

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

H.C. DIVORCE CAUSE NO. 175 OF 2001

N N S PETITIONER

V E R S U S

S A M..... RESPONDENT

R U L I N G

The Respondent through his counsel Ms J. A. Guserwa raised a preliminary objection in respect of the jurisdiction of this court to hear this cause on the grounds that both the parties profess Islamic faith and have contracted their marriage under Islamic Law.

It is evident that the parties in this divorce petition did celebrate their marriage under Islamic Law. The marriage certificate is enough proof of that fact. The wife/Petitioner has presented this divorce petition before the family division of the High Court under the provisions of the Mohamedan Marriage, Divorce and Succession Act. (Cap 156). It has also been averred by the Petitioner that she has reverted to Christianity and that she esno longer profess the Islamic faith.

After the petition was amended and filed on 31st October, 2002, the only objections which remained to be determined is that this court has unlimited jurisdiction but not by way of petition, but only when the parties came before the court by way of the plaint. Even that contention was eventually left to the court. The other issue was that it is only the Kadhi's court which can deal with the matters when the parties have contracted a marriage under Islamic Law.

Section 60 of the Constitution unreservedly grants unlimited jurisdiction to the High Court in Civil and Criminal matters. Section 66 (3) of the Constitution states that there shall be such subordinate courts held by Kadhis as Parliament may establish.

The Parliament has enacted the Kadhi's Courts Act (Cap11) section 5 thereof stipulates as under:

“A Kadhi's court sh all 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 sec tion shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.”

Clearly the section does not limit the Jurisdiction of the High Court in the matters before it and definitely does not exclude its jurisdiction to hear the matters so brought before it 3

In this case there is also a specific averment by the Petitioner that she does not any more profess the Islamic religion. Whether that fact and the fact that the Co-Respondent in this matter also does not profess Islamic Religion can remove this matter out of the ambit of Kadhi's court is not a matter which could be dealt with by way of a preliminary point.

The filing of the matter as a Petition also is not a matter which can go to the validity of the matter at this stage. This I do say because of the use of words 'Causer and suits' in the Kadhis' Act (Section 54 (3) as well as that of the word 'Petition' in Rules made thereunder (see Rule 9). Without much ado I shall find that the objections raised do not deserve the prayer of striking out the petition filed by the Petitioner.

This court has jurisdiction to hear this matter and I thus reject the objections raised.

The costs of the objection be in the cause.

Dated and delivered at Nairobi this 21st day of November, 2002.

K.H. RAWAL

JUDGE.