



After a series of adjournments, a scheduling conference was held on 1<sup>st</sup> November 2006 and seven issues were framed -:

1. Whether the respondent is guilty of adultery.
2. Whether the respondent is guilty of cruelty.
3. Whether the co-respondent is guilty of adultery.
4. Whether the marriage between the petitioner and the respondent has irretrievably broken down.
5. Custody of Benjamin Bashaija.
6. Remedies available to the parties.
7. Costs.

On 23<sup>rd</sup> October 2007, the petitioner testified and was cross-examined. The petitioner's case was closed. When the matter came up for the respondent's case on 23<sup>rd</sup> January 2008, Counsel for the respondent informed court that the parties were in advanced stages of working out a Separation Agreement with a view of saving the marriage between the parties. Court gave the parties up to 27<sup>th</sup> February 2008 to work out a Separation Agreement. Indeed on the appointed date both Counsel informed court that the Separation Agreement was due to be signed the following day i.e. 28<sup>th</sup> February 2008. In the Separation Agreement (on court record) one of the terms agreed to was that Divorce Cause No. 12 of 2005 was to be stayed.

The above agreement pertained until 17<sup>th</sup> December 2010 when the petitioner filed an application by Notice of Motion seeking *inter alia* for an order setting aside and vacating the Separation Agreement entered into by the parties. The Respondent

filed an Affidavit in reply and *inter alia* contended that the application was not tenable in law and that the Separation Agreement entered into by the parties operated as a consent judgment and could therefore not be set aside.

I need to state here, that from the record, the arrangement between the parties of 28<sup>th</sup> February 2008 was more or less a holding ground and did not amount to Judicial Separation as contemplated in Section 14 of the Divorce Act Cap 249 Laws of Uganda 2006.

Accordingly when the Notice of Motion was set down for hearing, Court advised the parties to instead fix Divorce Cause No 12 of 2005, which had been stayed, for hearing and completion.

Instead of pursuing a length liviligation, the parties reached a partial consent and court entered a ***Decree Nisi*** on 16<sup>th</sup> July 2012 dissolving the marriage. According to the terms of the consent the sharing of property was to be determined by Court hence this Judgment.

### ***Sharing of property***

The petitioner listed the following properties as those which she contends belong to the couple.

1. LRV 1633, Foho 16 Plot 8 Moyo Close in names of Geoffrey Bashaija
2. LRV 1707 Foho 5 Plot 8 Kawalya Kaggwa Close in names of Goeffrey Bashaija (caveat by Jane Bashaija).
3. LRV 2600 Foho 11 Plot 7c Impala Avenue in the names of Fred Bashaija.

4. LRV 618 Foho 8 Plot 8B Impala Avenu in names of Godfrey Bashaija. Caveats by Kipayo estate and Bashaija Jane.
5. LRV 1821 Foho 12 Plot 74 Friendship Road Ntinda in names of Geoffrey Bashaija.
6. Kibuga Block 29 Plot 57 Kanjokya Street Kamwokya Center in the names of Fred Bashaija.
7. FRV 358 Foho 12 Plot 6 Lower Kololo Terrace in names of Goeffrey Bashaija (sold 10-Jan-2005).
8. Kyanja Road Kisaasi.
9. LRV 323 Foho 1 Plot 135 Kabale Road in names of Fred Bashaija.
10. LRV 325 Foho 6 Plot 125 Kabale Road in names of Bashaija Fred.
11. Kibanja in Kamwokya – 8 houses.
12. LRV 289 Foho 10 Plot 26 Tuffnell Drive in names of Fred Bashaija and Jane Awori Bashaija.

It was the petitioner's case that the properties listed above were up for distribution since they were acquired between 1977 when the parties started staying together as husband and wife by vitue of a customary marriage celebrated at the time.

Counsel for the petitioner urged that even through the parties were married in Church 1998, the properties were nonetheless acquired when they were staying together post 1977. Counsel sought to rely on the Court of Appeal Case of ***Julius Rwabinumi Vs Hope Bahimbisomwe CA Civil Appeal No.30 of 2007*** for the proposition that all the property owned by the couple individually before marriage become joint matrimonial property on marriage.

Regrettably, this type of argument is no longer available to the petitioner since the Supreme Court decision in an appeal from the same case see **Civil Appeal No.10 of 2009** of March 2013. In the Supreme Court decision (Supra), Kisaakye JSC had this to say:-

*“So, while I agree that Article 31 (1) of the Uganda Constitution (1995) guarantees equality in treatment of either the wife or husband at divorce, it does not, in my opinion, require that all property either individually or jointly acquired before or during the subsistence of a marriage should in all cases be shared equally upon divorce.*

The Supreme Court’s position on the matter presently can well be gleaned from Kisaakye JSC’s Judgment at page 27 where she stated:-

*“The courts holding was irrespective of whether the claimant proves that he or she contributed to the acquisition of the said property either through direct monetary or non-monetary contribution towards payment of the purchase price or mortgage installments or its development or indirectly through payment of other household bills and other family requirement including child care and maintenance and growing food for feeding family.*

In the next paragraph on the same page Kisaakye JCS added:-

*“In my view the Constitution of Uganda (1995), while recognizing the right to equality of men and women in marriage and its dissolution, also reserved the constitutional right of individuals, be they married or not to own property either individually or in association with others under Article 26 (1) of the Constitutional of Uganda (1995). This means that even in the context of marriage the right to own*

*property individually is preserved by our constitution as is the right of an individual to own property in association with others who may include a spouse, children, siblings or even business partners. If indeed the framers of our Constitution had wanted to take away the right of married persons to own separate property in their individual names, they would have explicitly said so”*

At bottom of page 28, Kisaakya JSC went on to state:-

“..... then the courts will continue to determine each case based on the Constitution of Uganda, the applicable marriage and divorce law in force at the time in order to make determination whether the property in question is marital property or individual property acquired prior to or during the marriage and to determine whether such property should be divided either in equal shares or otherwise, as the facts of each case would dictate.

As to what constitutes matrimonial property in Uganda Kisaakya JSC cited with approval the approach adopted by Bbosa J (as she then was) in ***Muwanga Vs Kintu High Court Divorce Appeal No. 135 of 1997*** (unreported) where Bbosa J observed.

*“Matrimonial property is understood differently by different people. There is always property which the couple chose to call home. There may be property which may be acquired separately by each spouse before or after marriage. Then there is property which a husband may hold in trust for the clan. Each of these should in my view be considered differently. The property to which each spouse should be entitled is that property which the parties chose to call home and which they jointly contribute to”*

Bearing in mind the above principles as put down by the Supreme Court on how to treat and divide property upon divorce i will now apply the principles to each property in issue.

I have divided the properties in clusters;

### **CLUSTER A**

From the evidence on record, the properties acquired during the subsistence of marriage where the parties jointly contributed are the following:-

1. LRV 1633 Foho 16 Plot 8 Moyo Close Kololo.
2. LRV 1821 Foho 12 Plot 14 Friendship Road Ntinda.
3. Kibuye Block 29 Plot 57 Kanjokya Street.

### **CLUSTER B**

The matrimonial home of the couple is stated and admitted by all parties to be LRV 618 Foho 8 Plot 8 B Impala Avenue Kololo.

### **CLUSTER C**

Property in the joint names of the parties – LRV 289 Foho 10 Plot 26 Tuffnell Drive Kololo.

### **CLUSTER D**

The properties acquired by the 1<sup>st</sup> respondent before the marriage to the petitioner i.e before 26<sup>th</sup> November 1998:-

1. LRV 1707 Kawalya Kagwa Close Kololo.

2. LRV 2600 Foho 11 Plot 7 C Impala Avenue Kololo.
3. LRV 618 Foho 8 Plot 8 B Impala Avenue.
4. LRV 323 Foho 1 Plot 135 Kabale Road.
5. LRV 325 Foho 6 Plot 125 Kabale Road.

## **CLUSTER E**

Properties disputed by the respondent whose ownership has not been proved.

1. Kibanja in Kamwokya with 8 houses.
2. Kyanja Road Kisaasi Plot.

The finding of the Court are that the properties in Cluster A, Cluster B and Cluster C are marital properties which the parties have contributed to either directly or indirectly and should be put in a pool to be shared equally. In event that any property has been sold off, then the party who sold the property should compensate the other party in half the consideration.

The properties in Cluster D remain the property of the 1<sup>st</sup> respondent.

The properties in Cluster E are not proved and court makes no order relating to them.

Each party to meet its own costs

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**B. Kaiamura**  
**Judge**  
**18.09.2013**