

UGANDA / JUDGMENT

Burua v Burua (Divorce Cause 93 of 2019) [2024] UGHCFD 56 (17 September 2024)

[2024] UGHCFD 56

COURT

HC: Family Division (Uganda)

BEFORE

Nagawa, J

CASE / FILE NUMBER

Divorce Cause 93 of 2019

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA (FAMILY DIVISION)

DIVORCE CAUSE NO. 93 OF 2019

NANCY AKITE BURUA ::::::::::::::: PETITIONER

VERSUS

JOE BURUA ::::::::::::::: RESPONDENT

JUDGEMENT BEFORE HON. LADY JUSTICE CELIA NAGAWA

1.0 INTRODUCTION.

- 1.1 Nancy Akite Burua hereafter referred to as the Petitioner filed Divorce Cause No. 93 of 2019 against the Respondent Joe Burua seeking the following orders;
- 1. A decree dissolving the marriage between the Petitioner and the Respondent.
- 2. An order granting to the Petitioner and the Respondent joint custody of the issue of the marriage as per the terms of the Separation agreement.
- 3. An order that the Respondent continues to provide maintenance for the issue, per the Separation Agreement's terms.
- 4. An order that the jointly held DFCU shares be sold and the proceeds put towards the maintenance of the issue.

- 5. The Respondent pays the costs of the suit.
- 1.2 The Respondent was served twice on 9th August 2019 and 21st January 2021. There are two affidavits of service on the court record in evidence of this. The Petitioner also advertised the hearing notice in the Daily Monitor Newspaper on 24th February, 2024. The Respondent did not file a reply to the Petition and the Petitioner

prayed that the matter be heard **ex-parte** as per the provisions of **Order 9 Rule 11(2) of the Civil Procedure Rules SI 71-1**. The matter was heard exparte. The Petitioner testified on oath.

2.0 Hearing and Representation.

- 2.1 Counsel Patrick Mugalula of M/S Katende, Ssempebwa and Company Advocates represented the Petitioner.
- 2.2 When this matter came up for hearing, this court directed that the Respondent to be served by substituted service after he was served first and failed to file a reply.
- 2.3 The Hearing Notice Summons to file an Answer to the Petition was advertised in the Daily Monitor Newspaper on 15th February, 2024 at Page 34.
- 2.4 On 12th June 2024, this Petition came up for hearing, the Petitioner adduced her evidence vide a Witness Statement. After taking oath, the Petitioner's Witness Statement was admitted as her evidence in Examination-in-Chief and marked "PW1", she had no other witness. The Petitioner was cross-examined on the said Witness Statement by the Court. The Petitioner relied on her exhibits to prove her case.

3.0 Background of the Petition.

- 3.1 On 26th March, 2005, the Petitioner was lawfully married to the Respondent at Full Gospel Church Makerere. The Petitioner contends that around November 2015, the Respondent cruelly treated the Petitioner, by amongst others deserting her, withdrawing and denying the Petitioner the consortium of her spouse, leaving the matrimonial home and neglecting or failing to provide necessities and upkeep for the Petitioner and the issue.
- 3.1.1. The Petitioner contends that she has suffered severe emotional distress and mental anguish. Following the deterioration of the relationship, the parties assisted by their respective lawyers,

mutually agreed to enter a separation arrangement with joint custody of the issue. Due to irreconcilable differences that have developed over time, the said marriage between the Petitioner has irretrievably broken down.

3.1.2. The parties have matrimonial property, DFCU Bank shares held in both their names, which were acquired during the marriage. The Petitioner prays that the court dissolves the marriage between her and the Respondent, grants her custody of their issue as per the terms of the Separation Agreement, the court orders the Respondent to continue providing maintenance for the child and an order that the jointly held DFCU shares be sold and the proceeds put towards maintenance of the issue.

3.2. Scheduling.

3.2.1. On 21st February, 2024, the Petitioner filed her Trial Bundle and a Witness Statement followed by the Petitioner's Scheduling Memorandum on 26th June, 2024. The matter was scheduled and heard on the same day.

3.3. Evidence of the Petitioner.

- 1. In proof of marriage, the Petitioner presented a copy of a Marriage Certificate dated 26th March, 2005 marked "PEX 1".
- 2. The Petitioner also presented the Foster Care Placement form marked "PEX 2" for the child the couple fostered and are intending to adopt.
- 3. Due to the deteriorating relationship between the couple, they entered into a separation agreement with the help of their lawyers, marked "PEX 3".
- 4. The Respondent was served and failed to appear before this court despite service. A hearing Notice was placed in the Daily Monitor Newspaper on Thursday 15th February, 2024 marked "PEX 4".

- 5. During the subsistence of their marriage, the couple acquired shares in DFCU Bank. The Share Certificates are attached and marked "PEX 5".

3.4. Issues for determination by the Court.

- 1. Whether there is a valid Marriage between the Petitioner and the Respondent?
- 2. Whether there are any grounds for the dissolution of the Marriage?
- 3. Whether the plaintiff is entitled to any of the reliefs sought?

3.5. Burden of Proof.

3.5.1. In all civil matters like the present petition, he who alleges bears the burden to prove his/her case on a balance of probabilities. The Petitioner in this case under **Sections 101,102 and 103 of the Evidence Act, Cap.8** has the burden to prove the facts alleged by her in the Petition. **Section 101 of the Evidence Act, Cap. 8** provides that; *"Whoever desires any Court to give judgment as to any legal right or liability, dependent on the existence of the facts which he or she asserts must prove that those facts exist"*.*

3.6. Submissions

3.6.1. On 16th August, 2024, Counsel for the Petitioner filed written submissions in the resolution of this Petition. This Honourable Court has perused, analysed and considered the written submissions submitted by the Petitioner in the determination of this Petition.

4. Determination of Issues.

4.1. Issue 1. Whether there is a valid Marriage between the Petitioner and the Respondent?

- 4.1.1. Proof of marriage is by a marriage certificate, proof of a ceremony, followed by cohabitation of parties. **Kintu Muwanga Versus Myllious G. Kintu Divorce Appeal No. 135 of 1997**. In proof of her marriage to the Respondent, the Petitioner presented a copy of a Marriage Certificate dated 26th March, 2005 marked "PEX 1".
- 4.1.2. **Section 31 of the Marriage Act, Cap. 146** provides that; *"every certificate of marriage which shall have been filed in the office of the registrar of any district, or a copy of the certificate of marriage, purporting to be signed and certified as a true copy by the registrar of that district and every entry in a Marriage Register Book or a copy of the entry, certified as prescribed in this section, shall be admissible as evidence of the marriage to which it relates, in any court of justice or before any person having by law or consent of the parties authority to hear, receive and examine evidence"*.* The couple was married at Makerere Full Gospel Church. A Church marriage is one of the forms of marriage that are recognized under the **Marriage Act, Cap. 144** in Uganda.
- 4.1.3. This court therefore finds that a valid marriage exists between the Petitioner and the Respondent.

4.2. Issue 2. Whether there are any grounds for the dissolution of the Marriage?

- 4.2.1. **Section 4 of the Divorce Act, Cap. 144** provides for the grounds of Divorce and states that;

- 1. A husband or wife may apply, by petition to the court, for the dissolution of the marriage on the ground that since the solemnisation of the marriage, his wife or her husband
- a) Has been guilty of adultery;

- b) Has changed his or her profession of Christianity for a profession of some other religion, and gone through a form of marriage with another man or woman;
- c) Has been guilty of bigamy;
- d) Has been guilty of rape, sodomy or bestiality;
- e) has been guilty of cruelty; or
- f) Has been guilty of desertion, without reasonable excuse, for two years or upwards.
- 4.2.2. **Section 8 of the Divorce Act, Cap. 144** provides for the circumstances when the Petition shall be granted. It states that;
- *1. 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, the court shall pronounce a decree nisi for the dissolution of the marriage.*
- *2. Notwithstanding subsection (1), the court shall not be bound to pronounce the decree if it finds that the petitioner has during the marriage been guilty of adultery, or been guilty of unreasonable delay in presenting or prosecuting the petition, or of cruelty to the respondent, or of having deserted or wilfully separated himself or herself from the respondent before the adultery complained of, and without reasonable excuse, or of such wilful neglect of or misconduct towards the respondent as has conducted the adultery.*
- 4.2.3. For a Decree Nisi to be granted to the Petitioner, the Court must first be satisfied that the presented grounds have been adequately proven. Additionally, there should be no evidence of connivance,

condonation, or collusion with the Respondent in filing the Petition. The Court must also ensure that the Petitioner has not unreasonably delayed the filing, and has not subjected the Respondent to any of the offences under **Section 4 of the Divorce Act Cap 144**, or any other form of misconduct. This Petition is reliant on the grounds of Cruelty and Desertion.

4.3. Cruelty.

- 4.3.1. The legal conception of cruelty and the kind of degree of cruelty necessary to amount to a matrimonial offence has not been defined under the **Divorce Act, Cap. 144**. Cruelty may be defined as the wilful and unjustifiable conduct of such a character as to cause danger to life, limb and health, bodily or mental, or as to give rise to a reasonable apprehension of such danger. [(Russel v.)(<https://indiankanoon.org/doc/144300667/>) [Russel\)](<https://indiankanoon.org/doc/144300667/>) [(1897) AC 395
- 4.3.2. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is **physical**, it is a question of fact and degree. If it is **mental**, the enquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the spouse.
- 4.3.3. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse.
- 4.3.4. The agreed upon consensus by the courts is that the behaviour complained of must be "grave and weighty, not to be confused with actions resulting from the ordinary "wear and tear" of every marriage. It must be of the type as to satisfy the conscience of the Court that the relationship between the Parties has deteriorated to such extent due to the conduct of the other spouse that it would be

impossible for them to live together without mental agony, torture, or distress, to entitle the complaining spouse to secure Divorce.

- 4.3.5. It was the testimony of the Petitioner that during the marriage, the Respondent neglected the Petitioner, refused to make any contribution to the family, overtly engaged in extra-marital affairs and had a child out of their marriage. The Petitioner also deserted their matrimonial home to go live with another woman.
- 4.3.6. Marital neglect, characterized by a spouse's consistent failure to provide emotional, financial, or moral support within the marriage, can amount to cruelty under matrimonial law. When one party neglects their marital duties whether through abandonment, lack of communication, or refusal to contribute to the household, it causes the other spouse significant emotional distress. Such neglect undermines the fundamental essence of partnership and companionship in marriage. Prolonged neglect may lead to feelings of isolation, worthlessness, and psychological suffering, which adversely affect the well-being of the neglected spouse. Persistent marital neglect constitutes cruelty, as it inflicts emotional and psychological harm on the affected spouse.

- 4.3.7. Infidelity, by its very nature, constitutes a serious breach of the marital bond and is widely recognized as an act of cruelty in matrimonial law. When one spouse engages in an extramarital affair going to the extent of even having a child out of that affair, as is the case here, it causes deep emotional pain, betrayal, and humiliation for the other spouse, undermining the trust and intimacy essential to the marriage. The psychological impact of such infidelity can understandably result in significant emotional distress and instability for the innocent spouse. It is a violation of marital fidelity and amounts to cruelty due to the severe harm it inflicts on the innocent party's emotional well-being.

4.3.8. Based on the Petitioner's testimony unrebutted testimony, the court finds that the Respondent's conduct, including neglect, failure to contribute to the family, engagement in extra-marital affairs, having a child outside the marriage, and desertion of the matrimonial home to live with another woman amounts to cruelty.

4.4. Desertion without justifiable cause.

- 4.4.1. Desertion is defined as the act of one spouse leaving the other without justification for a minimum of two years before filing for divorce. This concept encompasses two critical elements: first, there must be a clear separation between the spouses, and second, the departing spouse must have intended to terminate the cohabitation permanently. The absence of either element renders the claim insufficient.
- 4.4.2. In divorce proceedings, the criteria for establishing desertion include;
 - a) complete cessation of cohabitation,
 - b) the passage of the statutory period,
 - c) a clear intention to abandon the marriage,
 - d) a lack of consent from the spouse being deserted, and
 - e) an absence of any spousal misconduct that could justify the abandonment.
- 4.4.3. In the landmark case of **Lang v. Lang [1955] A. C. 402**, the court clarified that desertion does not solely refer to the physical act of leaving a shared residence; rather, it encompasses the broader context of withdrawing from the marital relationship itself. The court emphasized the importance of the "animus deserendi," or the intention behind the separation, which must indicate a desire to permanently end the marital union.

- 4.4.4. Furthermore, in **Pardy v. Pardy** [1939] P. 288, the court reiterated that both the factual separation and the intention to sever the marital relationship are essential for proving desertion. This case underscored that a spouse's actions must reflect a clear intent to abandon the marriage, which can be inferred from their behaviour and circumstances.
- 4.4.5. Overall, the legal framework surrounding desertion necessitates a careful examination of both the physical separation and the underlying intentions of the parties involved to establish a valid ground for divorce.
- 4.4.6. In this case, the evidence demonstrates that the Respondent abandoned the matrimonial home in November 2015 and subsequently began cohabiting with another woman, with whom he had a child. This unequivocally illustrates his intention to permanently sever all marital ties with the Petitioner.
- 4.4.7. The Respondent's actions reflect a deliberate choice to disengage from the marriage, as evidenced by his decision to establish a new family unit with another partner. His refusal to participate in these divorce proceedings further underscores his lack of interest in preserving the marriage and his conscious decision to abandon his responsibilities as a spouse.
- 4.4.8. The law requires both a physical separation and an intention to permanently abandon the marriage, and both elements are present in this case. The Respondent has not only withdrawn physically but has also emotionally distanced himself from the Petitioner, demonstrating a complete disinterest in the continuation of their marital bond.
- 4.4.9. In light of these facts, it is evident that the Respondent has intentionally chosen to withdraw from the marriage. Therefore, desertion is conclusively established.

4.4.10. The court finds that the Marriage between the Petitioner and the Respondent has irretrievably broken down on the grounds of Cruelty and Desertion.

5.0. Issue 3. Whether the plaintiff is entitled to any of the reliefs sought?

5.1. Custody

5.1.1. The Petitioner sought the following orders and this court will determine whether or not she is entitled to them.

6.0. Decree Nisi

- 6.1. The Petitioner prayed that her marriage to the Respondent be dissolved as provided for under **Section 4 of the Divorce Act**. The petitioner has proved both cruelty and desertion as the grounds for her divorce. The Petitioner to the knowledge of this court has not condoned, connived or colluded with the Respondent in seeking this court.

- 6.1.2. The Respondent was served and the evidence of service is on the Court record, however, he chose not to file a reply to the Petition. The petitioner is therefore entitled to a Decree Nisi as provided for under **Section 4 of the Divorce Act, Cap. 144.**
- **7.0. Custody and Maintenance.**
- **7.1. Section 1(q) of the Children Act, Cap. 62** 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** provides that a parent is given the right and duty to care for and bring up their children. The couple undertook the foster care of the child Keiko Akite Burua together aged 12 currently in the custody of the Petitioner.

- 7.1.1. While the Parties intended/intend to adopt the child. This is not yet the case. The Foster care order for the child was issued in the names of both parents.
- 7.1.2. Under **Section 31 of the Children Act Cap 62**, a foster parent with whom the child is placed has parental responsibility for the child while the child is with him or her. This parental responsibility only extends to the period the child is in their care.
- 7.1.3. Previous parental rights and obligations of the biological parents are not terminated and therefore the court cannot make an order for permanent custody or maintenance in disregard for other parental rights and responsibilities over the child, even in the absence of the persons that hold them.
- 7.1.4. However, the court in acknowledgement of its role under **Section 3 of the Children Act, Cap 62**, considers what is in the best interests of this child. The child has lived with the Petitioner for the majority of her life. The Petitioner prayed that the court grants joint custody to her and the Respondent with her having Primary Custody of the Child. The prayer is allowed by the court.
- 7.1.5. Upon this award of Joint Custody, the court reiterates the position of **Section 4 of the Children Act** which states that it shall be the duty of a parent, guardian or *any person having custody of a child to maintain that child.* The Respondent applied to foster this child along with the Petitioner, he further committed to paying a sum of UGX 1,600,000/= One Million Six Hundred Uganda Shillings for the child support/education of this child. The court shall maintain the terms of the Separation Agreement on Maintenance.

7.2. Matrimonial Property.

7.2.1. Matrimonial Property was defined in the case of **Charman Versus 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".

- 7.2.2. The only matrimonial property held by the parties are Shares in DFCU Bank. The Petitioner provided this court with copies of the Share Certificates in both the Petitioner and the Respondent's names marked "PEX 5". The Petitioner prayed that the court order the sale of these shares and the funds be transferred to the care of the child.
- 7.2.3. However, the court must also take into account factors such as the Petitioner's testimony indicating that the Respondent has another child. In light of this, the court cannot issue an order that grants the sole property in the divorce entirely to one of his children, as doing so would unjustly overlook the Respondent's responsibility to provide for both children.
- 7.2.4. The second consideration is the nature of the Respondent's relationship with the child in question. As a foster parent, the Respondent's legal responsibilities are temporary and subject to his choice to continue the foster care arrangement and the decision of the probation and social welfare officer in charge of the child. Unlike adoption, where full parental rights and obligations are permanently transferred, foster care does not grant the Respondent full parental authority over the child. Therefore, the court cannot treat this foster relationship as equivalent to adoption when determining property division. A full transfer of property shares might be appropriate in an adoption scenario, where the biological parent's rights are terminated and full parental duties are awarded to the Petitioners. In this case, such an order would be premature and unjustified given the temporary and non-permanent nature of the Respondent's parental responsibility under foster care.

7.2.5. The court therefore allows the sale of the shares in DFCU Bank, however, the proceeds shall be divided on a 50:50 basis.

8.0. Costs.

8.1. Costs are awarded to the Petitioner. I take note that the Respondent did not participate in this petition despite several service process and the abuse of court process.

9.0. Conclusion.

- 9.1. In the final result, the court determines as follows.
- 1. This petition is allowed.
- 2. A decree Nisi is hereby pronounced in dissolution of the marriage between the petitioner and the respondent.

- 3. The Petitioner and the Respondent shall have joint custody of the child Keiko Akite Burua, with primary custody being held by the Petitioner while she is in their foster care.
- 4. The Respondent shall continue to cater for the child Keiko Akite Burua's school fees and requirements.
- 5. The Shares in DFCU Bank held by the petitioner and the Respondent shall be sold and the proceeds sold equally between the parties.
- 6. Costs are awarded to the Petitioner.

Dated, signed and delivered via email this 17th day of September, 2024.

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