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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

DIVORCE APPEAL NO. 135 OF 1997

(Arising from Divorce Cause NO. !7 OF 1989)

JOHN TOM KINTU MUWANGA.. APPELLANT

VERSUS

MYLLIOUS GAFABUSA KINTU.. RESPONDENT

BEFORE : THE HONOURABLE LADY JUSTICE S. B. BOSSA

JUDGMENT

This appeal arises from Mengo Divorce Cause No. 17 of 1989. It has a long and checkered history. The matter was initially fixed before His Worship Moses Ojakol Magistrate Gr. 1. The record indicates that trial commenced before him on October 5 1989.Ms. Kadaga represented the petitioner while Mr. Lwere held brief for Mr. Ndozireho. The matter did not proceed for hearing because Mr. Lwere applied for an adjournment which was granted. The matter next came up for hearing on October 12 1989. Ms. Kadaga continued to appear for the petitioner, while the respondent was represented by Mr. Muguluma. On that day, trial proceeded inter partes. Yosam Muruli PW1 testified and was cross- examined by Mr. Muguluma. Hearing was adjourned to October 19 1989. On October 1989, Mr. Muguluma reported that Ms Kadaga was indisposed. His Worship Ojakol then adjourned the hearing to October 23 1989. At the adjourned hearing, PW2 Sarah Ndagire Bomwezi testified. She was also cross- examined by Mr. Muguluma.

Two adjournments followed on October 25 1989 and on November 16 1989, before the same Magistrate. On the latter date, Ms. Kadaga made an application for an injunction under O. 37 r.(1) CPR in the absence of the respondent and his Counsel. The injunction was to restrain the respondent , his agents or servants from trespassing upon, occupying or remaining upon " all that dwelling house occupied by the petitioner or any party thereof until the final determination of the Divorce Cause No. 17 of 1989". Court heard the application ex parte, after an application to

dispense with service was made and granted. It adjourned the matter for ruling on November 20, 1989. Ruling was delivered on November 21, 1989, and the application was dismissed. This would appear to be the last time that the petition was heard by His Worship Mr. Ojakol.

At the next hearing date, which was on May 3 1990, the matter was fixed before a new Gr.1 Magistrate, His Worship M. Oloya. Counsel for the respondent did not appear. Court ruled that since this was a part-heard case, the matter should proceed ex parte and the last witness for the petitioner should go ahead and give her evidence. The petitioner herself went ahead to testify and the matter was adjourned to May 3, 1990 for submissions. Submissions were made on May 7, 1990. Mr. Oloya delivered an ex parte judgement in favour of the petitioner, on June 14 1990.

An application to set aside the ex parte judgment was filed and first came before His Worship Luba Kyeyune (RIP). The ex parte judgment was eventually set aside by his Worship Kisawuzi Magistrate Gr.1 (as he then was), on the application of the then Counsel for the respondent, Mr. Muguluma. This was on November 4 1994. The learned Chief Magistrate His Worship Apio Aweri then on February 16 1996, allocated the hearing of this case inter parties to Ms. Gloria Basaza Magistrate Gr.1 (as she then was).

Ms. Basaza chose not to start the hearing de novo. On March 12, 1996, she ruled that hearing would proceed from where the ex parte proceedings stopped. This was as well as O. 16 R. 10 CPR appears to give her discretion to start the trial de novo or deal with any evidence taken down as if it had been taken down by her. She chose the latter course. She also chose to make the record using short hand which was difficult to follow. Hearing before her started with the petitioner's evidence. She heard the case inter parties and it is her judgment, delivered on November 28 1997, that is appealed against, in this appeal. The grounds as far as they are relevant are as follows:

1. That the trial Magistrate had no jurisdiction to make the orders she made because the pecuniary jurisdiction of the Magistrate Gr. 1 is limited to Shs. 2,000,000/= as per s. 219 of the Magistrates' Courts Act (MCA)

2. That the learned trial Magistrate ought not to have considered incestuous adultery as a ground because;

   (i) the same was not pleaded in the petition for divorce and therefore its introduction into the proceedings was a departure from the pleadings

   (ii) the issue was an after thought on the part of the petitioner for she did not plead it, did not testify to it in her evidence in chief, let alone cross- examination. It was prompted during examination when the appellant's Counsel could not cross examine the petitioner about it

   (iii) there was no evidence to act upon by the court to draw conclusion that incestuous adultery had been committed. No evidence of parenthood or lineage to establish incest was proved. The appellant could not disprove what was no proved.

3. The respondent brought the petition for divorce under the Customary Marriage (Registration) Decree 1973. The respondent never proved the petition under that Decree in terms of S. 10. Therefore, the learned trial Magistrate ought to have dismissed the petition as the Divorce Act governs monogamous marriages, and does not govern customary marriages which are potentially polygamous. At any rate, the petition was not brought under the Divorce Act.

4. The case of *Mastula Mugisha v. E. Kakuru and Ors. HCCS No. 161 of 1993 [1994] IV KLR 49* is a good authority for the principle that a non registered marriage cannot found a cause of action as it is incapable of proof itself. The case had not been overturned or distinguished. Further, failure to register a customary marriage was an offence under S. 19 of the *Customary Marriage (Registration) Decree 1973*, and courts of law could not condone an illegality by making people like the respondent gain from their illegality.

He prayed that the appeal be dismissed.

On her part, Counsel for the respondent Ms. D. Musoke contended that the findings of dissolution of marriage were based on desertion and incestuous adultery. The latter being an act recognized in the customs as a ground for divorce. She contended that the divorce was not based on the Divorce Act alone.
Secondly, she argued that non -registration of a customary marriage does not invalidate it.

On alimony, she submitted that the respondent had not shown how the lower court had erred by granting alimony, and finally, that the memorandum of appeal was frivolous and vexatious and that it should be dismissed with costs.

Counsels' oral arguments in Court followed closely the substance of the written arguments already set out.

To appreciate Counsels' arguments, it is necessary to refer to the pleadings which were filed in the trial court. Paragraph 3 of the petitioner's petition was couched as follows:

> "That in the early nineteen sixties the petitioner lawfully contracted a marriage under Kinyoro Customary Law with the respondent at Hoima...."

Then in par. 9 she averred;

> " That the respondent has committed adultery with diverse women,
> <u>PARTICULARS</u>
> That since1987, the respondent and one Josephine Nassozi have habitually committed adultery, and the named woman resides with the respondent at Mackay Village, Mengo. As a result of this illicit association, the respondent has a number of issues with the named woman."

The answer to the petition consisted of general denials by the respondent but in particular, he denied that he had ever been married to the respondent. He denied all allegations of adultery. He admitted to being the father of all the children of the petitioner but denied that they were issues of his marriage to her. He finally denied that the petitioner was entitled to any relief.

Before I go into the merits of the appeal, it is pertinent to refer to the rules governing civil appeals in a first appellate court, which I must keep in mind.. According to the case of *Ephraim Ongom v. F. Benega Civil Appeal No. 10 of 1987(SC),* its duty is to consider and evaluate the evidence and come to its own conclusion. In so doing it must subject the evidence to a fresh and exhaustive scrutiny.

The issues raised by this appeal are the following;

(i) whether there was a valid marriage between the petitioner and the respondent,

(ii) whether the action for divorce is maintainable against the respondent under the Divorce Act, and if so, whether the respondent committed any matrimonial offence under customary law to justify the prayer for divorce;

(iii) whether the petitioner is entitled to share in the matrimonial property and what proportion is she entitled to, and whether the lower court had jurisdiction to make the orders it did with regard to matrimonial property;

(iv) whether the petitioner is entitled to alimony;

I will now proceed to resolve the above issues in the order in which they were framed. On whether there was a valid marriage, it is now settled law that in all matrimonial causes marriage must be proved. It can be proved by tendering a marriage certificate, (see S.72 and 75 of the Evidence Act), by proof of a ceremony followed by cohabitation of the parties, (see *Halsbury's Laws of England 3rd Ed. P 813*); or if it is customary and there is no marriage certificate, by evidence that according to the customs and laws of a given tribe, a marriage exists. (see *Uganda v. P. Kato and Ors.[1976] HCB 24*, and *R. v. Okumu s/o Ochenda (1910-20) ULR 152*. Further, in the case of *Nassanga v. Nanyonga [1977] HCB 314*, it was held that where the parties

to a marriage are from different tribes, the customs of the girl determine whether there was a marriage. Counsel for the respondent relied on the case of *Mastula* (supra)and argued that it is good law in that it sets down the rule that where a marriage has not been registered, it is not possible to bring an action on it. I am also aware that the *Customary Marriage (Registration) Decree* provides in S.9 that " A certificate of customary marriage issued under this Decree or a certified copy there of shall be conclusive evidence of such a marriage for all purposes in any written law." Mr. Kasule argued that it is a mandatory provision. Much as I appreciate the importance of registration, it is my considered opinion that it is absurd, to argue that if there is no certificate or that if the marriage is not registered, therefore that it is unenforceable. I do not understand S. 9 to be saying this. Neither does it say that if a marriage is not registered in accordance therewith, it is illegal or unenforceable. If the legislature had wanted to create that effect, it would have said so in no uncertain terms.

Moreover, the case cited above by Mr. Kasule as an authority on this is a High Court decision. I am not bound by it. In fact I choose not to follow it. I prefer to follow *Kato's* case (supra), which laid down what I consider to be a more reasonable rule, namely that non registration does not invalidate a customary marriage. Therefore failure by the parties to register their marriage should not prevent them from pursuing remedies based on their marriage, if it is proven to have taken place.

As to whether the marriage has been proved I have already cited authorities to the effect that the customs and tribes of the parties will normally guide court in this decision. The petitioner's evidence and that of her witnesses was that the marriage took place while the respondent denied that any marriage ever took place. I am called upon to decide who is telling the truth. The learned trial magistrate found for the petitioner on this point and on the evidence, I am entirely in agreement with her.

Yosam Muruli PW1 gave evidence that the respondent married the petitioner in 1958 according to Banyoro customs. He further testified that the ceremony took place in the presence of their uncle, auntie, another elder brother, together with other members of the family. He also added

that dowry consisting of goats , some beer and some cash was paid and has never been refunded to the respondent. There were four issues to the said marriage and this fact was not denied by the respondent. The petitioner testified in similar manner about her marriage to the respondent at 19 years of age. The respondent confirmed that he met her when she was that age. She and stated further that she separated from the respondent in 1982, when she run into exile with the blessing of the respondent, because her family was threatened with death for alleged support to rebels. She stated that she lived with the respondent at Hoima, then Fort Portal, then Kiwuwa, and finally at Mengo on her return from exile. This evidence is more plausible than that of the respondent and his witness.

Let me begin with the evidence of the respondent. According to him, he merely had an affair with the petitioner who he lived with up to 1968, and separated from. They were never married according to Kiganda customs. His witness also testified that he never accompanied the respondent to go to the petitioner's home for a marriage ceremony. I must say that both were not witnesses of truth. The respondent admitted in cross- examination that the petitioner had stayed at Kiwuwa, and he had communicated to her as his wife through out her stay in Nairobi. He admitted writing several letters to her in which he addressed her variously as wife, love, darling, etc. This was as late as 1986. She bore him four children who he admitted to fathering. He even admitted visiting the petitioner's home on a number of occasions. He further admitted to assisting her to put up a house at Lungujja, in a plot which she acquired on her own. If he had the casual affair that he described in his evidence, I fail to see what he was doing with the petitioner at his ancestral home at Kiwuwa, and later when he allowed her to occupy the children's home at one of the disputed plots at Mengo.

As for DW2, he turned out not to be the so close friend of the respondent that he initially claimed to be. He did not visit the parties when they were at Fort Portal and did not know much about what went on between them. He however admitted to working in Fort Portal with the respondent. I believe the petitioner when she states that he accompanied the respondent to her home. He merely denied it in court to keep the respondent happy.

Clearly, the petitioner and the respondent had a very close relationship, stemming from their customary marriage, until 1986 when the petitioner returned and found that the respondent had another woman, and refused to deal with him as her husband. This goes to confirm that the ceremony of marriage took place and the respondent treated the petitioner for all intents and purposes as his wife. He could not have married her under Kiganda customs because she was a Munyoro, and for her parents to give her to him, he had first to fulfil their demands according to their customs.

It is my judgment that the learned trial Magistrate came to the right conclusion on the evidence when she held that according to Banyoro customs, there was a marriage between the petitioner and the respondent.

The next issue for determination is whether the petitioner could maintain this action against the respondent. It was argued that the petitioner could not maintain this action under the Divorce Act because it governed monogamous marriages and the grounds there under could not found an action under a marriage based on customary law because it is potentially polygamous.

The debate on whether the Divorce Act applies to customary marriages is still unsettled. The Courts of Appeal and the Supreme Court are yet to rule on this matter. The only decision on the matter that I am aware is the case of *Aiiya v. Aiiya Divorce Cause No. 8 of 1973*, it was held there by Kakooza Ag. Judge, (as he then was), that the *Divorce Act* applies to customary marriages. His reasoning was that the then Constitution of 1967 conferred unlimited jurisdiction on the High Court to entertain any matter in its Article 83(now equivalent to Article 139 of the 1995 Constitution. He also reasoned further that the Judicature Act of 1967 in its Ss.3 and 17,(now equivalent to S.16 Judicature Statute 1996) provided that where no procedure was laid down, as in the case of customary divorce, then the High Court would adopt a procedure justifiable by the circumstances of the case.

I hold a different view. When parties make a choice and opt to be governed by customary law in their marriage, they are presumed to have made an undertaking that before, during and after their

marriage, they will be governed by the same rules. These rules are of course subject to those rights guaranteed to them under the *Constitution 1995*, Article 31(1) which provides as follows;

> " Men and women of the age of eighteen years and above, have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and its dissolution".

The same customs must also comply, and not conflict, with another Constitutional provision in Article 21(1) which provides for equality of all persons before the law, in all spheres of political, economic, social, and cultural life and in every other respect and shall enjoy equal protection of the law. It is further provided in sub-article (2) that a person shall not be discriminated against on the ground of sex, race, color, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, or disability.

However, that is not all. If such rules are against the dignity, welfare or interest of women or undermine their status, they are prohibited by Article 33(6) of the same Constitution.

If the customary rules pass the above tests, then they can be applied as the personal law chosen by the couple to govern their marriage. It would be wrong therefore to apply the *Divorce Act* to such a marriage where it is clear that parties made a choice to be governed by something else. It would also mean superimposing a foreign regime of law on customary practices, and this might result into unnecessary conflicts as the grounds for divorce may differ. Be that as it may, I have seen no evidence that the petitioner proceeded to file for divorce under the *Divorce Act*. The petition record, which was filed on September 30 1989, clearly indicates that it was filed under the *Customary Marriage (Registration) Decree 1973*. Even the summons issued thereunder so indicate. There is therefore no merit in Counsel for the respondent's submission that the petition was filed under the *Divorce Act*.

On the grounds filed by the petitioner, I understood Counsel for the respondent to be saying that adultery cannot be a ground for divorce in a customary marriage which is potentially polygamous.

To a certain extent he is right. If a person married under customary law continues to marry more wives under the same type of marriage, he does not commit adultery thereby. I think however that the situation is different where the other person involved is not legally married to that person under customary law. There, the association must be clearly adulterous. Secondly, I agree that there is need to prove grounds which justify divorce under customary law. This should be a question of evidence according to the tribes and customs of the parties. In this case, the petitioner's grounds were threefold. The first ground was that the respondent had committed adultery with one Josephine Nassozi, who he continued to stay with, and as a result had several issues with him. The second ground was that the respondent had deserted the petitioner without reasonable cause for a period of at least two years. The third ground was that the respondent had been cruel to the petitioner by continually harassing her, threatening her with eviction from the matrimonial home, and refusing or neglecting to provide for the petitioner or their children. She further stated that by reason thereof she had suffered in her health and was distressed in her mind.

To me the issue is, what are the grounds for divorce in a marriage contracted under Banyoro Customary law? Evidence on this point was not very clear. The wife was saying that incestuous adultery was a ground for divorce. So was desertion and cruelty. The respondent appeared to agree except that he denied committing any adultery asserting that the lady in question was his wife under customary law. His Counsel further submitted that the appellant could not raise incestuous adultery because it was never pleaded and also that it was not proved. I agree with him on both points. The pleadings of the petitioner did not mention incestuous adultery. It is now trite law that departure from pleadings offends the rules on pleading (see O 6 r CPR). Neither did her evidence bring this out. She could not therefore rely upon it.

Be that is it may, it is my considered opinion that she has proved adultery, cruelty, desertion, and irretrievable breakdown of her marriage with the respondent. . It is also my judgment that since the respondent did not dispute them as valid grounds for divorce in a customary marriage, he accepted them as such. First of all, it is clear from the evidence of the petitioner, which I accepted as the truth that when she came back form Nairobi, the respondent put her in the children's house and he continued to live with the other woman. He did not fend for her and he

did admit this when he stated that her children were grown up and looked after her. He then sought to evict her form this house and send her on the street on the grounds that she was disturbing his new family. Lastly, he neglected her as a wife, although she herself later made the decision to live without him, as husband and wife. Both parties appear to be agreed that they cannot leave together as husband and wife. On adultery, the respondent offered no proof apart from his testimony, that he married the woman with who he is staying. In these circumstances, it would be right for me to conclude that he was living in an adulterous association with her.

I must also point out that the respondent was full of contradictions, which cast his evidence in very poor light. Initially, he stated that his affair with her lasted for only one year, when he was transferred from Mulago to Hoima, and then Fort Portal. He stated that he was transferred to Kampala form Fort Portal, and she remained there. Later on he contradicted himself and said that she joined him at Kampala, at Kiwawu when she had just given birth to her first daughter. He further added that she used to move from Kiwawu to Kampala, Iganga, Kenya, Mombasa, etc, and when he returned from Britain in 1968, where he had gone for further studies in 1967, he separated from the petitioner. Later he admitted that he stayed with the petitioner for about 10 years, and left her in his house at Kiwawu where she misbehaved. Apparently, she stayed there until she went into exile in 1982, because he alleged that it was bombed in 1980 because she befriended a soldier in it. He also admitted in cross-examination that he lived with the petitioner at Kiwawu, although he claimed, untruthfully, in my view, that he slept in a separate bedroom.

He said he was registered as owner of the house in Mengo, where the petitioner is staying, in 1967. Later he claimed that all the houses at Mengo werç put up after their separation in 1969. He even admitted visiting her in Nairobi. On her return, he even gave her a house to stay in as the mother of his children at Mengo. He denied any links to her only later to admit that as late as 1986, they were still communicating as husband and wife, and that he assisted her to put up a house in Lungujja. Lastly, he denied that she was his wife, yet he described a wife as a legally wedded one, and he constantly referred to her as his wife in the letters he wrote to her. He must be lying about the dowry he paid for her. The learned trial magistrate was force to comment in

these terms about the demeanor of the respondent and I am quoting her exact words;" demeanor arrogant and evasive".

On the last issue of whether the petitioner is entitled to matrimonial property, I clearly believe that she does, and I so hold. Matrimonial property is understood differently by different people. There is always that property which the couple chose to call home. There may be property which may be acquired separately by each spouse before and after marriage. Then there is property which a husband may hold in trust for the clan. Each of these should in my view considered differently. The property to which each spouse should be entitled is that property which the parties choose to call home and which they jointly contribute to. it has been argued here that the wife should have no claim on the matrimonial property because she did not contribute to it. I find this argument untenable. I would like to depart from those English and even Ugandan cases to the effect that a wife must prove actual contribution to the property (see *Falconer v. Falconer[1969] All ER 449*). I have been persuaded by the view taken by the Kenyan Court of Appeal in the case of *Kivuitu v. Kiviutu Civil Appeal No.26 of 1985(C.A.)*. In that case, Justice Omolo, who wrote the lead judgment examined the contribution of a wife in wider terms. He stated that a wife does contribute to the family in a thousand other ways including child bearing, looking after the family, etc. I have reproduced his words for their effect here below. He stated and I quote;

> "The authorities to which we were referred dealt with situations in which one or the other of the spouse have made a financial contribution direct or indirect, to the acquisition of the family home. *Chapman vs. Chapman [1969] All E.R 476* involved a situation in which the husband and the wife put all their financial resources into the purchase of the house without reserving any separate interests, and as a joint venture and accordingly, they were held to have acquired equal interests in the home.

In *Falconer V Falconer [1969] All E.R 449* the money to purchase the land on which the matrimonial house was built was contributed wholly by the wife but both parties made contribution to the expenses for constructing the matrimonial home. In those

circumstances it was reasonably held the principles applicable to whether a matrimonial home standing in the name of the wife or the husband alone belonged to them both jointly (in equal or unequal shares) were that the law imputed to the husband and the wife an intention to create a trust for each other by way of inference from their conduct ad the surrounding circumstances; and that an inference of a trust would be readily drawn when each had made a substantial contribution to the purchase price or to the mortgage installments, either directly, as where the contribution was slated to be such, or indirectly, as where both parties went out to work and one paid the house keeping and the other paid the mortgage installments, but whether the parties held in equal shares would depend on their respective contributions. In the *Falconer* case, supra, the matrimonial home was registered in the wife's sole name. *Karanja v Karanja [1976] KLR 307* which was cited in the High Court mentioned before us was decided by High Court and held, as per the head note;-

> "Kikuyu customary law has changed radically since the days when land belonged to the tribe and section 17 of the Married Women's Property Act 1882 of England together with the English authorities decided there under is applicable to an African husband and wife in Kenya where both are in salaried employment and contributing to household expenses and the education of the children. The fact that property acquired after marriage is put into the name of the husband alone and that the husband has evinced no intention that his wife should share in the property does necessarily exclude the imputation of a trust nor preclude the wife in appropriate circumstances from obtaining declaration that the property acquired by virtue of a joint venture is held on trust for them both."

What is clear from this line of authorities is that both spouses were found to have made a financial contribution, either the wife or the husband has paid so much money towards the purchase of the property. Again there is little difficulty in what an indirect financial contribution is. Where both the wife and husband are in salaried employment of one or the other of them is in business and uses the income to pay household expenses such as

food, clothing, school fees and so on; such a spouse is making an indirect contribution to the purchase of the property because the other spouse can then use his or her income to pay for the price property. What about the ordinary house wife in Nairobi and other urban centres where this type of dispute is likely to occur? She remains in the house preparing food for the family, and generally keeping the house going. She ensures that the children are in a position to go to school in uniforms and that the husband also goes to work in clean clothes and generally attends to matters which enhance the welfare of the family. True, the money to do all these is for provided by the husband, but can it be said that such a woman is making no contribution to family welfare and its asset?

To take the not too uncommon situation in Kenya where the wife is left in the rural home tilling the land and generally keeping such home going. The husband is in paid employment in an urban centre and probably sends money home to the wife at the end of each month. The wife may apart from running the home, be growing and looking after crops such as tea, coffee, maize and such. She may even be left with the children who attend rural schools. The husband, using money from his job, acquires property in the town. Can such a wife be said to have contributed nothing towards the acquisition of such property and can only depend on the bounty of the husband?

For my part, I have not the slightest doubt that the two women I have used as examples have contributed to the acquisition of the property even though that contribution cannot be quantified a monetary terms. In the case of the urban house-wife, if she were not there to assist in the running of the house, the husband would be compelled to employ someone to do the house/chores for him; the wife accordingly saves him that kind of expense. In the case of the wife left in the rural home, she makes even a bigger contribution to the family welfare by tilling the family land and producing either cash or food crops. Both of them, however, make a contribution to the family welfare and assets. So that where such a husband acquires property from his salary or business and registers it in the joint names of himself and his wife without specifying any proportions, the courts must take it that such property, being a family asset, is owned in the equal shares. Where, however, such

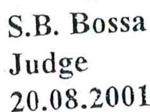
property is registered in the names of the husband alone then the wife would be, in my view, perfectly entitled to apply to the court under section 17 of the married women's property Act 1882, so that the court can determine her interest in the property and in that case, the court would have to assess the value to be put on the wife's non monetary contribution. I can find nothing *Chapman vs. Chapman, Falconer vs. Falconer, or Karanja vs Karanja,* supra which would force me to the conclusion that only monetary contribution must be taken into account. Any such limitation would clearly work an injustice to a large number of women in our country where the reality of the situation is that paid employment is very hard to come by."

This is more equitable and more acceptable. In any case, it is in line with the Constitutional provisions I have already quoted, and I choose to follow it.

Be that as it may, there is ample evidence that the petitioner contributed to the acquisition of the matrimonial home and she is clearly entitled to a share therein. First of all, the petitioner was a qualified nurse from Mulago Hospital. She earned at least Shs. 627/=, per month as a paying officer at the rank of Assistant banking Officer, in Grindlays Bank. The respondent put her income at between Shs. 300/= and Shs. 600/=. She first worked with Water Board as Assistant Personnel. Secondly, the petitioner had a taxi which used to earn her extra income. She was even able to put up another house of her own at Lungujja using these funds and a little help from the respondent. She has further testified that she sold that house and put the proceeds of sale in developing the matrimonial home at Mengo. The respondent admits that indeed the petitioner earned that amount of money. I find the petitioner's evidence on this matter credible and I accept it as the truth. Since the respondent allowed her to stay in the part of the house which she is currently occupying, and the respondent occupies another one with his new family, the petitioner is entitled to retain the house where she lives and take it as her own., and I so hold. The petitioner also proved that she contributed to the house at Kiwawu, although she understood that it was a family house for her husband's family, which also housed the burial grounds. In fact she did not claim a share of it.

Related to this is the issue of the jurisdiction of the grade1 Magistrate to make orders on matrimonial property whose value was beyond Shs. 5,000,000/=. To begin with, she had jurisdiction to entertain the petition because her court was the lowest court in which the parties being African, could file their matter. Although the Customary Marriage (Registration Decree) 1973 does not give guidance on this issue, the Divorce Acct does in its S.4(1). It provides that where parties are Africans, jurisdiction may be exercised by a subordinate court of Grade 1, or Chief Magistrate. One cannot quantify a matter like divorce except where there is a claim for money which can be clearly estimated. The learned trial magistrate did not exceed her jurisdiction in making a finding, on the facts, that the petitioner was entitled to a share in the matrimonial property, more so as she contributed to it. The quantification of the share is the issue which requires jurisdiction for the court, which this court properly has, and which I have already resolved above. Holding otherwise might lead to a multiplicity of suits which would deny parties speedy and conclusive justice and remedies. The legislature could not have intended this effect. A court which is properly seized of a divorce matter can surely adjudicate on the rights of the parties thereto regarding matrimonial property or other consequential order .

On alimony, the income of the respondent was not been proved. It is not also clear to me whether the petitioner earns any income as a pensioner. The evidence has however established that she receives assistance from her children. In the circumstances alimony of Shs. 30,000/= a month should suffice. In the result, I find no merit in this appeal which I dismiss with costs.



S.B. Bossa
Judge
20.08.2001

20/8/01
10.35am

Mutum for the appellant
holding brief for Kasule
Musoke for the Resp - abs
Both parties present
Judgement read out.