

UGANDA / JUDGMENT

Tako v Apika (Divorce Cause 94 of 2022) [2024] UGHCFD 27 (6 June 2024)

[2024] UGHCFD 27

COURT

HC: Family Division (Uganda)

BEFORE

Kitariisibwa-Katunguka, J

CASE / FILE NUMBER

Divorce Cause 94 of 2022

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(FAMILY DIVISION)

DIVORCE NO. 94 OF 2022

ALFRED TAKO KENYI ODUBASA : PETITIONER VERSUS

APIKA JACQUELINE: RESPONDENT Before: Ketrach Kitariisibwa
Katunguka;(judge).

Ruling on a Preliminary point

Introduction.

- 1. DC 94 of 2022 came up for hearing on 15/3/2024; in the presence of both parties and their counsel; counsel Samson Natamba for the respondent raised a preliminary point of law to the effect that the petition is brought in breach of **section 1(a) of the Divorce Act cap. 249**; which prohibits *the making of any decree of dissolution of marriage unless the petitioner is domiciled in Uganda at the time when the petition is presented.*
- 2. It was submitted for the respondent that the pleadings show the petitioner is a national and a resident of Juba in South Sudan; he therefore does not have domicile in Uganda; counsel referred to the case of Joy Kiggundu vs. Horace Awori, Divorce Cause No.8 of 1998; where court held that a dissolution of marriage cannot be made unless the petitioner is domiciled in Uganda when the petition is presented.

Counsel further submits that since the petitioner is praying for a share in the matrimonial property, if a decision is made against him, he could leave the jurisdiction of court and the same cannot be enforced; counsel prays that the petition be dismissed with costs.

- 3. In reply, counsel Julius Kinyera for the petitioner submits that the petitioner is domiciled in Uganda by choice; that after solemnization of their marriage, the couple lived in Kampala in several places with the respondent and in USA; the petitioner worked in different places especially South Sudan while the couple cohabited in Kampala rented and paid for by the petitioner; the petitioner spent almost all of his adult life in Uganda; purchased a leasehold land in Uganda; he relocated to South Sudan to look for a job; and he is also a Ugandan citizen with a national identity card;
- 4. That the facts in this case are distinguishable from the facts in Joy Kiggundu vs. Horace Awori, (supra); for in this case the petitioner is domiciled in Uganda by choice; has lived all his adult life here; acquired Ugandan citizenship, renting a place in Bbunga; only went to South Sudan in search for a job; he has acquired property in Kyadondo; hence he has intention of permanently residing in Kampala; there is no matrimonial property for the petitioner solely acquired the property.
- 5. The petitioner filed an affidavit in reply to the point of law without court's leave; since pleadings had already been closed, the affidavit in support shall not be admitted as the petitioner's evidence.

Determination:

- 6. A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit (see **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696**).
- 7. It is a legal requirement that before a decree for dissolution is issued, the petitioner ought to be domiciled in Uganda at the time when the petition is filed. The term domicile is defined in **Black's Law Dictionary 11th Edn page 614** as; **'The place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere.*'* A person's domicile is the place where his habitation is fixed without any present intention of moving therefrom.
- 8. In **Robinah Erina Kagaya Kiyangi V Doctor Aggrey Kiyangi High Court Civil Appeal No. 41 of 2004**, the word domicile was defined as the country in which a person is or presumed to be permanently resident, the place of a person's permanent home. It depends on the physical fact of residence plus the intension of remaining; court further stated that domicile must not be confused with nationality.

- 9. The petitioner's pleadings show that after conducting a civil marriage, the parties cohabited in Bunga, Mengo and then Bunga again in Kampala as well as in the United States for 3 months; when misunderstanding developed between them, the petitioner relocated to South Sudan where he got a job and left the respondent in Bunga; the petitioner avers that he invited the respondent to Juba- South Sudan but she rejected; in 2017 the petitioner returned to Kampala in an attempt to reconcile with

the respondent in their rented apartment; the properties acquired during the subsistence of marriage are in Uganda;

- 10. Counsel argues that the petitioner is domiciled in Uganda by choice. According to *Black's Dictionary 11th Edn page 614*; *domicile by choice* is established by physical presence within a state or territory, coupled with the intention of making it a home; or the domicile that a person chooses after reaching majority or being emancipated.
- 11. In *Nygh on Conflict of Laws in Australia 7th edition (Lexis Nexis, Australia, 2002) [13.18]*: "A person acquires a domicile of choice in a country by being lawfully present there with the intention of remaining in that country indefinitely. The two elements of physical presence and intention must occur at the same time. ... Provided the intention can be proved to exist the length of presence in the state is immaterial; it need be no more than a split second".
- 12. In *SRQQQ and SRRRR and Repatriation Commission [2002] AATA 510*; It was observed that; *"A person may change their domicile by adopting a domicile of choice. A domicile of choice is acquired if a person resides or has resided in a country and intends to remain there indefinitely. A person may acquire a domicile of choice notwithstanding a continuing emotional attachment to another country. A person may also abandon an earlier domicile of choice if he or she ceases to have the intention to remain there indefinitely."*
- 13. According to paragraph 1 of the petitioner's affidavit he is a Sudanese national and resident of Juba, in South Sudan. Black's Law Dictionary 11 Edition at page 1565; states: *'resident'* is expounded to mean; Someone

who lives permanently in a particular place; specifically, a person who has established a domicile in a given jurisdiction. Domiciled and resident mean the same thing, and are both included in the term resident...a resident does not mean a mere casual visitor, but a person domiciled. (see: *Davies v Western Australia [1904] HCA 46; 2 CLR 29*).

- 14. It is the petitioner's averments that he relocated and is now resident in South Sudan; in which country he is a national; a mere property proprietorship in a state does not automatically confer domicile on an individual; I differ from the argument of counsel for the petitioner that because the petitioner owns property in Uganda and that he pays rent for the respondent, he is domiciled within this jurisdiction.

- 15. On the above premises I find that at the time of filing the instant petition, the petitioner was not domiciled in Uganda; neither has he led evidence to show his expressed intention of returning to Uganda indefinitely for court to draw the inference that he is domiciled in Uganda by choice.

In the result, I find merit in the preliminary objection. The petition is dismissed with no orders as to costs.

Ketrah Kitariisibwa Katunguka;(Judge).

6/06/2024

Delivered by email to:[negesaamina@gmail.com,](mailto:negesaamina@gmail.com)
[natambasam@gmail.com,](mailto:natambasam@gmail.com)[infor@meritaslawyers.com]
(mailto:infor@meritaslawyers.com)

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