



AM v YOA (Divorce Cause E122 of 2024) [2024] KEKC 16 (KLR) (13 June 2024) (Judgment)

Neutral citation: [2024] KEKC 16 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT MOMBASA
DIVORCE CAUSE E122 OF 2024**

AH ATHMAN, CK

JUNE 13, 2024

BETWEEN

AM PETITIONER

AND

YOA RESPONDENT

JUDGMENT

1. The parties both Kenyans from Mombasa worked for gain in the Kingdom of Saudi Arabia. The respondent, a documented worker, worked in Riyadh while the petitioner, an undocumented work initially worked in the Holy city of Mecca then moved to Riyadh where he met the respondent, a married Muslim but estranged with his wife. According to the respondent they did a ‘misyar’ marriage to allow them live together as husband and wife. They are not blessed with any child from their wedlock. The respondent returned to Kenya and the couple had an arrangement where the petitioner would transport consignment of cargo to him through his respondent’s brother. Several consignments were successfully sent, they were goods for trade for the couple. The petitioner sent the last consignment through ‘Zainco Door To Door Services worldwide freight forwarder’ and came back to Kenya herself. The ownership of this consignment between the parties is disputed. The transport company has declined to release the consignment to either party unless the issue is settled by court.
2. The petitioner prayed for orders for dissolution of the marriage, the respondent be ordered to keep off the consignment shipped from Saudi Arabia and surrender title deed No. Kilifi/ Chakama Phase II/ 264.
3. The petitioner claims the consignment is her, it was shipped by herself from Saudi Arabia and that the marriage has irretrievably broken down.
4. The respondent filed reply to the application but not the petition. However, he relied on the same in reply to the petition. He fully participated in the trial.



5. The issues in this matter are: divorce or validity of the marriage, ownership of the consignment with Zainco forwarders and title deed of the Chakama plot.
6. A valid marriage under Islamic law must fulfil five key requirements: consent of bride and her waliy, husband and wife free from legal impediments, offer and acceptance, witnesses and dowry. Al Sharbini Al Khatib in his Al Mughni al Muhtaj, a commentary on Imam Nawawi's al Minhaj at pg. 139 [Al Babi al Halabi edition] states:

‘The pillars of marriage are five: the offer and acceptance of marriage, husband, wife [free from any impediments to marriage], waliy [legal guardian] and [at least] two witnesses.’
7. Etymologically ‘Misyar marriage is a new term, unrecognizable in the traditional canons of Islamic law. It refers to a practice of an arrangement in which the husband does not stay continuously in one place with his wife but visits regularly at his discretion. As commonly understood, it describes a marriage contract under all conditions of Islamic marriage but the woman gives up some of her standard rights including accommodation, maintenance and the husband's overnight stay. Many Islamic scholars have rebuffed misyar marriage as illegal while others like Al Qaradawy have deemed it legal as long both parties to the marriage fulfil its terms and conditions. (Confabulating misyar marriages in Indonesia, Ratno, Onati Socio-Legal series, vol. 2 issue S1 (2022)). It has been discouraged by some scholars due to the stigma associating it with discarded wives and financially unstable husbands. The practice however, has enabled many women to enjoy legal marital life albeit with limited rights, due to high divorce rates, high number of unmarried women and reluctance of many men to enter marriage contract due to the associated high cost in some communities. The upshot however, is that if all the basic requirements of a valid marriage: bride and groom, guardian wali of the bride, an explicit offer ijab and acceptance qabul are met, the marriage is valid, otherwise it is not.
8. In this case, the respondent does contend they are not married while the wife asserts she was married. She provided photos of the celebration as evidence. It is not disputed they cohabited in Saudi Arabia as husband and wife. The respondent even attempted to get it documented in Kenya but was not successful due to lack of documentary proof. It speaks volumes of the character of the parties especially of the respondent if they entered a marriage just so they conveniently live together and enjoy conjugal rights. The respondent further informed court he made formal proposal to the petitioner's relatives and gave out goats as dowry but that the actual marriage has not been made. In his own submissions, he also agrees the marriage has broken down.
9. The respondent's position of on the marriage is conflicting. He even contends the petitioner is still married to her first husband. In any case, there is no legal proof of marriage. A marriage without wali' is not valid, the parties being Shafii Muslims. The ‘misyar’ marriage in my view, conducted without a recognized guardian of the bride, did not fulfill the requirements of a valid marriage under Islamic law. It is hereby declared invalid, nul and void.
10. The second issue is the consignment. The petitioner argued she shipped herself so it belongs to hers. The respondent argued the items in the shipment are his as he was the one employed in Saudi Arabi and the petitioner had no financial ability to buy the items.
11. The petitioner filed shipping document HBL No. 103198 from Zainco door to door services worldwide freight forwarder issued on 26th October, 2020. It indicates the shipper is Amina Mohamed and the consignee is Omar Hussein of Bondeni – Mombasa. It contains 23 pieces weighing 491 kgs. The contents of the items in the consignment are described as: (2) bags of 63 kg, (12) cartons of 200 kg, (1) drum 63 kgs, (10) dave 8kg, (1) wheel chair 16 kg, (1) sinia 2 kg, (1) sufuria 13 kg, (1) standing chair 5kg, (1) freezer, 112 kg.



12. The respondent filed copies of photos of alleged items in the consignment. He did not provide any receipts. He alleged the receipts are in the consignment but this claim was not supported by any evidence. It is not listed in the contents in the HBL form.
13. The burden to prove a claim rests with the claimant. Qur'an.27.64 provide:
'...say produce your proof if you should be truthful.'
14. Bukhari 3/213 [214], Muslim 5/128, Baihaki 10/252, Nasai 2/311, Ahmad 1/342, Abu Daud 3619, Al Tirmidhi 251 reported on the authority of Ibn Abbas [R.A] that the Prophet [PBUH] said: 'If people be given only on the basis of their claims they would claim the blood and property of others, but the [onus of] oath is on the defendant.'
15. This burden, the claimant must discharge positively and on the required standard. Article 1699 of the Majalla [the Ottoman Courts manual] provides: 'the legal objective of evidence is to prove a right. Consequently, purely negative evidence is inadmissible, as where someone states that a certain person did not belong to a certain person, or that someone is not in debt to a certain person'.
16. Analysing the evidence adduced before this court in this matter, the parties are married. They both under Islamic laws of marriage, continue to enjoy the same right to ownership. It had not been claimed that the consignment was matrimonial property. The petitioner produced positive documentary uncontroverted evidence in the form of the HBL shipment form. The respondent on the other hand, produced copies of photos of consignment that do not appear in the description of the items in the consignment and relies on negative evidence that the petitioner was financially unable to purchase the items. This negative evidence is inadmissible and insufficient to sustain the respondent's claim. Clearly on the weight of evidence which is the only tool of consideration in resolution of disputes before courts, the petitioner's case is stronger. She has discharged her burden of proof on a balance of probabilities. She is declared the legal owner of the consignment with Zainco forwarders. We hereby order and direct the Directors / Manager of Zainco door to door services worldwide freight forwarder to release the consignment HBL No. 103198 to AM the petitioner herein.
17. The third issue relates to the Chakama plot. Disputes of property ownership are within the exclusive jurisdiction of the Environment and Land court. The petitioner did not provide sufficient conclusive evidence on the issue. It is hereby dismissed.

Each party to bear its own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA ON 13TH JUNE, 2024.

HON. ABDULHALIM H. ATHMAN

CHIEF KADHI

In the presence of

Mr. Salim Kerrow, Court assistant

Petitioner

Respondent

