THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

FAMILY DIVISION

MISC.CAUSE No 6 OF 2012

JULIAN GALTON FENZI :: APPLICANT

VERSUS

NABBOSA NATASHA MARIE :::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE THE HON.JUSTICE B. KAINAMURA

RULING

The Applicant brought the application under O 52 r 2 and 3 of CPR, Section 98 of CPA and section 76 of the Children Act (cap 59). It is for orders that an order for maintenance of the children in the marriage between the Applicant and the Respondent be issued in favour of the applicant and in the alternative an order for the division of the suit property and /or disposal thereof to cater for the maintenance of the children and for costs.

The grounds of the application are that the applicant and the respondent got divorced on 10th May 2011 vide Divorce Cause 9 of 2010 where the applicant was granted custody of the two children in the marriage aged 17 years and 11 years respectively and that since then, the respondent being mother of the children has failed to support them financially notwithstanding the fact that she was granted all the property which is valued at approximately US $ 1 million and that it is just and equitable that the application be granted as it is in the best interest of the children.

The respondent opposed the application and filed an affidavit in reply. The affidavit in reply is to the general effect that all matters in respect of the marriage were conclusively determined under the consent reduced in the *Decree Nisi* which granted custody of the children to the applicant and ownership of the marital property to the respondent. It was further contended that the property she was offered in the divorce settlement had been encumbered by the applicant and part of it has been sold to offset the loan obligations.

By way of background, the applicant and the respondent were lawfully married on 9th November 1999. Subsequent to the marriage, both lived and cohabited with each other and out of the said marriage they begot two children to wit:- Jonathan Abel Galton - Fenzi born on 9th October 1994 and Jasper Julian Galton – Fenzi born on 11 February 2000. During the subsistence of the marriage, the parties constructed four properties on land comprised in Block 244 Plots 6118 and 7596 Mayenga Bukasa. In April 2010 the applicant (then petitioner) petitioned this Court for divorce and prayed for the dissolution of the marriage, custody of the children and sale of the matrimonial properties and division of the proceeds of sale equally between the parties. In May 2010, the respondent (even then Respondent) filed a reply to petition wherein she denied the alleged matrimonial offences and in answer to the status of the matrimonial property alleged that the applicant/petitioner had obtained a Mortgage with DFCU Bank and used as security the land at Bukasa which was registered in her names and failed and or ignored to service the Mortgage and that it was the respondent who paid off the Mortgage. With the reply, the respondent filed a Cross Petition where she stated that the marriage between her and the applicant /petitioner had irretrievably broken down and she prayed for dissolution of the marriage and custody of the younger issue of the marriage with visitations rights to the older issue of the marriage.

When the case came up for hearing, the parties opted not to pursue a lengthy litigation and on 17th June 2010 a *Decree Nisi* was entered in the following terms:-

1. A *Decree Nisi* dissolving the marriage of the parties is hereby entered.
2. The Petitioner is herby granted permanent custody of both
   a) Jonathan Abel Galton – Fenzi
   b) Jasper Julian Galton – Fenzi
3. Ownership of marital property comprised in Block 244 Plots 6118 and 7596 Muyenga Bukasa is hereby granted to the respondent.
4. The respondent will be entitled to full visitation rights in respect of the issues of the marriage including the right to call and talk with the said children from time to time.
5. Each party will bear its own costs.

The *Decree Nisi* was made *Absolute* on the 10th day of May 2011.

The matter now before Court was filed by Notice of Motion on the 27th March 2012 for the orders and on the grounds first written above. Ms. Sheila K. Tumwine of Namara, Tumwine & Co. Advocates represented the applicant and Mr. Mpumwire of M/s Bashashe & Co Advocates represented the respondent. Both Counsel filed written submissions. The issues for determination were agreed as:-

1. Whether the applicant is entitled to the maintenance orders as prayed.
2. Whether the Court can make orders to split the property in order to pay for the maintenance of the children.

On issue one, Learned Counsel for the applicant sought to rely on Articles 3, 26 and 27 of the UN Convention on the Rights of the Child which articles granted ***inter alia*** right to benefit from social security, right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development and that

state parties are under, an obligation to take all appropriate measures to secure the recovery of maintenance for the child from the parents and that the best interests of the child shall be a primary consideration in the courts of law. Learned Counsel urged that based on the above, the applicant should be granted an order of maintenance of children so that the standard of living they are used to is not lowered. For this to happen, Counsel urged, the mother i.e respondent has a responsibility to participate in the upbringing whether or not she has loan obligations to pay since by her admission the property was family property.

Counsel further pointed out that under Article 18 of the UN convention (Supra) state parties are enjoined to use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Counsel added that consistent with this, Article 31 (4) of the Constitution 1995 provides that it is the right and duty of parents to care for and bring up their children.

Turning to the Children Act, Counsel pointed out parental responsibility to include the duty and reasonability of both parents to maintain their children and as such the respondent cannot opt out. Counsel further asserted that based on the welfare principle (cited ***Nakaggwa Vs Kiggundu*** (***1978***) ***HCB 315***), it is in the best interests of the children that the respondent should be ordered to maintain them. Counsel further contended that the duty to maintain a child is complementary and no party has a superior right over it (***cited Anne Musisi Vs Herbert Musisi & Another Divorce Cause 14 of 2007***) Counsel invoked the provisions of Section 76 (1) (a), (3) (a) and (4) (b) for the proposition that the father of the children can apply for a maintenance order against the respondent during the proceedings for divorce or during separation among other circumstances. Relying on ***Nyakairu Vs Rose Nyakairu [1979] HCB 261,*** Counsel urged that court can grant custody to any of the parents and at the same time order the other spouse to provide for

maintenance of the children. In conclusion Counsel submitted that the applicant is not precluded from applying for a maintenance order and prayed that a maintenance order be granted against the respondent and that it be paid in a lump sum.

On issue number two, Learned Counsel focused on property comprised in Kyadondo Block 244 Plot 7596 Muyenga Bukasa which according to him, through registered in the names of the respondent, is matrimonial property and it is only the respondent who is benefiting from it. Counsel stated that it is the position of the applicant that the property should be disposed off and the proceeds split among the parties (see paragraph 11 of his affidavit in support) so as to enable the applicant look after the children.

In reply, Learned Counsel for the respondent wondered why this matter was coming up when the parties had reached an amicable settlement and resolved all issues pertaining to the Divorce. In his opinion the matter is barred by *res judicata* and cannot be sustained. He relied on Section 7 of CPA and the decision in the case of ***Posiyano Semakula Vs Susane Magala [1979] HCB 90*** and urged that since under Divorce Cause No.6 of 2010, the Court, by consent of the parties, had issued a *Decree Nisi* whereof the marriage between the parties was dissolved, the applicant was granted permanent custody of both issues of the marriage and ownership of marital property comprised in Block 244 Plots 6118 and 7596 Muyenga Bukasa was granted to the respondent, which Decree was subsequently made Absolute, then the present application was clearly barred by the doctrine of *res Judicata.*

Learned Counsel further urged that the orders sought in this application were resolved by consent of the parties and that a consent order cannot be vitiated by the application now before court. Counsel added that a consent judgment to be varied

or discharged it must have been obtained by fraud or collusion or by agreement contrary to the policy of the Court (***see Hirani Vs Kassam [1952] EACA 133***). Counsel concluded by stating that since the dissolution of marriage by consent had not been contested, no fraud, collution or misrepresentation had been alleged, then the present application was incompetent since it was aimed at varying the consent order in Divorce Cause No. 9 of 2010.

In reply Learned Counsel for the applicant stated that the application before Court was not *res judicata* as the main issue was an application for maintenance which was not a substantial issue in the divorce petition. Counsel further urged, erroneously in my view, that *res judicata* does not apply to maintenance as child maintenance is a continuing obligation and the custodial parent has a right to apply for maintenance at any time and is not restricted under the law. Counsel concluded by stating that Section 76 (4) of the Children Act afforded the applicant an opportunity to apply for maintenance since the children had not yet attained age of eighteen.

Whereas i agree with Learned Counsel for the applicant's articulation of the content and purpose of the provisions of the United Nations Convention on the Rights of the Child, i am of the view that they are not helpful to his case as stated. Suffice to say that in my opinion both the Constitution, the Children Act and other legislation touching on the child are complaint with the provisions of the UN convention. Turning to the provisions of Section 76 of the Children Act, i am inclined to believe it is not helpful to the applicant's case as brought out. To begin with, the procedure followed by the applicant is contrally to the dictates of Section 76 of the Act.

Subsection 5 of Section 76 provides:-

> *"An application for a maintenance order shall be made by* ***Complaint on Oath to a Family and Children Court*** *having jurisdiction in the place where the applicant resides.……"* ***(emphasis mine)***

To operationalise the above, the Children (Family and Children Court) Rules S.1. No 59-2 was put in place. Rule 19 thereof, clearly lays out the procedure to follow in an application for a maintenance order among others. My view is that the applicant chose to opt for the procedure he did, so as it tie the application to the divorce proceedings concluded vide Divorce cause 9 of 2010.

Having done that, then it is indeed proper, as Learned Counsel for the respondent has prayed court to determine whether the application is indeed barred by *res judicata.*

Section 7 of CPR provides:-

> *"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised and has been heard and finally decided by that Court."*

To determine the perimeters envisaged under S.7 CPA above, I will look to the case of ***Posiyano Semakula*** (supra) cited by Counsel for the respondent where the

Court of Appeal held inter alia that:-

> *"In determining whether or not a suit is barred by res judicata the test is whether the plaintiff in the second suit is trying to bring before the court in another was in the form of a new cause of action a transaction which has already been presented before Court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If this is answered affirmatively the plea of res jidicata will then not only apply to all issues upon which the first court was called upon to adjudicate but also to every issue which properly belonged to the subject of litigation and which might have been raised at the time through the exercise of due diligence by the parties".*

The import of the above decision is that the applicant should have exercised all due diligence to litigate on all issues which properly belonged to the subject of litigation – in this case divorce – and sought for maintenance of the children whose custody was granted to him in the consent judgment. Since the applicant chose not to seek for maintenance in the divorce proceedings or it has come as an afterthought, as it seeks to be, then indeed he is barred by *res judicata* to resurrect the matter now. Indeed as urged by Counsel for the respondent the consent judgment between the parties does present a resolution of disputes as between them and is final and binding on all parties so any application to vary the consent judgment in Divorce Cause 9 of 2010 is incompetent and should not be entertained by this Court.

I so hold.

Since the resolution of issue one above effectively resolves issue two as well, i will not delve into issue two in this judgment.

In the result the application is dismissed with costs.

B. Kainamura
Judge
6.09.2013