

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA
HCT-05-CV-DC-0002-2021**

ISABELLE FRANCES ::::::::::::::::::::::::::::::: PETITIONER

VERSUS

NATHAN NSHAIJA ::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON LADY JUSTICE JOYCE KAVUMA

JUDGMENT

Introduction.

[1] This is a petition for divorce filed by the Petitioner against the Respondent for a decree that the marriage between her and the Respondent be dissolved; division of matrimonial property; custody of the issues to the marriage; for costs of the petition and other relief as may be deemed to be just by this court.

Background.

[2] The background is that the Petitioner, a British national lawfully married the Respondent in a civil marriage at the office of the Chief Administrative Officer (CAO) in Kiruhura District, Uganda. They after that cohabited together at Nyaga, Rurambira, Nyakasharara, Nyabushozi, Kiruhura District for a period of three years. The Petitioner continued living at their home as housewife taking care of the couple's activities including farming on the said land operating a tourism business. Around July 2020, the Petitioner decided to focus on her career and secured a job offer as a teacher at International School of

Uganda in Lubowa, Wakiso District. During the subsistence of the marriage, the Petitioner gave birth to three issues and the parties acquired various properties to wit; twenty heads of cattle, goats, vehicles and a motorbike.

The Petitioner averred that around the end of July 2020 she discovered that the Respondent was secretly having an extra-marital affair with a one Ankunda Naomi Katabazi with whom he sired a child who was approximately two years old. It was further averred by the Petitioner that the Respondent was cruel to her in various ways including excessive drinking, disappearing from home for long periods of time, selling cattle without the consent of the Petitioner and abandoning his responsibilities of taking care of the children.

[3] The Respondent despite being served by substituted service did not file any reply within the required time. This court on **8th December 2022** having ascertained that service against the Respondent was effected by placing an advertisement of the hearing notice in the Daily Monitor newspaper of **6th December 2022**, ordered the suit to proceed ex parte.

Representation.

[4] The Petitioner was represented by Mr. Oryokot Emmanuel learned counsel.

Analysis and decision.

[5] Before going into the merits of the instant application, I have to lay down some legal principles that will guide me through the resolution of the instant petition.

It is a settled principle of evidence that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. (See **Section 101 of the Evidence Act**). It is said that this person has the burden of proof. This is the person whose suit or proceeding would fail if no evidence at all were given on either side. (See **Section 102 of the Evidence Act**).

The standard of proof in cases like the instant one where adultery is alleged is on a standard or degree slightly higher than that in civil cases (which is on a balance of probabilities) but not beyond reasonable doubt as is in criminal cases. (See Dr. Specioza Kazibwe vs. Eng. Charles Kazibwe Divorce Cause no.3 of 2003; Gliksten vs. Gliksten and Deane (1917) 116 LT 543). This is so because whereas adultery is a criminal offence, the suit under which it is brought is a civil and not a criminal proceeding. Therefore, the same standard of proof as that required in criminal cases is not necessarily needed for a petition for divorce to succeed on the ground of adultery. (See Davis vs. Davis, [1950] P. 125: [1950] 1 All E. R. 40 per Lord Denning).

Where a court decides to proceed ex-parte pursuant to a default on the parties, as it did in the instant case, the court sets down the suit for

formal proof. Where the court sets down a suit for formal proof after a default order has been made, the Petitioner is under a duty to place before the court evidence to sustain the averments in her petition. (See generally Kaga Limited vs Haidaya Nantongo HCT -00 – CC – CS - 0626/2014 per Bamwine J (as he was then)).

The pleadings and written submissions are not evidence. Thus even where there is no rebuttal because of the Respondent's failure to file a written statement of defence or proceeding with the case, hence in a matter that requires formal proof, Sections 101 – 104 and 106 of The Evidence Act apply. The Petitioner being desirous of this court giving judgment as to legal rights or liability dependent on the existence of facts which they assert, must prove that those facts exist. (See Yoswa Kityo vs Eriya Kaddu [1982] HCB 58).

As a matter of law, despite the absence of cross-examination, it was held in Kirugi and another vs Kabiya and three others [1987] KLR 347, that:

“The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.”

[6] For the proper resolution of the instant petition, I have laid down the following issues for resolution.

1. Whether or not the marriage between the petitioner and the respondent should be dissolved.
2. Who is entitled to custody of the issues to the marriage?
3. What remedies are open to the parties?

Issue 1: Whether or not the marriage between the Petitioner and the Respondent should be dissolved.

[7] For a person to succeed in a divorce petition as the instant one, they have to prove to court, the existence of all or any of the grounds of divorce set out in **Section 4** of the Divorce Act and secondly that there has been no connivance, condonation or collusion with the Respondent in presenting the petition. (See Rebecca Nagidde vs Charles Steven Mwasu Court of Appeal Civil Appeal No. 160 of 2018 per Fredrick Egonda-Ntende JA and Uganda Association of Women Lawyers and 5 Others vs AG Constitutional Petition No. 2 of 2002).

In the instant petition, the Petitioner relies on two grounds of divorce; these are adultery and cruelty.

Adultery:

[8] Adultery is defined as consensual sexual intercourse during the subsistence of the marriage between one spouse and a person of the opposite sex not the other's spouse. (See Veronica Habyarimana v Perfect Habyarimana [1980] HCB 139).

The burden to prove the fact that the Respondent was adulterous lies on the Petitioner. As I have already pointed out above, this burden is on the standard or degree slightly higher than that in civil cases (which is on a balance of probabilities) but not beyond reasonable doubt as is in criminal cases.

The fact that the standard of proof required of cases involving adultery is placed higher than that of ordinary civil suits does not necessarily mean that there should be satisfactory evidence of the commission of the matrimonial offence.

Since it is rarely the case that the Petitioner will get the Respondent red-handed in the act of adultery, proof of adultery may be inferred from circumstances which lead to it by fair inference as a necessary conclusion. (See Dr. Specioza Kazibwe (supra)). Evidence of direct acts of adultery is therefore usually disbelieved. (See for example Rydon on Divorce, 6th Edn., page 115; Douglas vs. Douglas [1951] P. 85: [1950] 2 All E.R. 748).

In similar terms, in the English case of Preston Jones vs. Preston Jones, L. R. [1951] A.C. 391, Lord MacDermott pointed out persuasively that;

“If a judge is satisfied beyond reasonable doubt as to the commission of the matrimonial offence relied on by the petitioner as ground for divorce, he must surely be “satisfied” within the meaning of the enactment, and no less so in cases of adultery where the circumstances are such as to involve the paternity of a child. To succeed on an issue of adultery it is not necessary to prove the direct fact of, or even an act of adultery in time and place; for if it were so, in many few cases would that proof be attainable.”

According to Halsbury’s Laws of England, Matrimonial and Civil Partnership Law, Volume 72 (2009) paragraphs 1 – 541 at page 315, it is stated as follows;

“In nearly every case the fact of adultery is proved by confessions or is inferred from circumstances which by fair inference lead to that necessary conclusion. There must be proof of disposition or inclination and opportunity for committing adultery, but the conjunction of strong inclination with evidence of opportunity does not lead to an irrebuttable presumption that adultery has been committed, nor is the court bound to infer adultery from evidence of opportunity alone.”

I have examined the instant petition, the only inference of adultery against the Respondent was only made in the Petition itself where the Petitioner alleged that the Respondent was secretly having an extra-marital affair with a one Ankunda Naomi Katabazi and the two had sired a child who was now two years old.

No evidence was led by the Petitioner to prove these allegations to the satisfaction of this court when the matter was set down for formal proof.

I am therefore unable to find the Respondent guilty of the matrimonial offence adultery on the pleadings alone.

Cruelty

[9] The legal conception of cruelty and the kind of degree of cruelty necessary for it to amount to a matrimonial offence has not been defined under our laws. This court in Veronica Habyarimana vs. Perfect

Habyarimana [1980] HCB 139 provided the following assessment of the concept;

“There is no definition of cruelty in the Divorce Act but case law has established that no conduct can amount to cruelty in law unless it has the effect of producing actual or apprehended injury to the petitioner’s physical or mental health. There must be danger to life, limbs or health or mental, or a reasonable apprehension of it, to constitute legal cruelty (Kasasa v Kasasa Divorce Cause No. 13 of 1976 HCB 348)...to constitute cruelty the conduct complained of must be serious. It must be higher than the ordinary wear and tear of married life. It is therefore the effect of the conduct rather than its nature which is of paramount importance in assessing a charge of cruelty and it must be proved that the respondent however mindless of the consequences has behaved in a way which the petitioner could not in the circumstances be called upon to ensure that such conduct caused injury to health or reasonable apprehension of it...In determining whether conduct amounts to cruelty, the general rule is stated in 12 Halsbury’s laws of England Vol. 3 pages 270-271 as follows: the general rule in all questions of cruelty is that the whole matrimonial relations must be considered, and that the rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations and taunts. Before coming to a conclusion, the judge must consider the impact of the personality and the conduct of one spouse on the mind of the

other, and all incidents and quarrels between the spouses must be weighed from that point of view. In determining what constitutes cruelty regard must be had to the circumstances of each case, keeping always in view the physical and mental condition of the parties and their social character and social status.”

(See also Russel vs. Russel [(1897) AC 395]).

In a nutshell, for conduct to amount to cruelty within a matrimonial setting, it must be conduct of such character as to have caused danger to life, limb or health or as to give rise to a reasonable apprehension of such danger. The conduct of the Respondent to the Petitioner should be of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious to cohabit with the Respondent anymore.

In Gakwavu vs. Mariana Gasengayire [1977] HCB 322, it was held that:

“The Courts cannot examine every petty squabble in a marriage to build a case of cruelty... the standard of proof of cruelty is not beyond reasonable doubt as required in criminal cases. But like in adultery, in cruelty the standard of proof is slightly higher than in a preponderance of probabilities required in ordinary civil case...for a marriage bond cannot be set asunder lightly.”

[10] Cruelty may be manifested physically or mentally against a Petitioner. The former type of cruelty is usually manifested by physical bodily injury. The latter, mental cruelty, is said to have occurred when the conduct of the other spouse causes mental suffering or fear to the

matrimonial life of the other. It is a mental state of mind towards the behavioral pattern of the other spouse. Whereas it is easy to establish physical cruelty from the direct evidence of the Petitioner, mental cruelty is difficult to establish by direct evidence. It is therefore a matter drawn by inference from the facts and cumulative circumstances of the case as drawn from the parties' matrimonial life. (See Savitri Pandey vs. Prem Chandra Pandey, (2002) 2 SCC 73).

In Halsbury's Laws of England [Vol.13, 4th Edition Para 1269] the concept is summarized as hereunder:

“The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the

other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse. Malevolent intention is not essential to cruelty but it is an important element where it exists.” [Emphasis mine]

Unlike adultery, proof of cruelty is on a balance of probabilities. What is required of the Petitioner is to make out a case before court that the allegations claimed in the petition most probably than not happened. The Petitioner has to show the court that the cruelty complained of was to such a degree as to cause reasonable apprehension in her mind that it would be harmful or injurious for her to live with the Respondent. It has been held that the expression harmful or injurious cannot be limited to physical harm or injury. That anything that would hinder the ability of the spouse to blossom into his or her fullness and to enjoy life in matrimony must fall within the expression of cruelty within the Divorce Act. (See the Indian High Court decision of Samdeep Mohan Varghese vs Anjana Mat. Appeal no. 99 of 2009).

[11] In her uncontroverted evidence the Petitioner in court testified that she had stayed apart from the Respondent since July 2020 and for all this time, she has been in custody of the issues to the marriage. That the Respondent has made no efforts to reach out to her or the children. That the children last saw him in January 2021 for just a few minutes and because of this the children have gone through psychological trauma. That it has become difficult to know where he stays.

On the above evidence of the Petitioner, it is the finding of this court that the Respondent's behavior in the circumstances of the instant case has hindered the Petitioner's ability to blossom into her fullness as a wife and to enjoy life in their marriage.

The Respondent is therefore found guilty of the matrimonial offence of cruelty.

Issue 2: Who is entitled to custody of the issues to the marriage?

[12] Custody concerns the legal rules governing the right of children regarding whom to live with. It means the sum total of the rights which a parent may exercise over their child.

Article 31 (4) of the 1995 Uganda Constitution enjoins a duty upon parents to care for and bring up their children. This means that the parents of a child have the first right to custody of their own children. It is when parents live apart, are unmarried or divorced or one or both of them are dead that the issue of who should have custody of children.

Article 34 of the 1995 Uganda Constitution and **Section 3** of the Children Act provide that the best interests of the child shall be the primary consideration in all matters concerning children. The welfare principle in relation to children has been held to involve; the natural wishes of the parents (**See Samwiri vs Rose Achen [1987] HCB 297**), the conduct of the parents in relation to the child (**See George Nyakairu vs Rose Nyakairu [1979] HCB 261**), the age and sex of the child (**See Wambwa vs Okumu [1970] EA 578**), the ability of the applicant to take

care of the child's needs (See Hofman vs Hofman [1970] EA 100) and medical factors.

[13] In the instant case, there is undisputed evidence of the Petitioner that she was the sole provider for the issues to the marriage ever since the Respondent stopped staying with them. According to the three birth certificates that were admitted in court as PEXh 1, 2 and 3, the issues are 5 years, 6 years and 3 years old making them minors.

It is therefore in their best interest and for their welfare to stay with their mother the Petitioner who can enforce her parental duties and rights on them since they have been in her sole custody since 2020.

Should the Respondent require access to his children he should first consult with the Probation and Social Welfare Officer (PSWO) within the jurisdiction of their residence. It's upon this assessment that the PSWO will recommend visitation with or without supervision.

I point out that although custody has been granted to the petitioner, children maintainance is always a joint responsibility of both parents. Thus the Respondent as their father has a parental responsibility to contribute towards their welfare.

Issue 3: What remedies are available to the parties?

[14] The Petitioner having proved the matrimonial offence of cruelty to the required standard specifically in relation to the dissolution of her marriage with the Respondent, she is entitled to divorce.

In relation to the matrimonial property to wit; 20 heads of cattle and goats, it was the Petitioner's testimony that the goats had been sold by

the Respondent by the time she filed this petition. The cows were still under the care of her father-in-law but she was the one treating them.

[15] This court has jurisdiction to share property that constitutes part of matrimonial property and not personal property of the parties to the marriage upon divorce. This is so because even during the subsistence of a marriage, parties in the marriage can legally own property exclusive from their spouses. (See Rwabinumi vs. Bahimbisomwe (Civil Appeal 10 of 2009) [2013] UGSC 5 per Kisaakye JSC and Article 26(1) of the 1995 Constitution of Uganda).

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 be considered differently. The property to which each spouse should be entitled is that property which the parties chose to call home and which they jointly contributed to. (See Muwanga vs Kintu High Court Divorce Appeal No. 135 of 1997 per Bbosa J quoted with authority in Rwabinumi (supra)).

It has been held by this court in previous decisions and the apex court in this jurisdiction that where a spouse makes a substantial contribution to the property, it will be considered matrimonial property. The contribution may be direct and monetary or indirect and non-monetary. (See Muwanga vs Kintu (supra); Kivuitu v. Kivuitu, (1990 – 1994) E.A. 270 and Rwabinumi vs. Bahimbisomwe (supra)).

In the latter decision, Kisakye JSC who gave the lead decision of the apex court, while considering contributions held as follows;

*“The other pertinent question that arises is what amounts to contribution to earn a spouse a share in the property. In **Kagga, (supra)**, the court pointed out that the contribution may be direct and monetary or indirect and non-monetary. In **Muwanga v. Kintu, High Court Divorce Appeal No. 135 of 1997, (Unreported)**, Bbosa, J., adopted a wider view of non-monetary indirect contributions by following the approach of the Court of Appeal of Kenya in **Kivuitu v. Kivuitu, [1990 – 19994] E.A. 270**. In that case, Omolo, AJA., found that the wife indirectly contributed towards payments for household expenses, preparation of food, 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 family income and assets which entitled her to an equal share in the couples’ joint property.*

I entirely agree with the position taken by the lower courts in the above cases and in the Kivuitu case. These cases recognize not only a spouse’s direct or indirect monetary contribution but also a spouse’s non-monetary contributions, which enables the other spouse to either acquire or develop the property in question.”

It is not in dispute that the Petitioner in the instant case acquired the cows jointly with the Respondent during subsistence of their marriage. I take note that these cattle have multiplied over time. It's also not in dispute that the Petitioner has continued to provide the veterinary services to these cattle. The fact that the Petitioner is in custody of the 4 children, she has made and continues to make direct and indirect monetary contributions to their upbringing thus enhancing their welfare. The Respondent is not automatically entitled to equal shares of the matrimonial property in case of divorce. The Petitioner has proved her contribution to enable her get a fair share of the distribution of property. It's in the interest of justice that the Petitioner takes sole charge of their remaining cattle that are in custody of the father in law. It's the Petitioner's unchallenged evidence that the proceeds from the sale of goats that were jointly acquired by herself and the Respondent are unaccounted for by the Respondent. There is no evidence that the Petitioner got any of the proceeds from their sale. Thus there's no justification for equal distribution of the remaining animals between the Respondent and the Petitioner.

In the circumstances, it is just and fair that the Petitioner is entitled to the matrimonial property to wit; cows that are in custody of the father in law's custody.

[16] Accordingly, judgment is entered as prayed against the Respondent for the following orders: -

- i. A **decree nisi** is hereby issued for the dissolution of the marriage between the Petitioner and the Respondent.
- ii. The Petitioner is granted custody of Natasha Nshaija, Joanna Nshaija and Nowamani Daniel Nshaija, the issues of the marriage.
- iii. The Petitioner is awarded the matrimonial property to wit cattle that is in custody of her father in law.
- iv. Costs of the petition are awarded to the Petitioner.

I so order.

Dated at Mbarara this 31st day of August 2023.

Joyce Kavuma
Judge.