

Examining the Law Governing Divorce and Sharing of Property in Uganda

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ABSTRACT

This article examines the legal framework governing divorce and property distribution in Uganda, revealing that children's rights are often compromised during divorce proceedings. Despite constitutional guarantees ensuring children the right to know and be cared for by their parents, these rights are frequently overlooked. The article advocates for the adoption of a no-fault divorce system, suggesting that the sole ground for divorce should be the irretrievable breakdown of the marriage. This approach would eliminate discriminatory grounds for divorce, focusing instead on the spouses' inability to continue living together. Moreover, the government has a responsibility to create a conducive environment for the introduction and enforcement of new laws that uphold these principles. This includes recognizing and promoting women's rights to equal treatment and legal protection. The article further calls on the Ugandan legislature to develop a divorce law that addresses the rights of women and ensures a balanced approach to the needs of both parties during the dissolution of marriage. It proposes the repeal of the current Divorce Act (Cap 249) in favor of new legislation that better safeguards women's rights.

Keywords: Children, Divorce, Legal framework, Sharing property, Spouses

INTRODUCTION

The principal legislation on divorce in Uganda is the Divorce Act^[1]. Unfortunately, it does not define the terminology "divorce". The Black's Law Dictionary^[2] defines divorce as the legal separation of husband and wife, effected, for cause, by the judgment of a court, and either totally dissolving the marriage relation, or suspending its effects so far as concerns the cohabitation of the parties. The Matrimonial Causes Act 1857^[3] provides that a party to a marriage could obtain a decree of divorce on proving that the spouse had committed a matrimonial offense. The only offense that entitled a husband to obtain the decree was adultery. For a wife, it was not enough for her to prove adultery against her husband. She had to prove that the husband was guilty of aggravated adultery that is adultery coupled with another offense for example incest, bigamy, cruelty, among others, or that he had changed his faith from Christianity to some other faith and he through a form of marriage with another woman. Despite the fact the English have since reformed the

Matrimonial Causes Act, and have abandoned the concept of divorce granted on the basis of proof of matrimonial offenses, the 150-year-old English law is still intact and in force in Uganda. Another misfortune is that Section 3 (3) of the Divorce Act requires that the courts here in Uganda exercise their jurisdiction under the Act, "in accordance with the law applied in matrimonial proceedings in the High Court of Justice in England." Divorce in Uganda is governed by the Divorce Act, Cap 249 Laws of Uganda which lays down the procedure to be followed in divorce proceedings. The Divorce Act provides for requirements that should be met by both parties in order for a divorce decree to be granted. The Divorce Act however, provides under Section 4 (1) that a husband may apply by petition to the court for the dissolution of his marriage on the grounds that since the solemnization of the marriage, his wife has been committing adultery^[1]. Thus a man only needs to prove adultery by his wife. Section 4 (2) of the Divorce Act Cap 249. Despite the provisions of the Divorce Act, women are still

suffering because the said Act is unfair in relation to the requirement that a woman needs to prove in divorce proceedings. The divorce law as it exists in Uganda today is outdated and does not conform to the standards of equality between sexes. It is based on the Matrimonial Causes Act of 1857 of Britain

which has been amended several times in its country of origin. There is no principle legislation on the sharing of property in Uganda. It is against this backdrop that the present study examines divorce and property sharing in Uganda.

The legal framework guiding divorce in Uganda

The 1995 Constitution of the Republic of Uganda

Article 31 (1) of the Constitution of the Republic of Uganda 1995[4] states that men and women of the age of eighteen years and above have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage, and at its dissolution. The constitution therefore recognizes the fact that marriages do not work out sometimes and

they need to be dissolved. This shows that the constitution does recognize the fact that marriage can be dissolved and in so doing it provides that men and women should be accorded equal treatment during the proceedings and even after the dissolution is final[5].

The Divorce Act Chapter 249

Divorce is the dissolution of marriage. Marriage is an institution that is supposed to be for a lifetime however due to conditions beyond human control this institution is shaken and the law comes in to protect the affected parties[6]. Jurisdiction is very important in divorce; it is important to identify the court with prerequisite jurisdiction to entertain the petition for the purpose of divorce under the Divorce Act. Jurisdiction is provided in Section 3 of the Divorce Act[1]

this Act are Africans or where a petition for divorce only is lodged in accordance with section 21, jurisdiction may be exercised by a court over which presides a magistrate grade I or a chief magistrate.

- ii. In all other cases jurisdiction shall be exercised by the High Court only.

- i. Where all parties to a proceeding under

In [7], it was held that in a divorce petition, the petitioner must prove marriage, domicile, and the ground for divorce and that there's no condonation, collusion, or connivance.

The Marriage and Divorce of Mohammedans Act of Uganda cap 252

Section 2[15] provides that all marriages between persons professing the Mohammedan religion and all divorces from such marriages celebrated or given according to rite and observances of the

Mohammedan religion customary and usual among the tribe place shall be valid and registered as provided in the Act.

The Hindu Marriage and Divorce Act cap 250

Section 8[16] is to the effect that the Divorce Act shall apply to marriages and matrimonial causes relating to marriages celebrated under the Hindu Marriage and Divorce Act. In addition to the grounds for divorce mentioned in the Divorce Act, a petition for divorce may be presented by either party to a marriage on the ground that the respondent has ceased to be a Hindu by reason of conversion to another religion; or the respondent has renounced the world by entering a religious order and has

remained in that order apart from the world for at least three years immediately preceding the presentation of the petition; and by the wife, in the case of a marriage solemnised before the commencement of this Act, on the ground that her husband at the time of the marriage was already married; or married again before the commencement of the Act, the other wife being, in either case, alive at the date of presentation of the petition[16].

Divorce Under Customary Marriage

In *John Tom Kintu Muwanga v Myllious Gafabusa Kintu*[17], it was stated by Justice SB Jossa that, when parties make a choice and opt to be governed by customary law in their marriage, they will be governed by the same rules. The rules of course subject to those rights guaranteed to them in the Constitution.

incurable disease and there was generally a breakdown in the marriage.

Incompatibility: this could take all forms including insult, and nagging by the wife.

The Customary Marriages Act[18] is silent on how customary marriages are dissolved. In Uganda, customary divorce was by the return of bride price as held in *Bisanga v Bisanga*[19], where the court held that once a customary law marriage is dissolved, the husband is entitled under the Teso customs to claim the return of dowry. The formal divorce may take a long time after the separation and it is signified by the actual return of

1. Laziness
2. If one of the parties suffered from an

dowry or on order for such return. The return of the bride price is evidence that the marriage has been dissolved and the claims the full amount irrespective of the years that the couple had been married, the number of children produced, or whose fault it was that led to the breakup of the marriage. However, the decision of *Mifumi (u) Ltd and others v Attorney General*[20] provided a new twist in customary marriages and divorces as discussed above. In the case, the court held that the bride price denotes the property that is given by the groom's parents to the bride's parents in customary marriage. It was observed that bride price is not

uniform among all ethnic groups in Uganda. On the issue of whether the practice of demanding for refund of the bride price is unconstitutional, the court observed that the custom of refunding of bride price devalues the worth, respect, and dignity of a woman. The bride price constitutes gifts to the parents of the girl for nurturing her and taking good care of her up to marriage, and being gifts, it should not be refunded. Refund of bride price violates Article 31(1)[4] which provides that "men and women of the age of 18 and above have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution.

Domicile

The Black's Law Dictionary[2] defines domicile as that place in which a man has voluntarily fixed the habitation of himself and family, not for a mere special or temporary purpose, but with the present intention of making a permanent home, until some unexpected event shall occur to induce him to adopt some other permanent home. This legal system includes the law which determines the legal capacity

of that person as for principle whether that person has the legal capacity to marry or how the property of a deceased person is to be distributed. For example, a man domiciled in Uganda is under the jurisdiction of Uganda for purposes of dissolving or annulling his marriage. The law on domicile is important in defining the position in many marriage and succession matters[8].

Procedure for Divorce

Section 30[1] is the law that regulates the procedure of divorce regulated by the Civil Procedure Act[9] and the rules made there under. S.31 provides that proceedings are commenced by way of petition which must state in the facts on which the petition is based and shall be verified by an affidavit. The affidavit must state there is no collusion or connivance between the petitioner and the respondent. Where there are issues, the

petitioner should indicate the names of the children and their ages. The petition should show the existence of marriage and where it was contracted from, the ground relied on and the facts conferring jurisdiction on the court. The petition may also pray for maintenance, custody, and distribution of property and indicate those properties. The same principles apply to company properties since it is a distinct entity[10].

The consequences of divorce

In a petition for dissolution of marriage, the aggrieved party may claim damages from any person for having committed adultery with his wife. The procedure for damage recovery is provided under Section 21(3)[1] which provides that the court may

direct that the damages be levied from movable and immovable property of the person ordered to pay for the benefit of the children and maintenance of the wife.

Custody

In a suit for dissolution of marriage, the court may, or after decree absolute has been pronounced make such orders as to custody and maintenance of young children. In *Teopista Kayongo v. Richards*[11], it was stated that custody of children of tender years should be with the mother unless she is not fit and proper. 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 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.

Alimony

According to Section 23, a wife whether or not she has obtained a protective order may apply to court pending suit and the court may make such order as it may deem it fit and just except that the order should not exceed 1/5 of the average net income for three years next preceding the date of the order[12]. Section 24[1] provides for permanent alimony where

a decree absolute has been made, the court has to take into account the ability of the husband and the conduct of the parties. The court may direct the alimony to be paid in a lump sum, annually weekly, or monthly during the life of the wife depending on the ability. Section 40[1] provides that "no clergyman in Holy Orders of the Church of

Uganda shall be compelled to solemnize the marriage of any person whose former marriage has been dissolved the ground of his or her adultery, or

shall be liable to any suit, penalty, or censure for solemnizing or refusing to solemnize such marriage.

Process of Final Dissolution of Marriage

If the court allows the petition, it makes a decree nisi and the decree cannot be made absolute until the expiration of 6 months from the declaration of that decree or longer periods as the Chief Justice may prescribe by rules. In *Neogy v. Neogy*[13], it was held that there is no power in Uganda for the court to bridge the 6 months period provided in Decree

Nisi and Decree Absolute. In *Morris v. Morris*[14] it was held that the 6 month period is for cooling after which either party can show why the decree should not be made absolute. Section 37 is to the effect that where the petitioner fails to move the Court within a reasonable time for the decree to be made absolute the court may dismiss the petition[1].

CONCLUSION AND RECOMMENDATIONS

Parents must continue to play an important role in the lives of their children, despite families beyond the parents being disrupted by divorce. It is generally a good idea that the parents design a thought-out parenting plan to keep some predictability in a family structure. This is good for the sake of the children. Although the 1995 Constitution of the Republic of Uganda and other international conventions that Uganda ratified give protection to women among other persons against abuse of their rights, women should be sensitized about their legal rights and obligations to be unable them see legal redress where they have been denied their rights to own property. It was discovered that children's rights are violated in the process of divorce, despite the constitution providing that children have the right to know and be cared for by their parents. It is against this backdrop that the article calls for the law to provide for no-fault-based divorce and move towards the sole ground of irretrievable breakdown of the marriage. In this way, the discriminatory grounds will be done away with because divorce will be granted on the basis that the spouses can no longer live together and the marriage

cannot continue. More so, the Government has a duty to create an enabling environment for the promulgation of a new law as well as its enforcement. It should also be ready to accept and promote the realization of the rights of women to equal treatment as well as protection by the law. Furthermore, The Ugandan legislature must move to create a divorce law that considers the rights of women and balances the needs of both parties during dissolution. The Divorce Act cap 249 should be repealed and a new law put in place to protect the rights of women. Similarly, the court should uphold the decision of the court in *Uganda Association of Women Lawyers and 5 Others v. Attorney General*[21], in which the discriminatory sections of the Divorce Act were declared unconstitutional until the law was out in place. The courts should be vigilant enough to interpret the law in a non-discriminatory way so as to avoid injustices. Finally, the judiciary should further uphold the decision in *Rwabinumi v Bahimbisomwe*[22], in sharing of property in case of divorce. The courts should be careful to protect the rights of the different parties involved.

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CITE AS: Ekemiya Waiswa, Asika Winnie, Tuhaire Denis, Unihira Bravery, Hebet Peace Muiai, Agilinya Penlope, and Akirunda Tony (2024). Examining the Law Governing Divorce and Sharing of Property in Uganda. IAA Journal of Arts and Humanities 11(2):38-42. <https://doi.org/10.59298/IAAJAH/2024/11.3842.33>