

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**  
**CIVIL APPEAL NO. 0014 OF 2015**

**(Arising from FPT – 00 – CV – DC – 001 of 2009)**

**KENNETH MBOIJANA.....APPELLANT**

**VERSUS**

**MONICA ABESIGAMUKAMA.....RESPONDENT**

**BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO.ANTHONY OJOK, JUDGE**

**Judgment**

This is appeal against the decision of His Worship Michael Bbosa Magistrate Grade1 at Fort Portal delivered on 28/05/2015.

**Background**

The Respondent/Petitioner in the instant case petitioned for divorce from the Appellant on 30<sup>th</sup>/1/2009 and prayed for a decree;

1. That the marriage between the petitioner and the Respondent be dissolved.
2. That the Petitioner be awarded alimony.
3. That the Respondent pays costs of and incidental to the petition.
4. That Court be pleased to order that the house at Nsoro, Fort Portal be taken by the Petitioner.

The Respondent/Appellant on the other hand in reply to the petition denied the contents there to and prayed that;

1. The marriage between the Petitioner and the Respondent be dissolved.
2. That permanent alimony be granted.
3. That the land and house at Nsoro, Fort Portal be granted to the Respondent.
4. That costs be provided.

It was agreed that there was a customary marriage entered into between the Petitioner and the Respondent/Appellant in 1998. That the parties have no issues together. That, their matrimonial home, is at Nsoro in Fort Portal. That, the Parties, had not been sharing a bed for some time.

**Issues raised were;**

1. What form of marriage did the parties enter into?
2. Whether there are grounds for dissolution of the marriage?
3. Whether there has been any connivance, collusion or condonation?

4. What reliefs are available to the parties?

In resolving the issues;

The first issue the trial Magistrate concluded that the parties were customarily married in 1998.

The second issue – grounds for dissolution of the marriage were found to be adultery and cruelty.

The third issue – no connivance, collusion or condition by the parties was found.

The fourth issue – a decree nisi was issued for the dissolution of the marriage. The following orders were made in regard to the property;

- a. The Petitioner to pay the Respondent/Appellant UGX 15,000,000/= being half of the value of the house and plot within 6 months and the Respondent/Appellant relinquish any claim in the house and plot.
- b. That in the event the Petitioner defaults in effecting the terms in (a) above, the Respondent/Appellant shall exercise an option to pay the Petitioner UGX 15,000,000/=:, and possess/own the house within 3 months from the date of default.
- c. In the event both parties fail to meet the terms in (a) and (b) above, the house and plot shall be sold and proceeds shared out equally.
- d. Petitioner was awarded costs.

Note however need be made that after the issuance of the decree nisi the Petitioner deposited in Court money covering the half of the Respondent's/Appellant's share.

The Appellant being dissatisfied with this decision lodged an appeal whose grounds were;

1. That the learned trial Magistrate erred in law in holding that adultery in a customary marriage constitutes a ground for divorce.
2. That the learned trial Magistrate erred in law and fact in holding that there were any grounds of cruelty.
3. That the learned trial Magistrate erred in law in holding that there was no condonation of the alleged adultery.
4. That the learned trial Magistrate erred in law in making the orders he did before a decree absolute had been made.

The Appellant abandoned the first three grounds and argued only the fourth ground. The appeal was allowed and the division of property and costs were set aside. That the trial Magistrate was in error when he ordered for sharing of the property before the decree absolute was issued. That, as regards the value of the property, the parties were to obtain the current market value of the property and that the value as given by the Respondent may not have been the actual value. As for the costs, that the instant case was one that did not necessitate an award of costs.

The Respondent then by Notice of Motion under **Section 37** of the Divorce Act, **Order 52 Rules 1-3** of the Civil Procedure Rules and **Section 98** of the Civil Procedure Act made an application for orders that;

1. The decree nisi granted by Court on 26<sup>th</sup> November 2009 be made absolute.
2. The property acquired during the marriage of the parties be shared equitably.
3. Costs of the application.

The trial Magistrate in his opinion found that the land in issue was purchased by the Applicant/Respondent and the structure put up by her with some help from the Respondent/Appellant. The property should be divided in the ratio of 7:3 that is 70% for the Applicant/Respondent and 30% to the Respondent/Appellant.

The trial Magistrate gave justification for his decision as putting into consideration inter alia the fact that the Respondent/Appellant had been renting since he left the house as well as the developments made on the property by the Applicant/Respondent as evidenced by the annexures on the application. That the parties may obtain a valuer in respect of the property to ascertain each other's shares. The decree nisi was made absolute and each party to bear its own costs.

In ascertaining the actual value of the property in issue, a Government valuer did the valuation however; Court discovered that the parties were not party to the consent but rather it was made by only the advocates. The Government valuer put the value of the property at UGX 45,000,000/=. The Respondent disagreed with this value since he was not part of the valuation process and Court allowed him to engage an independent valuer. This was done on 7<sup>th</sup> January 2015 by Katuramu & Co. and a report which put the value of the property at UGX 80,000,000/= was filed in Court.

Court observed that the two reports had a wide gap of disparity and was prompted to visit the locus to make its own conclusion with the guidance of both reports. Court on visiting locus with the lawyers and the parties found;

1. A residential house – plastered (shell in nature) – no ceiling and generally incomplete but habitable. 3 bedrooms, 1 sitting room, 1 dining room, bathroom, kitchen and store installed with power with part of the floor incomplete.
2. The land accommodating the residential house was approximately 0.290 hectares which is 0.718 of an acre hence slightly more than an acre.

Court valued the property in issue at UGX 52,000,000/=. the shell house at UGX 19,000,000/= and the land/kibanja at UGX 33,000,000/=. Thus, the parties were to divide the property at a ratio of 7:3 as provided by Court.

The Appellant was dissatisfied with this decision lodged this appeal whose grounds are;

1. That the learned Trial Magistrate misdirected himself when he ordered the distribution of the matrimonial property at a ratio of 7:3 (70% and 30%) for the Petitioner/Respondent herein and the Appellant respectively.

2. That the Trial Magistrate misdirected when he found the Petitioner/Respondent herein to have bought the said matrimonial property alone on the basis of a forged sale agreement neglecting that of the Appellant.
3. That the Trial Magistrate misdirected himself when he neglected to consider the valuation report carried out by the Appellant's valuer having been permitted by Court to do the same and thus based the determination of the value of the matrimonial property on his own opinion leading to the wrong decision on the same.
4. That the Trial Magistrate misdirected himself when he ordered that the money that had been deposited in Court on basis of orders of the decree nisi by the Petitioner/Respondent herein be paid to the Respondent/Appellant herein as his 30% on the matrimonial property.

The Appellant was unrepresented, Counsel Bwiruka Richard represented the Respondent.

Counsel for the Respondent objected to the appeal for being filed out of time. That, the appeal, should have been lodged from the decree extracted on 16<sup>th</sup> September 2014 and not the ruling made on 28<sup>th</sup>/5/2015.

Counsel submitted that both parties agreed to use a Government Valuer to assess the value of their property. That this was done and the Report was filed thereto and besides under **Order 3 Rule 1** of the Civil Procedure Rules, it is provided that parties can appear in person or by advocate so whatever the advocates does binds his client. That Court also went and valued the property increasing it to UGX 52,000,000/= from UGX 45,000,000/= of the Government Valuer.

From the Court record the appeal was filed on time and in compliance with the 30 days legal provision. The appeal is against the ruling that gave rise to the value of the property to be applied to the 7:3 ratios. This ruling was made on 28<sup>th</sup>/5/2015 and appeal was lodged on 17<sup>th</sup>/6/2015. This was within 30 days as provided by the law.

The property in issue was valued by a Government valuer who I would be inclined to believe as being neutral, however, in the interest of justice Court allowed the Appellant to indulge an independent valuer. The independent valuer's report had the property valued at almost twice as much as that of the Government valuer being UGX 80,000,000/=. Court then visited locus to reconcile the two Reports and ascertained that the matrimonial property is valued at 52,000,000/= which it ordered that this be applied to the 7:3 ratio.

Note should be taken that the Respondent had been making improvements on the said property and it would only be fair that these be excluded in the portion that the Appellant will be getting since they were not part of his sweat. From the evidence as adduced in the lower Court, it was clearly stated that the Respondent is the one that purchased the land which fact was corroborated by her witnesses and even one of the witnesses to the Appellant. The sale agreement as adduced by the Appellant was even denied by one his witnesses; the LC1 Chairperson whom he purported had signed the same.

The Respondent was seen to have been the only one with gainful employment and it is only logical that she is the one that could afford to develop the matrimonial property. However, in the interest of justice and fairness, for the effort that the Appellant put in he was given a share of 30% consideration being made to the developments that were made after the decree nisi was issued. The trial Magistrate also considered the fact that the Appellant had been spending on rent from the time he left his matrimonial home.

It is therefore my humble opinion this appeal is frivolous, vexatious, ill intended, a waste of Court's time and an abuse of the Court process. The Appellant should not be greedy and claim that which he did not work for but rather be content with what is fairly and equitably being awarded to him in all fairness and in the interest of justice. Therefore, the decision of the lower Court is upheld and the parties should therefore divide the property at a ratio of 7:3 and the value of UGX 52,000,000/=.

In the case of **Prince J. D. C Mpuga Rukidi versus Prince Solomon Kioro and Others, Civil Appeal No. 15 of 1994 (S.C)**, it was held that;

*“That however, where Court is of the view that owing to the nature of the suit, the promotion of harmony and reconciliation is necessary, it may order each party to bear his/her own costs.”*

The appeal is dismissed. In the circumstances each party shall bear its own costs. This is to alleviate the Appellant from the extra financial burden and promote harmony between the two parties.

Right of Appeal explained.

**All in the presence of;**

1. The parties
2. James Court clerk

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**OYUKO. ANTHONY OJOK**

**JUDGE**

**2/9/16**