

Rwabinumi v Bahimbisomwe

Submitted by \Jane Mugala on 25 April 2013 - 12:31pm

Case No:

CIVIL APPEAL NO. 10 OF 2009

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Judgment Date:

20 March 2013

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: ODOKI, C.J., TSEKOOKO; KATUREEBE; TUMWESIGYE; KISAAKYE, JJ.S.C.)

CIVIL APPEAL NO. 10 OF 2009

BETWEEN

JULIUS RWABINUMI :::::::::::::::::::: APPELLANT

AND

HOPE BAHIMBISOMWE :::::::::::::::::::: RESPONDENT

[Appeal from the Judgment of the Court of Appeal at Kampala (Twinomujuni, Kitumba&Kavuma) dated 19th June 2008, in Civil Appeal No. 30 of 2007].

JUDGMENT OF DR. KISAAKYE, JSC.

This is an appeal against the decision of the Court of Appeal dismissing an appeal brought by the appellant against the respondent.

Background to the appeal

The brief facts of this case are that the appellant contracted a marriage with the respondent on 30th August 2003, at Our Lady of Africa Mbuya Catholic Church. Prior to their wedding, the parties had cohabited together and also produced a son, Edison Rubarema, who was born on 28th

March 2003. The appellant and the respondent developed serious misunderstandings during the first year of their marriage, which culminated in the appellant chasing the respondent and her infant son out of the couple's residence in Kisasi village, Kampala District, on 30th July 2004.

The respondent subsequently petitioned for divorce on 14th February 2005 under Divorce Cause No. 4 of 2005, on grounds of the appellant's adultery and cruelty, which had led to her marriage to irretrievably break down. She prayed for judgment against the appellant for the following orders:

1. *Divorce order;*
2. *Maintenance order for the child;*
3. *A share of the property to which she contributed;*
4. *A return of all gifts and presents given during the giveaway ceremony;*
5. *Cost of the petition; and*
6. *Any other remedy as court may think fit.*

The appellant also cross petitioned for divorce on grounds of the respondent's adultery, witchcraft and irretrievable break down of marriage.

The Petition was heard by Kasule J., who entered a Decree Nisi dissolving the respondent's marriage to the appellant and dismissed the cross-petition on 18th June 2007. He also made orders for the sharing of the parties' property.

Dissatisfied with the judgment of the High Court, the appellant lodged Civil Appeal No. 30 of 2007 in the Court of Appeal, which dismissed his appeal, with costs to the respondent.

Being dissatisfied with the Court of Appeal's decision, the appellant filed this second appeal on the following grounds of appeal:

- “1. *The learned Justices of the Court of Appeal erred both in law and fact when they held that all property solely acquired by the Appellant became jointly owned property upon his marriage to the respondent and should be shared equally.*
2. *The learned Justices of the Court of Appeal erred in law in their interpretation of Article 31 of the 1995 Constitution of Uganda by applying it to equality in the distribution of property independently owned by the appellant.”*

The appellant prayed that his appeal be allowed and that the judgment and orders of the Court of Appeal be set aside. He also prayed that the costs of this appeal and in the two courts below be provided for.

At the hearing of this appeal, the appellant was represented by Mr. MasembeKanyerezi of MAKKS Advocates. Mrs. VennieMurangira of MurangiraKasande& Co. Advocates represented the respondent. Both counsel filed written submissions in support of and against the appeal.

Counsel for the appellant argued both grounds of appeal together. Counsel for the respondent, on the other hand, first challenged the competency of this appeal. Thereafter, in the alternative, she replied to counsel for the appellant's submissions, tackling each of the two grounds of appeal

separately.

I will first consider submissions made challenging the competency of this appeal. Thereafter, I will consider the two grounds of appeal separately, starting with the first one. Lastly, I will deal with the appellant's submissions regarding the Court of Appeal's errors in law with regard to the holding on the law governing distribution of individually and jointly held property upon divorce.

Respondent's Submissions on the Competency of this Appeal

Counsel for the respondent attacked the competency of this appeal on three grounds. First, she argued that the appellant's Memorandum of Appeal was incurably defective because it was at variance with the Notice of Appeal which had indicated that the appellant intended to appeal against the whole of the decision of the Court of Appeal. She argued that the Memorandum of Appeal eventually appealed against only one ground of appeal (Ground 4), out of the six grounds of appeal on which the appellant based his appeal in the Court of Appeal.

Secondly, counsel for the respondent argued that the memorandum and record of appeal were filed out of time. She argued that the appellant had been granted 10 days by Justice Okello, JSC. (*retired*), to file his memorandum of appeal but failed to do so and to attach Justice Okello's ruling as evidence of the Court's extension of time to file the appellant's memorandum of appeal. She submitted that the appellant's failure to comply with the ruling and to attach the said Ruling offended Rule 4 (d) and (e) of the Supreme Court Rules. The end result of the appellant's omissions, counsel argued, is that there is no appeal for this Court to consider.

Thirdly, counsel for the respondent argued that the record of appeal filed by the appellant lacked the Certificate of Correctness of the record issued and signed by the Registrar of the Court of Appeal; the Decree embodying the decision of the Court of Appeal and a copy of Justice Okello's ruling referred in the preceding paragraph, which allowed the appellant to file his Memorandum of Appeal and the Record of Appeal, out of time. She argued that the appellant's failure to file these documents resulted in the entire appeal offending the law and the Rules of the Supreme Court. She submitted that the appeal should be struck out.

Although counsel for the appellant was given time by court to file a rejoinder to counsel for the respondent's submissions, he did not do so.

Consideration

Let me now briefly consider counsel for the respondent's submissions on the competency of this appeal.

Counsel's submissions are based on the appellant's alleged omissions to comply with the Judicature (Supreme Court) Rules and the orders made by Justice Okello, JSC (*as he then was*). Counsel for the respondent objected to the competence of the appeal on the basis of three points. The first point about the appellant's omission to appeal against the whole decision has no substance. (*See Rule 82 of the Judicature (Supreme Court) Rules*). Similarly, the third point of objection has no merit since Rule 83 of the *Judicature (Supreme Court) Rules* was substantially complied with.

The second point of objection to the competency of the appeal is substantial. Okello, JSC., granted the appellant leave to institute the appeal within ten days. Leave was granted on 5th

August 2009. (*See Supreme Court Civil Application No. 14 of 2009*). Under Rule 4(a) of the *Judicature (Supreme Court) Rules*, the counting of days started on 6th August, 2009 and ended on Saturday, 15th August 2009. By virtue of Rule 4(b) of the same Rules, therefore, Saturday 15th and Sunday 16th are excluded. The appellant filed the appeal on 17th August 2009, a Monday, which was the next working day. I accordingly hold that the appeal was filed in time and that it is therefore competent. This court made a ruling to that effect in *Supreme Court Civil Application No. 25 of 2009* between the same parties.

Ground 1 of Appeal.

Ground 1 of appeal was framed as follows:

“1. The learned Justices of the Court of Appeal erred both in law and fact when they held that all property solely acquired by the Appellant became jointly owned property upon his marriage to the respondent and should be shared equally.”

Counsel for the appellant submitted that the appellant appeal was challenging the way the learned Justices of Appeal handled ground 4 of the appellant's appeal in the Court of Appeal, which was framed as follows:

“The learned trial Judge erred in law and fact when he ordered that the parties share the various properties when the respondent never proved any contribution towards acquisition of the same.”

In a surprising turn of events, counsel for the appellant lauded the trial Judge, against whose judgment he had lodged an appeal before the Court of Appeal. He submitted that the learned trial Judge properly followed the law on ownership of property of married spouses and gave due consideration to the governing legal principles when he held that the parties' matrimonial home, which was built before the parties got married, belonged to the appellant, with the respondent only being entitled to the cost of the improvements she made on the house.

Counsel for the appellant however took issue with the trial Judge's orders regarding the distribution of the Kasangati land. Counsel for the appellant faulted the learned Justices of Appeal when they confirmed the trial Judge's holding that the parties should share it equally. He argued that the respondent's own evidence was that she had only contributed a total of Shillings. 7,500,000/= towards the total purchase price of Shillings. 20,000,000/=. On this basis, he argued that the Court of Appeal failed to properly evaluate this evidence and to find, according to the respective parties' contribution ratio, that the respondent's share of the Kasangati land was only one third and not one half, as the trial Judge had found.

In conclusion, counsel for the appellant submitted that the Court of Appeal failed to re-evaluate not only the appellant's evidence but also his submissions. He prayed to the Court to allow the appeal, and to reverse the orders relating to the sharing of the Kasangati land, as well as the Court of Appeal's wrong holding on the law on the distribution of property upon marriage and upon divorce.

Counsel for the respondent, on the other hand, supported the judgment of the Court of Appeal. She submitted that the learned Justices of Appeal properly addressed themselves to the law and facts of the case and reached the right decision by ordering that marital property should be shared equally at the time of dissolution of marriage.

In response to counsel for the appellant's submissions, counsel for the respondent submitted that nowhere did the learned Justices of Appeal hold that all properties solely acquired by the appellant became joint property upon his marriage to the respondent. She contended that the learned Justices decision had actually excluded the properties the appellant acquired before his marriage to the respondent.

Counsel for the respondent also contended that the decision of the learned Justices of Appeal on the distribution of property was based on, among others, the principle of proprietary estoppel and the community property system, which are both applicable in Uganda as a common law jurisdiction. She relied on, among others, the English case of *Bernard vs. Joseph [1982] 1 Ch. 391*, which dealt with ownership of a house which was bought in joint names, where the couple pooled their joint income towards the initial deposit and later took out a mortgage in their joint names. She also contended that the principle of a constructive or a resulting trust which was enunciated by Lord Denning in the case of *Cook v. Head, [1972] 1 W.L.R. 518*, was also applicable to the present case.

Counsel for the respondent urged the court to disallow ground 1 of appeal because counsel for the appellant had failed to show how the learned Justices of Appeal erred in law and in fact by holding as they did that marital property has to be shared equally between the parties at the dissolution of the marriage. She further prayed that since the appellant was only challenging the Court of Appeal's decision on ground 4 of appeal in CACA No. 30 of 2007, and not any other decision made by the Court on the other grounds, this Court should be pleased to uphold the judgment of the Court of Appeal in respect of grounds 1, 2, 3, 5 and 6 which the appellant did not challenge. She also prayed to the court to dismiss the appellant's appeal with costs in this court and the two courts below.

Consideration of ground 1 of appeal

Let me now turn to consider the merits of ground 1 of appeal. Under this ground, counsel for the appellant made two contentions about the holding of the Court of Appeal for which he sought this court to find that learned Justices of Appeal erred in fact and in law.

The first contention is that the learned Justices of Appeal held that *“all property solely acquired by the Appellant became jointly owned property upon his marriage to the respondent.”* The second contention by counsel for the appellant was that the learned Justices of Appeal held that all property solely acquired by the Appellant prior to his marriage should be shared equally with the respondent upon the parties' divorce. Counsel for the appellant, however, failed to point out the *“solely acquired property of the appellant”* which the learned Justices of Appeal ordered to be shared equally between the parties

Contrary to counsel for the appellant's contentions, the holding of the Court of Appeal with regard to the appellant's and respondent's property, can be clearly found on page 18 of the lead judgment of Twinomujuni, J.A., when he was disposing of ground 4 of appeal. It reads as follows:

“In the instant appeal, the learned trial judge tried as much as he could to share what he found as matrimonial property between the appellant and the respondent. However, he did not follow the formula proposed above. He took into account to what extent the spouses had

contributed to the acquisition of each property in question. He was obviously following the common law and both British and local authorities which have followed. Most of those decisions were made before the promulgation of Uganda 1995 Constitution. Nevertheless, I do not think that we should disturb his findings and division of the property, especially when the respondent did not cross-appeal against it. I would uphold the decision of the trial judge on this issue.”

The decision of the trial Judge which was upheld by the Court of Appeal on the sharing of the property of the parties provided as follows:

“...

4. The matrimonial properties are divided between the petitioner and the respondent as follows:

i) Land at Kasangati: Out of Kyadondo Block 104: 2 acres:

Court orders the same to be shared equally between the two. If for some reason, physical sharing is not possible, then whoever retains the physical land, or is responsible for its disposal, one way or the other, shall pay half of its value as determined by Government valuer, to the other. In case of valuation, both parties have to meet in equal shares the expenses of the Government valuer.

ii) J.H. Party Services business:

Petitioner is to pay Shs. 3,000,000/= to the respondent as his equal share in the enterprise, whereupon the business shall solely belong to the Petitioner.

iii) Motor-vehicle Minibus (PSV) Registration Number UAE 527 K:

The Respondent is to retain the same, but pay Shs. 3,500,000/= to the petitioner being half of its current value.

iv) The matrimonial home at Kisaasi, Kampala:

The respondent is to retain this home but he is to pay shs. 3,782,000/= being the petitioner's contribution to improvement of the same.

v) Plots of land with house at Mparo, Kabale:

Respondent is held to be sole owner of same with petitioner having no interest therein.

vi) Motor vehicle Pajero Registration Number UAE 887 Z:

Respondent is held responsible for the whereabouts of the same. The vehicle is part of the matrimonial property jointly owned by both in equal shares. Court assesses its value now at Shs.15,000,000/= and order the respondent to pay Shs.7,500,000/= to petitioner being her entitlement in the vehicle.

vii) Motor-vehicle Toyota Corona Registration Number UAE 944 R:

Court holds the same to be solely owned by respondent.

viii) Gifts given at introduction ceremony:

It is ordered that, as much as it is practically possible, the articles be divided equally between petitioner and respondent.

5. *Any payment ordered to be made by any party shall carry interest at the court rate as from 30.07.04, the date of breakdown of marriage, or in case of a payment accruing in the future, as from the date when that payment becomes due, till payment in full."*

6. *The cross-petition stands dismissed."*

With all due respect to counsel for the appellant, and in light of the holding of the Court of Appeal, I find that the appellant's contentions are not valid. I agree with counsel for the respondent that no where did the learned Justices of Appeal hold that all properties solely acquired by the appellant prior to his marriage become joint property upon his marriage to the respondent.

A case in point was the appellant's house at Kisaasi. Although the trial Judge and the learned Justices of Appeal found this house to have been the home where the parties had lived during their short lived marriage, they nevertheless allowed the appellant to retain the house as his separate property because he had acquired the house prior to the marriage. In this case, the appellant was only ordered to refund to the respondent her direct monetary contribution of Shs. 3,782,000/= only, which she made towards the improvement of the house.

Another such property that both the trial Judge and the Court of Appeal allowed the appellant to keep as the sole owner was the land and house at Mparo, Kabale. The court held that the respondent had no proprietary interest in this land, which the appellant testified to have bought before his marriage to the respondent. The court reached this holding and overlooked the claims of the respondent that she had contributed money for the roofing and the purchase of the doors of the house.

The court also held that Motor Vehicle No. UAE 944 R, which the respondent testified not having made any contribution, solely belonged to the appellant.

I therefore find that the learned Justices of Appeal actually excluded the properties the appellant had acquired before his marriage to the respondent, when they upheld the division of property ordered by the trial Judge. This finding stands, despite the pronouncements on what constitutes joint property of spouses married under the *Marriage Act, Cap. 251 Laws of Uganda (2000 Edition)* that the learned Justices of Appeal made and which I will discuss later in this judgment.

On the other hand, the properties the court ordered the appellant to share with the respondent included (a) Land at Kasangati; (b) the Minibus (PSV) Reg. No. UAE 527 K, which the appellant was ordered to keep after paying the respondent one half of its current value (3,500,000/=); (c) the Party Services business where the appellant was to receive Shs.3,000,000/= from the respondent, who would then remain the sole owner; and (d) Motor Vehicle No. UAE 887 Z where the appellant was to pay Shs. 7,500,000/= to the respondent as her half share.

In three of these cases, [i.e. (a), (b) and (d),] the respondent testified that she made a cash contribution towards the properties' purchase, while in the case of (c), there was also evidence from both parties that they jointly owned the business and that they had both made cash contributions towards that business. All these properties were acquired during the subsistence of the parties' short lived marriage.

The appellant did not testify that the properties the court ordered to be shared with the

respondent were acquired before his marriage to the respondent. In those instances where the appellant testified that he had acquired the property solely, the respondent also gave evidence to the effect that she had made a contribution. The trial Judge, who had the opportunity to listen to the evidence and to observe the demeanor of both parties, chose to believe the respondent's side of the story.

In the case of the Kasangati land, for example, the appellant admitted that he received Shs. 1,000,000/= from the respondent as a contribution towards the purchase price. He, however, sought to minimize the respondent's cash contribution by calling it a loan advanced by the respondent to him. It is worth noting that by the time the petition was heard in the High Court, which was over one year later, the appellant had not paid back the loan he admitted receiving from the respondent. It is therefore not surprising that the learned trial Judge and the Court of Appeal believed the respondent's evidence and not that given by the appellant on this issue.

I will now turn to consider the argument made by counsel for the appellant to the effect that the Court of Appeal should not have upheld the trial Judge's order that the parties share the Kasangati property equally. Counsel argued that the courts should have followed the respective contributions of the parties, which would have resulted into a 30% share of the property for the respondent wife and a 70% share for the appellant.

The issue of how a court should determine a contributing spouse's share in joint property has come up in several cases before the High Court and the Court of Appeal. In *Kagga v. Kagga, High Court Divorce Cause No. 11 of 2005*, (unreported), for example, Mwangusya, J. observed as follows:

“Our courts have established a principle which recognizes each spouse's contribution to acquisition of property and this contribution may be direct, where the contribution is monetary or indirect where a spouse offers domestic services. ...When distributing the property of a divorced couple, it is immaterial that one of the spouses was not as financially endowed as the other as this case clearly showed that while the first respondent was the financial muscle behind all the wealth they acquired, the contribution of the petitioner is no less important than that made by the respondent.”

The court proceeded to order for the registration of 50% interest in the parties' matrimonial house, and for the transfer of several other houses in favour of the wife, despite the Judge's finding that the wife had only rendered domestic services, as opposed to the respondent husband who was “the financial muscle behind all the wealth.” *See also, Sempiga v Sempiga Musajjawaza, High Court Divorce Cause No. 007 of 2005 (Unreported)*, where the court awarded the wife, among others, a 50% share in a Farm measuring 154 acres. These decisions were clearly consistent with English cases such as *Chapman v. Chapman, [1969] All E.R. 476*, where the wife was held to have acquired an equal share in the property although she had not made an equal cash contribution to the acquisition of the property in question. The court found and held that the husband and wife had put all their financial resources into the pool to purchase their house without reserving any special interests. In *Muthembwa v Muthembwa, [2002] 1 EA 186*, the Court of Appeal of Kenya also rejected a similar argument by the appellant husband contesting an order awarding the wife a 50% share in all the matrimonial home and other properties and businesses. The court held that the issue of whether the wife had made a contribution to the acquisition of the suit properties was a question of fact. The court further held that where since it was impracticable to take accounts for purposes of determining the respective contributions of the parties to the management of a home, there arose a rebuttable presumption of an equal contribution.

It is also worth noting that the contributing spouse's share is not restricted to a maximum of 50% share either in the matrimonial home or in other jointly held property. In some other cases, the

court awarded a higher percentage share either in the matrimonial home or in some other properties. For example, in *Mayambala v Mayambala, High Court Divorce Cause No. 3 of 1998*, the wife's interest in the matrimonial home was established at a 70% share. Similarly, in *Kagga, (supra)*, the court awarded the wife several other houses and properties, in addition to the 50% share she received in the parties' matrimonial home.

The other pertinent question that arises is what amounts to contribution to earn a spouse a share in the property. In *Kagga, (supra)*, the court pointed out that the contribution may be direct and monetary or indirect and non-monetary. In *Muwanga v. Kintu, High Court Divorce Appeal No. 135 of 1997*, (Unreported), Bbosa, J., adopted a wider view of non-monetary indirect contributions by following the approach of the Court of Appeal of Kenya in *Kivuitu v. Kivuitu, [1990 - 19994] E.A. 270*. In that case, Omolo, AJA., found that the wife indirectly contributed towards payments for household expenses, preparation of food, purchase of children's clothing, organizing children for school and generally enhanced the welfare of the family and that this amounted to a substantial indirect contribution to the family income and assets which entitled her to an equal share in the couples' joint property.

I entirely agree with the position taken by the lower courts in the above cases and in the *Kivuitu* case. These cases recognize not only a spouse's direct or indirect monetary contribution but also a spouse's non-monetary contributions, which enables the other spouse to either acquire or develop the property in question.

Turning to the present appeal, I find that there is no merit in the appellant's contention challenging the half share given to the wife in the Kasangati land. I also find that the learned Justices of Appeal did not err in fact when they upheld the orders of the trial Judge regarding the property the appellant had acquired before he married the respondent. Similarly, the learned Justices of Appeal did not err when they upheld the trial Judge's orders made in respect of the property that were to be shared between the appellant and the respondent, based on their respective contributions.

Ground 1 of appeal should therefore fail.

Ground 2 of appeal

Ground 2 of appeal was framed as follows:

“ 2. The learned Justices of the Court of Appeal erred in law in their interpretation of Article 31 of the 1995 Constitution of Uganda by applying it to equality in the distribution of property independently owned by the appellant.”

In arguing this ground of appeal, counsel for the appellant contended that the learned Justices of the Court of Appeal erred in law when they held that Article 31 of the 1995 Constitution of Uganda required that the appellant's property, which he had acquired prior to his marriage, be shared equally with the respondent.

Counsel for the appellant argued that in the absence of legislation to the contrary, property acquired prior to the marriage by either spouse, or property inherited during the marriage or property individually owned by either spouse where the other spouse has not made any direct or indirect contribution, remains individual property. He submitted that courts have no jurisdiction to pass the proprietary interests of one spouse to the other.

Counsel for the appellant contended that the learned Justices of Appeal erred in law when they attempted to fill the legislative gap existing in the law regarding distribution of property upon divorce in Uganda, by interpreting Article 31(1) of the Constitution of Uganda, 1995 beyond its broad objective. He contended that Article 31(1) merely states the constitutional principle of non-discrimination on the basis of sex and that it is neither a legislative nor a property distribution provision that passes proprietary interests from one spouse to another. He further contended that the learned Justices also erred by literally interpreting the marriage vows exchanged during the celebration of a Christian marriage.

Counsel for the respondent, on the other hand, submitted that the learned Justices of Appeal properly applied Article 31 of the Constitution of Uganda, 1995, (as amended). She further submitted that their Lordship's findings on the division of property at the dissolution of the marriage were consistent with Article 31 of the Constitution of Uganda, 1995.

She also argued that the learned Justices of Appeal were right to apply Article 31 of the Constitution of Uganda, 1995, (as amended), which domesticated Uganda's international obligations to ensure equality of spouses at the dissolution of marriage. These international obligations, counsel argued, are espoused in Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); Article 23(4) of the International Covenant on Civil and Political Rights; and the International Declaration of Human Rights. She contended that if this Court were to set aside the findings of the Court of Appeal on the distribution of the parties' property, it would amount to discrimination against women, which is prohibited by the 1995 Constitution of Uganda.

Consideration of ground 2 of appeal

Under ground 1 of appeal, I considered in detail how the learned Justices of Appeal dealt with the question of the sharing of the parties' separate property, as well as their joint property, whether acquired prior to or during the marriage. My earlier consideration of ground 1 of appeal disposed of the main contentions in this ground as well, in as far as it concerned the Court of Appeal's adjudication regarding the distribution of property individually owned by the appellant. My holding is that the learned Justices of Appeal upheld the orders of the trial judge which clearly distinguished between individually owned property of the appellant where the respondent had no claim for contribution, from those that the Court found to either be joint property or those where the respondent had made a contribution for which she was either to be refunded or to be paid a share as was determined by the court. I therefore find no merit in the appellant's claims contesting the court's holding on the sharing of property individually owned by each party.

Appellant's submissions on errors of law made by the learned Justices of Appeal.

I will now consider the submissions made by counsel for the appellant contending that the learned Justices of Appeal erred in law when they held that in Uganda all property individually held prior to a marriage automatically becomes joint property upon marriage and that it should be divided equally between the parties on divorce.

Counsel for the appellant contended that the learned Justices of Appeal made the following three holdings on law governing the ownership of property of persons married under the Marriage Act and the distribution of such property upon divorce.

First, he submitted that the learned Justices of Appeal held that all property that spouses own individually prior to their marriage becomes joint property upon marriage by virtue of the marriage vows they exchanged during the marriage ceremony.

Secondly, counsel argued that the learned Justices of Appeal held that all property that the spouses individually acquire during marriage also becomes joint property of both spouses irrespective of whether both spouses made a contribution to its acquisition either in monetary terms or not and that this is by virtue of Article 31(1) of the Uganda Constitution, 1995.

Thirdly, counsel submitted that the learned Justices of Appeal also held that since property owned prior to marriage by either spouse becomes joint property on marriage and that also other property acquired during marriage by either spouse becomes joint property, then it follows that upon divorce, all such property should simply be divided equally between the husband and wife.

Counsel for the appellant faulted the Court of Appeal in their holding on what constitutes matrimonial property in Uganda, which he submitted, was a total departure from the common law position and prior Ugandan decisions on the matter. Relying on the English cases of *Pettitt v Pettitt (1969) 2 All ER 394*; *Chapman v Chapman (1969) 3 All ER 476*; *Gissing v Gissing (1970) 2 All ER 780*; *Falconer vs. Falconer (1970) 3 All ER 448* and the Ugandan case of *John Muwanga vs. MylliousKintu, High Court Divorce Appeal No. 135 of 1997*, counsel for the appellant contended that the above authorities made a clear distinction between what constitutes matrimonial property and what does not. He submitted that matrimonial property is that property that a married couple chooses to call home and such other property that a married couple or either of them contributes to, directly or indirectly and may be registered in their joint names. He contended that even where such property is registered in the names of either the husband or the wife, such property will be held to be matrimonial property on the basis of a resultant trust.

Counsel for the respondent, on the other hand, did not find any problems with the holding on the law as stated by the learned Justices of Appeal. Relying on the English case of *Bernard v Joseph, [1982] 1Ch. 391*, counsel submitted that some of the authorities relied on by counsel for the appellant, such as *Pettitt (supra)* and *Gissing (supra)* were no longer good law on the distribution of marital property in Uganda. I did not find the *Bernard* case relevant to this appeal, as it concerned an unmarried couple who had cohabited together and bought a house in their joint names.

Consideration of Parties' Submissions on errors of law made by the learned Justices of Appeal.

I will start by considering the submissions of counsel for the appellant which relate to the legal effect of marriage vows exchanged during marriage ceremonies celebrated according to religious rites of the parties. The submissions of counsel for the appellant arise from the following articulation of the law by Twinomujuni, J.A., which I have deemed necessary to quote at length.

“The parties to this appeal were married in the Christian tradition... All those who choose to be married in Church must make vows at the precise moment when they become husband and wife. These vows are to the effect that they undertake to live together as husband and wife, in

shared companionship in riches or poverty.

These vows are usually made in the presence of hundreds and sometimes thousands of their parents, relatives and friends. My understanding of the vows is that at the time the bridegroom and the bride become husband and wife, all the property they own become joint property. All the property they acquire during the subsistence of their marriage is theirs to share equally in unity and love. At the time of the vows, it is never envisaged that the spouses would have to split. In fact they are told in Church

That which God has put together let no one divide'

Unfortunately, however, marriage breakdown are so common these days and cannot be ignored. Divorce proceedings normally follow. The issue as to what should happen to their joint property arises for determination as in this case.

In my humble judgment, I do not see why the issue of contribution to the property should arise at all. The property is theirs - Period."

The statements of Twinomujuni, J.A., though *obiter dicta*, warrant consideration in order to clarify on the law governing the property owned by married persons acquired either before and/or during the subsistence of a marriage. These statements on the effect of marriage vows and the marriage ceremony on a spouse's individual property rights and the legal conclusions he drew there from have no legal basis and cannot therefore be left to stand.

In arriving at his decision on what constitutes matrimonial property and the formula to be applied in dividing it at the time of the dissolution of the parties' marriage, Justice Twinomujuni, J.A., was guided in his analysis by the fact that the parties' marriage had been contracted in Church under Christian tradition. In my view, it was not only legally wrong but also very dangerous for the court to hold that proprietary rights can pass from one party to a marriage to another, based purely on religious marriage vows taken in accordance with one's religious beliefs or denomination, in the absence of specific legislation providing that such parties' property rights shall be determined according to their religious beliefs and practices.

Another important point to note is that the respondent, who was the petitioner in the High Court, never based her claims to a share of the property registered in the appellant's names on the marital vows they had exchanged at the time of contracting their marriage. As the record of appeal clearly shows, the respondent's claims for a share in the property were purely based on her direct cash contributions and not on the mere fact that she had been married to the appellant and that the appellant had exchanged marriage vows with her, giving her "all his property". Since the issue of whether marital vows can give rise to property rights *per se* was never canvassed by either party at the trial stage or even before the Court of Appeal, I find, with due respect, that it was not necessary for the learned Justices of Appeal to make any pronouncements on it. In this respect, I entirely agree with the observations made by Justice Kavuma, J.A., at page 10 of his partial dissenting judgment, when he rightly noted as follows:

"Neither we or the court below had the benefit of being addressed by counsel for the parties on the church vows the appellant and the respondent made. Given the possible differences in the conduct of marriage ceremonies even among sects professing Christians, I would hesitate to take judicial notice of the vows made by the parties as their marriage and the legal effect of such vows on the treatment of marital property at marriage or during marriage or at the dissolution of marriage in Uganda. "

Secondly, it should also be noted that although the appellant and the respondent contracted their marriage at Mbuya Catholic Church, under the religious rites of the Catholic Church, this

marriage was celebrated in accordance with the provisions of the Marriage Act of Uganda. This Act not only governs marriages celebrated in places of worship but also authorises recognized Church Ministers to perform weddings in any licensed place of worship. (*See sections 20 - 25 of the Marriage Act, Cap. 251, Laws of Uganda*). The learned Justices of Appeal declared that the legal position they articulated concerning the legal effect of vows taken during marriages celebrated in places of worship on property individually held prior to or during marriage “*is confined to the marriages under the Marriage Act, Cap. 251, Laws of Uganda.*” In so doing, the learned Justices of Appeal failed to take into account the fact that the Marriage Act not only governs marriages contracted in places of worship, but also provides for non-religious marriages, commonly referred to as “civil marriages.” Section 26 of the said Act provides for vows for civil marriages, which are silent on individual property the parties to the marriage may own at the time of the marriage or during the marriage. This too was an error of law on the part of the learned Justices of Appeal.

I will now turn to consider the legal arguments made by both counsel on the import of Article 31(1) of the Constitution of Uganda (1995) on property rights of married persons and the sharing of property on divorce.

Prior to its amendment, Article 31(1) of the Constitution of Uganda (1995) [now Article 31(1)(b)] provided as follows:

“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.”

Commenting on this article in relation to property rights of married persons, Twinomujuni, J.A. observed as follows:

“In 1995, for the first time in our history, the Constitution of Uganda clearly put into reality the equality in marriage principle contained in Genesis Chapter 2 verse 24 (supra) and what those who choose to contract marriages under the Marriage Act undertake to practice. My conclusion is that matrimonial property is joint property between husband and wife and should be shared equally on divorce, irrespective of who paid for what and how much was paid. Very often, the woman will find a husband who is already wealthy and has a lot of property. If that property belongs to the man at the point of exchanging the vows in Church, that property becomes joint property. These days it is normal for a woman to come into marriage with wealth such as houses, land, cows and other properties from her own sweat, her parents, relatives and friends. If at the time of the Church vows, they are solely owned by the woman, they become joint matrimonial property. From then onwards, the fact that they are registered in the names of the wife or husband is not relevant. It belongs to both. Therefore on separation, they should be equally divided and shared to the extent possible and practicable.

I must hasten to add that this categorical statement is confined to the marriages under the Marriage Act, Cap. 251, Laws of Uganda. This does not mean that the constitutional requirement of equality in marriage does not apply to other types of recognized marriages in Uganda. The principle applies to all marriages in Uganda. However, the application may vary depending on the nature of the marriage contract the spouses agreed to contract. I would also add that like in all other contracts, parties to a marriage have a right to exclude any property from those to be deemed as matrimonial property. This can be made expressly or by implication before marriage or at the time of acquisition of the property by any spouse. Otherwise the joint trust principle will be deemed to apply to all property belonging to the parties to the marriage at the time of the marriage and during its subsistence.”

The statements and reasoning of the learned Justice of Appeal are, with due respect, legally problematic, for several reasons. First, it is important to note that Uganda is a secular state,

which is not governed by Canon law, but by the Constitution, statutory law, case law as developed from common law and doctrines of equity; principles of justice, equity and good conscience. Customary law is also applicable in some areas of personal law, provided it meets the Constitutional standard set out in Article 32(2) of the Constitution of Uganda, 1995. (*See sections 14 and 15 of the Judicature Act*). Given the secular nature of this country, it was again not proper, for the learned Justices of Appeal, to base their judicial decision on religious marital vows. For as Justice Kavuma, J.A., rightly observed in his partial dissenting judgment:

“Considering that Uganda is a secular state where there is no officially recognised state religion, See article 7 of the Constitution, it is, in my view, only appropriate that questions of marital property rights in marriages under the laws of the land, including the marriage in issue in this appeal solemnized in a Catholic church, are handled solely under the law applicable in that behalf, without resorting to invoking the holy scriptures. I find that Article 31(1) of the Constitution is explicit and clear as the Constitutional source of equality of rights of the parties in any legal marriage in this country. The article, in my view and indeed the entire law of the land, does not require any reinforcement from invoking divine authority.”

It is also clear from the quotation drawn from the Judgment of Twinomujuni, J.A., that the learned Justice of Appeal mixed up the constitutional requirement of equality in the treatment of men and women “during marriage and at its dissolution” with what he perceived to be equality of sexes prescribed by the Bible. The learned Justice of Appeal not only wrongly articulated the law as to what constitutes matrimonial property, but also how and when individually held property of person acquired before or during marriage becomes matrimonial property. I therefore agree with counsel for the appellant when he took serious issue with the pronouncements made by the learned Justices of Appeal that legal title to an equal share of any property previously held individually passes to the other spouse, first by virtue of the marriage vows exchanged during the marriage ceremony; and secondly by virtue of Article 31(1)(b) of the Constitution of Uganda (1995) which entitles men and women to equal rights “at marriage, during marriage, and at its dissolution”.

In my view, Article 31(1)(b) of the Constitution of Uganda (1995) restates the constitutional prohibition of non-discrimination on the basis of sex which is enshrined in Articles 21 and 33 of the Constitution of Uganda (1995), in as far as it relates to marriage. The article prohibits the discrimination in treatment which the Constitutional Court struck down in the *Uganda Association of Women Lawyers and The Attorney General, Constitutional Petition No. 2 of 2003*, when it declared as unconstitutional several provisions in the Divorce Act relating to grounds of divorce, damages, etc. that treated men and women differently. So, while I agree that Article 31(1) (b) of the Uganda Constitution (1995) guarantees equality in treatment of either the wife or the 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. It was therefore erroneous for the Court of Appeal to hold that all individually held property of persons who contract religious marriages under the Marriage Act becomes matrimonial property upon marriage and joint property of the couple and that it should be shared equally on divorce by virtue of their marriage vows and Article 31(1) of the Constitution of Uganda (1995). The Court's 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 requirements including child care and maintenance and growing food for feeding the family.

In my view, the Constitution of Uganda (1995), while recognizing the right to equality of men and women in marriage and at 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 Constitution 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 stated so.

In conclusion of Ground 2 of appeal, I find that there is merit in the arguments raised by learned counsel for the appellant on errors of law. I find that the learned Justices of Appeal erred in law when they declared that Article 31(1) of the Constitution of Uganda (1995) requires that divorcing spouses married under the Marriage Act should get equal shares in individually held separate property irrespective of whether the party had proven that they made a direct or indirect contribution to the property in question.

I also find that the learned Justices of Appeal erred in law when they held that marriage vows *per se* create proprietary rights of spouses in property individually held by spouses prior to the marriage and in property acquired during marriage, when the issue had neither been pleaded nor canvassed by the parties before them.

I further find that the learned majority Justices of Appeal also erred in law when they declared that all property owned by a party to a marriage contracted under the Marriage Act becomes joint property on marriage and that it should be shared equally on divorce.

In holding as I have done above, I am aware that any married person, in pursuance to the marriage vows he or she has made in church or in any other marriage ceremony, is at liberty to execute a legal instrument and to transfer into joint or sole ownership land and/or property he or she held prior to the marriage in favour of his or her spouse, either at the time of contracting the marriage or anytime after the marriage has been celebrated. Similarly, a spouse can also transfer into joint or sole ownership property he or she individually acquired during marriage. In such a case, the spouse, in whose favour the transfer of land has been made, would clearly be entitled to register the land in his or her names or in the couple's joint names as the transfer instrument may state. If this is not done as is the case in most cases, then the courts will continue in divorce cases where ownership or sharing of property is at issue, 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 the 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 the each case would dictate. In *Muwanga v. Kintu, High Court Divorce Appeal No. 135 of 1997*, (Unreported), Bbosa J., rightly pointed out the challenges that courts will continue to face in determining what constitutes matrimonial property in Uganda, when she observed as follows:

“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.”

Her formulation is insightful and provides a good starting point for a court seeking to make that determination.

In conclusion, I would partially dismiss this appeal with respect to the claims made by the appellant regarding his own individually owned property and uphold the division of property

made by the trial Judge, which was also upheld by the Court of Appeal.

I would also uphold all the other orders made by the trial Judge which were upheld by the Court of Appeal and against which the appellant never lodged an appeal to this court.

I would however partially allow this appeal on the appellant's claims that the learned Justices of Appeal erred in law, in those particular aspects that I have pointed out in this judgment when they made pronouncements on marital property and the distribution of property acquired before and during the marriage, which were neither founded in law nor on the pleadings of the parties.

Given the important points of law in our family law involved in this appeal which were raised by the appellant, I would order that the appellant pay only half of the costs in this Court and in the two courts below to the respondent.

Before I take leave of this appeal, I would strongly urge Parliament to enact a law that clearly defines what constitutes marital/matrimonial property as opposed to individually held property of married persons and that spells out the principles that courts should follow in adjudicating disputes involving division of property upon the dissolution of marriage. Such law should of course be based on the principle of equal treatment of the husband and wife, as is prescribed by our Constitution.

Dated at Kampala this20thday ofMarch..... 2013.

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HON. DR. ESTHER KISAAKYE
JUSTICE OF THE SUPREME COURT