



**FMM v AMF (Matrimonial Cause E015 of 2022)
[2023] KEKC 4 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEKC 4 (KLR)

**REPUBLIC OF KENYA
IN THE KADHI'S COURT AT UPPER HILL (NAIROBI MILIMANI LAW COURTS)
MATRIMONIAL CAUSE E015 OF 2022
AH ATHMAN, SPK
FEBRUARY 16, 2023**

BETWEEN

FMM PETITIONER

AND

AMF RESPONDENT

RULING

1. The petitioner moved court for orders that the court be pleased to:
 - a) Declare that the petitioner's marriage to AMF (now deceased) solemnized on 9th September, 1993 is lawful and valid
 - b) Declare that the Marriage certificate issue to AMF (deceased) on 10th September, 1993 bearing serial number 39xxxx is valid.
 - c) Issue a permanent order of injunction restraining the respondent AMF whether by himself, his agents, heirs assigns, employees and / or servants from occupying, using, trespassing into, dealing in, wasting, disposing of, construction on or in any way interfering with the estate of AMF (deceased) which solely devolves to the petitioner.

2. The respondent, the deceased's brother, then filed the current application for orders that:
 - a) Pending inter partes hearing and determination of this application, the court be pleased to order stay of proceedings in the suit herein.
 - b) That the Honourable court do hereby strike out the proceedings herein.



c) That in the alternative to prayer 2 above, the Honourable court be pleased to stay the proceedings herein pending hearing and determination of Succession Cause No. XXX of 2019 RE: Estate of AMF.

3. The applicant deposed that the petitioner claimed to be a wife of the deceased and took possession of his estate and petitioned the High court for letters of administration based on a fake marriage certificate. He denies that the petitioner was married to the deceased and stated that was only married to one SMA with whom they had two children. He averred that the issues raised in this petition are the same as those in the High Court succession cause and any decision in this matter may likely contradict the decision of the High court.
4. The respondent opposed the application through her 33-page replying affidavit filed on 19th January, 2023. She deposed that the applicant knew she was married to his deceased brother, they had met in the United Kingdom while in the company of the deceased and upon his death he showed him the properties of the estate in Kenya. She deposed that he changed and started threatening her when she declined his proposal to marry her. She deposed further that she was married under Islamic law in Eastleigh, Nairobi Kenya after the deceased had divorced his first wife and were issued with a valid marriage certificate while the applicant was not in the country. She averred that she was not consulted, involved in the matter leading to the stamping of the marriage certificate as ‘Not Genuine.’
5. The issues for determination in this application is whether or not these proceedings should be struck out or stayed pending the hearing and determination of the applications in the succession petition in the matter of the estate of the late AMF before the High Court.
6. It is not disputed that the petitioner filed for letters of administration in the High Court. The same is admitted in her pleadings. Indeed, letters of administration have been made and confirmed to the petitioner. Accordingly, orders relating to the estate should be filed in the court which is already seized with the matter. The High Court is competent and has original jurisdiction in succession matters. Prayer three 3 in the main petition is therefore struck out of this record.
7. The *sub judice* doctrine contemplates that no court shall proceed to try a dispute between same parties on substantially the same issue that is still pending before another court of competent jurisdiction. The purpose is clear; to avoid forum shopping, abuse of court process, conflicting decisions and maintain integrity of judicial process. In this matter the issue for determination is the validity of the marriage and the marriage certificate between the respondent and the deceased. In the High court the issues relate to the letters of administration given to the respondent in the estate of the late AMF. The applicant is challenging the letters of probate on the ground that the marriage certificate presented by the respondent for grant of the letters of probate is fake. The issue of validity of marriage between the late AMF and the respondent is not before the High court for determination.
8. The issues of validity of marriage and cogency of the certificate of marriage although related are distinct. The former examines the satisfaction of requirements of marriage under the applicable law while the latter probes whether or not the marriage certificate document is authentic and satisfied all marriage registration rules. The Kadhi’s court is conferred by Article 170 (5) of the *constitution* of Kenya [2010] with jurisdiction to determine questions of Muslim law on personal status, marriage, divorce and inheritance. Although the High Court has original jurisdiction in all civil and criminal matters, it is established practice and good order that matters are litigated before the lowest forum or organ with competent jurisdiction to determine it. This court is thus the appropriate forum to litigate the issue at first instance.



9. I find and hold that the matter is not sub judice. The application fails, save that parties shall only canvass the first two prayers of the main petition on the validity of the marriage and / or the marriage certificate.

Costs be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY ON 16TH FEBRUARY, 2023.

HON. ABDULHALIM H. ATHMAN

SENIOR PRINCIPAL KADHI

In the presence of:

Mr. Suleiman A. Mohamed, court assistant

Mr. Orlando for petitioner / Respondent

M/S Mahmoud Gitau for Applicant.

