

**DIVORCE CAUSE NO. 100 OF 2022**

## VERSUS

**JUDGEMENT BEFORE: HON. LADY JUSTICE CELIA NAGAWA.**

#### 4. Custody of all the Issues.

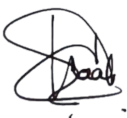
- 5. Costs, and
- 6. Any other orders that the Court deems fit.
- 1.3 The Petitioner was represented by Counsel Eriya Mikka of MMAKS Advocates, Kampala.
- 1.4 The Respondent was represented by Counsel Francis Nyakoojo of Uganda Christian Lawyers Fraternity, Baptist House, Kampala.

## **2.0 To Be Noted.**

- 2.1 It should be noted that the court shall at all times protect the best interests of all children brought before it. In this regard, identity of the Children will be kept off the record to the maximum extent possible, and so will all sensitive information regarding the children including the allegations brought forth by the parties in furtherance of their respective cases.
- 2.2 The court informs the parties that all the evidence and pleadings presented by them have been perused, analyzed and considered in the determination of this Cause.

## **3.0 Background.**

- 3.1 The Petitioner and the Respondent entered into a Marriage at a Ceremony held at St. Andrews Anglican Church in Jinja on the 22<sup>nd</sup> June, 2009. As a couple they were blessed with three children. The Petitioner contends that his marriage with the Respondent has broken down as a result of the Cruelty inflicted upon him by the Respondent during the subsistence of their marriage.



- 3.2 He contends that during his marriage, the Respondent inflicted cruelty on both him and the children in the form of physical violence and emotional abuse including the use of abusive and/or obscene and vulgar language against the Petitioner and the children. The Respondent has with malice made false reports of domestic violence, cruelty and sexual abuse against the Petitioner vide CIDHQTRS GEF 115/2021 and CIDHQTRS GEF 85/2021 respectively which resulted in the Petitioner's arrest and subsequent release on police bond. The Petitioner further contended that he had been maligned by the Respondent on various social media platforms and several church groups causing him mental anguish.
- 3.3 On her part, the Respondent contends that the Petitioner refused to financially support her during her pregnancies. She contends that the Petitioner has been harming the children. She also stated that she was raped and sodomized by the Petitioner which has resulted in cancer-causing cysts. The Respondent further contends that the Petitioner has made it a habit to disrespect her in front of the children causing them to be violent with her thereby causing a rift between her and her children.
- 3.4 The Respondent further states that she has been taking care of their matrimonial home and all its affairs including house chores from the time they got married. The Respondent has also significantly contributed to the construction of their matrimonial home and fence. She also averred that she supervised all the operations of construction directly including



developing a botanical garden and an exotic flower garden which have financially contributed to the family's wellbeing.

#### **4.0 Evidence of the Parties**

4.1 Both parties presented evidence annexed to their pleadings which I have duly read and considered. However, due to the volume of annexures, I will not reproduce them here but I have taken keen consideration. In summary, the parties presented and the Court admitted the exhibits below.

4.2 The Petitioner presented before this court **PEX-1 to PEX-14** and **PID-1& 2**. The Respondent presented before this court **REX-1 to REX-19** and **RID-1 to RID-5**.

#### **5.0 Issues for Court's Determination.**

1. Whether there are any grounds for Divorce between the Petitioner and the Respondent?
2. Whether the Property Comprised in Busiro Block 392 Plots 99 and 71 is Matrimonial Property?
3. Who is entitled to Custody?
4. What remedies are available to the parties?

#### **6.0 Burden of Proof.**

6.1 In all civil matters like the present petition, he who alleges bears the burden to prove his/her case on a balance of probabilities.

**Section 101,102 and 103 of the Evidence Act, Cap.6.**

**Section 101 of the Evidence Act (supra)** is to the effect that;

*"Whoever desires any Court to give judgment as to any legal right*



*or liability, dependent on the existence of the facts which he or she asserts must prove that those facts exist”.*

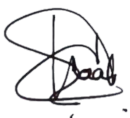
7.0 **Locus in Quo Proceedings.**

7.1 This court conducted a locus visit guided by **Practice Direction No.1 of 2007** issued to provide guidelines to litigants, counsel, and judicial officers on how locus in quo proceedings should be handled. See; **Bongole Geoffrey & Others versus Agnes Nakiwala CACA No. 0076/2015.**

7.2 **Order 18 of the Civil Procedure Rules SI 71-1**, prescribes the procedure for conducting and hearing of Civil Suits and examination of witnesses. See ***Nagidde Rebecca Vs Mwasa Charles Steven (Civil Appeal No. 160 of 2018) [2020] as decided by Hon. Justice Egonda Ntende.***

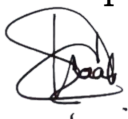
7.3 The locus in quo proceedings were conducted on 21<sup>st</sup> November, 2023 at Ssekuwunga, Muliro, Kabula, Entebbe Road Wakiso District starting at 2:00 pm, as provided for under **Order 18 Rule 14 of The Civil Procedure Rules SI 71-1** which provides that the Court may at any stage of a suit inspect any property or thing concerning which any question may arise. The parties, their witnesses and Advocates were present during the said proceedings.

7.4 Locus in quo proceedings form part of the trial, all rules observed in court were adhered to. The purpose of locus proceedings was to enable the court to check on the evidence given by the witnesses in court, and not to fill gaps in their evidence for them (***see Fernandes V Noroniha [1969] EA 506/***



***De Souza v. Uganda [1967] EA 784/ Yeseri Waibi v. Edisa Byandala [1982] IICB 28 and Nsibambi v. Nankya [1980] HCB 81).***

- 7.5 During the locus in quo, this court had the opportunity to verify the evidence already adduced in court by the witnesses, particularly on the physical state of the matrimonial property. This also gave the court a clear view of the physical aspects of the evidence to enhance the oral testimonies. It helped this court to better understand the evidence adduced by the witnesses.
- 7.6 The court was able to identify the two Plots of land as described in the Petition comprised at Busiro Block 392 Plot 99 and 71, the two houses, the trees, flowers, and banana plantation, forest, commercial trees, and fruit orchard as described by the parties. The court was also shown the water tank that the Respondent contends she bought and fixed on the property.
- 7.7 The court visually observed that both houses sit on Busiro Block 392 Plot 71 and Plot 99 has no structures. Plot 99 has what was described as a forest with trees enclosed in a fence. The property has about 200 trees comprising of Pine and Eucalyptus trees. Plot 99 also contains about 15 stems of banana plantation (Matooke) and another approximately 17 stems were found scattered around the property and some close to the main gate (*They were counted*).
- 7.8 Plot 71 also held several plants both in pots and planted on the ground. It held a few Avocado trees, oranges, mangoes and pineapples (fruit orchard). A wall fence was constructed using



slates on Plot 71 and Plot 99 was fenced off with cemented poles but without chain link or wires although the boundaries were clear.

8.0 **Submissions by Counsel.**

8.1 I have carefully perused the record and considered the written submissions by both learned counsel. Further, I evaluated and examined both parties' documentary evidence.

9.0 **Resolution of Issues.**

9.1 The Petitioner presented a marriage certificate marked '**PEX 1**' detailing the solemnization of the marriage between the Petitioner and the Respondent which took place at St. Andrews Church Jinja on 2<sup>nd</sup> June, 2009.

9.2 The law is that every certificate of marriage which shall have been filed in the office of the registrar of any district, or a copy of it, purporting to be signed and certified as a true copy by the registrar of that district for the time being, and every entry in a Marriage Register Book or a copy of it, certified as aforesaid, shall be admissible as evidence of the marriage to which it relates, in any court of justice or before any person now or hereafter having by law or consent of parties authority to hear, receive and examine the evidence. See **Section 33 of the Marriage Act, Cap. 251**. This court therefore finds that a valid marriage exists between the Petitioner and the Respondent.

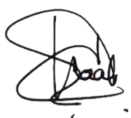
9.3 **Section 18 of the Law Revision (Miscellaneous Amendments) Act, 2023 that amended Section 4 of the**



**Divorce Act Cap 249** following the decision in **Uganda Association of Women Lawyers (FIDA) & 5 Others Versus Attorney General Constitutional Petition No 2/2002**, provides that;

- (1) A husband or wife may apply by petition to the court for the dissolution of the marriage on the ground that since the solemnization of the marriage, his wife or her husband—
- a) Has been guilty of adultery.
  - b) Has changed his or her profession of Christianity for the profession of some other religion, and gone through a form of marriage with another man or woman.
  - c) Has been guilty of bigamy
  - d) Has been guilty of rape, sodomy, or bestiality.
  - e) ***has been guilty of cruelty***; or
  - f) Has been guilty of desertion, without reasonable excuse, for two years or upwards.

9.4 The Petition before this court is premised on the ground of cruelty and the court will therefore examine whether the Petitioner and Cross Petitioner have sufficiently proved it. The petition will be successful under **Section 8 of the Divorce Act Cap 249** if the court is satisfied that the petitioner's case has been proved, and does not find that the petitioner has been an accessory to or has connived at the going through of the form of marriage or the adultery, or has connived at or condoned it, or that the petition is presented or prosecuted in collusion, the court shall pronounce a decree nisi for the dissolution of the

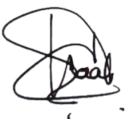




marriage. This court will examine the validity of the ground(s) presented by the Petitioner and Cross Petitioner.

### **Cruelty.**

- 9.5 Cruelty is not defined by the **Divorce Act Cap 249**, however, the court adopts the definition in **Habyarimana Vs Habyarimana (1980) HCB 139**, to mean any conduct that produces actual or apprehended injury to mental health.
- 9.6 **In Gakwavu Vs. Mariana Gasengayire [1977] HCB 322**, it was held that: “The Courts cannot examine every petty squabble in marriage to build a case of cruelty... the standard of proof of cruelty is not beyond reasonable doubt as required in criminal cases. But like in adultery, in cruelty the standard of proof is slightly higher than in a preponderance of probabilities required in ordinary civil case...for a marriage bond cannot be set asunder lightly”.
- 9.7 “The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements to create certain categories of acts or conduct as having or lacking the nature or quality that renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. The court should bear in mind the physical and mental



condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse. Malevolent intention is not essential to cruelty but it is an important element where it exists". **Halsbury's Laws of England [Vol.13, 4th Edition Para 1269]**

- 9.8 In his evidence in chief, the Petitioner led evidence detailing several instances of cruelty. He contended that the Respondent has continuously used abusive, obscene, and vulgar language against him in the presence of his children. He further stated that on several occasions the Respondent has with malice aforethought made false police reports of domestic violence, cruelty, and sexual abuse which resulted in his arrest and subsequent release on bond. The Petitioner has continuously made false allegations against the Petitioner stating that he has unnatural sex with his sons and defiled their daughter.
- 9.9 The allegations against the Petitioner were investigated on two separate occasions by the Directorate of Public Prosecutions and found to be lacking in merit. In further response to the allegations against the Petitioner, a psychiatric evaluation marked "**PEX 3**" was conducted on the child in question and Dr. Catherine Abbo, an Adolescents Psychiatrist, found that;



*“ ... There was no evidence from the psychiatric evaluation that the child suffers from psycho-trauma related to sexual abuse.”*

9.10 An investigative Report was also carried out by the Criminal Investigations Directorate at Kibuli marked **“PEX 4”** on the Petitioner’s Trial Bundle regarding the children who were said to have been sodomized and defiled by the Petitioner. In this report, it is clearly stated that;

*“..... The Posterior fissure and petulant Sphincter were normal. The medical examination of ..... revealed that “xxx” was normal with an intact hymen.”*

9.11 The DPP closed Case File HQTRS GEF 85/2021 because there was no evidence to sustain the charge of defilement.

9.12 The Petitioner also averred that despite the expert Reports dismissing the allegations, the Respondent has continued to relentlessly make damaging allegations against the Petitioner to his family members and on various social media platforms. He further stated that the allegations have put his life in danger and caused insecurity as it has led to threats of lynching from various activist groups.

9.13 By a press release dated 8<sup>th</sup> March, 2023 marked **“PEX 5”** on the Petitioner’s Trial Bundle, the Uganda Police Force clarified stating that the said allegations were false and frivolous since they were investigated on two separate occasions and found to be untrue. In the Report, it was stated that;

*“From the interviews and findings, the counselor did not find any signs of physical or sexual abuse, but she indicated that they had signs of psychological torture, as a result of abuse from their*



*mother. The victims were examined by Doctors at Mulago National Referral Hospital, and none of them found any evidence of alleged physical and sexual abuse. The posterior tissues and petulant anal sphincter were normal with no signs of physical and sexual abuse. The “xxx” was further examined in .... private parts and .... hymen was found still intact. In addition, the Labora Laboratory Findings on HIV, Hepatitis B, and blood levels were negative. The victims also denied any allegations of sexual abuse by anybody but acknowledged that they were closer to their father, which made their mother uncomfortable”.*

9.14 The Petitioner further stated that the Respondent has consistently threatened him both in person and through phone calls, she has continued to abuse the children telling their “children” that they were sodomized by their father and their “child” that “xxx” was defiled by the father and is a result of rape. The Petitioner and their children live in fear of the Respondent.

9.15 The Respondent submitted that the accusations made by her are not just mere allegations but are true. She asserted that she was raped by the Petitioner during their marriage and that the Petitioner’s claim that his life is in danger is a lie meant to mislead this Court.

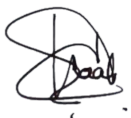
9.16 In her evidence in chief, the Respondent listed several allegations of sexual abuse against her and the Children by the Petitioner that will not be reiterated by this Court in this judgement but are duly noted and considered. She presented medical reports marked **“REX1 & 2”** in evidence of this.



9.17 The Respondent submitted that the Petitioner had been cruel to her by making it a habit to disrespect her in front of her children, and as a result, the children have become cruel and violent towards her. The Respondent contended that she no longer feels safe with the Petitioner as he is unbearable, irrational and has even been practicing witchcraft during the subsistence of their marriage.

9.18 Cruelty can be physical as well as mental: - If it is physical, it is a question of fact and degree. If it is mental, the inquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. **Samar Ghosh vs. Jaya Ghosh (2007) 4 SCC 511**

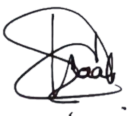
9.19 The allegations propounded by the Respondent are of a Criminal Nature. The Respondent averred that the Petitioner had not only raped her but had also molested their “*children*” and defiled their “*child*”. This Court handles Civil Family matters and not Criminal Matters. The Directorate of Public Prosecutions is mandated under **Article 120 of the Constitution of the Republic of Uganda 1995 as amended**, to direct the police to investigate any information of a criminal nature and to institute criminal proceedings against any person or authority in any court other than a court martial. Allegations of rape, sexual assault, and defilement are the purview of the



DPP and not this Civil Court. The Petitioner presented evidence to show that the allegations against the Petitioner were investigated on two separate occasions by the Directorate of Public Prosecutions and found to be lacking in Merit. The Respondent did not present this court with any evidence of ongoing investigations by the DPP, but instead, the court was presented with an investigative Report carried out by the Police marked **“PEX 4”** disproving the allegations of the Petitioner.

9.20 In further response to the allegations against the Petitioner, a psychiatric evaluation was conducted on the child in question and it was found that there was no evidence of trauma from sexual abuse. The Psychiatric report was presented by the Petitioner and is marked **“PEX 3”** on the Petitioner's Trial Bundle. An investigative Report was also carried out by the Police **“PEX 4”** which also disproved the allegations of the Petitioner. Furthermore, in a press release dated 8<sup>th</sup> March, 2023 marked **“PEX 5”** on the Petitioner's Trial Bundle, the Uganda Police Force clarified stating that the said allegations were false and frivolous since they were investigated on two separate occasions and found to be untrue.

9.21 The DPP and Uganda Police Force have set forms and procedures guiding Criminal Investigation whereby, upon completion of the investigation, the file is then presented for prosecution. In this cause, the allegations filed by the Respondent were investigated and found to lack merit. The Respondent presented medical Reports that do not prove her allegations, for example, the Reports detail rectal tears on one



of the children, but do not indicate the cause alleged by the Respondent. The Respondent contends that she has cancer-causing ovarian cysts detailed in **“REX 1”**, but it is judicial notice that there are several causes of Ovarian Cysts such as hormonal problems, pregnancy, endometriosis, severe pelvic infections, and previous ovarian cysts among others. The Respondent did not present police reports or medical reports to prove that she was raped and that the rape caused ovarian cysts. She presented medical reports which only prove the fact of the cyst but not its cause.

9.22 Furthermore, the elements of Marital Rape are proved in a Criminal Court. Exhibit **“REX3”** is a Psychological report compiled by Vivian Kityo, a trained Christian Counsellor, which only gives details of the allegations and physical observations of the behavior of the children and the Petitioner but does not prove that the children were molested and defiled by their father.

9.23 Considering the absence of evidence to substantiate the Respondent’s claims, the dismissal of her allegations by the DPP for lack of merit, and the press release by the Uganda Police Force stating that the said allegations were false and frivolous after investigations, the court finds that the Respondents continued allegations against the Petitioner amount to cruelty.

9.24 These allegations not only affect his relationship with the Petitioner and make it impossible for him to continue to live with her, but they affect his relationship with his children and in turn her relationship with her children.

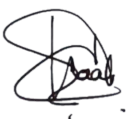


9.25 The court was also presented with **“PEX 9”**, a flash drive containing audio recordings in which the Respondent uses abusive, torturous, and inhumane language directed at both the Petitioner and the Children. In the audio, the petitioner curses at the Petitioner and their children stating that they will die in pain, not amount to anything, and other profanities that this court will not reiterate. The Respondent’s assertions of cruelty on the part of the Petitioner are based on the allegations discussed above for which she has failed to discharge her burden of proof.

9.26 The court finds that the averments, accusations, and character assassination of the Petitioner by the Respondent constitute cruelty. The unsubstantiated accusations leveled against the Petitioner are a grave assault on the character, honor, reputation, status as well as mental well-being of the Petitioner. Such aspersions are sufficient to substantiate cruelty in law, warranting the grant of a decree Nisi.

9.27 The Respondent is therefore found to be guilty of the marital offense of cruelty. The court is satisfied that the relationship between the parties had deteriorated to such an extent that it would be impossible for them to live together without mental agony, torture, or distress on the Petitioner. To keep the façade of this broken marriage alive would be doing an injustice to both parties.

## **10.0 Whether the Property Comprised in Busiro Block 392 Plots 99 and 71 is Matrimonial Property?**





- 10.1 Matrimonial Property was defined in the case of **Charman v. Charman (No 4) [2007] EWCA Civil 503; [2007] 1 FLR 1246** to mean “property of the parties generated during the marriage otherwise than by external donation’. In **Julius Rwabinumi Vs. Hope Bahimbisomwe, S.C. Civil Appeal No.10 of 2009** the Court found that while **Article 31 (1) of the Uganda Constitution (1995)** guarantees equality in the treatment of either the wife or husband at divorce, it does not, in “my opinion”, require that all property either individually or jointly acquired before or during the subsistence of marriage should in all cases be shared equally upon divorce.
- 10.2 **In Essa Vs Essa, Kenya Court of Appeal Civil Appeal No. 101 of 1995** it was held that there is no presumption that any or all property acquired during subsistence of the marriage must be treated as being jointly owned by the parties. It is therefore fully possible for the property rights of parties to the marriage to be kept entirely separate. Whether the spouses contributing to the purchase should be considered to be equal owners or in some other proportions must depend on the circumstances of each case. **(See Rimmer Vs. Rimmer [1953] 1 QB.63).**
- 10.3 **In Kagga v. Kagga, High Court Divorce Cause No. 11 of 2005**, (unreported), for example, Mwangusya, J. observed as follows: “Our courts have established a principle which recognizes each spouse’s contribution to the acquisition of property and this contribution may be direct, where the contribution is monetary or indirect where a spouse offers domestic services. ...When distributing the property of a divorced couple, it is immaterial

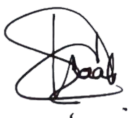


that one of the spouses was not as financially endowed as the other as this case clearly showed that while the first respondent was the financial muscle behind all the wealth they acquired, the contribution of the petitioner is no less important than that made by the respondent”.

10.4 The Petitioner submitted that he acquired the two Plots comprised in Busiro Block 392 Plot 99 and 71. He contended that he was their sole purchaser in the year 2001 predating his marriage and cohabitation with the Respondent. He presented the Certificates of Title to the two Plots of land marked “**PEX13**” and “**PEX14**” together with their purchase agreements marked “**PEX7**” and “**PEX8**”.

10.5 Counsel for the Petitioner relied on the authority of **Ambayo V Aserua (Civil Appeal No. 100 of 2015) [2022] UGCA 271 (15 November 2022)** to state that “*Spousal contribution is a question of fact. Courts recognize that the evaluation of the evidence of each spouse’s contribution is no mean task....the mere fact that 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”. The court can draw inferences from the conduct of the spouses. Such conduct may include a contribution towards the purchase, mortgage repayment et cetera*”

10.6 Counsel for the Petitioner contended that the two Plots on their own are an essential element of the development process without which there can be no development. The land represents an ever-appreciating asset whose location gives the

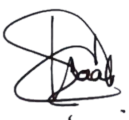


property a substantial proportion of its market value. The Petitioner contended that the construction of the houses on the property had been substantially complete before his marriage to the Respondent.

10.7 In his evidence in chief, the Petitioner admitted that the Respondent contributed to purchasing the small water tank on the smaller house and laying concrete cement in one of the rooms in the main house. He averred that the Respondent's contribution to the suit property amounts to no more than UGX 5,000,000/= (Five Million Uganda Shillings).

10.8 On her part, the Respondent submitted that whereas it is true that the Petitioner purchased the land, she significantly contributed to the developments thereon such as the two houses (small and big), a botanical garden and an exotic flower garden on the land and forest etc. She further contends that she contributed a significant amount of money at the start of the construction. She averred that she got the money she used to contribute from the sale of her land in Mubende and 9 other Plots in the greater Kampala area.

10.9 The Respondent also stated that she not only supervised the construction but also contributed to the construction of the perimeter wall, the windows of the main house, the garage, payment of all expenses of the construction laborers, finishing and fully furnishing the small house and so forth. She also averred that she solely developed the botanical garden by purchasing all the trees thereon including developing and maintaining the exotic flower garden. It was her submission



that she financially contributed to the developments on the suit property using income from the jobs and businesses she held such as a money lending business and the exotic flower garden on the property whose proceeds she used to buy construction materials.

10.10 The Respondent also submitted that she had made non-monetary contributions to the suit property such as house chores alongside caring for the Petitioner and the Children. She further stated that the Petitioner went for his doctorate studies in Sweden from 2009 to 2014 and during this time she provided for all the needs of the children using the income she was earning from her job.

10.11 The court distinguishes Matrimonial property as defined above from Non Matrimonial property which is a contribution to the marriage by one party and its source is usually outside the marriage. **In Hart Versus Hart [2018] Fam93 [2] Moylan LJ**, the Court of Appeal noted that non-matrimonial property can “be broadly defined in the negative, namely as being assets (or that part of the value of asset) which are not the financial product of or generated by one spouse before the marriage and assets which have been inherited or otherwise given to a spouse from, typically, a relative of theirs during the marriage. The presence of non-matrimonial assets potentially gives a reason to depart from equality in favor of the contribution.

10.12 In this Cause, it is evident that the two Plots of land were solely purchased by the Petitioner before the Marriage between the parties. This is as evidenced by the Certificates of Title and the



purchase agreements. **Section 59 Registration of Titles Act Cap 259** provides that possession of a certificate of title by a registered person is conclusive evidence of ownership of the land described therein. Therefore, the point of determination will only be about the developments made upon the land.

10.13 The Petitioner asserts that he had already constructed the big house and started construction of the smaller house before his Marriage to the Respondent. He admitted that the Respondent constructed the ramp on the smaller house, and put up the water tank and the piping into the smaller house. He provided proof of purchase of the suit land but did not have proof of his financial endeavors in the construction of the suit property.

10.14 The Respondent presented receipts as evidence of her contribution towards the construction. However, the receipts presented corroborate the Petitioner's assertions on her contribution. The receipts indicate payment for materials used for piping and the labor for the setup of the water tank from Moses Kasirye Technical Services, cement purchased from Suubi Hardware Suppliers and payment for quarry tiles purchased from Uganda Clays Limited marked **"REX 16"** on the Respondent's Trial Bundle. The Respondent presented other receipts that did not indicate the purchaser of the construction materials, such as **"RID5"** and the Receipts from Kyeyune Fred Hardware.

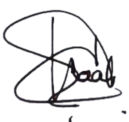
10.15 During the Locus in quo visit, the court was able to identify a small water tank on the small house, the big house was roofed but incomplete (a lot of work actually remains to be done), the



ramp was not constructed and the gardens maintained mainly the flowers and plants in the gardens for business.

10.16 The court acknowledges the fact that this is a highly contentious matter, where various falsehoods have been presented to this court by the Respondent as seen in the determination of Issue 1. Therefore this court must determine what assertions presented to it are true and which ones are most likely false. The court is guided by the Court of Appeal decision in **Ambayo V Aserua (Civil Appeal No. 100 of 2015) [2022] UGCA 271 (15 November 2022)** where the court quoted **Sarkar's Law of Evidence. 14<sup>th</sup> Edition. 1993 Reprint. Volume 1, at page 924925 thus 185** which provides that;  
*"There is no better criterion of the truth, no safer rule for investigating cases of conflicting evidence, where perjury and fraud must exist on the one side or the other, than to consider what facts are beyond dispute and examine which of the two cases best accords with these facts, according to the ordinary course of human affairs and the habits of life. The probability or improbability of the transaction forms a most important consideration in learning the truth of any transaction relied upon."*

10.17 In the evidence presented to this court, it is shown that the parties have lived at the suit property since the beginning of their Marriage. This corroborates the Petitioner's assertion that he had already constructed the house where they called their home at the time they got married. Further, from the evidence presented by the parties on their forms of employment and



income, it is more probable that the Petitioner constructed the houses in question.

10.18 The Respondent presented agreements of sale for her land Nagalabi and Kimbejja Buddo, dated 12<sup>th</sup> May, 2004 and 16<sup>th</sup> September 2009. Regarding the first sale of the Kimbejja Buddo property dated 12<sup>th</sup> May, 2004, does the Respondent seek to persuade this court that her contributions to the construction of the houses pre-dated their marriage, if so, she did not prove this fact. The Petitioner and the Respondent contracted this Marriage on 22<sup>nd</sup> June, 2009, 5 years after the said sale and therefore this would not fall within the ambit of property amassed by the couple together during the course of the marriage. However this court, in making this judgment, will consider the sale of the land in Buddo Nagalabi dated 16<sup>th</sup> September, 2009 which was made 3 months after the marriage between the parties and it would therefore be probable that the Respondent used some of the proceeds to improve the house.

10.19 The court finds that because the suit land was purchased solely by the Petitioner before his Marriage to the Respondent and because he was also responsible for the majority of the financial contribution put up for the development of the houses on the suit property, he shall be entitled to 90% percent of the total value of the suit property.

10.20 The Respondent shall be entitled to 10% of the total value of the suit property for her monetary contribution including building the ramp and water tank on the small house, the 5,000,000/= obtained from the sale of the land in Buddo Nagalabi, the



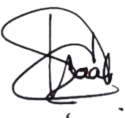
unpaid care work, and the planting of the botanical garden, trees, flowers, and banana plantation. This is also in consideration of her non-monetary value addition to the property such as hiring help, improving the grounds of the home, the perimeter wall supervision and construction together with ensuring that they are well maintained.

- 10.21 Any moveable plants, flowers, and half of the value of the trees planted on Plot 99 are awarded to the Respondent (meaning that the pine trees and Eucalyptus trees are to be shared equally with the Petitioner). The respondent shall not remove and/or destroy the fruit trees in the orchard or anywhere on the land since they have been compensated within the 10%. The banana plantation shall remain part of the land since the Respondent has been benefiting from it during this period of dispute, the remaining plantation shall belong to the Petitioner.
- 10.22 The 10% award in the value of the Property shall be paid to the Respondent upon Valuation of the Property. The Respondent shall surrender sole possession of the suit property to the Petitioner.

### **11.0 Who is entitled to Custody?**

11.1 **Section 1(q) of the Children's Act as amended in 2016** defines a custodian as a person in whose care a child is physically placed. **Article 31(4) of the Constitution of the Republic of Uganda 1995** provides that a parent is given the right and duty to care for and bring up their children.

11.2 However, it should be noted that this parental right to custody does not exist for the benefit of the parent. It exists for the



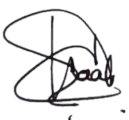


benefit of the child and is justified only in so far as it enables the parent to perform his/her duties towards the child. **See Gillick V West Norfolk and Wisbech Area Authority [1986] AC 112, 166-75, 181-90.** Custody is the duty of the parent to the person of the child. It is the duty to protect and care for the child until they reach the age of majority.

11.3 In the case of **Kagimu Vs Kagimu (2001-2005) 3 HCB 100**, the Court found that the cardinal principle in determining to whom to grant custody of a child is the welfare of the child as enshrined in Section 3 of the Children Act. In dealing with children of tender years, custody of such children should be granted to their mothers.

11.4 **Section 3 of the Children Act 2016 as amended** provides that the welfare of the child shall be of paramount consideration whenever the state, a court, a tribunal, a local authority, or any person determines the question with respect to the upbringing of the child, the administration of a child's property, or the application of any income arising from that administration. The law requires the focus to be placed on the best interest of the child, rather than the interests of the biological parents, adoptive parent(s) or anyone else.

11.5 Counsel for the Petitioner submitted that the Respondent is not a fit and proper person to have custody of the 3 children having made such statements that were adduced in the form of audio recordings that constitute a threat to the children's lives. In the recordings, played before this court during the trial, the Petitioner cursed the children, stating that they would



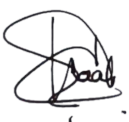
experience insanity and pain in their lives that they would not amount to anything, that they would not inherit any portion of her estate upon her death and that she would not provide them with anything during her lifetime.

11.6 In Recording 3, played before this court, the Respondent curses the children by spitting on her private parts and breasts and swears that the children shall suffer for the rest of their lives. She states that the children will live a life of suffering, wandering the world, feeding on garbage, and eventually dying in a state of madness.

11.7 Counsel for the Respondent further references **“PEX12”** which is a report from Child Psychiatrist, Dr. Sabrina Kitaka conducted on 12<sup>th</sup> June, 2023 which revealed that one of the children was psychologically affected by the Respondent’s delusional behavior and falsehoods meted against the children and their father. From this report, it was recommended that the child be kept away from a torturous environment created by the Respondent since she is now at a major risk of depression.

11.8 In the Petitioner’s submissions, he referred to a psychiatrist’s report conducted on XXX (*not real initials*), one of the children by Adolescent Psychiatrist, Catherine Obbo where she states that while there was no evidence that the child suffers trauma from sexual abuse, what was evident is that there was a problem with the relationship of the child and the mother.

11.9 The Petitioner contends he has ensured the mental rehabilitation of the children, and taken care of their physical, mental, and emotional needs of the children. He has placed



them in good schools and paid their fees, medical needs, and all other needs. The Petitioner submitted that he is willing to continue to care for the children and has no maintenance demands of the Respondent.

11.10 On her part, the Respondent submitted that her allegations against the Petitioner are true from her observations of him and from the medical reports that show that the children have been sexually assaulted and are currently undergoing medical treatment. The Respondent further submitted that the audio clips referred to by the Petitioner do not reflect her thoughts toward her children.

11.11 Counsel for the Respondent further stated that in measuring the welfare of the child, the court ought to look at the moral well-being of the child. He contended that the Petitioner exposed the child to pornography such as the Netflix show titled “Sex Education”.

11.12 He relied on the case of **Lough Versus Ward 1945 2 ALL ER 338** where it was held that *“Court therefore ought to do what a wise parent acting in relation to the child for its best interests ought to do. Welfare is not measured by money alone nor by physical comfort only. The world must be taken, by its widest sense, to include the moral and religious welfare, the physical wellbeing of the minor as well as the affection”*.

11.13 The Respondent averred that she has been extremely frustrated with the uncouth behavior of the Petitioner in denying her access to the children since he was granted interim custody. She merely seeks solace for her and the children to be able to



heal from the trauma they have gone through and a place where they can be raised to be morally upright and stable members of society.

11.14 Regarding the Respondent's assertion that the Petitioner exposes the children to Pornography such as the Netflix show called "Sex Education". Upon Research conducted by this court, it was found that the show is rated "PG18", and while ill-advised for children below the age of 18, does not fall within the definition of pornography.

11.15 At the crux of this dispute are the allegations of sexual abuse leveled against the Petitioner by the Respondent. As resolved under Issue 1, the allegations were found to be lacking in merit as summarized by the press release dated 8th March 2023 marked **"PEX 5"** on the Petitioner's Trial Bundle, which stated that *"From the interviews and findings, the counselor did not find any signs of physical or sexual abuse, but she indicated that they had signs of psychological torture, as a result of abuse from their mother. The victims were examined by Doctors at Mulago National Referral Hospital, and none of them found any evidence of alleged physical and sexual abuse. The posterior tissues and petulant anal sphincter were normal with no signs of physical and sexual abuse. The "child" was further examined in ....private parts and "xxx" hymen was found still intact. In addition, the Labora Laboratory Findings on HIV, Hepatitis B, and blood levels were negative. The victims also denied any allegations of sexual abuse by anybody but acknowledged that they were closer to their father, which made their mother uncomfortable."*

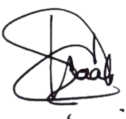


11.16 By the investigations conducted by the Criminal Investigation Department and the dismissal of the charges against the Petitioner by the Directorate of Public Prosecutions, it is clear to this court in as far as the investigation findings that the allegations of the Respondent are false.

11.17 On that basis, the court finds that the continued pursuit of the narrative that the Petitioner sexually assaulted the children in question despite medical and police reports stating the contrary is both mentally abusive and traumatizing to the children. The Respondent continues to state that the child was defiled by the father even after reports stating that “xxx” was not, including a medical examination stating that “xxx” hymen was intact. Regarding the eldest child, she continues to allege that he was sodomized by the father even after a medical report stating that the posterior tissues and petulant anal sphincter were normal with no signs of physical and sexual abuse.

11.18 The court considers the continued psychological trauma occasioned on these kids by their mother’s constant allegations, her demeanor in this court during the trial that demonstrated an inability to manage her anger, the audio recordings played before this court where the Respondent spoke of her children in a manner that did not demonstrate parental love, affection or care and were a way no parent should speak of their children.

11.19 This court finds that it would not be in the best interests of the children to award Custody to their mother given her irrational and unmotherly behavior. The court therefore awards Primary Custody of the children to the Petitioner as follows;



1. The Petitioner shall have Primary Custody of the three Children who are the issues of this Marriage.
2. The Respondent shall have visiting rights over the weekend twice every month regarding the youngest child, until the child turns 14 year old to decide for himself.
3. The two eldest children shall have the right to decide when to visit their mother as they are at an age where their wishes can be ascertained.
4. The parties shall alternate religious and public holidays per 2 and 3 above.

## **12.0 What remedies are available to the parties?**

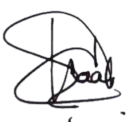
### **Child Maintenance**

12.1 **Section 5 of the Children Act Cap 59 as amended** provides for the parental duty to maintain the child including providing education and guidance, immunization, adequate diet, clothing, shelter; and medical attention.

12.2 **Article 31(4) of the Constitution of the Republic of Uganda 1995 (as amended)** stipulates the duty of parents to provide and care for their children. The petitioner contends that he has solely been paying all the bills for the children and does not require any maintenance for the children.

1. Each party shall pay for food, health and utility bills for the period the child is in their custody. In regard to the Respondent, she shall cater for the above when the children visit.

2. The Petitioner shall pay the children's school fees.



3. The Petitioner shall also cover the cost of the children's school requirements.
4. Any other miscellaneous needs of the child shall be covered by the parent with custody of the child at that time.

**Alimony.**

12.3 Both parties have demonstrated that they earn a living and can look after themselves. In that regard, the court denies the Respondent's prayer for Alimony.

**Costs.**

12.4 This being a family matter with cost implications relating to their children, I make no order as to costs.

**13.0 Conclusion.**

**13.1 In the final result, the Court Orders as follows.**

1. A decree Nisi is hereby pronounced dissolving the marriage between the Petitioner and the Respondent.
2. The Petitioner shall have primary custody of the children.
3. The Respondent shall have visiting rights over the weekend twice every month regarding the youngest child, until the child turns 14 year old to decide for himself.
4. The two eldest children shall have the right to decide when to visit their mother as they are at an age where their wishes can be ascertained.
5. The parties shall alternate religious and public holidays per 2 and 3 above.

A handwritten signature in black ink, appearing to be 'D. J. ...', is located in the bottom left corner of the page.

6. The Petitioner is awarded 90% of the suit property comprised at Busiro Block 392 Plot 99 and 71 including the two houses comprised thereon and half the value of the trees comprised on Plot 99.
7. The Respondent is awarded 10% of the value of the suit property to be paid in cash to her by the Petitioner upon determination of a payment plan, any moveable plants, and flowers on the property, and half of the value of the trees (*Pine and Eucalyptus trees*) comprised on Plot 99.
8. The respondent shall not remove and/or destroy the fruit orchard or any fruit tree anywhere on the property (Block 392 Plot 99 and Plot 71).
9. The Petitioner and the Respondent shall have the responsibility to provide maintenance of their children while in their custody.
10. The Petitioner shall pay their school fees and provide for all their basic needs and school requirements.
11. No vehicle shall be distributed to the Respondent.
12. The award of Permanent Alimony to the Respondent is denied.
13. Each party shall bear their own costs.

***Dated, Signed, and Delivered via email this 2<sup>nd</sup> day of April 2024.***



---

**CELIA NAGAWA  
JUDGE**