

THE REPUBLIC OF UGANDA

DIVORCE CAUSE NO. 60/2017

***ARISING FROM THE CHIEF MAGISTRATES COURT OF NAKAWA DIVORCE CAUSE
NO 007/2014***

AND

MISCELLANEOUS APPLICATION NO 2015 AT NAKAWA

DR JOSEPHINE NAKAKANDE.....APPLICANT/PETITIONER

VERSUS

JOSEPH BALIKUDEMBE.....RESPONDENT

BEFORE HON LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This matter was referred to this court by the Chief Magistrate of Nakawa Chief Magistrates Court for purposes of revision. This was under cover of letter addressed to the Deputy Registrar of this Court dated 14/02/2017.

The Chief Magistrate contends that the Magistrate Grade 1 dismissed the above divorce cause on grounds of lack of jurisdiction to dissolve a customary marriage, and that the said position is an error in law.

When I perused the court record I established that the petitioner filed the divorce petition against the respondent on 27/02/2014 at the Nakawa Chief Magistrates Court. The grounds were desertion, adultery, and cruelty. In addition to seeking dissolution of the marriage the petition sought a distribution of the property acquired during marriage.

The respondent filed a reply to the petition on 26/05/2014. He stated in his reply that the marriage had already been dissolved customarily on 07/07/2012. The matter was heard by learned trial magistrate Grade 1 Her Worship Phionah Birungi.

On 27/03/2015 the respondent indicated to court that he had no problem in dissolving the marriage because it had already turned “stale”. However the issue appeared to be on how the property was to be shared between the two parties. The trial magistrate ordered that since the parties had consented, a *decree nisi* should issue accordingly. On sharing of property, she ordered the parties to engage a Government Valuer to establish the true value of the land upon which the rate of compensation can be agreed.

The matter was adjourned to 27/03/2015 for mention. On the said date, the petitioner's counsel reported to court that the valuation report is not ready upon which the trial magistrate adjourned the matter to 06/05/2015.

On 06/05/2015 both parties attended court. The petitioner's counsel was not in court. The respondent's counsel informed court that he had matters to raise but he requested court to adjourn the matter so that he is able to raise the issues in the presence of the petitioner's counsel. The trial magistrate did not adjourn the matter but instead, on her own motion, dismissed the case with no order as to costs, stating that dissolution of customary marriages should be handled in accordance with customs of the parties. She stated that:-

“The dissolution of a customary marriage is negotiable in accordance with the customs and rites observed among the ethnic group of one of both parties to the marriage.”

The trial magistrate then signed an order dated 06/05/2015 dismissing the divorce petition “for lack of jurisdiction.” On 01/06/2016 she wrote on the *decree nisi* extracted by the petitioner's counsel the following words;

“Seen. Matter was dismissed. Order as to decree nisi not relevant.”

She did not sign the extracted *decree nisi*.

The petitioner then filed Miscellaneous Application No. 55/2015. The application sought to have the ruling and the order of the trial magistrate that dismissed Divorce Cause No. 007/2014 to be reviewed and set aside; for a reinstatement of the Divorce Cause for the determination of the matrimonial property; and reinstatement of the *decree nisi*.

The respondent never filed a reply to the application but the applicant's counsel filed written submissions on the application. The application was to be heard by a different magistrate Her Worship Kabugho who, however, had reservations and forwarded the matter to the Chief Magistrate who in turn forwarded it to this court for revision.

The issue to contend with in this matter is whether this is a proper case for revision.

Section 83 of the Civil Procedure Act cap 71 empowers the High Court to call for the record of any case determined by any magistrate's court if that court appears to have:-

- a) exercised a jurisdiction not vested in the law;
- b) failed to exercise a jurisdiction so vested; or
- c) acted in the exercise of its jurisdiction illegally or with material irregularity or injustice.

The High Court may in such circumstances revise the case and may make such order in it as it thinks fit. However no such power or revision is to be exercised unless the parties are first given an opportunity to be heard, or where, from lapse of time or other cause, the exercise of that power would involve a serious hardship to any person.

The trial magistrate stated that the dissolution of a customary marriage is negotiable in accordance with the customs and rites observed among the ethnic group of one of both parties to the marriage. While this may be a correct position of the law, it does not bar courts from dissolving customary marriages when those cases are filed in court. Courts are vested with jurisdiction to dissolve customary marriages. See **Aiiya V Aiiya Divorce Cause No 08/1973 Unreported; Negulu Milly Eva V Dr. Seruga Solomon Civil Appeal No 103/2013.**

In the instant case the learned trial Magistrate Grade 1 erred in law when she stated that she lacked jurisdiction to dissolve a customary marriage.

Secondly, the Magistrate erred in law when, after issuing a *decree nisi* for dissolution of the marriage, she proceeded to dismiss the case. After the issuance of the *decree nisi* which was based on both parties' indicating they were not opposed to the dissolution of the marriage, the next step was to resolve the remaining issue of distribution of the matrimonial property. Indeed the learned trial magistrate had correctly requested the parties to have the property to be valued by a Government Valuer to enable a fair assessment of the property before distribution. The same court would then issue a *Decree Absolute* six months after the issuance of the *decree nisi*, on being moved by any party.

The learned trial magistrate's change of heart to dismiss the case after issuing a *decree nisi* was an irregularity which calls for an order of revision by this court.

In the premises, the order of the trial magistrate dismissing the case after issuance of a *decree nisi* is hereby set aside. Divorce Cause No. 007/2014 is reinstated. The *decree nisi* issued on 06/05/2017 in respect of Divorce Cause No. 007/2014 is reinstated. Divorce Cause No. 007/2014 should be fixed for hearing by the trial court to resolve the outstanding issue of distribution of the matrimonial property which had stopped at procuring a Government Valuer to first value the property. Costs will be in the cause. I so order.

Dated at Kampala this 05th day of October 2017.

Percy Night Tuhaise

Judge.

