

UGANDA / JUDGMENT

Lugwaro v Karema (Family Cause 67 of 2021) [2024] UGHCFD 50 (26 August 2024)

[2024] UGHCFD 50

COURT

HC: Family Division (Uganda)

BEFORE

Nagawa, J

CASE / FILE NUMBER

Family Cause 67 of 2021

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT KAMPALA****[FAMILY DIVISION]****FAMILY CAUSE NO. 67 OF 2021****LUGWARO ABER BRENDA ::::::::::::::::::::::::::::::::::: PETITIONER****VERSUS****KAREMA EDWARD ::::::::::::::::::::::::::::::::::: RESPONDENT****JUDGEMENT BEFORE: HON. LADY JUSTICE CELIA NAGAWA.****1.0 Introduction.**

- 1.1 The Petitioner, Lugwaro Aber Brenda, brought this application against the Respondent, Karema Edward, seeking orders that;
- 1. The Petitioner be granted sole custody of the children with visitation rights to the Respondent.
- 2. A maintenance order be made against the Respondent in favour of the children.
- 3. An order of Parentage following a DNA test paid by the Respondent be made against the Respondent in favour of the child, Karema Mercy Eliana.

- 4. The property comprised in Busiro Block 263 Plot 939, land at Ssenge, owned by the Petitioner and Respondent be valued and then severed by sale.
- 5. The proceeds of the sale of the property in (4) above be applied to the maintenance of the children first and then any balance can be shared by the parties.
- 6. The Respondent pays the costs of the suit.
- 7. The Petitioner be granted such further and other reliefs in the premises as this Honourable Court may deem fit.
- 1.2 The Respondent was served on 28th February, 2023 by Ms. Oyenyboth Grace, a Court Process Server, after several attempts following evading service.
- 1.3 The Respondent did not file an affidavit in reply to this Petition. Accordingly, the Petitioner prayed that the Petition be set down for hearing **exparte** as per the provisions of **Order 9 Rule 20 (a) of the Civil Procedure Rules S. I. 71-1**. The matter was heard **exparte**. The Petitioner testified on oath.

2.0 Background of the Petition.

- 2.1 The Petitioner cohabited with the Respondent and they begot four issues aged 17, 16, 14 and 7 years old. While cohabiting, the parties jointly acquired a plot of land at Block 265 Plot 939 in Ssenge, Wakiso District and constructed a house on it.
- 2.2 In 2016, while pregnant with their last child, the Respondent abandoned the Petitioner with their three sons in their house and has not contributed to the maintenance of the four children to date. The Petitioner stayed in their home until the 2020 Covid-19 pandemic when she could not return home from the Naalya market where she worked due to movement restrictions.
- 2.3 Upon lifting the COVID-19 restrictions, she returned home to find that the Respondent was in possession of their home. She approached the Local council authorities who mediated her grievance reaching a decision that both parties should have access to the house, however, the Respondent denied the Petitioner access. He also denied being the father of Karema Eliana Mercy.

3.0 Issues to be determined by this Court.

1. What is the legal implication of the Respondent not filing an affidavit in reply?

- 2. Whether it is in the best interest of the children that the Petitioner be granted full custody and maintenance orders?
- 3. What other remedies are available to the parties?

4.0 Written Submissions.

4.1 I have perused and analysed the Petitioner's written submissions. I appreciate the submissions and arguments in the endeavour to resolve this Petition. Further, I evaluated and examined the Petition and the documentary evidence, as required by law and all have been considered in the determination of this matter.

5.0 Determination by Court.

Issue 1: What is the legal implication of the Respondent not filing an affidavit in reply?

- 5.1 The Petitioner relied on the case of **Kaggwa Micheal Vs Olal Mark & 6 others CA No. 0010/2017** where **Hon. Justice Stephen Mubiru** stated that an allegation of fact not specifically traversed will be taken to be admitted, whether this was intended or not and once treated as admitted, the party who makes it need not prove it.
- 5.2 The Petitioner contended that the Respondent's decision not to respond to the Petition confirms that the Respondent has admitted all the facts therein and as such the said facts have been admitted and need not be proved by the Petitioner.
- 5.3 The Respondent was served on 28th February, 2023 by Oyenboth Grace after evading service several times. He did not file an affidavit in reply to this Petition. Accordingly, the Petitioner prayed that the Petition be set down for hearing **exparte** as per the provisions of **Order 9 Rule 20 of the Civil Procedure Rules S. I 71-1**. The matter was heard **exparte.** The Petitioner testified on oath.

- 5.4 In scenarios where the Respondent even upon service refuses to file an affidavit in reply, he/she is presumed to have conceded to the application. However, the Petitioner still has to prove all facts alleged in this Petition as guided by **Section 101 of the Evidence Act, Cap. 8**. The Petitioner led evidence to prove her case.
- **6.0. Issue 2: Whether it is in the best interest of the children that the Petitioner be granted full custody and maintenance orders?**
- **6.1. Custody Order be granted to the Petitioner.**
- **6.1.1. Section 1 of the Children Act, Cap. 62** interprets a custodian to mean a person in whose care a child is physically placed. **Article 31 (4) of the Constitution of the Republic of Uganda 1995 (as amended)** provides that a parent is given the right and duty to care for and bring up their children. The children in this Petition are aged 17, 15, 14 and 7 years of age.

- 6.1.2. **Section 116 of the Children Act** **(supra)** provides for a custody order. It provides that the court may on application of a sole applicant or joint applicants, grant custody of a child on such conditions as may be determined by the court. In the matter before this court, it is the children's mother who made the application for a custody order over the children.
- 6.1.3. In the case of **Namukasa Joweria Versus Kakondere Livingstone Divorce Cause No. 30 of 2010**, **Hon. Lady Justice Eva K. Luswata** (**as she then was**) observed that;

"Custody concerns essentially the control and preservation of the child's person, physically, mentally, and morally."

6.1.4. The Petitioner is seeking sole custody of the four children. As averred in paragraphs 7,9 and 24 of the Petition and paragraphs 6 of the Witness Statement, she stated therein that the Respondent deserted and/or abandoned their sons with the Petitioner who was

at the time pregnant with the fourth child and has for about seven years shown no interest or concern for his children at all. The Petitioner relied on the authority of **Julius Chama Versus Specioza Rwalanda Mbabazi, Divorce Cause No. 25 of 2011** where the court stated that the cross petitioner who had had custody of the child for four years and half should retain custody.

- 6.1.5. The Petitioner also contended that the Respondent had denied parentage of their last born child, and it would not be in her best interest to be placed in the custody of her father.
- 6.1.6. The Petitioner cited **Section 4 (1) (a) and (2) of the Children Act** **(supra)**, which provides that a child has a right to live with his or her parent or guardian except for situations where a competent authority determines in accordance with the laws and procedures applicable that it is in the best interest of the child to separate him or her from his or her parents or parent.
- 6.1.7. The Petitioner relied on the case of **Birungi Nicholas Versus Kakyo Pamela, HCCA 32 of 2022** wherein it was noted that; *"Where the child is in custody of one of the parents, there must be compelling reasons why custody should be given to another parent and not the one who has been in custody of the issue involved. Such reasons may include for example where the one in custody of the child engages himself or herself in acts of immorality, case in point, prostitution or pornography or where such parent pays little attention to the care of the issue involved or where such parent is a convict of charges involving child abuse, then these may be some of the considerations that the court may consider in ordering that custody be removed from such parent to the other. In the absence of such completing reasons, it is my view that the parent who has been in the life of the issue involved and who has been looking after him or her should retain**

custody of the same in event of separation of parents. This is done on account that such parent understands better the needs and weaknesses of such child and the child would not struggle getting accustomed to a different environment than the one he or she has been used to. Financial position and or economic station of life of the parent, his political aspirations and influence in society should not be overriding factors. Such other parent of means can be ordered to continue paying maintenance while the child is in the custody of the other parent."

- 6.1.8. The Petitioner contended that the Respondent deserted their sons to her sole care while she was pregnant with their fourth child at the time. In the matter of **Twesiga (Infant) (Miscellaneous Application 4 of 2008 [2008] UGHCFD 1 (16 September 2008))**, Court stated that while the primary right of the child is to grow up under the tutelage of his or her parents, or parent, for the obvious reason of emotional attachment, if it is shown to the satisfaction of a competent authority, and in this case the Court, that it would serve the best interest of the child, then it would be proper for this Court to make an order removing such child from the parent.
- 6.1.9. In all child custody cases, the court is required to determine whether the parent is capable of caring for the child. This evaluation comprises financial, emotional, and physical considerations.
- 6.1.10. I am mindful of the "general principle" that delay in determining cases about children's upbringing "is likely to prejudice the welfare of the child", and the court is alive to the fact that it should not make any order in relation to children "unless it considers that doing so would be better for the child than making no order at all". It is against that background that the court must

also consider the welfare checklist in **Section 3 of the Children Act**.

6.2. The Welfare Principle

6.2.1. **Article 31 of the 1995 Constitution of the Republic of Uganda (as amended)** provides that;

(4) It is the right and duty of parents to care for and bring up their children.

(5) Children may not be separated from their families or the persons entitled to bring them up against the will of their families or of those persons, except in accordance with the law."

6.2.2. **Section 3 of the Children Act *(supra)* provides that;**

(1) 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.

(2) In all matters relating to a child, whether before a court of law or before any other person, regard shall be had to the general principle that any delay in determining the matter is likely to be prejudicial to the welfare of the child.

6.2.3. The meaning of "Paramount" has been interpreted by the House of Lords in **J Versus C [1970] AC 668, 710-11** by *Lord MacDermott* who gave the clearest judgement as to the meaning to be attributed to the term. He stated that;

"Reading these words in their ordinary significance...It seems to me that they must mean more than that the child's welfare is to be treated as the top item in list of items relevant to the matter in question. I think

they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed".

- 6.2.3. Evaluating a child's best interests involves a welfare appraisal in the widest sense taking into account, where appropriate, a wide range of ethical, social, moral, religious, cultural, emotional, and welfare considerations. Everything that conduces to a child's welfare and happiness relates to the child's familial, educational, and social environment, and the child's social, cultural, ethnic, and religious community is potentially relevant and has, where appropriate, to be taken into account, therefore the court must adopt a holistic approach.
- 6.2.4. It is clear that the Respondent has wilfully abandoned his children for seven years, during which time he failed to provide any support, guidance, or care. The best interests of the children, which this court is bound to uphold, have been served solely by the mother, who has consistently and dutifully provided for their needs and maintained a stable and nurturing environment for them. The children's mother is willing and able to provide them with the home they require at this vital stage of their upbringing.
- 6.2.5. Custody shall therefore remain with the mother, as it is in the best interest of the children to continue living with the parent who has demonstrated an ongoing commitment to their well-being. The

Respondent shall have visitation rights once a month over the weekend.

6.3. Maintenance.

- 6.3.1. **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.
- 6.3.2. **Section 121 (1) (a) of the Children Act** provides that a mother of a child who has custody of them may apply to this court for maintenance.
- 6.3.3. The Petitioner averred that despite several reminders, the Respondent has failed in his duty to maintain the children. The responsibility for the financial care of children falls equally upon both parents, regardless of custodial arrangements. For the past seven years, the petitioner has single-handedly borne this financial burden. Therefore, it is only just that the father contributes to the ongoing needs of the children, ensuring their welfare, education, and overall development.
- 6.3.4. The maintenance of the children shall be divided as follows:
 - 1. The Petitioner shall pay for the food and clothing for the children.
 - 2. The Respondent shall contribute 50% towards the children's accommodation and medical care.
 - 3. The Respondent shall contribute 80% of the children's school fees. The Petitioner shall contribute 20% towards the school fees.
 - 4. The Respondent shall also cover the expenses of the children's school requirements.

- 5. Any other miscellaneous needs of the child shall be covered by the Petitioner.

7.0. What other remedies are available to the parties?

7.1. Separation of Joint Tenancy.

- 7.1.1. The Petitioner prayed that this court orders a severance of the joint tenancy in the property comprised at Block 263 Plot 939 Land at Senge and the proceeds applied in maintaining the children. According to **PEX 1** which is the Certificate of Title to the suit property, the parties are joint tenants.
- 7.1.2. A joint tenancy may be severed in three ways: firstly, an act by any one of the joint tenants can sever his or her interest from the joint tenancy; secondly, a joint tenancy may be severed by mutual agreement; and thirdly, the course of dealing between the joint tenants may lead to the inevitable conclusion that the interests of the joint tenants is severed. (See the case of **Williams Versus Hensman** [1861] EWHC Ch J51 70 ER 862, (1861) 1 J & H 546 per Vice-Chancellor Sir W. Page Wood).

- 7.1.3. The Respondent has denied the Petitioner access to the suit property demonstrating that they can no longer jointly own the property. The Respondent has conducted himself in such a way that leads to the inevitable conclusion that the interests of the joint tenants are severed.
- 7.1.4. The court is persuaded by the decision in **Zachary Olum Versus Bongomin Odora CA 120 of 2015** relied on by the Petitioner. In this decision, the court stated that there are two types of partition of joint property, the first being physical division and the second being partition by sale.

- 7.1.5. The parties in this Cause each enjoy the right to the property, exercising their rights, which include unrestricted right of access to the property, the right to enjoy the property on an equal basis along with the co-owner and the right to share any proceeds from the sale of the property.
- 7.1.6. **The Black's Law Dictionary at page 3542** defines partitioning as the division of real property held jointly or in common by two or more persons into individually owned interests.
- 7.1.7. In the matter of partition by sale, it is important to note that the consent of the other joint tenant, in this case, the Respondent, is not a prerequisite. This is particularly relevant given the Respondent's conduct over the past seven years, during which he has effectively barred the Petitioner from accessing or utilizing the joint property.
- 7.1.8. The Respondent has deprived the Petitioner of her rightful opportunity to enjoy the property on an equal footing with him. Consequently, the Petitioner has been forced to bear the unnecessary financial burden of paying rent elsewhere, despite her legal co-ownership of the property in question. The Petitioner's inability to benefit from her property, due to the Respondent's actions, underscores the justification for proceeding with the partition by sale without requiring the Respondent's consent.
- 7.1.8. The court also acknowledges the fact that the Petitioner has been in charge of the custody and care of their children. In this regard, the court grants the order of Partition by Sale.
- 7.1.9. The proceeds of the sale shall be divided as follows.
- 1. The Petitioner and the Respondent shall both be entitled to a 50% share in the proceeds of the sale. However, this will be further divided as follows.

- a) Of the Respondent's 50% share of the proceeds, 10% is awarded to the Petitioner as compensation for Rental payments/displacement from their joint property for the last three and half (3.5) years.

- b) The Petitioner is therefore entitled to 60% of the proceeds of the sale and the Respondent is entitled to 40%.

7.2. Paternity.

- 7.2.1. The Petitioner produced prima facie evidence of a Birth Certificate in evidence of the assertion that Eliana Mercy Karema is the Respondent's child. The Respondent continues to deny his parentage of this child and it is the Petitioner's prayer that the court orders a DNA test to be carried out on the child to prove parentage. It is only reasonable that this prayer is granted. A DNA test shall be carried out on the child, Karema Mercy Eliana.
- 7.2.2. The Respondent shall avail himself for sample collection at the Department of Government Analysts Laboratories (DGAL), Wandegaya within seven (7) days from the date of this decision and have the DNA tests concluded and results transmitted to this court within one (1) month. A Deoxyribonucleic (DNA) sample shall be collected from the Respondent and the child, Eliana Mercy Karema.
- 7.2.4. The Costs of the DNA test shall be borne by the Respondent, Karema Edward.
- 7.2.5. Where it is found that Eliana Mercy Karema is not the Respondent's child, all orders for maintenance and custody shall not apply regarding this child.

8.0. Conclusion.

8.1. In the final result, the court determines as follows;

- 1. The Petitioner is granted sole custody of the four children with visitation rights of once a month over the weekend to the Respondent.
- 2. The Petitioner and the Respondent shall maintain the children as follows;
 - a) The Petitioner shall pay for the food and clothing for the children.
 - b) The Respondent shall contribute 50% towards the children's accommodation and medical care.
 - c) The Respondent shall contribute 80% of the children's school fees. The Petitioner shall contribute 20% towards the school fees.
 - d) The Respondent shall also cover the expenses of the children's school requirements.
 - e) Any other miscellaneous needs of the child shall be covered by the Petitioner.
- 3. A Deoxyribonucleic (DNA) test shall be carried out on the Respondent and the child, Karema Mercy Eliana as follows;

- a) The Respondent shall avail himself for sample collection at the Department of Government Analysts Laboratories (DGAL), Wandegeya within seven (7) days from the date of this decision and the results transmitted to this court within one (1) month.
- b) The Costs of the DNA test shall be borne by the Respondent, Karema Edward.
- c) Where it is found that Eliana Mercy Karema is not the Respondent's child, all orders for maintenance and custody shall not apply regarding this child.

- 4. The property comprised in Block 263 Plot 939 Busiro, Mengo, land at Ssenge jointly owned by the Petitioner and Respondent shall be valued and then severed by sale.
- 5. The Petitioner and the Respondent shall both be entitled to a 50% share in the proceeds of the sale. However, this will be further divided as follows;
 - a) Of the Respondent's 50% share of the proceeds, 10% is awarded to the Petitioner as compensation for rental payments/displacement from their joint property for the last three and half (3.5) years.
 - b) The Petitioner is therefore entitled to 60% of the proceeds of the sale and the Respondent is entitled to 40%.
- 6. Costs are awarded to the Petitioner.

Dated, Signed and Delivered via Email this 26th day of August, 2024.

..... CELIA NAGAWA JUDGE

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