



**TP v ABP (Miscellaneous Civil Application 20 of 2017)
[2021] KEHC 9767 (KLR) (9 June 2021) (Ruling)**

Neutral citation: [2021] KEHC 9767 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION 20 OF 2017**

JN ONYIEGO, J

JUNE 9, 2021

BETWEEN

TP APPLICANT

AND

ABP RESPONDENT

RULING

1. TP (thereafter the applicant) and BP (thereafter the respondent), are Shia Imami ismaili Muslims who celebrated their marriage on 26th November, 2000. The couple agreed to be bound by *the constitution* and personal laws of the Imami Ismaili Muslims. The couple further agreed to refer any dispute in relation to their marriage to his Highness the Aga khan Shia Imami Ismaili conciliation and arbitration board. According to that clause, the decision of the arbitration was final, conclusive and binding upon them.
2. The couple's marriage started to encounter infidelity related challenges with T (applicant) accusing her husband A the respondent of engaging in a polygamous marriage relationship with a lady known as AA. The matter landed before the Arbitrator for arbitration. On 11th May, 2013 the Arbitrator found that there was no evidence that A had married A. A was however ordered to pay T (applicant) kshs350,000 as monthly up keep with a 10% inflation increase annually besides providing a four bed roomed house in a safe and secure area in Mombasa for her and the children.
3. Aggrieved by this decision, T appealed to His Highness Prince Aga khan Shia Imami Ismaili conciliation and arbitration board (the ICAB). However, A did not take part in the appeal proceedings despite service of the appeal and request to participate.
4. On 11th December, 2013, the ICAB made an award recognizing that A was still lawfully married to T as no valid divorce had been pronounced. It further found that the respondent's (A's) marriage to



Amairah was in breach of the Ismaili constitution thus attracting disciplinary measures. Accordingly, ICAB made an award as hereunder;

- (a) A to pay T U.S \$1 million within 6 weeks of the date of the award and in default he would pay the said sum with liquated damages of 12 % per annually on the said amount.
 - (b) A to continue paying the monthly maintenance to T and provide a house for her and children as directed by NCAB.
5. Consequently, T filed an application dated 12th May 2017 seeking the high court to adopt the arbitral award as the judgment of the court. Unfortunately, A again did not file any response despite service of the application. The application was therefore allowed as prayed and the arbitral award adopted as an order of the court on 21st June 2017.
 6. Aggrieved by the adoption of the award, A moved to the court vide a Notice of Motion dated 21st July, 2017 seeking enlargement of time to file an application to set aside the said arbitral award, review of the order adopting the arbitral award and entry of judgment and that the court does refuse to recognize the arbitral award.
 7. In its ruling delivered on 4th May, 2018, the court rejected the prayer to extend time for the respondent to challenge the award. However, the court reviewed and vacated the adoption of the award on grounds that the application seeking its adoption did not annex the original copy of the award, agreement or duly certified copies thereof.
 8. Having set aside the exparte orders of 21st June, 2017, parties were technically restored to the position they were before the application dated 12th May, 2017 was filed and determined.
 9. In view of the above ruling, the applicant sought leave of the court to file a supplementary affidavit to introduce the marriage contract (agreement) in support of the application of 12th May, 2017 in compliance with the ruling of 4th May, 2018. Upon the court granting leave to file a supplementary affidavit, the applicant was directed to serve the respondent with the application seeking adoption of the arbitral award.
 10. On 24th February, 2012, the respondent's advocate (Taib & Co. Advocates) intimated to the court that they had no instructions to proceed. They cited inability to reach their client who had made it impossible to access him as he had tight security. Subsequently, vide the application dated 17th February, 2012 the firm of Taib ceased to act for the respondent. The application was allowed on 18th March, 2021 and the court directed service to be effected upon the respondent in person. Despite every effort to serve the application physically upon the respondent, his security did frustrate the same. Service was however effected through his security personnel who had instructions to acknowledge service. Nevertheless, the respondent did not bother to file any response nor appear for hearing hence hearing of the application proceeded exparte.
 11. During the hearing, the applicant basically relied on her affidavit in support of the application dated 12th May, 2017 and the supplementary affidavit sworn on 28th February, 2021. The application was therefore not opposed. I have considered the application dated 12th May, 2017 and the affidavit and supplementary affidavit in support. There is no dispute that there is an arbitral award pending adoption in compliance with Section 36 (1) of the *Arbitration Act* No 4/95 which provides that;

“a domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37”.



12. There being no objection to the adoption of the award made on 12th December, 2015 and the applicant having attached certified copies of the award and the marriage contract (agreement), I have no option but to allow the Chamber Summons dated 12th May, 2017 in terms of prayer one and therefore adopt the award dated 11th December, 2015 as judgment of the court.

Order accordingly.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 9TH DAY OF JUNE, 2021

J. N. ONYIEGO

JUDGE

