

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HODERN AT ARUA
CIVIL APPEAL NO. 0022 OF 2013**

KANA RICHARD ----- APPELLANT

=VERSUS=

EZATIRU AGNES ----- RESPONDENT

BEFORE HON: JUSTICE OKWANGA VINCENT

JUDGMENT

This appeal arises out of the decision and ruling of the Chief Magistrate Arua, His Worship Moses Angualia in Divorce cause No. 0007 of 2013, in which the marriage between the appellant and the respondent was dissolved.

As a background, the facts giving rise to this appeal are that the appellant and the respondent were a legally married couple having solemnized their Christian marriage at St. Phillips Church of Uganda, Arua town on 18/11/2000, after all the customary formalities were all fulfilled. The couple lived together in an apparent happy marriage for about 6 years until 2005 when the appellant was retired from his job in the Civil service when the couple started having serious problems in their marriage.

The couple enlisted the support of relatives and friends to help them reconcile but in vain, until 2012 when the appellant filed a petition in the civil court for divorce.

On 08th January, 2013 the Chief Magistrate issued a Decree Nisi and thereafter the same court proceeded to make a decree absolute on 23/04/2013, dissolving that marriage effectively dissolving the couple's marriage. As can be gathered from the evidence on

record the couple did not have any issue of that marriage during the subsistence of that marriage.

However during the hearing of the petition in the lower court, an issue of sharing of property allegedly acquired jointly as husband and wife during the subsistence of that marriage became the main point of contention in the petition.

After granting a decree absolute on 21/03/2013, which was strangely signed by the trial Magistrate belately on 23/04/2013, the court later on proceeded to continue hearing evidence from both parties respectively to determine the issue of property (house) allegedly acquired jointly by the parties as a couple during the marriage.

The trial court did this between 15/05/2013 and 25/07/2013, when the ruling was made by the trial Chief Magistrate giving sole possession of the contested residential house at Onzivu village, Oluko sub county, Arua District to the respondent and her father's children and further granting a permanent order of injunction restraining the appellant from interfering in the affairs of that house in any way.

The appellant not being contented with that decision and the orders thereon appealed to this Hon. Court challenging that decision.

Two grounds of appeal were filed as follows:-

- 1. The learned trial Chief Magistrate erred in fact and law by not awarding the appellant his share in and or contribution in the land and house in question but reaching a wrong decision that the land and house in question was bought by the respondent for and behalf of her father's family and that the house is part of the estate of the respondent and her father's children.**
- 2. The learned trial Chief Magistrate erred in fact and law by not properly evaluating the evidence on record thus reaching a wrong decision that the land and house in question does not constitute part of matrimonial property of both the appellant and the respondent.**

The appellant then prays for orders that;

- a) The judgment and orders of the learned trial Chief Magistrate in Arua Divorce cause No. 0007 of 2012 be set aside.
- b) The appellant be awarded his share of contribution in the land and house at Onzivu village, Oluko sub county, Arua District which constitutes part of the matrimonial property of the parties herein and;
- c) The appellant be awarded costs of this appeal and in the lower court.

At the hearing before me both parties appeared by themselves as they each didn't have any legal representation as was the case before the trial court.

This being the first appellate court, it has the duty to re-evaluate and scrutinize the entire evidence adduced during the trial in order to arrive at its own independent decision. It should do this while giving due allowance and consideration to the fact that it did not have the opportunity to hear and assess the demeanor of the witnesses during the trial. That role, as it were is to re-hear the entire case as it were in order to reach its conclusion.

After perusing and scrutinizing the entire evidence on record, I find that the trial Magistrate relied entirely on the documents and the affidavits filed in court when he made the orders and decrees dissolving the parties' marriage.

On the first hearing date, **20/09/2012**, the court records say:-

“Both parties represent themselves.

Petitioner: *I would like to this divorce petition.*

Respondent: *As per my affidavit in reply I do not intend to live as husband and wife with the Petitioner.*

Court: *Upon perusal of the documents in this case, I find sentiments are high and there is no opposition to the dissolution of the marriage.*

Court hereby issues a decree Nisi and in six months if the parties do not reconcile a decree absolute dissolving this marriage shall be issued.

Hearing adjourned to 20/03/2013. On 20/03/2013, the Petitioner said this in court:

Petitioner: *Within the six months no one came to me for reconciliation. The marriage has irretrievably broken down we should share what we had together.*

Respondent: *I consulted a few people especially the people who were concerned in our marriage and they said it all depends on us since the marriage is not working. I would not like to force it.*

Court: *Matter adjourned to 21/3/2013, for final disposal.*

On 21/03/2013, the record of proceedings read:

21/3/2013

Parties present

Court clerk Bada

Court: *This matter is for final settlement of the marriage relationship between the parties.*

Having given them sufficient time to reconcile and the same not having been fruitful, today I dissolve the marriage between the parties that was solemnized on 18/11/2000. From this day the decree absolute is hereby issued and the parties shall hence forth cease to be wife and husband.

This means there is no way each party to contract a fresh marriage if he/she so wishes the case of the house shall be handled on 26/04/2013 at 2.00pm.

I find that the procedure adopted by the trial Chief Magistrate in handling this matter was irregular and erroneous for the following reasons:-

All facts before court ought to be proved by way of evidence adduced before court. Apart from the respective affidavits filed by each party, the court did not treat the information court was receiving from each party as evidence at all that is why the court did not take such address by the parties before the trial court as evidence otherwise such information from the parties herein should have been received by the court after each party was sworn/or affirmed before court as a witness to satisfy the requirement of the Evidence Act. (Cap.6).

Even during the subsequent proceedings and hearing regarding the ownership of the residential house at Onzivu village, Oluko Sub County, in Arua District, the trial

Magistrate did not take the parties evidence in accordance with the requirement of section of the Evidence Act which requires that all evidence before Court must be taken on oath or affirmation as the case may be.

Furthermore, a petitioner in a divorce cause has to prove to the satisfaction of the law the specified ground of divorce before the petition can be granted. Whether there is no opposition to the petition or not, the burden is still on the petitioner to prove the grounds that entitles him or her to the grant of the orders petitioned under the Divorce Act. Instead the trial Chief Magistrate in effect treated the petition as separation agreement and not a divorce petition.

I find that the evidence on which the trial Chief Magistrate relied upon in deciding the ownership of the contested residential house was not proper evidence under the evidence Act as it was not put to the test as to its veracity.

The parties who gave the address before the trial court were not subjected to any oath or affirmation to bind them to the duty of telling the truth and obeying their human conscience.

Finally, there is overwhelming evidence that the parties, both the Petitioner and the Respondent jointly contributed money, materials and time to the construction of the house at Onzivu village, Oluko sub county in Arua, Pakwach road. There is also evidence that the Petitioner worked on the house taking there workers, buying materials like timber and fixing the ceiling, glass windows, which the respondent even acknowledged in her address before court but pleaded to refund the Petitioner's contribution if given time.

I find and do agree with the appellant's submission on his grounds of Appeal that the trial Chief Magistrate erred in law and fact in failing to properly evaluate the evidence on record and thus he arrived at a wrong conclusion. Had he done so, he would have found that the funds, labour and the supervision and the supply and ferrying of materials for constructing the contested residential house on Pakwach road, Onzivu village, Oluko sub county, Opposite CEFORD was jointly contributed by both parties herein when they

were still living together as husband and wife – I find that the property in dispute, a residential house on Arua – Pakwach Road, Onzivu village, Oluko Division is jointly owned by the two parties herein.

A spouse who makes a contribution to acquire a property during their marriage acquires an interest and a share in such a property as a spouse. The claimant's contribution need not be on a 50 – 50 % stake, it can be 1%, 10% or even 90%. Such a contribution from a spouse may be difficult to qualify in monetary terms.

If for instance one party (spouse) sends money and the other spouse spends his/her time in supervision of the workers, transporting the materials and running the errands concerning the family house project or even cooking for the spouse who is doing the actual construction, the other spouse who has contributed the 'passive' part is entitled to a share of the said property. There is no need for any prior agreement written or not for court to hold that the couple jointly contributed. Such contribution may be seen in the part played by each party during the acquisition of such property.

Accordingly I find and hold that the appellant (Petitioner) having made various contributions by way of provisions of the timber and the construction of the ceiling, the cement, paint and glass windows and further supervision of workers who he took to work on the residential house in dispute is entitled to a share of his contribution to that house in equal measure as a spouse.

Where two partners who undertook a joint project together of building a house together as a couple during their marriage complete such a project, the law takes a liberal view to interpret that their joint contribution should be shared in equal measure. In the absence of any specific agreement to the contrary, the court holds that the two partners, owns the property jointly in equal share. Any suggestion by the respondent that she be allowed to refund the appellant's contribution in monetary terms is not acceptable, because the appellant's share is in the whole property jointly held.

In the end court holds that the two parties herein the appellant and the respondent holds equal share in the residential house at Onzivu village, opposite CEFORD, on Pakwach –

Arua road, Oluko sub county, Arua. There is no evidence to prove that the proceeds of buying the land and construction that house came from the estates and the death gratuity payments from the respondent's late father.

Court hereby directs that an independent valuer agreeable to both parties gives a fair assessment and current valuation of the said house to assist the parties in sharing their joint interests in the said property.

Any party who feels he or she wants, can buy off the interest of the other party by buying off the latter's 50% stake (share) in the said property as assessed by such an independent valuer as above. Each party to bear his/her own costs.

It is hereby directed.

VINCENT OKWANGA

JUDGE

16/04/2015