

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
(FAMILY DIVISION)

MATRIMONIAL CAUSE NO.22 OF 2022

ANDREW MUHANG:.....PETITIONER

VERSUS

INGRID KARUNG:.....RESPONDENT

Before: Justice Ketrah Kitariisibwa Katunguka.

Ruling

Introduction:

1. Andrew Muhangi(herein called the petitioner)sued Ingrid Karungi (herein called ‘the respondent’) seeking for orders that: a decree nisi dissolving the marriage between them issues; the respondent to have sole custody of the child for three years, with the petitioner having access, and thereafter the parties to have joint custody; the petitioner caters for the general maintenance and medical expenses of the child while the respondent caters for the shelter; there is no matrimonial property and no order be made regarding the maintenance of the respondent; each party to bear their own costs;
2. The respondent filed an answer to the petition praying that: - the marriage between her and the petitioner be dissolved; the respondent be granted full custody of the issue of the marriage; the petitioner be ordered to pay to the respondent a total monthly sum of 7,000,000/= for the shelter, general maintenance and medical expenses of the child (Musinguzi Giovanni Muhoozi)l general damages of UGX 100,000,000/= permanent alimony in the sum of 90,000,000/= and costs of the suit.

Representation:

3. The petitioner is represented by counsel Dr. Harriet Diana Musoke of M/s Musoke & Co. Advocates; while the respondent is represented by counsel Pius Damulira of M/s MBS Advocate

The case:

4. The petitioner seeks an order for dissolution of the marriage between him and the respondent solemnized on the 7th day of November 2020 at All Saints Cathedral, Kampala; they have one child Musinguzi Giovanni Muhoozi (herein called 'the child') who was born on 4th day of May 2021 and is staying with the respondent;
5. It is the petitioner's case that the respondent without his consent deserted their home in August of 2021, went with the child and since then, the petitioner has not had access despite several pleas to bond with the child; he prays for joint custody and is willing to provide for the maintenance of the child; the respondent prays for full custody and permanent alimony from the petitioner.
6. When the matter came up for hearing on 3/6/2022; the parties by consent agreed that the marriage be dissolved on the ground of cruelty committed by both parties against each other; a decree nisi was issued on the 23rd day of June 2022; and a decree absolute dissolving the marriage was granted on 2nd day of March 2023;

Issues:

Both counsel submitted written submissions on the following issues:

1. *Whether the respondent should be granted custody of the child and the petitioner be granted visitation rights of the child?*
2. *Whether the petitioner and respondent should have joint custody of child?*
3. *Whether the petitioner should be granted legal custody of the child?*
4. *Whether the respondent is entitled to alimony from the petitioner?*
5. *How much should the petitioner provide for the maintenance of the child?*
6. *Whether court should grant costs of the suit?*

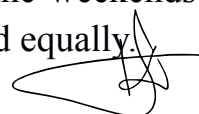
Resolution.

I shall determine issues 1, 2 and 3 jointly as they all revolve around the custody of the child, then resolve issues 5, 4 and 6 in that order.

7. Counsel for the petitioner cited Article 31(4), (5) of the Constitution of the Republic of Uganda 1995; section 3(1) of the Children Act as amended; and the case of Otto Methodius Pacific Vs. Edyline Sabine Pacific CACA No.88 of 2013; Nakaggwa vs Kiggundu (1978) HCB 310 for the proposition that parents should be given joint custody of children since both parents have a duty to bring up their children; unless it is not in the children's best interests;



8. On issue 1 and 2 whether the parties should have joint custody; or whether the respondent should be granted custody and the petitioner be granted visitation rights; counsel cited the **Singaporean Court of Appeal decision in CX vs CY (2006)4 LRC** for the proposition that it is critical that the courts promote and recognise joint parenting so that both parents can continue to have a direct involvement of the children's lives; and argued that this is a proper case for granting joint custody so that the child can know both parents; and that this was not denied by the respondent during cross examination; she cited *Anne Musisi vs Herbert Musisi* [2008] KALR 594 where it was held that the principle of welfare of children is paramount and supersedes considerations such as who of the parents has a superior right to children; that the welfare of the children is best served where both parents are involved in their upbringing;
9. On issue 3 as to whether the petitioner should be granted legal custody counsel submitted that it is in the best interests of the child for the father to take decisions concerning education options, his medical treatment and religious beliefs so she invited court to take judicial notice of the patrilineal system of society in Uganda where children belong to the father's side; that in all circumstances, the child takes on the father's clan, name and religion so it is in the child's best interests that the father takes decisions about his long life education situation, his medical treatments and religious beliefs; the parties are not on good terms so it is impractical for them to have joint legal custody; therefore sole legal custody should be granted to the petitioner and joint physical custody be given to both the petitioner and respondent;
10. Counsel argued that however the parents' constitutional fundamental right to bring up their children is not to be considered in isolation; but should be in view of the welfare of the children as a paramount principle; she cited *Kiyemba vs Battee* [2019] UGHCFD 46 where *Rwabuhemba Tim Musinguzi vs Harriet Kamakune*[2009] UGCA 34 was cited; she submitted that the respondent left with the child - by the time of the hearing it was 16 months since the petitioner had last seen the child; the petitioner requested to see the child but was denied access by the respondent; that that is proof that he loves his child and would like to be part of his life; that the child may stay with him for the weekends for 6 months and after they have bonded the custody may be shared equally.



11. On Issue 4 as to whether the respondent is entitled to alimony counsel submitted that the respondent does not state how much but even then she admits she is a business woman; her allegation that she used to work before getting married to the petitioner and that the petitioner used to pay her salary of UGX 2,000,000 was not supported; she has been maintaining herself since 2021 when she left the home; so she is not entitled to alimony.
12. In reply counsel for the respondent cited *Baguma vs Mbabazi* (HC-00-CA 3 of 2016) [2017] and *Teopista Kayongo vs. Richard Sekiziyivu* (1978) HCB 240; and submitted that this court be pleased to grant sole custody to the respondent; the child should stay with the respondent who is fit and proper to look after him especially at his tender age until he is 12 years with the petitioner having visitation rights; that after 12 years then custody may be shared; counsel argued that the petitioner in his petition for divorce filed on 7th February 2022 prays that he caters for the general maintenance of the child as the Respondent caters for the shelter which shows that the petitioner is agreeable to the child being in the physical custody of the respondent;
13. On whether the parties should be granted joint custody counsel referred to the holding in *Otto Methodius Pacific* (supra) that custody is not only about care and control and access but also involves the right to make long term decisions like education, religion, major healthcare decisions and others relating to the child; that joint custody is not possible because the parties are not on good terms; the bad terms are the fault of the petitioner so he should not benefit from his wrong doings; counsel referred to the Exb R2 which are messages between the parties where the petitioner was always abusive while addressing the respondent; the petitioner has made it very hard for the parties to communicate while the respondent has always laboured to keep in touch with him for the sake of the child;
14. On whether the petitioner should be granted sole legal custody based on culture, counsel cited Article 33 of the Constitution on equality of persons irrespective of gender; and the right of women to equal treatment with men and to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom as provided for under Article 33(4) and (5) of the Constitution; that cultures, customs and traditions as elaborated by counsel for the petitioner are against the dignity, welfare and interest of women, undermine their status in society and are prohibited by the constitution under Article 33(6)



of the Constitution and should be treated with the contempt they deserve. Counsel cited *Atwal vs Amrit* (2011) EA 20) and in view of section 3(1) of the Children Act submitted that all the circumstances surrounding the case must be guided by the best interests of the child.

I appreciate the case law availed by both counsel for the parties and the position of the law; generally that in all matters concerning a child the welfare and best interests of the child in question should guide all decisions; that a child is entitled to being looked after by both parents irrespective of where the child is;

Court's decision on issues No.1, 2, and 3:

15. **Section 29 of the Divorce Act Cap 249** provides that in suits for dissolution of the marriage, the court may at any stage of the proceedings, or after the decree absolute has been pronounced, make such order as it thinks fit, and may from time to time vary or discharge the orders, with respect to custody, maintenance and education of the minor children of the marriage; a decree absolute was entered so the custody and maintenance matters are what this ruling is about; ideally the alimony should have been raised at the time divorce was declared but since the issue is still outstanding court shall consider it.
16. This Court has both a constitutional and statutory obligation to ensure that the best interests of the child guide its decision. The welfare principle cuts across both local and international legislation as regards the rights of children; **Article 3(1) of the United Nations Convention on the Rights of a Child** provides; in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. **Section 3 of the Children Act** as amended provides 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."*
17. Courts have enunciated the position that 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....’

18. The right of both parents to have custody and care of their child(ren) stems from the rights of the family under the Constitution of the Republic of Uganda 1995 (as amended) to wit: **Article 31 (1)**: ‘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....’; Specifically, Article 31(4) entitles every parent to the right and duty 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; (see ***Rwabuhemba Tim Musinguzi vs. Harriet Kamakune (supra)***); the decisions on custody while considering the ideal position being co-parenting the decision must be made after taking into account the welfare of the child depending on the facts of each case(see *Otto Methodius Pacific V. Edyline Sabrina Pacific*), (*supra*); what amounts to a child’s welfare in one case may be different in another for control and care are not the only considerations.
19. The child’s entitlement to parental responsibilities should neither be affected by the dissolution or annulment of the marriage or other formal relationship nor the legal or factual separation between the parents; his rights should never be fettered by the relationship/ or lack thereof; between his parents;
20. In this case, the child in issue was born on 14/5/2021; the petitioner informed court that upon the respondent deserting the home; she went with the child to her mother’s home; the petitioner stated that although he could have access to the child, the respondent’s mother’s place was not a convenient place for him to access the child; and so he last saw the child 16 months ago; during cross examination the respondent stated that the petitioner has a right to know the child as a father; and that she has never denied him from accessing the child, she would not mind handing the baby over to the petitioner to spend time with him as long as the petitioner brings the child back;
21. In his petition filed on 7/2/2022 at paragraph 3 of the prayers, the petitioner states: ‘That the respondent have sole custody of the child for three years with the petitioner having access to the child and later the petitioner and the respondent have joint custody’. The respondent in her reply at paragraph 12(b) prays that she be granted full custody’; the position of the law is that a party is



bound by his pleadings;(see Order 6 r.7 of the Civil Procedure Rules to wit: ‘*No pleading shall, not being a petition or application, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading.*’ *this position was restated in Jani Properties Ltd. vs. Dar es Salaam City Council [1966] EA 281; and Struggle Ltd vs. Pan African Insurance Co. Ltd. (1990) ALR 46 – 47’;sole custody to the respondent is therefore not contested.*

22. In any case the child in issue is 1 year and 11 months old which makes him of tender years; according to barprephero.com, ‘*the tender years’ doctrine is a prominent common law principle in family law and custody jurisprudence. It presumes that during a child's "tender" years (generally regarded as the age of four and under), the mother has the superior skills to care for the child and she should have custody of the child*’; before a child can speak and be able to report events that happen in his life, unless the mother is not alive or not available, it is, in my view, in the best interests of the child that the protective maternal instincts around the child, from when the child is born to when the child is able to identify and report pleasure or pain; be not interfered with; **In Re S (an infant) [1958] 1 All ER 783, at 786 and 787**; Roxburgh J said: “*I only say this; the prima facie rule (which is now quite clearly settled) is that, other things being equal, children of this tender age should be with their mother, and where a court gives the custody of a child of this tender age to the father it is incumbent on it to make sure that there really are sufficient reasons to exclude the prima facie rule.*”(see also *Teopista Kayongo case(supra)*;
23. While sole custody is what the petitioner prayed for, the respondent prays for full custody and testified that she does not deny the petitioner from spending time with the child as long as he picks him himself and not send a driver; to avoid being technical at the expense of the child’s welfare and best interests, physical custody is granted to the respondent but the petitioner shall have visitation rights one day in a week until the child is 5 years of age; thereafter the parties shall have joint custody of the child with the petitioner staying with the child during school holidays but on notice to the respondent, it being understood that the child’s wishes shall always be taken into consideration.
24. Issue 3 on whether the petitioner should be granted legal custody is in my view contradictory because once the petitioner agrees to sole custody being granted to the respondent he cannot invite court to determine whether he should be

granted legal custody because in my view sole custody amounts to both physical and legal custody; having stated that however I have found it prudent to comment on the submissions by both counsel on the basis for framing the issue in the first place even when it was never pleaded.

25. Counsel for the petitioner submitted that Uganda is a patrilineal society and therefore the petitioner should be granted legal custody to determine religion, education and medical treatments of the child excluding the respondent the biological mother of the child; Article 31 of the Constitution provides that a man and woman who choose to get married and found a family have equal rights at and in marriage, during marriage and at its dissolution; this includes the right and duty to care for and bring up their children born within the marriage (see; Article 31(4) of the 1995 Constitution of the Republic of Uganda); According to *Oxford Languages Dictionary*, 'care' is defined as ' the provision of what is necessary for the health, welfare, maintenance and protection of someone or something';
26. The proposition by counsel for the petitioner that decisions concerning education(welfare), religion and medical(health) matters should be lopsided in his favour to the exclusion of the respondent, however allegedly cultural it may be deemed; must be within the constitution; the right to practice culture must be in accordance with the constitution; therefore culture that seeks to be discriminatory on account of gender is contrary to Article 33(1) of the 1995 Constitution of the Republic of Uganda; and cannot be upheld by this court; In the premises even if the issue of whether the petitioner should be granted sole legal custody was properly framed, it would be answered in the negative for being unconstitutional.

Issue No.5: ***How much should the petitioner provide for the maintenance of the child?***

27. In his pleadings, the petitioner prays he caters for the general maintenance and medical expenses of the child and the respondent caters for the shelter. **Section 5 of the Children Act**; provides for the parental duty to maintain the child including providing education and guidance, immunization, adequate diet, clothing, shelter; and medical attention; 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. In all matters relating to children, their welfare is the paramount principle. (see: *In the matter of Deborah Joyce Alitubeera (Civil Appeal No. 70 of 2011) [2012] UGCA 4*);

28. Counsel for the petitioner submits that court does not pronounce itself on figures; with all due respect in matters where the relationship between parents has broken down and this is admitted by counsel for the petitioner while justifying sole legal custody to be granted to the petitioner; it is my considered view that courts must grant orders that are clear so that ambiguity is not used as an excuse to defy them; I believe not making orders with specific figure would not be in the interest of justice so I shall work with what was availed to court;
29. The only indicative monthly figures on how much is needed to maintain the child were in a letter from the respondent dated 5/04/2022, to the petitioner through their respective counsel as follows: 'Milk(formula) estimated at UGX 960,000/=; Pampers estimated at UGX 150,000/=; clothes estimated at 5,000,000/=; wipes estimated at 100,000/= and feeding estimated at UGX 1,000,000/=(the total was UGX 8,000,000/=); through his counsel the petitioner requested for a list vide letter dated 22/04/2022, so that he could go and purchase the items himself;
30. From the pleadings the petitioner agrees to meet the maintenance and medical costs of the child; having considered the indicative figures which the petitioner did not contest, save that he wanted to purchase the items himself; other than the proposed figure for the cost of clothes which I find excessive the rest of the figures appear fair; In the premises I award a monthly child maintenance amount of UGX 3,500,000/= payable to the respondent by the petitioner;
31. Section 33 of the Judicature Act and section 98 of the Civil Procedure Act provides that court may make orders in the interest of justice; the petitioner did not deny that he has not been providing for the child since the petition was filed on 7th February 2022; at the time of this ruling it is 15 months since); the best interests of the child and his welfare demands that both parties provide for the child irrespective of where the child was/is; (see *Sarah Kiyemba vs Batte [2019] UGHCFD 46*); the petitioner shall compensate the respondent for the 7 and a half months he has not been contributing towards maintenance; maintenance envisaged under section 5 of the Children Act includes education and all attendant costs, the petitioner shall, on top of the monthly maintenance amount,

provide medical insurance and shall meet the educational needs when the time comes;

32. On shelter the respondent testified that she is carrying on business; she did not plead that she could not afford to provide shelter for the child although she testified that she lives with her mother; court has not found reason not to order that the respondent provide shelter for the child.

Issue No.4; ***Whether the respondent is entitled to alimony from the petitioner?***

33. The respondent prays that court grants her an alimony order against the petitioner; she testified that during the subsistence of marriage, the petitioner was giving her a monthly allowance of 2,000,000/= as maintenance, as she was a house wife having quitted her job at the request of the petitioner; the respondent however testified that ever since she left the petitioner's rental home in August 2021, she has been maintaining herself out of her business and savings;
34. **Black's Law Diction 8th Edition page 228** defines the term alimony as "*A court-ordered allowance that one spouse pays to the other spouse for maintenance and support while they are separated, while they are involved in a matrimonial lawsuit, or after they are divorced*"; an allowance which a party may be compelled to pay to his or her spouse for maintenance when they are living apart or after they have been divorced. The essence of alimony is to provide financial support to the party which makes no or lower income;
35. Marriage by nature is intended to last a life time and when it finally comes to a stop or it is suspended, one of the parties(in most cases the wife), who has been depending on the other may require compensation to tidy her or him till they find their feet again; it is a compensation to the less economically positioned spouse(on separation); or former spouse by the spouse who is better endowed; **In Ayiko Mawa Solomon Vs. Lekuru Annet Ayiko [2017] UGHCFD 1**; court held that, "*Alimony conceptualizes spousal support as compensation earned by the economically disadvantaged spouse (normally the wife) through marital investments and as a means of eliminating distorting financial incentives in marriage, as well as a way to relieving financial need. Under section 24 (1) of The Divorce Act, the court may on a decree absolute declaring a marriage to be dissolved obtained by a wife, order the husband to secure to the wife such sum of money as, having regard to her fortune, if any, to the ability of the husband, and the conduct of the parties, it thinks reasonable*".

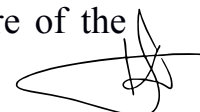
36. In this case, in their pleadings both parties agreed to the marriage being dissolved; counsel for the respondent submitted that circumstances including the length of the marriage must be considered; I agree; the parties got married on 7/11/2020; they separated on 16th September 2021; this petition was filed on 7th February 2022; the respondent's allegation that she was working before the marriage and was stopped by the petitioner who would give her a monthly allowance was not proved; I am not convinced that she invested a lot of time and resources in the marriage to deserve alimony; in any case she admitted to be involved in business and has resumed working; hence it is assumed she is not financially incapacitated to the point of not maintaining herself. Therefore, I find that the respondent is not entitled to receive alimony from the petitioner.

Issue 6: Whether court should grant costs of the suit?

37. It is trite law that costs follow the event and the successful party is entitled to costs (see section 27 of the Civil Procedure Act); I have considered the fact that the parties have a child together so in the spirit of reconciliation and the best interests of the child (see Article 126 of the 1995 Constitution of the Republic of Uganda; and section 3 of the Children Act) it is important that their relationship is not further aggravated; in any case both parties prayed for the marriage to be dissolved; therefore each party shall bear their costs

In the premises this petition majorly succeeds; I make the following orders;

- 1) Physical custody of the child Musinguzi Giovanni Muhoozi is granted to the Respondent Ingrid Karungi (the mother); while joint legal custody is granted to both the petitioner Andrew Muhangi (the father) and respondent;
- 2) The petitioner shall have visitation rights one day in a week until the child is 5 years of age; after which the parties shall have joint custody whereby the petitioner shall be entitled to stay with the child during school holidays but on prior notice to the respondent; it being understood that the child's wishes and best interest shall always be taken into consideration;
- 3) The Respondent is awarded a monthly child maintenance amount of UGX 3,500,000/= payable by the petitioner;
- 4) The petitioner shall within 30 days from this ruling compensate the respondent for the seven and a half months (his half contribution towards the care of the



child since he has not been contributing towards maintenance); at the rate now determined by court;

- 5) The petitioner shall, on top of the monthly maintenance amount, provide medical insurance and shall meet the educational needs when the time comes;
- 6) The Respondent shall provide shelter for the child.
- 7) The respondent is not entitled to receive alimony from the petitioner.
- 8) Each party shall bear their own costs.



Ketrah Kitariisibwa Katunguka.

Judge

29/05/2023.

Delivered by email to:
hmusoke@hotmail.com, piusddamulira@gmail.com, wanda5094@gmail.com

The dissatisfied party may appeal to the Court of Appeal of Uganda within 14 days from the date of this ruling.

