



FAS v AGH (Divorce Cause E016 of 2021) [2023] KEKC 12 (KLR) (25 January 2023) (Judgment)

Neutral citation: [2023] KEKC 12 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT KISUMU
DIVORCE CAUSE E016 OF 2021
JT KUNYUK, PK
JANUARY 25, 2023**

BETWEEN

FAS PETITIONER

AND

AGH RESPONDENT

JUDGMENT

1. Before this court is a suit filed by FAS herein after the Petitioner seeking among other orders dissolution of her marriage to AGH, return of investments during the marriage, eddah maintenance and refund for the educational and health expenses on the two issues of marriage.

The Petitioner's Case

2. The Petitioner's case is that they married under the laws and the rules of Islamic law and in the year 1999 and they established their home at Kaloleni, Kisumu where the Respondent's parents resided. The Petitioner got employed afterwards and she was convinced to move and rent a house way from the Respondent's parents. They lived in Nubian, Pembe Tatu, Migosi, Kenya-Re and now Milimani where the Petitioner still resides.
3. The Petitioner submits that she invested in a number of projects with the Respondent through her salary and the loans she took from various facilities. First among these is a shop at Jubilee Market where she advanced her 6 months' salary to the Respondent to establish the shop. The Petitioner accuses the Respondent of running down the shop. Unperturbed by his actions and driven by the belief that he had business potential, the Petitioner took a loan from Mwalimu Sacco which she advanced to the Respondent in order to build and re-stock the shot at Jubilee Market. Unfortunately for her the Respondent instead rented out the premises to a third party and he has since been collecting rent of about Kshs. 7,000 per month from the premises.
4. Yet again, the Petitioner did not give up on him. She took a Kshs. 3,000,000 loan from her new employer the County Assembly and advanced Kshs. 900,000 to the Respondent in order to foresee the



erection of new rental units at Plot 96 Kaloleni which belonged to the Respondent's family and which land had been a subject of litigation in which both parties herein were involved in defending. This time, and in order to avoid frustrations in the investments, the parties herein resolved to have a joint account in which the monthly rent of Kshs. 70,000 collected by the respondent was deposited. This account was to cater for the family's house rent, electricity, water and education bills for the children.

5. The Petitioner argues that instead of depositing the money in the joint account as agreed the Respondent used it for personal gain and the Petitioner was left to cater for those bills on her own. She singlehandedly worked hard to repay the loans, pay land rates, cater for children education from kindergarten to university and all other needs.
6. The Petitioner further submits that she incurred Kshs. 292,000 and Kshs. 660,000 as costs for taking the two issues of marriage to [Particulars Withheld] High School and [Particulars Withheld] High School respectively. Not forgetting the Kshs. 200,000 she paid for insurance policy for the children. There are also other expenditures enumerated by the Petitioner where there was no assistance of the Respondent. Neither did he provide basic needs nor did he contribute to parental responsibilities.
7. What irks the Petitioner is that with all the struggles she had, the Respondent went ahead and married another wife secretly and has since abandoned the matrimonial home. This marriage according to the Petitioner has made her exploited, disrespected, overburdened and exhausted.
8. Based on these submissions, the Petitioner prays for dissolution of marriage, payment of Mut'ah compensation and eddah maintenance, return of her investments and compensation for singlehandedly educating her children.

The Respondent's Case

9. The Respondent seeks dismissal of the Petition as the Petitioner has, according to him failed to prove her claim against the Respondent on a balance of probabilities. First because there was a 2004 Divorce Cause in the Kadhi's Court of Kisumu in which the Court granted Divorce. There was no evidence of a new marriage after the parties reconciled and therefore there existed no marriage to be dissolved. Secondly, there was no evidence of desertion and cruelty.
10. The Respondent further questions the invocation of this court to handle investment in marriage. He further asserts that the children are now adults in University and that he has been committed to their cause.
11. The Respondent prays for dismissal of the Case and return of his personal documents held by the Petitioner.
12. The Respondent asserts that the main issue that prompted the case was that he took another wife and the Petitioner was not happy about it.

Issues for Determination

13. The parties, with the assistance of their advocates were able to agree on the following questions for determination: -
 - i. Whether the marriage between the petitioner and the Respondent should be dissolved.
 - ii. Whether the Respondent should maintain the Petitioner, if divorce is granted.
 - iii. Whether the Respondent should maintain the children of marriage.



- iv. Whether the Respondent refund the expenses the Petitioner spent on the Children's education, health.
 - v. Whether, the two parties made any financial investments in any family business and if so, what is the investment made and whether either is entitled to a refund on the investment.
 - vi. Whether the Petitioner should surrender to the Respondent all the Respondent's documents in the custody of the Petitioner with respect to all the properties owned by the Respondents.
14. On the question of dissolution of marriage, the Petitioner relied on the grounds of desertion, failure to maintain and cruelty. The Petitioner led evidence on how the Respondent deserted the matrimonial home in Milimani after marrying another wife. She also argued that the Respondent had failed to provide maintenance to her and her children and she's all along shouldered the responsibility of maintaining the children. She however did not pursue the ground of cruelty.

The Respondent objects to the dissolution of the marriage for the reason that with the divorce issued in 2004 by the Kadhi's Court, the parties did not come back to court to renew their vows hence there was not marriage between the parties that should be dissolved. He also disputed the grounds of desertion due to what he alleges as failure by the Petitioner to indicate the period of desertion and asserts that he has been visiting the Petitioner and has been educating the children to University.

15. It was submitted during hearing that the Respondent married the second wife in the year 2019 and subsequently left the matrimonial home. A husband who has married another wife does not stay away or live separately with the other wife to the detriment of the first wife unless it is proven that the first wife's hostility to him was so pronounced that his only option was to flee the matrimonial home. Otherwise, he would be guilty of desertion as espoused by the Quran in chapter 4 verse 129

[Falaa tamiiluu kullal mayli fatadharuuhaa kal mu'allaqah]

“But do not incline completely (toward one) and leave another hanging (in suspense)”.

16. Further, there is no requirement under Islamic law that the parties whose marriage was dissolved by a court should approach the court for renewal of vows after reconciliation. As I observed in *re JLA* [2020] eKLR in the application seeking an advisory on re-marriage after dissolution, judicial dissolution by a court can be considered a minor irrevocable talaq (baynuunah sughraa) in which the parties can re-marry by entering into a new marriage contract. Section 49 of the *marriage Act* recognizes a Kadhi, Sheikh or Imam as person authorised by *the Act* to officiate Muslim Marriages. It follows therefore, that the re-marriage between the parties herein was valid as there was no requirement to have it exclusively officiated by a Kadhi.

17. The fact that the parties have not been able to reconcile since 2019 points to the irretrievable breakdown of this marriage. The Quran exhorts Muslims to explore mediation but the parties to date have not been able to exercise that option:

[wa in khiftum shiqaaqa baynihimaa fab'athuu hakaman min ahlihii wa hakaman min ahlihaa in yuridaa islaahan...]

“If you fear a split between the two, then appoint an arbiter from his relations and arbiter from her relations, if they desire reconciliation...”

With desertion proven, and the irreconcilable differences between the parties, this marriage stands dissolved.



18. It suffices to add that the only evidence the Respondent has for providing maintenance is that of November, 2022 that arose out of this petition and the interim orders given. That therefore means that without the intervention of the court, the Respondent would not be in a position to prove his maintenance of the spouse and children.

19. On the issue of whether the Respondent should maintain the Petitioner upon divorce, the Respondent in the final submissions chose not to contest the issue since according to him, the amount of maintenance is recorded in the nikahnama, the marriage certificate. To me the Respondent seems to conflate the payment of Mahr with maintenance. It was submitted by the Respondent during the hearing that the Mahr he paid was Kshs. 20,000 and the balance is Kshs. 20,000. Mahr is a right upon marriage and the Respondent is required to pay the balance to the Petitioner.

Maintenance however, is a different matter. A divorced woman is entitled to eddah maintenance for the 3 months after the issuance of a declaration of divorce. That is the law according to Quran 2: 228 and it does not matter the manner of divorce whether it be a unilateral declaration by the husband, a Khul' initiated by the wife or a declaration by the Court. That's the opinion of a majority of Muslim jurists.

The other type of maintenance is a one off consolatory gift called mata'a or Mut'ah which the husband advances to the wife as a compensation especially for unilateral declaration of divorce by the husband. Muslim jurists' opinion is divided on whether it is obligatory or not. Courts in other jurisdictions have used it as an equitable remedy paid by the affluent according to his means and the poor according to his means (Quran 2: 236). Courts therefore have the discretion to award it and the quantum thereof.

In the instant Case, the Petitioner claims that the Respondent should pay both the eddah and Muta'ah maintenance since the husband earns, according to her at least Kshs. 400,000 per month from his rental business, dog sale business and other properties. We shall revert back to make a decision on this after assessing the other questions connected to this.

20. On the question as to whether the Respondent should maintain the children, the Respondent also chose not to contest the issue as he correctly argued that Islamic law commands fathers to maintain their children. The Petitioner on the other hand asked the Court to extend parental responsibility of the children who are now young adults beyond the statutory 18 years. As is already known from the jurisprudence of the superior courts, the jurisdiction of the Kadhi's courts to handle children matters is heavily contested with a majority of the judges ruling that Kadhis do not have jurisdiction to entertain children matters. With the uncertainty, I would be hesitant to make a declaration on the question of extension of parental responsibility following on the Islamic legal maxim that says

Da' maa yariibuka ilaa maa laa yariibuka

(Leave that which gives you doubt for that which does not give you doubt).

It suffices that the Respondent has reiterated his commitment to cater for his children's needs.

21. On whether the Respondent should refund the school fees incurred by the Petitioner for their children, the Respondent denied the allegation that the Petitioner had been solely responsible for the payment of fees. He further asserts that the particular claim is in the realm of special damages which must not only be pleaded but be strictly proved.

Although Islamic law enjoins upon fathers with the responsibility of maintenance of his children, that responsibility is exercised on fair terms, based on the father's ability. The Petitioner would be entitled to a refund if they made an agreement that the expenses she incurred should be refunded at a later date.

The Petitioner being an employee of the County Government desired the best for her children and therefore invested heavily in the education of the children. There are bundles of receipts in the Petition



with regard to payment of fees. It is not clear whether the moneys originated from the Petitioner or the Respondent thus this court is not in a position to make a determination on the same without strict proof.

22. The bigger question that this court is asked to determine is that on the investments made by the parties. The Respondent in the final submissions interestingly chose to question this court's jurisdiction in handling the issue of investments in a marriage and the cases of *Samuel Kamau Macharia -vs- Anor KCB & 2 others* and *Motor Vesses M. V. Lilians -v- Caltex Oil (Kenya) Ltd* have been listed with respect the Respondent failed to find a connection of the two cases with the question of investment in marriage. Investment in marriage is what is otherwise known as contribution to matrimonial property and the Kadhi's court's jurisdiction to handle matrimonial property has not been contested to date in any courts. In *AWA -V- HDD* (2018) eKLR , Chitembwe J. opined thus:-

“As held in the case of *MSR -V- NAB* a dispute involving matrimonial property of a Muslim can be heard by either the subordinate court including the Kadhi's court or the High court.”

Section 3 of the *matrimonial property Act* 2013 provides that: - “A person who professes the Islamic faith may be governed by Islamic law in all matters relating to matrimonial property.” Thus this court, being a court that applies the laws and the rules of Islamic law has the requisite jurisdiction to handle their matters since both parties profess Islamic faith.

23. Both parties claim to have invested in the property. More importantly, the Petitioner has proved that she advanced an amount of Kshs. 900,000 for the construction of rental units at Kaloleni 96 plot and the 6 months' salary for the erection of shops at Jubilee market.

The thread that runs through the submissions is that the Respondent was a person of meagre means before the Petitioner invested her own salary and part of her loan amounts in the properties.

It is confirmed that the parties opened a joint account but the Respondent after some months decided against depositing money there. It is however not clear whether the moneys the Respondent earned from the investment was used to cater for the family's needs but the compensation tabulation in the final document filed on 23rd November, 2022 suggests that the Respondent only defaulted and neglected to assist his family in the last 6 years if the rent tabulation is anything to go by.

24. The Petitioner argues that the Respondent stopped depositing money since 2014 or 2015 thereabouts. The petitioner is entitled to return of her investments on equitable terms. Considering that the Respondent will solely enjoy the return on the Petitioner's investment in the plots in perpetuity, this court endeavours to resolve this question as follows:
- a. Since the parties have not particularized their proof on payment of rent for Kenya Re and the Milimani house the parties will divide the costs by half and therefore the Petitioner is entitled for the rent arrears of Kshs. 2,057,000 for the 6 years.
 - b. The Petitioner is also entitled to her contribution in the construction of the rental units at plot 96 – Kaloleni amounting to Kshs. 1,356,300.
 - c. Since the Respondent is going to benefit in perpetuity from the return of investment this court awards the Petitioner a further 1 million compensations for the efforts and the responsibility in managing and investing in the matrimonial property.
25. On the question as to whether the Respondent is entitled to a return of his documents with regard to the properties, it is answered in the affirmative. The documents include sale agreements, Allotment letters for Kaloleni plot 96 and the Grant of representation.



26. I would like to thank the advocates for both parties for their patience and industry in handling this matter.

Determination

27. The upshot of all of the above is that this court proceeds, to make the following declarations and orders:

- a. That the marriage between the Petitioner and the Respondent is hereby dissolved and a decree nisi of 3 months to issue.
- b. That the Petitioner is entitled to eddah maintenance of Kshs. 20,000 P. M. for the three months of eddah amounting to a total of Kshs. 60,000.
- c. That the Petitioner is entitled to her Mahr balance of Kshs. 20,000 to be payable within the next 3 months.
- d. That the prayer for Mata'a is hereby denied.
- e. The prayer for refunds for the school fees of the children is hereby denied.
- f. That the prayer for maintenance of the children is beyond the scope of this court.
- g. That the Petitioner to return the documents that belong to the Respondent to the Respondent within the 3 months of eddah.
- h. That the Petitioner is entitled to a total of Kshs. 4,413,300 as rent refund, contribution to matrimonial property and compensation for being denied the benefit from her investment in the plots.
- i. Each party to bear their own costs.

28. Orders accordingly.

HON. T. J. KUNYUK

PRINCIPAL KADHI

25/1/2023

