



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

DIVORCE CAUSE NO. 5 OF 2016

MSR.....PETITIONER

VERSUS

NAB.....RESPONDENT

RULING

The petitioner and the respondent got married on 12.8.2008. The marriage was solemnised and celebrated at Malindi under Islamic Law. On 4.3.2016 the petitioner filed divorce cause No. 5 of 2016 seeking the dissolution of the marriage. The petition is based on grounds of cruelty and desertion.

The respondent filed a preliminary objection. The objection stipulates as follows: -

1. That this suit may prejudice, embarrass or delay the fair trial of the action for reasons that the jurisdiction of this Honourable Court ought to be exercised as an appellate court since shall arise determination of question of Muslim Law which can be amicably be addressed by the Kadhi's Court established to determine matters to parties who profess Muslim religion hence this petition be struck out.

2. It is otherwise an abuse of the process of the court that the marriage was formalized under Islamic sharia law and that at the time of marriage both the petitioner and the respondent confessed Muslim faith and that are subject to the Kadhi's Court Act Cap 11 which states that under section 5 that Kadhi's Court shall have and exercise the following jurisdiction, namely the determination of question of Muslim Law relating to personal status, marriage, divorce or inheritance in proceedings in which all parties profess the Muslim religion hence this petition be struck out.

Parties agreed to determine the preliminary objection first by way of written submissions. The respondent submits that the jurisdiction of this court ought to be invoked as an appellate court and not as the court of first instance since the marriage was solemnized under Islamic Law. By getting married under the Islamic Law, the petitioner impliedly accepted to be bound by the Kadhi's Court. Counsel for the respondent maintains that section 5 of the Kadhi's Act provides that Kadhi's Court has jurisdiction to determine questions of Muslim Law relating to personal status, marriage, divorce or inheritance in proceedings where all the parties profess Islamic religion. It is further submitted that there is another suit pending before the Environment and Land Court, vide ELC No. xx of 2016 involving the same parties. The dispute relates to Plot Number GEDE/KIREPWE [particulars withheld] that was purchased during the pendency of the marriage. Counsel for the respondent is of the view that both the dissolution of the marriage and the distribution of the matrimonial property should be handled by the Kadhi's Court.

Counsel for the respondent contends that section 3 of the Matrimonial Property Act, 2013 states that people who profess Islamic faith have the option of Islamic Law in relation to matters involving matrimonial property. The property is registered in joint names. The respondent seeks to have the divorce petition struck out.

On his part, counsel for the petitioner maintains that this court has original and appellate jurisdiction to determine both criminal and civil matters as stated under Article 165 of the Constitution. The petitioner was deserted by the respondent and she reverted to Christianity. She no longer subject herself to Islamic Laws and Procedures. Article 170 (5) of the Constitution provides that the jurisdiction of the Kadhi's Court is limited to situations where all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's Court. Therefore, for the Kadhi's to have jurisdiction, all the parties must submit themselves to the jurisdiction of the Kadhi's Court. Even if all the parties are Muslims but one does not submit himself/herself to the jurisdiction of the Kadhi's Court, then the jurisdiction of the Kadhi is ousted. It is submitted that this court has all the jurisdiction to hear and determine the divorce cause.

The preliminary objection is premised on the contention that marriage between the parties was solemnized under the Islamic Law and it should therefore be dissolved under that Law. Apart from the issue of divorce, there is the collateral issue of distribution of the property acquired during the marriage. The respondent maintains that under Islamic Law, if a woman wants to be divorced, she is supposed to buy the divorce from the husband and return all what belong to the husband.

The petitioner concedes that the marriage was celebrated under Islamic Law. A copy of the marriage certificate that was issued the following day after the marriage has been exhibited in the petition. The petitioner's contention is that she no longer professes the Islamic religion.

Section 5 of the Kadhi's Court Act, Cap 11, states as follows: -

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

Article 170 (5) of the Constitution provides for the jurisdiction of the Kadhi's Court in the following terms: -

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

Sections 71 and 72 of the Marriage Act states as follows: -

71. The dissolution of marriage celebrated under Part VII shall be governed by Islamic Law.

72. Where a Kadhi, sheikh Imam or person authorised by the Registrar grants a decree for the dissolution of a marriage celebrated under Part VII, the Kadhi, sheikh, Imam, Mukhi or authorized person shall deliver a copy of the decree to the Registrar.

Section 48 of the Marriage Act provides for Islamic Marriages. It states that Islamic Law shall only apply to persons who profess the Islamic faith. Under section 49, an Islamic Marriage shall be officiated by a Kadhi, Sheikh or Imam as may be authorized by the Registrar. The two sections form part VII as referred to by section 71 of the Act.

It is agreed that the marriage between the parties was celebrated under Islamic Law. In the current divorce petition, it is the wife who is seeking the divorce. The objection raises the issue of the

jurisdiction of this court to deal with the dissolution of an Islamic Marriage.

The wording of section 5 of the Kadhi's Court Act is to the effect that nothing in that section shall limit the jurisdiction of the High Court or subordinate courts in any proceedings which comes before it. In essence therefore, the jurisdiction of the High Court is not limited by the provision of section 5 of the Kadhi's Court Act. The jurisdiction of the Kadhi's Court is clearly stipulated under Article 170 (5) of the Constitution. Briefly, that jurisdiction is limited to four issues, personal status, marriage, divorce and inheritance.

Section 3 of the Matrimonial Property Act, 2013 (Act No. 49 of 2013) states as follows: -

“A person who professes the Islamic faith may be governed by Islamic Law in all matters relating to matrimonial property.”

My view on the above section is that it does not expand the jurisdiction of the Kadhi's Court as provided under Article 170 (5) of the Constitution. Section 3 of the Matrimonial Property Act only gives discretion to a person who professes the Islamic faith to have issues relating to matrimonial property governed by Islamic Law. No reference is made to the Kadhis Court under section 3. The effect would be that a dispute involving the matrimonial property of someone who professes Islamic faith can be determined by any other court provided that the basis of the determination is Islamic Law. Section 3 does not oust the jurisdiction of the Subordinate Court or High Court in determining matrimonial property disputes involving a Muslim.

The core of the dispute is the dissolution of the marriage. The prayers in the divorce petition only seeks the dissolution of the marriage. The issue is whether the marriage should be dissolved by this court or by the Kadhi's Court. Section 3 (4) of the Marriage Act states that parties to an Islamic Marriage shall only have the rights granted under Islamic Law.

Before a marriage is dissolved, the parties are deemed to be still married. It is the act of dissolution of the marriage which brings the marriage to an end. Dissolution of the marriage is done through divorce proceedings. The Black's Law Dictionary (9th edition) defines a **“divorce”** as the legal dissolution of marriage by a court. Before the marriage herein is dissolved, it is still being regarded as an Islamic marriage. The reverting of the petitioner to Christianity does not change the status of the marriage. The parties are therefore lawfully married under the Islamic Law as of now. Until the marriage is dissolved, the parties are deemed to be still married even if the marriage only exist on paper.

Given the fact that the petitioner converted to Islam and submitted herself to a marriage under the Islamic Law, I do find that it would be prudent if the issue of the dissolution of the marriage is handled by the Kadhi's Court. Issues relating to the dissolution of a marriage celebrated under Islamic Law shall be governed by Islamic Law as stated under section 71 of the Marriage Act. The fact that the petitioner no longer professes Islamic faith does not change the situation. The respondent can equally contend that he is a Muslim and does not wish to have his marriage dissolved under any other form of law other than the law it was solemnised.

With regard to the issue of the jurisdiction of this court to deal with marriages celebrated under Islamic Law, I do find that the High Court has jurisdiction to deal with the dissolution of such marriages. Divorce matters are civil in nature and the High Court has original jurisdiction to deal with civil disputes. The conferring of jurisdiction to the Kadhi's Court does not oust the High Court's jurisdiction to handle Islamic Marriages. Indeed, appeals emanating from the Kadhi's Court, whether the appeals deal with marriage, inheritance or divorce, are by law dealt with by the High Court.

Given the circumstances of this dispute, I do find that it would be prudent if the divorce is handled by the Kadhi's Court. I wish to categorically state that the Kadhi's Court shall only deal with the issue of dissolution of the marriage. Once the divorce is granted, the petitioner herein shall have ceased to be governed by Islamic Law. Section 3 of the Matrimonial Property Act shall not apply. Even if the respondent raises issues relating to property ownership in the divorce proceedings, the Kadhi should limit

himself to the issue relating to the dissolution of the marriage. The petitioner contends that she is the one who bought the property. The parties are already litigating before the ELC Court. That is the wrong forum as the issue involves property bought during the marriage. Issues relating to matrimonial property are dealt with by the High Court. Not all matrimonial properties involve land.

In the end, I do find that although this court has jurisdiction to determine the divorce petition, the dispute relating to the dissolution of the marriage should first be handled by the Kadhi's court. Doing so would not be subjecting the petitioner to Islamic Law. Her marriage is yet to be dissolved and the same was contracted under the Islamic faith. The petitioner should exit from the marriage through the same door she entered into the marriage. The presumption was that the marriage was going to last forever. Now that the petitioner wants to exit, she should exit through the Kadhi's Court so that the Kadhi can issue the divorce and sign the divorce certificate. Under section 72 of the Marriage Act, the Kadhi is expected to deliver a copy of the decree to the Registrar of Marriages.

I do find that the preliminary objection is merited and is hereby upheld. The divorce petition herein is hereby struck out. The petitioner to file a fresh divorce cause before the Kadhi's Court. Each party shall meet his/her costs.

Dated and delivered in Malindi this 21st day of February, 2017.

S.J. CHITEMBWE

JUDGE