



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION MILIMANI LAW COURTS

CIVIL APPEAL NO. 123 OF 2016

BETWEEN:

KNM.....APPELLANT

AND

MHM.....RESPONDENT

J U D G M E N T

1. This is an Appeal arising from the Decision of the Kadhi's Court by Honourable I. Hussein (Mr.) (Senior Resident Kadhi) delivered on the 30th day of November 2016 in Misc Application No.17 of 2016. The Appellant herein was the Respondent in the Kadhi's Court while the Respondent was the Applicant in the application dated 1st November 2016. After hearing the said application, the Honourable Kadhi on 30th November 2016 delivered a ruling concluding the case as follows;

a. The Respondent had been afforded reasonable opportunity to present her evidence having attended the hearing of the Application on the 24th November 2016 thus an opportunity of fair hearing was granted.

b. The talaq issued by the Respondent vide the letter dated 28th January 2016 was valid under Islamic Law. The Respondent adduced documentary evidence at the trial indicating he had duly granted the Appellant Second Talaq vide a letter dated 28th January 2016 and no valid objection had been raised by the Appellant.

c. That under traditional Muslim law, no notice of Talaq was required to be given to the wife and in case of written Talaq, the Talaq became legally operative from the time of writing and not from the time it was received by the wife as such registration will have no effect on the validity of the Talaq.

d. That in regards to the divorce, every Muslim husband is vested with a primary faculty of dissolving the marriage notwithstanding the wife's approval if the wife by her bad character renders the union unhappy but in absence of serious reasons, no matter the law or religion can justify a divorce.

e. That the court is under obligation to administer justice without circumventing the original text of the law as promulgated by the Islamic Lawgivers and that the court is not at liberty to refuse to administer any portion of those tenets even though in certain respect they may sound strange.

2. Aggrieved by the decision of the Hon. Kadhi, the appellant preferred this appeal. The Appellant filed her Memorandum of Appeal dated the 19th December 2016 and filed on the 20th December 2016 appealing against the entire decision of the Kadhi's Court. The Appellant sought orders that:

a. The Appeal be allowed.

b. The Honourable Court be pleased to reverse in its entirety the ruling of the Lower Court delivered on the 30th day of November, 2016 that allowed the application to reissue the divorce certificate.

c. This Honourable Court grant this appeal and direct that the Appellant to be properly heard on her evidence.

d. The costs of and incidental to this appeal

3. The Grounds relied upon can be summarized as follows:

- a. The Honourable Kadhi erred in law by issuing a divorce certificate upon the Respondent's Exparte chamber summons application dated 2nd February 2016 before the lapse of *Eddat* period required under Islamic Law.**
- b. The Honourable Kadhi erred in law by issuing a divorce certificate upon the Respondent's Exparte chamber summons application dated 2nd February 2016 without according the Appellant an opportunity to be heard.**
- c. The Honourable Kadhi erred in law and in fact in validating the Certificate of Divorce upon the Respondent's Application dated 1st November, 2016 which he had initially revoked upon the Appellant's Application dated 26th August 2016 on grounds that it had been issued before the lapse of *Eddat* period and that the Appellant had not been granted an opportunity to be heard. That the Honourable Kadhi shouldn't have validated the revoked divorce certificate without ordering the Respondent to institute proper proceedings and to correct the procedural anomalies leading to that revocation.**
- d. The Honourable Kadhi erred in law and in fact when validating the divorce certificate upon application by the Respondent dated 1st November 2016 by finding that no notice of Talaq is required to be given to the wife by the husband under Islamic Law.**
- e. The Honourable Kadhi erred in law by reissuing the divorce certificate on the Respondent's Application dated 1st November 2016 without hearing the parties on oral evidence as it was in the first instance before revocation and or taking evidence and in the process prejudicing the Appellant's right to a fair hearing and her entitlement to be subjected to the due process of the law.**
- f. The Honourable Kadhi erred in law and in fact by finding that the Appellant had been properly granted an opportunity to be heard based merely on a Notice of Motion Application which is not a proper way of instituting a divorce cause.**

4. On the 12th July 2017, the Respondent filed his Replying affidavit sworn on the 17th April 2017 opposing the suit appeal terming it as being frivolous and without merit. He stated that, upon the revocation of the divorce certificate on the 21st October 2016, he filed an application dated 1st November 2016 thus giving the Appellant an opportunity to be heard. He contended that, the Appellant did not have any valid and compelling reasons why the divorce certificate should not be granted; that the Appellant being a Muslim was well aware that under the Islamic Law, no notice of Talaq was required in case of a written Talaq given by the husband and that there was no requirement of a petition to be filed in order for the Talaq to be validated; that the Appellant is out to frustrate him by making frivolous claims both in Kenya and Geneva. He averred that the Appeal lacks merit and should therefore be dismissed with costs to the Appellant.

5. The appeal proceeded by way of written submissions. Parties filed their respective submissions on the 17th August 2017 and 21st September 2017 respectively and highlighted on the same on the 19th July 2018. The appeal was heard with the assistance of Hon. Mwaito Salim Juma (Kadhi) of Kwale and Hon. Dogo Sheikh Dabasoo (Kadhi) of Kibera.

6. It was the Appellant's Submissions that she had been denied a fair opportunity to present her evidence and that the divorce could not stand as the Respondent did not follow the strict and proper procedure as stipulated by the Islamic law as follows;

- a. The Respondent neither appeared before the Kadhi together with the Appellant and two witnesses nor issue the Talaqs as is required by shariah law**
- b. The rules of procedure do not provide for either Notice of Motion or Chamber summons as a means of instituting a suit and in this case the Respondent instituted the same by way Chamber Summons.**

She further submitted that an application challenging an order granting divorce cannot be said to amount to a fair hearing in light of the requirements of fair hearing.

7. The appellant in closing her submissions sought that the procedure in issuing the divorce was not according to Islamic law and that she was not accorded fair hearing amounting to injustice. That the Respondent failed to approach the court in the proper way thus prayed that the honorable court finds it just to depart from the decision of the Kadhi's court to revoke the certificate of divorce issued and order a retrial in the matter

8. The Respondent in his submissions in response thereto stated that, the Respondent had a right under Islamic jurisprudence to pronounce the Talaq unilaterally and the same becomes binding and enforceable upon communication. It was his submissions that the Kadhi's court has no mandate to rule on the validity of the talaq pronounced by the husband unless the wife can clearly prove that the same is unfair, prejudicial and discriminatory.

9. He further stated that both the parties are residing in Geneva, Switzerland where the courts have already determined that their divorce is valid and enforceable having been living separately for more than two years as from 8th march 2015 to date.

10. He prayed that the honorable court consider that substantive justice demands priority over minor procedural technicalities and that there was need to end litigation so that parties can move on with their respective lives. Consequently he pleaded that the appeal be dismissed.

11. The Honourable Kadhis herein provided me with a written opinion dated and signed on 5th October 2018 wherein they noted that the

only issue was in the procedure by which the talaq was issued and more specifically the absence of witnesses when it was issued. They made reference to the Chapter 2 verse 228,229,230,231,232,236,237 and 241 all of the Quran where Talaq was in absence of witnesses and only in Chapter 65 verse 2 where witnesses in divorce are mentioned.

12. They proceeded to make reference to *Ghansi Bibi v. Ghulam Dastagir (1968) 1 Mys. L.J. 566*(Mulla's Principles of Mahomedan Law, 19th Edition at page 259), where it was stated that the pronouncement of the word Talaq in presence of the wife or when knowledge of such pronouncement comes to the knowledge of the wife it results in dissolution of the marriage. The intention of the husband is inconsequential.

13. The honorable Kadhis proceeded to state that marriage is a contract in Islam, where parties are supposed to live and enjoy union in harmony and passion. That when there is no passion then there is no marriage. They further made reference to Chapter 2 verse 229 of the Quran that directs that the husband can keep the wife if they are in good terms or release her in good terms as well and when the husband divorces his wife the court cannot compel two adults to live together.

14. I have considered the appeal, the submissions of both the appellant and the respondent, the opinion of the Honourable Kadhis and the entire record and Ruling of the trial Kadhi's court.

15. This is a first appeal. As a first appellate court, I am required to consider the evidence on record afresh and come to my own conclusion and inferences. See the case of *SELLE –VS- ASSOCIATED BOAT COMPANY LIMITED [1968] EA 122*.

16. This appeal has arisen from proceedings in the Kadhi's court, and the parties are Muslims. Under Article 170 (5) of the Constitution of Kenya 2010, the jurisdiction of the Kadhi's court is defined as follows;

“ The jurisdiction of a Kadhi's 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 parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts”.

17. This Court can, as an appellate court, interfere with the exercise of such discretion by an inferior court in certain limited circumstances. In *Mbogo and Another vs. Shah [1968] EA 93* the Court stated:

“...That this Court will not interfere with the exercise of...discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

18. I note that at the trial court, the Respondent filed a Notice of Motion Application dated 1st November 2016 seeking for validation of the divorce given to the Applicant on the 28th January 2016 and an issuance of a divorce certificate to that effect.

19. The Application was premised on the grounds that divorce given on the 28th January 2016 was revoked on grounds that the eddat period had not lapsed and the Appellant had not been given an opportunity to be heard. However, he argued that nine (9) months after the divorce was given the parties had not reconciled and it would be in the interest of justice that the divorce be validated.

20. The Appellant filed her reply on the 22nd November 2016 opposing the Respondent's application in its entirety, stating that there had been no substantive divorce petition by the Respondent and that the said procedural irregularities occasioned the process leading to the grant of the certificate of divorce against the Appellant and that upon revocation of the certificate of divorce by the Honourable Kadhi on 21st October 2016, the Applicant ought not to have moved the court to validate the revoked certificate of divorce through a notice of motion but instead complied with the procedural requirement under Islamic law and given the Appellant a chance to reply and contest the divorce before the trial court. She urged the court not to entertain the application

21. The application came up for interpartes hearing on the 24th November 2016, when the Respondent through his advocates confirmed that he married the appellant through Islamic Law on 13th December 1987 in Mombasa; that he had issued the Appellant with the 1st talaq on 3rd April 2015; that on the 8th March 2015 he moved out of their matrimonial home due to persistent differences and that on the 28th January 2016 issued the Respondent with a second Talaq after which he proceeded to obtain the certificate of divorce, which was revoked through the Appellant's Application dated 26th August 2016.

22. He further stated that unless the Appellant has compelling reasons why Talaq shouldn't be validated, the court should proceed and allow his application.

23. The Appellant on her part objected to the application relying on her replying affidavit dated 16th November 2016 and stated that despite the Islamic Law having a provision on unilateral divorce the court have a duty to ensure a party is granted fair opportunity to be heard.

24. The respondent argued that the Appellant had been granted an opportunity to be heard during the inter partes hearing on 24th November 2016. Consequently, the principles of natural justice were not in any way violated.

25. The main grounds advanced in this appeal are the allegation that, the respondent filed a mere application instead of a substantive suit in seeking a divorce certificate contrary to the applicable law and that the Kadhi having revoked the first divorce certificate, he should not have reissued it again without fresh proceedings. Under section 7 of the Kadhi's Court Act;

“Every Kadhi’s court shall keep such records of proceedings and submit such returns of proceedings to the high court as the chief Justice may from time to time direct”.

Section 8(2) also provides that; **“Until rules of court are made under subsection(1), and so far as such rules do not extend, procedure and practice in a Kadhis’s Court shall be in accordance those prescribed for subordinate courts by and under the civil procedure Act”**

26. I am not aware of any rules of procedure governing proceedings in Kadhi’s Court having been promulgated. It then means the rules applicable in the magistrates court i.e. civil procedure shall apply. Does notification and registration of Talaq before a Kadhi’s Court for purposes of issuing a certificate of divorce require filing a formal substantive suit as though it was a divorce proceedings? According to the opinion of the two Kadhi’s sitting with me during the appeal, such proceedings do amount to divorce proceedings as divorce is determined unilaterally and declared in advance by the husband before notifying the Kadhi for issuance of a divorce certificate.

27. Under section 6 (iii) of the Kadhi’s court Act, no finding, decree or order of the court shall be reversed or altered on appeal or revision on account of the application of the law or rules of evidence applicable in the high court, unless such application has in fact occasioned a failure of Justice.

28. In the instant case, the respondent notified the Kadhi of the divorce through an application. This was necessitated by the fact that there is no specific provision in law prescribing through what procedure such notification should be brought before the Kadhi. Since this was not a substantive suit for divorce, there is no prejudice suffered by or occasioned on the appellant’s part. The prayer to set aside the Kadhi’s court’s decision on that ground is not tenable in the spirit of section 6(iii) of the Kadhi’s Court Act and Article 159 (2)(d) which provides that justice shall be dispensed without undue regard to technicalities. It would be onerous to subject Kadhi’s courts to the strict rules that apply in the ordinary courts **(see RWK VS AMA (2014) eKLR).**

29. Regarding whether the allegation that the Kadhi had revoked the divorce certificate when he set aside his original ex parte orders granting the certificate, the opinion of the Kadhis sitting with me was that the Kadhi did not rescind the divorce by giving the appellant an opportunity to be heard on the regularity of the Talaq. I do agree with the learned Kadhi’s opinion that the declaration of divorce could not be invalidated by the setting aside of the original ex parte orders for the sake of affording the appellant an opportunity to be heard.

30. A marriage is a voluntary union between two consenting adults. Its workability is determined by both partners to the marriage. From the evidence on record before the Kadhi’s court, the Respondent left their matrimonial home on the 8th March 2015 due to persistent differences, and he even proceeded to issue talaq to the Appellant on two occasions after a failed attempt in reconciliation.

31. As regards the procedure of issuance of talaq as contested by the Appellant, there are no guidelines or grounds to grant a divorce between a Muslim couple set out in the statute. In the circumstances, the court seeks refuge to the Islamic holy book of the Quran

32. In the instant case opinion of the Kadhis was anchored on the book known as ***The Islamic Law (1997 Reprint)*** by Prof. Abdur Rahman I Doi, a renowned writer. In his book Shariah: he says this about divorce (Talaq);

In Chapter 11 under the heading Talaq: Divorce in Shariah (pp. 168)

“... Islam marriage is a contract and the contract should be made to work but not when it becomes humanly impossible to do so. It is only in such unavoidable circumstances that divorce is permitted under Shariah.”

And that:

“..... when a marriage becomes impossible to work, it is better to separate amicably rather than drag on indefinitely making the family home a hell.”

33. According to the Kadhis, it is a condition precedent in the Muslim community and for the good of society’s stability and continuity that before getting to the final step of divorce, all efforts must be put in reconciling the parties. The foregoing generally refers to divorce sought by the husband.

34. There is no doubt that, marriage whether Christian, Hindu or Muslim is a voluntary union or social contract pegged on mutual love, trust and commitment to each other’s weaknesses and strength. In this case it is clear that the parties have attempted reconciliation to naught, they have been leaving separately since 8th March 2015 and that the respondent is no longer interested in the union. The courts have no business in forcing such relationship to subsist. Each party should be left free to continue with his or her life elsewhere in the manner satisfying one’s desire and happiness.

35. From the foregoing, it is my finding that the Kadhi did not misdirect himself in any way in arriving at the impugned decision. The upshot of it all is that, the Kadhi’s Court Ruling is upheld in its entirety and the Appeal herein dismissed. Regarding costs, this is a family issue hence each party shall bear his or her own costs.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 30TH DAY OF JANUARY 2019.

J.N. ONYIEGO

(JUDGE)