

UGANDA / JUDGMENT

Mukulu v Mukwaba (Divorce Cause 16 of 2021) [2024] UGHCFD 14 (18 March 2024)

[2024] UGHCFD 14

COURT

HC: Family Division (Uganda)

BEFORE

Nagawa, J

CASE / FILE NUMBER

Divorce Cause 16 of 2021

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[FAMILY DIVISION]

DIVORCE CAUSE NO.16 OF 2021

MUKULU JANE GLADYS ::::::::::::::::::::::::::::::::::: PETITIONER

VERSUS

CHRISTOPHER MUKWABA ::::::::::::::::::::::::::::::::::: RESPONDENT

JUDGMENT BEFORE HON. LADY JUSTICE CELIA NAGAWA

1.0 Introduction

- 1.0 The Petitioner, Mukulu Jane Gladys filed Divorce Cause No. 16 of 2021 against Christopher Mukwaba, the Respondent on grounds of adultery and cruelty, seeking the following orders;
- 1. A decree nisi be granted dissolving the marriage between the Petitioner and the Respondent.
- 2. The Petitioner and the children continue to stay in the matrimonial home.
- 3. Custody of the children be granted to your Petitioner and the Respondent granted access.

- 4. The Respondent to continue to maintain the children.
- 5. Any other and further relief this court deems fit to grant.
- 1.1 The Petitioner was represented by Mr. Gilbert Nuwagaba of KGN Advocates while the Respondent was represented by Mr. Lubega Kyle of Lubega & Buzibira Co. Advocates, Kampala.

2.0 Background.

- 2.1 The Parties to this petition solemnized their marriage on 9th July, 2011 at St. Augustine's Chapel, Kampala. During their marriage they were blessed with two issues namely Shawn Peter Seremba 11 years old and Shem Siima Bwaniika aged 5 years old. The parties resided in Kulambiro, Kisaasi, Namugongo and finally in Kawoko Village in Kayunga- Hoima Road, Wakiso District.
- 2.2 The marriage suffered a number of setbacks, the Petitioner alleges that the Respondent committed adultery with Ms. Nakkazi Winnie and together they have 3 children. Both allege cruelty as a ground of divorce. The marriage has irretrievably broken down. The Petitioner and the respondent in their pleadings both pray to court for dissolution of their marriage and for a decree nisi to be entered. There is no collusion or connivance between the Petitioner and the Respondent.

3.0 Evidence of the Parties

- 3.1. I have considered all the evidence adduced by the parties, both parties exhibited a marriage certificate as proof of marriage celebrated on 9th July, 2011 and this was marked "PEX1".
- 3.2 Both parties relied on a Certificate of Title for land comprised in Busiro Block 280 Plot 78 land at Kawoko, marked "PEX2".
- 3.3 The Respondent exhibited Birth Certificates for Bwaniika Sheth Siima date of birth 4th January, 2018 and Sereba Shawn Peter date of birth 29th June, 2012 and marked; "DEX1" and "DEX2" respectively.

4.0 Issues for Court's determination.

1. Whether the marriage between the Petitioner and the Respondent has irretrievably broken down and should be dissolved?

2. Whether the parties are entitled to the remedies sought?

5.0 Burden of Proof.

5.1. In all civil matters like the present petition, he/she who alleges bears the burden to prove his/her case on a balance of probabilities by virtue of Section 101, 102 and 103 of the Evidence Act, Cap. 6.

6.0 Divorce proceedings.

- 6.1 Divorce proceedings are instituted by way of Petition stating distinctly the facts on which the Petition is based and the Petitioner verifies the petition. (*See Section 31 (1) of the Divorce Act, Cap. 249).* This provision was complied with by the Petitioner and the Respondent.
- 6.2 The contents of the divorce Petition should expressly state that there is no collusion or connivance between the Petitioner and the Respondent. (See Section 31 (2) of the Divorce Act (supra)). The Petitioner and Respondent have satisfied this requirement.
- 6.3 The Petitioner and Cross Petitioner/Respondent also proved that they were domiciled in Uganda at the time they presented the Petition as is required under Section 1 (a) of the Divorce Act (supra).

7.0 Submissions by Counsel.

7.1. Both parties filed written submissions, the Petitioner filed on 23rd February, 2024 and respondent filed on 1st March, 2024. A rejoinder if found necessary was supposed to be filed on 7th March, 2024 but at the time of writing this decision, no rejoinder was on record, I take it that the Petitioner did not find it necessary to respond. I have carefully perused the record and considered the submissions by both learned counsel in determination of this petition.

8.0. Resolution of Issues by this Court.

Issue 1. Whether the marriage between the Petitioner and the Respondent has irretrievably broken down and should be dissolved?

- 8.1 A marriage certificate marked 'PEX 1' was presented to this court by the Petitioner detailing the solemnization of the marriage between the Petitioner and the Respondent which took place at All Saint's Cathedral Kampala on 18th February, 2006. The law on proof of existence of a marriage provides that; "every certificate of marriage which shall have been filed in the office of the registrar of any district, or a copy of it, purporting to be signed and certified as a true copy by the registrar of that district for the time being, and every entry in a Marriage Register Book or a copy of it, certified as aforesaid, shall be admissible as evidence of the marriage to which it relates, in any court of justice or before any person now or hereafter having by law or consent of parties authority to hear, receive and examine evidence. See Section 33 of the Marriage Act, Cap. 251. This court therefore finds that a valid

marriage exists between the Petitioner and the Respondent.

- 8.2 The Divorce Act provides the grounds upon which divorce of the parties to a matrimonial union may be considered and determined. Prior to **Uganda Association of Women Lawyers (FIDA) & 5 Others Vs Attorney General Constitutional Petition No 2/2002 (unreported)** Section 4 (2) of the Divorce Act, Cap. 249 governed the grounds upon which a divorce petition may be presented. The husband could only present a petition for divorce on one ground which was adultery. The wife could only present a divorce petition on the ground of adultery

coupled with another grounds such cruelty, desertion, bigamy, rape and others. The different treatment of the spouses to a marriage in divorce proceedings was challenged in the Constitutional Court as being unconstitutional and the Constitutional Court held that the different treatment of spouses was unconstitutional on account of discrimination. It ordered that both spouses would henceforth be entitled to the same grounds for divorce as set out in Section 4 of the Divorce Act.

- 8.3 Section 18 of the Law Revision (Miscellaneous Amendments) Act of 2023 following **Uganda Association of Women Lawyers (FIDA) & 5 Others Versus Attorney General Constitutional Petition No 2/2002**, it is sufficient for either spouse to allege one ground for divorce as set out in Section 4 of the Divorce Act for a petition or cross petition to succeed.
- 8.4 Section 8 of the Divorce Act provides for the circumstances in which a petition may be successful or not. It states;

When Petition shall be granted

(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 conduced the adultery.

8.5 Ordinarily for a Petitioner to be issued a Decree Nisi, the court must be satisfied that the grounds as presented have been proved. That no connivance or condonation or collusion with the respondent has been undertaken in presenting the Petition and finally that the Petitioner is not guilty of adultery, or unreasonable delay in presenting the petition or cruelty to the respondent, or desertion or separation or other misconduct. This petition is based on grounds that are presented below and are subject to proof.

Adultery

- 8.6 Adultery is a voluntary act of sexual intercourse between someone who is married and a person of the opposite sex who is not their spouse. In the case of **George Nyakairu Vs Rose Nyakairu (1979) HCB 261** Justice Ntagoba (*as he then was)* in his judgement, he defined adultery stating that; it is not necessary to prove the direct act of adultery for the fact was almost always to be inferred from the circumstances as a necessary conclusion".
- 8.7 The Petitioner cited the case of **Rosette Tabitha Nakiryowa Mabikke Versus Michael Mabikke Divorce Cause No. 68 of 2020** *held by Hon. Lady Justice Jeanne Rwakakooko,* stating that, "the Respondent having fathered children in 2020 outside his marriage, it was evident enough that he had committed adultery".

- 8.8 The Petitioner submitted to this court that the Respondent was engaged in another marital affair with Ms. Nakkazi Winnie and together they have 3 children. This fact was admitted by the Respondent during cross examination. According to the Petitioner this is a sign that the Respondent is no longer interested in their marriage and he has since moved on into another relationship.
- 8.9 On his part, the respondent submitted that indeed in reference to the Petitioner's paragraph 6 and 7 of her Witness Statement she averred that the Respondent had been adulterous and begot children outside marriage, which the Respondent did not deny and blamed it on the Petitioner who denied him conjugal rights during that period and yet she was his wife.
- 8.10 In the case of **Kironde Vs Kironde & Anor (Divorce Cause 6 of 2001) [2002] UGHCFD 2** the Justice Kagaba stated that adultery can be proved by a party adducing evidence to prove the same or by the adulterer admitting the fact of adultery or by circumstantial evidence.
- 8.11 The Respondent did not deny the fact that he committed adultery, actually during cross examination he stated that he resides with the other family and on occasions when he visits the Petitioner's home he is looked at and considered a total stranger in his home a situation that he is not comfortable with, he stated that he wants to get home and enter the matrimonial bedroom and live in the home like he is the father instead of getting into the children's bedroom on occasions he is at the said home. Each stated that their marriage has irretrievably broken. I find that the ground of adultery has been satisfactorily proved to this

court.

Cruelty.

- 8.12 Cruelty was defined in the case of **Habyarimana V Habyarimana (1980) HCB 139**, to mean any conduct that produces actual or apprehended injury to mental health. Cruelty may be mental and it may include injuries, reproaches, complaints, accusations, taunts, denial of conjugal rights among others. Mental cruelty is a state of mind, it is the feeling of deep anguish, disappointment, or frustration in one spouse caused by the conduct of the other over a long period of time.
- 8.13 This court continues to emphasize that in regard to proceedings for divorce, the conduct complained of as amounting to cruelty should be **"grave and weighty"** so as to come to the conclusion that the Petitioner cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life".
- 8.14 Both parties allege cruelty by the other. The Respondent states in paragraph 5 of his Witness Statement that it is this cruelty from the Petitioner of denying him conjugal rights that prompted him to seek companionship from someone else thereby having children out of wedlock.
- 8.15 The Respondent further submitted that as a result of cruelty towards him by denying him conjugal rights, this left him depressed which affected him mentally. He prayed that this court finds that the Petitioner was cruel towards him and hence a sufficient ground to dissolve the marriage.
- 8.16 According to the Petitioner, she found the Respondent inconsiderate when he blamed her for not being able to conceive another child and yet it was clearly not her fault. In her sworn statement the Petitioner averred that when she failed to conceive a second child the respondent always blamed her and rubbed it into her face which she admitted that

it was humiliating coming from him. The continuous insults from the respondent really sent her into depression considering, she expected support from him.

8.17 The parties have all expressed that their marriage has come to the end of the road and it is in their interest to have it dissolved. The Petitioner has proved on a balance of probabilities the ground of cruelty. This court therefore finds that the marriage between the parties has irretrievably broken down. Against this background, therefore, the marriage between the Petitioner and Respondent is hereby dissolved and decree nisi granted.

9.0 Whether the parties are entitle to any remedies sought? Custody of the Children

- 9.1 **Section 29 of the Divorce Act, Cap. 249** provides that; "In suits for dissolution of marriage, or for nullity of marriage or for judicial separation, the court may at any stage of the proceedings, or after the a 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 the custody, maintenance and education of the minor children of the marriage, or for placing them under the protection of the court".
- 9.2 Article 31(4) of the Constitution of the Republic of Uganda 1995 provides that it is the right and duty of parents to care for and bring up their children.
- 9.3 **Section 3 (1) of the Children Act** is to the effect 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.

- (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.
- (3) In determining any question under subsection (1), court or any other person shall have regard to—
 - (a) the ascertainable wishes and feelings of the child concerned, with due regard to his or her age and understanding; (b) The child's physical, emotional and educational needs; (c) The likely effects of any change in the child's circumstances; d) The child's sex, age, background and any other circumstances relevant in the matter; (e) Any harm that the child has suffered or is at the risk of suffering; and (f) where relevant, the capacity of the child's parents, guardian or any other person involved in the care of the child, and in meeting the needs of the child."
- 9.4 In the case of **Kagimu Versus Kagimu (2001-2005) 3 HCB 100**, Court found that the cardinal principle in determining to whom to grant custody of a child is the welfare of the child as enshrined in Section 3 of the Children Act. In dealing with children of tender years, custody of such children should be granted to their mothers.
- 9.5 The parties to this petition had 2 issues during the subsistence of their marriage namely Shawn Peter Seremba 11 years and Shem Siima Bwaniika aged 5 years old.
- 9.6 It is the right of every child to stay with their parents 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. *(See; Section 4 of the Children Act, Cap. 59).*

- 9.7 The petitioner prayed that full custody be granted to her on the basis that it would be in the best interests of the children.
- 9.8 On his part the Respondent cited Article 34 (1) of the Constitution of the Republic of Uganda on the children's rights to know and be cared for by their parents. He also relied on the case of **Rwabuhemba Tim Musinguzi Versus Harriet Kamakune SCCA No. 142 of 2009**. In addition to the welfare principle.
- 9.9 The welfare of the child is the paramount consideration in most court adjudicated disputes in the child's upbringing. This means that rights and interests of others are relevant only in so far as they bear upon the child's interest. Alternatives to the welfare principles remain closely wedded to its basic premises; that children should be afforded special consideration in the decision making process. Children's rights play an increasingly important role in family law and are now widely recognized and respected.
- 9.10 In all child custody cases, the court is required to determine whether both parents are capable of caring for the child. This evaluation comprises financial, emotional, and physical considerations.
- 9.11 While being cross examined, the Petitioner averred that she recognizes the Respondent and that the Respondent is father of her children, entitled to parental rights of their children and equally entitled to custody of the children and access to the children. She prayed to be granted primary custody of the children. On the other hand the Respondent during cross examination testified that the children should stay in the house and the Petitioner also wants to stay in the house. The children bide them, to make it normal or humane is to have the children were they have been staying.

- 9.12 The Respondent in his submissions recognizes that the Petitioner is the mother of the children and for that reason he prays for joint custody. He added that in as much as the children are minors, their welfare is not solely determined by age but by looking at several considerations including but not limited to child's stability, and security. According to the respondent sole custody would instead isolate him from his children's lives. Counsel for the Respondent cited and relied on the case of **Otto Methodius Pacific Versus Edyline Sabirna Pacific Civil Appeal No. 88 of 2013 (Hon. Justice A S Nshimye- JA)** held while citing the case of **CX V CY [2006] 4 LRC** whose reasoning the court adopted, has recognized that in any custody proceedings, it is crucial that the courts recognize and promote joint parenting so that both parents can continue to have a direct involvement in the child's life.

- 9.13 The Respondent further testified during cross examination that the Petitioner has been diagnosed with breast cancer, he further stated that he has been supportive and he led a campaign from his family and whatever he got he gave it to the Petitioner to decide on how to use it.
- 9.14 Marriage vows as recited before pronouncement of Husband and wife state that, "...for better, for worse, in sickness and in health*..." the petitioner and the respondent have resolved to dissolve their marriage, although it was the testimony of the respondent that the Petitioner has suffered breast cancer. She needs support and now that their marriage has been dissolved only her children can render that support. Since the respondent testified that he has 3 other children within whom he has been residing since his relationship with the Petitioner got bitter, I find that the primary custody will be given to the Petitioner and the Respondent will have access to the children through visitation rights.

9.15 The Petitioner and the Respondent are both professional engineers they will therefore maintain their children jointly. The Respondent will continue to meet the minors' education and medical needs.

10.0 Matrimonial property

- 10.1 Matrimonial Property was defined in the case of **Charman v. 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". In **Julius Rwabinumi Vs. Hope Bahimbisomwe, S. C. Civil Appeal No.10 of 2009** Court stated that while Article 31 (1) of the Uganda Constitution (1995) guarantees equality in treatment of either the wife or husband at divorce, it does not, in my opinion, require that all property either individually or jointly acquired before or during the subsistence of a marriage should in all cases be shared equally upon divorce.
- 10.2 The dispute in this petition regarding matrimonial property relates to the property comprised in Busiro Block 280 Plot 78 land at Kawoko. The Petitioner testified during cross examination that the Respondent used his money to buy the land in the meantime they used to rent and she used to pay for the rent an amount of UGX. 500,000/= per month until the house was completed. They started renting in July, 2011 until 2013 when they moved into their house. The respondent wants to retain the house alone. Prior, he was a sole Registered Proprietor, he averred that he acquired a loan to obtain the property and he confirmed that the Petitioner paid the rent and the property was later transferred and registered into their joint names.
- 10.3 **Article 31 (1) (b) of the Constitution of the Republic of Uganda** states that; "...to equal rights at and in marriage, during marriage and at its dissolution".

- 10.4 In the case of **Ambayo Joseph Waigo Versus Aserua Jackline C/A 100 of 2015**, the Court of Appeal held that equality of spouses guaranteed by the Constitution is not synonymous with equal propriety entitlement and does not give automatic equal share in distribution of matrimonial property to a spouse. That propriety entitlement of a spouse is dependent on his or her contribution towards the matrimonial property. They further, held that spouse contribution to a matrimonial property may be direct or indirect; monetary or non monetary provided it enables the other spouse to either acquire or develop the property in question. Spousal contribution is a question of fact. The Court of Appeal further held that courts recognise that the evaluation of evidence of each spouse's contribution is no mean task.
- 10.5 The House of Lords in the case of **Pettit Versus Pettit [1967] ALL E R 385** held that the extent of the share of each spouse is a question of fact in each case, and the mere fact that evaluation of the respective shares may be difficult for want of clear evidence does not justify the wholesome application of the maxim "equality is equity". The court can draw inferences from the conduct of the spouses. Such conduct may include contribution towards purchase, mortgage repayment etc.
- 10.6 The Petitioner testified that the matrimonial has been her home and she has stayed in this home together with their children and she would not like to destabilize the children's stay. The petitioner tendered in the Certificate of title were both are Registered Proprietors. The Respondent testified that he first got registered on the title on 18th September, 2013 and then jointly on 25th August, 2016. It is not known whether they are registered as joint tenants or tenants in common for the title is silent.

- 10.7 It is therefore presumed that the parties have joint ownership with equal beneficial interests in the property as registered proprietors.
- 10.8 The Respondent testified that he acquired a loan to procure the land and construction of the matrimonial property on land at Kawoko (PEX 2). The Respondent did not adduce sufficient evidence to prove that indeed he acquired a loan, stating the amount and who exactly serviced the loan. Nor did he adduce a sale agreement indicating the consideration that he paid for this land. I would have expected him to show the purchase (sale) agreement for the land, notwithstanding, the stated salary loan would have been used to do other activities besides the said purchase of land. For that reason, since both relied on the Certificate of Title (PEX2) I will resort to Section 59 of the Registration of Titles Act, which is to the effect that a certificate of title issued under the Act cannot be impeached or defeated and wherever it is presented it shall be conclusive evidence that the person named in the certificate is the owner of the land described in the certificate.

