

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA, AT KAMPALA  
DIVORCE CAUSE NO.3 OF 2002.**

AJANTA KETHAN

THAKKAR:.....

:.....: PETITIONER

vs.

KETHAN

THAKKAR:.....

:.....:RESPONDENT.

**BEFORE: V.F.MUSOKE-KIBUUKA (JUDGE)**

**JUDGMENT.**

**INTRODUCTORY:**

Ajanta Kethan Thakkar, the petitioner, and the respondent were married in Baroda, India on 26.7.1990. They married in accordance with the law governing Hindu marriages in India. Their marriage was blessed with one issue, a boy now about ten years old.

In 1990, the family of three changed their domicile to Uganda. They resided at Bukoto in Kampala.

**PLEADINGS:**

On 17th May, 2002, the petitioner presented this petition to the Registrar of the High Court seeking the following orders:

- a) an order for the dissolution of her marriage with the respondent;
- b) an order granting the petitioner custody of the issue of the marriage,
- c) an order providing maintenance for the petitioner and the issue of the marriage, and
- d) an order awarding the costs of this petition to the petitioner.

The grounds upon which the petition is based are contained in paragraph 6 of the petition. They are:

- a) that the respondent, during the month of February, 2000, changed his religion from Hinduism to Christianity (Pentecostal).
- b) That the respondent has been guilty of —adultery coupled with desertion without reasonable excuse since March, 2000.

As at 4th February, 2003, nearly four months after summons to answer the petition had been served upon him, the respondent had not done so. The petition was mentioned on that day. The respondent, however did turn up in court in person on that day. He stated that he did not intend either to answer the petition or to contest the allegations made by the petitioner in court. He asked the court to determine the petition as it saw fit.

The petition was presented under Section 5(2) (b) of the Divorce Act, Cap. 215 and section 9 (2) (a) (i) of the Hindu Marriage And Divorce Act, Cap 214. Three issues identified from the petition, for proof by the petitioner, to the satisfaction of the court as required under the provisions of Section 9 of the Divorce Act.

#### ISSUES.

Three issues were:

- a) whether the respondent had ceased to be a Hindu by reason of conversion to Christianity; and
- b) whether the respondent had committed adultery.
- c) Whether the petitioner merited the remedies sought in the petition.

#### FIRST ISSUE.

The petitioner's evidence was that after moving to Uganda, the petitioner, the respondent and their son, Rohan Kethan, who is now 10 years old, lived together till March, 2000, at Bukoto, in Kampala.

Before March, 2000, the respondent had got involved with a certain lady by the name of Anne Piribiri who was a born again Christian, working with Ultima Clinic along Bombo Road. During March, 2000, the respondent deserted the petitioner and started cohabiting with Anne Piribiri at Kikaya, near the Bahari Temple.

It was during his stay with Anne Piribiri that the respondent changed his religion from Hinduism to a born again Christian. The respondent himself confessed to the petitioner that he had so changed his religion. The petitioner had no reason to believe that the respondent had reverted back to Hinduism since he was still involved with the same lady, Anne Piribiri. The two were attending Christian services together at Kampala Pentecostal church along, Kampala road.

Since the respondent had categorically told this court that he had no intention of contesting the allegations made against him in the petition, the petitioner's evidence remain unchallenged. This court does not, in the least, doubt its truthfulness. The petitioner appeared to me to be innocently truthful.

Accordingly, I find that she has proved to the satisfaction of this court that since the solemnisation of her marriage between her and the respondent, in July, 1990, at Harmi, Baroda,

India, under the Hindu rite, the respondent has changed his religion from Hinduism to Christianity. That fact is ground for divorce under Section 9(2) (a) (i) of the Hindu marriage And Divorce Act, cap. 214. Upon that ground a decree nisi for the dissolution of the marriage between the petitioner and the respondent, shall issue, under section 9 of the Divorce Act, Cap. 215.

#### SECOND ISSUE.

The second issue relates to whether the respondent committed adultery with Anne Piribiri. The petitioner in the petition, pleaded adultery coupled with desertion as is required under section 5(2) (vi) of the Divorce Act, cap 215. This court, at the commencement of the trial, advised learned counsel, Mr. Rwarinda to abandon the desertion part of the ground. The court considered the provisions of section 5 of the Divorce Act in as far as it provided for a husband to prove only adultery as a ground for dissolution of his marriage and a wife to prove adultery coupled with desertion or cruelty as a ground for dissolution of the same marriage, to be unconstitutional and of no effect. This court would refuse to apply or give effect to it on that account as required by Article 2 of the constitution- (the supremacy clause).

As it stands, section 5(2) (vi) would be in direct conflict with the equality rights and anti discrimination provision set out in Article 21 of the constitution. It would also be inconsistent with the provisions of Articles 31(1) and 33, of the constitution providing for equal rights during marriage and at its dissolution and dignity between men and women in all areas of human endeavour. **(See Divorce Cause No. 006/2001 Annette Nakalema Kironde Vs. Apollo Kaddu Mukasa Kironde And Another, unreported.**

In those circumstances, this court applied the provisions of Article 273 of the constitution which requires courts in this country, after the coming into force of the 1995 constitution, to construe all existing laws, “with such modifications, adaptations, limitations and qualifications as may be necessary to bring it into conformity with this Constitution”.

The effect of applying Article 273 of the constitution to section 5 of the Divorce Act is, quite clearly, that the grounds for divorce provided under that section apply equally to husbands and wives. In other words, if a husband can secure a decree nisi for the dissolution of a marriage

between him and his wife, a wife can equally obtain the same decree upon the same ground but not upon the same ground coupled with some other ground. The latter would be placing the wife under a burden or disadvantage not placed upon the husband under the same law. That would amount to discrimination based upon sex. That is clearly forbidden by the constitution under the equality clause and the equal dignity clauses.

On the ground that the respondent committed adultery, the petitioner's evidence was that the respondent himself informed the petitioner that he was co-habiting with Anne Piribiri and that he was having sexual intercourse with Anne Piribiri. The petitioner said that on five earlier occasions she had each time forgiven the respondent. She did so only to save the marriage between herself and the respondent for the sake of Rohan Ketan, their infant son and sole issue of the marriage.

The petitioner testified that the respondent could not extricate himself from the adulterous relationship with Anne Piribiri. Each time the petitioner forgave him he would find his way back and commit adultery all over again. The petitioner then gave up the respondent. The respondent stopped visiting her and she sent Rohan to her parents in India. She has been living alone ever since and she has not been seeing the respondent who continued to cohabit with Anne Piribiri whom the respondent regards as his fiancée.

Direct evidence proving the fact of commission of adultery is quite rare in divorce causes. At best, the evidence is mostly circumstantial. Ntabgoba, PJ, in George Nyakairu Vs. Rose Nyakairu (1979) HCB, 261, did explicitly acknowledge this fact in a very vivid expression when he wrote, "In allegations of adultery, it is not necessary to Prove the direct fact of adultery for that fact is almost to be inferred from circumstances as a necessary conclusion since it is indeed very rare that parties are ever surprised during the direct act of adultery".

In the instant case, the petitioner's evidence reveals the circumstance of the respondent's co-habiting with Anne Piribiri whom the respondent called his fiancée. It also reveals the self-confession by the respondent to the petitioner that he was not only co-habiting with Anne Piribiri but he was also having sexual intercourse with her. Above all, there is the fact that the respondent told this court that he did not wish to contest the truthfulness of the allegation of adultery made against him by the petitioner.

Those circumstances, in my humble view, should lead to no other conclusion but to one that the petitioner has proved, upon the balance of probabilities, the ground that the respondent committed and continues to commit adultery with Anne Piribiri whom he cohabits with and regards as his fiancée.

Upon the above ground, a decree nisi for the dissolution of the petitioner's married would, as well also issue.

#### CUSTODY AND ALIMONY.

There is evidence on record that the respondent abandoned or deserted both the petitioner and the only issue of the marriage Rohan Ketan, aged 10 years. The petitioner has struggled to put him into school in India where he resides with the petitioner's parents. In those circumstances, under section 30 of the Divorce Act, custody of Rohan Ketan must be and is granted to the petition. It is clear that his welfare will best be ensured if his custody is granted to his mother.

The petitioner stated that she currently spends about \$ 2000 a year, upon the school dues for Rohan Ketan in India. She, in addition, asked for an award of \$200 @ month for her own upkeeps as well as that of Rohan Ketan.

The evidence did not reveal the income of the respondent. The petitioner merely stated that the respondent is a business man. The affidavit of service deponed by Wabusa Eddie, of Mutambi Mushega, and Co. Advocates, shows that the respondent was a shop keeper in L.J. (U) Ltd

located at plot 4, Johnson Street. It remains unclear whether the shop belongs to the respondent or not.

Be that as it may, this court has to assume that the respondent who migrated to Uganda in 1999 came to do business as the petitioner says. It is also safe, upon the evidence available, to conclude that the respondents, at I east earns some moderate income and that he will continue to do so.

Upon the above basis, I find that an order that the respondent, though custody of the infant issue of the marriage is granted to the petitioner, meets the education costs of that child either in India or in Uganda and as reasonably required from time to time as the child progresses in his educational and intellectual growth.

Lastly, the petitioner has prayed for alimony of \$ 200@ month for the up keep of herself and the issue of the marriage. The entitlement of the upkeep of both the issue of the marriage and the petitioner, who is currently unemployed and lives alone, raises no doubts considering all the circumstances of this petition. I, therefore award the petitioner a sum of US \$ 1,800, a year, to be paid by the respondent to the petition during all the time the petitioner remains unmarried. The amount is to be remitted by the respondent in quarterly installments at the beginning of each quarter.

#### ORDERS.

This court is satisfied that the petitioner has proved each of the two grounds upon which her petition is based, namely, that the respondent has changed his religion from Hinduism to Christianity. Secondly, that the respondent has committed adultery with one Anne Piribiri. The following orders are accordingly made:

- a) an order for the issuance of a decree nisi for the dissolution of the marriage between the petitioner and the respondent. The decree nisi is to be made absolute by this court upon the expiry of six months from the date of this judgment unless cause is shown why it should not be made absolute;
- b) an order granting the custody of Roham Ketan, the only issue to the marriage of the petitioner and the respondent, to the petitioner;
- c) an order requiring the respondent to cater for all the educational monetary requirements of Rohan Ketan till the time he completes his formal education;
- d) an order requiring the respondent to pay a sum of \$ 1,800 to the petitioner annually, by way of quarterly installments for the upkeep of both herself and Rohan Ketan. The money being paid to her as long as she remains unmarried;
- e) an order awarding the costs of this petition to the petitioner against the respondent.

**V.F.MUSOKE-KIBUUKA (JUDGE)**

26.6.2003.

**Court: Order.**

The Deputy Registrar of the High Court, in charge of Civil matters, may deliver this judgment on a date and time fixed by her.



**V.F.MUSOKE-KIBUUKA (JUDGE)**

26.6.2003.