

Handing of Marriage and Divorce cases in a G1's court

Hon Dr Justice Douglas Karekona Singiza

Defition of key terms

- Family
- Jurisdiction
- Marriage
- Consanguinity
- Matrimonial property
- Divorce
- Alimony

Origin of family (familia)

- ❖ Slavery and family, Property and family
- ❖ State and control of family (**Engels F (1884)**)
- ❖ Religion and marriage
- ❖ African tradition and marriage
- ❖ Colonial codification marriage laws and practices and the view that Customary Marriages were a form of 'Wife purchase'
- ❖ (**Rv Amkeyo, 7 E.A.L.R. (1917)**)
- ❖ 1995 Constitution the 'equality doctrine', the feminist legal theory and *Mifumi (U) Ltd. & Another v. Attorney General & Another* (**On refund of dowery and the doctrine of unjust enrichment**)

Jurisdiction

- The power to celebrate a marriage
 - This depends on the type of marriage
 - Registrar/ Church Minister), Imam and clan heads, etc
 - Focus shall be on marriages under customary law, MA & the DA
 - Certificate of marriage good evidence of marriage but marriage may be proved by other evidence
 - Power to hear petition for divorce vests in
 - Magistrates court
 - High court (where a spouse is not an African)
 - District Khadhi
- Note: subject to the statutory jurisdiction limits (contestable)
- Case law:

Conditions for customary marriage

- ❑ Customary marriage potentially polygamous but void if—
 - ❖ female party has not attained the age of sixteen years;
 - ❖ male party has not attained the age of eighteen years;
 - ❖ one of the parties is of unsound mind;
 - ❖ the parties within the prohibited degrees of kinship specified in the Second Schedule
 - ❖ Either party is in a subsisting [monogamous marriage](#)

Source: **Customary Marriage (Registration) Act Cap 248.**

Condition of marriage under the Marriage Act

- Residence status of one of the parties within the [district](#) in which the marriage is intended to be celebrated (at least fifteen days)
- Each of the parties (not being a widower or widow) is twenty-one years old
- if he or she is under that age, then with written consent
- No impediment of kindred or affinity, or any other lawful hindrance to the marriage
- Neither of the parties to the intended marriage is married by customary law to any person **other than the person with whom such marriage is proposed to be contracted. (S 10 of the MA)**
- Void and voidable marriage**

Petition of divorce

- ❑ Who may be party to a divorce petition?
- ❑ When is a co-respondents necessary?
- ❑ Grounds for divorce
 - A husband may apply for the dissolution of his marriage on the ground that
 - a. Since the solemnisation of the marriage his wife has been guilty of adultery.
 - A wife may apply for the dissolution of her marriage on the ground that since the solemnisation of the marriage—
 - a. (Husband changed his profession of Christianity for the profession of some other religion, and
 - b. Gone through a form of marriage with another woman;

cont...

Or

Husband has been guilty of—

❖ (incestuous adultery;(ii)

❖ *bigamy with adultery;*

❖ *marriage with another woman with adultery;(iv)rape, sodomy or bestiality;*

❖)Adultery coupled with *cruelty;*

❖ Or adultery coupled with *desertion, without reasonable excuse, for two years or upwards (why?)*

❑ Normal 'wear and tear' approach by courts to marriage (**s 4 of the DA**)

When to name co-respondent

□ Where the husband is the petitioner, the alleged adulterer is a co-respondent

❖ *Unless he is excused by the court from doing so on one of the following grounds—*

➤ the respondent is leading the life of a prostitute (sexist?)

➤ The alleged adulterer unknown *and efforts to establish the identity;*

➤ The alleged adulterer is dead (**misogynistic**) **See (s 5 of the DA)**

Nature of inquiry

- Burden of proof is on the preponderance of evidence (Miller v Minister of Pensions)
- Adulterers usually hide the trail of evidence
- Check for the following:
 1. Connivance
 2. Condonation
 3. Counter charge against the petitioner
 - 4. Resumption of sex is evidence of condonation**

See sections 6 & 7 of the DA.

The intrusive nature of the inquiry is fatiguing to the court.

Guidance from court

- *Rv Amkeyo*, 7 E.A.L.R. (1917) Customary Marriages As 'Wife Purchase' I
- *Mayambala v Mayambala* (Divorce Cause No.3 Of 1998) [1998] UGHC 16 (3 November 1998);
- *Uganda Association Of Women Lawyers And 5 Other vs AG* CP No 2 Of 2003 Per Twinomujuni JCC As He Then Was Is A Good Guide
- The Constitution And The Introduction Of The Equality Doctrine
- *Habyarimana v Habyarimana* (1980) HCB 139 Is No Longer Be A Good Precedent.
- NB: *Namukasa v Kakondere* (Divorce Cause No. 30 of 2010) [2015] UGHCFD 49 (10 April 2015) *Luswata J* who seems to disagree with *Bossa J* on application of the DA to customary marriages

John Kintu Muwanga Vs Myllious Gafabusa Kintu HCDA 135/97 and *Bossa J*'s view against superimposing a foreign regime in customary relationships.

Sharing of property on divorce

- Tricky -properties in divorce lead to jurisdictional issues for G1s
- Constitutional imperative on equality
- *Julius Rwabinumi v Hope Bahimbisomwe* (Civil Appeal 30 of 2007) [2008] UGCA 19 (19 June 2008) per Twinomujuni, JA. This decision had adopted the reasoning of the trial judge in the high court.
- *Rwabinumi v Bahimbisomwe* (Civil Appeal 10 of 2009) [2013] UGSC 5 (20 March 2013) per **Dr. Kisaakye, JSC**.
- *Ambayo v Aserua* (Civil Appeal No. 100 of 2015) [2022] UGCA 272 (15 November 2022) rejects the approach on 50-50 sharing of property

Conclusion

- Marriage and Divorce is for equals
- No longer for life meaning the 'normal wear and tear' is not good law (*Amkeyo, Supra*)
- Most petitions will always end in consents judgments. (collusion/condonation?)
- Ensure you are not ensnared by divorce petitions
- Pay regards to other rights after divorce such a child custody and maintenance
- Is alimony good law?

END

THANK YOU!