

respondent states that she was not aware that the Respondent was married to the Petitioner till she had started living with him.

At the commencement of the trial the following facts were admitted:-

- (1) That the Petitioners and the Respondent solemnized their marriage at St. Mary's Church, Toddington United Kingdom on the 19th day of January 1991. The marriage Certificate was admitted in evidence.
- (2) That there are four issues to the marriage as follows:-
 - (i) Kiwanuka Musisi born on 08.06.1991.
 - (ii) Mirembe Musisi born on 08.07.1992.
 - (iii) Maya Musisi born on 10.03.1999.
 - (iv) Zara Musisi born on 02.09.2000.
- (3) That the Petitioner and the Respondent no longer live together.
- (4) That Maya and Zara Musisi attend school in Rainbow International School Kasanga, Kampala while Kiwanuka and Mirembe Musisi are students at Greensteds school in Nakuru Kenya.
- (5) That the Respondent and Co-respondent have committed adultery.
- (6) That the couple's house at Munyonyo was acquired during the subsistence of the marriage.
- (7) That the property known as Kyaggwe Block 391 Plot 52 at Busoke was acquired during the subsistence of the marriage.

(8) That the marriage between the Petitioner and Respondent has irretrievably broken down because the Petitioner and the Respondent have lived separately for over two years and all efforts to reconcile them have been futile.

In view of the admission of the fact of adultery by the Respondent the ground of adultery raised by the Petitioner is established.

I only wish to add that whatever domestic problems the couple might have had is no justification for the Petitioner's adulterous behavior and in respect of the Co-respondent she never attended the trial of the petition and the submissions on her behalf that she did not know that the Respondent was married have no value in this trial. The submissions can only have value when testimony is adduced and tested during a trial.

In addition to establishment of the ground of adultery, which under Section 4 of the Divorce Act is sufficient for dissolution of the marriage the Petitioner and the Respondent were agreed that their marriage had irretrievably broken down because of the long separation and the fact that all attempts to reconcile them had failed. As a consequence of these two factors the marriage between the Petitioner and the Respondent will be dissolved.

After dissolution of the marriage the only issues that remain for resolution are custody and maintenance of the children including payment of their school fees, division of the matrimonial property, damages and costs of the petition.

On custody of the children both Ms Irene Mulyagonja Counsel for the Petitioner and Mr. Kakooza Counsel for the Respondent recognise the welfare of the children as the paramount consideration in determining as to the custody of children. But while Ms Mulyagonja submitted that in line with this principle and the principle that children of tender years should normally stay with their mother Mr. Kakooza submitted that the father of the children has a natural and superior right of custody of children. Each one of them cited authorities to support their view.

While I agree that the welfare principle is the paramount consideration in deciding the custody of the children I am also of the view that the welfare of the children will be served better where both parents are involved in their upbringing. The roles of both Parents should be complimentary and the question of who has a superior right to their custody should be secondary. The children themselves need to interact and know each other so that the current arrangement where the older children almost exclusively stay with their father during their holidays and the younger children exclusively stay with their mother with limited visitation rights to their father should not be encouraged. To me the best arrangement would be to allow the older children spend half of their holiday with their mother and the other half of the holiday with their father and giving an allowance for each parent to visit the children during the time they are living with the other parent. The younger children should also be allowed more time with their father because he needs to know them as much as they need to know him. He should also be allowed to visit them during the time they are staying with their mother. With this in mind the order for the custody of the children will be as follows:-

The older children who attend a boarding school in Kenya will spend half of their holiday with their father and half with their mother. Each of the parents will pay half of their school requirements including their tuition.

The two younger children will stay with their mother except for the time when their older siblings will be at their father's during the holidays when they will also spend that time with their father. Their tuition and other school requirements will be paid equally.

On the issue of property the first principle to consider before distribution of property is that the couple are entitled to equal rights at the dissolution of the marriage as enshrined in Article 31(1) of the Constitution of the Republic of Uganda which provides that "men and women of the age of eighteen years and above have the right to marry and to found a family and entitled to equal rights in marriage, during marriage and its dissolution. The second principle is that the contribution of each of the spouses to the acquisition of the property must be recognized. In this case there is no doubt that both spouses made financial contributions to the property acquired during their marriage. But even if there were no such direct contributions courts

have established that indirect contributions of spouses are recognized when distribution of matrimonial property is in issue. The easiest approach adopted in a number of cases is the same approach adopted by Counsel in their final submissions where each property is listed and court determines as to the share, if any, that each spouse is entitled to and I will use the same approach dealing with the property that is least controversial first.

In their submissions both counsel are in agreement that a motor boat owned by the couple be sold and the proceeds divided equally amongst them.

On the U.K. Trust Account evidence on this account was that both the Petitioner and the Respondent run a trust account on behalf of the older children. The Respondent withdrew money from this account without informing the Petitioner. He explained that he used the money for the purpose of the trust i.e. payment of fees. First of all do not see as for why if he used the money for the purpose for which it was meant he made the withdrawals without informing the Petitioner or account for the money when the Petitioner raised the issues. The only way this issue can be resolved is for the Respondent to account for the money he used on school fees and he refunds whatever was used for a purpose for which it was not meant like paying rent. Otherwise another action to recover the trust fund may be taken because this is not matrimonial property.

On the property known as Kyaggwe Block 391 Plot 52 at Busoke It was admitted that this property was acquired during the subsistence of the marriage. Each of the spouses contributed to its acquisition. It was disposed of by the Respondent without informing the Petitioner. The Petitioner is entitled to half the proceeds realized from this property. Its value at the time of its disposal will be assessed and the Petitioner will be paid her entitlement by the Respondent.

It was also admitted that the house at Munyonyo which was the matrimonial home was acquired during the subsistence of the marriage. It was also established that each spouse contributed to the acquisition of the property and the development. The Petitioner still lives in this house while the Respondent vacated and is paying rent where he is staying. The

respondents suggestion that the property be sold so that each one of them acquires separate property where they will stay with their children is reasonable. It may be the only plausible way to share it.

On the company property this court is not competent to decide on this property because it is not matrimonial property. Another action to resolve this property may be taken in a company cause.

On costs both the Petitioner and Respondent have incurred costs and I order that each bears his or her costs. But the Co-respondent who never attended this trial will pay half the costs incurred by the Petitioner in prosecution of this petition.

Accordingly judgment is entered for the Petitioner against the Respondent and the following orders are made:-

- (1) A decree dissolving the marriage between the Petitioner and Respondent is granted.
- (2) The older children of the couple, namely, Kiwanuka Musisi and Mirembe Musisi currently in boarding school in Kenya shall spend half their school holidays with the Petitioner and the other half with Respondent and this arrangement is to continue for as long as they are still in school. Each parent will have the freedom to visit these children when they are staying with the other parent at an agreed time.
- (3) The younger children, namely, Maya Musisi and Zara Musisi currently living with the Petitioner shall continue living with the Petitioner. The Respondent shall be at liberty to visit them at an agreed time of the day. They will spend half their school holidays with the Respondent during which time the Petitioner will be at liberty to visit them at an agreed time.

- (4) The maintenance of the children will be a shared responsibility between the Petitioner and Respondent.
- (5) The Respondent shall pay to the Petitioner half of the proceeds obtained from sale of property known as Kyaggwe Block 391 Plot 52 at Busoke.
- (6) The matrimonial property at Munyonyo will be sold and the proceeds will be shared equally. An independent valuer is to give a value the market value of the property.
- (7) The Respondent shall refund the money withdrawn from the Trust Fund after accounting for the money spent on school fees.
- (8) The motor boat is to be sold and the proceeds shared equally.
- (9) The petitioner and Respondent will meet their costs of this petition.
- (10) The Co-respondent will meet half the Petitioners costs of this petition.

ELDAD MWANGUSYA

JUDGE

04.06.08

16.05.08 at 9.00 a.m.

Neither the Petitioner nor her Counsel is in court

Mr. Kakooza for the Respondent and Co-respondent none of whom is in court.

Ms Nakibuka Court Clerk.

Court

This petition is for judgment which is not ready.

To be delivered on 23.05.08 at 9.00 a.m.

ELDAD MWANGUSYA

JUDGE

15.05.08

04.06.08 at 2.45 p.m.

Ms Shala Kagoro holding a brief for Ms Eva Luswata Kavuma for the Petitioner.

The Respondent is in court without his Counsel.

Nakibuka Mariam Court Clerk.

Court

Judgment signed and read in open court.

ELDAD MWANGUSYA

JUDGE

04.06.08