

3. Together with the respondent, the couple have properties in Bugolobi flats where the petitioner resides with the children, a four unit property at Muyenga where the respondent lives and carries on business and another undeveloped parcel next to it in Muyenga whose status quo the petitioner prays to be maintained and preserved for the use and interests of the children.
4. When the matter came up for hearing on 5/7/2022 court was informed that summons to file an Answer to Petition was issued on 10/10/2020 and served on the respondent on 12/12/2020; there is an affidavit of service filed in court on 22/1/2021 to that effect; the respondent signed acknowledgment on the summons; there is an affidavit of service dated 21/6/2022 stating that the respondent was notified of the date of 5/7/2022; he chose to be absent; court granted counsel for the petitioner's prayer that the matter proceeds exparte under order 9 rule 10 of the Civil Procedure Rules.
5. The position of the law is that where one is claimed to have done certain acts, he is required to specifically deny if in his view what is claimed against him is false, otherwise it will be deemed the truth against him; see Prof. Oloka Onyango & Others Vs Attorney General (Constitutional Petition No.6/2014) and also (see Massa V Achen [1978] HCB 279). The respondent opted not to file a defence, therefore the facts stated in the petition are not denied by him; he is therefore deemed to have filed his answer to the petition and admitted all the petitioner's pleadings; although the claims themselves must pass probity;(see Samwiri Massa vs Rose Achen (1978) HCB.

Representation:

The petitioner is represented by counsel Tom Odeke of M/s T. Odeke & Co. Advocates;

Issues for determination:

6. Counsel for the Petitioner filed written submissions framing two issues for court's consideration:
 1. *Whether or not there are grounds for divorce?*
 2. *What remedies are available to the parties?*



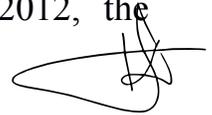
Resolution.

Whether or not there are grounds for divorce?

7. In resolving petitions for divorce as a first step court must be satisfied that there is a valid marriage between the parties before court; the petitioner presented an original certificate of marriage dated 20/9/2003 showing the marriage between the petitioner and the respondent celebrated at Our Lady of Africa, Mbuya; a copy of the certificate was admitted and marked as 'PExb1'; Section 34 of the Marriage Act provides that a certificate of marriage shall be admissible in evidence as proof of marriage; therefore there exists a valid marriage between the parties.
8. This petition is premised on desertion and cruelty as grounds for divorce; **Section 4** of the Divorce Act; which provides the grounds for divorce was found unconstitutional in the case of *Uganda Association of Women Lawyers (FIDA) & 5 Others V. Attorney General, Constitutional Petition No.2/2003*; because it gave different parameters for a man as opposed to the woman contrary to article 31 of the Constitution; each of the grounds can now be considered without pairing them in respect of the wife;
9. The burden of proof in divorce cases is on the party that alleges misconduct on the part of the other party, there being a presumption of innocence: (see **Redpath v. Redpath and Milligan [1950] 1 ALL E.R. 600**); because of the effect of divorce not only on the divorcing couple but also on the children of the said couple leave alone the two families of the couple; although divorce cases are civil in nature, the standard of proof is slightly higher than in other ordinary civil cases in which it is only on the preponderance of probability; although it is not as high as in criminal cases in which it has to be proved beyond reasonable doubt: (see: *Habyarimana Veronica V. Habyarimana Perfect [1980] HCB 139*);
Court shall consider each ground.

Desertion:

10. Caroline Asio the petitioner testified as the only witness; that the couple initially resided at their matrimonial home in Bugolobi Flats; in 2012, the



respondent deserted the matrimonial home and moved to one of the matrimonial properties in Muyenga;

11. For a spouse to be found to have deserted the marriage he/she should have left the marriage without the other spouse's consent and with no intention of coming back and stayed away from the marriage for at-least two years;(Section 4 of the Divorce Act); it may be the physical leaving of the matrimonial home or leaving the marriage although without leaving the home; (see *Kayhul v Kayhul (Divorce Cause 123 of 2016)*, where Justice Namundi held that desertion occurs where the spouse leaves the matrimonial home with an intention not to return or when parties still stay together in the same house/room but one spouse has withdrawn from the other and this continues for a period of time, two years or more.
12. In the old English case of *Fitzgerald v. Fitzgwalda : (1864). L.R. I P. L D. at p. 658.-* it was held that “*No one can ‘desert’ who does not actively bring to an end an existing state of cohabitation. Cohabitation may be put to an end by other acts besides quitting the matrimonial home. Advantage may be taken of temporary absence or separation to hold aloof from a renewal of intercourse. This done willfully, against the wish of the other party, and in execution of a design to cease cohabitation, would constitute ‘desertion.’*” The same position was reiterated in *Jacksoit v. Jacksoid [1995]-P. at p. 178* where Sir Henry Ihke said at page 23: “*If there is abandonment by one of the spouses of the other that is desertion. If one of the spouses causes the other to live separate and apart that, is desertion.*”
13. The respondent in this case left the matrimonial home in January 2012; and according to the evidence, has never shown any signs of reuniting with the petitioner and the children; the petitioner states in her petition that family meetings were called in 2015 and 2016 to reconcile them to no avail because the respondent insisted that unidentified persons wanted to kill him using the petitioner and so he could not be seen sharing a bed or be seen cuddling a person who intends to kill him; it was also the petitioner’s testimony that she has personally made several attempts to restore matrimonial harmony but the respondent neither has the willingness nor the desire to resume cohabitation with her.
14. If since 2012 the respondent has been away from the marriage he is found to have deserted;

Cruelty:

15. Black's Law Dictionary 11th Edition defines cruelty as, '*the intentional and malicious infliction of mental or physical suffering;.... specific conduct by one spouse that endangers the life, person, or health of the other spouse or creates a reasonable apprehension of bodily or mental harm;.... one spouse's course of conduct that creates such anguish that it endangers the life, physical health, or mental health of the other spouse*';
16. By its nature cruelty may not be universally identified so it depends on the circumstances of each particular case; but it can be described as the injurious effect of one's actions on the emotional or physical being of another; (see ***Namukasa Vs Kakondere DC No. 30 of 2010*** where Habyarimana Vs. Habyarimana (Supra) was cited.
17. In the case of Habyarimana v Habyarimana (supra) still court held that it is the effect of the conduct rather than its nature which is of paramount importance in assessing a charge of cruelty. In determining whether conduct amounts to cruelty, the general rule is that the whole matrimonial relationship must be considered.
18. Apart from being accused of being part of a plan to kill him, the petitioner informed court that the respondent also accuses her of witchcraft; and has not been providing for the children's welfare;
19. Article 34(1) of the Constitution of Uganda provides that subject to laws enacted in their best interests, children shall have the right to know and be cared for by their parents or those entitled by law to bring them up; The children are entitled to school fees, care and the general welfare; the children having been brought up only by their mother would mean that she had to stretch herself beyond her responsibilities to cover the gap that ought have been filled by the respondent who is the father; the parental responsibilities ought to be shared by both parents; none of the parents should, unless there is justifiable reason, shoulder the financial burden and emotional responsibility alone for to do that would in my view amount to cruelty by the reneging parent; in the case at hand the respondent who is the father, is alive but chose to leave the burden of providing for the children on their mother yet he lives in close proximity(Bugolobi and Muyenga are not even a 30

minute drive apart is emotionally cruel to both the children and their mother the petitioner;

20. Having found that the respondent deserted the petitioner; he automatically withheld conjugal rights from the petitioner for 10 years; sexual intimacy is not only physical but emotional so denial of the same may amount to mental and psychological torture which amounts to cruelty on the part of the respondent;

A marriage being a union and no union can exist unless there is both physical and emotional interaction feeding the intention of the union, where such aspects are missing the 'relationship' should not be allowed to continue to be called a marriage.

21. The allegation of witchcraft against the petitioner if proved, would in my view cause isolation of the petitioner by society because by its nature witchcraft is feared by some members of the society; it was however not proved;

Desertion and cruelty as grounds for divorce have been proved.

Issue 1 is answered in the affirmative.

What remedies are available to the parties?

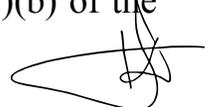
a) *Dissolution of marriage;*

The grounds of desertion and cruelty having been proved the petitioner is entitled to an order for dissolution of marriage.

Matrimonial property:

22. It is the petitioner's prayer that the status quo of the undeveloped parcel of land next to the developed property in Muyenga be maintained and preserved for the use and interests of the children. in court, she stated that she is currently residing in the matrimonial home in Bugolobi flats with the children; that whereas the respondent has many other properties, she is not interested in them; all she wants is an order for her to stay in the matrimonial home.

23. The position of the law is 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; (Article 31 (1)(b) of the



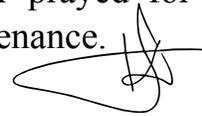
1995 Constitution of the Republic of Uganda); that marriage alone does not grant property rights; a spouse must have contributed either in monetary terms or non monetary terms; (*see: Muwanga versus Kintu High Court Divorce Appeal No. 135 of 1997, (Unreported); Rwabinumi Vs. Bahimbisomwe SC Civil Appeal No. 10 of 2009*; and *Kivuitu versus Kivuitu, [1990 – 19994] E.A. 270*); Like in all cases a claim must be proved so such indirect contribution can not be assumed.

24. Paragraph 7 of the petition shows that the petitioner and respondent own three properties to wit; property at Bugolobi flats block 8, Nakawa; where the petitioner resides with the children, a four-unit property at Muyenga; and another undeveloped parcel in Muyenga next to the four-unit property.

25. The petitioner has not proved existence of any of the properties; no land titles or purchase agreements were adduced in evidence, to enable court make out the ownership of the properties; monetary contribution to the acquisition of the matrimonial property has not been proved; the petitioner claims that she has been involved in the welfare and upbringing of the children since the respondent's desertion in 2012; whereas both parties are entitled to an equitable share in the mentioned matrimonial properties if they exist; the couple appears to own two properties each now occupied by either of the spouses; the petitioner in the Bugolobi property with the children while the respondent resides in Mbuya; it is the petitioner's prayer for declaration that she retains the property at Bugolobi flats; in the interest of justice; the matrimonial property in Bugolobi flats block 8, Nakawa Kampala district shall be retained by the petitioner; and the respondent shall retain the Muyenga properties. The prayer that the undeveloped piece of land in Muyenga be reserved for the children has not been supported because its existence was simply alleged but not proved therefore court shall not pronounce itself on it.

Custody and maintenance

26. The petitioner and respondent have three children namely: - Divine Dorothy Opul (now aged 18 years), Seeptha Serena Opul (now aged 17 years), Davidson Solomon Opul (now aged 11 years); the petitioner prayed for custody of the children and for the respondent to provide their maintenance.

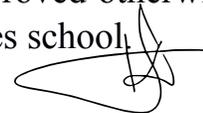


27. Section 2 of the Children Act defines a child as; a person below the age of 18 years. In **Brossy V Brossy (2012) ZASCCA** where the issue was whether the child who was no longer a minor was still entitled to maintenance, Court held that; the maintenance order ceased to apply since the child was above the age of majority; since Divine Dorothy Opul is now 18 years, she is no longer a child so an order of custody does apply to her;
28. It is trite law that when considering issues concerning children, their welfare is paramount and must be the guiding principle, pursuant to **Article 34** of the Constitution of the Republic of Uganda, **Section 3(1)** the Children Act, **Article 3(1)** of the United Nations Convention on the Rights of the child (which Uganda ratified in 1990); **Article 4(1)** of the African Charter on the Rights and the Welfare of the Child.
29. The welfare principle has been fortified by courts who have held that in all matters concerning children, the best interests of the child shall be the primary consideration (see *Mark Siduda Trevor (an infant) Family Cause No. 213 of 2014* and a host of other decisions). According to Bromley's Family Law, 8th Edition, at page 336, "...the children's welfare is the court's sole concern, and other factors are relevant only to the extent that they can assist the court in ascertaining the best solution for the child...'
30. **Article 31(4)** of the Constitution of Uganda provides that; it is the right and duty of parents to care for and bring up their children; **Section 4(1)** of the Children Act (as amended) provides that it is the right of every child to stay with their parents or guardians.
31. Parents hold the primary right to custody of their children and both parents have similar and equal rights with regard to their right. (see: *Rwabuhemba Tim Musinguzi Vs. Harriet Kamakune (Civil Application No.142 of 2009) [2009] UGCA 34*); it is important that both parents stay in the lives of the children because their welfare is best served if both parents are involved in their upbringing;
32. Therefore, legal custody is granted to both parents but the physical custody is granted to the petitioner who has been staying with them since the respondent deserted the marriage; the respondent shall have the right to spend time with the

children as and when he desires as long as he gives one week's notice to the petitioner; it being understood that the children's wishes shall always be taken into consideration.

Maintenance.

- 33.** Section 76(1) of the Children Act cap.59; provides that an application for a maintenance order may be made by any person who has custody of a child against the father or mother of the child; sections 5 and 6 of the Children Act provide that it shall be the duty of a parent, guardian or any person having custody of a child to maintain that child and, in particular, that duty gives a child the right to— (a) education and guidance; (b) immunization; (c) adequate diet; (d) clothing; (e) shelter; and (f) medical attention.
- 34.** The welfare principle governing decisions concerning children would demand that financially capable parents must cater for the needs of their children irrespective of where the children are, and depending on the circumstances of each case. (see In the matter of Deborah Joyce Alitubeera (Civil Appeal No. 70 of 2011) [2012] UGCA 4). All other considerations fall back to the position of mere guidelines compared to what will ultimately preserve and uphold the children's welfare.
- 35.** The petitioner testified in court that she works as Business Executive with Viva Energy, while the respondent is stated to be carrying out business at the four-unit property in Muyenga; both parties have the financial capacity to maintain their children; each shall contribute 50% towards the children's maintenance needs; specifically to cater for rent, school fees, medical needs and food.
- 36.** Before I take leave of the maintenance issue, I have found it pertinent to state that according to the curriculum of this country, young adults of between 18 and 25 years of age are still in school, therefore jobless and unable to cater for themselves; although Divine Dorothy Opul is now 18 years she may still be in school until the age of 25 years, and still living at home, unless proved otherwise; both parents therefore have the duty to maintain her till she finishes school.



37. On costs, section 27 of the Civil Procedure Act provides that costs follow the event; the respondent therefore shall bear the costs of this petition.

In the result, the petition majorly succeeds and it is hereby ordered that.

- 1) The marriage between **Caroline Asio** and **Dickson Opul** is hereby dissolved on account of desertion and cruelty; a decree nisi hereby issues.
- 2) The matrimonial property in Bugolobi flats block 8, Nakawa district shall be retained by the petitioner;
- 3) Legal custody of the issues to the marriage to wit; Scepter Serena Opul and Davidson Dorothy Opul is granted to both the petitioner and respondent but the petitioner shall have physical custody;
- 4) The Respondent shall have the right to spend time with the children anytime he wishes subject to one week notice to the Petitioner, it being understood that the wishes of the children shall be taken into consideration.
- 5) The petitioner and respondent shall each contribute 50% towards the children's maintenance including the maintenance of Divine Dorothy Opul until they all finish school and are able to fend for themselves.
- 6) The Respondent shall bear the costs.



Ketrach Kitariisibwa Katunguka

Judge

06/02/2023

Delivered by email to: odetoko2@gmail.com