



**YN v MMK (Divorce Cause E010 of 2021) [2023] KEKC 7 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEKC 7 (KLR)

**REPUBLIC OF KENYA**  
**IN THE KADHI'S COURT AT UPPER HILL (NAIROBI MILIMANI LAW COURTS)**  
**DIVORCE CAUSE E010 OF 2021**  
**AH ATHMAN, SPM**  
**FEBRUARY 23, 2023**

**BETWEEN**

**YN ..... PETITIONER**

**AND**

**MMK ..... DEFENDANT**

**JUDGMENT**

1. The parties both of Somali origin, were married under Islamic law in Birmingham in the United Kingdom on March 10, 2004. They lived in different countries including Somalia, United Kingdom and Kenya. Two properties were bought in Kenya during their coverture; one in Pangani, Flat No. xx on the 3<sup>rd</sup> floor of building erected on LR 209/35xx/xx (hereinafter referred as the 1<sup>st</sup> property) and another in Eastleigh, Flat No xx on the ground floor of building erected on LR 209/32xx/xx (hereinafter referred to as the 2<sup>nd</sup> property) both within Nairobi. The 1<sup>st</sup> property was sold in 2010. The 2<sup>nd</sup> property, an apartment in Eastleigh, Nairobi fetches monthly rent of about Kes 60,000.00 per month. The petitioner wrote the respondent a divorce letter on March 3, 2021. The petitioner is a medical doctor running a private clinic in [Particulars withheld], and dean Faculty of medicine, University of [Particulars withheld]. The respondent currently lives in the United Kingdom. The sale of the 1<sup>st</sup> property and fight for ownership and control of the 2<sup>nd</sup> property after divorce precipitated this cause.
2. The petitioner prayed for orders that:
  - a. the Honourable court do issue divorce certificate to the parties
  - b. A declaration that Flat No xx, Ground floor on LR No 209/32xx/xx Eastleigh Nairobi belong solely to the petitioner.
  - c. A declaration that the respondent did not share the sale proceeds with the petitioner after the sale of Flat marked xx, 3<sup>rd</sup> floor on LR No 209/32xx/xx Eastleigh, Nairobi in the year 2014.



- d. This Honourable court be pleased to issue a permanent injunction restraining the respondent and / or her agents and / or servants from interfering, trespassing, harassing, collecting rent from the tenants of the petitioner's Flat No. xx , Ground floor on LR No 209/32xx/xx Eastleigh Nairobi.
3. The respondent opposed the petition through her answer to petition dated June 25, 2021. She contemporaneously filed a counterclaim. She prayed for orders *inter alia* that:
    - a. A declaration that the petitioner divorced the respondent by way of one talak
    - b. The Court be pleased to formalise the talak by issuance of divorce certificate
    - c. Dowry of British sterling pounds UKP 5,000.00
    - d. Edda maintenance
    - e. A declaration that the respondent solely financed and purchased Flat No xx on LR No 209/35xx/xx and entitled to all proceeds from sale of the said property
    - f. The petitioner be ordered to pay the respondent USD 38,000.00 from proceeds of sale of the said property.
    - g. In the alternative the Honourable court, be pleased to declare the Flat xx on LR No. 209/35xx/xx constitutes matrimonial property and the respondent is entitled to half of the proceeds of its sale, and respondent be ordered to pay the respondent USD 13,500.00 from the proceeds of sale of the said property.
    - h. The court be pleased to declare Flat no xx on LR No 209/32xx/xx constitutes matrimonial property and that the respondent is entitled to a half of the income thereto from October 2013 to date of judgment.
    - i. The court be pleased to order the Registrar of Lands, Nairobi City County to transfer the 2<sup>nd</sup> property jointly to the petitioner and respondent.
    - j. A permanent injunction restraining the petitioner, his agents and / or servants, from selling, transferring, alienating and / or in any way whatsoever dealing with the 2<sup>nd</sup> property without the respondent's consent.
  4. The petitioner was represented by Ms Mary Wanjiku while the respondent was represented by Mr Dayib.
  5. The issue for determination in this matter:
    - a. Divorce
    - b. Dowry
    - c. Edda maintenance
    - d. Whether or not the 1<sup>st</sup> property was part of the parties' matrimonial property; whether petitioner received any proceeds of its sale.
    - e. Whether or not the 2<sup>nd</sup> property was part of the parties' matrimonial property and mode of distribution thereto.



## Divorce

5. The divorce is not contested. It is not disputed that the petitioner gave the respondent talak divorce letter through email on March 3, 2021. The respondent confirmed receiving it and also wants it formalised. Both parties prayed for issuance of divorce certificate. Parties' marriage is hereby confirmed annulled, first revocable (within 90 days) divorce with effect from March 3, 2021. Divorce certificate to issue.

## Dowry

7. Both the extent of dowry and whether it was settled are disputed. The petitioner argued it was £500.00 while the respondent holds it was £5000.00. The petitioner claimed he paid the £500.00 dowry a fact denied by the respondent. None of the parties adduced evidence on either issue regarding dowry. Marriage notification or certificate would have settled the matter. It is notable that the petitioner was not cross-examined by the respondent's counsel on this issue. The respondent was categorical at cross-examination that the dowry was not paid.

8. Dowry is a basic and fundamental right to the wife under Qur'an 4:4 and 25 and sunnah. It is not extinguished unless wholly or partly forfeited by the wife in her own free will and consent.

“And give to the women (whom you marry) their mahr (obligatory bridal-money) with a good heart; but if they of their own good pleasure, remit any part of it to you, take it, and enjoy it without fear of any harm (as Allah has made it lawful) Nisa: 4:4

“The Prophet [may peace be upon him] said: 'the greatest sin before Allah is a person who married a lady and after fulfilling his desires divorced her and did not give her her dowry, and a person who engaged a worker and did not give him his dues and another who kills an animal in vain'. Reported by Al Hakim and Baihaki. Certified as correct by Al Albany.

9. Al-Shirazi – a prominent Shafi' scholar – in his *Shirh al-Muhadhab* at vol 2 pp 57 states:

‘Dowry is entitled to the wife upon intercourse (of the husband and wife). Allah states ‘... and how would you take it (back) and you have gone unto each other and they have taken from you a firm and strong covenant’ Q.4. 21.

10. Although there exist minor differences in the approaches of Muslim Scholars in the solution of disputes as to extent of dowry, Prof Wahba Al-Zuhaily in *Islamic Jurisprudence and its evidences* at vol 9 pp 6822 preferred the opinion of Kadhi Abu Yussuf as the preponderant opinion in the issue. The wife has to furnish proof of her claim, failure to which the husband takes denial oath. If he takes the oath, the dowry will be what he stated (as long as it is not lower than the ordinarily prevailing dowry in the community) if he doesn't, it will be what the wife stated.

11. It is further noted that at the time of marriage, the respondent on her own admission, had been previously married and had two children from the previous marriage. Dowry of a newly married often differs from that of a previously married lady. In the absence of any documentary or independent oral evidence, according to the applicable law, the word of the husband prevails. In the special circumstances of this case, we hold the dowry was £500.00.

12. Was it paid? The respondent denied receiving it. The burden to prove it was paid lied with the petitioner. In Somali customs, it is most often deferred. No proof was produced to support the claim it was paid. We hold and find it had not been paid. The petitioner is directed to settle the same.



## Edda maintenance

13. Sheikh Muhammad Al Shirbiny Al Khatib in '*Al Mughni al Muhtaj*' at 3/384 defines edda as 'noun for period observed by women to ascertain purity of their womb, devotion or in grief over a departed husband.' A divorced wife is entitled among other rights, to edda maintenance. Edda pursuant to Q.2.228 is the period a divorced wife observes at the matrimonial home. During this time, (calculated as three menstrual cycles of the wife and estimated at approximately ninety days) although she is technically divorced, she is still regarded as a legal wife and the husband is therefore obligated to provide for her accommodation and sustenance. This provision is what is termed as edda maintenance. It is essentially aimed at ensuring the divorced wife's comfort at the matrimonial home whilst giving the spouses opportunity to reconsider the divorce and return to their legal marriage. Imam Al Qurtuby (d. 671H) in his commentary on the verse Q.65.1 Stated 'it is not lawful for a husband to vacate his divorced wife from the matrimonial home as long as she is in the edda period...'

'O Prophet, when you divorce women, divorce them at their 'iddah (prescribed periods) and count (accurately) their iddah (periods). And fear Allah your Lord (O Muslims). And turn them not out of their (husband's) homes nor shall they (themselves) leave, except in case they are guilty of some open illegal sexual intercourse.' Q.65.1

'And for divorced women maintenance (should be provided) on reasonable scale. This is a duty on al Muttaqeen (the pious). Q.2.241

14. In the instant case, at the time of divorce the parties were living in different countries and although pleaded, the issue was not argued at trial. The respondent failed to discharge her burden of proof. It is considered abandoned and is hereby dismissed.

## Division of Matrimonial property

15. The Kadhi's Court has jurisdiction to hear and determine issues of division of matrimonial property where both parties are Muslims and subject to the jurisdiction to the court. Section 3 of the [Matrimonial Property Act, 2013](#) provide:

'A person who professes the Islamic faith may be governed by Islamic law in all matters relating to matrimonial property.'

16. This was further held by the court of Appeal in the case of [RMM v BAM](#) [2015] eKLR, Civil Appeal No 267 Of 2011, Waki, G b m Kariuki, Mwilu, M'noti & Murgor, Jj a; where it was held:

'At the root of the issue is whether it was the High Court or the Kadhi's Court which has jurisdiction to determine the matter of distribution of the matrimonial property....' '...If their marriage was purely Muslim, and the property in issue was acquired during the currency of that marriage, the Kadhi's Court would be the most efficacious in handling and determining the dispute.'

17. Matrimonial property may be defined as property acquired by the husband and wife during the subsistence of the marriage in accordance with conditions stipulated by Islamic Law. Islam recognises the right to own property to both man and woman.

'And wish not for the things in which Allah has made some of you to excel others. For men there is reward for what they have earned, [and likewise] for women there is a reward for what



they have earned, and ask Allah of his Bounty. Surely Allah is All Knower of everything.'  
Q.4.32

18. Islamic law has provided protections to one's wealth and prohibited unlawful use of another's wealth and property.

'O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent. And do not kill yourselves [or one another]. Indeed, Allah is to you ever Merciful'. Q.4.29

19. Abu Huraira (May Allah be pleased with him) narrated that the prophet [PBUH] said: '...the life, wealth and dignity of a Muslim are sacred'. [Muslim 2564].

20. Islam thus recognises the right of husband and wife to own properties and enter financial transactions either independently or with others including with their spouse. Where a spouse made contribution to the acquisition or development of a property, he or she is entitled to a commensurate share thereof. The burden to prove the specific share of contribution rests with the claimant. The Supreme court of Kenya in Petition No 10 of 2020 *Joseph Ombogi Ongetoto v Martha Bosibori Ogentoto* [2023] agreed with Echaria case on the principles applied for distribution of matrimonial property. It stated thus:

'[78] to our minds the finding in Echaria was essentially that a spouse does not acquire any beneficial interest in matrimonial property by fact of being married only and that specific contribution has to be ascertained to entitle such a spouse a share of the property.'

21. The court went on to emphasize that the spouse seeking a share in the matrimonial property has to prove the extent of his or her contribution to the acquisition or development of the property. It stated:

'[83] the guiding principle again should be the apportionment and division of matrimonial property may only be done where parties fulfil their obligation of proving what they are entitled to by way of contribution.'

22. In the instant case, there are two properties in contention. It is not disputed that both were purchased during marriage of parties herein. We will deal with each property to determine, according to evidence adduced at trial, whether or not it forms part of the matrimonial property and share of each spouse thereto.

### **The first property**

23. The first property, Pangani, Flat No xx on the 3<sup>rd</sup> floor of building erected on LR 209/35xx/xx in Pangani, Nairobi in the Republic of Kenya. The petitioner's claim is that this was a jointly owned property but the respondent sold it unilaterally and has refused him his share the proceeds of rent and sale of this property. At trial he submitted that the contribution was 50% by each spouse and he did not receive his share of the proceeds of sale of this property. He admitted the respondent also contributed in the acquisition of this property through proceeds of sale of her gold.

24. The respondent does not deny sale of this property. She however contends it was her sole property which she bought after selling her 1.5kg gold. She admits however that it was registered in both their names but added that she only added his name out of love and affection because he was her husband. She contended the petitioner came from Somalia during the sale and appended his signature on the sale agreement.

25. The sale agreement dated April 28, 2010 drawn and witnessed by Ahmednassir, Abdikadir advocates in respect of this property indicate clearly that the purchasers herein were joint purchasers of this



property from Osman Ali Abdi and Ali Mohamed Nur. The agreement does not apportion specific shares to each purchaser. In the absence of evidence to the contrary, it presumed they were owners in equal shares. The agreement was not controverted. Indeed, the respondent admitted its authenticity. Written agreements have the force of contracts that can be vitiated if it can be proven it was executed through fraud, coercion or non-disclosure of material facts. The respondent, on the face of such strong evidence, had the burden to prove her claim she was the sole owner. She failed to discharge her burden. The evidence supports the petitioner's case. We find and hold this property was jointly owned by the parties' herein in equal 50% shares.

26. The parties agree this property was sold. The petitioner argued it was the respondent's unilateral decision but the respondent stated the petitioner had travelled from Somalia to sign and execute the sale agreement. Each filed sale agreement dated January 22, 2014 which indicates it was sold at USD 49,000.00. It is noted that the petitioner's document is not signed. The respondent argued his was a draft. It is noteworthy that the petitioner's signature in the respondent's copy is different from that in the sale agreement dated April 28, 2010 when they purchased the property. There is no evidence the petitioner was present at the execution of the agreement. We cannot find that the decision was mutual. However, the petitioner does not oppose the sale but wants his share of the proceeds. The respondent contradicted herself on receipt of the proceeds. In her pleadings she contends the money was transferred to the petitioner's account who has denied her her due share. There was no evidence adduced to prove this assertion. Her evidence under oath, she is clear she received the full purchase price of the sale this property. She informed court she used the proceeds to buy another property in Somalia where the petitioner operated a clinic. She was also the one in Kenya at the time of the sale and execution of the agreement while the petitioner was not. The respondent did not adduce any prove of payments made to the petitioner as alleged, from the sale of this property. We find and hold that the respondent owes the petitioner 50% (USD 24,500.00) of the proceeds of sale of this property.
27. It had been argued that this property having been sold before divorce of the party's herein does not constitute matrimonial property. With respect, we hold contrary view, especially in the circumstances of this case. Monetary rights are not extinguished by the time of divorce. They are in fact necessary to be resolved at divorce to ensure peaceful separation.

### **The second property**

28. The second property, Flat No xx on the ground floor of building erected on LR 209/32xx/xx is situate at Eastleigh, Nairobi within the Republic of Kenya. The petitioner claimed he is the sole owner of this property and that the respondent did not contribute anything towards its acquisition.
29. The sale agreement dated November 15, 2012, indicate the parties herein are joint purchasers. It does not apportion shares. The petitioner had alluded to the fact that the respondent was not employed and had no funds to make any contribution. The respondent has demonstrated she had resources as evidenced in the purchase of the first property. In any case, the strength of the sale agreement cannot be vitiated by aspersions on financial ability. We find, on the adduced evidence in this issue, that the parties have an equal 50% share in this property.
30. This property is rented and fetches about Kes 60,00.00 per month as rent. On the respondent's application dated June 3, 2022 the petitioner through ruling made on July 28, 2022 was restrained from collecting rent of the property either by himself or his agents. The money was ordered to be deposited in respondent counsel's account who would account for same upon determination of the suit. The respondent's application had been caused by the petitioner's lack of compliance with the court order in this regard made on June 30, 2021 upheld by High court in ruling made on May 6, 2022. The court had directed parties to open a joint account wherein the proceeds of rent of the said flat would be deposited



pending hearing and determination of the matter. From the date of pronouncement by court, the party responsible is presumed to have been collecting the rent proceeds of the flat. The petitioner is thus presumed to have been collecting rent of the said flat at least from June 30, 2021 to July 28, 2022 (12 months equivalent to 720,000.00). The respondent's counsel is presumed to have been collecting rent from July 28, 2022 to date.

31. The petitioner owes the respondent UKP 500.00 dowry, while the respondent owes the petitioner USD 24,500.00 his share of proceeds of the sale of the 1<sup>st</sup> property. The respondent cannot be forced to sale her share in the 2<sup>nd</sup> property but must settle the petitioner's share from the sale of the 1<sup>st</sup> property. I direct that the same be recovered from her share of rent proceeds of this property. The petitioner has collected at least Kes 720,000.00 (about USD 5,714.00). The orders of July 28, 2022 with respect to this property are hereby vacated. The petitioner to continue collecting rent of the 2<sup>nd</sup> property till recovery of his share USD 18,786.00. At the same rent of Kes 60,000.00 (USD 476.00) this will take thirty-seven (37) months from date of this judgment. Upon the petitioner having collected his share, the parties shall continue to jointly own the property and share proceeds thereof on a 50-50 basis.

Each party to bear its own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON 23<sup>RD</sup> FEBRUARY, 2023**

**HON ABDULHALIM H ATHMAN**

**SENIOR PRINCIPAL KADHI**

**In the presence of**

**Mr Suleiman A Mohamed, Court assistant**

**Mr Dayib for Petitioner**

**Ms Mary Wanjiku for Respondent**

