



REPUBLIC OF KENYA



KENYA LAW
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**In re FAO (Applicant) (Miscellaneous Cause E098 of 2024)
[2024] KEKC 5 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEKC 5 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT MOMBASA
MISCELLANEOUS CAUSE E098 OF 2024**

AH ATHMAN, CK

MAY 2, 2024

**IN THE MATTER OF THE KADHI'S COURT ACT CAP 11 LAWS OF
KENYA AND RULES 9 (1), 20 (2) OF THE KADHI'S COURT RULES, 2020**

RULING

1. The Notice of Motion application dated 5th February, 2024 brought under the provisions of article 159, 170 of the *constitution* of Kenya (2010), section 5 of the *Kadhi's court Act*, Cap 11 Laws of Kenya, rules 9 (1) and 20 (2) of the *Kadhi's courts rules of practice and procedure* (2020) seeks the following orders:
 - i. What is the effect of the verbal three talaks and whether the same is enough for an irrevocable divorce
 - ii. Does the absence of a divorce certificate invalidate a divorce in Islam?
 - iii. What evidence is necessary where a woman, at the time of marriage, states that she has consent to marry on the basis of having been divorced.
 - iv. What rights does the wife to a deceased person have under succession?
 - v. What is the Islamic ruling on the rights of a widow in Islam
 - vi. What financial support and benefit should she obtain pending the determination and confirmation of the succession process?
 - vii. What is her entitlement under the estate?
2. The applicant deposed that she was married to AAN at the time of his death, that his estate is before court in succession Cause No. E501 of 2022 where she is not listed as a beneficiary. She deposed that it is alleged she had no capacity to enter into marriage to the deceased having been previously married to another husband. She averred that she had been divorced by three talaks by her previous husband and therefore had capacity to marry making her second marriage to the deceased valid.



3. An advisory opinion should only deal with uncontested issues of law. It should not be on an issue that depends on the establishment of facts. The opinion could affect the other party who are not party to these proceedings denying them their constitutional right to fair trial. They have a right to participate in any matter whose decision may affect them. Whether in these proceedings or the other matter, the other parties ought to be made parties to argue to enable the proper establishment of facts. This is opinion is made on the assumption that the fact of pronouncement of the talaks is not contested.
4. Talak as defined by *Hamilton in Hidayat* vol. 1 at page 200 ‘signifies the dissolution of marriage as the annulment of its liability by the use of certain words.’ Divorce is the most abhorred by the Almighty Allah of legal issues. It has to be exercised as a last resort, with restraint and upon serious consideration. Q.2.228 provide:
‘The divorce may be pronounced twice, then keep them in good fellowship or let them go with kindness’
5. Under Islamic law, the husband has the original jurisdiction to effect divorce. He does not need leave of court or any organisation to exercise this inherent legal right. upon pronouncement by the husband, divorce is effective. It should be written, dated and witnessed to authenticate it. Part IX, Section 57 [1] of the *Marriage Act* No. 4 of 2014 requires it be registered within reasonable time.
Narrated Abu Huraira [R.A.] that the Prophet [PBUH] said: Three issues are considered effective upon pronouncement, whether one is serious or in jest: marriage, divorce and raj’at [returning wife to marriage contract after divorce before expiry of edda period in a revocable divorce]. Reported by the five Imams of Hadith except Al Nasa’i.
6. . Section 372 of the KCBB states:
“Once uttered by the husband through the express pronouncement, divorce becomes effective. However, in using symbolic words, the husband must have intended the divorce for it to become effective.”
7. . S.C. Sircar in ‘Marriage, dowry, divorce, Al Sharia Sunni and Imamiyah’ at page 389 states:
‘The divorce of every husband is effective if he be of sound understanding and mature age, but that of a boy or a lunatic or one talking in his sleep is not effective.’
8. The Muslim husband has two opportunities to take back his wife in marriage after divorce. Upon the third divorce the marriage is irrevocable. S.C. Sircar, in ‘al – Shari’a, Sunni and Imamiyah code’ at page 383 states:
‘Repudiation or divorce is ether revocable (raj’i) or irrevocable (ba’in). In the ahsan or best from, the single repudiation that is pronounced is revocable before the completion of the iddat, after which it is irrevocable or irreversible; in other forms, the first and second are revocable, with respect to an enjoyed wife, and the third is always irrevocable.’
9. The court’s duty where the husband effected his right to divorce is to ensure it met the requirements of the law. It has no powers to overturn it if it met the legal requirements. In *Asha Bibi v. Kadir Ibrahim Towther* (1910) ILR 33 Mad 22, His Lordship Justice Munro and Abdul Rahim, JJ at page 25 held:
‘No doubt an arbitrary or unreasonable exercise of the right to dissolve the marriage is strongly condemned in the Qur’an and in the reported sayings of the prophet (hadith) and is treats as a spiritual offence. But the impropriety of the husband’s conduct could in no way affect the legal validity of a divorce duly affected by the husband.’



10. Divorce is therefore effective upon pronouncement and / or writing by the husband and communicated to the divorced wife. It is the duty of the husband to register the divorce and be issued with a divorce certificate. The divorced wife could equally demand a divorce certificate as a matter of right and the court may issue one on application, if satisfied it was legal and valid. The procedure for confirmation of divorce is provided for under the provisions of section 152(1), (2) and (3) of the *Kadbi's court Rules of procedure and practice* (2020). It provides:
- '(1) A husband may divorce his wife in accordance with Muslim law.
 - (2) Within reasonable and practicable time after any divorce, a party to a divorce shall apply by way of an application to the court in the area in which the divorce took place with all necessary particulars and shall pay to the court the prescribed fees and the court shall verify on whether the unilateral divorce issued by the husband is valid in accordance with the Muslim school of jurisprudence of the parties and upon satisfaction forthwith register the divorce and issue a certificate of divorce; Provided that in the case of revocable divorce no certificate of divorce shall be issued until after the expiration of period of 'Idda.
 - (3) The court shall retain the role of verifying whether the unilateral talaq meet the standards of Muslim law.'
11. Scholars have differed on verbal three talaks pronounced once, whether they are counted as one or three. In any case where a husband pronounces talak and after expiry of three menstrual cycles (approximately 90 days) or delivery of pregnancy whichever is earlier, the marriage becomes minor irrevocable if it was the first or second divorce. This means the lady is legally free to be married to another husband upon satisfaction of the other requirements.
12. Where a marriage officer conducts or registers a marriage of a divorced woman, he is obligated to be furnished with evidence of divorce in fulfillment of the conditions of the registration of divorce. Where no divorce certificate is available, a divorce note and / or divorce affidavit is required. The divorced wife could also approach court on application for confirmation of divorce supported with affidavits and / or witnesses to the divorce. The court will, if satisfied, issue a divorce certificate. If none is issued, the divorced wife becomes a claimant on the issue whose evidence has to be tested under oath and cross-examination.
13. A widow is entitled to one-fourth (25%) of the estate if the deceased was not survived by any child and was the only wife at the time of his death. If he was survived with a child, the wife is entitled to one-eighth (12.5%) of the estate if she is the only wife. If the deceased is survived by more than one wife, they all share the one-eighths of the estate under Q.4.12
- 'In that which you leave, your (wives) share is a fourth if you leave no child; but if you leave a child' they get an eighth of that which you leave after payment of legacies that you may have bequeathed or debts.'
14. Upon death of propositus, the estate does not stay in abeyance it devolves automatically to heirs in their respective shares. The heirs become joint proprietors or owners of the estate in specific but undivided shares. All heirs should be given funds for the sustenance from the estate requisite with their respective shares or same be deducted from their shares during final distribution of the estate. M.M. Khan in 'Islamic Law of Inheritance' at page 30 states:
- 'Under Islamic law on the death of an owner, his / her heirs at once become entitled to specific shares. Some of them or all may not actually divide the property and continue managing jointly. Such arrangement unlike Hindu law, does not create joint tenancy or joint



family. They are only tenants in common owning well defined and specified shares. They can actually and physically separate and take possession of their specific shares, any time they like, without any technical or legal formality before actual separation and division. If any such heir dies his / her undivided but specific interest devolves on the heirs of the deceased and is not taken by the surviving co-heirs' these heirs have exclusive rights of possession, use and enjoyment as well as alienation without consent or concurrence of the other heirs.

DATED AND DELIVERED AT MOMBASA ON 2ND DAY OF MAY, 2024

HON. ABDULHALIM H. ATHMAN

CHIEF KADHI

