REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Divorce Cause 86 of 2005

JURGEN ENDER……. PETITIONER/RESPONDENT

VERSUS

AZZA EISSA ENDER……..……..……. RESPONDNET/APPLICANT

RULING

This matter first came up before me on 14th December, 2006 whereat the respondent/applicant was represented by learned counsel, Mr. O. Oduol assisted by Miss Onyango while the petitioner/respondent was represented by learned counsel, Mrs A.N. Mbugua.

Petitioner's/respondent's counsel said what was for hearing was chamber summons dated 1st November, 2006 by respondent/applicant seeking modification and variation of a consent order dated 1st December, 2005 recorded by the parties before the High Court, which order had given the petitioner/respondent unsupervised access to the child of the marriage between the parties, to provide for limited supervised access by the petitioner/respondent to the said child, NOOR TANIA ENDER.

On the other hand, respondent's/applicant's counsel said what was for hearing was chamber summons dated 30th November, 2006 challenging the jurisdiction of this court to entertain the proceedings in this matter. It was respondent's/applicant's case that he came late into this matter, having taken it over from a previous counsel who had overlooked the issue of jurisdiction. He (present respondent's/applicant's counsel) acknowledged that various applications had been filed and orders made while the parties were oblivious of the issue of jurisdiction and that the chamber summons of 30th November, 2006 raised that issue which he urged should be addressed first.

In response, petitioner's/respondent's counsel said she appreciated that the issue of jurisdiction is crucial. However, in her view the issues raised in chamber summons dated 1st November, 2006 are critical to the best interests of the child. She pointed out there were allegations that the petitioner/respondent was abusing the child and that the High Court had directed that a Psychiatrist attends the child and submits a report, which was yet to be submitted. To the foregoing, respondent's/applicant's counsel said the respondent/applicant was ready to give the petitioner/respondent supervised access to the child. However, in respondent's/applicant's counsel's view, the appropriate forum for issues relating to the child to be dealt with was the children's court and that as far as the High Court is concerned, it should deal with the issue of jurisdiction and get it out of the way first.

For the record, the child in question is a girl stated to have been aged 5 years in 2005 and should now be aged around 7 years.

This Court ruled that the issue of its jurisdiction ought to be addressed and determined first and directed the parties to proceed accordingly. I now advert to the issue of jurisdiction.

By chamber summons dated 30th November, 2006 and filed on 6th December, 2006 stated to be brought under sections 3, 4 and 5 of the Matrimonial Causes Act, Cap. 152 Laws of Kenya

ule 3 (3) of the Matrimonial Causes Rules, the respondent/applicant applied, *inter alia*, for the following substantive orders, namely:

'4. THAT the Honourable Court do strike out the Petition dated 29th June 2005 and Verifying Affidavit sworn on the 29th June 2005 and filed on the 1st of July 2006 (sic).

5. THAT the costs of this application and of the cause be awarded to the Respondent/Applicant.'

The grounds upon which the application is based are:-

a. That the petition herein as drawn and filed is incompetent.

b. That the marriage between the parties herein was celebrated and registered in Egypt in 1996.

c. That the parties have since the celebration of the marriage until August 2004 been resident outside the jurisdiction of this Honourable Court.

d. That at the time of filing the petition, the parties herein had not been domiciled in Kenya for 3 years as required under the Matrimonial Causes Act.

e. That the petition herein has been filed pre-maturely and without leave of this Honourable Court.

f. That the said provisions of the Matrimonial Causes Act on domicile are mandatory.

g. That this Court has no jurisdiction to hear and determine this matter and all proceedings pursuant to the petition and verifying affidavit dated 29th June 2005 and filed in Court on the 1st day of July 2005 are a nullity.

h. That the nullity of the proceedings herein is inexcusable and cannot be waived or cured by amendment.

i. That it is in the interest of justice that this application is heard as a matter of urgency.

The application is supported by the respondent's/applicant's affidavit sworn on 30th November, 2006.

On 12th March, 2007 parties' counsel sought authority and were authorized to file skeleton written submissions. On 22nd March, 2007 the parties' counsel appeared before me to give oral highlights of their respective written submissions.

Respondent's/applicant's counsel referred to section 4 of the Matrimonial Causes Act and contended that, if read with sections '3 and 4' (the reference to section 4 seems erroneous and I take it that counsel intended the reference to be to section 5), it requires that a person filing proceedings thereunder must have lived in Kenya for 3 years. It was his case that neither party had lived here for 3 years prior to the filing of proceedings herein. In response to the petitioner's/respondent's counsel's submission that the chamber summons dated 30th November, 2006 was filed belatedly after the respondent/applicant had filed a Memorandum of Appearance and Answer to Petition also including a Cross-Petition for dissolution of the same marriage and that, therefore, she had waived her right to challenge the Court's jurisdiction and acquiesced to it, respondent's/applicant's counsel submitted that the issue of jurisdiction can be raised at any time and that waiver or acquiescence cannot confer jurisdiction. He relied on Mombasa High Court

Civil Case No. 128 (O.S.) of 1994, He Zhuo Ying -vs- Qiu Ren and Re Continental Credit Finance Ltd [2003] 2 E.A. 395, also a decision of the High Court, for that proposition. Respondent's/applicant's counsel also contended that since the parties were married under Islamic Law, any proceedings between them should be before a Kadhis Court. It was his case that Islamic marriages are not dissolved under the Matrimonial Causes Act but under the Kadhis' Courts Act, Cap. 11. He urged this Court to terminate the proceedings before it now.

For her part, petitioner's/respondent's counsel pointed out that the marriage between the parties was at the Registry of Civil Affairs in Cairo, Egypt, a civil institution as opposed to a religious institution. She equated it to a civil marriage under Kenya's Marriage Act, Cap. 150 and contended that there is no law that Muslims, like the parties herein, cannot marry under civil law. Therefore in her view there is no bar for the petitioner to come to a civil court for dissolution of his marriage to the respondent/applicant.

Petitioner's/respondent's counsel opposed the objection raised by respondent/applicant to the petition filed by him herein, arguing that such objection should have been raised under rule 13 of the Matrimonial Causes Rules, i.e. by entering appearance to the petition under protest and applying for directions as to the determination of any question arising by reason of such appearance under protest, e.g. determination of a preliminary issue, such as jurisdiction, which the respondent/applicant failed to do. Petitioner's/respondent's counsel also drew attention to rule 27 which provides that a judge may direct and any party to a cause who has entered appearance may apply to a judge for directions for the separate trial of any issue of fact or any question as to the jurisdiction of the court, which, again, the respondent/applicant had failed to do. It was petitioner's/respondent's counsel's contention that there is no procedure for striking out of a petition pursuant to an application like the chamber summons dated 30th November, 2006; that the procedure followed is purely civil under the Civil Procedure Act, Cap.21 which in petitioner's/respondent's counsel's view is inapplicable here.

Petitioner's/respondent's counsel submitted that the issue whether the petitioner was domiciled in Kenya at the time of filing petition was a question of fact for determination after directions are given on the mode of hearing, i.e. whether by oral or affidavit evidence. It was petitioner's/respondent's counsel's contention that duration of 3 years in Kenya alluded to in sections 4 and 5 of the Matrimonial Causes Act is not what necessarily confers domicil since domicil can be acquired through citizenship or choice. He referred in this regard to Kenya's Law of Domicil Act, Cap.37. He also relied on Aslanidis -vs- Aslanidis & Schumacher [1967] E.A. 10 to make the same point. This case wad decided by the High Court of Uganda. It related to a petition by a wife based on the respondent husband's domicil in Uganda. It was proved (partly by the evidence of the respondent himself) that he came to East Africa in 1946 with a Greek domicil of origin, that he moved from Kenya to Uganda in 1957 and had resided there continuously since (apart from occasional visits abroad) and that he was the sole proprietor of a business in Uganda. The respondent also testified that he intended to stay indefinitely in Uganda and to make his permanent home there. It was held that the respondent (and therefore the petitioner) had acquired a domicil of choice in Uganda.

Petitioner's/respondent's counsel reiterated that domicil, which is the central issue in the chamber summons dated 30th November, 2006 is a question of fact and that the procedure for determining it is by way of separate trial. That was his understanding of the purport of rule 27 of the Matrimonial Causes Rules. He also said he relied on the following cases to make the same point:-

a) Field -vs- Field [1964] E.A. 43

b) Stone –vs- Stone [1959] I AII E.R. 194

c) Hopkins -vs- Hopkins [1950] 2 AII E.R. 1035.

The one point in Hopkin's case I consider worth highlighting is the finding that in the phrase 'ordinarily resident' in section 1 (1) (a) of England's Law Reform (Miscellaneous Provisions) Act, 1949, the qualifying adverb 'ordinarily' added nothing to the adjective 'resident'.

Petitioner's/respondent's counsel proceeded to further submit that chamber summons dated 30th November, 2006 is fatally defective for non-compliance with the Matrimonial Causes Rules and that it should itself be struck out. In her view, section 4 of the Matrimonial Causes Act bars the making of a decree of dissolution of marriage if the petitioner has no domicil but it does not automatically make a divorce petition a nullity. She contended that domicil is a question of fact determinable after proper procedure is invoked. She pointed out that a petition can be amended to seek prayers which the Court can grant.

In her final submissions, petitioner's/respondent's counsel pointed out that in the present case the respondent/applicant had waived her right to raise the issue of jurisdiction on grounds of domicil in that at paragraph 4 of her answer to petition she admitted that both the petitioner and herself are domiciled in Kenya. Also that she invoked the jurisdiction of the court in her cross-petition and similarly sought dissolution of the same marriage. Petitioner's/respondent's counsel added that there are consent orders recorded before the High Court and that vide her chamber summons dated 1st November, 2006, the respondent/applicant has sought modification and variation of those orders and that that application is still pending; that she has orders barring the petitioner from having access to the child; and that the respondent/applicant is not sincere in her chamber summons application dated 30th November, 2006.

Petitioner's/respondent's counsel urged this Court to strike out the chamber summons dated 30th November, 2006 with costs to the petitioner/respondent.

In reply, respondent's/applicant's counsel essentially acknowledged having realized that she was wrong in participating in the proceedings as instituted, hence the filing of her chamber summons dated 30th November, 2006. Counsel also acknowledged that some of the existing orders are in the respondent's/applicant's favour but she was candid enough to make disclosure relating to lack of domicil which in her counsel's view leads to lack of jurisdiction. In respondent's/applicant's counsel's view, if there is no domicil, there is no jurisdiction and if divorce is granted it will be a nullity. He submitted that since the petitioner/respondent is a German and the respondent/applicant an Egyptian and their marriage having been celebrated in Egypt, the parties should either go to Germany where the petitioner/respondent comes from or to Egypt where their marriage was solemnized and obtain valid divorce from either of the courts there. According to respondent's/applicant's counsel, his client correctly moved the court to strike out the petitioner's/respondent's petition dated 29th June, 2005 and that objection to jurisdiction can even be raised orally according to established case law and that you do not have to file any formal application. With regard to the Law of Domicil Act alluded to by petitioner's/respondent's counsel, he pointed out that permanent residence in the country in question is a requirement to establish domicil under section 8 of the Act. He reiterated that the petition as presently framed prays for a decree of dissolution of the marriage between the parties which, he pointed out, is prohibited by section 4 (a) of the Matrimonial Causes Act. In his view amendments which petitioner's/respondent's counsel said could be made would not cure jurisdictional defects. He reiterated that the respondent's/applicant's chamber summons application dated 30th November, 2006 be allowed.

I have given due consideration to the rival submissions of the parties and the judicial precedents relied on by the parties' respective counsel. I thank both counsel for the legal research done and I bear in mind the cases cited even though I may not make specific reference to all of them in the conclusions I reach on the issues calling for determination in this Ruling.

It is well established by judicial authority that when issue is raised of a court's jurisdiction over a matter in controversy before it, the jurisdictional issue should be dealt with and determined at the earliest possible opportunity. One such authority is "Lillian S" -vs- Caltex Oil (K) Ltd [1989] LLR 1653 decided by the Court of Appeal of Kenya. That principle has guided this Court in addressing the issue of jurisdiction herein first. It has to be recognized, though, that while jurisdiction, *qua* jurisdiction, is a question of law, determination of the existence or otherwise of jurisdiction has, in the ordinary course of events, to be premised on facts attendant upon a given case. In the case now under consideration, counsel for respondent/applicant told the court that the issue of jurisdiction arose from want of domicil on the part of the petitioner/respondent. What is domicil/domicile?

The term 'domicil' or 'domicile' is not defined in the Law of Domicil Act alluded to by respondent's/applicant's counsel but the Act describes situations giving rise to its existence in various forms. An overview of the concept may, however, be gleaned from the following Law Dictionary definitions:-

Baron's Dictionary of Legal Terms (2nd Edition) defines domicile to mean:

'**An individual's permanent home or principal establishment. Residence is not the same as domicile, since a person can have many transient residences but only one legal domicile, which is the home address to which he always intends to return for prolonged periods.'**

The Oxford Dictionary of Law defines domicile, *inter alia*, as under:

'**The country that a person treats as his permanent home and to which he has the closest legal attachment. A person cannot be without a domicile and cannot have two domiciles at once. He acquires at birth a domicile of origin …. He retains his domicile of origin until (if ever) he acquires a domicile of choice in its place. A domicile of choice is acquired by making a home in a country with the intention that it should be a permanent base ….'**

And Mozley & Whiteley's Law Dictionary (12th Edition) defines domicile, *inter alia*, as follows:

'**The place in which a person has his fixed and permanent home, and to which, when he is absent, he has the intention of returning. It is of three sorts: (1) by birth; (2) by choice; (3) by operation of law ….'**

Clearly, the issue as to where a person is domiciled is a question of fact, determined principally on evidence. The most appropriate forum for comprehensive determination of such question is the trial, where evidence is adduced and judicially tested.

What is the status of the evidence on domicil at this interlocutory stage? The Court has glimpses of part of the evidence. For instance, the petitioner/respondent pleaded at paragraph 7 of his petition dated 29th June, 2005 that both he and the respondent/applicant were domiciled in Kenya when he filed the petition. In the respondent's/applicant's answer to petition which included a cross-petition she admitted as much. Now the respondent/applicant says she was mistaken in so admitting thereby introducing controversy on the issue. In this regard the record shows that when the matter first came up before me on 14th December, 2006 counsel for petitioner/respondent drew attention to a replying affidavit sworn by the petitioner/respondent on 8th December, 2006 and filed the same day in reply to the respondent's/applicant's chamber summons dated 30th November, 2006. Petitioner's/respondent's counsel, however, told the court that the Commissioner before whom the replying affidavit was sworn did not affix his stamp. Petitioner's/respondent's counsel then said she wished to withdraw the affidavit and put in a proper one. She (counsel) said, however, that her client the petitioner was out of the country at the time, having left for Germany. The Court was pre-occupied with the issue whether or not it has jurisdiction to entertain the proceedings herein and did not address the question whether to allow or disallow withdrawal and replacement of the replying affidavit. That remains a possibility if the Court rules it has jurisdiction in this matter, bearing in mind that the pleadings are not closed.

It is a commonly accepted approach under general civil procedure law that a jurisdictional issue can be raised at any time of the proceedings in question, but preferably at the earliest possible opportunity and that it does not necessarily have to be by way of formal application. The chamber summons application dated 30th November, 2006 was brought under sections 3,4 and 5 of the Matrimonial Causes Act and rule 3 (3) of the Matrimonial Causes Rules. Rule 3 (3) is in the following terms:

'**3. (3) Except where these Rules otherwise provide, every application shall be made to, and any leave or direction shall be obtained from, a judge by summons in chambers,'**

The respondent/applicant came by summons in chambers and, according to his counsel, that was enough to enable him to raise the issue of jurisdiction. I see, however, that rule 13 (1) provides that an appearance to a petition or originating summons may be under protest while sub-rule (3) adds that any appearance under protest shall state concisely the grounds of protest and that the party so appearing shall apply for directions as to the determination of any question arising by reason of such appearance under protest and, in default of making such application, shall be deemed to have entered an unconditional appearance. The respondent's/applicant's appearance to the petition is dated 18th July, 2005 and filed on 19th July, 2005. I deem the same to have been entered on the date of filing . It is not under protest and under rule 13 (3) I deem it to have been entered unconditionally and that it never sought any directions for the trial of a preliminary issue, of which jurisdiction is a clear example. And rule 27 provides:

'**27. A judge may direct and a petitioner and any party to a cause who has entered an appearance may apply to a judge for directions for the separate trial of any issue of fact or any question as to the jurisdiction of the court.'**

The respondent/applicant did not deem it necessary to invoke rules 13 and 27. Can she rely on the practice obtaining in general civil procedural law where a preliminary issue or objection does not necessarily have to be by way of formal application in the face of the rules cited above requiring appearance to be entered under protest? To be able to answer this question in context, I think we need to ask and address other questions: Do the rules cited above provide a special procedure for raising jurisdictional issues? If so, what is to happen when a party bringing an application under the Matrimonial Causes Act does not invoke the procedure specified thereunder in raising the issue of jurisdiction? These are not simple questions to resolve or answer in that while non-compliance with a specified procedure may sound defiant of such procedure and therefore deserving of punishment, the bigger issue confronting the court is whether it can bury its head in the sand and ignore the possibility of lack of jurisdiction, which may lead to it doing that which is outside its powers? Viewing the issue from this philosophical foundation, it seems clear to me that by the court ignoring to address the issue of jurisdiction on the basis of such procedural technicality may eventually result in greater injustice if in the process the court assumes jurisdiction it does not have, because any verdict it pronounces and orders it makes would be an exercise in futility, which would ultimately undermine substantive justice. Procedural rules are hand-maidens of justice and when they appear to undermine substantive justice, I hold that the latter must prevail. I, therefore, hold that the respondent's/applicant's failure to enter appearance under protest and to seek separate trial of the issue of jurisdiction does not automatically preclude her from raising the issue of jurisdiction. The circumstances of a given case must be the principal guiding factor.

The respondent/applicant contended that the petitioner/respondent had not been domiciled in Kenya for 3 years as at the time of filing his petition and that the fact of the petitioner/respondent not having been domiciled here for 3 years deprived him of domicil/domicile. It seems to me that the respondent/applicant at times confused residence with domicil but, as the Law Dictionary meanings surveyed above indicate, mere residence in a country is not enough to confer domicil but it has to be accompanied by requisite intention, which in turn has to be proved by evidence or by necessary inference. As was observed, at page 11, in Aslanidis' case (supra):

'…**residence is a mere physical fact, and means no more than personal presence in a locality, regarded apart from any of the circumstances attending it. If this physical fact is accompanied by the required state of mind (*animus manendi*), neither its character not its duration is in any way material.'**

Note is made of the fact that reference to 3 years residence appears in section 5 of the Matrimonial Causes Act and its purpose appears to be to enable a wife who has been 'ordinarily resident' in Kenya for 3 years immediately preceding commencement of divorce proceedings by her against her husband to do so even though the husband was not domiciled in Kenya. This does not apply in the present case as the divorce proceedings being challenged on grounds of domicil are by the husband and there is no legal provision requiring a husband to have been 'ordinarily resident' for 3 years in Kenya immediately prior to filing divorce proceedings.

It was contended by respondent's/applicant's counsel that divorce proceedings between Muslims must go before a Kadhi's Court. In this connection, it is noted that the parties herein celebrated their marriage at the registry office of civil affairs in Cairo, Egypt. The said civil office does not sound like a religious institution and I do not see how the petitioner/respondent is precluded from seeking divorce under civil law. In any case section 5 of the Kadhis' Courts Act, Cap.11 Laws of Kenya provides:

'**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 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.'**

The petitioner/respondent filed his petition for divorce before the High Court and the respondent/applicant filed answer to petition and cross-petitioned for divorce before the same court. In view of the provisions of section 5 of the Kadhis' Courts Act, I find the contention that the divorce sought by petitioner/respondent must be adjudicated upon only by a Kadhi's court untenable and the same is dismissed.

It was suggested by counsel for respondent/applicant that section 4 (a) of the Matrimonial Causes Act automatically makes the petitioner's/respondent's petition a nullity. The section in question provides:

'**4. Nothing in this Act contained shall authorize –**

(a) the making of any decree of dissolution of marriage or of nullity of marriage unless the petitioner is domiciled in Kenya at the time when the petition is presented.'

I opined earlier on that whether or not the petitioner was domiciled in Kenya at the time of filing his petition is a question of fact, determinable principally on evidence. Earlier on in this Ruling I pointed out that the petitioner/respondent filed a replying affidavit sworn on 8th December, 2006 but that the Commissioner before whom it was sworn omitted to affix his stamp thereon. Among other things, the unstamped affidavit stated that the petitioner/respondent had settled in Kenya and made it his home and domicile of choice, which is what he had basically averred in his petition. There is no evidence at this interlocutory stage that the petitioner/respondent has been or is under any disability rendering him incapable of acquiring domicil of choice, which is permitted under section 8 of the Law of Domicil Act. While the unstamped affidavit may be invalid as filed, I note that the petitioner's/respondent's counsel indicated it would be withdrawn and replaced. As the pleadings are not closed, an application for withdrawal and replacement of the unstamped affidavit seems an open possibility, which further highlights the point that it is still early for a determination of the question of domicil conclusively.

Section 4 (a) of the Matrimonial Causes Act prohibits the court from making a decree of dissolution of marriage unless the petitioner is domiciled in Kenya. As already stated, whether or not the petitioner was domiciled in Kenya at the time of filing the petition is a question of fact, to be determined on evidence. Not all evidence is in yet at this stage and full evidence on the matter can only be assembled at trial time, which has not yet come. To the extent that the issue of jurisdiction is dependent on the existence of domicil in this case, which is yet to be proved or disproved, I consider it premature to determine the issue of domicil now, which must await the trial stage. The central theme of the petitioner's/respondent's petition is dissolution of marriage, i.e. divorce, which is clearly within the jurisdiction of this Court. Whether the petitioner/respondent will be able to prove the matrimonial offence or offences he seeks to rely on in seeking divorce is a matter of evidence for the trial. If the petitioner/respondent does not marshall adequate proof, that will not mean the Court has no jurisdiction to entertain the divorce proceedings but that the court will not be able to exercise its jurisdiction in favour of granting the divorce sought.

The upshot is that I find the chamber summons dated 30th November, 2006 to have no merit and the same is hereby dismissed. This is a delicate family matter. Costs shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 10th day of May, 2007.

B.P. KUBO

JUDGE