hearing, as evidence in proof. This, as with the Plaintiff's stunning failure to come to Court with the certificate of marriage which she claims is in her possession in Nairobi, is injurious to and negates her claim that she is married to the 2nd Defendant. The irresistible inference that I have to draw, from the Plaintiff's failure to avail the certificate of marriage, is that such certificate in fact does not exist; or if it does, then the Plaintiff is aware that it would not stand the test of critical scrutiny.

Accordingly, I do find the whole of the evidence adduced in support of the Plaintiff's claim that she concluded a customary marriage with the 2nd Defendant, in Eldoret Kenya in 2005, most unconvincing; and I have to discount it entirely as having no merit. In the result, I must find that

she has failed to discharge the burden that lay on her to prove, on a balance of probabilities, that the said marriage was indeed concluded, and that therefore she is truly the second wife to the 2nd Defendant. Therefore, I resolve issue No. 1 in the negative.

2. <u>Whether the suit property was a matrimonial home at the time it was mortgaged</u>.

Having determined that the Plaintiff has failed to prove that she is lawfully married to the 2nd Defendant, I should ordinarily have consequently found that the suit property is not a matrimonial home. However, this issue also stands to be determined upon one other consideration; namely, that the 2nd Defendant is married to Sarah Sheila Wanyoto Wafula (DW1), and this is undisputed. What amounts to matrimonial home is provided for in section 2 of the Mortgage Act, 2009; which defines *'matrimonial home'*, in, to mean: –

"a building or part of a building in which a husband and a wife or, as the case may be, wives, and their children, if any, ordinarily reside together and includes

(a) where a building and its curtilage are occupied primarily for residential purposes, that curtilage and outbuildings on it; and

(b) where a building is on or occupied in conjunction with agricultural land or pastoral land, any land allocated by one spouse to his or her spouse or in the case of a husband, to his spouses for his, her, or their exclusive use; "

Accordingly, whether the suit property was matrimonial home within the meanings assigned to this by the Mortgage Act, would best be established from the evidence of the 2nd Defendant. In the alternative from Sarah Sheila Wanyoto Wafula (DW1) who, in his statutory declaration that accompanied his application for the loan for which the suit property was mortgaged, the 2nd Defendant declared is his lawful and sole wife. He also stated in the said declaration that the suit property was not a matrimonial property but was for commercial purposes. DW1 corroborated the 2nd Defendant's declaration in her own statutory declaration in support of the application for the loan, and in Court she testified that her place of ordinary residence is at Bukoto; and that her husband has other properties in Arua and Mbale.

She further testified that she and her husband acquired the suit land to construct thereon commercial apartments to generate rental income. She also testified that she was engaged in commercial chicken rearing business. The officials of the 1st Defendant who appraised her husband's capacity to service the loan in issue testified in Court corroborating her testimony in

that regard. They first satisfied themselves, before approving the loan, that the construction of the suit property was not yet completed, and it was under the occupation of a security guard only. There is no dispute that, to date, construction work on the apartment block is not yet completed. In the absence of credible evidence to controvert the evidence shown above, it is clear that the suit property was not a matrimonial home as is envisaged under the provisions of the Mortgage Act.

There is one point of law I need to clarify here. As is shown above, section 2 of the Act clearly states that a matrimonial home is a *'building or part of a building in which a husband and a wife or, as the case may be, wives, and their children, if any, ordinarily reside together'*. The law refers to a *'building'* and in the alternative *'part of a building'*. It does not say *'a building, or part of which a husband and a wife ...'*. This is quite instructive. The plain meaning of the phrase *'part of a building'* in the provision of the law is that it envisages a situation where a family may occupy only part of a building; and as such, it is not the whole building but only that part of the building so occupied that qualifies as matrimonial home.

To my mind, this caters for a situation such as the one before me. The evidence adduced in Court is that the suit building is a block comprising four apartments; each with four bedrooms, a kitchen, and a self–contained guest wing. Each apartment is evidently entirely independent of the others; as distinguished from a situation where there is some part of the apartments shared by all of them. In the light of this, I easily distinguish the case of ***Kinzler vs Kinzler [1985] Fam Law 26 C.A.***, relied upon by Counsel for the Plaintiff, from the case before me. In that case, the Court found the whole of the hotel, and not only the living quarters occupied by the couple, to be matrimonial home since the whole hotel had *only one door and one kitchen* serving it.

Had section 2 of the Mortgage Act referred to *'a building, or part of which a husband and a wife ...'*, it would have meant that in a situation where a family occupies any part of a building as their matrimonial home, the whole building becomes a matrimonial home. This would apply even where the family occupies only one room out of the main house; or occupies the guest wing or servants' quarters of the main house, since the guest wing or servants' quarters are obviously part of the main house. Similarly, occupation of one apartment, or part of it, out of the whole building, would have rendered the entire building a matrimonial home; notwithstanding that each apartment is a completely independent unit from the others.

Conversely, if the Plaintiff were a lawful wife of the 2nd Defendant, and was indeed in occupation of the guest wing of one apartment out of the four apartments as claimed by her, I would have found this to be occupation of *'part of a building'* as envisaged in section 2 of the Mortgage Act. I would have accordingly restricted her matrimonial home to only that apartment whose guest wing she was in occupation of. Understandably, this would have necessitated the making of a consequential order for the apartment block to be brought under the operation of the condominium law, to protect her interest without interfering with the other interests in the same building.

3. Whether the mortgaging of the suit property, without the Plaintiff's consent, was lawful.

Apart from the requirement for consent with regard to matrimonial property, provided for under the Mortgage Act as shown above, the Land Act (Cap. 227), as amended, refers to such property as family land and accords it equal protection. It provides in its amended section 38A (4) that family land is land: –

"(a) on which is situated the ordinary residence of a family.

(b) on which is situated the ordinary residence of the family and from which the family derives sustenance.

(c) which the family freely and voluntarily agrees shall be treated to qualify under paragraphs (a) and (b) or

(d) which the family voluntarily agrees shall be treated to qualify or

(e) which is treated as family land according to the norms, culture, customs, traditions or religion of the family."

The same section then defines *'ordinary residence'* as follows: –

"the place where a person resides with some degree of continuity apart from accidental or temporary absences; and a person is ordinarily resident in a place when he or she intends to make that place his or her home for an indefinite period."

Furthermore, it defines *'land from which a family derives sustenance'* to mean: –

"(a) land which the family farms; or

(b) land which the family treats as the principal place which provides the livelihood of the family; or

(c) land which the family freely and voluntarily agrees, shall be treated as the family's principal place or source of income for food."

I have found that the Plaintiff has failed to discharge the burden of proving that she is a lawful wife to the 2nd Defendant. In the absence of any other claim of interest in the suit property apart from matrimonial interest, there is nothing in the law requiring that the 2nd Defendant should have sought and obtained the consent of the Plaintiff prior to securing the loan on the security of the suit property. If anything, it is the spousal consent of Sarah Sheila Wanyoto Wafula (DW1) which would have been necessary since she is the lawful wife of the 2nd Defendant. However, it would have required that the suit property is family property, from which the family principally derives its sustenance.

However, the persons who should know best about the suit property – the 2nd Defendant, and his wife DW1 – have both stated on oath that the suit property is neither a matrimonial, customary or family property, nor one from which the family derives its sustenance. DW1 testified that she ordinarily resides at Bukoto; and that her husband has other properties in Arua and Mbale. She further testified that she and her husband acquired the suit land to construct thereon rental premises. The Plaintiff does not feature anywhere in the acquisition of the suit premises. This is corroborated by the testimonies of the Plaintiff's own witnesses Mike Kabole (PW2) the caretaker of the suit property, and Petero Semanda (PW3) who constructed it, that the construction of the suit property started in the year 2000.

It is therefore evident that the suit property was acquired by the indisputably married couple long before the alleged marriage of the Plaintiff to the 2nd Defendant. No evidence was adduced in Court that Sarah Sheila Wanyoto Wafula's interest in the suit property terminated. This is pertinent in the light of the spousal consent she gave and the statutory deposition she made pursuant to the application for the suit loan. The Plaintiff testified that she was married to the 2nd Defendant in 2005, and it was in 2008 that the 2nd Defendant declared to her that the suit property is her matrimonial home; and that she made some financial contribution towards its development. Even if this were so, it would not have conferred on her spousal status or authority. The law on spousal consent does not protect a mere lover or paramour; but only a lawfully married spouse.

Most conspicuously, there is no evidence that the family had at any time freely and voluntarily agreed that the suit property shall be treated as the family's principal place or source of income for food; which is one of the considerations under the provisions of the Land Act cited above. It is quite clear from the testimony of DW1 that she had a chicken rearing business on top of the 2nd Defendant's employment in government and later with the U.N.; and that they acquired the suit property from their personal resources. It is thus clear that the family had its source of income for sustenance, and never envisaged that the suit property would be its principal place, or source of sustenance. Accordingly then, there was no requirement whatever for spousal consent for the mortgaging of the suit property.

The 1st Defendant contends that there was no legal requirement for spousal consent with regard to the suit property since it does not fall under the category of properties protected by the Mortgage Act or the Land Act. It therefore contends that the spousal consent and statutory declaration demanded of, and given by, Sarah Sheila Wanyoto Wafula was out of prudence. I fully agree. The fact that the 1st Defendant went out of its way to secure the consent of Sarah Sheila Wanyoto Wafula does not place the property under any of the considerations under the Mortgage act or Land Act. All that the 1st Defendant did was to be on the safe side by taking reasonable steps as provided for in the Mortgage Act in case there was something regarding the status of the suit property that the mortgagor had not disclosed.

In the premises then, I am in full agreement with the contention of the 1st Defendant that the Plaintiff is a mere front for the 2nd Defendant who has defaulted in his loan obligation to the 1st Defendant, and lacks the decency to face the consequence of his contractual obligation. There is much on record in support of this contention. Apart from the inexplicable failure by the 2nd Defendant to defend himself in Court, the Plaintiff failed to bring her marriage certificate to Court when it was the most crucial document in support of her claim. She could not remember the date of birth of her own child she alleges she has with the 2nd Defendant. The year she claims she first brought her children to the suit premises was when then they were, from her evidence, not yet born.

I must point out that in short, she is a pathological liar being used to frustrate the 1st Defendant. She together with the 2nd Defendant are quite lucky that the 1st Defendant has not brought a counter claim against both of them in this suit; as I would have penalised them in general and punitive damages for indulging in the abuse of the due process. In the result, I dismiss this suit with costs.

Alfonse Chigamoy Owiny – Dollo
JUDGE

10 – 04 – 2014