

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
FAMILY DIVISION
DIVORCE CAUSE NO. 96 OF 2019

JULIET NDAGIRE NABADDA..... PETITIONER

VERSUS

CHRISTOPHER KASULE SITYA..... RESPONDENT

BEFORE: HON. LADY JUSTICE JEANNE RWAKAKOOKO

JUDGMENT

Introduction

By her petition, the Petitioner seeks;

- a) That the marriage between the Petitioner and the Respondent be dissolved and a decree nisi be granted
- b) That the Petitioner be granted custody of the minor children.
- c) That the money collected from rentals be used to pay school fees and maintenance for the children
- d) That the matrimonial home be sold off and each party takes their respective share to acquire alternative accommodation elsewhere.
- e) Any other remedy that the court may deem fit.

Background

The Petitioner and the Respondent solemnized a customary marriage in 1991 and later on entered holy marriage on 22nd October 2005 at Namirembe Diocese Church. Pictures of the traditional marriage and the marriage certificate are attached and marked 'A' and 'PEX1'. The parties begot 6 children during the subsistence of the marriage of which 2 are still minors aged about 15 and 12 years old.

During the subsistence of the marriage, the parties acquired a matrimonial home located in Kawempe Division Block 208 Plot No. 3310, a kibanja which forms part of the matrimonial home with rentals thereon, two motor vehicles and land in Luwero Block No. 619 Plot 15 in Bulemezi.

The Petitioner pleaded that cruelty, desertion and adultery on the part of the Respondent has led to the irretrievable breakdown of the marriage.



The Respondent duly put in a reply to the petition however, it should be noted that on 7th July 2022 Hon Lady Justice Alice Komuhangi Khaukha ordered that the Respondent go for a medical examination by a psychiatrist from Butabika Mental Hospital. Subsequently, a medical report for the Respondent was furnished to this court on 5th August 2022 which stated that the Respondent suffered from schizoaffective disorder but could lead a normal life as long as he continued with his medication. The report also stated that the Respondent's judgment and abstraction were intact and he had full insight into his medical condition.

Representation

At the hearing on 13th March 2023, Lutaakome Simeo appeared for the Petitioner who was in court. The Respondent and his legal counsel were absent. Prior to the hearing, the Respondent appeared for the court sessions held on 4/10/2022, 1/11/2022 and 15/12/2022 but he did not have legal representation. Court gave the Respondent opportunity to get legal representation but to no avail. At the submission of the Petitioner, court allowed the matter in to proceed exparte and the Petitioner filed written submissions.

Issues for Determination

The following issues were raised in the submissions and scheduling memorandum which will be adopted by this court with slight modifications for determination of this matter;

1. Whether the petition raises grounds for dissolution of the marriage between the Petitioner and the Respondent.
2. Whether the Petitioner caused the Respondent to desert her
3. What remedies are available to the parties

Resolution

Issue One: Whether the petition raises grounds for dissolution of the marriage between the Petitioner and the Respondent

Article 31(1) of the 1995 Constitution of Uganda provides that men and women of the age of eighteen years and above, have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution.

Section 4 of the Divorce Act provides the grounds under which a husband and wife can petition for divorce. However, our courts have pronounced themselves on the unconstitutionality of those grounds when in the case of **Uganda Association of Women Lawyers and Ors Vs. Attorney General Constitutional Petition (No. 2 of 200)** (FIDA) case it was held that the provisions of Section 4 of the Divorce Act are null and void in as far as it required women to prove many grounds for divorce as opposed to men who were required to prove only one. The court considered this as discrimination on the basis of sex and in violation of the



equality provisions under the 1995 Constitution of Uganda. It was the view of the Learned Justices that all the grounds of divorce mentioned in Section 4(1) and 4(2) are available to both parties to the marriage.

Unfortunately, since the judgement in the FIDA case, there has not been statutory amendments to provide for this development, and the practice of courts therefore has been to adopt either the view of the Constitutional Court in **FIDA case (supra)** that all grounds are equally available to spouses who seek divorce.

In **Habyarimana Vs. Habyarimana [1980] HCB 139** it was held that there is no definition of cruelty in the Divorce Act but case law has established that no conduct can amount to cruelty unless it has the effect of producing actual or apprehended injury to the Petitioners' physical and mental health. That there must be danger to life, limb or health, bodily or mental or reasonable apprehension of it to constitute cruelty.

In the instant case, the Petitioner alleged that the Respondent started practicing acts of witchcraft in 2012 and that he would terrorize the whole family because of these acts. The Petitioner further alleged that the Respondent would reject the food the Petitioner had cooked and even deny the Petitioner conjugal rights since 2012 to-date. The Petitioner alleged that because of these acts, she has been living in fear of her life and has reported the Respondent to police and different civil society groups for relief.

The Petitioner alleged that the Respondent had openly informed her that he had gotten another woman and they had three children together. She also alleged that the Respondent had deserted her when he abandoned the home in 2014 and resurfaced in 2018.

In reply, the Respondent denied all allegations of practicing witchcraft. He contended that he left the home due to illness and had been admitted in hospital. The Respondent duly attached medical form and reports. He further contended that it is the Petitioner who refused him entry into the home on his return. He contended that when he tried to return to the home in 2018, the Petitioner reported the matter to the Kawempe Police station and the RDC who ordered him to leave the home.

The Respondent denied all allegations of adultery.

Adultery was defined in the case of **Habyarimana (supra)** as *the consensual sexual intercourse during the subsistence of the marriage between one spouse and a person of the opposite sex who is 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.*

In the case of **Bishop Kiganda David V Hadija Nasejje Kiganda Divorce Cause No. 42 of 2011** citing the case of **Nyakairu V Nyakairu [1970] HCB 261** stated that in allegations of adultery it is not necessary to prove the direct act of adultery



for the fact was almost always inferred from the circumstances as a necessary conclusion.

PW2 - Ahmad Jjingo who was the LC1 chairperson of the Keti Falawo zone between 1997-2018 in his witness statement stated that a dispute arose between the parties in 2012 because the Respondent wanted to evict the Petitioner from the matrimonial home. PW2 further stated that the Respondent had become a regular client of a traditional doctor dealing in cultural spiritual beliefs and the Respondent had turned the traditional doctor's daughter into his wife. Moreso, that the Respondent had enticed his oldest son to evict the Petitioner from the home and the two had become a danger to the Petitioner's life.

PW3 - Bakasambe Muhammed who is the secretary for defence Keti Falawo Zone LC1 in his witness statement stated that in 2012 the Respondent got another wife and the Respondent directed the Petitioner to vacate the matrimonial home in Kawempe.

As stated in the case of **Bishop Kiganda (supra)** it is not necessary to prove the direct act of adultery. The Petitioner's allegations of adultery against the Respondent are corroborated by the evidence of PW2 and PW3 that the Respondent was involved with another woman who was not the Petitioner.

Additionally, for one to be cruel, their acts have to cause either apprehended or actual injury to the physical and mental well-being of another. The Petitioner's allegations that the Respondent was cruel have also been corroborated by the evidence of PW2 and PW3 who both stated that the Respondent's behavior towards the Petitioner caused her to fear for her life to the extent that the local authorities and the police had to be involved.

Therefore, it is the finding of this court that the Respondent was cruel towards the Petitioner and adulterous during the subsistence of the marriage and this is sufficient for dissolution of the marriage between the Respondent and the Petitioner. This issue is resolved in the affirmative.

Issue Two: Whether the Petitioner caused the Respondent to desert her
Black's Law Dictionary 9th Edition 2009, at page 211, defines desertion 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.

Justice Mubiru in the case of **Ayiko Mawa Solomon V Lekuru Annet Ayiko Divorce Cause No. 0001 of 2015** stated that, *'The concept of desertion was*



explained further by Lord Porter in the case of *Lang v. Lang* [1954] 3 ALL ER 571 where he stated at page 573 that; -

To establish desertion two things must be proved: first certain outward and visible 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 be almost entirely 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?"

In **Lang v. Lang [1954] 3 ALL ER 571**, the Privy Council held that where a husband's conduct towards his wife was such that a reasonable man would know, and that the husband must have known, that in all probability it would result in the departure of the wife from the matrimonial home, that, in the absence of rebutting evidence, was sufficient proof of an intention on his part to disrupt the home, and the fact that he nevertheless desired or requested her to stay did not rebut the intention to be inferred from his acts – that he intended to drive her out – and he was guilty of constructive desertion.

The inference of this court is to establish whether the conduct of the Petitioner caused the Respondent to desert her.

The Respondent in his answer to the petition denied deserting the Petitioner. He stated vide paragraphs 10 and 11, that the Petitioner denied him entry into matrimonial home when he came back from hospital. The Respondent contended that the Petitioner chased him away because of his mental illness. The Respondent averred that when he attempted to come back to the matrimonial home in 2018, the Petitioner involved the police where a mediation was held and it was agreed that the Respondent come back to the matrimonial home, however, that the Petitioner involved the RDC who ordered the Respondent to leave the home.

In circumstances where one party makes it unbearable for the other to live in a home then that amounts to constructive desertion. The Petitioner alleged that because of the Respondent's acts of witchcraft and violence, she did not feel safe in her matrimonial home. The Petitioner did not respond to the allegations made by the Respondent that she prevented him from returning to the matrimonial home.

According to **section 101 of the Evidence Act**, the burden of proving that the Petitioner was responsible for the Respondent's desertion lies on the Respondent who has not discharged this burden. It is the finding of this court that the Respondent's actions induced the Petitioner not to allow the Respondent back into the matrimonial home because she felt unsafe when he was in the home. if anything, the Respondent is guilty of constructive an actual desertion having been away from the home for more than 2 years.



This issue is therefore resolved in the negative.

Issue Three: What remedies are available to the parties

The Petitioner prayed for dissolution of the marriage, custody of the minor children, that money collected from the rentals be used to pay the school fees and maintenance of the children, that the matrimonial home be sold off and each party takes their respective share to acquire alternative accommodation elsewhere and any other remedy that court may deem fit.

Matrimonial Property.

Article 31(1) of the 1995 Constitution of Uganda provides that men and women of the age of eighteen years and above, have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution.

An attempt was made to define the term ‘*matrimonial property*’ by Lady Justice Esther Kisakye in the case of **Rwabinumi Vs. Bahimbisomwe Civil Appeal No. 10 of 2009** where she cited with approval the case of **Muwanga Vs. Kintu (supra)** in which Bbosa J observed that;

“matrimonial property is understood differently by different people. There is always property which the couple chose 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 parties chose to call home and which they jointly contribute to”.

The Supreme Court of Kenya in **Joseph Ombogi Ogentoto V Martha Ogentoto Petition No. 11 of 2020** stated, ‘we also find that Article 45(3) (which is at parri materia with Article 31(1) of the Ugandan Constitution) acts as a means of providing for equality as at the time of dissolution of marriage but such equality can only mean that each party is entitled to their fair share of matrimonial property and no more. Nowhere in the Constitution do we find any suggestion that a marriage between parties automatically results in common ownership or co-ownership of property (hence vesting of property rights) and Article 45(3) was not designed for the purpose of enabling the court to pass property rights from one spouse to another by fact of marriage only.’

In the case of **Ambayo Joseph Waigo V Aserua Jackline CACA 0100 OF 2015** it was stated that the Court of Appeal in Kenya Nairobi in PNN Versus ZWN Civil Appeal No 128 of 2014 had occasion to consider at length Article 45(3) Constitution of the Republic of Kenya , 2010 which is in *parri material* with Article 31(1)b) of the 1995 Constitution of the Republic of Uganda and held that the equality of spouses guaranteed by the Constitution is not synonymous with



equal propriety entitlement and does not give automatic half share in matrimonial property whether or not he or she earns it. The propriety entitlement of a spouse is dependent on his or her contribution towards the matrimonial property.

Spousal contribution to the matrimonial property can be direct or indirect; monetary or non-monetary provided that it enabled the other spouse to either acquire or develop the property in question. **[Rwabinumi V Bahimbisomwe(supra)]**

The Petitioner alleged that during the subsistence of the marriage, the two acquired the following property;

- A matrimonial home located at Kawempe Division Block 208 Plot No. 3310
- A kibanja which forms part of the matrimonial home with rentals thereon
- Two vehicle of registration No. UAN 526V and UAS 285
- Land comprised in Bulemezi Block 619 Plot 15 Luwero.

In his answer to the petition, the Respondent averred that the kibanja forms part of the land on which the matrimonial home is since the Respondent got a title for the same. The Respondent contended that the Petitioner has a plot in Matugga with rentals which she got from money from the Respondent's chicken business. The Respondent contended that the Petitioner also has a plot with a shop in Kagoma, Wakiso district which was acquired during the marriage from the money from the rentals in Kawempe.

The Respondent stated that the vehicles are his as they are both registered in his name. Furthermore, he contended that the land in Luwero was his as it was a gift from his late aunt Anna Maria Tebanganya and it has a house and cultural site. The Respondent alleged that the Petitioner went with the title for the Luweero land.

The certificate of title for the matrimonial home and the land in Luwero are registered in the name of the Respondent from annexures marked PEX2 and PEX3. The logbooks to the two vehicles were not tendered in court but the Respondent contended that they were in his names.

By virtue of being married to someone does not confer an automatic right to equal ownership in their property. This is the position espoused in both the **Joseph Ombogi and the Ambayo Josep cases (supra)**. The Petitioner has not provided any cogent evidence as to her contribution to the properties acquired by the Respondent. It should be noted that spousal contribution doesn't have to be strictly monetary. It maybe of a domestic or emotional nature.

PW2 and PW3 both stated in their witness statements that the parties acquired a titled plot in Kawempe where they set up their family homestead. In the premise I find that the house in Kawempe qualifies as matrimonial property. Both the



Respondent and the Petitioner called this place home and lived there since 1991 until they started having squabbles in 2012. In the absence of cogent evidence that the Petitioner contributed to the other properties listed in the petition, I find that the house in Kawempe is the only one that the Petitioner has a share.

Custody and maintenance of the minors

Article 31 (4) of the Constitution provides that it is the right and duty of parents to care for and bring up their children.

Section 29 of the Divorce Act provides that “in dissolution of marriage, the court may at any stage of the proceedings make such orders with respect to the custody, maintenance and education of minor children of the marriage.” Again, according to **Section 3 Children Amendment Act** the welfare principles and the children’s rights set out shall be the guiding principles in making any decision with regard to children.

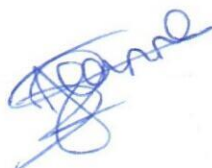
Article 3 of the United Convention on Rights of a Child provides in part as follows, “The best interest of children must be the primary concern in making decisions that may affect them...”

In the case of **Pulkeria Nakagwa Vs. Dominiko Kiggundu [1978] HCB 310**, Odoki Ag J (as he then was) stated that welfare in relation to custody of children should take into account all circumstances affecting the well-being and upbringing of the child and the court has to do what a wise parent acting for the best interest of the child ought to do.

I am aware that, although no parent is preferred in law, courts tend to grant custody of children of tender years to their mothers except where exceptional circumstances dictate otherwise.

In the present circumstances, the Petitioner averred that the Respondent had not provided any assistance towards her or the children for the last ten years. The two minor children are presently in the custody of the Petitioner and have been for the last ten years. This court also takes cognizant of the Respondent’s medical issues and his inability to take care of the minors considering that he himself is in need of extra care and attention.

Taking into account the welfare principle laid down in **section 3 of the Children’s act (supra)**, it is the finding of this court that the two minor children should be in the custody of the Petitioner. The Respondent has not made any effort to show this court that he is interested in the children or their welfare. The Petitioner has demonstrated that she has been taking care of the children for the past few years and continues to do so. In the premise, custody is granted to the Petitioner.



Section 76 Children Act (ass amended) provides that any person who has custody of a child including a parent, is permitted to make an application for a maintenance order against the father or mother as the case maybe.


In the **Matter of Ayla Mayanja (an infant) Misc. Application No. 20/2003 (unreported)** it was noted that the rights of a child as laid out both in the Constitution and the Children Act must be provided by the person entrusted with the parental responsibility of the child. This person must be a parent of a child or guardian. Apart from the psychological and emotional wellbeing, children are entitled to other rights that involve financial expenditure, e.g. school fees, shelter, Medicare, clothing, entertainment, etc.

It cannot be ignored that maintenance is always a joint responsibility of both parents. Despite whatever qualms the Petitioner and the Respondent have with each other, the Respondent is still the father of the minors and therefore has the responsibility to provide for their maintenance. Therefore, 50% of the monthly proceeds from the rentals will cater for the maintenance of the children and the other 50% will go to the Respondent to cater for his medical needs.

In conclusion, the following orders and declarations are made:

1. The marriage between the Petitioner - Juliet Ndagire Nabadda and the Respondent - Christopher Kasule Sitya is hereby dissolved and a Decree Nisi will be issued to that effect.
2. Custody of the minor issues of the marriage, Nakakande Angella and Buwembo Joshua is hereby granted to the Petitioner with visitation rights to the Respondent.
3. A valuation of the matrimonial home comprised in Block 208 Plot 3310 in Kawempe Division should be done and the property be put on the market for sale after the last born child turns 20 or at the instance of the Petitioner, whichever comes earlier. The Petitioner will be entitled to 70% of the share in the matrimonial home after sale and the Respondent will be entitled to 30% share.
4. 70% of the monthly proceeds from the rentals in Kawempe will cater for the maintenance of the Petitioner and the minor children, with the Petitioner having control of how the expenses are determined, and 30% will go to the Respondent for his medical needs and expenses.
5. Each party should bear its own costs.

I so order.



Jeanne Rwakakooko
JUDGE
25/04/2023

This Judgment is delivered this 8th day of MAY 2023

Consent Confirmation
8/5/2023

