



CYMBELL ADVOCATES NEWSLETTER

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FOREWORD

By Godwin M. Matsiko, Managing Partner

Mario Puzo once said, "loyalty is the strongest glue which makes a relationship last for a life time" As we do our regular check in with our clients this month, we will be looking at some key pitfalls in land transactions and how one can prepare for them. For companies or individuals faced with decisions on redundancies or have been impacted by the same, we would like to make sure you are aware of checks to a proper process. We also look at the vitality of quality assurance and service provision. On our usual take on dispute resolution, we conclude this issue by exploring the ground of "mental cruelty" in divorce matters.

Do reach out to us with your thoughts and comments as you read. Happy to engage more on areas of your particular interest.

"Loyalty is the strongest glue which makes a relationship last for a life time." – Mario Puzo

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ARE YOU PLANNING TO DO A LAND TRANSACTION? BEWARE OF THE FOLLOWING CHALLENGES. By Owen Henry, Associate Banking, Finance & Finance

On my first day in Law School some many years ago, my father gave me some advice that I have kept in mind. He said that if I wanted to become a good lawyer I had to master land transactions. Being a government valuer by profession, he had observed the span of land related issues in almost all aspects of legal practice.

Land transactions in Uganda are notoriously marred with fraud, violence, competing interests, errors and gross inefficiencies. Be it in estates and administration, banking or securities, contract, trespass, etc., land issues will surface and one's mastery of land transactions will come to bear in each case.

There are several transactions which pertain to land and the procedures for execution of the same have changed over time even though the law has remained rather unchanged. When dealing in most land transactions, the Land Act and the Registration of Titles Act are the Key legislations, however experience, contacts and soft skills such as vigilance, due diligence and care are really the differentiator. Not to mention the various guidelines by the Ministry of Lands, as well the discretion given to Registrars in executing these transactions.

1. Purchase of Land.

A transaction for purchase of land is contractual in nature with the assumption that a willing buyer and seller can freely reach a conclusion regarding the sell or purchase of land.

This is true but not entirely because there are various laws that may limit this contractual right. For example, if the

land in question is categorised as matrimonial property, the consent of the spouse is required before dealing with such land, In the recent case of Kolya Vs Kolya CS 150/2016, it was held that matrimonial property could not be bequeathed without the consent of the widow.

Secondly the land tenure in question may also affect the ability to freely sell or purchase. In the case of non-citizens, they can only acquire lease interests for a maximum of 99 years albeit with the right to renew for indefinite terms.

Land may also be encumbered with the interests of third parties such as mortgagees from banks or lenders, caveators, or with restrictive covenants which must be taken into consideration before the purchase.

There is also of course the practicality of purchasing and then enjoying the use of the land. In this regard certain locations may not be conducive or the history of the land may be so cumbersome. It is a well-reported fact that purchasing land in Northern Uganda is almost impossible due to the community which in many cases is hostile to outsiders. It may therefore be possible to purchase such land but impossible to occupy due to the hostility of the community. The same applies to land in wetlands or in hard to reach places. The practicalities rather than the legalities have to be borne in mind in these cases.

Assuming there is no legal or practical or even political impediment to the purchase, the parties may then advance with negotiations as to the consideration for the purchase. The purchase has to be witnessed and documented. The requirement for a written contract is not so much legal as it is practical.

When it comes to transfer of the land, a valuation for stamp duty will have to be undertaken on the basis of the purchase price indicated on the agreement

2. Transfer of title

If the land in question is registered land, i.e. if it has a land title, the purchase should culminate into the execution and availing of the following documents; the land title, purchase agreement, transfer forms and consent to transfer form (where applicable). In addition, and based on recent experience, a passport size photograph and as well the national identity cards have to be availed.

Our courts have long reiterated the due diligence required to precede a purchase of land. In many cases, the due diligence required has been held to involve; conducting a search at the lands registry and visiting the ground/location to ascertain the true ownership and any competing interests in the land. The standard of due diligence required is fluid and changes based on the surrounding circumstances also. Deeper due diligence may be required in the event that there is any reason to suspect fraud or impropriety in the transaction.

In fact, the transfer process commences with a valuation by a government valuer. This is to ascertain is to ascertain the value of the land and therefore the stamp duty tax payable for the transfer. The government valuer will assign a value in relation but not necessarily the same figure as indicated on the transfer agreement. Once the stamp duty tax has been paid to Uganda Revenue Authority, the documents may then be submitted to effect the transfer. These documents include the land title, the transfer forms, the national identity cards, the passport size photographs and the payment receipts relating to stamp duty and other registration fees.

It is important to state that the Registrar has the discretion to require more information or documents to confirm the authenticity of the transaction. For example, he or she may require the seller to personally attend before him or her to confirm that indeed the land has been sold.

The law requires every transaction pertaining to registered land which may affect proprietary interests on

such land to be notified on the title. This is effected by assigning each transaction a unique instrument number coupled with the wet signature of the Registrar and the time and date of the transaction. The latter is critical because of the principle that the first in time takes precedence with regard to competing interest in the same land. These days any changes on the title have to be captured on the Registry's computerised system, including scanning the title before the owner can collect it.

3. The role of legal counsel

In law advocates are some of the few categories of professionals mandated to witness and effect land transactions. It is expected that a lawyer would understand the full scale of the transaction as well as the legal and practical implications at each stage. Among the documents to be submitted during the transfer process is a copy of the advocate's practicing certificate and some registries require the Advocate to personally affix their stamp and signature to authenticate the same. This precaution helps parties to have recourse in the event of fraud or negligence affecting the transaction. They can have recourse against their lawyer through the Law Council. It is therefore important to have a lawyer assist with the process as it gives an added level of comfort or assurance.

Conclusion

In conclusion, the purchase and transfer of land is one of the commonest but most problematic transactions. From experience, issues start from the due diligence undertaken prior to the purchase. A shallow due diligence will lead to errors too expensive to remedy down the road. Prospective purchasers are therefore advised to spare no expense in the due diligence process before even commencing the transaction.



MENTAL CRUELTY AS A GROUND FOR DIVORCE IN UGANDA

By Arinda Herbert, Associate Litigation & Dispute Resolution

The Constitutional Court in *Uganda Association of Women Lawyers (FIDA) & 5 Others vs. Attorney General*, Constitutional Petition No. 2/2003, the positions of the law now is that each of the grounds for divorce specified in the Divorce Act are available equally to both the husband and the wife. The Constitutional Court further declared section 4 of the Divorce Act (as amended by case law) which set out separate grounds for divorce for men and women as unconstitutional.

The reasoning behind the decision of the courts was that Article 31(1)(b) of the Constitution of the Republic of Uganda, provides that a man and a woman are entitled to equal rights in marriage, during marriage and at its dissolution. This restates the constitutional prohibition of discrimination on the basis of sex enshrined in Articles 21 & 33 of the same Constitution. Therefore, the position of the law now is that each of the grounds for divorce specified in the Divorce Act are available equally to both the husband and the wife.

In this article, I am going to delve more on cruelty as a ground of divorce; especially mental cruelty which is common to most jurisdictions and which is very common in almost all African marriages given the patriarchal nature of families or homes. Therefore, one wonders, whether or not mental cruelty or anguish constitutes a legal ground for divorce. Although there is no definition of cruelty in the Divorce Act, case law (see *Habyarimana vs. Habyarimana* [1980] HCB 139) has established that no conduct can amount to cruelty unless it has the effect of producing actual or apprehended injury to the petitioners' physical and mental health.

Laws are principally enacted for the protection of humanity; and as a result, individuals who seek divorce look-up to the law for protection from their marriages or partners before it ultimately ends in physical or mental discomfort, or even death. It has been well established without exception in all jurisdictions that in cases where an individual suffers even minor infractions, he or she is given the necessary and adequate relief by courts of law.

Despite divorce being a remedy enacted solely for the purpose of affording relief to two contracting parties whose marriage has become irretrievably broken down or unbearable due to cruelty of either or both; there are a number of questions that are given weighty consideration such as: what is the extent necessary to sustain an action for divorce on the ground of cruelty?; must physical violence be present? and lastly should mere nastiness, continued quarrels among the parties, or incompatibility of temperament justify the existence of cruelty? Should the courts be granted unlimited powers of discretion or rather they be guided entirely by statutes? This is the challenge posed when trying to sustain mental cruelty or mental anguish as a ground for divorce especially in instances where physical violence is entirely lacking. Would a court in such circumstances deem it sufficiently serious for an action for divorce?

Though some courts do not absolutely reject mental cruelty as a grounds for divorce, other courts seldom found it to be sufficient without proof of physical violence. However, what the Courts have done to bridge the gap is to look at the totality of the facts before it and determine whether the facts lead to the finding that the marriage has irretrievably broken down then a divorce would be granted (see: *Julius Chama vs. Specioza Rwalinda Mbabazi Divorce Cause*

Single Acts of Cruelty

In almost all jurisdictions, unless an act of cruelty is such as to endanger life, a single act of cruelty will not constitute a ground for divorce. Nonetheless, some courts have concluded that a single act of aggravated cruelty may justify a divorce if it is accompanied by brutal neglect, despire, and abandonment or with such instances that satisfy the court of the likelihood of such acts being repeated.

Further, statutes require "extreme or repeated" cruelty, two distinct acts of violence are held sufficient, provided there is not too great a lapse of time between the distinct acts." "If the conduct of the guilty party is such as to naturally cause great mental suffering to the other and render impairment of health probable, so that further efforts to perform the duties of the marriage state would be dangerous, that is sufficient.' While actual bodily harm or apprehension thereof need not be shown to justify granting a divorce on the ground of cruelty, yet there must have been such treatment as to destroy the peace of mind and happiness of the injured party, and to endanger the health or utterly defeat the legitimate objects of the marriage.

Conduct, Intent, Wilfulness and Malice

Impliedly, conduct, intention, wilfulness or malice are necessary elements which the law recognizes and that must be proved in that cruel treatment for the divorce to be granted. In reiteration of my earlier discussion in this article, actual bodily harm or apprehension must be shown to authorize granting a divorce on the ground of cruelty.

Thus, even though the courts are aware that nothing but misery is to be attained by compelling the parties to live together where there is mental distress to -one or both, the courts are nevertheless confined to their statutes, which specifically designate when and how the divorce should be granted, regardless to the state of their marriage. In light of the law under Section 4 of the Divorce Act Cap 249, any one that wishes to divorce is given three grounds for divorce, to say; cruelty, adultery, and desertion. Thus, if courts are to confine themselves to the statute, no court will grant divorce unless a petitioner proves any of the three grounds.

Nevertheless, when it comes to cruelty, the courts are starting to be more liberal and trying to evoke a more

contemporary and perhaps more considerate rule that: *any unwarranted conduct by either partner that causes mental suffering must be deemed sufficient to constitute cruelty and thus permit the granting of a divorce. This liberal and contemporary approach was adopted in the case of Namuyimbwa vs David Ralph Pace, Divorce Cause No. 14 of 2017, wherein Justice Tuhaise granted divorce after having found that the Petitioner had satisfied court that the Respondent's conduct caused mental and psychological suffering to the Petitioner. The court further held that such conduct amounted to cruelty...*

The decision in the *Namuyimbwa* case (*supra*) is evidence that the courts in Uganda as well have embraced the mental cruelty or anguish as one of the grounds for a grant of divorce. Therefore, there needn't be physical abuse or contact for the Petitioner to succeed in divorce on the ground of cruelty. However, the burden of proof remains with the Petitioner to prove mental cruelty at a balance of probability. Thus all the Petitioner needs to show is that the conduct of the Petitioner has the effect of producing actual or apprehended damage to the Petitioner's physical and mental health.

Conclusion

I would caution that this article is not to convey the impression that all cases of trivial marital differences or singular acts of cruelty warrant a grant of divorce. However, there is no doubt that the majority of marriages today have distressed partners suffering mentally, emotionally and psychologically at the hands of their partners due to austerity of their partner's behaviour in regard to anger management, irritable language, intolerable manners, among many others. All this may not lead to actual bodily injury but without a doubt cause mental anguish or cruelty to an individual. Why should the courts of law give a blind eye, where a Petitioner is clearly suffering and there is no sign it can be remedied by prudent conciliation. Should the court stick to the rigid grounds provided by statute? Must the court leave such a Petitioner to continue suffering in silence and risk the possibility of allowing this torment to drive them into acts of violence, injury or even death for the Petitioner to be granted a divorce?. Many will disagree.

These are differences which the law did not envisage when it gave individuals the right of the redress in dissolving a marriage that they freely contracted to.

DECLARING REDUNDANCIES IN EMPLOYMENT. WHAT ARE THE LEGAL IMPLICATIONS?

By Brenda Karuhanga, Research Associate

Redundancy occurs when an employer no longer requires a particular job to be done. This means that all duties are distributed amongst existing employees or such duties are no longer required.

It is important to note that redundancy can only take place in the event that the position itself is declared redundant, and does not take place if one employee is just replaced with a new one. The term redundancy, retrenchment, and layoff are often used interchangeably. It can either be forced or voluntary in nature in regard to which employee is let go from the company. In the case of voluntary redundancies, employers usually offer incentives such as severance packages. Voluntary redundancies prevent the employer from having to choose which employee to terminate.

Redundancy is the loss of employment, occupation, job or career by involuntary means through no fault of an employee. It involves termination of employment at the initiative of the employer, where the services of an employee are no longer required. Redundancy may arise under various circumstances including:

- The employer has ceased, or intends to cease continuing business;
- The requirement for employees to perform work of a specific type or to conduct it at the location in which they are employed has ceased or diminished; or
- Reorganisation of the workforce resulting in less work and;
- Changes in conditions that result in the new job being quite different from the old one.

The Employment Act 2006 does not specifically define redundancy and therefore seem to classify it as termination under section 65(1).

Since the criteria for redundancy in Uganda is not defined by law, the employer must follow the criteria set for termination which is the existence of a fair ground to terminate the contract. An employee who has worked for at least 6 months is entitled to severance pay in case of termination or unfair dismissal. The law requires the employee and employer to negotiate severance pay. In the absence of such a negotiated agreement the determination may be done by a labour officer.

An employer who has decided to make an employee redundant must inform the employee and discuss the likely effects of the redundancy. This must happen as soon as practicable after the employer has decided to make the employee redundant.

Where voluntary redundancies are unsuccessful, forced redundancy can be applied and some factors may be used in assessing redundancy possibilities such as attendance records, disciplinary records, the standard of work performance of an employee, the employee's prior experience, or the contribution to the business as a whole. It becomes the responsibility of the employer to apply the test for redundancy and assess fewer employees to carry out a certain piece of work, and not just simply the work becoming diminished or ceased.

As is possible in the dismissal process, employees have the right to appeal against the decision to make them redundant, and the employer should agree on a process by which any appeals will be heard. Alternative to redundancy the employer might instead consider recruitment freezes, removing overtime pay (where applicable), stopping incremental pay rises, reducing agency worker spend, or revise terms and conditions of employment.

The selection process of staff to be impacted must be done fairly; for example according to their level of experience or capability to do the job. An employer can not select according to age, gender, or if one is disabled or pregnant. Any biased or legally unfair selections may be deemed unfair dismissal.

A declaration of redundancy and collective termination is a second option where an employer is either closed or facing reduction in business. The company would be required to provide the employee with notice of the termination indicating redundancy as the reason and pay to the employee their entitlements under the Act. Employees are entitled to accrued salary, payment for accrued leave not taken, payment in lieu of notice in case the company does not intend for the employees to continue working during the notice period, in some cases severance pay may also apply. Severance pay, where applicable should be agreed between employer and employee. Absent in agreement, based on recent court decisions such as in the case of **Donna Kamuli Vs. DFCU LDC 002/2015**, one month's pay for each year of service was recommended.



QUALITY MANAGEMENT IN LEGAL SERVICES PROVISION

By Alebar Kanyonza, Administration & Finance

Quality management basically refers to ensuring that an organization or a product is consistent. Quality management has four main components: planning, control, assurance and improvement. It is focused not only on product/service quality, but also the set process.

There are various types of quality management programs and although the approach to solving quality issues varies with the different quality management programs, the goal remains to create a high quality, high-performing product or service that meets and exceeds the customers' expectations.

What is referred to as "Quality"? Quality as defined by ISO is "the totality of features and characteristics of a product or service that bear on its ability to satisfy stated or implied needs." If a product or service meets the requirements specified by the clients then it is considered to be of good quality.

Why quality management is important:

The costs that come with poor quality output by an organization cannot be undermined. Internal failures, process downtime, price downgrading, customer complaints, product return, product liability costs among others weigh heavily on organisations.

Quality of a product/service can be measured in terms of performance, reliability and durability. The quality of a product or service sets it apart from the industry's competitors. So it is essential to create/give great quality products which not only meet but also exceed customer satis-

faction. Customers need to be satisfied with your brand. Marketers are more successful when they emphasize on quality than quantity.

Clients are loyal to organisations with trusted (quality) products / services. In any situation, no one is willing to go back to an organisation that they believe did not do their best to satisfy their needs.

Quality management eliminates defects and incorporates continuous changes and improvements in the system. Quality management ensures that you deliver products as per promises made to the customers through various modes of promotion.

Quality management tools help organizations to design and create products that the customer actually wants and desires. It ensures increased revenues and higher productivity for organizations; Heeding to quality management tools ensures better business, increased cash flow, satisfied employees and healthier workplace. These processes make the organization a better place to work. Money is a strong motivating factor. Employees deliver more work in less time and work with each other closely.

Understand what your clients expect of you, research on market dynamics, collect feedback on a regular and monitor the process to ensure you have the best quality output.

For legal service provision, law firms may guarantee quality through consistent and effective client representation. Law firms adhere to ethical standards, provide good value and instil confidence in all stakeholders.