THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

DIVORCE CAUSE NO. 19/2010

SUSAN ANNET KAYEGI :: PETITIONER

VERSUS

INNOCENT MARTIN WADAMBA :: RESPONDENT

BEFORE HON. MR. JIUSTICE B. KAINAMURA

Judgment

The Petitioner, **Susan Annet Kayegi** and the Respondent **Innocent Martin Wadamba** got legally married on 27th day of September 2003 at St. Austin's Catholic Church Mbale. After the marriage, the Petitioner and the Respondent lived with each other producing three issues to wit:- Martin Wadamba, Maria Wadamba and David Martin Wambi Kibaale aged 8, 6 and 4 years respectively.

The Petitioner brings this Petition seeking for the following orders:-

a). ***A decree that the marriage of the parties be dissolved.***

b) An order that the Petitioner gets custody of the children of the marriage.

c). An order for maintenance of the children.

d). An order that the properties acquired during the subsistence of the marriage be shared equally between the parties.

e). An order that the Respondent pays the costs of the Petition.

f). Other reliefs the Court deems fit.

The Petitioner raised the following grounds for the Petition namely- adultery, cruelty and desertion. The Respondent denied the allegations.

At the commencement of the hearing, Counsel for the parties applied to be allowed to file a Joint Memorandum of Scheduling. This, they did and in the agreed facts both parties recognized that the marriage between the parties was strained and had irretrievably broken down and agreed the marriage be dissolved. Three issues were framed:

1. ***Whether the properties listed in the Petition were acquired by the parties during the subsistence of their marriage.***
2. ***Whether the Petitioner should be granted custody of the children with maintenance.***
3. ***What remedies are available to the parties?***

During the trial, the Petitioner abandoned the issue of custody and maintenance of the children and only sought access to the children. This in effect left only the issue of which properties were acquired during the subsistence of the marriage and how they were to be shared. Counsel for the parties agreed to rely on affidavit evidence and call the deponents of the affidavits for cross examination.

Mr. Obiro Ekirapa Isaac appeared for the Petitioner while Mr. Higenyi Michael together with Mr. Ngugo Mathew appeared for the Respondent.

I have indicated above that in the Joint Memorandum of Scheduling filed by the Counsel for the parties, one of the agreed facts was that the marriage of the Petitioner and Respondent was strained and had irretrievably broken down and both parties wanted the marriage dissolved. Court does not have to look far to satisfy itself on this matter. During cross-examination, the Petitioner admitted that she had a four months old baby – Jordan Kitibwa, who is clearly not an issue of the

marriage. This to my mind means either party has chosen to move on and Court is convinced that the marriage has irretrievably broken down and should be dissolved.

From the evidence on record i find there was no collusion between the parties to the petition before filing the petition and further find that the Respondent did not condone the Petitioners acts of adultery.

The parties to the petition have also agreed that the three issues of the marriage shall remain in the custody of the Respondent who will provide all the maintenance. The Petitioner only sought access to the children which was agreed to by the Respondent. Court therefore has no reason to interfere with this arrangement and accordingly the Respondent shall have full custody of the children and the Petitioner shall have access to the children wherever they will be at reasonable hours and times of the day.

Court will now proceed to handle the remaining unresolved issue of the property. Paragraph 9 of the Petition sets out the details of the properties alleged to have been acquired by the parties during the subsistence of the marriage. These are:-

a) *Nasuti Hosanna Estate plot 411 at Nasuti Mukono district.*

b) *Martina Hostel in upper Kauga Mukono.*

c) *Plot 409 Jomayi Esate Bukerere Kyaggwa Mukono district.*

d) *The Matrimonial Home in upper Kauga Mukono District.*

e) *A House in Sironko-Salalira off Mutufu road Sironko District.*

f) *Land in Mission Cell in Gangama Mbale District.*

g) *100 acres of land Bunambutye Sironko District.*

h) *Land in Kagulumira Kayuga District.*

i) *Motor Vehicle Reg. No. UAG 063 N.*

j) *Motor Vehicle Reg. NO. UAL 173 S.*

k) *Motor Vehicle Reg. NO. UAM. 463 U.*

Learned Counsel for the Petitioner submitted that since the coming into force of the 1995 Constitution, Article 31 (1) thereof clearly puts the position that upon dissolution of a marriage both parties are entitled to the property equally. On his part Learned Counsel for the Respondent went at great length to prove to Court that there was no property acquired during the subsistence of the marriage and as such the Petitioner had no remedy in law in this regard.

Before delving into the evidence adduced on each property listed in the petition, it's pertinent to lay down the legal principles with regard to sharing of property upon dissolution of a marriage.

Article 31(1) of the Constitution 1995 provides:-

> *31 (1)* ***"A man and a woman are entitled to marry only if they are each of the age of eighteen years and above and are entitled at that age:-***
>
> ***(a) To found a family and***
>
> ***(b) To equal rights at and in marriage, during marriage and at its dissolution"*** *(emphasis added)*

This legal principle has since been extensively considered and expounded on by Courts but for purposes of this Judgment i will highlight the position taken by *Amos Twinomujuuni J A* in his lead Judgment in ***Julius Rwabinumi Vs Hope***

Bahimbisomwe Civil Appeal No. 30 of 2007 where the Learned Justice of Appeal had this to say:-

> ***"Unfortunately however, marriage breakdown are so common these days and have become a reality that cannot be ignored. Divorce proceedings normally follow. The issue as to what should happen to their joint property arises for determination as in this case. In my humble Judgment, i do not see why the issue of contribution to the property should arise at all. The property is theirs period. In 1995 for the first time in our history, the Constitution of Uganda clearly put into reality the equality in marriage principle contained in Genesis chapter 2 verse 24 and what those who choose to contract marriage under the Marriage Act under to practice. My conclusion is that matrimonial property is joint property between husbands and wife and should be shared equally on divorce irrespective of who paid for what and how much was paid. Very often the woman will find a husband who is already wealthy and has a lot of property. If that property belongs to the man at the point of exchanging the vows in church the property becomes joint property ……..…….. From then on words the fact that they are registered in the names of the wife or husband is not relevant it belongs to both. Therefore on separation they should be equally divided and shared to the extent possible and practicable"***

The above said, Court will now proceed to apply the principle to the properties set out in the petition.

By way of emphasis, Court is alive of the evidential burden on the Petitioner to prove her case as by law provided.

(a) Nasuti-Hossana estate plot 411 at Nasuti in Mukono District.

The Petitioner alleges that the property was bought for shs 5,000,000/=(shillings five million) and of this she contributed shs 3,000,000/= (shillings three million). On his part the Respondent denies having purchased the property and contends the Petitioner has failed to prove ownership of the property. During cross-examination, the Petitioner testified that there was no agreement of sale in respect of the property. I agree with the Learned Counsel for the Respondent that the ownership of the property is not proved and this property cannot therefore form part of the pool of the property from which a distribution between the couple is to be done.

(b) Land at Bukerere

By an affidavit in reply dated 3rd February 2012, the Petitioner annexed a search report verifying ownership of land comprised in Block 88 plot 409 Bukerere Kyaggwe Mukono District. The search report is dated 5th September 2011 and indicates the registered proprietor as Wadamba Innocent the Respondent (tendered in evidence as EXH. P. 6)

The search report indicates that there are two incumbrances on the title both mortgages by Centenary Rural Development Bank Ltd (MK 0100393 and MK 0115177). During the trial both the Respondent (during cross-examination) and his Counsel (in his submissions) contended that the Respondent does not own the property by reason of the mortgage on it.

Learned Counsel Higenyi indeed stated “it’s our submission that the Respondent does not own the said property. (land at Bukerere) as the law concerning legal mortgage is clear” I am surprised and indeed dismayed by the stance taken by Mr. Higenyi a Senior Member of the Bar.

Section 116 of the Registration of Titles Act Cap 230 Laws of Uganda 2000 is quite explicit on the matter:-

S.116 ***Mortgage not to operate as transfers***

> ***"A mortgage under the Act shall, when registered as herein before provided, have effect as a security but shall not operate as a transfer of the land thereby mortgaged……" (emphasis mine)***

It is therefore not right to state that the Respondent is not the owner of the land in question by reason of there being a mortgage on it. Court is satisfied that the land at Bukerere comprised in Block 88 plot 409 Bukerere is still vested in the Respondent.

In the circumstances, in line with the holding in ***Rwabunimi Vs Bahimbisomwe*** case (supra) the land at Bukerere comprised in Block 88 plot 409 Bukerere Kyaggew will be shared between the Petitioner and the Respondent on a 50-50 basis free of any of the incumbrances created by the Respondent.

(c) Martina Hostel in upper Kauga Mukono District.

In her affidavit and during cross examination the Petitioner contended that this property belongs to the Respondent. On his part the Respondent relied on the evidence of his father Kibaale Wambi (DW2) to the effect that the property in question housing Martina Hostel was his first home and that he had bought it in the names of, but not for, the Respondent. Annexed to his affidavit of 25th August 2011 is annexture B (admitted in evidence as EXH D4) which is an agreement of sale of the piece of land in question between one Norah Nalwanga Batume and the Respondent dated 9th November 1992.

In his submissions Learned Counsel for the Respondent contended that the property was acquired way before the marriage was contracted and does not

therefore fall in the category of any property acquired during the subsistence of the marriage. He further contended – and it's not clear whether this is in the alternative, that DW2 testified that he has never given the property to the Respondent.

I need to state here that both the Respondent and DW2 struck me during cross examination as untruthful witnesses bent to go to any length to deny the Petitioner any property whatsoever. Court will therefore treat their testimony with caution. For this reason, I find DW2's assertion in paragraphs 5 and 6 of his affidavit of 25th August 2011 that the land housing Martina a Hostel has never been owned by the Respondent untenable. I now turn to the point raised by Learned Counsel for the Respondent to the effect that the land on which Martin Hostel is built was acquired by the Respondent way before the marriage was contracted and does not therefore fall in the category of property acquired during the subsistence of marriage.

This assertion to my mind is premised on the fact that the issues framed for determination by Court in the Joint Memorandum of Scheduling dated 25th January 2012 put issue No 1 as:-

> *"**Whether the properties listed in the petition were acquired by the parties during the subsistence of their marriage"** (emphasis mine).*

To resolve this point, Court will again look to the ***Rwabinumi Vs Bahimbisomwe*** case (supra) where the Learned Justice of Appeal had this to say:-

> ***"Very often the woman will find a husband who is already wealthy and has a lot of property, if that property belongs to the man at the point of exchange of the vows in church, that property becomes joint property"***

Clearly based on the above decision, whether or not the property was acquired before marriage is now immaterial. That settled, the question for determination now is whether the parties by framing issue 1 for determination by Court the way they did i.e restricting the property to that acquired during marriage only, fetters Courts hands to apply the decision in the ***Rwabinumi Vs Bahimbisomwe*** case to all the property of the Respondent. The answer to this question i believe lies in the decision in ***Odd Jobs Vs Mabia*** (***1970) E A 476*** where Law J A had this to say on un pleaded issue:-

> ***"On the point that a Court has no Jurisdiction to decree on an issue which has not been pleaded, the attitude adopted by this Court is not as strict as appears to that of the Courts in India. In East Africa the position is that a Court may allow evidence to be called, and may base its decision on an un pleaded issue if it appears from the course followed at the trial that the un pleaded issue has been left to the Court for decision".***

As pointed out earlier, the parties opted to rely on affidavit evidence and avail the deponents for cross examination. The agreement of 9th November 1992 is on Court record as it is annexed to the affidavit of Kibaale Wambi of 25th August 2011. It was marked as EXH D4 during the Joint Scheduling. As held in ***Bwanika & 9 others Vs Administrator General SCC No.7 of 2003***, documents which are admitted in a scheduling conference will thereafter become part of the record and its only their content that can be challenged. Based on the decision in the ***Odd Jobs Vs Mabia*** (supra) I find that the issue of extending the net to property acquired by the parties before marriage i.e the Martina Hostel, is properly before Court and falls within the ambit of the ***Rwabunimi Case*** (supra).

In any event, I believe this would also be a proper case for the Court to invoke the provisions of Article 126 (2) (e) of the Constitution 1995.

With the above issue settled, Court will now look at the import of the 9th November 1992 agreement of sale of land where the Hostel is built. That the Respondent is the buyer is not in dispute. DW2 appeared to down play the importance of this agreement of sale when he testified during cross examination that he was buying the property in **the** name of **but not** for the Respondent. Learned Counsel Isaac Ekirapa for the Petitioner, referred this Court to Section 91 of the Evidence Act Cap 6 Laws of Uganda 2000. It states:-

> ***"When the terms of a contract or of a grant or any other disposition of property have been reduced to the form of a document no evidence ……shall be given in proof of the terms of such contract……except the document itself" .***

On this i should add that Section 92 of the same Act excludes oral evidence to contradict a written contract. It states:

> ***"When the terms of any such contract ……have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their respective interest for the purpose of contradicting, varying, adding to or subtracting from its terms.***

Since as earlier indicated in this Judgment, the agreement of 9th November 1992 is part of the record and since in the opinion of Court the Respondent has failed either through himself or his witnesses to challenge the contents of the agreement, it is the finding of this Court that the land and property referred to as Martina Hostel in Upper Kauga belongs to the Respondent and will be shared between the Petitioner and the Respondent on a 50-50 basis.

(d) Matrimonial home in upper Kauga in Mukono District.

The Petitioner's case is that it is at this property where the parties constructed their matrimonial home which was done over a period of five years. The land was given to them by DW2 the father of the Respondent. The Petitioner relied on affidavit of PW2 a one Nelson Kato which was to the effect that he supplied paint and glasses and other building materials towards the construction of the house.

The Petitioner also relied on the affidavit of PW3 one Morris Musitwa who deponed that he supplied timber for the construction of the house at Upper Kauga.

The Respondent on the other hand principally relied on the affidavit of DW2 of 25th August 2011 paragraph 3 thereof which was to the effect that the property at the said place was his property which he bought for his son Cuthbert Obiro Wakadali. Annexed to his affidavit is an agreement of sale of the property in issue between DW2 and Rev. Canon John Kiwanuka together with Ms Christine Kiwanuka dated 21st June 1995 marked as EXH D3.

The agreement of sale is clearly between DW2, the father of the Respondent and Rev. Kiwanuka and his wife. As far back as June 1995 it is stipulated DW2 was buying the property for his son Cuthbert Obiro. Accordingly Court finds that the only interest the couple have on the land is the house which as the evidence of PW2 and PW3 shows was constructed by the couple. Court has arrived at this position notwithstanding the denials by the Respondent and DW2 that no house was built by that couple on the land. As earlier indicated in this Judgment, Court has taken the evidence of the Respondent and DW2 with caution. Accordingly a value should be put to the house constructed by the couple on the land, and the Petitioner will be entitled to 50% of the value which should be paid to her.

(e) House in Sironko-Salalira road off Mutufu road.

It was the evidence of the Petitioner that the Respondent purchased the property in the year 2009 and two houses have been constructed thereon since. During cross

examination she admitted she has never stepped there. She did not disclose her source of information. On his part the Respondent denied any knowledge of the property in question. As earlier stated in this Judgment, Court is alive of the evidential burden on the Petitioner to prove her case. Basing on the evidence on record Court is unable to say that the Petitioner has been able to establish the existence and or ownership of the property under review on a balance of probability and accordingly this item fails.

(f) Land in Mission Cell Gangama Mbale.

The Petitioner's evidence is that the Respondent bought the property from his former driver in 2009. The Respondent denies this. Again Courts position in that the Petitioner has not discharged her burden to prove existence of the property. It remains an allegation. Accordingly the claim fails.

(g) 100 acres in Bunambutye Sironko

The Petitioner's evidence is that the land, in all measuring 900 acres was purchased by DW2 and that the Respondent was given 100 acres out of the 900 acres. The Respondent denies existence of the land so does DW2. Again its Courts position that the Petitioner has also failed to prove existence of the property and accordingly the claim fails.

(h) Land at Kangulumira in Kyandondo District.

The Petitioner's evidence is that this land was bought by the Respondent from a one Kasansula who used to work with Posta Uganda. Again the Respondent denied any knowledge of this property. The Court's position is that the Petitioner failed to discharge the burden of proof and the claim fails.

(i) Motor vehicle Reg. No. UAK 743 F.

The Petitioner's evidence is that the vehicle in question was registered in her names as clearly shown in EXH P2 and was forcefully seized from her by the Respondent who sold it. This was long after the Petition was filed. On his part the Respondent does not deny the existence or fact of sale of the vehicle but he stated during cross examination that he sold the vehicle to pay fees for the children. The view of Court is that the two should not be mixed and the value of the vehicle at point of sale should be established and the Petitioner should be paid by the Respondent half the value of the vehicles so established.

In conclusion the following orders are made:-

1. A Decree nisi is hereby issued for dissolution of the marriage between the Petitioner and the Respondent.

2. The Respondent is granted custody of the children Martina Wadamba, Maria Wadamba and David Martin Wambi Kibaale. The Petitioner shall have access to the children where ever they will be at reasonable hours and times of the day.

3. The distribution of the matrimonial property shall be effected as provided for in the Judgment.

4. For reasons which are evident in this Judgment, and with a view to bridge the acrimony between the parties which was evident during the trial, and for the sake of the children who deserve to be brought up in harmony, each party to the petition shall bear his or her own costs.

B.Kainamura
Judge
17.08.2012