

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(FAMILY DIVISION)

MATRIMONIAL CAUSE NO 23 OF 2005

PAUL KAGWA PETITIONER

VERSUS

JACKLINE MUTETERI RESPONDENT

18th May 2006

BEFORE: HON. MR. JUSTICE ELDAD MWANGUSYA:

JUDGEMENT:

On the 19th day of August 1983, the petitioner, PAUL KAGGWA and the respondent, JACKLINE MUTETERI celebrated a marriage at the District Commissioner's Office KABALE. Prior to the celebration of this marriage the respondent had, on the 7th day of February 1976 solemnised a marriage at the All Saints Cathedral, Kampala with one WILSON KARAKIRE who has since died. In his petition filed in this court on 1st December 2005, the petitioner prayed for nullification of his marriage with the respondent on the ground that at the time of their marriage the marriage between the respondent and the said Wilson Karakire was still subsisting. Under S.12 (1) (d) of the Divorce Act (Cap 249) one of the grounds on which a decree of nullity of marriage may be made is "that the former husband or wife of either party was living at the time of the marriage, and the marriage with the previous husband or wife was then in force."

The question as to whether or not at the time the petitioner married the respondent the previous husband was still alive was resolved at the scheduling conference. The respondent's contention had been that she had informed the petitioner of her previous marriage and also informed him that her previous husband had died. The petitioner denied having been informed of this previous marriage and stated that, in fact it is when he learnt of it that he separated from the respondent. From the evidence presented by the petitioner and the respondent it was conceded that at the time

the petitioner married the respondent the respondent's previous husband was still alive and that their marriage was subsisting. It is immaterial that the respondent might have thought that he was dead. Secondly, the person who gave her the information that he was dead did not file an affidavit as to the fact of the respondent's previous husband's death. Hence the concession that the marriage between the petitioner and the respondent was a nullity.

This nullification of the marriage gives rise to two issues. The first issue is as to who takes custody of the child who is still a minor and the second one is as to whether or not the respondent is entitled to any property since there was no legal marriage.

There is no dispute that following the marriage between the petitioner and the respondent. They cohabited and as a result four children, namely Diana Kagwa, Nora Kagwa, Rita Kagwa and Faith Kagwa were produced. Of the four children only Faith Kagwa is still a minor and is at school. The others are adults. Faith Kagwa lives with the petitioner at Entebbe while the respondent lives at Kabale. The respondent does not seem to mind that the petitioner remains in custody of this child so long as she is allowed access to her. In this respect she requests that the daughter stays with her for two of the three school holidays in a year. This is opposed by the petitioner because this period would be longer than the period he himself would stay with the children when he is supposed to be having her custody. There was even a suggestion that the girl may refuse to spend any holiday with her mother in Kabale because she has not been to Kabale for the last ten years. It must be appreciated that the upbringing of any child is the responsibility of both parents and thus responsibility goes beyond any financial or material support that the child gets from either parent. So the suggestion that the girl may refuse to go to visit her mother during holidays is most unfortunate because her mother's input in her upbringing is most essential. It was also suggested that the respondent can access her daughter through telephone or arranged visits but I do agree that a mother's access to her child should be so restricted. In the circumstances I will grant the respondent's prayer that the child spends two of the school holidays with her with an allowance that the petitioner spends a week of such holidays with his daughter. It will be up to the girl to arrange with her mother as to which of the two holidays she will wish to spend with her. This arrangement requires co-operation from all concerned for its objectives

to be achieved and the girl would be advised to desist from disobeying this order if at all she is contemplating doing so.

Then the issue as to what property, if any the respondent is entitled to. From the submissions of both counsel and the authorities provided there seems to be no contention that at the termination of a marriage or a relationship including cohabitation neither spouse walks out of the marriage empty handed. This is in recognition of the fact that each of the spouses makes a contribution towards acquisition of the matrimonial property and this contribution is not necessarily financial. There is still controversy as to what matrimonial property is because in this case the respondent is laying claim to property which the petitioner considers his own or his mothers. In the case of ***John Tom Kintu Mwanga v. Myllious Gafafusa Kintu (Divorce Appeal No. 135 of 1997)*** (unreported) the Honourable Lady Justice S.B. Bossa makes the following distinction:-

“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 the husband may hold in trust for the clan. Each of these should in my view be considered differently. The property to which each spouse is entitled is that property which the parties choose to call home and which they jointly contribute to (Emphasis added). I respectfully agree with the above distinction and in this case it happens that over time a home in Kabale and another home in Entebbe have been established. The home in Entebbe may have been established as a working arrangement as claimed by the respondent or as a result of estrangement following the petitioner’s discovery that the respondent was previously married to another man with whom she had children. That is immaterial because it provides a convenient basis for dividing the matrimonial property between the couple. The respondent will retain the house in Kabale while the petitioner retains the one in Entebbe. In addition the petitioner will retain the lockup shop in Kabale which she says she has solely run to supplement her salary as a civil servant. I am unable to distribute any other property to the respondent

because I have not been able to separate it from what the petitioner claims is his own family property including that of his mother.

In conclusion a decree nisi for nullification of the marriage between the petitioner and the respondent will be granted as prayed in the petition with the following orders:-

- (1) The petitioner shall retain the custody of their minor daughter, Faith Kagwa but the respondent shall have access to her during two of the school holidays the visitation of which will be arranged between respondent and the minor.
- (2) The respondent shall retain the residential house in Kabale described as LRV 2220 Folio 12 for her exclusive use.
- (3) The respondent shall retain the Lockup shop in Kabale for her exclusive use.
- (4) The respondent may transfer the above properties into her names.
- (5) Each party is to meet his or her own costs of this petition.

Eldad Mwangusya

JUDGE

Order:

As I am currently on leave the Assistant Registrar (Family) is directed to deliver this judgment to the parties on 9/5/2006 at 9.00 a.m.

Eldad Mwangusya

JUDGE

8/5/2006

18/5/2006

Court Judgement read.

Kavuma for respondent.

Respondent is absent.

Petitioner absent and counsel.

John O.E. Arutu

REGISTRAR FAMILY

18/5/2006