

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APP. NO.8 OF 2013

T S J.....APPLICANT

VERSUS

S H S R.....RESPONDENT

RULING

The Applicant filed an application pursuant to the provisions of **Section 36** of the **Arbitration Act** and **Rule 4 of the Arbitration Rules** seeking to have the award made by His Highness Prince Agha Khan Shia Ismailia Conciliation and Arbitration Board for Nairobi (the Board) adopted as a judgment of this court. The Applicant further prayed that the Respondent be compelled to pay to the Applicant the sum of Kshs.250,000/- being the monthly outstanding spousal maintenance due to the Applicant. The application is supported by the grounds stated on the face of the application and the annexed affidavit of the Applicant. The application is opposed. The Respondent filed a replying affidavit in the opposition to the application.

Prior to the hearing of the application, counsel for both parties agreed to file written submission in support of their respective client's opposing positions. The written submission were duly filed. The facts of this application are more or less not in dispute. The Applicant and the Respondent were on 2nd May 1992 married in Nairobi. The marriage was celebrated under the Ismaili Religious Rites. According to the Applicant, prior to the celebration of the said marriage, both the Applicant and the Respondent swore an oath of allegiance confirming that they were members of Shia Imami Ismaili faith. They further confirmed that they were followers of their spiritual leader His Highness the Aga Khan Shah Karim Al-Husseini. It was in accordance to this declaration that when a disagreement arose between the Applicant and the Respondent in respect to their marriage, the dispute was referred to the Board for the purposes of resolution. It was apparent that although the Respondent initially submitted to the jurisdiction of the Board, before the hearing of the case, he withdrew from the arbitration process. Nevertheless, the Board proceeded to hear the case and rendered its award. Of importance to this application is the fact that the Board proceeded to dissolve the marriage. It also made certain orders relating to custody and maintenance of the children. It also proceeded to make certain determination regarding the division of matrimonial property.

The issue that arose for determination for this court is whether the Board had jurisdiction to grant the order of divorce. The further issue for determination is whether the Board had jurisdiction to determine issues related to custody and maintenance of children. According to the Applicant, the Board had jurisdiction to grant the orders that were made in the award because both the Applicant and the Respondent had, by virtue of their marriage under the Ismaili faith, submitted themselves to the authority of the Board. The Applicant urged this court to consider the said award in a similar fashion to an arbitral award made pursuant to an arbitration agreement as envisaged in **Section 3(1)** of the **Arbitration Act**. On his part, the Respondent argued that the Board did not have jurisdiction to grant a divorce because it was not a legal body recognized by the law to issue such orders.

This court has carefully considered the rival submission made by the parties herein in that regard. It was clear to this court that the Board did not have jurisdiction to grant an order of divorce in proceedings commenced under Alternative Dispute Resolution Mechanism. The Ismailis are Muslims. However, they conduct their religious affairs differently to other adherents of the Islamic faith. They have established a

Board which is intended to address any dispute between members of the Ismaili faith. The issue for determination by this court is whether that Board has jurisdiction to perform functions which are within the jurisdiction of the ordinary courts or the Kadhis' Courts. The Applicant argued that since the Respondent bound himself by agreement that he would submit to the jurisdiction of the Board, the Respondent cannot subsequent turn around and refuse to be bound by the decision of the Board.

That may well be the case. However, the Board can only deal with matters which are not within the exclusive jurisdiction of either the ordinary courts or the Kadhis' Courts. Under **Article 170(5)** of the **Constitution**, the Kadhis' Courts are granted jurisdiction to determine 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 the jurisdiction of the Kadhis' Court. The Applicant cannot rely on the **Arbitration Act** in support of her assertion that the court should adopt the award because there was an arbitration agreement. Although it is not specifically stated in the **Arbitration Act**, this court is of the view that disputes envisaged to be resolved by arbitration under the said Act are essentially disputes of a commercial nature and not of a personal nature as is the case in the present application. This court holds that it is only the ordinary courts or the Kadhis' Courts which has jurisdiction to hear and determine matrimonial disputes which may result in the granting of an order of divorce. The Board had no jurisdiction or power to grant an order of divorce purportedly pursuant to an arbitration agreement. Similarly, the Board did not have jurisdiction to make orders of custody and maintenance of children. That jurisdiction is specifically reserved to the Children's Court under **Section 73** of the **Children Act**. This does not however preclude a body such as the Board from arbitrating over disputes relating to custody and maintenance of the children where both parties submit to the authority of such a body by agreement.

In the premises therefore, this court holds that the arbitral award made by the Board on 15th September 2012 is null and void and is not capable of enforcement as it purported to grant an order of divorce which is within the exclusive jurisdiction of either the ordinary courts or the Kadhis' Courts. The Board did not have jurisdiction to grant orders relating to custody and maintenance of children. That jurisdiction is within the exclusive jurisdiction of the Children's Court as established under the **Children Act**. The application filed by the Applicant dated 18th February 2013 is therefore dismissed with costs to the Respondent. The orders granted by the Board cannot be enforced because the Board exceeded its jurisdiction when awarding the same.

DATED AT NAIROBI THIS 5TH DAY OF JUNE 2014

L. KIMARU

JUDGE