



**SVK v ANC (Civil Appeal E032 of 2021)  
[2024] KEHC 15895 (KLR) (16 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15895 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
CIVIL APPEAL E032 OF 2021  
CJ KENDAGOR, J  
DECEMBER 16, 2024**

**BETWEEN**

**SVK ..... APPELLANT**

**AND**

**ANC ..... RESPONDENT**

*(Being an appeal from the Judgment of the Kadhi’s Court (Senior Resident Kadhi Hon. T.W Karanja (Mr.) delivered on 6th April, 2021 in KCDC 66 of 2020 at Nairobi)*

**JUDGMENT**

**Introduction**

1. The Appellant and the Respondent got married on 16<sup>th</sup> November, 2019. The marriage faced challenges and the Respondent filed for a divorce accusing the Appellant of cruelty, desertion, and failure to support her financially. She also accused him of shunning all responsibilities towards the marriage as well as causing her emotional distress. She asked the Court to dissolve the marriage and issue a Divorce Certificate. She also asked the Court to order the Appellant pay Iddat maintenance for 3 months being Kshs.386,000/=. She also wanted the Appellant to pay Kshs.772,000/= for expenses she had incurred during the subsistence of the marriage, Kshs.100,000/= for dowry, and Kshs.340,000/= for a loan she had allegedly advanced the Appellant.
2. The Appellant filed a Defense in which he denied the Respondent’s claims. He blamed the Respondent for the collapse of their marriage, and accused her of treating him with disrespect and contempt. He stated that it was the Respondent who requested for the divorce. On the issue of the monies claimed, he stated that the Court did not have jurisdiction to entertain the alleged personal debts. He denied that the Respondent had loaned him Kshs.340,000/=. He also claimed that he should not be ordered to pay dowry to the Respondent because he had paid dowry to her mother when they got married.



Lastly, he stated that he should not be ordered to pay the expenses incurred by the Respondent during their marriage because she is financially capable of taking care of herself.

3. The Court delivered a judgment in favor of the Respondent on 6<sup>th</sup> April 2021. The terms of the judgment were as follows; the Court registered the informal divorce between the Appellant and Respondent, and ordered the issuance of a divorce certificate. It also ordered the Appellant to pay the Respondent Iddat maintenance for 3 months to the sum of Kshs.90,000/=. He was also ordered to pay the sum of Kshs.340,000/= being monies advanced to him by her during the subsistence of the marriage, Kshs.180,000/= being past maintenance during the 6 months the marriage persisted, and Kshs.100,000/= deferred dowry.
4. The Appellant was dissatisfied with the judgment and appealed to this Court vide a Memorandum of Appeal dated 15<sup>th</sup> April, 2021. He listed 21 grounds of appeal which are as follows;
  1. That the learned Kadhi erred in fact and in law in failing to appreciate the evidence and facts on record adduced by the Appellant.
  2. That the learned Kadhi erred in fact and in law in finding the Appellant liable for payments as prayed in the Petition. This finding occasioned grave injustice to the Appellant.
  3. That the learned Kadhi erred in law and in fact in disregarding vital legal and factual issues while making his decision.
  4. That the learned Kadhi erred in fact by overlooking the jurisdiction of the Kadhi's court and tackled matters of debt which are clearly civil in nature.
  5. That the learned Kadhi erred in failing to take into account that the Respondent is the one who prayed for divorce, twice, thus she forfeits dowry payment.
  6. That the learned Kadhi erred in fact and in law in stating that the Appellant was liable to an extent that he was not.
  7. That the learned Kadhi erred in placing a financial burden on the Appellant in the amount of Kshs.780,000/= without due regard to the law or the facts before him.
  8. That the learned Kadhi erred in law and in fact in ordering the Appellant to pay Kshs.340,000/= being monies advanced during the subsistence of marriage.
  9. That the learned Kadhi erred in law and in fact in ordering the Appellant to pay, retrospectively, Kshs.180,000/= being maintenance for 6 months they were together.
  10. That the learned Kadhi erred in law and in fact in ordering the Appellant to pay Kshs.100,000/= being payment of deferred dowry despite the divorce being a KHULA in nature.
  11. That the learned Kadhi erred in law and in fact in ordering the Appellant to pay Kshs.90,000/= being payment of the Iddat period despite the fact that it was the Respondent requesting for the divorce more than once.
  12. That the learned Kadhi erred in law and in fact in failing to take into account the pre-wedding marital contract where there were discussions on financial responsibility.
  13. That the learned Kadhi erred in law and in fact in failing to consider and apply the law appropriately.



14. That the learned Kadhi erred in law in failing to appreciate that in view of the nature of the case, it was unjust to consider the determination of a purported debt matter yet the same is outside the jurisdiction of the Kadhi's Court.
  15. That the learned Kadhi misunderstood the facts and misapplied the law.
  16. That the learned Kadhi erred in law and in fact by failing to consider the Appellant's plea to have his personal effects returned. The same did not feature in the judgment.
  17. That the Judgment of the learned Kadhi was against the facts and the weight of evidence adduced and as a result has placed a huge financial burden as against the Appellant where such burden in actuality should not exist.
  18. That the learned Kadhi erred in law and in fact in failing to consider the Appellant's affidavit of means, the circumstances leading to the marriage and the circumstances leading to its breakdown when arriving at his judgment.
  19. That the learned Kadhi erred in law and in fact in failing to consider and apply the law appropriately.
  20. That the learned Kadhi erred in law and in fact in finding for the Respondent whereas the same was not proved even on a balance of probability. This finding occasioned grave injustice to the Appellant.
  21. That the learned Kadhi failed to appreciate sufficiently or at all the evidence on record.
5. The Appellant asked the Court to allow the Appeal and set aside the judgment dated 6<sup>th</sup> April, 2021 of the Kadhi's Court delivered in KCDC 66 of 2020 at Nairobi by Honorable Senior Resident Kadhi, T.W. Karanja. He asked the Court to, in the alternative, reassess the evidence and issue a determination. He also sought an order directing the Respondent to release all his personal effects that she is holding.
  6. The Appeal was canvassed by way of written submissions. The Appellant filed his submissions but the Respondents did not, despite being given the opportunity to file.

### **Appellant's Written Submissions**

7. The Appellant submitted that the Kadhi's Court should not have ordered him to pay the Respondent Kshs.340,000/=. He submitted that the Court failed to consider whether the financial transactions between the parties were loans or just merely a helping hand to a loving spouse. He argued that the amounts were not loans but contributions made within the marital context, intended to support the family. He argued that the Respondent did not prove that these amounts were loans. He submitted that the court should set aside the unjust financial awards and reassess the financial evidence.
8. The Appellant also submitted that the Kadhi's Court did not have jurisdiction to adjudicate the Kshs.340,000/= debt dispute. He argued that the Court's jurisdiction was limited to matters of personal status, marriage, divorce, and inheritance under Muslim law. Thus, he argued that the Court overstepped its jurisdictional boundaries by addressing matters of debt because the same does not fall within the jurisdiction of the Kadhi's Court. Instead, he argued that the debt dispute can only be determined by a civil court. He also argued that the alleged debt cannot be treated as a matrimonial dispute.
9. In addition, the Appellant argued that the Respondent is not entitled to the payment of Kshs.100,000/= for dowry because it was the Respondent who sought the dissolution of marriage through Khul. He stated that according Islamic Law, a wife who initiates a divorce without any fault on the husband's



part is supposed to return the dowry. He submitted that the Respondent initiated the divorce without any fault on his part and thus she forfeited her right to claim dowry from the Appellant. He maintained that the Respondent did not prove any fault on his part.

10. Lastly, the Appellant submitted that the Respondent is not entitled to Iddat maintenance because the circumstances of the divorce do not warrant such an obligation on his part. He argued that, according to the principles of Islamic jurisprudence, Iddat maintenance is not absolute and should not be provided for where the wife has initiated the dissolution of the marriage without valid grounds. He stated that the Respondent did not provide any evidence of his wrongdoing or misconduct and thus she was not entitled to Iddat maintenance.

### **Issues for Determination**

11. I have considered the Appellant's grounds of appeal and submissions and I am of the view that the issues for determination are;
  - a. Whether a Kadhi's Court has jurisdiction to entertain debt disputes within its pecuniary jurisdiction.
  - b. Whether the Kshs.340,000/= paid to the Appellant was loan.
  - c. Whether the Respondent is entitled to the payment of Kshs.100,000 for dowry.
  - d. Whether the Respondent is entitled to Iddat maintenance.

### **The Duty of the Court**

12. It is trite law that the duty of the first appellate Court is to re-evaluate the evidence in the subordinate Court both on points of law and facts and come up with its findings and conclusions. As the court is re-evaluating the evidence, it is required to bear in mind that it had neither seen nor heard the witnesses. This principle was set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”

### **Whether a Kadhi's Court has jurisdiction to hear and determine contractual commercial disputes amongst Muslims**

13. The Appellant argued that the Kadhi's Court did not have jurisdiction to adjudicate the Kshs.340,000/= debt dispute. He argued that the Court's jurisdiction was limited to matters of personal status, marriage, divorce, and inheritance under Muslim law and thus the court overstepped its jurisdictional boundaries. He argued that the alleged debt cannot be treated as a matrimonial dispute and the debt dispute can only be determined by a civil Court.
14. At the lower Court, the Appellant contested the court's jurisdiction to hear and determine the debt. He maintained this position both in his defense and the submissions. In both pleadings, he argued that the court did not have jurisdiction to determine the issue of debt. In his submissions at the trial Court, he stated that, even if the Respondent was to be believed that the monies were a debt owed, the Court



had nothing further to do with the claim for want of jurisdiction. I have relooked at the judgment of the trial Court and noted that the Honorable Kadhi did not address himself to the jurisdiction question.

15. This Court has been called upon to determine whether the Kadhi's Court has jurisdiction to hear and determine contractual commercial disputes amongst Muslims. A similar question arose in the case of *Mumtaz Ali Khan & 2 others v Mushtak Yakub Kalu & another* [2018] eKLR, where the High Court held that the Kadhi's Court does not have jurisdiction to hear a dispute about a sale agreement. In the case, the Appellants challenged the jurisdiction of the Kadhi's Court to deal with a matter concerning the nullification of a sale agreement. The Court agreed with the Appellant and stated as follows;

“15. The jurisdiction of the Kadhi's Court is limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance. This Court appreciates that the question as to whether or not the estate of the Deceased was properly distributed among primary heirs relates to the issue of inheritance. However, the Property is now registered in the name of a third party and the validity of the agreement pursuant to which the property changed hands is being challenged. The Respondents also sought a declaration that the said agreement be declared null and void. The question as to the validity of and prayer for nullification of the sale agreement is clearly outside the ambit of the Kadhi's Court and any attempt to entertain the same would be tantamount to the Kadhi's Court arrogating to itself jurisdiction exceeding that which is conferred upon it both by *the Constitution* and by statute”.

16. Similarly, in the case of *FW v NA* [2017] eKLR, the Court in held that;

“In Islamic law and practice a man is only allowed to pay dowry. Dowry is the right of the women upon the man. Dowry has no specific minimum or maximum. It can be delayed or given in advance... I therefore don't understand whether this one hundred and forty thousand (140,000/=) was a gift or a debt. If it is a debt, then this is the wrong forum. I advise the defendant to take the matter to the right court.”

17. Lastly, in the case of *Genevieve Bertrand v Mohamed Athman Maawiya & another* [2014] eKLR, the Court of Appeal held that a Kadhi's Court did not have jurisdiction where an Appellant's interest arose out of a contractual transaction. It held;

“Further the appellant's interest arose out of a contractual transaction. [23] There is no doubt that the issue of jurisdiction was one of mixed law and fact, and that the facts upon which the issue of jurisdiction was anchored were clear and uncontested. On those facts, it was obvious that the appellant's claim did not fall within the jurisdiction of the Kadhi's court, and the Kadhi could do no more than down his tools as he did. In light of such a clear position, the appeal before the High Court was no more than an academic exercise as no arguments could change this position.”

18. Based on these authorities, I find that the Kadhi's Court did not have jurisdiction to hear and determine the Kshs.340,000/= debt dispute between the Appellant and the Respondent. I hold that the question on whether there was a valid loan agreement between the parties involves contract law and falls outside the parties' personal status, marriage, divorce or inheritance.



### **Whether the Kshs.340,000/= paid to the Appellant was loan**

19. Even though I have found that the Court did not have jurisdiction to hear and determine the debt dispute, I shall, nonetheless, and for completeness of record, determine whether the Court had made the right conclusion on the debt assuming that it had jurisdiction.
20. Both parties agree that the Respondent transferred Kshs.340,000/= to the Appellant during the subsistence of their marriage. However, they disagree on whether the amounts were a friendly donation or a loan. The Appellant maintained that the amounts were merely a helping hand to a loving spouse and was intended to support the family. On the other hand, the Respondent maintained that it was a loan which the Appellant borrowed with a promise to pay back. The lower Court believed the Respondent's version of the story and held as follows;

“As regards the Kshs.340,000/= claim by the [Respondent] that she claims she advanced the [Appellant] as a loan during the subsistence of the marriage in her pleadings and which the [Appellant] clearly admitted to receiving from the [Appellant] through M-Pesa during cross-examination albeit citing the reason for the transactions to be donations towards his father's medical bills.

I find the claim by the [Respondent] (former wife) has been supported by the admission of the [Appellant] (former husband) and therefore find that the [Appellant] owes the money advanced”.

21. I have reevaluated the evidence to ascertain whether this Court's holding should hold. The lower Court made the wrong conclusion on the finding that the Appellant had admitted the debt. There was no evidence to show that the Appellant had admitted the debt of Kshs.340,000/=.
22. The Appellant denied the debt and it was upon the Respondent to adduce sufficient evidence to prove the existence of the debt. Given that the Appellant did not dispute receipt of the same, it was upon the Respondent to show that, there was a mutual agreement that the Appellant would repay. In her statement, she stated that the Respondent had borrowed the money with a promise to pay back. She did not provide documentary evidence to prove this assertion. In cross-examination, she admitted that ‘I do not have any where he acknowledged he will pay.’
23. Based on the above analysis, I find that the Respondent did not provide sufficient evidence to prove that the amounts were made to be a loan. I thus find that her claim for the amount of Kshs.340,000/= cannot stand.

### **Whether the Respondent is entitled to the payment of Kshs.100,000 for dowry**

24. The Appellant argued that the Respondent is not entitled to the payment of Kshs.100,000/= for dowry because it was the Respondent who sought the dissolution of marriage through Khul. He submitted that the Respondent initiated the divorce without any fault on his part and thus she forfeited her right to claim dowry from the Appellant.
25. The trial Court did not address itself on this issue despite the fact that the Appellant properly raised this issue at the lower Court. In both his witness statement and the submissions at the lower Court, the Appellant insisted that the Respondent was not entitled to dowry because she had unilaterally requested for the divorce through Khul. On the other hand, in her Reply to Answer to Petition, the Respondent admitted that she requested for a divorce. She however stated that she made the request due to the harm caused by the Appellant which had made it impossible for her to continue in the marital relationship.



26. Although the Court held that the Appellant had rightly exercised his right to issue a divorce to the Respondent, the Court did not make an observation on the circumstances under which the same was issued. Given that the Respondent had admitted to have requested for the divorce, the trial Court ought to have addressed itself on whether that fact had any implication on the Respondent's right to dowry.
27. In the case of *HSA v AAL* [2020] eKLR, the Court observed that,
- “ 18. Dowry is a basic and fundamental right to the wife under Qur'an 4: 4 and 25. It is not extinguished unless wholly or partly forfeited by the wife in her own free will and consent.”
28. Similarly, in the case of *AAA & another v KAM (Civil Appeal 2 of 2019)* [2022] KEHC eKLR, the Court held as follows;
- “ There are four main conditions of khula:-
- (i) There must be an offer from the wife. The wife may make a proposal either by the use of word “Khul'u” or its derivative e.g. the wife states ‘give me a Khul'u in exchange of my dowry.’”
29. I have relooked at the evidence placed before the lower Court to ascertain whether the Respondent did expressly forfeit her right to dowry. I have perused the documents and I cannot see the exact communication in which the Respondent requested for the divorce. The communication would be useful because it would guide the Court on whether the Respondent expressly relinquished her right to dowry. Although the Appellant stated that the Respondent made a written and unequivocal demand for divorce on the 16<sup>th</sup> May, 2020, he has not provided evidence of the said demand.
30. The Appellant, in his defense, claimed that he paid the dowry to the Respondent's mother. This assertion was denied by the Respondent in her Reply to Answer to Petition. During cross-examination, he admitted that he had no evidence on record to show that he had paid the dowry to the Respondent's mother. He also admitted that he did not call any witness to testify on that issue. Based on the above analysis, I agree with the Kadhi's Court's finding that the Respondent is entitled to her entire deferred Mahar (dowry) of Kshs.100,000/=.
31. In the foregoing, I find that the Respondent is entitled to the payment of Kshs.100,000/= for dowry.

### **Whether the Respondent is entitled to *Iddat* Maintenance**

32. The Appellant submitted that the Respondent is not entitled to Iddat maintenance because the circumstances of the divorce do not warrant such an obligation on his part. He argued that, according to the principles of Islamic jurisprudence, Iddat maintenance is not absolute and should not be provided for where the wife has initiated the dissolution of the marriage without valid grounds. He stated that the Respondent did not provide any evidence of his wrongdoing or misconduct and thus she was not entitled to Iddat maintenance.
33. The trial Court considered this issue in great detail, and held that the Appellant should pay Iddat maintenance for 3 months to the sum of Kshs.90,000/=. The trial Court considered all the factors in arriving at this amount and I find no reasons to disturb the Court's finding under this heading. The same case applies for the lower court's order to pay Kshs.180,000/= being past maintenance during the 6 months the marriage persisted. I find that the trial Court applied the right principles in arriving at this value. The same is hereby held.



## **Disposition**

34. The Appeal Partially succeeds.
35. The Trial Court's order directing the Appellant to pay Kshs.340,000/= is hereby set aside.
36. The rest of the orders of the Kadhi's Courts are hereby upheld to wit, the Appellant shall pay the Respondent;
  - a. Kshs.180,000/= for past maintenance during the 6 months the marriage persisted
  - b. Kshs.100,000/= for deferred dowry due to the Respondent on demand.
  - c. 90,000/= for Iddat maintenance for 3 months.
37. There is no order as to costs.
38. It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 16<sup>TH</sup> DAY OF DECEMBER, 2024.**

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**C. KENDAGOR**

**JUDGE**

In the presence of:

Court Assistant: Beryl

Ms. Odhiambo Advocate for the Appellant

