REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 927 OF 1977

M .....APPLICANT

VERSUS

M P.....RESPONDENT

JUDGMENT

This matter bears flavours of procedure, jurisdiction and conflict of laws.

It is an application by a wife divorcee praying , in the main, for the Court's permission to take the twenty-month old son, the issue of the marriage, outside the jurisdiction and (in addition) for maintenance for herself and the child at the rate of Shs 2000 per month from April 1977 and that the husband pays her the Shs 10,000 *haq mehr* which he undertook to pay to her at the time of the marriage and which he has failed to pay.

The application has been made by undesignated chamber summons and without reference to the statutory authority under which it has been brought; and Mr Vohra, counsel for the husband, made a point of this although refraining from specifically pressing any argument tending to have the application deemed improper or misconceived and struck out.

The nature and history of the entire cause will reveal why this has perhaps been so. But Mr Khaminwa for the applicant rested his views on what I understood to mean the inherent jurisdiction of the court, in that the divorce was wholly or in part dealt with by this Court. I say "wholly or in part dealt with" because:

> (1) The parties both of the Sunni sect were married under Mmohamedan law in November 1975 and differences having arisen between them the applicant's advocate filed a plaint in this court (Civil Case 927 of 1977) praying for the dissolution of the marriage, maintenance and custody of the child and payment of the *haq mehr*
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> (2) With defence filed and at the hearing of summons for directions before another judge, the record shows as follows:
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> > Mr Vohra: I have made objections as to the Court's jurisdiction and as to the cause of action.
> >
> > I wish to apply by way of notice of motion to strike out the plaint. The summons for directions should be stood over so that I have time to make the application where it will be decided whether or not the matter can go to hearing.
> >
> > Mr Chakava: "No objection"

Order: By consent ...

This took place on 14th July 1977 and I take the above extract from the record of proceedings to mean exactly what is stated.

> (3) It however transpired that there was never any application for or determination on motion to decide the fate of the filed plaint and defence and in particular whether this court has jurisdiction to be seized of the litigation in any form.
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> I make this observation because the objection in the defence referred to at hearing of summons for direction is:
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> (4) The claim by the [applicant] for the dissolution of the said marriage performed under Mohamedan law (the parties belonging to the Sunni sect) cannot be entertained by this court as the [applicant] wife is not entitled under the basic Mohamedan law to judicial divorce on the grounds of cruelty as alleged in the plaint which grounds are hereby denied by the [respondent].

Despite this plea of no jurisdiction and the advocate's declaration to the Court that proceedings on motion would be forthcoming it was not done and instead this is what next appears on the record.

> Judgment
>
> 14th June 1978
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> By consent judgment entered in favour of the [applicant] in terms of consent letter dated 8th December 1977 and filed in Court on 22nd December 1977.
>
> Sgd .....
>
> Deputy Registrar

There is no doubt that what now transpired in the court's registry is effectual in law to terminate the proceedings so far as they had gone; but the present application raises a curious state of affairs.

The consent letter is as follows:

1. **M P**[the respondent] son of **M N** do and hereby divorce his wife **M** [the applicant] daughter of the late **M S** by pronouncement of "*talak"* three times in succession in absence of witnesses in accordance with Mohamedan law custom and rites as applicable in the Republic of Kenya which divorce has been granted by him at the instance and request of the said **M** daughter of the late **M S** and become *talak-i-bain* on execution of the document and such divorce was duly communicated to the said **M** daughter of the late **M S**.
2. The [applicant] be and is hereby given the custody, care and control of Mohamed Nabil the male child of the marriage until he attains the age of seven years in accordance with the Shariat.
3. The [respondent] will have access to the said child of the marriage on the second and fourth Saturday and on the first and third Sunday in each month as well as on 5th November each alternate year from 10.00 am to 7.00 pm. In 1978 the [respondent] shall have access to the said child on 5th November as well as on the two Idd festivals in 1978. The [respondent] will have in addition access to the said child of the marriage each Wednesday from 6.30 pm to 8.30 pm.
4. The [applicant] will not remove the said child of the marriage from jurisdiction of this Court without its permission.
5. The [respondent] do pay Shs 300 per month by way of maintenance for the said child of the marriage, the first of such payment to be made on 1st December 1977 and thereafter on the first day of each succeeding month until the child attains the age of three years with liberty to either party to apply thereafter.
6. In the event of remarriage of any party the other shall have the right and liberty to apply to this

Court for any variation of the order to the custody and maintenance of the said child of the marriage in accordance with Mohamedan law and custom applicable to the Sunni sect.

7. The [applicant] do hereby relinquish all claims of whatever [nature] past, present or future in relation to the marriage and its dissolution.

I have deliberately emphasised the last paragraph. The document was signed by the parties, two witnesses and the two advocates acting for the parties. I can only invite the reader of this ruling to read that paragraph then paragraphs 6, 3 and 4, in that order.

In my humble opinion the record of proceedings up to the present application depicts a flirtation with the jurisdiction of this Court and a suspensory reliance on it. In plain terms in Civil Case 927 of 1977 the parties resorted to their personal law and terminated the court proceedings, making it clear that they might at some future date resort to this court's jurisdiction if and when stated circumstances arise.

It is quite obvious to me, as urged by Mr Vohra advocate for the respondent, that paragraph 7 by its terms may leave no room for the present application.

The applicant is a British citizen and the respondent a Kenyan citizen; and, the divorce having been effected by the consent agreement expressed to have been contemplated as being in accordance with Mohamedan law, the following portion of the agreement is of importance in the application:

> The [applicant] ... is ... given the custody, care and control of Mohamed Nabil ... the male child of the marriage until he attains the age of seven years in accordance with the Shariat.

This coupled with the restriction of non-removal of the child from the jurisdiction without the permission of the court is in direct conflict with the paragraph 6 and, with the greatest of respect to the draftsmen of the agreement, my firm view is that the jurisdiction of the court ought not to be treated as a matter of convenience.

I like to express my humble views on problems as these in the simplest of language: "There being no rules as yet made by the Chief Justice for the assimilating of the practice under the Matrimonial Causes Act with the Mohamedan Marriage, Divorce and Succession Act, the cause and contentions of the parties cannot freely and correctly be made to blow hot and cold on the jurisdiction of this court."

Indeed the history of the proceedings demonstrates a hide-and-seek attitude, ie: "If and when we in fact need or think it convenient to recognise the jurisdiction of the court we approach the Court; but so long as we do not find such step necessary, we will plead Mohamedan law to the hilt; and at all events if and when the need arises, we have only to remind the lawgivers and the judiciary that we are within the jurisdiction; and we will or must be heard".

I honestly do not think that this is playing fair with the jurisdiction of the court which can be heard to say: "If I am good enough for breakfast, I should be good enough for dinner".

The marriage between the parties took place less than three years ago, and the child is about one and half years old; and the averments of the applicant's affidavit, if true, disclose a most distressing and distasteful state of affairs which cries out for the intervention of those institutions which undertake the prevention of cruelty to and the housing of the destitute.

She is a British subject and by a letter from the office of the British High Commissioner, Nairobi, the further processing of her application to settle in England has been held up pending this Court's decision whether or not she is permitted by the Court to take the child out of the jurisdiction.

No doubt, if my readings of current British Commonwealth affairs serve me correctly, her British citizenship might well have been the basis on which the family of three might have avoided the touchy question of people of their origin settling in England. The gist of the present problem is: will she leave the infant behind, thereby relinquishing his judicially-affirmed custody and perhaps seek the assistance of the

Court to review the question of custody if either party remarries before the child attains the age of seven years, or must this Court grant her permission to take the child with her?

As I have, perhaps insufficiently, already intimated, this matter touches a certain aspect of international law, particularly as the assimilating rules of the Mohamedan Marriage, Divorce and Succession Act have not yet been made, thereby leaving occasions of resort to the jurisdiction of this Court a matter of will or caprice.

If the assimilating rules were already in existence or the application were made under the Guardianship of Infants Act, I incline to the view that I would have found no difficulty in following Savigny's theory and assume regularity in differing systems of law and have treated the application with reference to sections 8, 10, 11 and 17 of the Act.

But I am forced to consider whether or not there is a foreign element in the matter and this appears clearly so by section 2(1) and (3) of the Mohamedan Marriage, Divorce and Succession Act. I say a "foreign element", ie personal law, because there are no assimilating rules as I have already pointed out; and, to put it in a compendious form, this is a matter of religious-social-legal relations.

At the bottom of the whole matter before the Court is a contract of marriage and I think it is correct to say that, in the field of conflict or absence of rules, where the validity and future of contracts are in issue, it is useful and proper to resort to that system of law with which the transaction is closest connected.

I should say in passing that I do not consider that I am called upon to deal with the question as to how far, if at all, a person within the jurisdiction should be permitted to choose his law. This has been answered, wholly or in part, by the Mohamedan Marriage, Divorce and Succession Act as opposed to kindred statutory provisions.

The resulting position in this partial High Court case is that the parties in their marriage dissolution proceedings contracted out of relevant existing statutory provisions and resorted to their personal law, to which the legislature has given statutory recognition for application within the jurisdiction.

It has been urged by Mr Khaminwa for the applicant that, since this Court has been seized of the matter at the institution of the divorce proceedings and accepted the personal law divorce agreement as the culmination of those proceedings, this Court is bound to countenance this application and treat its merits or otherwise as it would most other cases.

I may be wrong but I do not agree with this suggestion because (1) on the principle *expressio unius, exclusio alterius*, the Legislature has specifically treated [such] marriages as this by the special Act (ie the Mohamedan Marriage, Divorce and Succession Act); (2) in the provisions of the Act specific distinctions exist in respect of the validity, etc, of these as opposed to other statutory recognised marriages; and (3) reflecting upon the contractual nature of the entire transaction between the parties, the Court would be seen in effect to be asking the legislature to be walking back (as it were) upon the self-same reasons for the exclusionary reasons for the special statutory provisions if the adjudications upon incidents arising in and from the exempted field of affairs were to be treated in a general manner.

I say without hesitation that in my humble view the better and precautionary step would have been to ask advocates for the parties to withdraw the plaint and defence filed in this Court or formally to declare the High Court proceedings closed, instead of recording the written personal law consent agreement as a judgment in the case.

It is a moot question, I think, whether or not the definition of "suit" (ie "all civil proceedings commenced in any manner prescribed") necessarily means that commencement *per se* connotes a suit, particularly where (as in this case) the contentions and rights of the parties were determined out of Court and in accordance with their personal law, evidence on which was never here adduced.

At all events I think that I am correct in considering this matter from its contractual aspect. There is

nothing before the Court to cause the consent agreement to be termed a compromise. I prefer to treat it as mere termination of a contractual relationship between parties who are of capacity. They have executed the agreement with specific reference and regard to the tenets of their common religious rules and, much as I am inclined to the view that the inherent jurisdiction of the court may reach out in aid of any infant whatever within the jurisdiction, such a step appears inappropriate in this case, as the agreed impositions and restrictions in respect of the custody and movement of the infant have been made within the framework of the personal law of all three residents within the jurisdiction.

There is also the point made by Mr Vohra that the infant's father is a Kenya citizen; and as to this weighty considerations arise.

Mr Khaminwa urged that the applicant was emotionally upset at the time of executing the consent agreement. That might well have been so; but there is nothing before this Court to afford her the effect of a plea *non est factum.*

In my judgment, and for the reasons considered above, the application ought not to be granted and it is accordingly dismissed with costs to the respondent. An appeal would be appreciated for the future guidance of this Court. Leave to appeal granted.

Application dismissed with costs. Leave to appeal.

Dated and delivered at Nairobi this 18th day of September 1978

C.H.E MILLER

JUDGE