

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT JINJA

CIVIL APPEAL NO. 096 OF 2014

KASINGYE EMMANUEL:.....APPELLANT

VERSUS

GENEVIEVE KASINGYE:.....RESPONDENT

JUDGMENT

BEFORE HONOURABLE JUSTICE EVA LUSWATA

1. Introduction.

The appellant through his lawyers Baruga Associated Advocates filed this appeal against the decision of Her Worship Joy. K. Bahinguza, Chief Magistrate Mukono, delivered on 24/9/2014 on the following grounds;

- 1. The learned trial magistrate erred in law and fact when she misconstrued a judicial separation to be a divorce.**
- 2. The learned trial magistrate erred in law and fact when she failed to properly evaluate the evidence before her which resulted into a gross miscarriage of justice to the respondent and the children.**
- 3. The learned trial magistrate erred in law and fact when she did not consider the substantiality of the DNA evidence produced in court that led to her erroneous decision and orders against the appellant.**
- 4. The learned trial magistrate erred in law when she erroneously ordered custody of only four children of the five to the petitioner, disregarding the youngest.**
- 5. The learned trial magistrate erred in law and fact when she ordered all the matrimonial property including their matrimonial home to be sold without considering the welfare principal**

Facts of the appeal

The facts of appeal as gathered from the judgment can be briefly stated as follows;

The parties to the appeal were lawfully married on 1/3/1992, at St. Stephens Church of Uganda Nsambya in Kampala District. During the subsistence of the marriage they were blessed with the following issues:

1. Michael Kasingye.
2. Mathew Murungi
3. Martha Mildred Ninsima.
4. Maria Magdalene Tuhirirwe.

They lived together first at Nsambya Railway Quarters and subsequently, in their matrimonial home at Nasuti Mukono Town Council. The respondent then sought an Order for judicial separation on grounds of cruelty, including failing to provide maintenance and physical assault, desertion of the matrimonial bed, and denial of conjugal rights. She in addition sought for an Order of maintenance and custody of the couple's children.

The appellant (the respondent in the lower court) denied all conjugal offences and in a cross petition, asserted adultery against the respondent, with allegations of a female child conceived outside wedlock. He then sought orders for a finding by the Court that the respondent was guilty of desertion, and costs.

In her decision, the trial Magistrate reframed the issues. She came to the conclusion that the marriage had irretrievably broken down, and ordered it terminated. She granted custody of the issues of the marriage to the respondent and ordered the sale of the matrimonial home with each party taking an equal share in it and any other properties jointly owned. She in addition dismissed the appellant's cross petition and ordered each party to bear their costs of the petition and cross petition. There was no appeal against dismissal of the cross petition.

The appellant being dissatisfied with that decision lodged this appeal on the grounds. I have stated above.

The duty of the 1st Appellate Court:

The duty of the first appellate court were well stated in the decision of **Kifamunte Henry Vs Uganda, SC, (Cr) Appeal No. 10 of 2007**, it was held that:

“...the first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate court must then makeup its own mind not disregarding the judgment appealed from but carefully weighing and considering it...”

I will accordingly be guided by the above principles.

Resolutions of the grounds of appeal.

I will resolve ground 1 and 2 concurrently.

The learned trial magistrate erred in law and fact when she misconstrued a judicial separation to be a divorce.

The learned trial magistrate erred in law and fact when she failed to properly evaluate the evidence before her which resulted into a gross miscarriage of justice to the respondent and the children.

The main bone of contention in the first ground is that the Magistrate granted a divorce where none was pleaded. According to the appellant’s counsel, she ignored the issues agreed upon at the scheduling conference and instead considered those ‘smuggled’ into the submissions by the respondent’s counsel. That she as a result, misconstrued a prayer for a decree of separation for one of termination which resulted into a miscarriage of justice.

Respondent’s counsel agreed that new issues were considered by the Court but that the Court is empowered to frame, settle or determine issues in a suit. That although the issue of dissolution of the marriage by divorce was never specifically framed, it was raised as a preliminary point of law in the appellant’s final submissions when contesting the legality of the marriage. That notwithstanding that new issues were considered in the judgment, the Magistrate evaluated the central issues and resolved the dispute between the parties as she did and came to the conclusion that grounds of a divorce had been proved.

My decision

An Order for divorce and that of judicial separation are independently provided for under the Divorce Act Cap 249(Section 4(2) and 14 respectively). For each, cruelty, adultery and /or desertion can be grounds. However, the resultant order of the Court signifies different remedies and consequences of the marriage.

According to Section 4 of the Act (hereinafter referred to as the Act), a successful petition will earn a complete dissolution of the marriage and thereby total severance of the marital relations and obligations between the spouses. While in Section 14, only judicial separation can be achieved. Unfortunately, no clear definition of judicial separation was provided in the Act. Therefore, recourse to other authorities would be helpful.

According to Black's Law Dictionary, Judicial separation "...is an arrangement whereby a husband and wife live apart from each other while remaining married, either by mutual consent(of them in a written agreement) or by judicial decree"

See pg 1572 10th ED.

The respondent in her amended petition specifically sought for an Order of judicial separation, not divorce. There was equally no counter claim for divorce in the cross petition. Also, according to the record, on 11/7/2013 six issues were raised for determination i.e:-

1. *Whether or not the petitioner was refused conjugal rights by respondent.*
2. *Whether or not the respondent has refused to provide necessities of life to the petitioner and the issues.*
3. *Whether or not the respondent committed cruelty against the petitioner.*
4. *Whether or not the party's marriage has irretrievably broken down.*
5. *Whether there was adultery committed by petitioner.*
6. *Whether or not there was collusion or connivance on both parties.*

The Magistrate noted those issues but chose to resolve the dispute using the issues raised by the respondent's counsel in his submissions. Her reason was that the framed issues had prompted

lengthy submissions by both parties yet the key issue was whether the marriage had irretrievably broken down.

I would agree with respondent's counsel, and in this I am supported by statute that, a court is empowered to amend, frame new, or strike out issues wrongly framed or introduced before passing a decree. It may come as a result of the evidence led, but principally it must be done to assist court to determine the actual matter(s) in controversy between the parties.

Beyond their pleadings, both parties did not allude to divorce in their evidence.

PW1, the respondent stated in her testimony at page 22 of the record stated that *"I have not deserted my marriage but I want a judicial separation..... I am not against Bible and catholic religion belief but I am looking for relief from tortures and abusive messages"*. She was specific at page 20 of the record that *"my prayer in this court is judicial separation as per my pleading"*.

Likewise, the Respondent (DW1) stated in his testimony that *"I do not want to separate from my wife because I am a Christian and we took marriage vows which provides that what God has put together no human being should separate"*.

He preferred the court not to dissolve or separate them despite all that had happened because he still loved his wife.

In my view, the circumstances of the case did not call for an amendment or framing of new issues in the manner it was done. I would agree with the trial Magistrate that the issue whether the marriage had irretrievably broken down was central to the dispute. It is surprising therefore that she left it out of the issue that she framed and instead chose to adopt the issues as framed by respondent's counsel. The result is that the Magistrate then concentrated on termination of the marriage which was never a prayer in the pleadings of both parties.

It is clear that both parties by their pleadings sought a judicial separation and not complete termination of their marriage. However the Magistrate appeared to have been swayed by the respondent's final submissions that the marriage be fully dissolved as the parties cannot live together under one roof. She then proceeded to adopt the issues as framed by the respondent's counsel full scale.

With respect, that was a wrong decision.

In the case of **Interfreight Forwarders (U) Ltd. vs. East African Development Bank, SCCA No. 33 of 1992**, the Court held that;

*“The system of pleading is necessary in litigating. It operates to define and deliver clarity and precision of the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which court will be called upon to adjudicate between them. It thus serves the double purpose of informing each party what is the case of the opposite party and which will govern the interlocutory proceedings before the trial and what the court will have to determine at the trial. See Bullen & Leake and Jacobs Precedents of Pleadings, 12th Edition page 3. Thus, issues are framed on the case of the parties so disclosed in the pleadings and evidence is directed at the trial to the proof of the case so set and covered by the issues framed therein. A party is expected and bound to prove the case as alleged by him and as covered in the issues framed. **He will not be allowed to succeed on a case not set up by him and be not allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by the way of amendment of the pleadings.**”*

It is also a well established rule that a party cannot be granted a relief which it has not claimed in the pleadings. **see Semalulu v Nakitto (Civil Appeal No.4/2008) [2017] UGHCLD 49 (27/4/17), DFCU Bank Limited v Muwanga (MISC. APPLICATION NO. 240 OF 2018) [2018] UGHCLD 38 (12/4/2018).**

The Magistrate resolved that issue by terminating the marriage. In circumstances where both parties had significantly shown in their pleadings and evidence that they only wanted a legal separation, the court should have assisted the parties to prompt the respondent to amend her pleadings to seek divorce and not judicial separation.

In my view, in fully dissolving the marriage, far reaching legal orders with regard to the parties' state as a married couple, matrimonial property and legal custody of their children automatically ensued. This would be a serious miscarriage of justice especially when, as I will show, the grounds for divorce or legal separation were not proved to the required standard.

In **Catherine Alak Aleku v Jackson Leku (Divorce Cause No.8/2009) [2010] UGHC 23 (24 February 2010)**; it was held that in order for a decree for judicial separation to be granted, there has to be proof of either cruelty, adultery, desertion or all of them.

In our law some of the grounds for seeking a divorce are open to one seeking a judicial separation. According to Section 14 of the Act

“A husband or wife may apply by petition to the court for a judicial separation on the ground of cruelty, adultery, or desertion without reasonable excuse for two years or upwards, and the court, on being satisfied that the allegations of the petition are true, and that there is no legal ground why the application should not be granted, may decree judicial separation accordingly.” Emphasis of this Court

It was the respondent’s testimony that she was forced out of the matrimonial bed due to the appellant’s cruelty in particular, he attempted to strangle her in 2008. The respondent gave testimony of other instances of violence. That on occasion she had to report to work after beatings with visible marks of violence which was an embarrassment. She also mentioned that the appellant committed adultery with the house maid and at some point forced himself into their daughter’s bed. Also that there were instances when the appellant forcefully had sex with her, leading to low self-esteem and extreme fear. That in addition the appellant locked her out of the home, refused to maintain his children, and denied to eat food she and the house maid cooked for fear of being poisoned which was not true.

Although the appellant admitted that the couple had last had sex in 2009, he denied all acts of violence or desertion. He argued that the respondent left the matrimonial bed and home on her own volition and then indulged in acts of adultery.

I note that the respondent gave quite an extensive testimony detailing the matrimonial offences against the appellant. The appellant denied any wrong doing and in my view, produced sufficient evidence of the respondent’s adultery which she did not contest.

I fear that much, if not all of the respondent’s testimony was her uncorroborated evidence. I am aware that no number of witnesses are required to prove a fact. However, in the circumstances of

this case, it was necessary for the respondent to have produced additional evidence or witnesses to back up her story. She may have had good reason to protect her children from testifying, but the couple's long term disagreements were allegedly reported to various police stations, Church elders, and even her work mates had some knowledge of the marriage discourse. These were vital witnesses who could have been called to back up the claims of physical and psychological cruelty. Evidence that the respondent was single handedly supporting the family and educating children for certain periods have been retrieved from documentary evidence.

Proof of facts under the Divorce Act have been placed at a pedestal higher than a mere balance of probabilities. According to the decision in **Dr. Specioza Wandera Kazibwe Vrs Engineer Nsubuga Kazibwe Divorce Cause No. 3/2003**, the standard of proof is higher than what is ordinarily required in other civil matters but not as high as that required in criminal cases.

In my view, the respondent's unsupported testimony on the facts proving the matrimonial offences of cruelty and adultery would not be sufficient to lead to an order to dissolve the marriage especially when the appellant produced various exhibits depicting him as a man of good character and he professed that he still loved his wife and wanted the marriage to continue.

Proof of desertion would include proof that it was not for reasonable justification or excuse. The testimony of the respondent was that she was forced out of the matrimonial room due to the respondent's acts of cruelty and adultery. That evidence was strongly contested. As I have already found, the evidence of cruelty and adultery was not convincing to the required standard. More important though is the fact that the petitioner conceded to acts of adultery and if there was desertion by the appellant which was denied, that act would not necessarily without excuse.

In summary, I find that the evidence was not properly evaluated resulting into the erroneous decision to grant a divorce.

Therefore, Ground 1 and 2 of the appeal succeed.

The learned trial magistrate erred in law and fact when she did not consider the substantiality of the DNA evidence produced in court that led to her erroneous decision and orders against the appellant.

There was strong evidence and the respondent did in fact concede to the fact that the appellant was not the biological father of the child Atuhaire Michelle. PW1. A DNA test was secured by an order of the Mukono Chief Magistrate's court and the report dated 24/7/2013 was tendered in Court as D/exhibit No VII. the DNA report dated 24th July, 2013. That evidence, coupled with the appellant's testimony that the couple had not had sex since December 2009, confirmed the fact that the respondent had committed adultery. It is a common law principle that a party should not be allowed to benefit from their wrong and the Magistrate should have given more attention to that fact when making her decision. See for example *Rubwa Vs Rubwa (HCB) 1986*.

In my view, the Magistrate gave very little weight to the above and instead dealt heavily on the appellant's alleged cruelty and failure to maintain and educate his children. This was glaringly a very unbalanced evaluation of the evidence produced by either party to the dispute. She came to the unsupported and thus erroneous decision that it was the appellant who had exhibited acts of violence against the petitioner since 2008, deserted the marriage and thus the marriage had irretrievably broken down.

Ground three accordingly succeeds.

The learned trial magistrate erred in law when she erroneously ordered custody of only four children of the five to the petitioner, disregarding the youngest.

Under Section 29 of the Act once a Court grants an order for dissolution of marriage, it has powers to make consequential orders with respect to the custody, maintenance of the minor children of the marriage. The provisions of the Act are certainly subject to the constitution and Children Act (as amended)

Neither party sought for an order for custody of the children of the marriage. Nonetheless, the court granted custody of the children to the respondent and ordered the appellant to continue educating the two older boys and contributing substantially towards maintenance of all the children. He was in addition given unlimited access to the children dividing the holidays and other days convenient to the parties.

In view of my finding that divorce should not have been granted, the issue of custody is no longer relevant.

Nonetheless, the point in contention is that the youngest child's custody was not dealt with.

In the petition, the respondent mentioned only four children. During her testimony she revealed the existence of a child Atuhaire Michelle. It was that child who was by a DNA test proved conclusively to have been conceived out of wedlock.

The above notwithstanding, It would have been prudent for the Magistrate to have mentioned the status of Atuhaire after the marriage was dissolved. In my view however, that omission is not fatal and did not result into a miscarriage of justice. It was conclusively proved that the child was not a product of the marriage being dissolved. In fact, it was the appellant's testimony that the respondent removed her from the matrimonial home as far back as 2009. Thereafter that child's custody and maintenance must have been the responsibility of the respondent. Her welfare which is paramount, would not be affected by her omission in the decree, and since the appellant was not expected to participate in her upbringing or contribute towards her maintenance, the Learned Magistrate's decision generally did not cause him any prejudice.

Ground four thus fails.

The learned trial magistrate erred in law and fact when she ordered all the matrimonial property including their matrimonial home to be sold without considering the welfare principal.

Both parties were in agreement that they jointly owned a property at Nasuti (Plot 762 Block 190) and another in Nakabago (Plot 1203 block 107 Kyaggwe Central) East Buganda). In her decision of **Muwanga V Kintu (1997)**, **Bbosa J** noted that matrimonial property to which each spouse should be entitled, is that property which the parties chose to call home and which they jointly contribute to. In the more recent decision of **Julius Rwabinumi V Hope Bahimbisomwe Civil Appeal No.30 of 2007**, it was held that where a spouse makes a substantial contribution to a property, it will be considered matrimonial property. The contribution may be direct and monetary or indirect and non-monetary.

I have found that there was no basis for the Court to dissolve the marriage. There would equally be no basis for the Court to make consequential Orders with regard to the matrimonial property including the matrimonial home.

Therefore, the orders to value and sell the matrimonial home, and for each party to retain property acquired individually, was made in error.

Ground five thus succeeds.

In conclusion, the appellant has succeeded on four out of the five grounds of appeal raised. I would accordingly allow the appeal and make the following orders that;

- a. The decision of the lower court to terminate the marriage between the appellant and respondent is set aside.
- b. The marriage between appellant and respondent legally subsists.
- c. Costs of the appeal are awarded to the appellant.

I so Order

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EVA K. LUSWATA

JUDGE

14/01/2019