THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

CIVIL DIVORCE CAUSE NO. 006/2001

ANNETTEE NAKALEMA KIRONDE ::PETITIONER

Versus

1. APOLLO KADDU MUKASA KIRONDE]
2. MOSES ZIZINGA]::::::::::::::::::::::::::RESPONDENTS

BEFORE: HON. MR. JUSTICE V. A. RWAMISAZI-KAGABA

J U D G M E N T

This judgment arises out of Divorce Petition No. 6/2001 in which the petitioner, Annettee Nakalema Kironde seeks the dissolution of her marriage with Apollo Kaddu Mukasa Kironde. The grounds in support of her petition are contained in paragraphs 6 to 8 of her petition dated 6th June 2001.

The respondent filed his reply to the petition and cross petition, both dated 19th July, 2001. The petitioner filed a reply to the petition and cross-petition on the 30/7/2001. The co-respondent, also filed his reply to the cross-petition on the 8th of August, 2001

The summary of the facts in support of the petition and cross-petition are that the petitioner and the respondent married at Namirembe Cathedral on 1/10/1983 and a Marriage Certificate Annexture "A" was issued to them. The petitioner and the respondent cohabited at different places in Kampala between 1983 and 1991. During their stay together as husband and wife, three children, namely - Gulemye Apollo Kironde (19 years), Senteza Kaddu Mukasa Kironde (17 years) and Mpagi Kalibala Kironde (13 years) were produced by the couple.

It was the contention and grounds of the petitioner that the respondent, since the solemnisation of the marriage committed adultery with Ms Ayeta, Ms Nambasa Florence and Fatuma Nanfuka in addition to committing acts of cruelty against the petitioner and their issues. The petitioner also alleged that the respondent deserted her in 1999.

In reply the respondent accused the petitioner of committing adultery and producing a child who is not the respondent's. He admitted associating with the women mentioned by the petitioner but denies committing adultery with any of them.

The respondent Moses Zizinga ws joined as a co-respondent in the cross-petition and he denied ever committing adultery with the petitioner.

The petitioner denied, in reply to the cross-petition ever committing adultery with any man, being cruel to the respondent and or deserting him. She added Safina Namigadde, Grace Majoro, Sarah Matovu, Cissy Nanfuka and Norah Lule as other and additional women with whom the petitioner committed adultery. Both the petitioner and the respondent prayed for the dissolution of their marriage on the ground of adultery committed by the respondent, then the petitioner, respectively. At the hearing of the petition, Paul Kiapi appeared for the petitioner, Nasser Lumweno for he respondent and Mathias Sekatawa for the co-respondent respectively.

Both counsel agreed on two issues, which were:

1. Whether the petitioner is entitled to the reliefs sought in the petition.
2. Whether the respondent, is entitled to the reliefs sought in the cross-petition.

During the Scheduling Conference, both counsel agreed on the following facts:

a) The petitioner has committed acts of adultery with the co-respondent, and a child known as Joe Sebugwawo had been born out of those acts of adultery.

b) The respondent had committed acts of adultery with Ayeta Wangusa and Florence Nambasa.

c) That the property comprised in LRV 2382 Folio 21 Plot 82, Old Kira Road, Naguru is the joint property of the Petitioner and the respondent and that any dispute touching on that property will be resolved in another forum.

d) The children of their marriage remain in the custody of the petitioner but that the respondent should be given access to those children while they are in the custody of the mother at Naguru or at school.

e) That the children of their marriage shall be at liberty to stay at the home of either the petitioner or the respondent.

f) That the petitioner shall bear ⅔ of the Children's maintenance, while the respondent shall bear ⅓ of the same, subject to the respondent having the financial means to meet his share of bringing up the children.

g) The petitioner shall take full responsibility of the Children where the respondent fails to meet his financial obligation toward the children.

This petition is brought under section 5 (2) of the Divorce Act which lays down the circumstances under which, the petitioner, in case of a wife, may petition for the dissolution of marriage, under the law (Divorce set) as it appears under the passing of the 1995 Constitution, this petition would have been incompetent for disclosing no grounds for dissolution of marriage. In other words it would be a plaint/petition that discloses no cause of action against the respondent.

But counsel for the petitioner has cited to me provisions of the 1995 Uganda Constitution which seek to place all human being as equals before the law. Article 31(1) of the Constitution provides: "Men and women of the age of eighteen years and above, have the right to marry and to found a family and are entitled to equal rights in Marriage, during marriage and its dissolution.

Article 33(1) of the Constitution reads:

"Women shall be accorded full and equal dignity of the person with men"

Article 34(4) reads:-

"Women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.

Article 33(6) provides:

"Laws cultures, customs or traditions which are against the dignity, welfare, or interest of women or which undermine their status are prohibited by this Constitution.

The summary of all the above provisions of the Constitution is contained in Article 273(1) and (2) of the Constitution, where it is provided in **273(1)**"

"Subject to the provisions of this Article, the operation of existing laws after the coming in force of this Constitution shall not be affected by the coming in force of this Constitution, but the existing law shall be construed with such modifications adoptions, qualifications and exceptions as may be necessary to bring it into conformity with this constitution.

And------ **273(2) reads:**

"For the purpose of this Article, the expression "existing law" means the written and unwritten law of Uganda or any part of it as existed immediately before the coming in force of this constitution, including any Act of Parliament or Statute or Statutory Instrument enacted or made before that date which is to come into force on or after that date.

Article 2(1) of the Constitution provides:

"This constitution is the Supreme Law of Uganda and shall have the binding force on all authorities and persons throughout Uganda".

Articles 2(2) of the constitution reads:

"If any other law or any custom is inconsistent with any of the provisions of this constitution, the Constitution shall prevail and that other law or custom shall, to the extent of the inconsistency, be void.

Article 21(1)(2) and (3) of the Constitution provides for equality equal protection of every human being before the law and that no person shall be discriminated against on the ground of that person's sex-tribe creed, social or political standing or his or her physical disability.

Lastly - the Judicature Statute confers upon the High Court jurisdiction which it exercises in conformity with the Constitution, written law, equity, common law, customs, See section 16 of the Judicature Statute.

The effect of all these constitutional provisions is show that sections 5 and 6 of the Divorce Act are inconsistent with the Constitution in that they create different sets of rights, opportunities and treatment for men and women to the same institution of marriage.

If sections 5 and 6 of the Divorce Act are to be given effect, their aspects which infringe the above quoted provisions of the Constitution cannot be enforced or relied upon as good law.

The principle of equal rights and opportunities before the law, therefore, requires that the wife may sue for divorce of her marriage on the ground of adultery alone, in the same way as the husband is entitled to do under that section. (Section 5 of the Divorce Act).

In the result, therefore, I hold that the petitioner's petitioner as well as respondent cross-petition are both competent and validly before the court.

Both the petitioner and the respondent have relied on each other's adultery in their prayers for the dissolution of their marriage. Both have admitted the fact of adultery.

Adultery can be proved by a party adducing evidence to prove the same or by the adulterer admitting the fact of adultery or by circumstantial evidence. It must be remembered that whoever desires court to give judgment as to his/her legal right or liability must produce evidence to prove the existence of the facts he asserts exist.

See: sections 100-103 of the Evidence Act.
Muller vs. Minister of Pensions (1947) 2 All E. R. 372

Adultery, on the part of both the petitioner and the respondent has been admitted and hence proved by their express pleadings in the petition and cross-petition, Under Order XI rule 1 of the C. P. R. any party to a suit may give notice by his pleadings or otherwise in writing that he admits the truth of the whole or any part of the case of any other party. A fact, once admitted, need not be proved and the plaintiff is entitled to judgment on the defendant's admission of his claim.

See: Pan African Insurance Co.
versus
Uganda Airlines, (1985) HCB 53-4.

Once the admission is made, the party making the same will not normally be allowed to resile from a pleaded admission unless made under a genuine mistake of fact.

See: International Life Insurance Company. (U) Ltd.
Versus
Amin. A
Civil Application 12/1968
Court of Appeal - Kenya.

See: (i) Gower vrs Gower (1950) 1 All E. R. 804 (C.A),

(ii) Bater vs Bater (1951) Probate 35 (C. A.)

Notwithstanding the admissions of adultery by both the petitioner and respondent, I find that neither of them has connived with the other to bring the present proceedings, neither of them has condoned the other partner's adultery and neither the petitioner nor the respondent have colluded with the other to institute these divorce proceedings.

See: section 8 of the Divorce Act.

Therefore this court do hereby pronounce a decree nisi for the dissolution of the petitioner's and respondent's marriage respectively.

After the decree nisi has been pronounced the court has to consider who of the parties to the marriage shall have the custody of the children. Section 30 of the Divorce Act provides that the court makes such order as to the custody, maintenance and education of the child or children as it deems fit. The guiding principle that the court must address is the welfare of that child or those children. What the welfare principal means is contained in sections 4 - 6 and the First schedule of the Children Statute.

See: Habyarimana vs. Habyarimana
Divorce Cause No. (1980) HCB 139
Nakaggwa vrs Kiggundu (1978) HCB 315.

The parties to this petition have agreed that the Children of their marriage shall remain in the custody of the petitioner who shall provide two thirds of their material and educational needs.

Where circumstances permit, the father respondent shall assist in the education and maintenance of the children to the extent of one third (⅓) of their material and educational requirements.

Notwithstanding the order that the custody of the Children be vested in the petitioner the petitioner and respondent have mutually agreed:

a) that the respondent shall have access to their children at the Petitioner's home at Naguru at reasonable times of day and at the schools where they are schooling, and,

b) that such visits to their children should not be a source for the breach of peace; and

c) the children may stay at the home of the petitioner or respondent when and how they wish provided that such visits to their father (respondent) shall not be a source of tension between the petitioner and the respondent.

Section 23 of the Divorce Act provides for the co-respondent to pay costs to petitioner (in case the petitioner is the husband) where adultery with the wife of the petitioner is proved.

This section raises the same issues of being in conflict with the Constitution. It seeks to punish the adulterous wife while the adulterous husband goes scot free as far as costs with the co-adulterer are concerned. In fact, the co-adulterer does not have to be joined in the petition for dissolution of marriage where the petitioner is the wife. This provision of the Act is manifestly discriminatory in nature and particularly against women. It is therefore void to the extent of its being discriminatory and in conflict with the Constitution.

I will therefore apply the general laws that apply to costs under section 27 of the Civil Procedure Act. 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
Vrs
Muganga Construction Company Ltd.
(1981) HCB 35.

The court can lower, in its discretion, deny the successful party costs if it deems fit having regard to the circumstances of the case. Such circumstances may include:

a) the mutual consent of the parties to waive the costs.

b) the incapacity of the unsuccessful party to pay the costs.

c) the mitigatingfactors available to the losing party.

d) the aggravating circumstances contributory to the winning party - e.g. misconduct or neglect of the winning party.

Under section 23 of the Divorce Act, the petitioner would not be entitled to costs even is she proved the adultery of the respondent. This law is obviously discriminatory and inconsistent with the constitution.

The case of ***Mrs. Ruhara vrs Christopher Ruhara - (1997) HCB 86***, is remotely relevant to the present case both in that the petitioner and the respondent are equally guilty of adultery. This case is one where there is no winner and no loser. No party should be allowed to benefit from his or her wrongs. The court,

would therefore, exercise its discretion to refuse costs to both of them as none of them has come to court with clean hands.

I would also refuse to grant costs to either the petitioner or respondent on the basis of the reasoning and principles adopted by the Supreme Court in the case of ***Prince J. D. C. Mpuga Rukidi vs Prince Solomon Iguru & others***
Supreme Court Civil Appeal No. 18/94 where Justice Oder held:

"It is, I think, in the interest of peace and harmony within the family and community of Bunyoro-Kitara Kingdom as a whole, that the rift or feud caused by the case, should be healed, if possible, as speedily as can happen. One side has won. The other has lost. In such circumstances it would assist the process of reconciliation within the family and the community concerned as a whole to bring to an end the possibility of one side trying to extract its "pound of flesh" from the other".

And Judge Tsekoko, made his concluding remarks on the same subject of costs - in the same case by stating:

"In fairness this harmony can be fostered by ordering each party to bear his own costs". I think it is a proper case where neither the petitioner nor the respondents should be penalised in costs, for he reasons that:

a) all the parties to the petition are guilty of adultery.

b) the parties have agreed to settle the case expeditiously thereby saving court and themselves protracted proceedings that would involve loss of money and time.

c) the petitioner and the respondent have agreed to maintain a harmonious relationship for he good and welfare of their children.

d) the petitioner and the respondent have accepted to have their children as a linking or joining bridge between them.

For the reasons shown above, I shall not grant any costs to any party to this petition. This includes the co-respondent. In the result, each party shall bear his or her own costs.

For the same reasons as I have given with regard to my refusal to award costs to any party, I shall not give any damages to any party. Besides the damages claimed have not been proved.

Finally, the following orders are made:

A: A decree Nisi is hereby pronounced dissolving the marriage between the petitioner and the respondent.

B: The custody of the children of he said marriage is granted to the petitioner, their mother.

C: The respondent shall have access to their children, at reasonable hours and times whether they (children) are at the petitioner's home or at school.

D: Each party to the petition shall bear his or her own costs.

Dated this 12th day of December, 2002

V. A. RWAMISAZI-KAGABA

J U D G E