

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

FAMILY DIVISION

DIVORCE CAUSE NO. 38 OF 2010

**NUWAHA NELSON.....PETITIONER/CROSS
RESPONDENT**

VERSUS

**KYARIMPA CHRISTINE..... RESPONDENT/CROSS
PETITIONER**

BEFORE HON LADY JUSTICE PERCY NIGHT TUHAISE

JUDGMENT

The petitioner/cross respondent filed this petition for divorce against the respondent for a decree that the marriage between the petitioner/cross respondent and the respondent/cross petitioner be dissolved; that all the matrimonial property, assets or liabilities acquired or incurred jointly and in common during the subsistence of the marriage be justly shared and or distributed according to the law; that appropriate custody orders be made for the child; that the respondent pays for the costs of the petition; that the court injunction on land and house at Namirembe Hill Block 1 Plot 972 made against the petitioner be lifted and or annulled; and that the petitioner be granted such other reliefs as the honourable court may deem fit.

The respondent/cross petitioner filed an answer to the petition which included a cross petition praying for orders that the cross petition be allowed and the marriage between the cross petitioner and the cross respondent be dissolved; that the respondent be granted custody of the issue of the marriage; that this court orders that the cross respondent has no interest in the cross petitioner's properties and businesses; that any caveats lodged on the cross petitioner's properties by the cross respondent be vacated; that the property comprised in LRV 3983 Folio 24 Plot 4375 Kyadondo Block 273 land at Zana Wakiso District is the cross petitioner's and cross

respondent's matrimonial home; that the cross respondent contributes to the welfare of their child; and that the court grants other reliefs to the cross petitioner as it thinks fit.

This case was part heard by Hon. Mr. Justice Moses Mukiibi who has since been transferred to another Division. At the time I started to hear it, the petitioner/cross respondent had given his evidence in chief.

The petitioner's case is that he got married to the respondent on 06/01/2004 at Our Lady of Africa Catholic Church, Mbuya, Kampala. They cohabited at their matrimonial home at Namirembe Hill Block 1 Plot 972 in Kampala. They were blessed with one issue Nuwaha Trevor. On 6th January 2009 the respondent petitioned the Magistrate's Court of Makindye seeking nullification of the marriage but she disappeared from the matrimonial home immediately after serving the petitioner with court papers. In November 2009 the respondent voluntarily withdrew from the matrimonial home and separated from the petitioner. The respondent kept reporting to the matrimonial home but she became quarrelsome and nagging.

It is also the petitioner's case that during the subsistence of the marriage, he and the respondent purchased and developed several properties using family resources; that they opened diverse bank accounts in their names in form of a family trust; that they conducted family businesses, and that they jointly and mutually acquired loans and overdrafts some of which remain unpaid to date. The petitioner further pleads that the respondent committed adultery and conceived a child for another man, and that the petitioner's marriage to the respondent has irretrievably broken down.

The respondent agrees in her answer to petition and cross petition that she was married to the petitioner and they have one child together. It is her case that she cohabited with the petitioner between 2002 and 2004 prior to her marriage with him. She denies that their matrimonial home was on Namirembe Hill Block 1 Plot 972 Kampala. It is her case that they lived as a couple at their matrimonial home comprised in LRV 3983 Folio 24 Plot 4375 Kyadondo Block 273 Zana. It is her case that she did not leave the matrimonial home voluntarily, but that she left because the petitioner's son from a previous customary marriage threatened to beat her. She denies ever operating a family business with the petitioner. It is her case that the joint account she operated with the petitioner was to save the petitioner's business, and that the petitioner benefitted from

his loans as an individual. She contends that the reason the marriage has irretrievably broken down is because the petitioner has committed acts of cruelty against her.

The agreed facts, as set out in the scheduling memorandum were that:-

- The petitioner and the respondent got married on 06/01/2004 at Our Lady of Africa Catholic Church, Mbuya, Kampala.
- Out of the marriage a child called Nuwaha Trevor was born on 23/05/2004 at Mulago Hospital.
- During the subsistence of their marriage the petitioner and the respondent lived in Zana from 2004 to 2009, and after that, in Mengo until October 2009 when they separated.
- The petitioner is currently staying in Zana with the children he got before marrying the respondent, and the respondent is staying with a relative.
- The petitioner and the respondent have not had sexual intercourse since October 2009.
- The respondent is the biological mother of the child she conceived after separation.

The issues to be determined are:-

1. Whether the respondent/cross petitioner committed adultery?
2. Whether the respondent/cross petitioner deserted the petitioner/cross respondent?
3. Whether the petitioner/cross respondent committed cruelty towards the respondent/cross petitioner?
4. Whether there are any family matrimonial properties?
5. Whether the parties are entitled to share in the ownership of the properties, and if so, to what extent?
6. Who is entitled to custody of the issue to the marriage?
7. What remedies are available to each party?

Issues 1, 2, 3, 4, 5, and 7 were agreed on by the parties in their joint scheduling memorandum. Issue 6 on custody was added by court because it is pertinent to the dispute.

Issue 1: Whether the respondent/cross petitioner committed adultery?

Adultery is defined as consensual sexual intercourse during the subsistence of the marriage between one spouse and a person of the opposite sex not the other spouse. It is sexual intercourse

between two persons of whom one or both are married but who are not married to each other. See **Veronica Habyarimana V Perfect Habyarimana [1980] HCB 139.**

It was an agreed fact during the scheduling of this case that the respondent/cross petitioner is the biological mother of the child she conceived with another man after separation from the petitioner/cross respondent. In addition, the respondent/cross petitioner stated during her examination in chief that she went out of her marriage, had sex with another man, and conceived in 2010; that by the time she conceived she had separated from the petitioner; that they were living separately and she had moved on. In re examination she stated that the father of Trevor is the petitioner/cross respondent, and that the father of the other child is Christopher Kyerere.

It is thus not in dispute that the respondent/cross petitioner committed adultery while she was still married to the petitioner/cross respondent. Going by the definition of adultery above, it does not matter that the parties were already living separately when adultery was committed. As long as a marriage between the parties is still subsisting, a spouse who has consensual sexual intercourse with another not being his/her spouse commits adultery, which is a ground for divorce under the Divorce Act. The respondent/cross petitioner cannot justify her adultery with the alleged cruelty on the part of the petitioner as she adduced no evidence to show that her spouse's alleged cruelty drove her to commit adultery. The adduced evidence bears out the agreed position that the adultery occurred after the two parties started living separately. The respondent/cross petitioner, according to her own evidence, "had moved on".

Issue 1 is answered in the affirmative.

Issue 2: Whether the respondent/cross petitioner deserted the petitioner/cross respondent?

The petitioner/cross respondent did not adduce any evidence on his being deserted by the respondent/cross petitioner, neither did his counsel make any submissions on the issue. In that regard, I agree with the respondent/cross petitioner's counsel's submissions that the issue on desertion was abandoned by the petitioner/cross respondent. I will therefore not dwell on it.

Issue 3: Whether the petitioner/cross respondent committed cruelty towards the respondent/cross petitioner?

The respondent's cross petition for divorce against the petitioner/cross respondent is on grounds that the latter is abusive and quarrelsome; that he comes home late and drunk; that he does not provide for the issue to the marriage; that he threatens violence against the cross petitioner and their child; that he disrespects the cross petitioner; that he absents himself from home on pretext of hiding from creditors; that he is constantly on the run because of financial problems; that he does not control his children from previous marriages from threatening violence to the cross petitioner; that he forges the cross petitioner's signature; and that he failed to provide maintenance for the issue of their marriage.

It was held in **Veronica Habyarimana V Perfect Habyarimana**, already cited, that no conduct can amount to cruelty in law unless it has the effect of producing actual or apprehended injury to the petitioner's physical or mental health. There must be danger to life, limbs or health, bodily or mental, or a reasonable apprehension of it. The same court also held that:-

“To constitute cruelty, the conduct complained of must be serious. It must be higher than the ordinary wear and tear of married life....the general rule in all questions of cruelty is that the whole matrimonial relations must be considered, and the rule is of special importance when the cruelty consists of non violent acts but of injurious reproaches, complaints, accusations and taunts.”

In **Gakwavu V Gasengaire [1977] HCB** the court stated that:-

*“The court cannot examine every petty squabble in a marriage to build a case of cruelty. The standard of proof of cruelty is not beyond reasonable doubt as required in criminal cases. **But like in adultery, in cruelty the standard of proof is slightly higher than in a preponderance of probabilities required in ordinary civil cases.**”* (emphasis mine).

The respondent/cross petitioner (DW1) stated during cross examination that the petitioner used to beat her; that she at one time got a cut on her eye as a result of the beating; and that she visited Case Clinic for treatment. She produced exhibit **R40** a medical report from Case Clinic to support her case. She stated during cross examination that she cannot remember the year she was assaulted. In re examination she stated it was 2007, but that the report was made in 2009. The Doctor (DW7) who prepared exhibit **R40** gave evidence that the respondent/cross petitioner

went to him in September 2007 though he made the report on 18/11/2009. DW7 also stated that there is a scar below the respondent/cross petitioner's eyebrow.

The respondent/cross petitioner testified that she picked the report on 18/11/2009. This was apparently on the same day it was prepared. This was one month after the parties had separated, in view of the agreed fact that they separated in October 2009. It was also apparently procured one month and a half before the respondent's filing a divorce/nullity petition against the petitioner in Makindye Chief Magistrate's court. The record shows the Makindye Court case to have been filed on 05/01/2010. In fact, the same medical report was annexed to the petition as annexure **B**.

Exhibit **R40** is a medical report stating that the respondent/cross petitioner reported to Case Medical Clinic with a cut wound above her left eye and that the wound was treated. The report does not state when the respondent reported to the clinic, though it states it was after an assault. According to the report, the respondent had a deep cut wound above the left preorbital area. It is also the evidence of DW7 that the medical report was prepared more than two years from the alleged time of the assault. DW7 testified that the medical records were destroyed; that hospital documents are normally destroyed within a period of time, three to five years, if patients do not report. This court could therefore not have access to them, except for the report. The respondent herself did not produce any medical documents that she might have kept as an individual who underwent the treatment in 2007.

There was no logical explanation as to why the report, which did not even indicate when the assault was referred to the clinic, was prepared two years after the alleged assault. It was procured after the parties started living apart, and shortly before the respondent filed for divorce in the Makindye Magistrate's Court. The relevant treatment/hospitalization documents were stated by DW7 to have been destroyed by Case Medical Center. The respondent/cross petitioner, in the given circumstances where such vital evidence was missing, did not avail her individual copies of the treatment documents.

I do not find the report, which does not even indicate when the cut or injury was referred to Case Medical Center, credible enough to suggest that the assault in the report referred to the alleged

injury in this dispute, or that the scar was a result of the alleged injury. The report does not show that it is the petitioner who inflicted the so called injuries.

The respondent/cross petitioner also testified as DW1 that the petitioner burnt her clothes; and that at another time he took her clothes and threw them at her workplace. DW3 Arineitwe Habius testified that the petitioner came drunk at the petrol station and threw the respondent's clothes at the station, and that he (DW3) got them and passed them through the window into the respondent's office. He stated that the clothes he picked were not burnt. DW4 Kabongo Hassan testified in cross examination that he was not at the petrol station when the clothes were thrown but was told by DW3 and others. DW8 Kyomugisha Costance also testified in cross examination that she was told by the boys that the respondent's clothes were dumped at the petrol station by the petitioner. The evidence of DW4 and DW8 on this matter was hearsay evidence and court did not rely on it.

The respondent/cross petitioner also alleged that the petitioner/cross respondent tried to force the respondent's employee, Diana Kembabazi, into a sexual relationship; and that he attempted to rape their maid at Zana. The alleged sexual harassment of Diana Kembabazi also featured in the testimonies of DW4 and DW8 Kyomugisha Costance. DW5 Kakuru Jane testified to the petitioner's attempted rape of the parties' maid at Zana; that the maids would tell her about the petitioner's sexual advances to them.

The evidence of DW4, DW5 and DW8 relating to the petitioner's forcing the respondent's employee Diana into a sexual relationship and his attempting to rape their maid at Zana is hearsay evidence. The respondent's employee Diana, and the maid, the alleged subjects of the respondent's sexual advances were not called as witnesses.

The respondent/cross petitioner also testified during cross examination that the petitioner/respondent was abusive even before the two wedded but that she went on to marry him for love; that she continued living with him and helping him get loans even at a stage of their living separately; and that she would welcome him to the Mengo house after she had left the Zana house to protect him from creditors and let him see his son. This conduct on the part of the respondent/cross petitioner, in my opinion, is inconsistent with her claims of a person living in actual or apprehended physical or mental injury posed by the petitioner/cross respondent.

The legal position, as highlighted above, is that the conduct constituting cruelty must be serious, higher than the ordinary wear and tear of married life. The standard of proof of cruelty is, like in adultery, slightly higher than in a preponderance of probabilities. In the instant case, I find that the respondent has not adduced evidence of legal cruelty against the petitioner to the required standards. I also find, having addressed the entire matrimonial relations between the parties, that in those aspects where deviant conduct of the petitioner, like being drunk, and throwing the respondent's clothes at the respondent's work place were established by some witnesses, the respondent/cross petitioner failed to establish that the petitioner/respondent's conduct has the effect of producing actual or apprehended injury to the petitioner's physical or mental health. The respondent/cross petitioner pleaded various other particulars of cruelty against the petitioner/cross respondent. Some of them were not supported by credible evidence while others were not shown to have amounted to legal cruelty as defined above. Others were simply pleaded but no evidence was adduced to substantiate them.

Issue 3 is answered in the negative.

Issue 4: Whether there are any family/matrimonial properties?

Issue 5: Whether the parties are entitled to share in the ownership of the properties, and if so, to what extent?

Issues 4 and 5 will be addressed together since they are interrelated, and they were submitted on by both Counsel jointly.

In **Julius Rwabinumi V Bahimbisomwe SCCA No. 10/2009** the Supreme Court adopted the holding by Bbossa J, as she then was, in **Muwanga V Kintu High Court Divorce Appeal No. 135/1997**, that “*matrimonial property is understood differently by different people. There is always property which the couple chooses to call home. There may be property which may be acquired separately by each spouse before or after marriage. Then there is property which a husband may hold in trust for the clan. Each of these should, in my view, be considered differently. The property to which each spouse should be entitled is that property which the parties choose to call home and which they jointly contribute to.*” (emphasis mine).

In the same case, the Supreme Court went on to hold, *inter alia*, that the court should determine the ownership or sharing of property in issue basing itself on the Constitution of Uganda, the applicable marriage and divorce law in force as to whether property should be divided either in equal shares or otherwise as the facts of each case would dictate.

In **Muthembwa V Muthembwa [2002] EA 186**, it was stated at page 187, that the issue of whether the respondent made a contribution to the construction of the suit properties was a question of fact.

Section 2 of the Mortgage Act also defines a matrimonial home as a building or part of the building in which the husband and wife as the case may be wives and their children ordinarily reside together. Section 38 A(4) of the Land Act as amended defines ordinary residence to mean the place where a person resides with some degree of continuity apart from temporary absence, and a person is ordinarily resident in a place when he or she intends to make that place his or her home for an indefinite period. The said definitions are for purposes of giving spousal consent when transferring family land by way of mortgage, pledge, lease, sale, gift or other transaction, in that the transaction concerning the property is void if spousal consent for the transfer or dealing in property is not given.

The petitioner/cross respondent's evidence is that he cohabited with the respondent/cross petitioner at their matrimonial home at Namirembe Hill Block 1 Plot 972 in Kampala. The respondent/cross petitioner however denies that their matrimonial home was on Namirembe Hill Block 1 Plot 972 Kampala. It is her case that they lived as a couple at their matrimonial home comprised in LRV 3983 Folio 24 Plot 4375 Kyadondo Block 273 land at Zana. The petitioner on the other hand states that the Zana house is his personal property. The question therefore is which of the two houses was the matrimonial home?

Property comprised in LRV 3983 Folio 24 Plot 4375 Kyadondo Block 273 Zana

The respondent/cross petitioner stated during cross examination that she left Zana for her house in Mengo around March 2009. She also stated that they started living together in the Boys Quarters at Zana in 2002 and eventually wedded in January 2004. She produced in court various photographs collectively exhibited as **R1** which she stated were taken while they were still living in the Boys Quarters as the main house was being constructed. She stated that she contributed

money to the construction of the house which was completed in 2005. She stated that she did not keep receipts for the construction of the Zana house; that her contribution was before 2004 prior to their wedding; that she ran away from Zana to stay at Mengo because her marriage was on the rocks. In re examination she stated that she let the petitioner/cross respondent stay in Mengo because the creditors he was hiding from knew the Zana house, and also because he wanted to see his son.

The petitioner/cross respondent stated that he bought a kibanja on 12/03/93 and lived there; that he obtained a lease of 49 years from 2005 from Buganda Land Board, exhibit **R7**. He stated during cross examination that exhibit **R1**, a photo of the respondent/cross petitioner and her aunt at the Zana house while it was being reconstructed, was taken by the respondent who was visiting; that she came with a camera and she took photographs. He agreed that the respondent/cross petitioner signed a spousal consent, exhibit **P2**, to mortgaging of the Zana house to enable him obtain a loan; that at the time she signed the spousal consent on 31/12/2009, the respondent/cross petitioner was a spouse of the petitioner/cross respondent.

It is an agreed fact that during the subsistence of their marriage the petitioner and the respondent lived in Zana from 2004 to 2009, and after that, in Mengo until October 2009 when they separated. It is evident from the adduced evidence that the family spent most of their married life in the Zana house. Both parties agree that they lived in Zana from 2004 to 2009. There is evidence that the respondent left the Zana house in March 2009 when her marriage with the petitioner was on the rocks.

In this case, in line with the above case decision definitions of matrimonial property, and the adduced evidence, it is my finding that the property comprised in LRV 3983 Folio 24 Plot 4375 Kyadondo Block 273 land at Zana was the matrimonial home for the cross petitioner and the cross respondent.

Property on Namirembe Hill Rubaga Div Block 1 Plot No. 972

The respondent/cross petitioner testified that she bought the property in 2006. The petitioner/cross respondent testified that he bought the Namirembe house as a plot which had an old house on it; that he got U.Shs.40,000,000/= (forty million) from their Nile Bank joint account, added U.Shs. 5,000,000/= (five million) and gave it to the respondent/cross petitioner.

He stated that the land is registered in the names of Kyarimpa Christine (respondent/cross petitioner) because she was his wife and he trusted her; that they renovated the old house and built a flat behind; that he did most of the reconstruction and had many receipts which he could not access because he was chased away. He stated that he got iron sheets to construct the flat, barbed wire for the perimeter wall, pipes for the doors, tiles, and stairs for the flat. He tendered in evidence exhibits **P18, P19, P20** and **P21** to support his case.

In cross examination however he stated that it is not true that he gave money to the respondent/cross petitioner to buy the Namirembe property. He stated that they got a loan together from the Bank and he contributed U.Shs.5,000,000/= (five million); that the money was not got from the loan account; that he got the money and gave it to his wife to look for property.

The purchase agreement for the Mengo house located on Namirembe Hill Rubaga Div Block 1 Plot No. 972 was entered into between the respondent/cross petitioner and M/S Speedway Auctioneers & Property Managers, as evidenced exhibit **R22**. Under the agreement, the respondent/cross petitioner purchased the property from M/S Speedway Auctioneers & Property Managers at Uganda Shillings 45,000,000/= (forty five million). Exhibit **R21** shows that U.Shs. 45,000,000/= (forty five million) was debited on the DFCU Bank joint account of Christine Kyarimpa (respondent) and Loy Wamala against cheque number 2020 on 20/10/2006. This supports the respondent's testimony that she bought the house using the money withdrawn through the said cheque. Exhibit **R23** shows that the money was paid by the respondent/cross petitioner and receipt was acknowledged by M/S Speedway Auctioneers & Property Managers.

The petitioner/cross respondent's names do not feature anywhere in exhibits **R22** and **R23**. Exhibits **P18, P19, P20** and **P21** which the petitioner/cross respondent relies on are receipts issued to Mashilingi/Nuwaha (petitioner) by M/S Roofings regarding various construction materials. All the said exhibits were issued between September and November 2009 when the parties were already living separately. The petitioner testified during cross examination that the receipts for buying the materials remained in Mengo but when the respondent sued him alleging his non contribution he went to M/S Roofings and was issued with the exhibited receipts.

It is difficult for this court to ascertain that exhibits **P18, P19, P20** and **P21** were substitute receipts. On the face of the documents they appear to be fresh receipts, since there is nothing to

indicate they were substituted for earlier receipts. The respondent did not call any witness from M/S Roofings to support his claims that they were substitute receipts. Secondly, there is nothing to show that the materials purchased as indicated in the receipts were used in the construction of the Namirembe house. Thirdly I find the petitioner's claim that he procured the substitute receipts to counter the respondent's divorce petition at Makindye Court to be false, considering that the receipts were issued between September and November 2009 yet the petition was filed later, in January 2010. DW6 also countered the petitioner's evidence of having purchased the Mengo property using the Nile Bank facility in his testimony that the purpose of the loan facility was for capital expenditure to enable him complete a payment for a fuso truck, as evidenced by exhibits **R33** and **R34**.

The petitioner/cross respondent claimed that the house on this land was the matrimonial home which he contributed in its purchase and construction. There is evidence that the respondent chose to move to this house when her marriage with the petitioner was on the rocks. There is evidence, which is not rebutted by the petitioner, that the petitioner/cross respondent would at times visit the home but this was because he was hiding from his debtors who knew his Zana house, or was visiting to see his son, or to have meals. There is no evidence to show that the parties chose to call this house their home.

The house is registered in the names of the respondent/cross petitioner, as per exhibit **P5** which also shows various incumbrances on the title, namely two mortgages with Standard Chartered Bank and two caveats by Nuwaha Nelson and Kyarimpa Christine, the parties to this suit. The sale agreement, exhibit **R22** shows that it was purchased by the respondent/cross petitioner. The petitioner/cross respondent's evidence that he purchased some materials towards the construction of the house at Namirembe was not convincing. Exhibits **P18, P19, P20** and **P21** which he relies on are receipts issued by M/S Roofings. There is nothing to show that the materials purchased as indicated in the receipts were used in the construction of the Namirembe house.

I also find the petitioner/cross respondent's evidence contradictory with irreconcilable versions, which made it difficult for this court to believe. His evidence in chief was that he got U.Shs.40,000,000/= from their Nile Bank joint account, added U.Shs.5,000,000/= (five million) and gave it to the respondent/cross petitioner. In cross examination however he stated that it is not true that he gave money to the respondent/cross petitioner to buy the Namirembe property.

He stated that they got a loan together from the Bank and he contributed U.Shs.5,000,000/= (five million); that the money was not got from the loan account. During the same cross examination, he stated that he got the money and gave to his wife to look for property.

In that regard therefore, based on the adduced evidence and the applicable law, it is my finding that the Namirembe Hill Block 1 Plot 972 Kampala was not a matrimonial home. There is nothing in the adduced evidence to show that this house was a matrimonial home. Besides, after applying the same principles that were applied when assessing the contribution towards the construction of the Zana house, it is my finding that the Mengo house is the property of the respondent/cross petitioner which she acquired and developed separately on her own though the petitioner would visit the same and have his meals there, following the respondent/cross respondent's departure from the matrimonial home at Zana. The petitioner/cross respondent is not entitled to any share in the said property.

On the issue of whether the parties are entitled to share in the ownership of the properties, the law as stated by the Supreme Court is that the property to which each spouse should be entitled is that property *which the parties choose to call home and which they jointly contribute to*. The question to address is, did the parties in this suit jointly contribute to the construction of the matrimonial home in Zana?

Exhibit **R7** shows that the land on which the Zana house is located (LRV 3983 Folio 24 Plot 4375 Kyadondo Block 273 Zana Wakiso) was as at 30/11/2011, registered in the names of the petitioner/cross respondent. At that time it had no incumbrances, but exhibit **R9** shows that the respondent/cross petitioner lodged a caveat on it on 5/01/2012.

The respondent/cross petitioner's evidence that her contribution was before 2004 before they wedded is not supported by any evidence. She did not avail any receipts showing her contribution in as far as constructing of the Zana house was concerned, yet such evidence was vital, to support her pleading that she contributed to the construction of the house before she married the petitioner. In my opinion, the respondent/cross petitioner has not adduced cogent and credible evidence to prove or support her pleadings that she contributed to the construction of the house at Zana as to be entitled to a share of the same.

Thus, on basis of the court decisions already cited and the facts of this case, it is my finding that the property comprised in LRV 3983 Folio 24 Plot 4375 Kyadondo Block 273 Zana Wakiso was owned by the petitioner/cross respondent, and the respondent/cross petitioner did not contribute to its construction.

Namagoma land

This land is located at Block 33 Plot 516. The petitioner pleaded and testified that he bought the land from the family business. His counsel submitted that both parties contributed to it after the solemnization of their marriage and that they are accordingly entitled to it. The respondent's evidence is that she purchased the property with Loy Tugaineyo Wamala at Uganda Shillings 30,000,000/= (thirty million). She relied on exhibit **R21** to support her case.

The sale agreement (exhibit **R19**) shows that the vendors of the said property were Sekulima Moses, Sebunya Sulaiman, and Yusuf Kalule who sold to Loy Tugaineyo Wamala and Christine Kyarimpa on 25/05/2007. Exhibit **R21** shows that Uganda Shillings 30,020,000/= (thirty million twenty thousand) was debited on the DFCU Bank joint account of Christine Kyarimpa and Loy Wamala on 28/05/2007 against cheque number 2029. This was three days from the time Loy Tugaineyo Wamala and Christine Kyarimpa signed the sale agreement (exhibit exhibit **R19**). This supports the respondent/cross petitioner's testimony that she purchased the property with Loy Tugaineyo Wamala. The petitioner adduced no evidence to support his claims that the land was bought from income from the family business. He thus failed to discharge his burden of proving what he alleged under section 101 of the Evidence Act.

I am in that connection inclined to believe the respondent's evidence that she purchased the property with Loy Tugaineyo Wamala. This property belongs to the respondent jointly with Loy Tugaineyo. It is not part of matrimonial property.

The property at Katuna and Kyoojo

The petitioner pleaded and testified that the property at Katuna Kyoojo was built by him before the marriage. The respondent's evidence is that the said properties are matrimonial properties used as their upcountry home. There is no evidence adduced by the respondent to show that this

at any one point became part of the matrimonial property. The respondent/cross petitioner failed to discharge her burden of proving what she alleged under section 101 of the Evidence Act

In that regard it is my finding that the property at Katuna and Kyoojo were individual properties owned by the petitioner/cross respondent before the parties' marriage. They do not form part of the matrimonial property.

The Fuel Business

It is the contention of the petitioner/cross respondent that he contributed to the acquisition, improvement and financing of Shell Mengo, Shell Malindi Kibuye, and Shell Bombo Road. His Counsel submitted that they were family properties by 2009 when the marriage between the petitioner/cross respondent and the respondent/cross petitioner was still subsisting.

Regarding the business of Shell Mengo, Shell Malindi Kibuye, Shell Bombo Road (fuel stations), the petitioner/cross respondent's evidence is that he got money from various banks and gave part of it to the respondent/cross petitioner to add capital to the fuel business. He testified that he gave U.Shs.46,000,000/= from his account in Equity Bank and gave it to the respondent/cross petitioner; that he gave U.Shs.35,000,000/= (thirty five million) from his account to Shell Mengo under Christine, and U.Shs. 11,000,000/= (eleven million) from his account to Equity Bank to Shell Mengo under Christine. He produced exhibits **P16 and P17** support his case.

The respondent's evidence is that she and the petitioner operated independent businesses before and after they got married. The respondent (DW1) and her father (DW2) testified that the respondent's business partners in the fuel business were initially her father (DW2) and Loy Wamala. When Loy Wamala withdrew from Shell Kawempe and Shell Malindi Wandegeya the respondent applied for it. The respondent's father DW2 testified on oath that he financed the respondent's fuel business. DW1 stated that the deposits reflected in exhibits **P14, P15, P16 and P17** were from her daily business sales which she would personally deposit or give to the petitioner to deposit on his account. She testified that she would put money on the respondent's account from her business in Shell Mengo and Shell Malindi Kibuye which would be transferred back to her account after one or two days. She testified that this was to enable the petitioner have

a functional bank account so that he could get a loan from Global Trust Bank or Equity Bank. She relied on exhibit **R32** to support her case.

Exhibit **P14** is a bank statement for the period 01/04/2009 to 21/04/2009 Global Trust Bank account number 0320000143 in the names of both parties. Exhibit **P15** is a bank statement of Global Trust Bank account number 0420000132 for the period 01/06/2009 to 31/07/2009, in the names of both parties. Exhibit **P16** is an application for funds transfer forms from Equity Bank account number 1003200415951 in the petitioner's names dated 14/09/2009 to Shell Mengo account number 010201393L700 at Standard Chartered Bank Kikuubo Branch. Exhibit **P17** is an application for funds transfer forms from Equity Bank account number 1003200415951 in the petitioner's names dated 18/09/2009 deposit slips for Global Trust Bank account number 0420000132 and Equity Bank account number 1003200415951.

Exhibits **P14, P15, P16** and **P17** show that there were various wire transfers of funds to Shell Mengo account number 010201393L700 at Standard Chartered Bank Kikuubo Branch. The same deposits are reflected in exhibit **R32** the documents collectively showing summaries of sales deposited on the petitioner's account. The dates on the deposit slips (exhibits **P14, P15, P16** and **P17**) are a day after the dates on the daily sales reflected in exhibit **R32**. This confirms the respondent's version of evidence that deposits from the respondent's sales would be deposited on the petitioner's account number 0420000132 Global Trust Bank and then be wired to Shell Mengo a day later. There is nothing in the said exhibits to show that the petitioner contributed towards the respondent's business. In that regard, the respondent's version of evidence is more believable than the version of evidence advanced by the petitioner. The petitioner/cross respondent has failed to discharge his burden of proving what he alleged under section 101 of the Evidence Act.

It is my finding therefore that the fuel business was operated by and in the names of the respondent/cross petitioner. The petitioner/cross respondent was neither a partner in the business nor did he contribute to its operation.

Liabilities

The petitioner pleaded and testified that the parties jointly contracted liabilities during their marriage. The first is U.Shs.80,000,000/= (eighty million) from Opportunity Bank contracted on

01/02/2010, the balance of which currently stands at U.Shs.79,631,483/= (seventy nine million, six hundred thirty one thousand, four hundred and eighty three). The second is U.Shs.55,000,000/= (fifty five million) from DFCU Bank contracted in December 2004, as evidenced by exhibits **P6**, **P7** and **P8**. By 21/04/2011 the loan had accumulated to U.Shs.175,994,863/= (one hundred seventy five million, nine hundred ninety four thousand, eight hundred and sixty three) as evidenced by exhibit **P10**. It is still outstanding. The third is a loan of U.Shs.42,000,000/= (forty two million) from Nile Bank (now Barclays Bank) which currently stands at U.Shs.26,256,008/= (twenty six million, two hundred fifty six thousand and eight).

The respondent's evidence is that she never took out any loan jointly with the petitioner or benefitted from the said loans. She relied on exhibits **R14**, **R44**, **R45** to support her case.

According to the testimonies of DW1, DW6 and DW9, the petitioner forged the respondent's signatures on the loan agreements with Opportunity Bank and DFCU Bank. Exhibit **P6** is a master lease agreement signed between DFCU Leasing Company (lessor/supplier) and the parties to this suit, Nelson Nuwaha and Kyarimpa Christine (lessees). The leasing facilities, as revealed in exhibits **P6**, **P7** and **P8**, were a used 10 ton truck at a financed cost of U.Shs. 55,000,000/= (fifty five million). Exhibit **R45**, a laboratory report of DW9 Ezati Samuel the handwriting expert, however, is to the effect that after comparing Kyarimpa's specimen signature and the signatures of Kyarimpa Christine (respondent) on exhibit **P6**, the specimen signatures and the signatures on exhibit **P6** were most probably not signed by one and the same writer. DW9 the author of exhibit **R45** stated during cross examination that the greater chance is that the specimen signatures and the signatures on exhibit **P6** were not signed by one and the same writer.

It is my finding therefore on basis of the adduced evidence, that the respondent was not party to the petitioner's loan obligations with DFCU Leasing Company.

The loan of Uganda Shillings 80,000,000/= (eighty million) from Opportunity Bank contracted on 01/02/2010, the balance of which currently stands at Uganda Shillings 79,631,483/= (seventy nine million, six hundred thirty one thousand four hundred and eighty three) is stated by the petitioner to be a joint loan incurred from the bank by the parties to this suit. The loan agreement,

which forms part of Exhibit **R44**, was purportedly signed between Opportunity (U) Ltd and the two parties (Nuwaha Nelson and Christine Kyarimpa) on 1st February 2010. The other document forming part of exhibit **R44**, a laboratory report prepared by DW9 a handwriting expert, however, indicates that the signature of Christine Kyarimpa (respondent/cross petitioner) was forged. In that regard this court finds for the respondent/cross petitioner that the loan with Opportunity Bank was incurred by the petitioner/cross respondent and the respondent's signature was forged.

It is my finding therefore on basis of the adduced evidence, that the respondent was not party to the petitioner's loan obligations with Opportunity Bank.

Exhibit **R10** is a copy of court documents in Civil Suit 122/2012 Land Division of the High Court filed by the respondent against Housing Finance Bank (1st defendant) and the petitioner (2nd defendant) for among other things, a declaration that the mortgage loan between the 1st defendant and the 2nd defendant was obtained without the consent of the plaintiff (respondent in this case). Exhibit **R14** shows documents and pleadings (Civil Suit 240/2010 Commercial Court) between the Stanbic Bank and the petitioner/cross respondent where the bank claims that the petitioner is indebted to it. It is also on record that the petitioner was serving a prison sentence as a civil debtor at Luzira Prison during part of this trial. The parties' testimonies reveal that the imprisonment was in connection with his indebtedness to M/S Mea Ltd. I found nothing in the said evidence to show that the respondent was party to the claims of indebtedness brought by the parties in the said suits.

Regarding the loan with Barclays Bank, there is evidence that it was put on the parties' joint account number 5800000019, being the original Nile Bank account number 447452006. DW6 Ayebazibwe Kevin, an employee of the Bank, however testified that the bank did not have the respondent's mandate to procure the loan though it was purportedly in the names of both parties. He testified during cross examination that the loan was individual though deposited on a joint account, and that such depends on the mandate given by the client. He testified that the petitioner/cross respondent individually applied for the loan. The petitioner's Counsel doubted the witness's competence to give evidence on behalf of the Bank and prayed court to order that such Bank's authorization be availed. This was done in a letter addressed to court by a Keneth Lokolong, who signed it as Senior Legal Counsel/Ag Head of Legal Department. The

petitioner's counsel submitted that it is inconceivable that money was loaded on the parties' joint account but one of them the respondent had none of it.

The application letter (exhibit **R33**) and the offer letter (exhibit **R35**) are in the names of Nelson Nuwaha (petitioner/cross respondent). The logbook (exhibit **R37**) is also in the names of Nelson Nuwaha (petitioner/cross respondent). The petitioner has failed to discharge his burden under section 101 of the Evidence Act of proving that the loan with Barclays Bank was a joint liability with the respondent/cross petitioner.

In that regard, in view of the adduced evidence, I find that the loan with Barclays Bank is not a joint liability of the petitioner and the respondent, but is rather the petitioner/cross respondent's sole liability.

Issue 6: Who is entitled to custody of the issue to the marriage?

Section 3 of the Children Act cap 59 provides that the welfare principle and the children's rights set out in the First Schedule shall be the guiding principles in making any decision based on the said Act. The welfare principle includes the ascertainable wishes and feelings of the child in light of his/her age and understanding; the child's physical, emotional and educational needs; the likely effects of any changes in the child's circumstances; any harm the child has suffered or is at the risk of suffering; and, where relevant, the capacity of the child's parents or guardians or others involved in meeting the child's needs. Section 4 of the same Act provides that a child is entitled to live with her parents or guardians, but where a competent authority determines in accordance with the laws and procedures applicable that it is in the best interests of the child to separate the child from the parents, the best substitute care available shall be provided for the child.

On custody of the child Article 34 of the Constitution and section 3 of the Children Act provides that the best interests of the child shall be the primary consideration in all matters concerning children. The said principles are also embodied in the United Nations Convention on The Rights of The Child 1989 which Uganda ratified, and other international instruments concerning children. Also see **Re M an Infant Civil Appeal No 22/1995**, Supreme Court. It was held by the Court of Appeal in **Otto Methodius Pacific V Edlyne Sabrina Civil Appeal No. 88/2013**, unreported, that sole custody should only be granted where joint custody cannot work.

The petitioner testified that he does not want the respondent/cross petitioner to stay with his child because she got a child with another man; that he wants to take care of the child; that from the time they separated with the respondent, he has seen Trevor four times from court; that the respondent/cross petitioner refused him to see the child; that his younger sister will help him take care of the child; and that he will get a houseboy to look after the child.

The respondent testified that the child Trevor is currently staying with her and that she has been meeting all his basic necessities in life including his educational needs. She stated during cross examination that she wants to keep Trevor because she is responsible and a better parent than the petitioner. She acknowledged that Trevor will always have one dad who is the petitioner. In re examination she testified that the petitioner has never visited the child or taken care of him from the time he stopped living with them.

The child, Nuwaha Trevor, after being found to be of understanding age by this court, was called as a court's witness. This was in line with clause 3 of the first schedule to the Children Act which provides, on the welfare principle, that court shall have regard to the ascertainable wishes of the child, in light of his/her age or understanding, when determining any question with respect to the upbringing of a child. The child testified on oath that he preferred staying with his mother who pays for his school fees and medical services; that his father has never paid anything for him; that he would not allow his father to visit him but that he can change his mind if the law allows it.

The adduced evidence shows that both parents are interested in the custody of the child. There is also evidence that the petitioner has, since the parties started living apart in 2009, only seen the child four times at court premises. He has never visited the child at her mother's home where he stays. He himself indicated in his testimony that he was heavily indebted to various debtors. The record shows that during part of this trial, he was serving a prison sentence as a civil debtor. Even if his claims of the respondent refusing to visit him at home were correct, the circumstances of this case show that the child was attending school. The petitioner could have exploited that opportunity and visited the child at school. There is also evidence that he has not been providing for the child in terms of his education, healthcare and other necessities during their period of separation. His evidence is that he will let his younger sister to take care of the child and that he will employ a houseboy to do that. The child himself insisted in his testimony

that he preferred staying with his mother and would not allow his father to visit him. It was only after further probing by this court that he said he can change his mind if the law allows it.

It is noted from the pleadings, the sworn testimonies and the submissions and prayers of each party that the other party be denied custody of the child based on that party's conduct or matrimonial wrongs. The petitioner/cross respondent does not want the respondent/cross petitioner to have custody of the child due to her having committed adultery. The respondent/cross petitioner does not want petitioner/cross respondent to have custody of the child on claims that he was cruel or abusive to her. The issue of custody of a child, as set out in the Constitution and the Children Act, including international Conventions ratified by Uganda, is not about which spouse is a better parent, but rather what is in the best interests of the child, or the welfare principle.

I have carefully addressed the foregoing provisions, weighed the *pros* and *cons* of issuing sole custody as against joint custody, addressed the facts of this case, including the demeanour of the parties to this suit during trial and the child's opinion or preference. It is my considered opinion that it is in the best interests of the child Trevor Nuwaha that his custody remains with the respondent/cross petitioner who has been caring for him. The petitioner however, as the other parent to the child with rights to access and bring up his child as set out in the cited laws, should have visitation rights and maintenance duties over the child to ensure reasonable access to his son as well as fulfillment of his duties as a parent of the child.

Issue 7: What remedies are available to each party?

The pleadings show that each of the parties prayed this court to dissolve the marriage. The petitioner seeks the marriage to be resolved based on the respondent/cross petitioner's adultery. The respondent/cross petitioner seeks the marriage to be resolved on basis of the petitioner/cross respondent's cruelty.

It is already a finding of this court that the respondent/cross petitioner's committing adultery while still married to the petitioner/cross respondent is not in dispute. This is based on the agreed fact during the scheduling of this case that the respondent/cross petitioner is the biological mother of the child she conceived with another man after separation from the petitioner/cross respondent. This factor was confirmed by the respondent/cross petitioner in her testimony to

court. There is no evidence of connivance, collusion or condonation of the adultery by the petitioner. On that ground alone I would grant a decree *nisi* dissolving the marriage on the grounds of the respondent's adultery. Besides, the adduced evidence shows the marriage has irretrievably broken down and the parties have since October 2009 been living separate lives with the respondent going on to conceive a child with another man.

On cruelty of the petitioner/cross respondent against the respondent/cross petitioner, this court has found that the respondent/cross petitioner has failed to prove her allegations of cruelty to the required standards.

On custody of Nuwaha Trevor the issue to the marriage, this court has made a finding that it is in the best interests of the child Trevor Nuwaha that his custody remains with the respondent/cross petitioner, but that the petitioner/cross respondent as the other parent should be entitled to access his child by being accorded visitation rights. He is also obliged under the Constitution and the Children Act to maintain the child as a parent. In that spirit, this court finds it appropriate to order that the party who is not having custody of the child contributes to his maintenance within his means.

The prayer for visitation rights was not made by any party to this suit. However, section 33 of the Judicature Act empowers this court to grant absolutely or on such terms and conditions as it thinks just all such remedies as any of the parties to a cause or matter is entitled to in respect of a legal or equitable claim properly before it, so that all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings avoided. It is my opinion that the parent who is not having custody of the child should be granted visitation rights of his child at reasonable times.

On the matrimonial home at Zana, this court found that the respondent/cross petitioner has not adduced cogent and credible evidence that she contributed to the construction of the house at Zana as to be entitled to a share of the same within the principles set out in the Supreme Court decision in **Julius Rwabinumi V Hope Bahimbisomwe**. In any case, even if this court had found the respondent/cross petitioner to be entitled to a share in the matrimonial home, it would have ordered the settlement of her share in the home for the benefit of the respondent and the issue to the marriage since the marriage is dissolved on account of the respondent/cross

petitioner's adultery. This is based on section 26 of the Divorce Act which, following the decision in **Uganda Association of Women Lawyers & Others V Attorney General Constitutional Petition No.2/2013**, now applies to both spouses regardless of sex.

On the other properties this court finds that they were owned by the parties as individuals and there is no property jointly owned or liability jointly shared.

On costs, in view of the animosity exhibited by the parties against each other during the trial, and to encourage future cooperation in the upbringing of the child Trevor Nuwaha, and since some aspects of the findings favoured each party, each party should bear their own costs. The cross petition stands dismissed.

It is accordingly ordered and or declared as follows:-

- i) A decree *nisi* is issued dissolving the marriage between the petitioner/cross respondent and the respondent/cross petitioner.
- ii) The petitioner/cross respondent has no interest in the respondent/cross petitioner's properties in Namirembe Hill Block 1 Plot 972 Kampala, Namagoma land, and the fuel business.
- iii) Custody of the child Nuwaha Trevor is granted to the respondent/cross petitioner.
- iv) The petitioner/cross respondent shall have visitation rights over the child Nuwaha Trevor at reasonable times.
- v) The petitioner/cross respondent shall, within his means, contribute to the maintenance of the child.
- vi) The property comprised in LRV 3983 Folio 24 Plot 4375 Kyadondo Zana Wakiso was the matrimonial home but the respondent/cross petitioner did not contribute to its construction.
- vii) Any caveats lodged by the petitioner/cross respondent on the respondent/cross petitioner's properties mentioned in this suit should be vacated.
- viii) Each party will bear their costs of the petition.

I so order.

Dated at Kampala this 08th day of October 2015.

Percy Night Tuhaise

Judge.