

UGANDA / JUDGMENT

Kayhul v Kayhul (Divorce Cause No. 123 of 2016) [2020] UGHCFD 7 (3 July 2020)

[2020] UGHCFD 7**COURT**

HC: Family Division (Uganda)

BEFORE

Namundi, J

CASE / FILE NUMBER

Divorce Cause No. 123 of 2016

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THE REPUBLIC OF UGANDA IN THE HIGH COURT UGANDA AT KAMPALA (FAMILY DIVISION) DIVORCE CAUSE NO. 123 OF 2016

| AMELIA
SETAI
KAYHUL | ::::::::::: | PETITIONER |

|-----|-----|-----|

| | VERSUS | |

| DAVID
KAYHUL | ::::::::::: | RESPONDENT |

BEFORE: HON JUSTICE GODFREY NAMUNDI**JUDGMENT**

This is a Petition for Divorce filed by the Petitioner **Amelia Setai Kayhul** against the Respondent **David Kayhul** for a decree that the marriage between her and the Respondent be dissolved, and Orders:

- a) That custody of the issues of the marriage Kayhul Carol, Kayhul Tracy and Kayhul Patricia be granted to the Petitioner.
- b) For sole custody of the issues of the marriage and the Respondent to be given access.
- c) That the matrimonial property or any property acquired during this marriage be shared equally to wit; - land at Namulonge.
- d) That the Respondent contributes UgShs 35,000,000 towards the construction of a house on the land at Namulonge.
- e) That the Respondent pays costs and any incidental to this petition.

- f) That any such further and other relief(s) in the premises as to the Honourable Court may deem fit.

The Respondent filed a reply to the petition.

The Petitioner petitioned this court for dissolution of marriage on grounds that the marriage had irretrievably broken down following the Respondent's conduct of cutting communication with Petitioner and they started living in separate rooms with no communication. The Respondent stopped the petitioner from visiting her country Lesotho.

In reply to the petition, the Respondent contested the allegation of the marriage being irretrievably broken down and stated that he was still interested in the marriage. He stated that he has never stopped communicating with Petitioner or from visiting her parents who stay in Lesotho. That upon marriage they chose to stay in Uganda since it is the Respondent's home country. That he lives in the same room with the Petitioner at their matrimonial home and he has always ensured they live happily with the Petitioner but instead the Petitioner has been harsh, cruel, and abusive and caused him embarrassment by shouting at him in public. That since he has never subjected the Petitioner to harshness, violence, emotional abuse or humiliation there's no reason for dissolution of the marriage.

The background is that the Petitioner and Respondent solemnized marriage on 18 th may 2002 at Lesotho Evangelic Church. They lived in Lesotho and moved to Uganda in 2003. The Petitioner and Respondent

lived and cohabited together at Mbuya, Kampala and begot three issues to the said marriage namely;-Kayhul Carol aged seventeen (19) years old, Kayhul Tracy aged Fifteen (15) years old and Kayhul Patricia aged Twelve (12) years old.

While at Scheduling the parties agreed on the following facts: -

- 1. That the parties got married in 2002 and got three issues to wit;Kayhul Carol aged seventeen (19) years old, Kayhul Tracy aged Fifteen (15) years old and Kayhul Patricia aged Twelve (12) years old.
- 2. That the Respondent and the Petitioner have been married for thirteen (13) years in Uganda.

The issues raised for courts determination are;-

- 1. Whether or not there are grounds for divorce?
- 2. What remedies are available to the parties?

The Petitioner's evidence as adduced from her sworn witness statement is that she got married to the Respondent at Lesotho Evangelic Church in Lesotho and the Respondent is in possession of the marriage certificate. The Respondent in his reply to the petition paragraph 3 admitted to being married to the Petitioner, the two briefly lived in Lesotho. In 2003 they agreed to relocate to Uganda. They begot three issues Namely;- Kayhul Carol aged seventeen (19) years old,

Kayhul Tracy aged Fifteen (15) years old and Kayhul Patricia aged Twelve (12) years old. That in or about 2012, the Respondent stopped communicating with the Petitioner and was not sharing a bed with her. They eventually started living in separate bedrooms and were no longer living as husband and wife.

She stated that the Respondent stopped her from visiting her parents in Lesotho (a letter from Interpol was attached as annexure P. E.3). She further stated the Respondent neglected her and the children which prompted her to open up a case of neglect against the Respondent at Kinawataka Police Station under SD Ref 24/7/2016.

That after filing the Divorce Petition the Respondent engaged in Domestic Violence. Since March 2017 the Petitioner has been living in Kirinya whereas the Respondent lives in Namugongo. That the marriage between her and the Respondent has completely broken down and should be dissolved.

In cross examination she maintained her evidence that they got married on 3 rd/05/2002 in Lesotho Evangelic Church in Lesotho but the Respondent hid marriage certificate plus children's birth certificates. That the witnesses to the marriage were Tsikane Makopoi, Elizabeth Thabisi (matron) and Malapos Stai (Her grandfather). That the grandfather acted as a parent to both of them since the Respondent

had no relatives in Lesotho as he was there for work. That Obua James acted as a go between her Respondent and her parents, he paid 1 cow as dowry. That they have three children. Two in Kings College, Budo and one is in Trinity College Nabbingo. The Respondent pays the tuition and the Petitioner provides small necessities.

In re-examination she stated that Respondent was a teacher in Lesotho and like herself. That she met the Respondent at 18 years and got married to him at 20 years. They came to Uganda in March 2003 and stayed together up to 2017.

The Respondent's evidence as adduced from his sworn witness statement is that he has never married the Petitioner, they were only staying together as boyfriend and girlfriend. That he has never stopped communicating or visiting her parents in Lesotho. That they chose to stay in Uganda upon marriage but was never solemnized. The the Petitioner visited her parents in 2004, 2005, 2018 and 2016 at the cost of the Respondent. That he was staying with Petitioner in the same home although the Petitioner could sleep with her children. That he established several businesses for the Petitioner, bought her vehicles and has been providing maintenance. The Respondent has never been cruel, instead it is the Petitioner who was cruel that is to say she was

harsh and abusive; she used to embarrass the Respondent by shouting at him in public.

He stated that he has never deprived of the Petitioner of the comfort in bedroom instead it is the Petitioner who left the bedroom claiming the bed was small. He further stated on oath he stayed with Petitioner for long but they were not married.

In cross examination, he stated that while in Lesotho he did not go to the Petitioner's parents place. That he was in Lesotho as a teacher where he met the Petitioner. That he came back to Uganda in 2003 alone and the Petitioner as a friend. That it was indicated on the Petitioner's entry visa that she was a wife because that is the only way she could enter Uganda otherwise the Petitioner was just his girlfriend.

Decision of court

I have carefully read the petition and the reply to the petition as well considered the evidence adduced by the parties and the submissions of counsel in support of their respective cases. I now turn to resolve the issues

Issue 1: whether or not there grounds for divorce?

Before I consider the grounds for divorce in this petition, I will first determine whether there was a valid marriage between the Petitioner and Respondent.

The Petitioner produced a scanned copy of the marriage register to support her case that she was legally married to the Respondent in a church marriage conducted in Lesotho Evangelic Church in Lesotho on the 3rd/05/2002 and Claimed that the Respondent hid the marriage certificate. In his Affidavit in reply to the petition, the Respondent admitted to being married to the Petitioner (see paragraph 3) and stated in paragraph 6 that he was still interested in the marriage. But, in his sworn statement he denied to ever being married to the Petitioner and stated that they just merely boyfriend and girlfriend.

The parties are bound by their pleadings and cannot be permitted to depart from what they have pleaded. See **Struggle (U) Ltd vs. Pan Africa Insurance Co. Ltd (1990) KLR 46-4**.

Further, Order 6 r.7 of the Civil Procedure Rules (CPR) embeds a rule against departure from pleadings as follows;

**"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."*

Therefore the Respondent cannot depart from what he pleaded in the affidavit in reply to the petition since he did not apply for amendment court is inclined to consider what he stated in his pleadings. His allegation that he was mixed up at the time he made the affidavit in reply to the petition is disregarded.

A church marriage is one of the forms of marriages 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. The Petition is based on the grounds of desertion. Desertion as a ground for divorce is provided for under **Section 4 of the Divorce Act Cap 249**.

I now move on to consider whether there are grounds for divorce

Desertion occurs where the spouse leaves the matrimonial home with an intention not to return or when parties still stay together in the same house/room but one spouse has withdrawn from the other and this continues for a period of time, two years or more.

In the case of Lang V Lang (1954) 3 ALL ER 571 it was stated;

"To establish desertion two things must be proved: first certain outward and visible conduct- the factum of desertion and secondly the "animus deserindi"- the intention underlying this conduct to bring the matrimonial union to an end. In ordinary desertion the factum is simple: it is the act of the absconding party in leaving the matrimonial home. The contest in such a case will be almost entirely as to "animus Deserindi". Was the intention of the of party leaving the home to break it up for good, or something short of, or different from that."

Section 4 of the Divorce Act requires that the desertion be for two years or more.

The evidence before this court shows that the Petitioner and Respondent were living in separate bedrooms and eventually both of them left the matrimonial home in March 2017 and are now living in different places. The Petitioner lives in Kirinya whereas the Respondent

lives in Kireka at Namugongo Road for a period of two (2) years and two months now.

Looking at the evidence in its entirety, the relations of the parties during the subsistence of the marriage, coupled with the fact that the parties are not living together, are not planning any reconciliation.

It is evident that the marriage between the Petitioner and Respondent has irretrievably broken down.

Issue 2: What remedies are available to the parties?

The petitioner prayed to that the matrimonial property or any property acquired during this marriage be shared equally to wit: land at Namulonge and the respondent to contribute Ug Shs 35,000,000 towards the construction of a house on the land at Namulonge.

In his submissions learned counsel for the respondent submitted that the property was not acquired by Petitioner but the Respondent for the interest of the children.

In the case of **Rwabinumi Vs. Bahimbisomwe Civil Appeal No. 10 of 2009** citing with approval the authority of **Kagga Vs Kagga (High Court Divorce Cause No.11/05)**, the Supreme Court did recognize the un monetized contribution of wife where Justice Mwangusya observed that, **"Our courts have established a principle which recognizes each"**

***spouse's contribution to acquisition of property and this contribution may be direct, where the contribution is monetary or indirect, where a spouse offers domestic services.....when distributing the property of a divorced couple, it is immaterial that one of the spouses was not financially endowed as the other as this case clearly showed that while the first respondent was the financial muscle behind all the wealth they acquired, the contribution of the petitioner is no less important than that made by the respondent.*"**

It is my finding therefore that the property in Land at Namulonge is matrimonial property therefore the Petitioner is entitled a share in the same. Therefore the said land shall be divided equally amongst the parties.

That custody of the issues of the marriage kayhul Carol, Kayhul Tracy and Kayhul Patricia be granted to her and the Respondent to be given access.

According to Section 3 of the Children Act Cap 59, the welfare principle and the children's rights set out in the 1 st schedule shall be the guiding principle in making any decision concerning children. In the case of **In Re M (an infant)Supreme Court Civil Appeal 22/1994**, the court stated that the welfare of the child should be looked up in the widest possible sense.

In consideration of the best interests of the child the Petitioner is given sole custody of the issues of the marriage with the Respondent having reasonable access.

The Respondent shall contribute 35,500,000/= (Thirty Five thousand Shillings towards the construction of the house at Petitioner's share at the Land in Namulonge where she will stay with the children of the marriage.

The Respondent shall provide maintenance of the three issues of the marriage which shall include among other School fees, Clothing, Medical, feeding as he has been doing.

I accordingly order as follows.

- 1. A decree Nisi is hereby entered dissolving the marriage between the Petitioner and the Respondent.
- 2. The Petitioner is granted Primary custody of the minors Kayhul Carol, Kayhul Tracy and Kayhul Patricia, with the Respondent having visitation rights upon sufficient notice to the Petitioner.
- 3. The Respondent shall provide maintenance of the children which include school fees, clothing, medical, feeding and others.
- 4. The Petitioner and the Respondent shall share the Land at Namulonge equally.

- 5. The Respondent shall contribute Ug Shs. 35,000,000/= towards the construction of the House on the Petitioners share on the Land at Namulonge.
- 6. This being a family matter, I make no order as to costs.

GODFREY NAMUNDI

Judge:

Date: 03-07-2020

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