

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(FAMILY DIVISION)
DIVORCE CAUSE NO.221 OF 2021

MARIAM NABASIRYE ::::::::::::::: PETITIONER

VERSUS

SSEJJENGO EMMANUEL ::::::::::::::: RESPONDENT

BEFORE HON. LADY JUSTICE CELIA NAGAWA

JUDGMENT

1.0 Introduction

1.1 Nabasirye Mariam (hereinafter called “the Petitioner”) filed Divorce Cause No. 221 of 2021 against Ssejjengo Emmanuel (hereinafter called the “Respondent”) seeking the following orders.

- a) The legal marriage between the Petitioner and the Respondent be dissolved.
- b) Custody of the Children be granted to the Petitioner.
- c) That both Parties vacate the Matrimonial home in Kiteezi.
- d) That the said house is let out for rental purposes and the proceeds be put to the maintenance of the Children.
- e) That the Respondent pays school fees for the Children.
- f) That the Respondent be ordered to pay costs of the Petition.

g) That the Petitioner may have any such relief/reliefs in the premises as the Honourable Court may deem fit.

2.0 Representation.

- 2.1 The Petitioner is represented by Counsel Jeremy Kibukamusoke jointly with Counsel Kebba Nicholas of M/S Kibukamusoke & Tendo Advocates & Legal Consultants.
- 2.2 The Respondent is represented by Counsel Albert Muhumuza from Blair & Co. Advocates.

3.0 Background of the Petition.

- 3.1 The Petitioner and the Respondent solemnized a Church Marriage on 1st October, 2016 at St. Charles Lwanga Catholic Parish, Ntinda. Following the said marriage, the parties lived together in Ntinda, Kisaasi, Kiwatule and are currently residents of Kiteezi, Wakiso District where they constructed their matrimonial home.
- 3.2 The parties have two children namely; Zion Alban Mudde Malaika, aged 9 years and Selah Catherine Nampijja aged 2 years old.
- 3.3 Throughout the subsistence of the marriage, the Petitioner contends that she has provided maintenance for the family with no or little help from the Respondent. She avers that since the inception of their marriage, it has been marred with cruelty through excessive drinking of the Respondent and his lack of respect to the sanctity of the parties' marriage.
- 3.4 The Petitioner averred that her marital relationship with the Respondent has been unhappy and stormy owing to the

Respondent's cruel and erratic behavior. She further stated that the Respondent is an alcoholic who returns home in the wee hours. The Respondent withdrew from the affairs of the home and his actions have caused her a lot of pain, anguish and distress.

- 3.5 On his part, the Respondent stated that he had been providing for the family fully with little support from the Petitioner. The Parties used to live together until the Petitioner deserted him and the issues of the marriage in November, 2021 taking with her several household items needed for the children's care, causing gross mental and psychological suffering to the family members. He contended that he is neither a nuisance nor an alcoholic as alleged by the Petitioner.

4.0 Evidence of the Parties.

4.1 Petitioner's Evidence

1. The Petitioner was married to the Respondent at St Charles Lwanga Catholic Parish, Ntinda, Kampala on the 1st October, 2016. (A copy of the marriage certificate is attached to the petition, marked **"PEX 1"**).
2. The Petitioner stated that the Respondent is an alcoholic nuisance who spends his nights in the bar, only to return home late and on one occasion he left the door open and exposed them to thieves. A copy of a Police Complaint lodged after thieves accessed the home and stole property is attached to the file and marked **"PEX 2"**.

3. The Petitioner averred that she was providing support and maintenance to the family with little to no support from the Respondent. A copy of a bank statement and western union form is attached and marked **“PEX 3”**.
4. The Petitioner contends that she made financial contributions towards the construction of the matrimonial home. The Proof of contributions is attached to the file and marked **“PD1”**.
5. The Petitioner stated that on several occasions, she had to pick up the rent bills, utility bills, sometimes the medical bills and provide for the necessities of the family. The Copies of the Receipts of maintenance of the family are marked **“PE4”**.
6. The Petitioner further stated that whenever she picks up their son Zion Mudde from the Respondent, he is sick and she has to take him to the hospital. She attached medical records in evidence of this marked **“PE5”**.
7. She contributed towards the school needs of their child. The Proof of contribution is attached and marked **“PE6”**.

4.2 **Respondent’s Evidence.**

8. The Respondent stated that prior to his marriage with the Petitioner, he was the owner of the land comprised in Kyadondo Block 113 Plot 305 Block 113 Land at Kiteezi and he had made plans to construct a residential house thereon. He attached a copy of the plans for the residential house marked **“DE1”**, a copy of the purchase agreement for the

land marked “**DE6**” and a copy of the land sale agreement marked “**DE7**”.

9. The Respondent also stated that he took out a Salary loan with Barclays Bank in order to complete the house. The loan documents are attached to the file and marked “**DE2**”.
10. The Respondent stated that his employment provides him with medical Insurance cover extending to the petitioner and the two children. The Medical Insurance Cards are attached “**DE 4**” and “**DE 8**”.

5.0 Burden of proof.

- 5.1 The Petitioner by virtue of **Section 101, 102 & 103 of the Evidence Act Cap 6** has the burden of proving the facts alleged by her in the Petition on the balance of probabilities.

6.0 Issues for Court’s determination.

- 1. Whether the facts give rise to grounds for divorce?**
- 2. Whether the property constitutes matrimonial property and if so, should it be equally distributed?**
- 3. Whether either party is fit and proper to have custody of the Children?**
- 4. What remedies are available to the parties?**

7.0 Submissions by Counsel.

- 7.1 Counsel for the Petitioner filed written submissions on 15th May, 2023 and Counsel for the Respondent filed written submissions in Reply on 24th May, 2023 and thereafter a rejoinder was filed by Counsel for the Petitioner. This court has

carefully perused these submissions and considered them in determination of this Divorce Cause.

8.0 Decision of Court

- 8.1 In any Divorce Proceeding, court has the duty to establish whether there was a valid marriage between the Petitioner and Respondent. The Petitioner produced a certified copy of their marriage certificate to support her case that she was legally married to the Respondent in a church, a marriage that was conducted on 1st October, 2016, at St Charles Lwanga Catholic Parish Ntinda, Kampala.
- 8.2 The provisions of **Section 33 of the Marriage Act, Cap 251** are to the effect that, “Every certificate of marriage which shall have been filed in the office of the registrar of any district, or a copy of it, purporting to be signed and certified as a true copy by the registrar of that district for the time being, and every entry in a Marriage Register Book or a copy of it, certified as aforesaid, shall be admissible as evidence of the marriage to which it relates, in any court of justice or before any person now or hereafter having by law or consent of parties authority to hear, receive and examine evidence”. A church marriage is one of the forms of marriage that are recognized under the Marriage Act, Cap. 251 in Uganda. Thus, this court finds that there was a valid marriage between the Petitioner and the Respondent.

Issue 1: On whether the facts of the Petition give rise to grounds for Divorce.

- 8.3 The question to address is whether the facts reveal any of the grounds for divorce set out under **Section 4 (2) of the Divorce Act, Cap. 249**. Initially Section 4 of the Divorce Act set out separate grounds for divorce for men and women and was therefore declared unconstitutional by the Constitutional Court in **Uganda Association of Women Lawyers (FIDA) & 5 Others Versus Attorney General Constitutional Petition No. 2/2003**. It was on the basis of Article 31(1) (b) of the Constitution which provides that a man and a woman are entitled to equal rights in marriage, during marriage and at its dissolution, in essence restating the Constitutional prohibition of discrimination on the basis of sex enshrined in Articles 21 and 33 of the same Constitution. The legislature is yet to fill the gap created by the Constitutional Court's decision. Courts have since been looking at the facts in totality to determine whether a marriage has irretrievably broken down.
- 8.4 **Following Uganda Association of Women Lawyers (FIDA) & 5 Others Versus Attorney General Constitutional Petition No 2/2002** it is sufficient for either spouse to allege one ground for divorce as set out in Section 4 of the Divorce Act for a petition or cross petition to succeed.
- 8.5 This means that the Petitioner must sufficiently prove that there was Cruelty, Desertion or Adultery, or a combination of two grounds or all three grounds. This Petition is based on the ground of Cruelty and this court will examine whether the facts

sufficiently prove that the Respondent subjected her to Cruelty during the subsistence of their marriage.

Cruelty

- 8.6 Cruelty has been defined in the locus classicus case of **Habyarimana Versus Habyarimana (1980) HCB 139**, to mean any conduct that produces actual or apprehended injury to mental health. It is the intentional and malicious infliction of physical suffering upon another human being or the wanton, malicious, and unnecessary infliction of pain upon the body, or the feelings and emotions of another. Cruelty may be mental and it may include injuries, reproaches, complaints, accusations, taunts, denial of conjugal rights among others. Mental cruelty is a state of mind, it is the feeling of deep anguish, disappointment, or frustration in one spouse caused by the conduct of the other over a long period of time may lead to mental cruelty.
- 8.7 The spouse does not have to intend to hurt the other spouse for it to be cruelty. It is the effect that their actions have on their spouse that is considered.
- 8.8 To bring a successful application, the Petitioner must prove, on the balance of probabilities; behavior by the respondent, which means it, would be unreasonable for the Petitioner to have to continue to live with the Respondent and that the marriage has irretrievably broken down.

- 8.9 The behavior complained of could be deliberate, if it could be unintentional. This court also has to determine whether or not the behavior is of a type or level that makes it unreasonable to expect the petitioner to live with the respondent. The fact that the petitioner may him or herself find the situation unbearable is not determinative.
- 8.10 In **Lang V Lang [1955] AC 402, 418 (Privy Council)**, the Privy Council noted that “A husband’s irritating habits may so get on the wife’s nerves that she leaves him as a direct consequence of them, but she would not be justified in doing so. Such irritating idiosyncrasies are parts of the lottery in which every spouse engages on marrying, and taking the partners of the marriage “for better, for worse”.
- 8.11 The test that was applied, per **Dunn J in Livingstone-Stallard Vs Livingstone –Stallard [1974] 2 ALL ER 766,771**, is “would any right- thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances and the characters and personalities of the Parties?”.
- 8.12 There is therefore an objective element (‘would any right-thinking person’) and a subjective element that enables the court to consider the cumulative effect on the petitioner. The court, does, and must, try to read the minds of the parties in order to evaluate their conduct. In matrimonial cases, we are not concerned with the reasonable man as we are in cases of

negligence. We are dealing with this man or woman and the fewer a priori assumptions we make about them the better. Moreover, [w]hat may be regarded, as trivial disagreements in a happy marriage could be salt in the wound in an unhappy marriage. It is therefore important to state how the behavior has affected the petitioner, as in the particulars of behavior contained in the wife's petition in **Owens V Owens [2017] EWCA Civ 182, [41] (Munby P)**.

8.13 The Petitioner testified that the Respondent is an alcoholic who drank heavily, spent nights out in bars only to return in the wee hours of the night. She stated that the Respondent returned home from a drinking spree with blood stained clothes and that he had no recollection of what had happened to him. She further stated that the Respondent's alcoholism turns him into a Nuisance and that he returns home totally impaired with no mental capabilities. She stated that the Respondent wet and soiled himself, crawled all over the house and eventually blacked out on the bedroom floor. To this effect, the Petitioner presented Video recordings to this court of the Respondent in the described state. The Petitioner stated under Paragraph 6 of her Witness Statement that the actions of the Respondent have caused her a lot of pain, distress and mental anguish.

8.14 On his part, the Respondent denied that his drinking had become excessive. He stated that he used to drink with the Petitioner and that his actions are not actions of a person who poses a danger whether actual or apprehended. He stated that

the Petitioner had knowledge of his drinking from the start of the relationship and willingly married him. He further stated that his behavior constituted of non-violent actions and averred that this court cannot look at one instance in a finding of Cruelty where no physical violence is present.

8.15 This Court finds that Alcoholism can amount to Cruelty even when there are no acts of Violence occasioned on the Petitioner or the Children. It may amount to mental cruelty or emotional abuse when the alcoholic spouse's behavior causes severe emotional distress, humiliation, or mental suffering to the other spouse. This court continues to emphasize that in regard to proceedings for divorce, the conduct complained of as amounting to cruelty should be "grave and weighty" so as to come to the conclusion that the petitioner cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life".

8.16 Consistent Alcoholism is "grave and weighty" especially if it has affected a spouse consistently by causing mental and emotional stress and abuse. This court also notes that simply because the behavior was known to the spouse at the start of the relationship, does not mean it will not amount to or cause mental anguish to the Petitioner during the subsistence of the marriage or that the Petitioner should endure it because she had knowledge of it to begin with. The Petitioner displayed to this court a video recording of the Respondent in a drunk state

and contended that he has caused her consistent distress and humiliation due to his alcoholism. This court finds that this behavior amounts to Cruelty as it is consistent and continuous and the Petitioner cannot be expected to continue to endure it.

8.17 Under **Section 8 of the Divorce Act, Cap 249**, a petition for divorce shall be granted if the court is satisfied that the petitioner's case has been proved, and does not find that the petitioner has been accessory to, or has connived at the going through of the form of marriage or the adultery, or has connived at or condoned it, or that the petition is presented or prosecuted in collusion.

8.18 Based on the above, this court finds that the Marriage between the Petitioner and the Respondent has irretrievably broken down. The issue therefore, is answered in the affirmative.

9.0 Issue 2: Whether either party is fit and proper to have custody of the Children?

9.1 On the issue of custody, **Section 1(q) of the Children's Act, Cap. 59 (as amended)**, defines a custodian as a person in whose care a child is physically placed. **Article 31(4) of the Constitution of the Republic of Uganda 1995 (as amended)** provides that a parent is given the right and duty to care for and bring up their children. The children in this petition are aged 9 and 3 years of age.

9.2 **Section 29 of the Divorce Act, Cap. 249** provides that, "In suits for dissolution of marriage, or for nullity of marriage or for judicial separation, the court may at any stage of the

proceedings, or after a decree absolute has been pronounced, make such orders as it thinks fit, and may from time to time vary or discharge the orders, with respect to the custody, maintenance and education of the minor children of the marriage or for placing them under the protection of the court”.

9.3 Section 4 of the Children Act, Cap. 59 provides for a Child’s rights to stay with their parents except for situations where a competent authority determines in accordance with the laws and procedures applicable that it is in the best interest of the child to separate him or her from his or her parents or parent.

9.4 **Section 3 (1) of the Children Act** is to the effect that; “The welfare of the 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 a child, the administration of a child’s property, or the application of any income arising from that administration.

(2) In all matters relating to a child, whether before a court of law or before any other person, *regard shall be* had to the general principle that any delay in determining the matter is likely to be prejudicial to the welfare of the child.

9.5 The welfare of the child is the paramount consideration in most court adjudicated disputes in the child’s upbringing. This means that rights and interests of others are relevant only in so far as they bear upon the child’s interest. Alternatives to the welfare principles remain closely wedded to its basic premises; that

children should be afforded special consideration in the decision making process. Children's rights play an increasingly important role in family law and are now widely recognized and respected.

- 9.6 The meaning of "Paramount" has been interpreted by the House of Lords in **J V C [1970] AC 668, 710-11 by Lord MacDermott** who gave the clearest judgement as to the meaning to be attributed to the term; the second question of construction is as to the scope and meaning of the words "shall regard the welfare of the infant as the first and paramount consideration. *"Reading these words in their ordinary significance.... It seems to me that they must mean more than that the child's welfare is to be treated as the top item in list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed"*.
- 9.7 Evaluating a child's best interests involves a welfare appraisal in the widest sense taking into account, where appropriate, a wide range of ethical, social, moral, religious, cultural, emotional and welfare considerations. Everything that conduces to a child's welfare and happiness relates to the child's familial, educational and social environment, and the child's social, cultural, ethnic

and religious community, is potentially relevant and has, where appropriate, to be taken into account, therefore the court must adopt a holistic approach.

9.8 The function of the judge in a case like this, is to act as the ‘judicial reasonable parent’, judging the child’s welfare by the standards of reasonable men and women today in 2023, having regard to the ever changing nature of our world including, crucially for present purposes, changes in social attitudes, and always remembering that the reasonable man or woman is receptive to change, broadminded, tolerant, easy-going and slow to condemn. We live, or strive to live, in a tolerant society. We live in a democratic society subject to the rule of law. We live in a society whose law requires people to be treated equally and where their human rights are respected. We live in a plural society, in which the family takes many forms, some of which would have been thought inconceivable well within living memory.

9.9 In the matter of **Twesiga (Infant) (Miscellaneous Application 4 of 2008) [2008] UGHCFD 1 (16 September 2008)** Court stated that while the primary right of the child is to grow up under the tutelage of his or her parents, or parent, for the obvious reason of emotional attachment; if it is shown to the satisfaction of a competent authority, and in this case the Court, that it would serve the best interest of the child, then it would be proper for this Court to make an order removing such child from the parent.

9.10 Article 31 of the Constitution provides for the right and duty of the parents to care for and bring up their children and that children may not be separated from their families or the persons

entitled to bring them up against the will of their families or those persons except in accordance with the law. This is read alongside Article 34 (1) and other Conventions on the rights of the child.

9.11 In the case of **Rwabuhemba Tim Musinguzi Versus Harriet Kamakume (Civil Application 142 of 2009) [2009] UGCA 34 (25 August 2009)** court stated that parents have a fundamental right to care and bring up their children. This is a constitutional right. Of course it is not considered in isolation. The welfare of the child is a consideration to be taken into account, and most times it is the paramount consideration. A parent can only be denied the right to care for and raise her children when it is clear and has been determined by a competent authority, in accordance with law, that it is the best interest of the child that the child be separated from the parent.

9.12 'Parenthood is for life'. When one of the parents not only walks away from marriage but neither maintains nor shows any interest in the children, an enormous unfair burden is placed on the other. It is for this reason that the custody of the children namely Zion Alban Mudde Malaika, aged 9 years and Selah Catherine Nampijja aged 2 years old is granted to both the Petitioner and the Respondent. Custody of the children shall therefore be joint for both parents.

Child Maintenance

9.13 **Section 5 of the Children Act, Cap. 59** provides 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 education and guidance, immunization, adequate diet, clothing, shelter; and medical attention.

9.14 Parental responsibility includes the duty and reasonability of both parents to maintain their children and as such the respondent cannot opt out. **(See; Nakaggwa Vs Kiggundu (1978) HCB 315).**

9.15 The parties testified that they are both in gainful employment and will therefore maintain their children throughout until final completion of their education. This responsibility will be carried out jointly.

10.0 Issue 3: Whether the property constitutes matrimonial property and if so, should it be equally distributed?

10.1 Matrimonial Property was defined in the case of **Charman v. Charman (No 4) [2007] EWCA Civil 503; [2007] 1 FLR 1246** to mean “property of the parties generated during the marriage otherwise than by external donation’. **In Julius Rwabinumi Vs. Hope Bahimbisomwe, S.C. Civil Appeal No.10 of 2009** Court stated that while **Article 31 (1) of the Uganda Constitution (1995)** guarantees equality in treatment of either the wife or husband at divorce, it does not, in my opinion, require that all property either individually or jointly acquired before or during the subsistence of a marriage should in all cases be shared equally upon divorce.

10.2 **In Essa v. Essa, Kenya Court of Appeal Civil Appeal No. 101 of 1995** it was held that there is no presumption that any or all property acquired during subsistence of the marriage must

be treated as being jointly owned by the parties. It is therefore fully possible for the property rights of parties to the marriage to be kept entirely separate. Whether the spouses contributing to the purchase should be considered to be equal owners or in some other proportions must depend on the circumstances of each case. **(See Rimmer Vs. Rimmer [1953] 1 QB.63).**

10.3 In the instant case, the property in question relates to the property comprised in Kyadondo Block 113 Plot 305 Block 113 Land at Kiteezi. The Respondent averred that he owned this property before his marriage to the Petitioner and had already made construction plans for a residential house before the marriage. In evidence of this he attached a copy of the plans for the Residential house marked “**DE1**”, a copy of the purchase agreement for the land marked “**DE6**” and a copy of the land sale agreement marked “**DE7**”, all of which are in his names. The Respondent also stated that he took out a Salary loan with Barclays Bank in order to complete the house. The loan documents are attached to the file and marked “**DE2**”.

10.4 On her part, the Respondent averred that she contributed towards the construction and furnishing of their matrimonial home. The Petitioner further presented exhibits **P9 to 33** to prove her contributions towards the matrimonial home. The Proof of contributions is attached to the file and marked “**PD1**”. She also stated that on several occasions, she had to pick up the rent bills, utility bills, sometimes the medical bills and provide for the necessities of the family. She provided evidence

through copies of the receipts of maintenance of the family marked “**PE4**”.

10.5 This court considers the monetary and non-monetary contributions of the Petitioner to the matrimonial home juxtaposed with the fact that the land was purchased by the Respondent who acquired a loan for its construction and completion. Court also considers the fact that the Petitioner contributed not only indirectly by supporting the home but also directly by financing the furnishing of the home and buying some materials needed in its construction. The property a party owns before contracting a marriage remains his property even in the dissolution of the marriage and does not become matrimonial property. In this case however, the said property was improved upon and developed largely by the Respondent with minimal contributions from the Petitioner after the marriage was contracted. Some receipts produced in evidence by the Petitioner reflected figures amounting to 187,500/-, 216,000/-, 218,000/-, 181,000/= 695,000/-, 183,000/-, 93,000/= and grocery receipts, in addition to other disbursements towards the home could be identified and items such as paint being purchased.

10.6 Court also considers the role of all non-monetary contributions of the Petitioner as the mother in the home. In **Muwanga v. Kintu, High Court Divorce Appeal No. 135 of 1997, (Unreported), Bbosa, J** (as she then was), adopted a wider view of nonmonetary indirect contributions by following the

approach of the Court of Appeal of Kenya in **Kivuitu versus Kivuitu, [1990 – 19994] E.A. 270**. In that case, Omolo JA found that the wife indirectly contributed towards payments for household expenses, preparation of food, and purchase of children's clothing, organizing children for school and generally enhanced the welfare of the family and that this amounted to a substantial indirect contribution to the property.

10.7 This Court also took note that this was not a stay home spouse, she testified that she had worked in several companies and places, much as her salary was never disclosed and the quantum of her contribution computed. The children and herself were on medical insurance as per the Respondent's employment, for a while they have had only one child the last born child now being less than 4 years therefore the expenses were not quite high on both the child and the home and lastly other than the garage, the Petitioner could not place a figure on the parts of the house that she ably contributed to since some of receipts were addressed in the names of the Respondent. Which could equally mean that the Respondent could refund her contribution to the said property if at all.

10.8 In consideration of all the above, this court being cognizant of all contributions from both parties, this court finds that the Respondent is entitled to 85% of the matrimonial property and the Petitioner is entitled to 15% of the said property as compensation for her monetary and non-monetary

contributions. The Respondent shall pay the Petitioner 15% worth of the matrimonial property.

1.0 Conclusion

1.1 In the final result, the following Orders are made:

1. A decree Nisi is hereby pronounced dissolving the marriage between the Petitioner and the Respondent.
2. The Petitioner and the Respondent shall have joint custody of the children.
3. The Petitioner and the Respondent shall have the responsibility to provide maintenance of their children while in their custody.
4. Both parties shall equally educate their children.
5. The Respondent is entitled to 85% of the land at Kiteezi on Plot 305 Block 113 Land at Kyadondo while the Petitioner shall be entitled to 15%.
6. Each Party to bear their own costs.

Dated, signed and delivered by email this 31st day of May, 2023.

**CELIA NAGAWA
AG.JUDGE**