

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**  
**HCT – 01 – CA – 0010 OF 2016**  
**(Arising from KAS – DC – No. 002 of 2014)**

**MBAMBU STELLA.....APPELLANT**

**VERSUS**

**MONDAY NICHOLAS.....RESPONDENT**

**BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE.**

**Judgment**

This is an appeal against the decision of His Worship Dawa Francis, Chief Magistrate of Kasese delivered on 29/4/2016.

**Background**

The Appellant filed a divorce petition against the Respondent seeking dissolution of marriage, alimony, division of property and costs of the petition. The grounds for the petition were cruelty, adultery and denial of conjugal rights.

The Respondent on the other hand contended that there were no grounds for divorce and no matrimonial property to be shared equally since what had been owned jointly was sold and divided accordingly.

**Issues for determination were;**

1. Whether there are grounds for divorce?
2. Whether the Petitioner is entitled to a share of the matrimonial property?
3. Whether there are any remedies available to the parties?

The trial Magistrate found that the Appellant proved cruelty as a ground for divorce and in regard to the property the two parties were found to have shared what was jointly acquired fairly and the petitioner's prayer to divide what was left with the Respondent was dismissed. A decree nisi was issued to be made absolute in six months. No orders as to costs were made.

The Appellant being dissatisfied with the above decision lodged the instant appeal whose ground is;

1. That the learned Chief Magistrate erred in law and fact when he did not order for sharing of the commercial house in Kasese Town when the Appellant contributed greatly to the building of the same causing a great miscarriage of justice.

The Appellant was unrepresented and M/s Sibendire, Tayebwa & Co. & Advocates represented the Respondent.

It is the duty of the first Appellate Court to re-evaluate the evidence on record by subjecting it to a fresh and exhaustive scrutiny in order to form an opinion on the correctness of the decision of the lower Court. **(See: Begumisa versus Tibega, Supreme Court Civil Appeal No. 17 of 2002).**

**Resolution:**

The Appellant abandoned her only ground of appeal and chose to raise new grounds to be determined.

Counsel for the Respondent brought it to the attention of Court that the Appellant deviated from the grounds in the Memorandum of appeal and cited **Order 6 Rule 7** of the Civil Procedure Rules, which prohibits the same and provides that;

*“No pleading shall, not being a petition or application, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading.”*

And **Order 43 Rule 1(2)** of the Civil Procedure Rules which provides that;

*“The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and the grounds shall be numbered consecutively.”*

Counsel for the Respondent went on to submit that the Appellant raised new grounds on appeal without the leave of Court and this appeal should therefore be dismissed with costs.

Counsel for the Respondent further noted that the record of proceedings and decree are missing on the file and stated that no appeal can be determined without a typed and certified copy of the proceedings of the lower Court.

**Order 43 Rule 10(1) and (2)** of the Civil Procedure Rules provides that;

*“(1) When a memorandum of appeal is lodged, the High Court shall send notice of the appeal to the court from whose decree the appeal is preferred.*

*(2) The court receiving the notice shall send with all practicable dispatch all material papers in the suit or such papers as may be specially called for by the High Court.”*

In the instant Appeal the Appellant decided to raise totally new grounds of appeal and departed from the initial ground as raised in the Memorandum of Appeal. No leave was

sought from this Court to amend the Memorandum of appeal. It is trite law that a party should not depart from their pleadings.

In the case of **Uganda Breweries Ltd versus Uganda Railways Supreme Court Civil Appeal No.6 of 2001**, it was held that;

*“To my mind the questions for decision underground 2(i) of the appeal appears to be whether the party complaining had fair notice of the case he had to meet; whether the departure from pleadings caused a failure of justice to the party complaining (in the instant case the Appellant); or whether the departure was a mere irregularity, not fatal to the case of the Respondent whose evidence departed from its pleadings.”*

Reference in the above case was made to **Interfreight Forwarders (U) Ltd versus East African Development Bank Supreme Court Civil Appeal No. 33 of 1993 (unreported)**, where it was observed that;

*“The cause of action as stated in the plaint and reflected in the issues framed by the party at trial was negligence. But the learned trial judge erred when he found in the alternative that the respondent was liable on a different cause of action namely, as a common carrier, which puts strict liability on the carrier for any change or loss to goods he accepts to carry. This court upheld the ground of appeal complaining against the trial judge’s finding to that effect on the ground that the cause of action proved was a complete departure from what had been pleaded by the respondent.”*

Further in the case of **Captain Harry Gandy versus Caspair Air Charter Ltd. (1956) 23 EACA 139**, SIR Ronald Sinclair said:

*"The object of pleadings is of course, to ensure that both parties shall know what are the points in issue between them, so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent."*

That must be the reason for the legal requirement that a party should not depart from its pleadings. (See: **Uganda Breweries Limited versus Uganda Railways Corporation - Supreme Court Civil Appeal No. 6 of 2001 [2002] UGSC 1 (24 April 2002)**)

The duty of the first Appellate Court as already laid out is to re-evaluate the evidence on record and come to its own conclusion after subjecting it to a fresh and exhaustive scrutiny in order to form an opinion on the correctness of the decision of the lower Court

The instant Appeal was lodged with no lower Court proceedings on file, this Court will be operating a mere fishing expedition if it went on to determine the same without evidence that is supposed to be the subject of fresh scrutiny.

In the case of **Board of Governors and the Headmaster Gulu SSS versus Phinson E. Odong High Court Civil Appeal Number 2 of 1990** it was held that; it is a requirement of law that the documents namely the decree or order and the memorandum of appeal must be filed together with an appeal. A decree or order from which appeal is preferred must be

extracted and filed together with the memorandum of appeal and failure to do so renders the appeal incompetent.

Also in the case of **Mukasa versus Oholi (1968) EA 89 at 90**, Justice Sheridan J. (as he then was) in a similar case held that there are ample authorities, for saying that a court has no jurisdiction to entertain an appeal where a decree embodying the terms of the judgement has not been drawn.

It is my considered opinion that the departure from the pleadings by the Appellant and failure to attach a decree and lower Court proceedings renders this Appeal incompetent and premature. The Appellant being a lay person should have sought the indulgence of a legal brain and had the Appeal properly lodged with the requisite documents.

I therefore dismiss this appeal with costs for being incompetent and lacking in substance.

Right of appeal explained.

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**OYUKO. ANTHONY OJOK**

**JUDGE**

**23/03/2017**

Judgment read and delivered in open Court in the presence of;

1. James – Court Clerk

In the absence of both parties and Counsel for the Respondent.

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**OYUKO. ANTHONY OJOK**

**JUDGE**

**23/03/2017**