

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
FAMILY DIVISION
DIVORCE CAUSE NO. 43 OF 2012

TIBENDERANA JAMES..... PETITIONER

VERSUS

REEM AL - TORKI..... RESPONDENT

BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

JUDGMENT

This is a petition for divorce filed by the petitioner against the respondent for dissolution of the marriage between the petitioner and the respondent. The initial prayer on custody was that custody of the child of the marriage be granted to the respondent with visitation rights to the petitioner' plus any further relief in the premises. However this was later amended to read that the petitioner be granted custody of the child to the marriage.

The petitioner's case is that he was lawfully married to the respondent before the Registrar of Marriages at Kampala under the Marriage Act cap 21. After the marriage, the petitioner lived and cohabited with the respondent in Kampala, Uganda. They had one issue, Nasser Yusuf Kananura Al Turki – Tibenderana, born on 2nd January 2007. The respondent deserted the petitioner without reasonable excuse, consequent to which the marriage irretrievably broke down with no likelihood of the parties living together as husband and wife.

When the matter was called for hearing on 08/10/2015, the petitioner's counsel prayed to proceed *ex parte*, on grounds that the respondent was served through substituted service as ordered by court, but she failed to attend after previous attempts to serve the respondent in the ordinary way and out of jurisdiction failed. This court allowed the petitioner's counsel's prayer to proceed *ex parte* after noting that the affidavit of service on record revealed that substituted service was effected by placing an advertisement of the hearing notice in the Daily Monitor

newspaper of 21/08/15. The petitioner filed his sworn witness statement within time schedules set by this court, after which his counsel filed written submissions.

The law, however, is that whether a suit proceeds *ex parte* or not, the burden on the part of the plaintiff to prove his/her case to the required standards remains, as was held in **Yoswa Kityo V Eriya Kaddu [1982] HCB 58**. Regarding the burden of proof, it was stated in **Kaga Limited V Haidaya Nantongo HCT -00 – CC – CS -0626/2014**, Bamwine J, as he then was, that:-

“In law, a fact is said to be proved when court is satisfied as to its truth. The general rule is that the burden of proof rests on the party who asserts the affirmative of the issue or question in dispute. When the party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof: that is, his allegation is presumed to be true, unless his opponent adduces evidence to rebut the presumption.”

Learned Counsel Enoth Mugabi framed two issues in his written submissions, but I added one issue on custody, so that this case is fully disposed of, that is:-

1. Whether or not the marriage between the petitioner and the respondent should be dissolved?
2. Who is entitled to custody of the issue to the marriage?
3. What remedies are open to the parties?

Issue 1: Whether or not the marriage between the petitioner and the respondent should be dissolved?

Section 4 of the Divorce Act which sets out separate grounds for divorce for men and women was declared unconstitutional by the Constitutional Court in **Uganda Association of Women Lawyers (FIDA) & 5 Others V Attorney General Constitutional Petition No 2/2003**. This was on basis of Article 31(1)(b) of the Constitution which provides that a man and a woman are entitled to equal rights in marriage, during marriage and at its dissolution. This, in essence restated the constitutional prohibition of discrimination on the basis of sex enshrined in Articles 21 and 33 of the same Constitution. The same court also held that all the grounds of divorce mentioned in section 4(1) and (2) of the Divorce Act are available to both parties to the marriage. In **Dr. Specioza Wandira Naigaga Kazibwe V Eng. Charles Nsubuga Kazibwe Divorce**

Cause No. 03/2003, Kibuuka Musoke J observed that the position of the law, after the decision in *Uganda Association of Women Lawyers (FIDA) & 5 Others V Attorney General Constitutional Petition No 2/2003*, appears to be that each of the grounds for divorce specified in section 4 of the Divorce Act is available equally to both the husband and the wife. Courts have also been addressing the facts in totality to determine whether a marriage has irretrievably broken down. See *Julius Chama V Specioza Rwalinda Mbabazi Divorce Cause No. 25/2011*, Kainamura J.

In the instant case the petitioner is basing his petition for dissolution of the marriage on the respondent's desertion of the petitioner for over two years without reasonable cause. **Black's Law Dictionary 9th Edition 2009, page 211**, desertion is defined as:-

“The willful and unjustified abandonment of a person's duties or obligations, especially to military service or to a spouse or family. In Family Law the five elements of spousal desertion are 1) a cessation of cohabitation, 2) the lapse of a statutory period, 3) an intention to abandon, 4) a lack of consent from the abandoned spouse, and 5) a lack of spousal misconduct that might justify the abandonment.”

In **Lang V Lang (1954) 3 ALL ER 571**, cited at page 3 of **Dr. Joseph Erume V Deborah Kyomugisha Divorce Cause No 09/2014**, it was stated that:-

*“To establish desertion two things must be proved: first certain outward and physical conduct – the factum of desertion and secondly the ‘**animus deserendi**’ – the intention underlying this conduct to bring the matrimonial union to an end. In ordinary desertion the factum is simple: it is the act of the absconding party in leaving the matrimonial home. The contest in such a case will almost entirely be as to ‘**animus**’. Was the intention of the party leaving the home to break it up for good, or something short of, or different from that.”* (emphasis mine)

The petitioner states in his sworn witness statement that he was married to the respondent on 09/01/2006 before the Registrar of Marriages at Kampala. The two lived and cohabited in Kampala. They have one issue, Nasser Yusuf Kananura Al Torki – Tibenderana, born on 2nd January 2007. After getting the child, the respondent deserted the petitioner without reasonable excuse. That they travelled between countries at the petitioner's expense. The petitioner

encouraged the respondent to relocate to Uganda once she obtained her citizenship, but the respondent gave excuses why it was not feasible to return until late 2011.

The petitioner also stated on oath that the relocation of the respondent did not solve anything since she requested for and was granted an Islamic divorce because of the complications she was experiencing with the Government of Saudi Arabia; that from then onwards there was no marriage as he and the respondent lived separately; that the petitioner had a problem of erectile dysfunction and he tried herbal remedies, which the respondent was aware of; that since there was no longer a religious basis for the marriage following the Islamic divorce, he could not consummate the marriage; that he was the sole provider for the respondent and their son, and he availed the respondent reasonable luxury including a Toyota Rav 4 car, a rented three bedroom house in Kololo, a driver, a gardener, a guard, a houseboy and a chef; that since the marriage he had to provide for the respondent to live in the United Kingdom (UK), for the son to receive excellent education, and for the family to have a relatively high standard of living, which required him to work hard to excel at his job so that he earns promotions to increase his income; and that he had to travel frequently from Uganda to the UK to visit the respondent and their son.

It is also the petitioner's evidence that the respondent made it difficult for him to live comfortably at home by complaining about one thing or the other; that she assaulted/battered him but he did not report such matters to the police to save his reputation; that the respondent kept him in *communicando* on matters concerning their child or his welfare and he is unable to enforce his parental rights on the child; and that the marriage between himself and the respondent has irretrievably broken down.

The petitioner attached various documents to his sworn witness statement to prove his case. The documents included a copy of the parties' marriage certificate (annexture A); copies of the tenancy agreement and landlord's acknowledgement of rent payments showing that the petitioner was renting and meeting the rent expenses of the house where the family resides; copies of the invoices, payment receipts and enrolment confirmation in respect of the child Nasser Yusuf Al Torki Tibenderana showing that the petitioner was paying the fees for the child, correspondence showing that the petitioner made inquiries regarding the whereabouts of the child to no avail, the child's birth card, the islam marriage certificate of 23/04/2006, the Islamic divorce certificate of

06/09/2012; and an acknowledgement of house keys for the family residence being received from the respondent's lawyers to the petitioner's lawyers.

The petitioner's counsel submitted for the petitioner that the respondent had shown an outward and visible act of separation between the parties, compounded by grant of the Islamic divorce on 06/09/2012, plus reluctance to relocate and live in Uganda with the petitioner. He contended that this was a clear manifestation of the respondent's intention to stay permanently separate from the petitioner.

In **Habre International Co Ltd V Ebrahim Alakaria Kassam & Others SCCA 4/1999** the Supreme Court held, *inter alia*, that:-

“whenever the opponent has declined to avail himself of the opportunity to put his essential and material case, in cross examination, it must follow that he believed that the testimony given could not be disputed at all”.

The petitioner has adduced uncontroverted evidence that the respondent deserted him for over two years without reasonable cause in that she unwillingly relocated to Uganda on the encouragement by the petitioner but requested for an Islamic divorce soon after on account of complications she was experiencing with the Government of Saudi Arabia. The Islamic divorce was granted on 06/09/2012, presumably dissolving the Islamic marriage contracted on 23/04/2006. There is also evidence that the respondent is no longer traceable, and has made no efforts to return to her husband.

This, in my opinion, infers that not only has the respondent withdrawn from the company of the petitioner or separated from him, but also intends to stay away permanently, hence having *animus deserendi* on her part. There is nothing on record or in the adduced evidence to show that the respondent's leaving and staying away from the petitioner was reasonable or excusable, or that the petitioner had consented or acquiesced to it. There is also uncontroverted evidence that the parties are no longer living together.

Thus, looking at the facts of this case in totality, the respondent's acts of desertion which include her leaving the country with the issue to the marriage and not returning to the company of her husband, lead to my finding that the respondent has deserted the petitioner for more than two

years without lawful excuse, and that the marriage between the petitioner and the respondent has irretrievably broken down.

Issue 2: Who is entitled to custody of the issue to the marriage?

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 cardinal principle enshrined in the Constitution and the Children Act is the welfare of the child. 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 the child's needs. Section 4 of the Children Act also 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. The same principles are also embodied in the United Nations Convention on The Rights of The Child 1989 and other international instruments concerning children which Uganda ratified.

In this case, there is undisputed evidence on oath that the petitioner was the sole provider for the respondent and their son. The child is still a minor, having been born on 2nd January 2007. It is in his best interests, and for his welfare for him to stay with his father for he is unable to enforce his parental rights on the child who was removed from him by the respondent.

Issue 3: What remedies are open to the parties?

The petitioner's case has been subsequently proved before me to the required standards by the petitioner. This is in regard to all the aspects of the petition, specifically on the dissolution of the marriage and on custody of the issue to the marriage. I am satisfied that the petitioner has proved his claim against the respondent to the required standards on all the prayers. He would therefore be entitled to the remedy of having his marriage with the petitioner dissolved, and to the custody of the child to the marriage.

In the premises, on the uncontroverted evidence adduced by the petitioner, I find for the petitioner. Accordingly, judgment is entered as prayed against the respondent for the following orders:-

- i) A decree *nisi* is granted for the dissolution of the marriage between the petitioner and the respondent.
- ii) The petitioner is granted custody of Nasser Yusuf Kananura Al Torki – Tibenderana, the issue of the marriage.
- iii) Costs of the petition are awarded to the petitioner.

Dated at Kampala this 03rd day of December 2015.

Percy Night Tuhaise

Judge.