

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
FAMILY DIVISION
DIVORCE CAUSE No. 25 OF 2011

JULIUS CHAMA : PETITIONER/RESPONDENT IN CROSS PETITION

VERSUS

SPECIOZA RWALINDA MBABAZI : RESPONDENT/CROSS PETITIONER

BEFORE THE HON. JUSTICE B. KAINAMURA

JUDGMENT

In his petition filed in this Court on 16th August 2011 **JULIUS CHAMA** (herein referred to as the Petitioner/Respondent in Cross Petition) sought orders of this Court for dissolution of his marriage with **SPECIOZA RWALINDA MBABAZI** (herein referred to as Respondent/Cross Petitioner). He also prayed for custody of the only child in the marriage and costs of the petition.

The petition was based on the ground of cruelty as set out in the petition.

In reply to the petition, the Respondent/Cross Petitioner denied in toto the allegations and cross petitioned on the grounds of cruelty, desertion, and adultery. She prayed for dissolution of the marriage, custody of the child in the marriage, maintenance and claim in the matrimonial property.

After filing the reply to the petition and cross petition the Respondent/Cross Petitioner was unable to serve them on the Petitioner/Respondent in cross petition and she accordingly applied for an order for substituted service which was granted on the 20th February 2012. Court ordered for a copy of the reply to the petition and cross petition to

be affixed at the last known place of abode of the Petitioner/Respondent and a copy sent by registered mail to the Petitioner's/Respondent's known address in Tanzania. In an affidavit of service filed on the 12th April 2012 one Fred Kamyia a Clerk with M/s Kakooza & Kawuma Advocates deponed that he sent a copy of the reply to the petition and cross petition to the Petitioner/Respondent by DHL to his known address in Dar-es-Salaam and affixed a copy of the documents on the door of his known residence in Kampala. The case was fixed for hearing by the Respondent/Cross Petitioner on 17th April 2012. On the said date the matter was adjourned to 5th June 2012.

At the hearing on 5th June 2012, Ms Eva Luswata Kawuma (as she then was) Counsel for the Respondent/Cross Petitioner prayed Court to dismiss the petition under O 9 r. 22 CPR and proceed with the hearing of the cross petition under O 8 r.13 CPR. Court granted the prayers and proceeded to hear the cross petition *ex-parte*. Learned Counsel, for the cross petitioner thereafter filed witness statements on oath of the Respondent/Cross Petitioner and a one Jeniventius Nsabinama her brother.

Learned Counsel for the Cross Petitioner filed written submissions. The issues for determination were:-

- a) *Whether the marriage should be dissolved.*
- b) *How the property acquired during the marriage should be distribute.*
- c) *Who should be granted custody of the child of the marriage.*
- d) *Quantum of maintenance for the child.*

In her submission, Learned Counsel first brought out the current position on the law of divorce in as far as the requirement to prove the grounds for divorce is concerned. Counsel pointed out the land mark case of ***Uganda Association of Women Lawyers (FIDA) and 5 others Vs Attorney General – Constitutional Petition No. 2 of 2003*** where the Constitutional Court nullified Sections 4 (1), (2), 5, 22, 23, 24 and 26 of the Divorce Act Cap 249 Laws of Uganda 2000. Counsel urged, rightly so in my view, that

the said provisions are of no legal consequence and are no longer valid. This remains the positions of the law since the legislature has not stepped in to ameliorate the situation (*see Han Herman Kock Vs Victoria Kayecha Divorce Cause No. 6 of 2011*). What the Courts have done to bridge the gap is to look at the totality of the facts before it and determine whether the facts lead to the finding that the marriage has irretrievably broken down then divorce is granted. (*see Gershom Masiko Vs Florence Masiko Civil Appeal No. 8 of 2011*)

In the Cross Petition sworn witness statement, of 6th December 2012 she states at paragraph 9 that during the subsistence of the marriage, the Petitioner/Respondent committed acts of adultery with diverse women more particularly a one Victoria and a one Margaret who according to the Cross Petitioner boasted about the relationship. At paragraph 8, she catalogues acts of cruelty which include excessive verbal abuse, physical violence characterized by beatings and boxing, addictive drinking which would drive the Respondent into feats of anger and aggressiveness towards the Cross Petitioner. At paragraph 8 (i) the Cross Petitioner states that since May 2008, the Respondent has deserted her and their marriage. All these alleged acts are corroborated by Jeniventius Nsabimana brother to the Cross Petitioner in his sworn witness statement of 6th December 2013.

Since the acts of adultery, desertion and cruelty have according to the uncontroverted evidence of the Cross Petition and her witness been established, the marriage between the Petitioner/Respondent in Cross Petition and the Respondent/Cross Petitioner has in my view irretrievably broken down and should be dissolved.

After dissolution of the marriage the next issue for determination is how the property acquired during the marriage should be distributed.

Under paragraph 18 of the reply and cross petition, the Cross Petitioner lays claim to the matrimonial home and property in Kyetabwa and Akright estates. In her sworn witness statement at paragraph 15, the Cross Petitioner depones that she, jointly with the

Petitioner, acquired real estate property in Akright estates and a matrimonial home in Bukasa Kirinya Bweyogerere. Under paragraph 17 of the witness statement, mention is made of Annexure “E 1” being certificate of title for property on Entebbe road Akright estates and annexure “E 2” being proof of existence of matrimonial home at Kirinya but the said annexures are nowhere on the Court file. I am not certain how this came about whether it was inadvertence on the part of Counsel for the Cross Petitioner or whether the annexures do not exist. Court cannot be seen to conjecture. In the circumstance, in absence of proof of existence and ownership of the said properties, this issue fails as Court has no property to distribute.

On custody of the only child in the marriage, Counsel for the Cross Petitioner relied on both the Divorce Act and the Children Act to invoke the welfare principal and pray Court to grant custody of the child to the Cross Petitioner. (*see Veronica Habycrimona Vs Perfect Habyarimana 1980HCB 139*) Counsel further urged that where the issue of custody of a child is concerned and the child is of tender age, custody must be granted to the mother (*see Kayongo Vs Sekiziyivu 1973 HCB 24*)

The Cross Petitioner in her sworn witness statement at paragraph 13 states that the Petitioner and father of the child, has for the last four and half years not seen nor provided for the child- Carol Umamaria. She further states that she has **defacto** custody of the child. The above can only lead to Court calculating that the Petitioner/ Respondent in cross petition has no interest whatsoever in the load force of the child.

I agree that the welfare principal is the paramount consideration in deciding on the custody of the child and since the Petitioner has been shown not to have much interest in the child’s upbringing, the Cross Petitioner will retain the custody of the child. The Petitioner/ father of the child will however have visitation rights which will be agreed on by the parties.

In the Cross Petition under paragraph 16, the Cross Petitioner prays for maintenance of the child in the marriage. The maintenance prayed for is in the following terms.

- a) *School fees and school related costs until the child completes undergraduate studies.*
- b) *Food and toiletries – shs 500,000/= per month.*
- c) *Medical expenses – Medical Insurance*
- d) *Contribution towards shelter – shs 250,000 per month.*

The Cross Petitioner further makes a claim at paragraph 17 of the cross petition of a lump sum payment of shs 3,000,000/= being refund of money she spent towards the maintenance of the child since May 2008. However in the witness statement at paragraph 14 the amount claimed is a total lump sum of shs 28,611,500/=. This is a departure from the pleadings which cannot be sanctioned (so I will disagree this latter sum and grant the lump sum claim of Shs 3,000,000/= pleaded).

A close look at the itemized terms of maintenance reveals that the sums prayed for are fair. In addition, the Cross Petitioner has testified that she is not employed while on the other hand, the Petitioner/Respondent in cross petition is stated to be gainfully employed in Dar-es-salaam Tanzania.

In the circumstances Court will make an order for maintenance in the terms prayed.

On costs, the Petitioner/Respondent will pay costs of the cross petition.

Accordingly Judgment is entered for the Cross Petitioner against the Petitioner/Respondent in cross petition and the following orders are made:-

- (1) *A decree nisi dissolving the marriage between the Cross Petitioner and the Petitioner/Respondent is granted.*
- (2) *The Cross Petitioner is granted custody of the child Uwamaria Carol. The Petitioner/Respondent will have full visitation rights.*

(3) The maintenance of the child will be met by the Petitioner/Respondent in the terms set out in this Judgment.

(4) The Petitioner/Respondent will meet the costs of this cross petition.

B. Kainaumra
Judge
26.08.2013