THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

FAMILY DIVISION

HCT-00-FD-DC-0010-2007

FREDRICK KATO **PETITIONER**

VERSUS

ANN NJOKI **RESPONDENT**

BEFORE

THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

RULING

1. The Petitioner and Respondent were married in the Republic of Kenya in June 2000 under the customary law of the Kikuyu. They moved to Uganda where they lived together until the events giving rise to these divorce proceedings arose. The parties are now living apart.
2. The petitioner has petitioned for divorce and the respondent has cross petitioned for divorce too while disputing the allegations of the petitioner against her. There have been a couple of interlocutory proceedings in this matter, the last of which were settled by agreement.
3. Originally this case was before my brother, Mwangushya, J., and it was subsequently allocated to me. On perusing the file I formed the preliminary view that jurisdiction of

this matter lay with the Chief Magistrates Court/Magistrates Grade 1 Court at Mengo. I notified the parties of this view, and they decided to address me on the subject before I reached a final decision on the matter.

4. Mr. Masembe, learned counsel for the Respondent, opposed the proposed direction to transfer this case for trial to the Chief Magistrates' Court of Mengo, while Mr. Byaruhanga, learned counsel for the Petitioner had no objection to the transfer of the case.
5. Mr. Masembe submitted that Section 3 of the Divorce Act which provided for divorce petitions by Africans to be filed in Magistrates' Courts and petitions of Non Africans to be filed in the High Court was discriminatory and therefore offended Article 21 of the Constitution. He submitted that the different treatment given to different parties was only on the basis of race, and thus denied African petitioners to commence their petitions in the High Court, a court that had more expertise than Magistrates Courts.
6. Secondly Mr. Masembe submitted that this court and the magistrates' courts have concurrent jurisdiction with regard to divorce matters. If this court was minded to transfer this matter to the lower court, that decision was discretionary. A decision was discretionary only in the sense that there was no binding rule of law but the decision maker had to be just, fair, right, equitable and reasonable. Mr. Masembe referred to several authorities in support of his case which included Ward v James, [1965] 1 All ER 562, Blunt v Blunt [1943] 2 All ER 76, National Enterprise Corporation v Mukisa Foods Ltd Court of Appeal Civil Appeal No. 42 of 1997 and Civil Procedure and Practice in Uganda by Ssekaana Musa et al.
7. Mr. Masembe submitted that the parties had been in the High Court for over one and half years and had developed an expectation, a legitimate expectation that the High

Court would hear and determine this matter. He feared that if sent below this case would suffer further delay given the backlog of cases in Magistrates' Courts.

8. Mr. Byaruhanga learned counsel for the petitioner had no objection to this matter being transferred to a magistrates' court for determination. He was confident that it would not suffer any unusual delay in that court. He challenged the respondent's assertion that Divorce Act was discriminatory, given that there was no decision of the Constitutional Court on the matter.

9. I start discussion of the matters in issue by setting out the relevant statutory provisions. Section 3 of the Divorce Act states,

> '(1) Where all the parties to a proceeding under this Act are Africans or where a petition for damages only is lodged in accordance with Section 21, jurisdiction may be exercised by a court over which presides a magistrate grade 1 or a chief magistrate.
> (2) In all other cases jurisdiction shall be exercised by the High Court only.'

10. Article 21 of the Constitution states in part,

> '(1) All persons are equal before the law and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.
> (2) Without prejudice to clause (1) of this article 1, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.'

11. The Divorce Act came into force on 1st October 1904. Unfortunately it has not been the subject of reform since then to-date, a period in excess of 100 hundred years! I am not sure what was the motivation or rationale for the different treatment of Africans from Non-Africans at the time at the beginning of the last century. Was it discrimination per se? Or was it some form of affirmative action intended to ensure

that Africans, the single largest segment of the population of the country at the time and now, had access to the courts that were nearest to them, that is the magistrates courts, rather than the High Court which was only located at Entebbe at the time?

12. Whichever it may be that debate may be unnecessary given the clear words of the Constitution which intend that all parties shall be treated equally irrespective of race save where for policy reasons intended to address social, economic, educational or other imbalances in society. It is difficult to justify the different treatment based on race by using clause 3 of Article 21 of the Constitution given that discrimination was only outlawed in this country in 1962 with our first independence constitution. To that extent Section 3 of the Divorce Act may be in conflict with the Constitution.

13. In light of Article 2 of the Constitution the Constitution is the supreme law of the land, and any law inconsistent with the Constitution is void to the extent of the inconsistency. The power to declare an Act of Parliament or provision thereof is a power that is reserved to the Constitutional Court. If the question of interpretation is substantial the question must be referred to the Constitutional Court.

14. However, where such a question arises not before the Constitutional Court but before another court and that question is not substantial, that court is obliged to interpret the law in question in accordance with Article 292 with such modifications, adaptations and qualifications as are necessary to bring such law in conformity with the Constitution. See Ostraco Limited v Attorney General, HCT-00-CV-CS-1380-1986.

15. Taking that course in this instance and having found that Section 3 of the Divorce Act is inconsistent with the Constitution I am obliged to interpret it in such a manner as would not permit its discriminatory aspects to persist so as to bring it in conformity with the Constitution. There are several choices I have.

16. Firstly I can take the route proposed by the respondent and accept the proposition that now all divorce cases may be filed in the High Court. The other proposition may be that in order to bring all litigants at the same level all cases under the Divorce Act may start before a magistrates' court.
17. The High Court is a court of unlimited jurisdiction with supervisory powers over magistrates' courts. No doubt the High Court has jurisdiction to determine divorce causes of any nature of parties regardless of race. Nevertheless the High Court has powers under Section 18 of the Civil Procedure Act to withdraw cases from Magistrates Courts and try them or to transfer cases to Magistrates' courts for trial in those courts.
18. Though a matter may be filed in High Court the High Court may transfer the same to a magistrate court. The High Court may withdraw from a Magistrates' court a matter and try it in the High Court. The discretion granted to the High Court is wide and perhaps limited only by various other applicable laws to jurisdictional issues and that such discretion shall be exercised judicially.
19. Given the need for the rational distribution of business in the courts so as not overwhelm one section of the court system with any particular class or category of cases and to ensure that the largest number of people have access to courts that are closest to the population it would be unwise in my view to conclude that all divorce cases must now be filed in the High Court. The High Court is chocking with cases and the backlog in the family division of the High Court of Uganda stretches back to cases well over 10 years old. And perhaps it is not for me to say all cases except those mentioned in Section 3(1) of the Divorce Act (cases involving Africans or a claim for damages for adultery) must now be filed in Magistrates' courts. That should be for legislature upon reform of the Divorce Act.

20. In the result I would find that though Africans can file their divorce petitions in the High Court just as people of all other races may do the High Court retains the power to order that such cases may be tried in the Magistrates' courts for reasons it would give.

21. In my view, barring exceptional circumstances, actions should be commenced in the lowest court having jurisdiction over the matter. The lower the court in the hierarchy of the court system the near the court is to the population of the country. Access is much easier in that regard. In the majority of cases it may be cheaper to litigate in the lowest court too. Though on the other hand the possibility for a greater number of appeals may vitiate that aspect in case appeals are pursued.

22. In the interim, pending reform of the Divorce Act, and perhaps for the guidance of the public, where in a divorce cause, the matrimonial assets in contention exceed the upper limit of the pecuniary civil jurisdiction of a magistrates' court that may amount to an exceptional circumstance to allow the filing of such a matter directly in the High Court. The current upper limit is Shs.50,000,000.00. Where the matrimonial assets exceed this amount such a matter may be filed in the High Court.

23. Pending reform of the law I am satisfied that magistrates' courts have jurisdiction to try divorce petitions such as the one before me. Magistrates' Courts are the lowest courts with jurisdiction in this matter. I see no reason why they should not try this matter. I am unable to accept that one party has acquired a legitimate expectation that this matter must be tried only in the High Court. The hearing of the substantive main petition and cross petition has not started. The respondent may well have an expectation that this matter must be tried by this court. Such an expectation is not legitimate in my view.

24. The only legitimate expectation a party before our courts should have is to have their matter tried speedily or at least within a reasonable time by a court with jurisdiction to try the same, and not necessarily a court of his or her choice in the hierarchy of courts.
25. I have examined the pleadings in this matter. They do not disclose that there are any matrimonial assets in contention. I see no exceptional circumstance why this matter should not be tried in a magistrates' court.
26. In light of the foregoing I direct that this matter be transferred to the Chief Magistrates Court of Mengo for trial before a chief magistrate or magistrate grade 1.

Signed, dated and delivered this 29th day of January 2009

FMS Egonda-Ntende
Judge