

UGANDA / JUDGMENT

Seduge v Muhimpundu (Divorce Cause 113 of 2023) [2023]

UGHCFD 145 (1 August 2023)

[2023] UGHCFD 145

COURT

HC: Family Division (Uganda)

BEFORE

Nagawa, J

CASE / FILE NUMBER

Divorce Cause 113 of 2023

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA (FAMILY DIVISION) DIVORCE
CAUSE NO. 113 OF 2022

EDWARD SEDUGE MUWANGA ::::::::::::::: PETITIONER

VERSUS

MUHIMPUNDU CLARISSE MUWANGA ::::::::::::::: RESPONDENT

BEFORE HON. LADY JUSTICE CELIA NAGAWA

JUDGEMENT

1.0 Introduction

This is a Petition for Divorce by the Petitioner Edward Seduge Muwanga against the Respondent Muhimpundu Clarisse Muwanga seeking for a decree that the marriage between him and the Respondent be dissolved, and other orders to this effect be granted,that;

- a) The Petitioner be granted primary custody of the children of the marriage and the Respondent be accorded reasonable visitation rights and
- b) Any other and further relief that this Honourable Court may deem fit.

- 1.1 The Petition was served on the Respondent by the Petitioner on the 15th June, 2022. The Respondent filed an Answer to the Petition and a Cross Petition against the Petitioner on the 14th July, 2022 seeking the following orders.

- a) A Decree dissolving the marriage between the Cross- Petitioner and the Respondent.

- b) The Cross Petitioner be granted primary custody of the children of the marriage and the Respondent be accorded reasonable visitation rights.
- c) The Respondent be ordered to pay maintenance for the children.
- d) Any other and further relief that this Honourable court may deem fit.

On 29th July, 2022 the Petitioner filed a reply to the Respondent's answer to the petition and answer to the cross petition.

2.0 Representation.

- 2.1 The Petitioner was represented by Learned Counsel Derrick Kizito together with Learned Counsel Kenneth Kiapi of M/S MMAKS Advocates, Kampala.
- 2.2 The Respondent/ Cross Petitioner was represented by Learned Counsel Karugaba Denis of M/S Sebanja & Company Advocates, Kampala.

3.0 Background.

- 3.1 The Petitioner and the Respondent solemnized a church wedding on 28th December, 2018 at St. Luke's Church of Uganda, Ntinda. The parties have 2 issues together namely Enzo Mathias Senakiro Muwanga aged 11 and Cuba Jason Kayi Muwanga aged 6.
- 3.2 The Petitioner contends that during the subsistence of their marriage, the Respondent was cruel toward him and that she deserted the matrimonial home. He contended that their wedding ceremony was almost exclusively financed by him and as a result, the financial situation of the family completely deteriorated. He averred that he was

forced to sell off 3 cars and reduce the family's expenditure and borrow money from money lenders to stay afloat. This caused a strain on their marital relationship.

- 3.3 The Petitioner averred that all efforts to reconcile with the Respondent failed and she fled to Burundi with their two children in 2019. The Respondent denied the Petitioner access to his children for a year until March 2022. The children are in the Custody of the Petitioner. He averred that their marriage has irretrievably broken down.

- 3.4 In reply to the Petition, the Respondent/Cross Petitioner contested the allegations and stated that it is the Petitioner who is guilty of cruelty having been violent towards her and in his fits of rage, was violent towards the children. The Respondent contended that the Petitioner had been previously violent towards the Respondent causing severe injury to her left eye.
- 3.5 The Respondent further contended that the Petitioner abandoned the matrimonial home taking household items with him. She continued to live in their home with the Children while incurring all the household expenses as the Petitioner did not offer any financial assistance to her at the time. She averred that out of fear of violence by the Petitioner, she decided to leave the matrimonial home with the children and went to Burundi to stay with her mother.
- 3.6 As a result of these grounds, having lived apart for over 3 years the marriage irretrievably broke down and Respondent also prayed for its dissolution.

4.0 Evidence of the Parties.

4.1. Petitioner's Evidence.

1. A copy of the Marriage Certificate marked "PEX 1".

- 2. The Birth Certificates of the Children marked "PEX 2 & 3".
- 3. A copy of the Revised House Budget during the Petitioner's financial troubles marked "PEX 4".
- 4. The loan agreements in evidence of the loans that the Petitioner had to undertake marked "PEX 5".
- 5. A Copy of the email sent by the Petitioner to the Respondent's lawyer in search of her and the children marked "PEX 6".
- 6. The Admissions of the issues (Children) to Lohana Academy where they attend school marked "PEX 7 & 8".
- 7. A Copy of the land title to the Petitioner's home in Kasangati marked "PEX 9".
- 8. The Petitioner's bank statements marked "PEX 10".
- 9. The Police Report from Nalussuga Police Station in respect of SD/REF/04/25/06/2019.

4.2. The Respondent's Evidence.

- 1. The Respondent's first 3 annexures replicated the Petitioners 1st to 3rd annexures.

- 2. The Respondent further attached a copy her medical form from Lifetime Medical & Diagnostic Centre marked "REX 4.1".
- 3. A copy of Police Form 3 detailing the Respondent's assault marked "REX 4.2".
- 4. A Copy of the child Enzo's Maths' school certificate of attendance is marked "REX 5".
- 5. A Copy of the child Jason's school certificate is marked "REX 6".
- 6. A copy of the Respondents list of Expenses for the children is marked "REX 7".

- 7. The Respondent further attached copies of the children's photographs marked "REX 8".
- 8. A Copy of the email from the Petitioner confirming how well the children are taken care of by the Respondent marked "REX 9".
- 9. A copy of the email from the Petitioner about the Children's visit marked "REX 10".
- 10. A copy of the email from the Petitioner confirming renewal of the Children's passports, "REX 11".
- 11. A copy of the email from the Respondent's employment contract marked "REX 12".
- 12. A copy of the Respondent's certificate of service marked "REX 13".
- 13. The Respondent's annual leave plan is marked "REX 14".
- 14. A copy of the Respondent's tenancy agreement is marked "REX 15".
- 15. A copy of the social inquiry report on the custody of the children marked "REX 16".
- 16. A copy of the children's school calendar marked "REX 17".

5.0 For the Petition and Cross- Petition the following issues arise for Court's determination.

- 1. Whether there are any grounds for Divorce between the Petitioner and the Respondent?
- 2. Which of the parties should be granted Custody of the Children?
- 3. What Remedies are available to the Parties?

6.0 Burden of Proof.

6.1 In all civil matters like the present petition, he who alleges bears the burden to prove his/her case on a balance of probabilities. Both

parties in this case by virtue of Section 101,102 and 103 of the Evidence Act, Cap.6 have the burden to prove the facts alleged by them in the Petition and Cross Petition. Section 101 of the Evidence Act 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".*

7.0 Submissions

I perused and analyzed the Parties written submissions. I appreciate counsel's submissions and arguments in their endeavor to resolve this divorce cause in favor of their respective clients. The written submissions by Counsel shall offer me guidance when I am resolving this application. Further, I evaluated and examined the matter and the documentary evidence, as required by law.

8.0 Resolution of Issues by this Court.

- 8.1 A marriage must exist in order for it to be dissolved. Therefore, before this court can consider the grounds for divorce in this petition, it will first determine whether there was a valid marriage between the Petitioner and Respondent.
- 8.2 The Petitioner and the Respondent both adduced evidence of a certified copy of their marriage certificate marked "PEX 1" and "REX 1" with their trial bundle to support the fact that they were legally married, marriage which was conducted at St. Luke's Church, Ntinda on 28th December, 2018. (*See Section 33 of the Marriage Act, Cap. 251 on certificate of marriage and the entry in a Marriage Register Book or a copy of it, certified as admissible as evidence of the marriage).* A Church marriage is one of the forms of marriage that are recognized under the Marriage Act, Cap. 251 in Uganda.

- 8.3 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**. Thus, this court finds that there is a valid marriage between the Petitioner and the Respondent.
- 8.4 The Petitioner and the Respondent were domiciled in Uganda and conducted their marriage in Uganda within the jurisdiction of this court. **Section 3 of the Divorce Act, Cap. 249** provides for jurisdiction in particular **Section 3(2) and (3)**, as such this court has jurisdiction to entertain this Petition.

Section 4 (2) of the Divorce Act, Cap. 249 provides the grounds for divorce. The provisions of **Section 4** are discriminatory against women on grounds of sex. Section 4 of the Divorce Act which sets out separate grounds for divorce for men and women was declared unconstitutional by the Constitutional Court in **Uganda Association of Women Lawyers (FIDA) & 5 Others V Attorney General Constitutional Petition No 2/2003**. This was on basis of **Article 31(1) (b)** of the Constitution which provides that a man and a woman are entitled to equal rights in marriage,

during marriage and at its dissolution, in essence restating the Constitutional prohibition of discrimination on the basis of sex enshrined in **Articles 21 and 33 of the same Constitution**. The Petitioner and Cross Petitioner seek for a dissolution of the marriage on grounds of cruelty and desertion stating that the marriage has irretrievably broken down and efforts at reconciliation have been futile. The Petitioner states that he has in no way been an accessory to or connived or condoned the acts of cruelty and desertion.

8.6. Cruelty.

Cruelty was defined in the case of **Habyarimana V Habyarimana (1980) HCB 139**, to mean any conduct that produces actual or apprehended injury to physical or mental health or probably injury. Cruelty may be mental and it may include injuries, reproaches, complaints, accusations, taunts, denial of conjugal rights among others.

8.5 The ground of cruelty differs in each marriage, *a* conduct that may undoubtedly be cruel in one case may clearly not be cruel in another on account of differing circumstances. The learned judge, *Sir Charles Newbold* in *Colarossi v Colagrossi* [1965] E. A 129 held that:

"no comprehensive definition of cruelty has ever been accepted as satisfactory – much depends on the habits and circumstances of the matrimonial life of the husband and wife, their characters, the normal mode of conduct one to the other and the knowledge which each has of the true intention and feelings of the other. An essential element of every petition based on cruelty is, however, that the party seeking relief must prove actual or probable injury to life, limb or health. For this reason, it is seldom indeed that a decree is granted upon a single act of cruelty though, should that act be serious enough and result in injury, then the court will grant the decree."*

I would also refer to the case of *Naveen Kohli Versus Neelu Kohki (AIR 2004 All 1)* where the Court made a commentary on what constitutes elements of cruelty thus;

- 8.6 "Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in a day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non-violent. To constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". The conduct taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical

and mental conditions, customs and traditions".*

- 8.7 It is against that background, that a decree can be granted upon a single act of cruelty, though, it should be serious enough, and result in injury, for court to consider. What the law envisages for the grant of divorce on cruelty is prove of conduct complained of by way of evidence. That is grave and weighty for the Court to come to a conclusion that human dignity and conscience has been implored. It must be conduct more serious than ordinary wear and tear of married life.

- 8.8 In consideration of human relations, marriage union is generally solemnized by two people from different socioeconomic; cultural/customary or even ethnic backgrounds. Although, in very clear votes the parties covenant to move together for worse, ill health, for poor, while solemnizing the marriage that alone has never sustained the marriage. As a vital step each of the parties to marriage union has to address the various inherent personal traits based on the range of possibilities and options to shift the focus on the success of the collation. Conflicts that may arise during the subsistence of the marriage need to be managed through interactive participatory and inclusive approaches for the sake of building interests, power and adjusting parties' expectations to the marriage. There is need to strike a balance among the various components of human relationships namely, goal incompatibility, attitudes, socio-economic status, cultural/customary differences, behavior, etc to ensure peaceful co-existence to avoid any of the spouses using his or her power to suppress the perceivably weak spouse to the marital union.
- 8.9 As such the basis of cruelty as agreed for divorce is case specific within the scope of the Marriage Act. It is sufficient that one spouse or both proves to the Court that the cruelty being explained is of such a type that it's impossible for them to live together.
- 8.10 Regarding this Divorce cause, the Petitioner contended that the Respondent compounded on his financial problems by being

abrasive, abusive and disharmonious. He averred that without consulting him, the Respondent took their children to Burundi and denied him access to them until recently.

- 8.11 On her part, the Petitioner led evidence to show that the Petitioner was physically violent to her and the children. The Respondent also produced a copy her medical form from Lifetime Medical & Diagnostic Centre marked "REX 4.1" in evidence of the injuries she incurred when the Petitioner was violent with her. She also produced a Police Report from Nalussuga Police Station in respect of SD/REF/04/25/06/2019 where she reported the matter.
- 8.12 Physical Violence of any form inflicted by one party onto another amounts to Cruelty. The link between violence and cruelty is undeniable and well-established. It may be through the intentional infliction of harm, the psychological impact on victims, or the malicious

intent behind violent acts. This court recognizes violence as a manifestation of cruelty, contrary to the intention of the law in protecting individuals from the suffering and harm caused by such actions. There is no clearer depiction of Cruelty than Physical Violence. On the basis of these various points in the petition and cross-petition apparently there is evidence of immeasurable mental agony, physical harm and torture which constitutes cruelty. This court is satisfied with this ground.

Desertion without Justifiable Cause.

8.13 Desertion has been defined as an unjustifiable withdrawal from cohabitation, without the consent of remaining spouse and with intent of being separated permanently. In family law, the elements of

desertion include, a cessation of cohabitation, the lapse of a statutory period, an intention to abandon, a lack of consent from the abandoned spouse and a lack of spousal misconduct that might justify the abandonment. In the case of **Perry V Perry [1952] 1 ALL ER 1075** it was held that desertion does not necessarily mean and constitute withdrawal from a place, but constitutes withdrawal from a state of things.

- 8.14 In the case of **Patricia Ogule Versus Busulwa Billy Best Divorce Cause No. 31 of 2022** this court stated that; "desertion involves the respondent leaving the Petitioner, without justification, for at least two years immediately preceding the presentation of the petition. The spouse who leaves is not necessarily the person who is the deserter, forcing that on the other party through their behavior. He or she must have intended to cause the marriage to end even if they did not anticipate or want that consequence".
- 8.15 The undisputed position is that the marriage of the Petitioner as presumed by cohabitation with the Respondent since 2018 has in fact fallen apart as per the averments. Certain key differences cropped up between the Petitioner and the Respondent to the extent that the Petitioner contended that the Respondent abandoned their matrimonial home for about 4 years and has no intention of returning. It was the Respondents contention on her part that the Petitioner left their matrimonial home for about 2 weeks and rented a house in Naalya financially abandoning them in the process. In the case of **LANG V LANG (1954) 3 ALL ER 571**, it was held that, "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 party leaving the

home to break it up for good or something short of or, different from that? The Petitioner averred that he tried to reconcile with the Respondent but to no avail. It can be construed that even though he left the marriage for two weeks, his intention was not to break the marriage up for good. The Respondent abandoned her matrimonial home for almost four years, obtained a new job in a different country where she intends to stay. It is very clear that the physical fact of desertion by the Respondent exists in this case to the satisfaction of this court.

- 8.16 I therefore find that, the marriage between the Petitioner and the Respondent has broken down irretrievably and it is no longer alive, keeping it any longer might be dangerous to either party. This court will therefore allow the Petition and order the marriage between the Petitioner and the Respondent dissolved.
- 9.0 **Issue 2: Which of the parties should be granted Custody of the Children?**
- 9.1 In resolving disputes relating to custody of children, the court must decide what is in the child (ren)'s best interest and the court needs to consider the position of the each child before it as an individual.
- 9.2 According to **Article 31(4)** of the Constitution of the Republic of Uganda 1995 (as amended) a parent is given the right and the duty to care for and bring up their children. The children in this case are 6

and 11 years of age as evidenced by their birth certificates, marked "PEX2" and "PEX3".

- 9.3 In the case of **Kagimu V 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**.
- 9.4 The children, the subject of this Petition are only 6 and 11 at the time of the making of this decision. They currently study at Lohana Academy, a school in Uganda. The Respondent currently works in Mali as an employee of the World Food Program where the children cannot be relocated too. The petitioner prayed that full custody be granted to him on the basis that it would be in the best interests of the children. This court will keep the stability of the children in mind in making this decision.
- 9.5 Section 4 of the Children Act, Cap. 59 provides for a Child's rights 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.
- 9.6 **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.

- 9.7 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. This principle of "**Paramount Consideration**" was interpreted by the House of Lords in *J V C* [1970] AC 668, 710-11 by Lord MacDermott.
- 9.8 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.
- 9.9 The function of the judge in a case like this, is to act as the 'judicial reasonable parent', judging the child's welfare by the standards of reasonable men and women today, having regard to the ever changing nature of our world including, crucially for present purposes, changes in social attitudes, and always remembering that the reasonable man or woman is receptive to change, broadminded, tolerant, easy-going and slow to condemn. We live,

or strive to live, in a tolerant society. We live in a democratic society subject to the rule of law. We live in a society whose law requires people to be treated equally and where their human rights are respected. We live in a plural society, in which the family takes many forms, some of which would have been thought inconceivable well within living memory.

- 9.10 In determining the custody of the children taking into consideration the best interests of the child principle, this court intends to base on values to inform choice and assigning utilities to various outcomes. What do the parties in this Divorce Cause want? The children's preference was never sought nor given any weight in consideration of their age and nature of the case. To make the child responsible for their choice may jeopardize his/her future relationship with the other parent. And we often lack confidence that the child has the capacity and the maturity appropriately to determine his/her own utility. Moreover, whether or not the court looks to the child for some guidance, there remains the question whether best interests should be viewed from a long-term or short term perspective. The conditions that make a person happy at age six (6) to ten (10) may have adverse consequences at age thirty (30). The Children Act does not itself give content or relative weights to the pertinent values and if the court looks at society at large, one finds neither a clear consensus as to the best child rearing strategies nor an appropriate hierarchy of ultimate values.

- 9.11 Both Counsel cited the case of **Rwabuhemba Tim Musinguzi v**

Harriet Kamakume (Civil Application 142 of 2009) [2009]

UGCA 34 (25 August 2009) court stated that parents have a fundamental right to care and bring up their children. This is a constitutional right. Of course it is not considered in isolation. The welfare of the child is a consideration to be taken into account, and it is the paramount consideration. *A parent can only be denied the right to care for and raise her children when it is clear and has been determined by a competent authority, in accordance with law, that it is the best interest of the child that the child be separated from the parent.* Neither party was able to present proof of the danger posed to the children by the other party.

- 9.12 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. This has been argued ably by both parties.
- 9.13 Article 31 of the Constitution provides for the right and duty of the parents to care for and bring up their children and that children may not be separated from their families or the persons entitled to bring them up against the will of their families or those persons except in accordance with the law. This is read alongside Article 34 (1) and other Conventions on the rights of the child.
- 9.14 'Parenthood is for life'. When one of the parents not only walks away from marriage but neither maintains nor shows any interest in the children, an enormous unfair burden is placed on the other. However, in this case both parents preferred primary custody of their children. In consideration of the unique circumstances of the children, the court grants the Petitioner and the Respondent joint Custody of the Children on the following term;

- 1. That the children's educational stability will not be compromised any further than it has already been.
- 2. That the school term and school holiday of the children will be divided into two starting with the Respondent when she is living in Uganda.
- 3. That the parties shall have alternating public holidays starting with the Petitioner.
- 4. That the parties shall have reasonable access to the children when in the Custody of the other Parent.
- 5. That the Respondent shall be allowed to travel with the Children when in her Custody and only on School Holiday unless otherwise mutually agreed by both parties.

- 6. The children home base is in Uganda and should not be relocated permanently to another country without this Court's Order.

Maintenance.

- 9.15 **Section 5 of the Children Act (supra)** provides for the parental duty to maintain the child including providing education and guidance, immunization, adequate diet, clothing, shelter; and medical attention.
- 9.16 **Article 31(4) of the Constitution of the Republic of Uganda 1995** (as amended) stipulates the duty of parents to provide and care for their children. This court therefore finds as follows;
- 1. Each party shall pay for food, health and utility bills for the period the child is in their custody.
- 2. The Parties shall equally contribute towards the school fees and school needs of the Children.

10.0 Conclusion.

10.1 In the final result, the Petition is resolved 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 parties shall have joint custody of the children Mathis Senakiro Muwanga and Cuba Jason Muwanga to be handled as follows;
- a) That the school term and school holiday of the children will be divided into two starting with the Respondent when she is living in Uganda.
- b) That the parties shall have alternating public holidays starting with the Petitioner.
- c) That the Petitioner and the Respondent shall have reasonable access to the children when in the Custody of the other Parent.
- d) That the Respondent shall be allowed to travel with the Children when in her Custody and only on School Holiday unless otherwise mutually agreed by both parties.
- e) The children home base is in Uganda and should not be relocated permanently to another country without this Court's Order.
- 4. The Petitioner and the respondent will both contribute to the upbringing, care, education, clothing, medical care, etc. of the children in the following manner:

- a) Each party shall pay for food, health and utility bills for the period the child is in their custody.

- b) The Parties shall equally contribute towards the school fees and school needs of the Children.
- 5. Each party shall bear its own costs.

Dated, Signed and Delivered electronically this 1st August, 2023.

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