

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISC. APPLICATION NO. 443A OF 2018**

**(ARISING FROM CIVIL APPEAL NO. 33 OF 2016 AND DIVORCE
CAUSE NO. 11 OF 2016 CHIEF MAGISTRATES COURT OF KAMPALA
NAKAWA)**

**EDWARD TIBAHWERWAYO APPLICANT
VERSUS**

DAISY NAMULI RESPONDENT

RULING

BEFORE: HON. LADY JUSTICE KETRAH KITARIISIBWA KATUNGUKA

Introduction

[1] This Application is brought by Edward Tibahwerayo under **Sections 2, 4, 9 and 10 of the Domestic Violence Act 2010 and S.33 of the Judicature Act**, seeking the grant of a protection order as against the respondent.

[2] The grounds for this application are set out in the affidavit of the Applicant, Edward Tibahwerayo, and are briefly that: the applicant and respondent have been divorced since September 2016; the applicant and the respondent continue to live in the same house which has led to the emotional and psychological breakdown of the applicant and which has created a hostile environment thereby inflicting psychological violence to the applicant.

[3] The above grounds were disputed by the respondent who filed an affidavit in reply.

Representation

The Applicant is represented by Counsel Robinah Kyamuhangire of M/S Nanyombi, Kyamuhangire Advocates; while the Respondent is represented by Counsel John F. Ssengooba of M/S Ssengooba & Co. Advocates.

5 The case

[4] The applicant and the respondent were divorced in September 2016. Prior to the divorce, the respondent deserted the matrimonial home in Bugolobi and only returned to that home upon receiving the divorce petition. The applicant then applied for a restraint order which was granted directing the applicant to
10 move to their other house in Mbuya; in spite of the court order, the respondent continued to follow the applicant at the Mbuya home and harassed him until he left Mbuya and moved back to the Bugolobi home. The applicant continues to live in Bugolobi together with the respondent in an uncertain environment which has become stressful and psychologically draining to him and now prays
15 that a protection order be issued and the respondent vacates the Bugolobi house and returns to where she stayed prior to the divorce.

The issues for determination are;

1. Whether this court has jurisdiction to entertain this matter.
2. Whether the application should be granted.

20 Resolution.

The position of the law.

[5] Section 2 of the Domestic Violence Act states that court means a magistrates court, local council court or a family and children court. S. 9(1) and (2) and S.10(1) provide for jurisdiction in matters of domestic violence and in the
25 issuance of protection orders to the effect that such matters and applications

may be heard and determined by the Magistrates Court. S. 17(1) and (2) provides for jurisdiction of the family and children court and states that a family and children court may hear and determine a matter of domestic violence, whether or not it involves a child and may also issue a protection order. The
5 Family and Children Court under S.13 (2) of the Children Act is one presided over by a magistrate not below the grade of grade II magistrate.

From the above provisions, it is clear that matters of domestic violence and applications for protection orders as in the instant case are supposed to be heard and determined by the Magistrates Court. Jurisdiction is a creature of statute
10 and court cannot confer on itself jurisdiction.

[6] However the exception to the above provisions is that High Court is vested with unlimited original jurisdiction under Article 139 of the Constitution and S. 14 of the Judicature Act. This court thus has jurisdiction to entertain this application.

15 It was submitted for the respondent that this application ought to have been heard within 48 hours as required by S. 9 (5) of the Domestic Violence Act. The application was filed on 3rd October 2018. On 5th October 2018 counsel wrote informing court that she had omitted to attach summons. By that time the 48 hours required for an application of that nature had lapsed since no summons
20 had been attached. When they were finally attached court did not deem the matter urgent any longer and gave it a later date. I shall still go ahead and resolve it.

The issue now is whether this application should be granted.

[7] Domestic Violence as defined under S.2 of the Domestic Violence Act is any
25 act or omission of a perpetrator which, inter alia, harms, injures or endangers

the health, safety, life, limb or wellbeing, whether mental or physical, of the victim or tends to do so and includes causing physical abuse, sexual abuse, emotional, verbal and psychological abuse and economic abuse.

[8] The applicant states in his affidavit that he feared for his security and could not risk living with the respondent in the same house and therefore obliged the court order in MA 11/2016 and moved to Mbuya. He further avers that the respondent followed him to Mbuya and harassed him and he thus shifted back to Bugolobi where he lives with the respondent.

The respondent in reply states that she went to the Mbuya/Kinawataka home to make improvements on the property although she avails no evidence to this effect in form of receipts for construction materials among others. The respondent avers that the applicant was a changed person when he relocated from Kinawataka and that in spite of the applicant's transgressions, she has always been good to the applicant and that she instead fears more for her life.

[9] The applicant states in his affidavit that the respondent should vacate the Bugolobi property and return to where she lived prior to the divorce proceedings.

I take note of the fact that M.A No. 11/2016 directed the applicant to move to **Mbuya if he so wished** (highlighted and underlined for emphasis). The applicant thus had the option to either remain in Bugolobi or move to Mbuya and he chose to move to Mbuya. He later moved back to Bugolobi even while claiming harassment by the respondent in Mbuya which actions are contradictory especially since he was moving to the alleged source of harassment. Counsel for the applicant cited section 2 of the Domestic Violence Act and argued that the conduct of the respondent by insisting on living with

the applicant as if they are husband and wife and her repeated exhibition of possessiveness of the Bugolobi home constitutes a serious invasion of the applicant's privacy, liberty, integrity or security, and amounts to emotional and psychological abuse and as such domestic violence.

5 [10] I find the applicant's statements contradictory and hard to believe especially as he states that he feared to live in the same house with the respondent and yet when allegedly harassed by the respondent, he moves back into the same house where the respondent resides. He does not show any evidence of how he was harassed or how his health, safety or wellbeing (mental or physical) has been
10 threatened and moreover he has lived with the respondent since 2016 to date and without any reports of abuse or fast tracking his application for a protection order. S.101 of the Evidence Act is to the effect that burden of proof is on he who alleges the existence of any fact.

I have not seen any proof of violence. While it may be appreciated that the
15 parties, having gone through divorce proceedings may not necessarily be the best of friends, the fact of violence or fear emanating from the respondent needs to be specifically proved. No evidence was called either from a neighbor, local council leadership, religious leaders or even police that there was danger or threat to the life of the applicant. Having said that however, there is no reason
20 why the parties having been divorced should live in the same house even if court has declared that they are both entitled to equal shares. Being entitled to a house except in extreme lack of alternative accommodation and mutual consent, does not demand that both parties live together especially in circumstances like these. The residence in Mbuya is still available to the respondent since she is
25 said to have lived there any way. For the peace of both parties I hereby direct that until the appeal is finally disposed the respondent shall return to Mbuya

while the applicant stays at Bugolobi not because there is domestic violence but for the peace of both parties.

The application therefore fails.

Application dismissed with costs.

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Dated this 26th day of August 2019

**KETRAH KITARIISIBWA KATUNGUKA
JUDGE**

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