THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CV-CA-0019-2004

(From MBR-00-CV-DC-004-2001**)**

BANGIRANA HENRY)

GLADYS BANGIRANA)……. APPELLANTS

VS

ROSEMARY BANGIRANA…… RESPONDENT

BEFORE: THE HON. MR. JUSTICE P. K. MUGAMBA

JUDGMENT

This is an appeal brought by the 1st and 2nd Appellants against the decision of the Chief Magistrate's court of Mbarara whereby a decree nisi was granted dissolving the marriage between the l Appellant and the Respondent herein. In that decree of 31st March 2004 court ordered for the equal distribution of the spouses' property acquired prior to 10th December 1993, the date when court had granted legal separation to them. The appeal contains the following five grounds:

1. That the learned Chief Magistrate erred in law when she ordered that the property acquired before 10/12/1993 be distributed equally between the 1st Appellant and the Respondent without specifying the property thereby leaving room for further conflicts which has occasioned a miscarriage of justice.,

2. The learned Chief Magistrate erred in law when she did not take into account the children of the marriage in the property distribution.

3. The learned Chief Magistrate misdirected herself when she held that the property to be shared was the one (sic) acquired before 10/12/1993 without taking into account the fact that the 1st

Appellant and the Respondent had each lived on his/her own since 1986 and since then separately acquired properties which ought not be included in the property to be shared.

4. The learned Chief Magistrate erred in law when she did not judicially evaluate the evidence on record and arrived at wrong conclusions which have occasioned gross miscarriage of justice.

5 The learned Chief Magistrate erred in law when she ordered that the Respondent be paid costs when the circumstances of the case merited an order that each of the parties meets his/her costs.

Grounds I and 3 of the memorandum are basically similar. They relate to the decision of the trial court to have property acquired before 10th December 1993 distributed equally between the 1st Appellant and the Respondent. For the record 10th December 1993 was the date the two spouses were granted an order of legal separation by court. Thereafter they lived separately sanctioned by law as opposed to earlier on when their separation, in the eyes of the law, could not be recognized. The learned Chief Magistrate held inter alia,

> ‘2. An order of equal distribution of all that property that was acquired before 10/12/1993. This may be facilitated by a jointly agreed valuer, whose report should guide the process. Finer details to be worked out by the parties and their advocates’.

It is contended by the appellant’s counsel that the spouses had been living separately since 1986 and that after that time each of them had acquired individual property which could wrongly be a subject for distribution as part of the joint family property. I hasten to add that so long as the marriage subsisted only legal separation could be recognized. Counsel also urged that the learned Chief Magistrate should have been more specific regarding what property would be subject of division as family property as the valuer could serve only to value specified property. Furthermore, counsel for the appellants argued, distribution of family property was not one of the agreed issues at the hearing. I have looked at the Amended Petition filed on 27th February 2001. Paragraph 6 thereof lists property acquired jointly by the 1t Appellant and the Respondent. Prayer (c) of the Amended Petition seeks the distribution of the joint property. Since the pleadings referred to joint property and evidence of such was produced before court the fact that counsel did not agree on distribution of property as one of the issues could not limit court’s

ability to deal with the matter by way of resolution once it cropped up as an issue. Doubtless the learned Chief Magistrate had her eye on Section 27 of the Divorce Act, Cap 249, which provides:

> ‘After a decree absolute of dissolution or of nullity of marriage, the court may inquire into the existence of antenuptial or postnuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or part of the settled property. whether for the benefit of the husband or wife or of the children, if any, or of both children and parents, as seems fit; except that no order for the benefit of the parents, or either of them, shall be made at the expense of the children.’

I hasten to add that children were not involved in the petition nor was their relevance highlighted by any of the parties in the course of the proceedings. The above provision therefore concerns only the spouses here. Similarly I should state that the section is helpful in that court will proceed to deal with the nitty-gritty of the settlement afterwards but that will be after the decree nisi is made absolute under S.37 of the Act.

This is not yet the case regarding the parties before me. There is no decree absolute in order to render S.27 operational. I find therefore nothing amiss with the decision of the learned Chief Magistrate in the premises. The two grounds fail.

Regarding the second ground of appeal, I find, with respect, that it is farfetched. There are no children mentioned relevant to the distribution of family .property. The issue would have been relevant if mention had been made of infant or dependant children either in the pleadings or evidence. This ground also fails.

Concerning the 4th ground of appeal I am not satisfied by the argument of counsel for the Appellants that the trial court did not judicially evaluate the evidence on record and that it arrived at wrong conclusions which have occasioned a miscarriage of justice. From my perusal of the record and the written submission of counsel for the Appellants I find no merit in this ground which I dismiss.

The final ground relates to costs. The learned Chief Magistrate granted costs of the Petition to the Petitioner, the Respondent herein.

Section 27 (1) of the Civil Procedure Act provides that it is in the discretion of court to determine by whom costs should be paid. In *Uganda Development Bank vs Muganga Construction Company Ltd* [1981] HCB *35* this court held that under section 27 (1) costs should follow the event unless court ordered otherwise. Secondly it was held that a successful party can only be denied costs if it is proved that but for his conduct the action would not have been instituted. The trial court exercised its discretion to grant costs of the Petition to the Petitioner and I find no reason to interfere with that discretion. Again this is a ground that should fail.

In the result I would dismiss this appeal with costs.

P. K. Mugamba

Judge

7th June 2005

Mr. Ngaruye for the Appellants

Mr. Kwizera for the Respondent

Ms Tushemereirwe court clerk

Court:

Judgment read in court.

P. K. Mugamba

Judge