

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA**

**DIVORCE CAUSE NO. 011 OF 2008**

**LUCAS BALLY:.....PETITIONER**

**VERSUS**

**FLORENCE KICONCO:.....RESPONDENT**

**BEFORE: HON. LADY JUSTICE MARGARET C. OGULI OUMO**

**JUDGMENT:**

The petitioner brought this suit against the respondent seeking for orders;

1. That the petitioner be judicially separated from the respondent
2. That the petitioner be granted custody of the children.
3. That the respondent pays the costs and incidents to the Petition.
4. That the petitioner may have any such further relief as court may deem fit.

The respondent did not file any response after service was effected on her personally. (see affidavit of service on the court file).

When the matter came up for hearing, neither the respondent nor her counsel appeared to defend the suit. Counsel sought to submit his arguments by way of written submissions which leave was granted and I shall now refer to his submissions in my judgment.

At the hearing of the case exparte, the petitioner was represented by Mr. Nkurunziza.

The brief facts of the petition are that the petitioner brought a suit for judicial separation on account of the respondent's cruelty to him as well as legal custody of the issues of the marriage and costs of the petition.

Brief facts:

The petitioner was legally married to the respondent on the 1<sup>st</sup> December, 1995, at the Registrar of Marriages in Kampala. They had two issues out of the marriage. In 2006, the respondent joined a religious organization whose ideologies and beliefs led the respondent to act in a manner which resulted in serious hardships and suffering to both the petitioner and the issues of the marriage. That as a result of the new beliefs the respondent took to destroying the property of the matrimonial home under the belief that it was infested with demons. That she also took to giving away property of the matrimonial home to strangers thus putting physical and mental strain on the petitioner and the issues of the marriage, resulting into separation of the parties by agreement. A copy of the separation agreement is attached as Annexure “B” on the court file for the record.

The following issues were framed for determination.

1. Whether the respondent committed the matrimonial offence of cruelty during the marriage.
2. Whether the petitioner is entitled to the reliefs sought?

**Issue No. 1 – whether the petitioner committed the matrimonial offence of cruelty?**

Mr. Nkurunziza, counsel for the petitioner, submitted that during the marriage to the petitioner, the respondent committed acts tantamount to cruelty as follows:

1. That sometime in or about 2006, the respondent joined a religious organization whose ideological beliefs have caused serious hardships and suffering to the marriage.
2. That as a result of the respondents religious convictions she has taken to giving away property of the matrimonial home without the consent or prior knowledge of the petitioner thus putting great strain on the marriage.
3. That the religious convictions have led the respondent to believe that some of the property belonging to the children is demon possessed and she has repeatedly behaved in a manner that causes alarm and apprehension.
4. That the children of the marriage and the petitioner and respondent have been living in separate parts of the matrimonial home since early 2006, culminating into a Separation

Agreement executed on 1<sup>st</sup> December, 2006. (See copy of the separation agreement attached).

5. Further that the acts of the respondent have caused anguish to the marriage and there is likelihood that such conduct might endanger the life of the petitioner and the children.
6. Counsel for the petitioner submitted that the acts are tantamount to cruelty.

Counsel for the petitioner submitted that the petition is undefended and that in the case of **Pamela Sabina Mbabazi Vs. Henry Musisi Bazira Court of Appeal Case No. 44 of 2004**, *it was held that if a case is undefended (as in this case) that standard of proof is lower than in a defended case.*

Counsel for the petitioner also invited court to look at Order 8 r13 of the Civil Procedure Rules S1 71-1 which provides that “*every allegation of fact in a plaint, if not denied specifically or by necessary implication or stated not to be admitted in the pleadings of the opposite party, shall be taken to be admitted* and in **Habre International Co. Ltd Vs Ebrahim Alakaria Kassam and others, SCCA 4 of 1999**. The Supreme Court held inter alia that;

*“Whenever the opponent has declined to avail himself of the opportunity to put his essential and material case, in cross examination, it must follow that he believed that the testimony given could not be disputed at all”*

Mr. Nkurunziza submitted that in the **Bazira case (supra)**, LJ Leticia Kikonyogo DCJ, held that “*in uncontested documentary evidence on record and filed on oath, the requirement to lead oral evidence is superfluous and unnecessary*” At page 13, the learned D.C.J stated that;

*“Besides, the appellant alleged cruelty and the respondent did not deny it. What evidence was there to justify that the applicant did not suffer any injury- mentally or emotionally”.*

Mr. Nkurunziza urged the court to admit the contents of Paragraphs 11(a) and 14 of the petition and find that cruelty has been proved. He cited the case of **Veronica Habyarimana v Habyarimana (1980) HCB 139**, where it was held that,

*“there is no definition of cruelty in the Divorce Act but case law has established that no conduct can amount to cruelty unless it has the effect of producing actual or apprehended injury to the petitioners’ physical and mental health. There must be danger to life, limb or health, bodily or mental or reasonable for it to constitute cruelty”.*

That the petitioner and respondent after accepting the breakdown of their marriage entered into a Separation Agreement on the 1<sup>st</sup> December, 2006, which Agreement is attached as Annexure “B” to the petition. That under Clause 2 thereof, it was agreed that the parties would live in separate parts of the home. That under Clause 6, the Respondent would vacate the matrimonial home on the children attaining majority age. Mr. Nkurunziza submitted that under paragraph 14 of the petition, the petitioner testified that despite the above agreement, the solution is untenable.

He further states that the respondent has taken to giving away/destroying property of the matrimonial home, believing the children’s property is demon possessed and there is direct likelihood that such continuous conduct might endanger the lives of the petitioner and the children. The petitioner continued to give matrimonial property to third parties, after the separation agreement, in particular, members of the organization. That to remain living under the same roof is traumatic.

In the instant case, court is satisfied that the petitioner’s acts of giving away matrimonial property even after the separation agreement amounts to cruelty as it has caused mental anguish to the petitioner. That the petitioner has proved on a balance of probability, and it is not denied that the respondent has committed an offence of cruelty and the case of **Habre International**, cruelty has been proved.

**Issue No. 2 – whether the petitioner is entitled to the relief sought?**

Counsel for the petitioner submitted that the petitioner prayed for judicial separation because the marriage has broken down as a result of the acts of the respondent and he also seeks for sole custody of the children of the marriage. That according to section 3 of the Children Act Cap 59, the welfare principle and the children’s rights set out in the 1<sup>st</sup> schedule shall be the guiding

principles in making any decision based on the Act. That in the case of **In Re M (an infant) Supreme Court Civil Appeal 22/1994**, Justice Benjamin Odoki, as he then was, stated that the welfare of the child should be looked up in the widest possible sense.

Mr. Nkurunziza submitted that the petitioner is a caring father and a businessman who is well placed to provide for the children of the marriage and cater for all their needs and granting custody to the petitioner and the children will enable the petitioner and the children go through a time of mental and emotional healing together.

That the evidence of the petitioner on oath shows that the respondent is not a fit and proper person to have custody of the children as she is the reason the petitioner is before court. That on the other hand, in paragraph 7 of the petition, the petitioner has proved he is an upright person, devoted father and a businessman who is capable of providing for the necessities of life and cater for the welfare of the children. That it was in contemplation clauses 3, 6, 7 and 8 of the Annexure "B" that the petitioner would have custody of the children. That under clause 3, the parties were to live and stay in the matrimonial home with the issues of the marriage up and when the children were of majority age. That the respondent was to vacate the home on the children attaining majority age and that she was to take whatever fittings and furnishings she contributed and away from the matrimonial home. That the petitioner is to be fully responsible for the education, well being of the children and the general upkeep of the home. That thereafter, the respondent will have unlimited access and unconditional right to visit the children at any time of the day as and when the need arises.

That under clause 5, the petitioner has already made enormous contributions to the respondent's maintenance and she relinquished further claim for maintenance

Mr. Nkurunziza submitted that the petitioner also prayed for costs.

In section 14 of the Divorce Act, a husband or wife may apply to court for a judicial separation on the ground of cruelty, adultery or desertation without reasonable excuse for two years

upwards and the court may on being satisfied that the allegations of the petitioner are true, and that there is no legal ground why the application should not be granted, may decree a judicial separation accordingly.

In the instant case, court is satisfied that the respondent is guilty of the offence of cruelty and this has not been countered by her thus that there is no legal ground why the application should not be granted.

Consequently, the petitioner is granted judicial separation from the respondent.

1. The petitioner who has shown responsibility in looking after the children is granted custody of the said children. The petitioner will be fully responsible for the education, well being of the children and their general upkeep.
2. The Petitioner is to hire suitable accommodation for the Respondent to reside in.
3. The Respondent can take whatever fittings, furnishing, she contributed to in the matrimonial home.
4. The respondent shall thereafter have unlimited access and unconditional right to visit the children at reasonable hours of the day after notifying the petitioner.
5. The respondent is barred from molesting or interfering with the person and property of the petitioner and the children.
6. The respondent shall bear the costs of the petition.

**Margaret C. Oguli Oumo**

**JUDGE**

**29/01/2010**

Present:

1. Mr. Nkurunziza, Counsel for the petitioner
2. The petitioner
3. Nalongo Nandaula, court clerk
4. Nyakwebara Elizabeth, Research Assistant