



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS FAMILY DIVISION
MISC. CAUSE NO. E004 OF 2021
CAO.....APPLICANT
-VERSUS-
JAA.....RESPONDENT
RULING

1. The applicant CAO has applied for the transfer of the **Divorce Petition No. 102 of 2020** filed by her against the respondent JAA at the Kadhi's Court at Nairobi to the Chief Magistrate's Court at Milimani for hearing and disposal. The reasons for the transfer are that, although the parties got married under Islamic law on 31st January 2019, while both were Muslims, the applicant has since changed religion and converted to Christianity which was her original faith. She states that her conversion to Christianity happened after she had filed the divorce petition.

2. This is what she deponed in paragraphs 5, 6, 7 and 8 of her supporting affidavit: -

“5. THAT at the time of the petitioning for divorce, I realized that I had been unduly influenced to convert to Islam and therefore reverted back to my usual faith being Christianity. As such, at the time of the marriage both parties were Muslim and the jurisdiction of the Kadhis Court would thus have applied.

6. THAT I was made to understand that as part of the Muslim and or sharia law requirements, divorce is not tenable where the man never paid dowry for his wife until and unless the said dowry is eventually paid and settled. Even though I had requested this in my divorce petition as necessitated, I wish to now just obtain the divorce without requiring any dowry paid.

7. THAT given the fact that I reverted to my original faith being Christianity which I professed since birth, I swear this affidavit in support of my application to this Honourable Court to transfer the Divorce Petition to the Chief Magistrates Court for determination. (annexed hereto and marked “CAO – 3” is a copy of the letter from my spiritual leader and church being Kileleshwa Covenant Community Church dated 26th October 2020).

8. THAT in the circumstances, I am advised by my Advocates on record herein, which information I verily believe to be true, that the Divorce Petition ought to be transferred to the Chief Magistrate Court at Nairobi for hearing and final determination as only one party being the respondent professes the Islamic faith and thus the jurisdiction of the Kadhi's courts do not apply.”

3. Her case is that she no longer professes Islamic faith and therefore the Kadhi's court has no jurisdiction to hear and determine the divorce cause.

4. The respondent opposed the application which he termed as an abuse of the process of the court. He stated that he was being harassed and vexed by the applicant by being dragged from one court to another. He stated that the applicant converted to Islam in 2018, and on 31st January 2019 they celebrated an Islamic marriage following which they were issued with a certificate of marriage under **Part VII of the Marriage Act 2014**. His case was that the marriage that was sought to be dissolved was the product of this certificate of marriage, and as such the proper construction of such certificate could only be undertaken by the Kadhi's court, and not the Chief Magistrate's Court. He swore that once parties were married under Islamic law the marriage could only be dissolved under Islamic law, and the fact that the applicant may have converted back to Christianity did not change things. He denied having influenced the applicant to become a Muslim.

5. The applicant had claimed in the petition that the respondent owed her unpaid dowry of Kshs.100,000/=. The respondent cross-petitioned for the refund of Kshs.2,100,000/= being loss and damage suffered by him during the subsistence of the marriage. The applicant wishes to forego the payment of the dowry when she goes to the Chief Magistrate's Court. According to the respondent the easier thing would have been for the matter to proceed before the Kadhi's court and for the applicant to abandon her claim for the dowry.

6. The respondent filed a notice of preliminary objection dated 30th March 2021 whose grounds were that:

“a) That the Notice of Motion is contrary to Section 71 of the Marriage Act, No. 4 of 2014, which expresses that Islamic marriages be dissolved under Islamic law;

b. That the subject motion violates Section 3(4) of the Marriage Act, No. 4 of 2014;

c. That the Chief Magistrate's Court Milimani, where the applicant herein seeks to transfer Divorce Cause No. 102 of 2020 CAO -v- JAA, has no jurisdiction to hear and determine the said cause or whatsoever.”

That court directed that the application and the preliminary objection be heard together.

7. The issues for determination are:-

a. whether the Chief Magistrate's Court would have jurisdiction to hear and determine the divorce petition between the parties;

b. whether parties married under Islamic law can divorce under any other law; and

c. whether the conversion by the applicant from being Muslim to being a Christian denied the Kadhi's court the jurisdiction to hear and determine the petition by the applicant.

These questions are interlinked and will therefore be discussed together, as much as possible.

8. Kadhi's courts are a creature of **Article 170** of the Constitution. Their jurisdiction is provided for under **Article 170(5)** as follows:-

“(5) The jurisdiction of a Kadhis' court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.”

Under **Article 170(3)**, Parliament is empowered to establish Kadhi's courts, each having the jurisdiction and powers conferred to it by legislation, but subject to clause (5) above. The legislation contemplated is the **Kadhi's Courts Act (Cap 11)** whose **section 5** states as follows:-

“(5) A Kadhi's court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.”

9. It follows that a Kadhi's Court has the jurisdiction to hear and determine questions of law relating to a divorce matter in which the parties profess the muslim religion and submit to the jurisdiction of the Kadhi's Court.

10. It is trite that a court's jurisdiction flows from either the Constitution or legislation or both (**Samuel Kamau Macharia & Another –v- Kenya Commercial Bank Ltd & 2 Others [2012]eKLR**).

11. In **C.K.C. & Another (suing through their mother and next friend J.W.N.) –v- A.N.C. [2019]eKLR**, the Court of Appeal was dealing with the question whether the appellants, children born of a Muslim father and a non-Muslim mother who were not formally married, could inherit the estate of their deceased father. The appellants contended that they could because, being non-Muslim, Islamic law was not applicable to them. On the other hand, the respondent, the mother of the deceased, contended that Islamic law applied to the estate of the deceased by virtue of the cited constitutional and statutory provisions and that under that law, illegitimate children were not entitled to inherit from their Muslim father. The Kadhi's court had held that because the dispute involved the determination of the estate and heirs of a deceased Muslim it had jurisdiction to hear and determine it. It decided that the appellants were non-Muslims who could not inherit from the estate. In the High Court, the application by the appellants was dismissed. The court in refusing jurisdiction observed that:-

“However, as long as the estate herein belonged to deceased Muslim and as long as Article 24(4) remains in our Constitution and further as long as section 2(3) remains in the Law of Succession Act, the court's hands are tied.”

The appellants moved to the Court of Appeal whose determination was as follows:-

“For all the foregoing reasons, it is the High Court that must determine the succession to S's estate under the Law of Succession Act because all claimants to his estate are Muslims, and the appellants in particular, have not submitted to the jurisdiction of the Kadhi's Court. If there are other persons who claim to be dependants of S. and entitled to inherit from his

estate, their claims will be heard by the court together with that of the appellants.”

The court reiterated that the Kadhi’s court can only hear and determine a dispute relating to personal status, marriage, divorce and inheritance where the parties to the dispute profess the Muslim faith and submit to the jurisdiction of the Kadhi’s court.

12. In **Genevieve Bertrand –v- Mohamed Athman Maawiya & Another [2014] eKLR**, the Court of Appeal set out the factors that must exist for a Kadhi’s court to assume jurisdiction over a matter. It stated as follows:-

“Thus the jurisdiction of the Kadhi’s Court is determined by the existence of three factors. That is the subject matter of the claim in dispute, the party’s muslim faith, and the party’s submissions to the jurisdiction of the Kadhi’s Court.”

13. There is no dispute that the applicant and the respondent were married in a ceremony officiated in the Kadhi’s court subject to **Part VII** of the **Marriage Act, 2014**. The parties were subsequently issued with a certificate of marriage in accordance with **section 57** of the **Act**. Under **section 71** of the **Act**:

“The dissolution of marriage celebrated under Part VII shall be governed by Islamic Law.”

Then, **section 3(4)** of the **Act** states that –

“Subject to subsection (2) the parties to an Islamic marriage shall only have the rights granted under Islamic law.”

14. The respondent was opposed to the application stating that the marriage between him and the applicant was guided by Islamic law and should therefore be heard by the Kadhi’s court. It was the submission of his counsel Mr. Gachaga that the marriage regime of Islamic law does not change merely because the applicant no longer professes Islamic faith, and therefore she has to be heard by the Kadhi’s court which she herself chose in the first place. Reliance was placed on the case of **M.S.R. –v- N.A.B. [2017]eKLR** where the High Court held that–

“The reverting of the petitioner to Christianity does not change the status of the marriage. The parties are therefore lawfully married under the Islamic law as of now. Until the marriage is dissolved, the parties are deemed to be still married even if the marriage only exists on paper.”

15. The court further stated as follows:-

“Given the fact that the petitioner converted to Islam and submitted herself to a marriage under Islamic Law, I do find that it would be prudent if the issue of the dissolution of the marriage is handled by the Kadhi Court. Issues relating to the dissolution of a marriage celebrated under Islamic Law shall be governed by Islamic Law as stated under section 71 of the Marriage Act. The fact that the petitioner no longer professes Islamic faith does not change the situation.”

16. Lastly, the respondent’s counsel relied on **MM –v- M aka JKM [2019]eKLR** in which the High Court observed that -

“Change of religion does not of itself convert a marriage to the new religion. The parties must take steps to ensure the law is complied with. Converting a marriage from one type to another is a legal process.”

17. On the other hand, the submissions of M/s Akello for the applicant was that it was imperative that the parties to a marriage, even when they profess the Muslim faith, do submit to the jurisdiction of the Kadhi’s court for it to take up the matter. Further, that the submission has to be voluntary and, because **Article 32** of the Constitution allows for the freedom of conscience, religion, belief and opinion, a party to a Muslim marriage has the liberty to convert to Christianity with the result that she or he will not submit to the jurisdiction of the Kadhi’s court.

18. There is no dispute that when the applicant and the respondent were married by the Kadhi’s court and received a certificate of marriage under **section 57** of the **Act**, the law applicable during divorce proceedings was Islamic law. All things being equal, the forum for the resolution of the divorce petition would be the Kadhi’s court. However, **Article 170(5)** provides that the Kadhi’s court would have jurisdiction to hear and determine the matter only when the parties have submitted to its jurisdiction. If any of the parties does not submit to jurisdiction, then the Kadhi’s court would be denied jurisdiction over the dispute.

19. I agree that once the marriage is under Islamic law and a certificate of marriage issued to the parties, the conversion of one of the parties to Christianity would not change the fact that the marriage was a Muslim one. However, because of the conversion, the party to the dissolution dispute will have the freedom not to submit to the jurisdiction of the Kadhi’s court. The Constitution in **Article 170(5)** would afford him that freedom.

20. In the instant case, it is not denied that after the applicant filed her petition at the Kadhi’s court for the dissolution of the marriage she changed her religion from being a Muslim to being a Christian. If the change of her faith was constitutionally allowed, I find that her decision to apply to this court to move her away from the Kadhi’s court to the chief Magistrate’s Court is in line with her right not to any longer submit to the jurisdiction of the Kadhi’s court. The effect would be that, although the parties were married under Islamic law, because of the loss of jurisdiction by the Kadhi’s court, they will be subjected to the process of hearing and determining of their divorce dispute before a court other than the Kadhi’s Court.

21. These are the reasons why I allow the application, and transfer the **Divorce Petition No. 102 of 2020** at the Kadhi’s court at Nairobi

between the applicant and the respondent to the Chief Magistrate's Court at Milimani for hearing and resolution.

22. This is a family dispute. I make no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 27TH JANUARY, 2022

A.O. MUCHELULE

JUDGE