

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
DIVORCE CAUSE No. 0001 OF 2015

AYIKO MAWA SOLOMON PETITIONER

VERSUS

LEKURU ANNET AYIKO RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The petitioner met the respondent sometime towards the end of the year 2009 whereupon they began dating. On or about 20th January 2009, the respondent moved in with the petitioner and they began cohabiting at the petitioner's family house in Anyafio East, in Arua Municipality. On 14th February 2009, the two underwent an Islamic traditional *Nikah* ceremony and continued to live together at the petitioner's family house in Anyafio East. The ceremony took place at the respondent's uncle's residence at Tanganyika Village, in Arua Municipality. Later they moved into the petitioner's brother's house still in Anyafio East. At the time they began dating, the respondent was expecting another man's child and on 13th October 2009 she was delivered of that child but attributed paternity to the petitioner in the relevant medical records. The couple then on 2nd December 2009 underwent a civil marriage at the office of the Chief Administrative Officer of Arua District. The petitioner stated that they had to undergo this ceremony because he needed a marriage certificate for immigration purposes. They subsequently moved into their own matrimonial home at plot 3 or 4 Jerekede Avenue, Anyafio in Arua Municipality.

Their relationship henceforth suffered a number of set-backs; the petitioner began suspecting the respondent of having adulterous relationships with some Canadian students living in the petitioner's brother's house in Anyafio East and with other unnamed men, during the time the petitioner had returned to Canada to continue with his research in peace building and human security. The petitioner states that he later discovered the baby was not his but rather was

fathered by an unnamed doctor at Arua Hospital. The respondent though contends the petitioner was aware of this fact from the very beginning since she disclosed that much to him. The petitioner contends that it is when he confronted her with that fact that a quarrel broke out between them whereupon she left the home and has never returned.

The respondent has a different version of the troubles that befell their marriage. On her part, she stated that their marriage became troubled due to the interference of her in-laws who thought she was not fit for their son. They would insult her and call her a prostitute. One day when she went to the petitioner's family house in Anyafio East, she found her husband with another woman by the name Emily. One night during the year 2010 at their matrimonial home in Jerekede, he found her husband in compromising situation after midnight in the boys' quarters, kissing Mildred, one of the Kenyan female guests they had hosted. In September 2010, the petitioner went on a working trip to Yumbe where he said he would spend only three days. He only returned after two weeks and even then, not to the matrimonial home at Jerekede but to his family house in Anyafio East. Subsequently, he came with two elderly women and another woman to the matrimonial home. He introduced her as Anim and that she was his new wife from Yumbe. He said they needed a discussion as to how the two of them would be taking care of him. After the respondent rejected the suggestion she picked her handbag and went outside. The appellant then put her bag outside and told her to find somewhere else to go. The respondent picked whatever personal property she could from their bedroom and left the home and has never returned to the home. The petitioner has since then had two children with Anim.

The petitioner contends that it is from his student loan as a Masters Student that he paid a maid to perform all the household chores including preparing food, laundry services, shopping for groceries, and so on. The respondent was not employed during the ten months of their cohabitation before the civil marriage and the one year of cohabitation after that marriage. She never made any financial contribution towards the acquisition of any of his property, save the provision of consortium. The respondent on her part stated that she did all these chores herself including hosting her husband's friends and guests. She at times helped the petitioner with his research over the internet, helped him manage a number of their businesses including an internet cafe and restaurant by the name "Asianda House," run a poultry farm at home, a Tipper Lorry, a

video library in Nsambya Awindiri Ward, maintained gardens where they grew crops like cassava, and supervised the construction of the house which subsequently became their matrimonial home at Jerekede Avenue, Anyafio in Arua Municipality.

During the period of her desertion of the home, the petitioner asked her to give him custody of the child and she obliged him. He found a school for the child in Entebbe and henceforth paid school fees for the child. Both parties want the marriage dissolved. The respondent wants a share of the property acquired during the subsistence of the marriage. The petitioner is not willing to let the respondent have any share of the property, most of which he contends is his personal property acquired before the marriage and the rest of it either belongs to his brother or the Non Governmental Organisation that employs him.

I have re-characterised / reformulated the issues for determination in this petition as follows;

- a) Whether the *Nikah* ceremony constituted a valid marriage between the parties; and
- b) If so, whether the subsequent civil marriage altered the status of the parties.
- c) Whether there are grounds established for the dissolution of that marriage.
- d) Whether the parties are entitled to any of the reliefs sought upon such dissolution.

First issue: Whether the *Nikah* ceremony constituted a valid marriage between the parties.

In paragraph 3 of his petition, the petitioner states that he professes the Islamic faith while the respondent professes the Christian faith. The only marriage that the petitioner acknowledges in paragraph 4 of his petition the civil marriage solemnised on 2nd December 2009 at the office of the Chief Administrative Officer of Arua District. The petition is completely silent as regards the Islamic traditional *Nikah* ceremony which took place at the respondent's uncle's residence at Tanganyika Village, in Arua Municipality on 14th February 2009. In her reply to the petition, the respondent never adverted to this ceremony at all. It first featured in these proceedings during the cross-examination of the petitioner and examination in chief of the respondent. Whereas the respondent contended this ceremony constituted a valid marriage between them, the petitioner dismissed this and gave non committal concessions about the character and purport of this ceremony.

Issues in a trial arise when material propositions of law or fact are affirmed by one party and denied by the other. According to *Kahwa Z. and Bikorwenda v. Uganda Transport Company Ltd. [1978] HCB 318*, issues generally arise from pleadings but may also arise from the evidence adduced at the trial. The court is empowered to frame issues at trial arising from evidence on oath by either party and the court may also amend or frame additional issues on such terms as it thinks fit before judgment. The court may also strike out any issue if wrongly framed or introduced. Therefore, under Order 15 rule 5 of *The Civil Procedure Rules*, since this court is empowered to amend and frame issues, and considering that the determination of the character of this ceremony is important to the subsequent marital status of the parties, I have chosen to frame it as the first issue, although it was not pleaded and only arose from the evidence. The nature of a *Nikah* ceremony is explained as follows;

A solemn and sacred social marriage contract between bride and groom. This contract is a strong covenant "*mithaqun Ghalithun*" as expressed in Quran 4:21.

The Muslim *Nikah* - A Step by Step Guide:

What is *Nikah*?

Marriage (*nikah*) is a solemn and sacred social contract between bride and groom. This contract is a strong covenant "*mithaqun Ghalithun*" as expressed in Quran 4:21). The marriage contract in Islam is not a sacrament. It is revocable, i.e. you can divorce!

A man, the groom does not have to have a *wali* at the time of the marriage contract, rather the man is the one who enters into the marriage contract by himself. It is the woman who needs to have a *wali*, because the Prophet ﷺ said, according to the *hadeeth* narrated by 'Aa'ishah: "Any woman who gets married without a *wali*, her marriage is invalid, invalid, invalid." Narrated by al-Tirmidhi, 1102; classed as *hasan* by Abu Dawood, 2083; Ibn Maajah, 1879.

But if a man is feeble-minded, he has to have a *wali* (guardian). If he is of sound mind, however, he does not need a *wali*. So, in essence, both parties mutually agree and enter into this contract. Please note. Both bride and groom have the liberty to define various terms and conditions of their liking and make them a part of this contract.

There is a strict condition for a Muslim woman. She may only marry a Muslim man and there is no *Nikkah* if she marries a non Muslim. If she wishes to marry him, he must convert to Islam free willingly. A Muslim man may marry a Christian or Jew faith woman so long as she does not practise *Shirk* and does not believe in anything

that is forbidden in Islam. A Muslim man is Not allowed to marry a non believing woman who follows any other faith such as Atheist, Hinduism, Sikhism, Buddhism and so on. A word of advice, please avoid doing secret *Nikkah* or trying to play the hero doing it swiftly by yourselves and without the blessings of the parents or close relatives and guardians. You risk committing *zinaa* (Illegal sexual acts) as there may be no *Nikkah* in the first place.

Set the Date of *Nikah*

First of all, after agreeing to getting married, the couple need to consult each other's families and set a date! Both parties should discuss their wishes and expectations before setting to work, deciding upon a budget, and organising all that is required. Do you wish to hold the *nikah* at home or at the *masjid*? Will you require a separate civil ceremony? Who will you invite? Where will you hold the *Walima*? All this, and more, requires careful consideration. Remember the best wedding is considered to be the one with the least expenses.

Al-Nikah: the Islamic Marriage Ceremony.

Let's look at the basics. The *nikah* is a simple ceremony in which a man and woman declare their verbal commitment to each other as husband and wife. It is a "contract" to which both must agree and it is considered an act of worship (*ibadah*). In the very simplest form of the ceremony: there is the *Al-Ijab wal-Qubul* (offer and acceptance) only, where the *Wali* (woman's guardian in marriage) offers the bride to the groom, who then accepts. One matrimonial party expresses "*ijab*" willing consent to enter into marriage and the other party expresses "*qubul*" acceptance of the responsibility in the assembly of marriage ceremony. (The *Wali* may say: "I give you my daughter / the girl in my guardianship in marriage in accordance to the Islamic *Shari'ah* in the presence of the witnesses here with the dowry agreed upon. And Allah is our best witness.") The husband-to-be replies with: "I accept marrying your daughter/in your guard giving her name to myself in accordance to the Islamic *Shari'ah* and in the presence of the witnesses here with the dowry agreed upon. And Allah is our best witness."The ceremony is then complete! Yes, over in just a few minutes!

The requirements of *Nikah*:

Primary Requirements:

- 1) Mutual (consent) agreement (*Ijab-O-Qubul*) by the bride and the groom; 2) Legal guardian *Wali* (Muslim) or his representative, *wakeel*, "representing "the bride; 3)Two adult and sane Muslim witnesses, (*Ash-Shuhud*), 2 males or 1 male and 2 females; 4) *Mahr* (marriage-gift) to be paid by the groom to the bride either immediately (*muajjal*) or deferred (*muakhkhar*), or a combination of both.

Secondary Requirements:

1) Written marriage contract ("*Aqd-Nikah*") signed by the bride and the groom and witnessed by the two adult and sane witnesses; 2) Qadi (State appointed Muslim judge) or *Ma'zoon* (a responsible person officiating the marriage ceremony) usually the Imam. (However any trust worthy practicing Muslim can conduct the *nikah* ceremony, as Islam does not advocate priesthood.); 4) *Khutba-tun-Nikah* (sermon) to solemnise or bless the marriage, this includes making *Du'aa*.

The contract is written and signed by the bride and the groom and their two respective witnesses. This written marriage contract (*Aqd-Nikah*) is then announced publicly. The marriage contract documents are recorded with the *masjid* and registered with local government, thus fulfilling the civil obligations of the marriage. Without this, the marriage would not be recognised under the law of the country you reside and the legal rights of the spouse, such as inheritance, couples and later their children rights would not be valid. You will note that it is not essential to have the couple present in the same room during *Nikah*, just so long as the *Wali* and the Witnesses are there and have witnessed everything and the bride has given her consent and permission. She may remain silent. Meaning it's a Yes! She accepts.

Announcement of the Nikah:

Islam encourages its followers to announce a marriage and to celebrate this wonderful relationship between a man and a woman. The *nikah* is also a social activity. The Prophet ﷺ said: "Declare this marriage, have it in the *masjid* and beat the drums." However, despite being a religious ceremony, the *nikah* does not need to take place in a *masjid*. That is a matter of personal choice. However, you will be required to hold a separate civil ceremony. Sometimes, men and women sit separately at the *nikah*. They may be in a separate room or there may be a partition between them. Again, this is a matter of preference.

Sermon:

The marriage sermon (*Khutbah-tun-Nikah*) is a way of blessing the marriage and begins by praising Allah سبحانه و تعالى. "There is none worthy of worship except Allah and Muhammad is His servant and messenger", the Muslim confession of faith, is then declared. The main body of the sermon comprises three verses from the holy Qur'an and one *Hadith*:

Yaa ayyuha'n-naas uttaqu rabbakum alladhi khalaqakum min nafsin waahidatin wa khalaqa minhaa zawjahaa wa baththa minhumaa rijaalan katheeran wa nisaa'an wa'ttaqu-Llaah alladhi tasaa'aloona bihi wa'l-arhaama inna Allaaha kaana 'alaykum raqeeban (O mankind! Be dutiful to your Lord,

Who created you from a single person, and from him He created his wife, and from them both He created many men and women, and fear Allaah through Whom you demand your mutual (rights), and (do not cut the relations of) the wombs (kinship) Surely, Allaah is Ever an All-Watcher over you).’ [al-Nisaa’ 4:1],

Yaa ayyuha’lladheena aamanu-ttaqu’Llaaha haqqa tuqaatihi wa laa tamootunna illaa wa antum muslimoon. (O you who believe! Fear Allaah as He should be feared, and die not except in a state of Islam (as Muslims) with complete submission to Allaah.)’[Al ‘Imraan 3:102],

Yaa ayyahu’lladheena aamanu-ttaqu’Llaaha wa qooloo qawlan sadeedan (O you who believe! Keep your duty to Allaah and fear Him, and speak (always) the truth).’[al-Ahzaab 33:70].”

Al-Nisaa’i reported that ‘Abd-Allaah ibn Mas’ood (may Allah be pleased with him) said: “The Prophet ﷺ taught us Khutbat al-Haajah: Al-hamdu Lillaahi nasta’eenahu wa nastaghfiruhu, wa na’oodhu billaahi min shuroori anfusinaa wa sayi’aati a’maalinaa. Man yahdih Illaahu falaa mudilla lahu wa man yudlil falaa haadiya lahu. Wa ashhadu an laa ilaaha ill-Allaah wa ashhadu anna Muhammadan ‘abduhu wa rasooluhu. (Praise be to Allah, we seek His help and His forgiveness. We seek refuge with Allah from the evil of our own souls and from our bad deeds. Whomsoever Allah guides will never be led astray, and whomsoever Allah leaves astray, no one can guide. I bear witness that there is no god but Allah, and I bear witness that Muhammad is His slave and Messenger). (Sunan al-Nisaa’i: Kitaab al-Jumu’ah, Baab kayfiyyah al-khutbah.

The ceremony draws to a close with Du’aa for the bride and groom, their families, the local Muslim community and the Muslim community as a whole (*ummah*).

Mahr:

It is written in the Qur’an that *mahr* must form part of the marriage contract. The groom gives *mahr* to his bride as a demonstration of his commitment to her and to providing for her. It can take the form of money, property or possessions. There is no set amount, although moderation is recommended, and the gift is agreed between the bride and the groom. “And give the women their dowries as a free gift, but if they are pleased to offer you any of it accept it with happiness and with wholesome pleasure.” [Qur’an 4:4]

The groom may pay the *mahr* before he marries, at the time of marriage, or at a later date, as agreed with his bride. The *mahr* can even be postponed indefinitely. However, it will become payable immediately in the case of divorce or death. The amount and method of payment is written into a contract, which is signed by the bride, groom and their witnesses. Following this, the *Aqd-Nikah* is announced to all who attend the *nikah*. Traditionally, *mahr* would reflect the social status of the bride's family. However, these days, the giving of *mahr* is seen mainly as a symbol. No one wants to begin married life burdened with debt and, equally, Islam does not wish to prevent men from getting married simply because they cannot afford an expensive dowry.

Walima: the marriage banquet:

The wedding banquet (*Walima*) is traditionally held by the groom after the *nikah* has taken place. It may take place immediately following the *nikah*, on the following day, the following week or at a future date, but the purpose of the banquet is for family and friends to share in the groom's happiness on the occasion of his marriage and to give thanks to Allah سبحانه و تعالى. The Prophet Muhammad ﷺ encouraged Muslims to accept invitations to attend marriage ceremonies and marriage feasts: "...and he who refuses to accept an invitation to a marriage feast, verily disobeys Allah and His Prophet". [Ahmad & Abu Dawood]. The *Walima* should not be wildly expensive. Islam emphasises moderation and it is sensible to keep this in mind. No one should start their married life with a huge debt, or to burden the families with debt, owing to an extravagant *Walima*. It is an occasion to celebrate the happiness of the newlyweds and competing with what you may have experienced at a friend or relative's *Walima* will most likely lead to escalating costs and distract you from the occasion. The Prophet ﷺ said: "The best wedding is that upon which the least trouble and expense is bestowed" [Mishkat]. The *Walima* gives family members and friends the opportunity to congratulate the happy couple: the bride is congratulated by the women around her and by her family and friends; the groom receives the congratulations of men. The newlyweds are also presented with gifts. It is believed that gifts given willingly will strengthen the relationships between people. Therefore, it is important to keep gifts affordable. The Prophet ﷺ said: "Exchange gifts, strengthen your love of one another" [At-Tirmizi]

Other traditions:

Remember these are traditions and a cultural necessity in certain countries. It is not a requirement in Islam. A *mangni* (engagement ceremony) may take place once the couple has accepted each other for marriage. It provides an opportunity for the two families to come together and for the couple to exchange rings, if they so wish. This is not a religious requirement but cultural. (Actually in Islam there is no exchange of

rings.) The outfit of the bride-to-be is traditionally provided by the groom's family. It is traditional, but not a religious requirement for the bride to hold a *mendhi* ceremony, usually at home, shortly before the wedding. The groom's family provides the *henna*, which is applied to the bride's hands and feet. Following the application of *mendhi*, the bride does not leave the house until the *nikah*. Her wedding clothes are also provided by the groom's family. Please note again: It is not a religious requirement for the bride and groom to exchange rings in marriage; however it has become tradition and culture dictates it. Gold jewellery is acceptable for women only, although silver rings may be worn by both men and women.

The wedding night:

Anticipation of the wedding night can be a cause of wedding day nerves for most newlyweds, but do try not to let any apprehension spoil your special day. If you know what is expected on this special night, you can reduce the feelings of uncertainty. The Prophet Muhammad ﷺ has described for us ways in which the wedding night can be fulfilling and enjoyable. The *Sunnah* encourages the groom to place his hands upon his wife's head and to pray for her. In the words of the Prophet ﷺ : "O Allah, I ask You her goodness, and the goodness of the inborn dispositions which You have given her, and I solicit Your protection from her evil, and the evil of the inborn dispositions which You have given her" [*Abu Dawud and Ibn Majah*]. It is preferable that the groom leads his wife in two *raka'at* (units of prayer) before asking of Allah what they wish for themselves. The Prophet ﷺ also suggested saying: "O Allah, bless my wife for me, and bless me for her. O Allah, unite between us in good, and if you separate us, separate us in good" [*Abu Shaybah*]. The groom should treat his bride with kindness and it is the *Sunnah* to offer her something to eat or drink.

Conclusion

This article has provided an overview of the most important and fundamental elements of the occasion of *Nikah* (marriage). Let's be clear, many communities have their own traditions and perhaps different ways of doing things, which you will learn of as you go about your planning. So be flexible to include a few traditions as well as long as they are not extravagant or against the *shariah*. Do not forget that relatives will prove to be a mind of information and of great help to you at this exciting, yet busy, time so always engage with them over the planning stages.

(See

https://web.facebook.com/permalink.php?story_fbid=674295059270105&id=502950646404548&_rdr, (visited the site on 10th February 2017).

I therefore construe a *Nikah* as a valid Islamic traditional marriage ceremony whose essential requirements are; mutual (consent) agreement by the bride and the groom; presence of a Legal guardian (*Wali*) for the bride or his representative, (*Wakeel*); the presence of two adult and sane Muslim witnesses, (*Ash-Shuhud*), who should be two males or one male and two females; and the payment of *Mahr* (marriage-gift) by the groom to the bride either immediately (*muajjal*) or deferred (*muakhhkar*), or a combination of both.

In her testimony, the respondent explained that the ceremony was preceded by the exchange of letters containing a proposal and acceptance between the petitioner and her parents. The actual ceremony involved her late paternal uncle as her *Wali*, it was witnessed by several people and her consent was sought and she signified it by indicating her *Mahr* as shs. 75,000= which the petitioner paid. I find this to be credible evidence that a ceremony did take place and that it complied with the minimum requirements of an Islamic marriage ceremony. The petitioner too in his evidence confirmed that it was a marriage ceremony. For all intents and purposes therefore, the parties became husband and wife on 14th February 2009 when they underwent the *Nikah* ceremony, which in my view met all the essential requirements of a traditional Islamic marriage.

Section 2 of *The Marriage and Divorce of Mohammedans Act*, Cap 252 recognises the validity of marriages performed according to the rites and observances of the Mohammedan religion, customary and usual among the tribe or sect in which the marriage takes place, (save only that in this case one of the parties, the respondent, professed the Christian faith). In *Mayi Bint Salim and ten others v. Hajji Sulaiman Mayanja C.A. Civil Appeal No.37 of 2008*, it was held that “the simplest ceremony suffices to bring into being an Islamic marriage” and that absence of a marriage certificate was inconsequential as regards the validity of such a marriage. This issue therefore is answered in the affirmative.

Second issue: If so, whether the subsequent civil marriage altered the status of the parties.

According to section 2 of *The Marriage and Divorce of Mohammedans Act*, relief cannot be sought under *The Divorce Act* where the marriage of the parties has been declared valid under *The Marriage and Divorce of Mohammedans Act*, however the High Court may grant relief under Mohammedan law. In the instant case though, the parties underwent a second ceremony of

marriage on 2nd December 2009 when they solemnised a civil marriage at the office of the Chief Administrative Officer of Arua District.

The implication of the second ceremony is that whereas the parties initially became husband and wife under a potentially polygamous marriage, the second ceremony converted that marriage into a monogamous one. It ceased to be an Islamic marriage governed by *The Marriage and Divorce of Mohammedans Act*, Cap 252 and turned into a civil marriage governed by *The Marriage Act* cap 251 and *The Divorce Act*, Cap 249.

Third issue: Whether there are grounds established for the dissolution of that marriage.

In paragraph 11 (a) of the petition, among the reliefs sought by the petitioner is one for dissolution of the marriage. He contends that this has not been sought in collusion with the respondent. On her part, the respondent in paragraph 16 of her reply to the petition, she responded that she is not against the divorce sought since “at all material time it has been the petitioner who committed adultery.” Marriage still continues to serve valuable social, legal, economic, and institutional functions, and for that reason the underlying public policy continues to promote marriage and discourage divorce unless the parties strictly comply with the statutory requirements for divorce.

Although there are attitudes expressed in modern times that divorce should not be based solely on traditional fault grounds such as adultery, cruelty, and desertion, but instead divorce should be viewed as a regrettable, but necessary, legal definition of marital failure where often the factors leading to the marriage breakdown were caused by the parties’ incompatibility and irreconcilable differences, section 8 of *The Divorce Act* still enjoins court to pronounce a *decree nisi* for the dissolution of marriage only after being satisfied that the petitioner’s case has been proved, and does not find that the petitioner has been accessory to or has connived at the going through of the form of marriage or the adultery, or has connived at or condoned it, or that the petition is presented or prosecuted in collusion. That the respondent does not oppose the petition for divorce is not sufficient of itself to justify issuance of a *decree nisi* for the dissolution of marriage.

Whereas section 4 (1) of *The Divorce Act* provides for adultery committed by the wife after solemnisation of the marriage as the only ground upon which a husband may seek divorce, it has since been that each of the grounds for Divorce specified in this section is available equally to both the husband and the wife (see *Uganda Association of women Lawyers and eight others v. Attorney General Const. Petition No.2 of 2003* and *Dr. Specioza Wandira Naigaga Kazibwe v. Eng. Charles Nsubuga Kazibwe, Divorce Cause No.3 of 2003*).

In the instant case, although the respondent averred in her reply that at all material time it has been the petitioner who committed adultery, since she did not present a cross-petition on that account, proof of the grounds for divorce will only be considered on basis of what the petitioner alleges. In paragraph 6 of the petition, the petitioner avers that the respondent is guilty of adultery committed by way of living an adulterous life with a number of men unknown to the petitioner. In paragraph 7, he further avers that the respondent deserted the matrimonial home within a short period after 13th October 2010 without any reasonable excuse. On that account, he in paragraph 10 avers that there has been an irretrievable breakdown of the marriage.

The standard of proof required in proof of the various grounds of divorce varies according to the gravity of the accusation. Lord Denning in *Blyth v Blyth [1966] AC 643*, stated that, “ so far as the grounds for divorce are concerned, the case, like any civil case, may be proved by a preponderance of probability, but the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear.” For example in *Bater v. Bater [1951] P 35*, the wife petitioned for divorce, alleging cruelty. It was held by the Court of Appeal that it had not been a misdirection for the trial court to require the petitioner to have to prove her case beyond reasonable doubt: ‘A high standard of proof’ was required because of the importance of such a case. The court stated;

Also in civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

For that reason, it was held in *Kakunka Edward v. Aliet Yudesi Kyoyanga*, [1972] HCB 208; *Ruhara Mary (Mrs) v. Ruhara Christopher* [1977] HCB 86 and *Habyarimana Veronica v. Habyarimana Perfect* [1980] HCB 139 that the standard of proof of adultery and cruelty is above the ordinary preponderance of evidence but not as high as beyond reasonable doubt.

As regards the allegation of adultery, direct evidence proving the fact of commission of adultery is quite rare in divorce causes. At best, the evidence is mostly circumstantial. Ntabgoba, PJ, in *George Nyakairu v. Rose Nyakairu* [1979] HCB, 261, commented thus; “in allegations of adultery, it is not necessary to prove the direct fact of adultery for that fact is almost to be inferred from circumstances as a necessary conclusion since it is indeed very rare that parties are ever surprised during the direct act of adultery.” That as it may be, adultery must be proved to the satisfaction of the Court. It is not enough for the petitioner to allege as the petitioner did in paragraph 6 of the petition that “the respondent was living an adulterous life with a number of men unknown to the petitioner who used to pick her from the matrimonial home while the petitioner was away on work related trips.” The petitioner had to adduce evidence of facts on basis of which considering circumstances, the court can conclude that an adulterous sexual intercourse took place. Such evidence should be akin to that required of circumstantial evidence in criminal cases. The exculpatory facts should be incompatible with the innocence of the spouse and incapable of explanation upon any other reasonable hypothesis than that of sexual intercourse having taken place. The circumstances must be such as to produce near moral certainty, to a standard above mere preponderance. It is necessary before drawing the inference of adultery from circumstantial evidence of that nature to be sure that there are no other co-existing circumstances which would substantially weaken or destroy the inference.

In the instant case, the only evidence adduced by the petitioner is of rumours or information he received from third parties that the respondent would from time to time stay out late at night with one of the Canadian students. Not only was this not proved as a fact, but also of its own is insufficient to support an inference of adultery. The other piece of evidence came from the respondent herself when she testified that the petitioner happened to return home one day unannounced and coincidentally that was the day she spent the night with the petitioner’s sisters. This too cannot of its own support an inference of adultery. This being the only evidence

adduced by the petitioner to support his ground of adultery, I find that this ground has not been proved to the required standard and therefore it cannot form the basis for the pronouncement of a *decree nisi* for the dissolution of this marriage.

Considering the second ground of desertion, Black's Law Dictionary 9th Edition 2009, at page 211, defines desertion as:-

The wilful and unjustified abandonment of a person's duties or obligations, especially to military service or to a spouse or family. In Family Law the five elements of spousal desertion are 1) a cessation of cohabitation, 2) the lapse of a statutory period, 3) an intention to abandon, 4) a lack of consent from the abandoned spouse, and 5) a lack of spousal misconduct that might justify the abandonment.

The concept was explained further by Lord Porter in the case of *Lang v. Lang* [1954] 3 ALL ER 571 where he stated at page 573 that:-

To establish desertion two things must be proved: first certain outward and visible conduct- the *factum* of desertion and secondly the "*animus deserendi*"- the intention underlying this conduct to bring the matrimonial union to an end. In ordinary desertion the *factum* is simple: it is the act of the absconding party in leaving the matrimonial home. The contest in such a case will be almost entirely as to "*animus*". Was the intention of the party leaving the home to break it up for good, or something short of, or different from, that?"

As it is put in Rayden and Jackson on *Divorce and Family Matters* 17th edition, paragraph 8.33, "In its essence desertion is the separation of one spouse from the other with an intention on the part of the *deserting* spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse." At common law and in accordance with section 4 (2) (b) (vi) of *The Divorce Act*, desertion takes effect with the lapse of two years or more of such abandonment. In the instant case, it is common ground between the parties that the respondent left the matrimonial home sometime in September 2010 and has not returned since. Therefore by the time this petition was filed on 1st June 2015, the respondent had abandoned the home for nearly five years. The *factum* of desertion has therefore been established by the available evidence.

As to the *animus* there must proof of lack of intent to return and resume the marital relationship. The respondent against whom desertion is alleged may testify as to intent but cannot evade the effect of his or her conduct. The court ascertains the respondent's intent by considering all of the facts and circumstances. The passage of time in and of itself cannot constitute an intention to desert. Intention to leave the home and break it up for good is to be determined in each case from all the evidence on the record. The circumstances must disclose some definite act(s) showing an intention to desert. Such intention must be shown by clear and satisfactory evidence.

In the instant case, there are conflicting reasons given which led to the respondent abandoning the home. According to the petitioner, the respondent abandoned the home when she was confronted with the truth about the paternity of her child. On her part, the respondent averred that it was because the petitioner brought a second woman into the home that he introduced as his second wife and demanded that the two work out modalities of how they would thenceforth care for him. I am inclined to believe the respondent. The petitioner's subsequent conduct of demanding the return of the child and thereafter finding a school for the child, paying the school fees for the child and otherwise providing maintenance for the child is not consistent with a jilted husband who suddenly discovered that the child was not his. That conduct is more consistent with the respondent's version that the petitioner knew the true paternity of this child even before the child was born. It is rather conduct of a husband who from the very early stages of the relationship with the mother of the child knew that he was not the father of the child and accepted to be the child's putative father.

That being the case, I believe the respondent when she said she left the home with no intention of returning as a wife due to the introduction of a second wife who has since then had two children with the petitioner. The respondent's subsequent conduct of not returning to the home since then, despite letting the petitioner have her child, confirms the fact that she abandoned the home with the intention of bringing the matrimonial union to an end and thereby leaving the home and breaking it up for good. There will be desertion from, and only from, the time when that intention is formed or can be inferred. It has *prima facie* been impossible to repair the marriage or reconcile the parties for a period of more than two years since the respondent abandoned the home. I am therefore satisfied that both the *factum* and *animus* of desertion have been established

by the available evidence in this case. It is doubtful though that it was without any good reason and without the consent of the petitioner, considering the respondent's contention that the petitioner dropped her bag out of the house and demanded that she finds somewhere else to live.

In *Sickert v Sickert* [1899] P 272 it was held that there is no substantial difference between the case of a husband who intends to put an end to the state of cohabitation, and does so by leaving his wife, and that of a husband who with the like intent obliges his wife to separate from him. In the instant case, the unreasonable behaviour by the petitioner could easily be construed as that of a person harbouring an intention on his part to treat the relationship as at an end, and hence constructive abandonment. In a situation like this, the question which needs to be asked is summarised in *Griffiths v. Griffiths* [1964] 1 WLR 1483 at 1486 – 1487 as follows:

Was the husband guilty of such grave and weighty misconduct that he must have known that his wife, if she acted like any reasonable woman in her position, would in all probability withdraw permanently from cohabitation?

It seems to me that the answer to the question in *Griffiths v. Griffiths* above, based on the facts of this case, is in the affirmative yet is a requirement that to rely on this ground of divorce, the petitioner must show lack of spousal misconduct that might justify the desertion. The requirement that the deserting spouse must intend to bring cohabitation to an end must be understood to be subject to the qualification that if without just cause or excuse a man persists in doing things which he knows his wife will probably not tolerate, and which no ordinary woman would tolerate, and then she leaves, he has deserted her whatever his desire or intention may have been (see *Divorce and Family Matters* 17th edition, paragraph 8.33). In such a case his “intention” to bring the relationship to an end is in fact attributed to him (see *The Secretary of State for Work and Pensions v. W* [2005] EWCA Civ 570).

In *Lang v. Lang* [1954] 3 ALL ER 571, the Privy Council held that where a husband's conduct towards his wife was such that a reasonable man would know, and that the husband must have known, that in all probability it would result in the departure of the wife from the matrimonial home, that, in the absence of rebutting evidence, was sufficient proof of an intention on his part to disrupt the home, and the fact that he nevertheless desired or requested her to stay did not

rebut the intention to be inferred from his acts – that he intended to drive her out – and he was guilty of constructive desertion.

Unfortunately for the petitioner, I do not find him innocent when I consider the circumstances which led the respondent's desertion of the home. It is due to his misconduct, serious and egregious marital misconduct, of not living up to the requirements of a monogamous marriage, that the respondent was forced to leave the home. The respondent was effectively forced out of the home by the unacceptable conduct of her partner, the petitioner. The petitioner's conduct constituted offences which "no ordinary woman would tolerate" and from which court can infer that he cannot have intended the relationship to continue. Whether that is seen as desertion or constructive desertion is of little consequence.

Although lack of spousal misconduct that might justify the desertion is a requirement established by case law, it should be construed in light of the constitutional prohibition against subjecting persons to any form of torture or cruel, inhuman or degrading treatment (see article 24 of *The Constitution of the Republic of Uganda, 1995*). Engaging in adultery or cruelty is not the sort of sharing behaviour which marriage should have to endure. The treatment of the respondent by the petitioner rose to a level that the mental well being of the respondent was endangered making it unsafe and improper for the respondent to continue living with the petitioner. In my view, denying the petitioner divorce on account of his spousal misconduct being contributory to the respondent's desertion would indirectly shackle the respondent in an abusive relationship with the petitioner. I have as well considered the fact the parties have no children between them likely to suffer long-lasting psychological and economic damage resulting from the divorce. The fact of the petitioner's misconduct though will be taken into account when determining spousal support and property distribution.

Lastly before pronouncing a *decree nisi* for the dissolution of the marriage, the court should be satisfied that there is no condonation, collusion or connivance between the parties. In *Y. Mugonya v. Trophy Nakabi Mugonya*, [1975] HCB 297, it was stated that proof of condonation requires evidence of forgiveness and reinstatement of the relationship, although further commission of matrimonial offences revives the condoned offence. As to the standard of proof

required to establish that the ground for divorce has been condoned, it was held by Lord Denning in *Blyth v Blyth* [1966] AC 643, that:

So far as the bars to divorce are concerned, like connivance or condonation, the petitioner need only show that on balance of probability he did not connive or condone as the case may be.

In the instant case, I have not found any evidence of condonation, collusion or connivance by the petitioner. The closest the evidence has come to suggesting the possibility of such bars is the fact that the petitioner has since the desertion been looking after the child of the respondent. I do not find this to be evidence of the resumption of any conjugal relationship between the parties after the desertion. As a result, there is no hope of reconciliation as the respondent has lost interest in the marriage which has irretrievably broken down.

Being satisfied that the petitioner has proved the ground of desertion to the required standard, a *Decree Nisi* hereby issues for the dissolution of the marriage between the petitioner and the respondent.

Fourth issue: Whether the parties are entitled to any of the reliefs sought upon such dissolution.

In the petition, in an addition to an order of dissolution of the marriage, the petitioner seeks relief by way of; costs incidental to the petition and any other relief the court may deem fit. On her part, the respondent in paragraph 15 of her reply to the petitions seeks to have the property jointly acquired during the subsistence of the marriage, divided equally between them. She listed the following as the property jointly acquired during the marriage;

- a) A residential house at Anyafio West in Arua District.
- b) A semi permanent house in Anyafio East in Arua District.
- c) A permanent residential house in Ediofe, Arua.
- d) A commercial plot of land along Pakwach Road in Arua Hill Division.
- e) 10 acres of land in Awika Parish, Arua District.
- f) 200 acres of farmland at Bondo village in Arua District.
- g) 17 acres of farmland in Bondo village Centre, Arua District.
- h) Assorted farm machinery for making chicken feeds.

- i) Tipper Lorry Reg. No. UAM 135 Y
- j) One LG refrigerator.
- k) One Samsung refrigerator.
- l) Two Sony Data Projectors.
- m) One Honda Generator.
- n) A printer.
- o) 20 acres of land at Pajuru village in Arua District.
- p) One Sony Bravia 32” flat screen.
- q) Seven Dell Laptops.

In paragraphs 4 and 7 of his answer to the respondent’s reply to the petition, the petitioner refuted the respondent’s claim that any of that property was acquired jointly during the subsistence of the marriage, but rather all of it was acquired by the petitioner either before the marriage or after the respondent had deserted the home.

At the commencement of the hearing of this petition, the petitioner adduced the following documents which were admitted in evidence by consent; a land purchase agreement dated 27th July 2009 marked as exhibit P.E.2 in respect of land at Jiako village, Vurra County in Arua District (not listed); a land purchase agreement dated 17th October 2009 marked as exhibit P.E.3 in respect of land at Pajulu (numbered (n) on the list of property above); a land purchase agreement dated 31st July 2009 marked as exhibit P.E.5 in respect of land at Anakawa Orobi village, Arivu in Arua District (not listed); a land purchase agreement dated 23rd September 1999 marked as exhibit P.E.4 in respect of plot 17 Awudole Crescent (not listed).

What constitutes “matrimonial property” was defined in *Muwanga v. Kintu High Court Divorce Appeal No. 135 of 1997* (unreported) where Bbosa J observed as follows;

Matrimonial property is understood differently by different people. There is always property which the couple chose to call home. There may be property which may be acquired separately by each spouse before or after marriage. Then there is property which a husband may hold in trust for the clan. Each of these should in my view be considered differently. The property to which each spouse should be entitled is that property which the parties chose to call home and which they jointly contribute to.

The above decision appears to have given the concept of matrimonial property a narrow definition which limits it only to “property which the parties chose to call home and which they jointly contribute to.” A much more expansive definition is to be found in *Charman v. Charman (No 4) [2007] EWCA Civ 503; [2007] 1 FLR 1246* where it was defined as “property of the parties generated during the marriage otherwise than by external donation.” Similarly, sections 9 and 10 of the *Family Law (Scotland) Act 1985*, defines it as “the matrimonial home plus property acquired during the marriage otherwise than by gift or inheritance.”

However, not every property acquired by either spouse during the subsistence of the marriage constitutes matrimonial property. In absence of statutory provision, there can be no suggestion that the status of marriage *per se* results in any common ownership or co-ownership of property. This was more explicitly stated by Kisaakye JSC, in *Julius Rwabinumi v. Hope Bahimbisomwe, S.C. Civil Appeal No.10 of 2009* where she stated;

So, while I agree that Article 31 (1) of the Uganda Constitution (1995) guarantees equality in treatment of either the wife or husband at divorce, it does not, in my opinion, require that all property either individually or jointly acquired before or during the subsistence of a marriage should in all cases be shared equally upon divorce..... In my view *The Constitution of Uganda (1995)*, while recognizing the right to equality of men and women in marriage and its dissolution, also reserved the constitutional right of individuals, be they married or not to own property either individually or in association with others under Article 26 (1) of *The Constitution of Uganda (1995)*. This means that even in the context of marriage the right to own property individually is preserved by our constitution as is the right of an individual to own property in association with others who may include a spouse, children, siblings or even business partners. If indeed the framers of our Constitution had wanted to take away the right of married persons to own separate property in their individual names, they would have explicitly said so...then the courts will continue to determine each case based on the Constitution of Uganda, the applicable marriage and divorce law in force at the time in order to make determination whether the property in question is marital property or individual property acquired prior to or during the marriage and to determine whether such property should be divided either in equal shares or otherwise, as the facts of each case would dictate.

The principle that “community ownership between husband and wife is to be assumed unless otherwise excluded” is a matter of policy for Parliament and cannot be inferred by the courts (see

Pettitt v. Pettitt [1969] 2 WLR 966). Similarly, in *Essa v. Essa*, Kenya Court of Appeal Civil Appeal No. 101 of 1995 (unreported) it was held that there is no presumption that any or all property acquired during subsistence of the marriage must be treated as being jointly owned by the parties. It is therefore fully possible for the property rights of parties to the marriage to be kept entirely separate. Whether the spouses contributing to the purchase should be considered to be equal owners or in some other proportions must depend on the circumstances of each case (see *Rimmer v. Rimmer* [1953] 1 QB 63).

The general practice of courts in presuming common ownership or co-ownership of property is in respect of such property as is registered in the names of both spouses or property registered in the names of one spouse but in respect of which there is evidence of the other spouse's contribution to the purchase of the property. In such cases, the spouses will be considered to be equal owners or in some other proportions. This is illustrated by *Pettitt v. Pettitt* [1969] 2 WLR 966, at page 991 paragraph H, where Lord Upjohn opined, thus:

But where both spouses contributed to the acquisition of property, then my own view (of course in the absence of evidence) is that they intended to be joint beneficial owners, that is so whether the purchase be in the joint names or in the name of one. This is a result of an application of resulting trust.

A similar decision was reached in *Kamore v. Kamore* [2000] 1 EA 81 where the Court of Appeal of Kenya presumed equality in two properties registered in the name of the husband and wife jointly saying at page 85 paragraph d: "where property is acquired during the course of coverture and is registered in the joint names of both spouses the court in normal circumstances must take it that such property being a family asset is acquired in equal shares". That is of course a rebuttable presumption. Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property.

In the instant case, on basis of the available evidence, the property can be placed in four categories. In the first category, is that property in respect of which there is evidence of acquisition before the petitioner's marriage to the respondent. This includes the land at plot 17

Awudole Crescent which was purchase on 23rd September 1999. This property cannot be categorised as matrimonial property since it does not constitute the matrimonial home and there is no evidence of joint acquisition during the subsistence of the marriage.

In the second category, is property whose ownership the petitioner attributes to other persons. This includes the residential house at Anyafio West in Arua District and the semi permanent house in Anyafio East in Arua District (listed as (a) and (b) above) which he said belong to his late brother; property belonging to a non-governmental organisation “Peace for all International” which include – the assorted farm machinery for making chicken feeds, the Tipper Lorry Reg. No. UAM 135 Y, the LG refrigerator, the Samsung refrigerator, the two Sony Data Projectors, the Honda Generator, the printer, the Sony Bravia 32” flat screen and the even Dell Laptops, (all listed as (h) – (m), (n), (p) and (q) above). The burden lay on the respondent to prove that this was matrimonial property. She did not adduce any evidence to refute the petitioner’s assertion. I am therefore inclined to believe the petitioner that it is not matrimonial property since all but one of it constitutes the matrimonial home and there is no evidence of joint acquisition.

In the third category are properties which the petitioner admitted belong to him but in respect of which there is no evidence as to when they were acquired. These include; the permanent residential house in Ediofe, Arua, the commercial plot of land along Pakwach Road in Arua Hill Division, the 10 acres of land in Awika Parish, Arua District (he said he owned only 7 ½ not ten acres), the 200 acres of farmland at Bondo village in Arua District, (he said he owned only 57 acres), the 17 acres of farmland in Bondo village Centre, Arua District and the 20 acres of land at Pajuru village in Arua District (he said the latter is rather 22acres - all of these properties are listed as (c) – (b) and (o) above). In respect of this property, the court has not been furnished with evidence of acquisition during the subsistence of the marriage. I find that property in this category has not been proved to be matrimonial property since none of it constitutes the matrimonial home and there is no evidence of joint acquisition.

In the last category, is property which was acquired after 14th February 2009, the day the parties underwent the Islamic traditional *Nikah* ceremony which took place at the respondent’s uncle’s residence at Tanganyika Village, in Arua Municipality thereby becoming husband and wife. The

property includes land at Jiako village, Vurra County in Arua District acquired on 27th July 2009; land at Pajulu acquired on 17th October 2009; and land at Anakawa Orobi village, Arivu in Arua District acquired on 31st July 2009. None of this property was acquired in the joint names of both parties. All the respective agreements indicate the purchases were made in the sole names of the petitioner. For the respondent to lay claim to any of these properties as being matrimonial property, she had to adduce evidence of joint contribution to the purchase since there is no general presumption that any or all property acquired during the subsistence of a marriage is to be treated as being jointly owned by the parties.

This burden of proof was explained in followed in *Kimani v. Kimani* (1997) LLR 553 which was cited with approval in *Kamore v. Kamore* [2000] 1 EA 80 that;

It was for the Appellant to prove on a balance of probabilities that she directly or indirectly contributed towards acquisition of the properties in respect of which she claimed to be entitled to a share without losing sight of the fact that in regard to indirect contribution, the same was invariably to be considered in its own special circumstances

In *Echaria v. Echaria* [2007] 2 EA. 139, a bench of five Judges of the Court of Appeal of Kenya after a review of several local and English decisions held, inter alia, that where the disputed property is not registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportion of financial contribution, either direct or indirect towards the acquisition of the property and where the contribution is not ascertainable but substantial it may be equitable to apply the maxim “equality is equity”.

The respondent in the instant case does not claim to have made any direct contribution to the purchase of any of these properties, but rather an indirect contribution. As to the kind of indirect contribution which will create a joint interest in the property registered in the name of only one of the spouses, there has been an attempt by courts in East Africa to reckon a wife’s non-monetary contributions as indirect contribution to the acquisition of matrimonial property. This for example is seen in the Tanzanian case of *Lawrence Mtefu v. Germana Mtefu*, Civil Appeal No. 214 of 2000 (HCT), regarding some of the properties including the house at Tandika and the

sewing machines, in respect of which counsel submitted that the respondent was an unemployed house wife who earned no income and could not contribute anything in terms of money or property towards the construction of the house. That the only contribution made is “house-keeping” which amounts to a purely conjugal obligation which does not entitle the applicant to the division of the house in Tandika. As for the sewing machines, the submission was that they were acquired before the marriage and therefore the respondent never contributed towards their acquisition, it was held by Kimaro, J;

The submission by Mr. Mbuya, to say the least, is a clear reflection of the violence and discrimination which a woman has lived within the society for years. Services by women which require recognition and compensation are termed conjugal obligations on the part of the woman. This is so even where they are not reciprocated and the woman ends up in being exploited and a loser. In this case the respondent did testify of being sent to Moshi to take care of the appellant’s grandmother who was old. She stayed with her until her death. She also used to take care of the appellants “kihamba’s and cows” and the income was used for the development of the houses in Moshi. Definitely the respondent made contributions towards acquisition of the properties. The case of *Bi Hawa Mohamed* recognizes housekeeping as services requiring compensation. As was observed by the Court of Appeal, the rendering of such services make the other spouse stable and enhances the ability to concentrate on development of properties.

Similarly in the Kenyan case of *Kivuitu v. Kivuitu*, [1991] K.L.R 248; (1988 – 1992) 2 KAR 241; [1990-1994] E.A. 27, where the parties were a husband and wife who, in the process of obtaining a divorce, contested the division of the family home registered in the names of both spouses. The matrimonial property in dispute was bought and registered in the joint names of the husband and wife without specifying the share of each. After the dissolution of the marriage the wife filed an originating summons under section 17 of *The Married Women’s Property Act, 1882* (a statute of general application in Kenya - see *I v. I* [1971] EA 278; *Karanja v. Karanja* [1976] KLR 307) seeking an order that the matrimonial property be sold and the proceeds be shared equally. The lower court awarded the husband a three-quarter share and the wife a one-quarter share, concluding that the husband had made mortgage payments and the wife had contributed to family income and assets by being employed intermittently and by running various business ventures on behalf of the family. On appeal, the Court of Appeal at Nairobi, Kenya, reversed this decision and held that the value of the home should be split evenly between the spouses. It ruled

that, in addition to making direct financial contributions to the family income, the wife had made indirect contributions by paying for household expenses, preparing food and clothing for the children, organizing their schooling, and generally enhancing the welfare of the family. One judge commented as follows: “The time when an African woman was presumed to own nothing at all and all [that] she owned belonged to her husband and was regarded as a chattel to her husband has long gone. Women are now honourably employed and occupy high positions equal to men in the Government and in the private sector ... The situation has changed and so have customs.” Masime, J.A. stated thus:-

And, even where only the husband is in the income earning sector the wife is not relegated to total dependence on him without an ability to make some reasonable contribution towards the economic management of their family. It is no longer right to assume, as was done under customary law that the wife was totally dependent on the husband and not capable of contributing at all or substantially to the development of the household and increase in the family wealth.

Omolo, Ag. J.A (as he then was) expressed himself thus;

For my part I have not the slightest doubt that the two women I have used as examples have contributed to the acquisition of property even though that contribution cannot be quantified in monetary terms. In the case of the urban housewife, if she were not there to assist in the running of the house, the husband would be compelled to employ someone to do the house chores for him; the wife accordingly saves him that kind of expense. In the case of the wife left in the rural home, she makes even bigger contribution to the family welfare by tilling the family land and producing either cash or food crops. Both of them however, make a contribution to the family welfare and assets.... Where, however such property is registered in the name of the husband alone then the wife would be, in my view, perfectly entitled to apply to the court so that the court can determine her interest in the property, and in that case, the court would have to assess the value to be put on the wife’s non-monetary contribution.

Similar views were expressed in *Nderitu v. Kariuki* [1995-1998] E.A 235 where the Kenya Court of Appeal stated;

A wife's contribution, and more particularly a Kenyan African wife, will more often than not take the form of back-up service on the domestic front rather than a direct financial contribution. It is incumbent, therefore, upon a trial judge.....to take into

account this form of contribution in determining the wife's interest in the assets under consideration.

In *Kivuitu v. Kivuitu*, Omolo Ag. J.A. (as he then was) commented that, “even if I had been of the view that the wife had contributed no money at all towards the purchase of the home, I would have gone on to assess her non-monetary contribution as a wife and put a value upon that. As I said earlier it would be extremely cruel to the wife and to the other women in her position that they can only have a share in property acquired during marriage if they can prove financial contribution.” Despite this decision, in *P. Mburu Echaria v. Priscilla Njeri Echaria*, Kenya Court of Appeal Civil Appeal No. 75 of 2001, it was held that a spouse is only entitled to that part of matrimonial property which she can prove that she contributed to the acquisition thereof, by way of financial contribution. The Court stated thus;

Where the disputed property is not registered in the joint names of the spouses, but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contributions either directly or indirect towards the acquisition of the property.

The Supreme Court of Uganda took a similar stance in the case of *Julius Rwabinumi v. Hope Bahimbisomwe* where it emphasized tangible financial contribution, direct or indirect, which is clearly provable towards the acquisition of the property in dispute, as the guiding principle in determining the wife's share. For the wife to be entitled to a share of the property registered in the name of the husband, she has to prove financial or monetary contribution towards the acquisition of the property. Unquantifiable non-monetary contribution by a wife will not entitle her to a share of property. This position is consistent with the English law of trusts by which it is only the wife's financial contribution, direct or indirect towards the acquisition of the property registered in the name of her husband that entitles her to a beneficial interest in the property. The respondent is obliged to prove the extent of her contribution towards the acquisition of the property in dispute. This is illustrated in *Burns v. Burns* [1984] 1 All ER 244, where it was held that;

If the plaintiff or anybody else, claims to take it from him, it must be proved the claimant has, by some process of the law, acquired interest in the house. What is asserted here is the creation of a trust arising from common intention of the parties. The common intention may be inferred where there has been a financial contribution,

direct or indirect, to the acquisition of the house. But the mere fact that parties live together and do the ordinary domestic tasks is, in my view, no indication at all that they thereby intended to alter the existing property rights for either of them.

May L.J. was more emphatic. He said at page 265 paragraph c:

Finally, when the house is taken in the man's name alone, if the woman makes no "real" or "substantial" financial contribution towards either the purchase price deposit, or mortgage instalments by means of which the family home was acquired, then she is not entitled to any share in the beneficial interest in that home even though over a very substantial number of years she may have worked just as hard as the man in maintaining the family, in the sense of keeping house, giving birth to and looking after and helping to bring up the children of the union

Examples of such contribution were given in that case, thus; "If there is a substantial contribution by the woman to the family expenses, and the house was purchased on a mortgage, her contribution is, indirectly referable to the acquisition of the house since in one way or another, it enables the family to pay the mortgage instalments. Thus a payment could be said to be referable to the acquisition of the house if, for example, the payer either: (a) pays part of the purchase price, or (b) contributes regularly to the mortgage instalments, or (c) pays off part of the mortgage, or (d) makes a substantial financial contributions to the family expenses so as to enable the mortgage instalments to be paid." That list is not of course exhaustive. Similar views were expressed by Kisaakye JSC's Judgment in *Julius Rwabinumi v. Hope Bahimbisomwe, S.C. Civil Appeal No.10 of 2009* at page 27:-

The courts holding was irrespective of whether the claimant proves that he or she contributed to the acquisition of the said property either through direct monetary or non-monetary contribution towards payment of the purchase price or mortgage instalments or its development or indirectly through payment of other household bills and other family requirement including child care and maintenance and growing food for feeding family.

As the law currently stands, the status of being married does not, of its own, entitle a spouse to a beneficial interest in the property registered in the name of the other, nor is the performance of domestic duties. A wife who makes other important non-financial contributions such as staying in the house, keeping it clean, bringing up the children etc. is without a remedy. Even the fact that the wife was economical in spending on housekeeping will not do. There has to be proof of

engagement in activities that generate “real” or “substantial” financial contribution by direct cash or material contribution or by way of indirect expense substitution, quantifiable in monetary terms, through financial contributions to the family expenses so as to enable the property to be acquired.

The position of the law in Uganda is not dissimilar from the law as it obtained in England before the enactment of *The Matrimonial Proceedings and Property Act 1970* which came into force on 1st January, 1971 and which empowered courts to make property adjustment orders. In particular, Section 5 (1) (f) of the Act gave court power in considering whether to make a transfer of property to have regard, among other things, to; “the contributions made by each of the parties to the welfare of the family including any contributions made by looking after the home or caring for the family”. That power was re-enacted in *section 24 of The Matrimonial Causes Act 1973*. In *Wachtel v. Wachtel [1973] 1 All ER 829* at page 839 paragraph g, the court observed that a wife who had made other important non-financial contributions such as staying in the house, keeping it clean, bringing up the children etc., was left without a remedy until the enactment of that Act. The Court observed that *The Matrimonial Proceedings and Property Act 1970* was not merely a codifying statute but a reforming statute designed to facilitate the granting of ancillary relief in cases where marriages had been dissolved. Since that enactment, the wife’s non-monetary contributions can be taken into account and value put on them as indirect financial contribution toward matrimonial property.

Some injustices, such as this, that may exist in property rights between husband and wife involve matters of policy which are outside the realm of judicial interpretation and which can only be corrected by the Parliament enacting law to cater for the conditions and circumstances in Uganda and give proprietary rights to spouses as distinct from registered title rights, as indeed it was done in England with the enactment of the *Matrimonial Homes Act of 1967*, later replaced by the *Matrimonial Proceedings and Property Act of 1970* and *The Matrimonial Causes Act of 1973*. Until then, courts of law are handicapped in correcting the imbalance which may be found to exist in property rights as between husband and wife, without legislation.

In the instant case, the burden therefore lay on the respondent to adduce evidence of those activities which generated “real” or “substantial” financial contribution by direct cash or material contribution or by way of indirect expense substitution, quantifiable in monetary terms, through financial contributions to the family expenses, which enabled the petitioner acquire any of the property in the fourth category, i.e., property acquired after 14th February 2009, the day the parties underwent the Islamic traditional *Nikah* ceremony which took place at the respondent’s uncle’s residence at Tanganyika Village, in Arua Municipality thereby becoming husband and wife. The property includes land at Jiako village, Vurra County in Arua District acquired on 27th July 2009; land at Pajulu acquired on 17th October 2009; and land at Anakawa Orobi village, Arivu in Arua District acquired on 31st July 2009.

It should be recalled that the petitioner and the respondent remained married for slightly over one year and a half, i.e. from 14th February 2009 up to sometime in September 2010 when she left the home. Throughout that time, the couple were co-operating in the management of their family affairs, more so the property in dispute. In her testimony, she stated that during that period, she reared chicken at home, managed their internet cafe and restaurant, and it is clear that for a considerable period of time, the petitioner depended on the respondent for the supervision of construction work of what was later to become their matrimonial home. Although the respondent did not furnish specific figures to guide the court in quantifying that indirect financial contribution, it is not conceivable that throughout that period the respondent did not contribute direct or indirect financial support for the acquisition or maintenance of the property in this category. Acquisition of that property is partly attributable to indirect financial marital contributions of the respondent and thus subject to equitable division.

The next question which of necessity follows, is how much the respondent’s contribution was. Considering the manner in which the couple managed their affairs, it may not be easy to affix an exact figure based solely on the material before me. In cases such as this, the court must do its best to fix what in its view, would be the respondent’s share. In *Echaria v. Echaria* [2007] 2 EA. 139, a bench of five Judges of the Court of Appeal of Kenya after a review of several local and English decisions held, inter alia, that in all cases involving disputes between husband and wife over the beneficial interest in the property acquired during marriage which have come to the

courts, the Court has invariably given the wife an equal share basing its decision on assessed contribution towards acquisition of the property.

In cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim "*Equality is equity*" while heeding the caution by Lord Pearson in *Gissing v. Gissing* [1970] 2 All ER 780 at page 788 paragraph c that:

No doubt it is reasonable to apply the maxim in a case where there has been very substantial contributions (otherwise than by way of advancement) by one spouse to the purchase of property in the name of the other spouse but the portion borne by the contributions to the total purchase price or cost is difficult to fix. But if it is plain, that the contributing spouse has contributed about one-quarter, I do not think it is helpful or right for the court to feel obliged to award either one-half or nothing.

One of the guiding principles in the distribution of matrimonial property following a divorce is equality. In *White v. White* [2001] 1 AC 596; [2000] 3 WLR 1571 it was observed as follows;

.... from the poverty stricken to the multi-millionaire. But there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party..... relating to the parties' contributions..... to make to the welfare of the family, including any contribution by looking after the home or caring for the family.' If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer..... As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination..... There is increased recognition that, by being at home and having and looking after young children, a wife may lose forever the opportunity to acquire and develop her own money-earning qualifications and skills. In *Porter v Porter* [1969] 3 All ER 640, 643-644, Sachs LJ observed that discretionary powers

enable the court to take into account “the human outlook of the period in which they make their decisions”. In the exercise of these discretions “the law is a living thing moving with the times and not a creature of dead or moribund ways of thought.”

Other considerations in the determination of what is fair distribution were outlined in *Miller v. Miller and McFarlane v. McFarlane*, [2006] 2 AC 618, [2006] 3 All ER 1, [2006] 2 WLR 1283, the House of Lords when applying *The Matrimonial Causes Act 1973* stated;

The Act gives only limited guidance on how the courts should exercise their statutory powers. Primary consideration must be given to the welfare of any children of the family. The court must consider the feasibility of a “clean break”. Beyond this the courts are largely left to get on with it for themselves. The courts are told simply that they must have regard to all the circumstances of the case..... Implicitly the courts must exercise their powers so as to achieve an outcome which is fair between the parties. But an important aspect of fairness is that like cases should be treated alike. So, perforce, if there is to be an acceptable degree of consistency of decision from one case to the next, the courts must themselves articulate, if only in the broadest fashion, what are the applicable if unspoken principles guiding the court's approach..... For many years one principle applied by the courts was to have regard to the reasonable requirements of the claimant, usually the wife, and treat this as determinative of the extent of the claimant's award. Fairness lay in enabling the wife to continue to live in the fashion to which she had become accustomed..... The financial provision made on divorce by one party for the other, still typically the wife, is not in the nature of largesse. It is not a case of “taking away” from one party and “giving” to the other property which “belongs” to the former. The claimant is not a suppliant. Each party to a marriage is entitled to a fair share of the available property. The search is always for what are the requirements of fairness in the particular case..... to greater or lesser extent every relationship of marriage gives rise to a relationship of interdependence. The parties share the roles of money-earner, home-maker and child-carer. Mutual dependence begets mutual obligations of support. When the marriage ends fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties' housing and financial needs, taking into account a wide range of matters such as the parties' ages, their future earning capacity, the family's standard of living, and any disability of either party. Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter..... Another strand, recognised more explicitly now than formerly, is compensation. This is aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage. For instance, the parties may have arranged their affairs in a way which has greatly advantaged the husband

in terms of his earning capacity but left the wife severely handicapped so far as her own earning capacity is concerned. Then the wife suffers a double loss: a diminution in her earning capacity and the loss of a share in her husband's enhanced income. This is often the case. Although less marked than in the past, women may still suffer a disproportionate financial loss on the breakdown of a marriage because of their traditional role as home-maker and child-carer..... A third strand is sharing. This "equal sharing" principle derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership of equals..... This is now recognised widely, if not universally. The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less. But I emphasise the qualifying phrase: "unless there is good reason to the contrary". The yardstick of equality is to be applied as an aid, not a rule..... A short marriage is no less a partnership of equals than a long marriage. The difference is that a short marriage has been less enduring. In the nature of things this will affect the quantum of the financial fruits of the partnership..... In all cases the nature and source of the parties' property are matter to be taken into account when determining the requirements of fairness..... The rationale underlying the sharing principle is as much applicable to "business and investment" assets as to "family" assets..... In the case of a short marriage fairness may well require that the claimant should not be entitled to a share of the other's non-matrimonial property. The source of the asset may be a good reason for departing from equality. This reflects the instinctive feeling that parties will generally have less call upon each other on the breakdown of a short marriage. With longer marriages the position is not so straightforward. Non-matrimonial property represents a contribution made to the marriage by one of the parties. Sometimes, as the years pass, the weight fairly to be attributed to this contribution will diminish, sometimes it will not. After many years of marriage the continuing weight to be attributed to modest savings introduced by one party at the outset of the marriage may well be different from the weight attributable to a valuable heirloom intended to be retained in specie..... A lump sum payment represents, to that extent, the financial closure of a failed marriage. It draws a line under the past. Periodical payments represent the opposite. Future earnings and future payments lie in the future. They are a continuing financial tie between the parties. Today the undesirability of such continuing ties is regarded as self-evident. The modern approach was expressed succinctly by Lord Scarman in his familiar words in *Minton v Minton* [1979] AC 593, 608: "an object of the modern law is to encourage [the parties] to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down."..... there remains a widespread feeling in this country that when making orders for financial ancillary

relief the judge should know who was to blame for the breakdown of the marriage. The judge should take this into account. If a wife walks out on her wealthy husband after a short marriage it is not “fair” this should be ignored. Similarly if a rich husband leaves his wife for a younger woman.

The practice of English Courts in respect of short marriages as to division of assets was focused on making provision for the financial needs of the claimant, usually the wife, and on compensating her for any financial disadvantage she had suffered from the breakdown of the marriage. To greater or lesser extent this approach appears in *S v S* [1977] *Fam* 127, *H v H* (*Financial Provision: Short Marriage*) (1981) 2 *FLR* 392, *Robertson v Robertson* (1983) 4 *FLR* 387, *Attar v Attar* (no 2) [1985] *FLR* 653 and *Hedges v Hedges* [1991] 1 *FLR* 196.

However in *Miller v. Miller and McFarlane v. McFarlane*, the court was of the view that it should be concerned to decide what would be a fair division of the whole of the assets, taking into account the parties’ respective financial needs and any need for compensation. The court will look at all the circumstances. The general approach in this type of case should be to consider whether, and to what extent, there is good reason for departing from equality. As already indicated, in short marriage cases there will often be a good reason for departing substantially from equality with regard to matrimonial property.

I have taken into account the value of the property acquired during that time, viz.; the land at Jiako village, Vurra County in Arua District at the price of shs. 5,100,000/=; the land at Pajulu at the price of shs. 11,900,000/=, and the land at Anakawa Orobi village, Arivu in Arua District at the price of shs. 6,100,000/=, hence a total of shs. 23,100,000/= was spent on acquisition of that matrimonial property during that period. In all probability, this property may have appreciated in relation to its fair market value since the parties’ marriage. From the respondent’s activities adverted to before, she made payments on domestic expenses. In the instant case though, there is good reason for departing from equality principle since the marriage was short-lived and the respondent’s contribution was derived from financial activities of a modest nature. I determine her overall contribution to have been 15% which is approximately 3,465,000/=, as her indirect financial contribution towards the acquisition of the matrimonial property in issue.

Bearing in mind that 15% contribution, I must strive to achieve fairness in enabling the respondent as wife to continue to live in the fashion to which she had become accustomed; ensuring a fair share of the available property, by making provision for the parties' housing and financial needs; taking into account a wide range of matters such as the parties' ages, their future earning capacity, their standard of living; redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage; taking into account the fact that it was a short marriage, considering that the parties will generally have less call upon each other on the breakdown of such a short-lived marriage; that a lump sum payment may as well represent financial closure of the failed marriage so as to encourage the parties to put the past behind them and while attributing blame for the breakdown of the marriage to the petitioner, I consider the land at Jiako village, Vurra County in Arua District to be a fair share for the respondent of the matrimonial property. I therefore decree this to be her fair share of the matrimonial property.

Furthermore, in respect of the matrimonial home at Jerekede Avenue, Anyafio in Arua Municipality whose construction the respondent supervised, I have not found any good reason for departing from equality principle. In respect of this property, I am inclined to apply the maxim "*Equality is equity.*" This property should be valued by a valuer appointed by the Assistant Registrar of this court within a period of one month from the date of delivery of this decision. The valuer shall file a report of his assessment of the value of this property within two months from the date of such appointment with each party meeting half the costs of the valuation. The petitioner shall within six months of the filing of the valuation report, pay to the respondent half the value of the property as assessed by the valuer.

Marriage is viewed today as a shared partnership with important economic and non-economic expectations. Alimony conceptualizes spousal support as compensation earned by the economically disadvantaged spouse (normally the wife) through marital investments and as a means of eliminating distorting financial incentives in marriage, as well as a way to relieving financial need. Under section 24 (1) of *The Divorce Act*, the court may on a decree absolute declaring a marriage to be dissolved obtained by a wife, order the husband to secure to the wife such sum of money as, having regard to her fortune, if any, to the ability of the husband, and the

conduct of the parties, it thinks reasonable. Alimony provides a secondary remedy and is available where economic justice and the reasonable needs of the parties cannot be achieved by way of an equitable distribution of the matrimonial property. The purpose of alimony is not to reward one party and punish the other, but rather to ensure that the reasonable needs of the person who is unable to support herself through appropriate employment are met. It is an order designed to afford economic justice between the parties.

I have considered that the resources of the respondent are not adequate to meet her reasonable needs and the petitioner has the ability to pay, based on his accumulation of the property within a short time and with little indirect financial support from the activities of the respondent. Although in the instant case the *decree nisi* has been obtained by the husband rather than the wife, I have found the husband at fault when he engaged in inappropriate marital conduct by way of abandonment, indignity, and mistreatment of the respondent in the circumstances leading to the divorce, which exerted considerable mental and emotional stress on the respondent, whose effects were visible to court when she broke down during her testimony. The respondent gave up her plans of pursuing further education by reason of this marriage. She invested over a year of her time in the attempt to have a successful marriage. An award of alimony is properly made where the evidence shows that choices made during the marriage have generated hard future needs on the part of the respondent. This is only mitigated by the fact that the petitioner has since then provided for the welfare of the respondent's daughter.

For those reasons, as current alimony law generally does not bar the recognition a spouse's non-economic contributions to the marriage and to the well-being of the family during the subsistence of the marriage in determining spousal support, I deem this a fit and proper case for the petitioner to pay rehabilitative alimony to the respondent as a one off payment, to cover reasonable expenses during readjustment to her new life, especially in obtaining additional education, job skills, or training, as a way of becoming more self-sufficient as an unmarried woman, in adjusting to the economic consequences of the divorce and to cover the time necessary for her to find gainful employment, in the sum of shs. 20,000,000/=. This is to be paid within a period of three months from the day the decree absolute declaring this marriage finally dissolved, is issued.

Under section 27 of *The Civil Procedure Act* the successful party is entitled to costs unless the court, in its discretion and for shown reasons decides otherwise (see *Uganda Development Bank v. Muganga Construction Company Ltd. [1981] HCB 35*). In the instant case, in order to provide a disincentive for such behaviour as the petitioner has been found guilty of, there should be concomitant, financial consequences for engaging in inappropriate behaviour and yet relying on such behaviour to petition for divorce. It is for that reason that the respondent is awarded the cost of these proceedings.

In the final result, I make the following orders;

- a) A *decree nisi* for the dissolution of the marriage between the petitioner and the respondent hereby issues.
- b) As her fair share of the matrimonial property, the respondent is to take the land at Jiako village, Vurra County in Arua District.
- c) The petitioner is to pay the respondent half the confirmed value of the matrimonial home at Jerekede Avenue, Anyafio in Arua, within six months of the filing of the valuation report in this court by a valuer appointed by the Assistant Registrar of this Court.
- d) The petitioner is to pay the respondent alimony in a lump sum of shs. 20,000,000/= within a period of three months from the day the decree absolute declaring this marriage finally dissolved, is issued.
- e) The costs of this petition are awarded to the respondent.

Dated at Arua this 17th day of February 2017.

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Stephen Mubiru

Judge