

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(FAMILY DIVISION)  
DIVORCE CAUSE NO. 37 OF 2010**

**MABLE SANGER .....PETITIONER**

**VERSUS**

**EFREN GUERRA.....RESPONDENT**

**Before:** Hon. Mr. Justice E.S. Lugayizi

**JUDGMENT**

**The background:**

This judgment is in respect of a petition that Ms. Mabel Sanger (hereinafter referred to as the “petitioner”) filed in the High Court (Family Division) on 25<sup>th</sup> November 2010. In the said petition the petitioner sought the following orders:

- (a) dissolution of her marriage with Efren Guerra (hereinafter referred to as the “respondent”) on the ground of cruelty;
- (b) custody of the children;
- (c) permanent alimony; and
- (d) retaining the matrimonial home compromised in Block 29 Plot 1544 at Mawanda Road, Mulago near Kampala.

The respondent opposed the petition; and cross-petitioned for divorce on the grounds of adultery and cruelty. He prayed Court to grant him the following orders:

- (a) divorce;
- (b) custody of the children; and
- (c) the petitioner to pay costs for the petition.

**The hearing:**

At the time of hearing, Ms. Birungi represented the petitioner and Mr. Kalule represented the respondent. The parties proceeded to admit the following facts:

1. that the petitioner and respondent were married 16 years ago; and are currently residing at their matrimonial home which is on Mawanda Road at Mulago.
2. that the petitioner and respondent have two children, namely Maribel Guerra and Ronald Guerra, both of whom are minors.
3. that the matrimonial home (referred to above) is registered in the names of the above children.

In addition, counsel for the petitioner and counsel for respondent framed the following issues:

1. Whether there are grounds of divorce in the petition and cross-petition.
2. Whether the evidence on record proves the grounds or any of them.
3. The remedies.

In her testimony the petitioner, among other things, revealed this: After living with the respondent, in Uganda, for sometime she came to know that he had been married to some one else in the Philippines. That marriage was a monogamous one; and still subsisted.

After recording the above testimony, Court sought to find out from the respondent whether it was true that he had married some one else in the Philippines before coming to Uganda and marrying the petitioner.

The respondent confirmed that the above was true; and that the marriage he contracted in the Phillipines was a church marriage, which still subsisted.

After getting the above confirmation, Court requested both counsel to write submissions on the ramifications of the above turn of events. Thereafter, it adjourned the matter to enable counsel to comply with Court's request.

After some time, both counsel duly complied with Court's request. Their respective submissions (which are part of the court record) showed that they were agreed on this: The subsistence of the first monogamous marriage that the respondent contracted in the Philippines rendered the second marriage (i.e. the customary marriage, which is the subject of this judgment) null and void.

**The law:**

In **Baindail v Baindail [1946] 1All E.R. 342** the appellate court in England had no difficulty in finding that a marriage which an Asian gentleman entered into with an English lady at Holborn Register office on 5<sup>th</sup> May 1939 was a nullity. For, prior to that marriage the gentleman (i.e. the appellant) had contracted a marriage with some lady under Hindu law in India; and that marriage still subsisted.

The Ugandan laws on marriage generally follow the English common law pattern. This is particularly so, where a person initially goes through a monogamous marriage. That person cannot during the subsistence of such marriage contract another valid marriage (whatever its form may be). (See **section 36 of the Marriage Act (Cap. 251); section 12 (1) (d) of the Divorce Act (Cap. 249) and section 11 (e) of the Customary Marriages Registration Act (Cap. 248)**).

**Court's decision:**

From the foregoing, Court fully agrees with the submissions of both counsel that **the marriage between the petitioner and the respondent is null and void.**

(Incidentally, the fact that the petitioner and the respondent did not disclose the above illegality in their pleadings is of no consequence. What matters is that by the petitioner's and respondent's confessions above, Court got to know of the existence of the illegality. Thereafter, it had the duty to face the illegality squarely. For, in law, an illegality is a serious matter, which goes beyond all other considerations. (See **Makula International Ltd v His Eminence Cardinal Nsubuga and Another [1982] H.C.B. 11**)).

**Consequences of the above decision:**

Since the marriage that is the subject of this judgment is null and void, it means the following:

- (a) there is nothing herein that Court would need to dissolve. In other words, the petitioner or respondent cannot obtain the remedy of divorce against the background of a void marriage;
- (b) the petitioner cannot obtain alimony which is an order that courts would, ordinarily, make after dissolving a valid marriage; and
- (c) except for the house on Mawanda Road at Mulago, this Court will not make any order relating to any other property that the petitioner and the respondent obtained while living together. For such property should **not** be distributed in accordance with the laws of marriage, but in line with the laws governing the manner in which the

petitioner and the respondent acquired it (e.g. the relevant land laws, company laws or partnership laws). Besides, the pleadings relating to the matters herein were also **not** designed to take care of such distribution of property.

All in all, the foregoing leaves only these remedies for Court to consider: The custody and welfare of the two children; and the family home on Mawanda Road at Mulago.

**The custody of the two children, etc:**

In the face of Court's decision above (i.e. that there is no marriage between the petitioner and the respondent) Court must decide where the two children, who were born to the said parties, namely Maribel Guerra and Ronald Guerra, should go. In short, who should take custody of those children? Should it be the petitioner or the respondent?

To answer the above question, Court must determine who of the two (i.e. the petitioner or the respondent) would be most suited to do the above job?

For that reason the welfare principle, which is centred on ***“the best interests of the child”*** becomes a very relevant factor to consider. In other words, Courts would ordinarily give custody of a child to the party who is most likely to uphold and advance the best interests of that child in life. **(See Catherine Jema Kalisa v John Kalisa (1974) HCB 108 ( per Wambuzi CJ as he then was); In the matter of Mirembe Sarah (an infant) Miscellaneous Application No. 58 of 1992 (1992-1993) HCB 187; In the matter of Jane Namukasa (an infant) Miscellaneuos Application No. 78 of 1991; In the mattes of Jane Nakintu and two others (infants) - Mukwenda Mukasa - Miscelleneous Application No. 966 of 1997; Article 34(1) of the Constitution; sections 3, 4, and 5 of the Children's Act (Cap. 59) and item 3 of the First Schedule to the Children's Act (Cap. 59) ).**

From the record it seems that the above two children (Maribel Guerra and Ronald Guerra) have been living in Uganda (which is their mother's home-land) for a long time.

Indeed, both children go to School in Uganda. Maribel who is 15 years old is in senior 3 at Emma High School; and Ronald who is 14 years old is in senior 2 at the same school.

It is quite unlikely, therefore, that the above children know much about their father's home land (i.e. the Philippines). For that reason, it would be unreasonable to expose them to circumstances in which they could be easily taken to live in a strange land (i.e. the Philippines') where they would be forced to begin life afresh at this rather odd hour of their lives.

The above argument, therefore, tends to tip the balance of granting custody of the said children to their mother (i.e. the petitioner).

Besides, there is this additional factor: The two children (i.e. Maribel and Ronald) categorically stated, in Court, that in case their parents went separate ways, they wished to remain in the custody of their mother (i.e. the petitioner).

Obviously at 15 and 14 years of age respectively the said children are mature enough to make intelligent and well informed choices. **(See Gillick v West Norfolk and Wisbech Area Health Authority and another (1986) 1 AC 112).**

From the foregoing Court is, therefore, of the view that it would be in the best interests of the above two children to remain in the hands of their mother (i.e. the petitioner). However, their father (the respondent) may, from time to time, visit them after informing the petitioner that he would do so.

In addition, the respondent will support the above children by paying for their maintenance, school fees and medical bills until each of them completes her or his academic studies.

**The family house:**

Needless to say, the family home, which is on Mawanda Road at Mulago belongs to the two children (i.e. Maribel and Ronald); and they are the registered proprietors thereof.

However in case there is any outstanding loan over the said house, this Court is of this view: Whoever incurred that debt must ensure that it is urgently paid off so that the certificate of title to the above house is left without any encumbrances.

**Conclusion:**

In conclusion, Court has no choice but to the make the following orders:

- (a) the alleged marriage between the petitioner and the respondent is hereby declared null and void. That means the petitioner is not entitled to alimony; and the division of property that the petitioner and the respondent acquired while living together must **not** follow marriage laws, but other laws relevant to the manner of its acquisition.
- (b) the petitioner will take custody of the two children (i.e. Maribel and Ronald) but the respondent may, from time to time, after letting the petitioner know visit the said children;
- (c) the respondent will support Maribel and Ronald by paying for their maintenance, school fees and medical bills until each of

them completes her or his academic studies;

- (d) the family house on Mawanda Road at Mulago is the property of the two children (i.e. Maribel and Ronald); and no one should dispossess them of it.
- (e) any outstanding debt over the house referred to in paragraph (d) above must urgently be settled by whoever incurred it so that the certificate of title thereof will remain free from incumbrances;
- (f) each party herein will bear her or his own costs.

Except for the orders in paragraphs (d) and (e) above whose complete effect is immediate, the rest of the above orders will be made absolute six months from the date herein. **(See section 12 (2) of the Divorce Act (Cap. 249)).**

E. S. Lugayizi (J)

16/8/2012

**Read before:** At 11.21 a.m

The petitioner

Mr. B. Kalule for the respondent

Ms. C. Nakayima c/clerk

E. S. Lugayizi

Judge

16/8/2012