

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT NAKAWA
(FAMILY DIVISION)
DIVORCE CAUSE NO. 09 OF 2014

DR. JOSEPH ERUME ::: PETITIONER

VERSUS

DEBORAH KYOMUGISHA ::: RESPONDENT

Before: HON. MR. JUSTICE WILSON MASALU MUSENE

JUDGEMENT

The Petitioner Dr. Joseph Erume through his lawyer M/S Alaka & Co. Advocates brought this Petition against the Respondent Deborah Kyomugisha for dissolution of Marriage which had been celebrated between her and the Respondent on 6th day of January 2001. The Petitioner sought the following reliefs;-

- a) That the Marriage of the Petitioner and Respondent be dissolved.
- b) That the Respondent pays the costs of and incidental to the Petition.
- c) That the Petitioner may have the custody of the children of the Marriage.
- d) That the Petitioner may have such further and other relief in the premises as to the Honorable Court may deem fit.

The brief background giving rise to this Petition is that the Petitioner a resident of Mbuya Kinawataka, Ugandan citizen and domiciled herein got married to the Respondent on the 6th day of January 2001 at the Church of Full Gospel Luzira in Kampala and begot three (3) issues to the marriage.

The Petitioner further alleges that from the year 2007 to date, the Respondent without any justifiable reason deserted and has continued to desert the Petitioner hence this Petition seeking for divorce.

The Respondent neither filed an affidavit in reply to the Petition nor made an appearance to defend the Petition yet she was served through substituted service. A copy of the New vision, Friday, September 20th, 2013, and another one of Wednesday, August 27th, 2014.

When this Petition came up for hearing on the 28th day of August 2014, Counsel for the Petitioner abandoned the prayer for custody of the children and prayed to pursue the same under a different forum on ascertainment as to the whereabouts of the children. He also prayed that the matter proceed exparte since the Respondent did not file affidavit in reply to the Petition and submissions. And the same was granted.

Therefore the matter proceeded exparte and Court directed Counsel for the Petitioner to file Petitioners Sworn Witness Statement on Oath and Submissions. This evidence was not challenged or controverted by the Respondent.

Counsel for the petitioner submitted that this Petition is based on one ground of Desertion as indicated under paragraph 10 of the petition. He further submitted that desertion as a ground for Divorce is laid down under Section 4 of the Divorce Act Cap249. It provides that;-

“4 (1) A husband may apply by petition to the court for the dissolution of his marriage on the ground that since the solemnisation of the marriage his wife has been guilty of adultery.

He further submitted that the ground for divorce to the Petitioner was discussed in the case of **Uganda Association of women Lawyers & 8 others versus Attorney General Constitutional petition No.2 of 2003**

cited with Approval in the case of Dr. Specioza Wandira Naigaga Kazibwe Versus Eng. Charles Nsubuga Kazibwe Divorce Cause No.3 of 2003 where the position of the law was stated as thus;-

“ That each of the ground for Divorce specified in section 4 of the Divorce Act cap 249 is available equally to both the husband and the wife and the import of the Law is that desertion is a distinctive ground on its own right upon which a decree Nisi may issue”.

Counsel for the Petitioner argued that desertion constitutes unjustifiable withdrawal from cohabitation without the consent of the other spouse and with the intention of remaining separate permanently. He referred Court to the decision of Lord Porter in the case of **LANG Versus LANG (1954) 3 ALLER 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."

He added that under paragraphs 7, 8, and 10 of the Petition, the Petitioner avers that the Respondent vanished from the matrimonial home since 25th June, 2007 to date being a space of two years upwards without any trace whatsoever. He contended that in light of the facts as averred in the Petition and ingredients required to be proved in the case cited above, there is in existence between the Petitioner and the Respondent a defacto separation and Respondent animus deserendi that is to say the intention on the part of the Respondent to remain separated permanently can be inferred from the fact that since 2007 to date the Respondent is un traceable and has made no

efforts to return to the matrimonial home. And that under para 9 of the Petition, the Respondent has demonstrated that she does not want anything to do with Petitioner.

Lastly, Counsel for the Petitioner prayed that the Petition be allowed and Court grants the Decree Nisi since the Marriage has irretrievably broken down.

I have carefully studied and internalized the Petition, looked at the Certificate of Marriage as well as the submissions of Counsel for the Petitioner, Petitioners Sworn Witness Statement on Oath and the authorities cited. In the present case, although the Respondent was served, and an affidavit of service was filed, she did not file an affidavit in reply to the Petition. The facts as stated in the Petition by the Petitioner have neither been denied nor rebutted by the Respondent.

Order 9 Rule 10 of the Civil Procedure Rules is to the effect that where the Defendant has not filed a defence on or before the date fixed in the summons, the suit may proceed as if he had filed a defence. A party who has not filed a defence is deemed to have admitted the allegations. As was held in **Agard Didi VS James Namakajjo High Court Civil Suit No. (1988) 1 KALR 180 at 181.**

In my view since the petitioner has never consented to the Respondent leaving the matrimonial home as submitted by Counsel for the Petitioner and the fact that there is no reasonable cause whatsoever for the Respondent withdrawing from cohabitation, this court finds that the petitioner has proved desertion on the part of the Respondent and since no rebuttal was made to the petition. I accordingly do hereby allow the Petition and since the Marriage has irretrievably broken down, grant Decree Nisi, to be made absolute after 6 months from today.

Costs to be in the cause.

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WILSON MASALU MUSENE

JUDGE

24/10/2014