

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
FAMILY DIVISION
DIVORCE CAUSE NO. 68 OF 2020

ROSETTE TABITHA NAKIRYOWA MABIKKE..... PETITIONER
VERSUS
MICHEAL MABIKKE..... RESPONDENT

BEFORE: HON LADY JUSTICE JEANNE RWAKAKOOKO

JUDGMENT

Introduction

By her Petition, the Petitioner seeks;

- a) Dissolution of the legal marriage between the Petitioner and the Respondent
- b) Custody of the issues of marriage
- c) That the Respondent is granted access and visitation rights to the children
- d) That the properties be shared between both parties
- e) That the Respondent provided maintenance for the children
- f) Non molestation orders be issued against the Respondent
- g) The Respondent be ordered to pay costs of the petition
- h) The Petitioner be granted any other such relief(s) as this Honorable court may deem fit.

Background

The marriage between the Respondent and the Petitioner was solemnized on the 9th September 2005 at Our Lady of Mt. Carmel Kansanga Kampala. The couple begot three issues who are between the ages of 20 – 10 years of age. The marriage was solemnized while the Petitioner was residing in the United Kingdom and the Respondent in Uganda. However, the Petitioner finally settled in Uganda.

The Petitioner complained of the Respondent's cruel, erratic, unstable and malevolent behavior towards her which was characterized by constant belittling of the Petitioner in front of their children, house-maids and other workers. The Petitioner further complained of acts of adultery and cruelty by the Respondent which caused the Petitioner mental pain and anguish. The Petitioner averred that because of the adulterous and cruel acts of the Respondent, the marriage had irretrievably broken down.



The Petitioner averred that there was no collusion, connivance or condonation between her and the Respondent.

There was no reply by the Respondent to the Petition. Numerous attempts to serve the Respondent proved futile until court ruled that the matter proceed exparte.

Representation

At the hearing on 15th December 2022, the Petitioner was represented by Innocent Ngobi Ndiko and the Petitioner was present. The Respondent was not present and court ruled that the matter proceed exparte. Court directed for the Petitioner to file submissions which the Petitioner complied with.

Issue for Determination

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

1. Whether there are any grounds for dissolution of the marriage
2. Whether the Petitioner should be granted custody and the Respondent granted Visitation rights.
3. Whether the parties have matrimonial property and if yes whether the Petitioner is entitled to a share
4. Whether both parties should contribute for the maintenance for the issues of the marriage.
5. Whether a non-molestation order should be issued against the Respondent
6. Whether the Respondent should be ordered to pay costs

Resolution

Issue One: Whether there are any grounds for dissolution of the marriage

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 the 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 alleges that the Respondent has been unbearably cruel to her since the solemnization of their marriage and has committed adultery with two women known to the Petitioner.

The Petitioner's witness statement is full of various instances in which the Respondent has allegedly been cruel to her. The Petitioner alleges that the Respondent was very aggressive, abusive and overbearing towards her and has continuously uttered derogatory and demeaning statements towards the Petitioner and the same has caused physical distress, tension and mental torture to the Petitioner. It is her assertion that the Respondent's actions clearly had a negative on the mental and emotional well-being of the Petitioner.

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.

The Petitioner in paragraph 60 of her witness statement gave evidence that in or about December 2019, a one Beatrice Kizza Kenzy came to her and the Respondent's home in Kansanga with children alleging that the Respondent was the father and had neglected to take care of them. That the Respondent asked Beatrice to hand over the children to him but she declined.

Furthermore, the Petitioner alleges via paragraph 62 that the Respondent has openly told her that she is not his wife and that his 'wife' and children reside in the USA while referring to a one Antonia Tibugulwa.



As was stated in the case of **Bishop Kiganda (supra)** it is not necessary to prove the direct act of adultery however in this instance the fact that there is uncontroverted evidence that the Respondent fathered children outside of his marriage is evidence enough that the Respondent committed adultery.

The Respondent, despite several attempts at being served, did not put in a reply to these allegations. In the case of **Habre International Co. Ltd Vs. Ebrahim Alakaria Kassam and others SCCA No. 4 of 1999** it was held that whenever an opponent declined to avail himself of the opportunity to put his essential and material case, in cross examination, it follows that they believed that the testimony given could not be disputed.

Therefore, it is the finding of this court that there are grounds for dissolution of the marriage between the Respondent and the Petitioner. This issue is resolved in the affirmative.

Issue Two and Four: Whether the Petitioner should be granted custody and the Respondent granted Visitation rights & Whether both parties should contribute for maintenance for the issues of the marriage

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.

Section 3(1) of the Children’s Amendment Act provides that, the welfare of a child shall be of paramount consideration whenever the state, a court, a tribunal, a local authority or any person determines any question in respect to the upbringing of the child

When court is dealing with matters relating to the upbringing of children, their welfare is paramount as elaborated **in the matter of Deborah Joyce Alitubeera and Richard Masaba (Infants) Civil Appeal No.70 of 2011.**

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 have tendered to grant custody of children of tender years to their mothers except where exceptional circumstances dictate otherwise

The facts in issue indicate that at the time of filing the petition, the parties had between them three children aged 18, 12 and 8 years. Presently, they would be aged about twenty, fourteen and ten years respectively. The Petitioner gave evidence that since 2008 she took on the responsibility of providing for the family including paying bills, buying food and contributing the school fees since the Respondent was contributing minimally. More so, that on various occasions the Respondent has threatened the Petitioner and the children that he would stop providing for the family and even sell the house within which they live.

The Petitioner in her witness statement to wit paragraphs 85, 86 and 87 stated that she pays all the three children's school fees and then later demands a 50% refund from the Respondent and that all the children currently live with her in the matrimonial home in Kansanga. Specifically, the Petitioner averred that the child Mabikke William Grace's tuition fees are UGX 2,300,000/= per semester at Makerere University Business School, Mabikke Jerome Leo's school fees are UGX 2,700,000/= per term and Nakimuli Megan Gazelle's school fees are UGX 1,800,000/= per term with UGX 2,000,000/= per term for transport.

Taking into account the tenets of the welfare principle as provided for in the Children's act, it is in the best interests of the children especially the two younger children aged 14 years and 10 years to stay in the primary custody of the Petitioner. The Petitioner has shown to be the primary parental figure in the children's lives and it would be unfair to the children to destabilize this dynamic. The older child who is now 20 years old is not a minor and is now an adult and therefore can choose with whom he wishes to live with.

The Petitioner also prayed that if she is granted custody, the Respondent be granted visitation rights. I see no problem with this because the Respondent is still the father of these children.

With regard to maintenance, under **Section 76 Children Act**, 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 may be.

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.

In the instant case, the Petitioner also testified that Respondent minimally contributes to the welfare of the children and their needs and has only started bonding with them when the Petitioner filed the present application.



It cannot be ignored that maintenance is always a joint responsibility of both parents. Despite whatever misgivings the Petitioner and the Respondent have with each other, the Respondent is still the father of the children and therefore has the responsibility to provide maintenance for them.

In conclusion, the Respondent as a father to the children still has a responsibility to make a contribution towards their wellbeing through maintenance.

Issue Three: Whether there is matrimonial property to be shared by the parties.

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)**]

Counsel for the Petitioner cited the case of **Muwanga V Kintu Divorce Cause Appeal No. 135 of 1997** where a wider view of non-monetary indirect contribution by following the approach of the Court of appeal of Kenya in Kivuiti V Kivuiti [1990-1994] E.A 270 where Omolo AJA found that the wife indirectly contributed towards payments for household expenses, preparation of food, purchase of children's clothin, organizing children for school and general enhanced the welfare of the family and this amounted to a substantial indirect contribution to the family income and assets which entitled her to an equal share in the couple's joint property.

According to the evidence on record, the Petitioner testified that upon her marriage to the Respondent, she and the first issue of the marriage went to live in the Kansanga home around 2006. In paragraph of the witness statement, the Petitioner avers that during the pendency of her marriage to the Respondent, the two acquired the matrimonial home situate in Kansanga and the house at Buziga. From the wider definition offered in the case of **Muwanga V Kintu**, matrimonial property can be property that the couple call home.

In paragraph 92 and 93, the Petitioner avers that when she and the Respondent moved into the Kansanga house, it was only four rooms with only two rooms roofed and the rest of the construction took place while they lived in the house. That during her time working at Diamond Trust Bank and Nile Bank from 2002 -2004, the Petitioner avers that she was earning UGX 450,000/= of which she would give UGX 150,000/= to the Respondent monthly as a contribution to complete construction of the matrimonial home. That even when she went to further her studies in the UK, the Petitioner continued to send the Respondent money periodically for the same. Furthermore, that the home in Kansanga has now grown to 25 rooms.

The Petitioner also averred in paragraph 52 of her witness statement that the Respondent would hold all his political campaigns, preparatory and planning meetings at their home in Kansanga and the Petitioner had the responsibility of hosting and cooking for more than 50 people and she would facilitate some of the campaigns. The Petitioner also averred in paragraph 55 of her witness statement that in 2008 she took the responsibility of providing for the family including paying bills, buying food and paying school fees because the Respondent was contributing minimally.



The Petitioner also stated vide paragraph 102 of the witness statement that the property in Buziga was bought during the pendency of the marriage and in order to build the Buziga house, the Respondent abandoned his family financial obligations and parental responsibilities to the Petitioner.

The Petitioner further averred that the site workers at the Buziga home were sent to commute from the Kansanga home as they were building the Buziga house and the Petitioner had the responsibility of providing them with food on a daily basis

The Respondent did not file a reply to the petition and only the Petitioner's evidence is on court record. Apart from the Petitioner's averments in her witness statement, the Petitioner did not attach any evidence of the actual contributions that she had made towards the home in Kansanga and the house in Bunga. However, I am alive to the decision in **Habre International Co. Ltd Vs. Ebrahim Alakaria Kassam and others (supra)** where it was held that whenever an opponent declined to avail himself of the opportunity to put his essential and material case, in cross examination, it follows that they believed that the testimony given could not be disputed.

In the premise, concerning the Buziga house, in the absence of evidence to the contrary from the Respondent, I am inclined to believe the testimony of the Petitioner especially so where she gave evidence as to her indirect contribution through feeding the workers during the construction of the Buziga house and also facilitating and hosting the campaign meetings of the Respondent. However apart from the above contribution, the Petitioner did not adduce any other evidence to show that the Buziga house matched the criteria to be called matrimonial home as defined by **Hon Lady Justice Esther Kisakye in the Rwabinumi case**. Because the entitlement of the spouse in property is dependent on the contribution, this court finds that the contribution of the Petitioner as adduced from her evidence is not sufficient to convince this court that the same entitled her to a share in the Buziga house.

The Petitioner demonstrated to this court that she contributed financially to the construction of the Kansanga home as highlighted above. Her evidence wasn't contested by the Respondent. Nevertheless, due to the fact that this is the home that the Petitioner and the children of the marriage call home, this qualifies as matrimonial home as also defined in **Rwabinumi V Bahimbisomwe (supra)**.

This court also noted that the Petitioner did not provide any documentation concerning the two properties. No copies of certificates of title were attached to the Petitioner. These should have been attached to the pleadings or exhibited in order for Court to correctly refer to them.

Therefore, this issue is partly resolved with the finding that the Kansanga property is considered matrimonial property and the Buziga house is not considered matrimonial property.



Issue Five: Whether a non-molestation order should be issued against the Respondent

Section 42(1) of the Family Law Act, UK 1996 Cap 27 provides that a "non-molestation order" means an order containing either or both of the following provisions—

- (a) provision prohibiting a person ("the Respondent") from molesting another person who is associated with the Respondent;
- (b) provision prohibiting the Respondent from molesting a relevant child.

Black's Law Dictionary 7th Edition defines molestation as the persecution or harassment of someone.

Section 101 of the Evidence Act provides;

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Counsel for the Petitioner submitted that from the Petitioner's evidence it is clear that the Respondent is violent and has an erratic behavior and that the Petitioner lives in fear that the Respondent will resort to verbal and physical abuse upon grant of the divorce.

The order for a non-molestation order is somewhat alien to our jurisdiction. The party seeking such an order should therefore discharge the burden provided for in section 101 of the Evidence Act. The Petitioner has not discharged the burden as provided under section 101 to show this court that granting such a remedy is a necessity. Therefore, this issue is resolved in the negative.

Issue Six: Whether the Respondent should be ordered to pay costs

In the case of **Hon. George Patrick Kasaija V Fredrick Ngobi Gume & the E.C EPA No. 68 of 2016** it was held that ordinarily costs followed the event and the award of costs was a matter of judicial discretion which had to be exercised judiciously.

Counsel for the Petitioner prayed that since this was a family matter then court should not award costs and prayed that each party bear its own costs. However, in the petition, the Petitioner prayed for costs to be borne by the Respondent and it is trite law that parties are bound by their pleadings.

Notwithstanding, costs are at the jurisdiction of the court.



Conclusion and Orders

I hereby order as follows:

1. The marriage between the Petitioner - Rosette Tabitha Nakiryowa Mabikke and the Respondent - Michael Mabikke, is hereby dissolved.
2. Custody of the minor children is granted as follows;
 - a) The Petitioner is granted primary custody of the minor children of the marriage.
 - b) The Respondent shall have visitation rights of the minor children at a place agreed upon by the Petitioner and the visitation date and time will be agreed by the parties in advance.
 - c) The Respondent is allowed to have physical custody of the minor children 2(two) weekends (Friday- Sunday) in a month during the school term
 - d) During school holidays, the Petitioner and the Respondent will share 50/50 custody of the minor children.
 - e) The minor children will alternate between the parents for celebrated holidays eg Christmas, Easter, Eid etc and should these holidays fall within the time the children are supposed to be with a particular parent, the minors will be handed over to the parent who is supposed to have them that particular celebrated holiday.
3. The Petitioner is hereby allowed to occupy the Kansanga home uninterrupted and will occupy the same until the youngest child attains the age of 18 after which both parties will share the same equally at 50/50. For avoidance of doubt, if there is any rental income that is derived from this home outside the aspect of occupation by the Petitioner, the said rental income will be shared by the parties 50:50.
4. The Respondent shall retain ownership of the Buziga property.
5. The Respondent shall pay maintenance of as follows;
 - a) The Respondent shall cover medical expenses of the minor children until the said minor children attain the age of 18 years.
 - b) The Respondent shall pay UGX 3,000,000/= per month as maintenance for the minor children until the said minor children attain the age of 18 years.
 - c) The Petitioner and the Respondent shall each pay 50% of the tuition fees of Mabikke William Grace until he completes his Bachelors' Degree.
 - d) The Respondent shall pay the school fees of Mabikke Jerome Leo until he completes his Senior 6(six) after which the Petitioner and the Respondent shall each pay 50% of the amount of fees required for his further education.



e) The Respondent shall pay school fees of Nakimuli Megan Gazelle until she completes her PLE examinations after which the Petitioner and the Respondent shall each pay 50% of the amount of fees for her further education.

6. The Respondent shall bear the costs of the petition.

I so order.



Jeanne Rwakakooko

JUDGE

25/04/2023

Judgment was delivered on the 8th day of MAY, 2023



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8m May 2023



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