



**UKMA v IID (Matrimonial Case E014 of 2022)
[2023] KEKC 17 (KLR) (10 August 2023) (Judgment)**

Neutral citation: [2023] KEKC 17 (KLR)

**REPUBLIC OF KENYA
IN THE KADHI'S COURT AT UPPER HILL (NAIROBI MILIMANI LAW COURTS)
MATRIMONIAL CASE E014 OF 2022
AH ATHMAN, CK
AUGUST 10, 2023**

BETWEEN

UKMA PETITIONER

AND

IID RESPONDENT

JUDGMENT

1. The parties, cousins, married under Islamic law in 2013 in a polygamous marriage. The respondent has three other wives. The petitioner was a student of Procurement and business administration at the Methodist University when they married. The respondent is a businessman in Nairobi. They are blessed with four children from their wedlock. They are aged between (4) and (9) years. The petitioner, for her safety returned to her parents. They have not been living together for more than one year.
2. The petitioner through amended petition dated December 16, 2022 prayed for orders that:
 - a. Dissolution of the marriage
 - b. Payment of dowry USD 2,000.00 equivalent to Ksh 200,000.00
 - c. Idda maintenance
 - d. Mata (consolatory gift)
 - e. Physical / actual custody, care and control of the minors
 - f. Shared legal custody of the minors
 - g. Respondent be granted visitation rights / access on alternate weekends from 10:30 am to 5:30 pm
 - h. School fees and related expenses



- i. Medical care from a private insurer other than / in addition to NHIF
 - j. Accommodation at Ksh 95,000.00 per month
 - k. Equitable distribution of the matrimonial properties listed in paragraphs 7 and 8 of the amended petition.
 - l. Salaries for house help at Ksh 10,000.00 and driver at Ksh 20,000.00 per month
 - m. Water and electricity bills at Ksh 15,000.00 and 10,000.00 per month
 - n. Cooking gas at Ksh 7,000.00 per month
 - o. Transport expenses for the minors
 - p. Either party be restrained from removing the parties' children from the jurisdiction of this Honourable court without the other party's prior written consent
3. The petitioner was represented by Mr. Fareed while the respondent was represented by Mr. Yusuf, who had ceased acting for the respondent due to lack of instructions but came back on record for him. The respondent failed to file reply to the petitioner or the amended petition and despite service both personally and electronically through WhatsApp platform failed to appear on the scheduled date for hearing of the matter. The matter proceeded ex parte to formal proof hearing under rule 68(1) (b) of the Kadhi's Court (procedure & practice) rules_2020.
4. When duly served and elect not to participate, the wheels of justice have to continue rolling. The claimant has an equal duty to be heard. She must however discharge the burden of proof at trial even in the absence of the respondent. In *North End trading Co Ltd (carrying on the business under registered name of Kenya Refuse Handlers Ltd v County Council of Nairobi* (2019) eKLR, Civil Case No 731 of 2008 at Milimani commercial and Tax division, the court stated:
- ‘it is my view that a party to a case having filed his pleadings should call evidence where the matter is considered to proceed by way of evidence. It is trite law that where a party fails to call evidence in support of its case, the party’s pleadings are not to be taken as evidence but the same remain mere statements of facts which have no probative value since the same remain unsubstantiated pleading which have not been subjected to the required test of cross examination. A defence in which no evidence is adduced to support it cannot be used to challenge the plaintiff’s case. The failure to call evidence means the evidence adduced by the plaintiff remain uncontroverted therefore unchallenged. In such a situation the plaintiff is taken to have proven its case on the balance of probability.’
5. The issue for determination in this matter:
- a. Divorce
 - b. Dowry
 - c. Edda maintenance
 - d. Mata’
 - e. Children custody and maintenance
 - f. Division of matrimonial properties



Divorce

6. The respondent did not file reply to the petition, the issue of divorce remains unopposed. It is noted that the parties had previously filed divorce case No 7 of 2019 in this court. That matter was not decided on the merit. The parties were granted leave to talk towards reconciliation but never returned to court to record any settlement. The matter was dismissed for want of prosecution on July 27, 2012. They had apparently reconciled. The petitioner's prayer for divorce is based on the grounds that the respondent is cruel, attempted to kill her when he fired a fire arm and the bullet narrowly missed her, has extra marital affairs and failed to perform his marital duties.
7. The respondent told court under oath that the respondent often assaulted her, denied her freedom to talk with anybody and had multiple extra marital affairs in their marital bed. Once he chained her to the dining table and beat her up. Another time, while she was in the shower, he put a gun in her mouth and threatened to kill her and yet another time he had admitted to a rehab although she had no drug addiction, just to punish her. The petitioner's parents corroborated the respondent's cruelty and that they had many times, returned the petitioner to the husband after despite his conduct. They further stated they have been supporting her financially since she left their matrimonial home.
8. Article 87 of the Islamic Charter on Family ICF grants wives the right to divorce where they face harm and mistreatment from their husbands. It is aimed at protecting them from harmful and repugnant practices and customs. It provides:

“If the wife has been harmed by her husband to an extent that would be impossible for most people similar to them to continue marital relationship under such circumstances, then she shall have right to ask for divorce. If her husband refuses to divorce her, she can raise her case to the judge. If the harm is proven, then the judge shall rule in her favor thereby divorcing her from her husband...”
9. Wives are entitled to fair treatment by their husbands. Husbands are directed by Qur'an and traditions to treat their wives not just with respect but with honour. Cruelty and violence are illegal in Islam and statutes and offend the objectives of marriage espoused under Q.30.21. The petitioner was not in err to leave the matrimonial home. The prayer for divorce is merited. The parties' marriage be and is hereby dissolved with effect from 10TH August, 2023 corresponding with 23rd Muharram 1445 A.H. Divorce certificate to issue.

Dowry

10. 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.

11. 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.
12. The petitioner's claim was supported by witness testimony, which we hereby find and hold, that the dowry of USD 2,000.00 had not been paid. The respondent to settle the same in any event but not later than (90) days from date of service of this judgment or order. It may be settled in its Ksh equivalent.

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. The divorce has been granted by court on the petitioner's own petition. The general principle is that edda maintenance is not given where the divorce or dissolution is given on the wife's own prayer. The rationale behind this is to not only prevent its misuse and avoid a party from benefiting twice from her own pleading but to also reduce the rate of divorce. In the instant case, however, the petitioner rightly left the matrimonial home for her own safety. In the special circumstances of this case, we find and hereby hold that she is entitled to edda maintenance. She is awarded Ksh 80,000.00 per month for three months (i.e Ksh 240,000.00) as edda maintenance.

Mata'

15. Mata' refers to gift given to a divorced wife upon divorce by her husband. It is aimed at consoling divorced wives from the pain of divorce. Al Qurtuby, in his '*Commentary of the Holy Qur'an*' at vol. 2 pp 895 while commenting on Q.2.241, opined:

'Scholars differed on the provision verse 'And for divorced women maintenance (should be provided) on reasonable scale. This is a duty on al Muttaqeen the pious'. Abu Thaur, Al Zuhry, Saeed ibn Jubair are of the view that the verse "affirmed conciliatory gift mat'a for



any divorced wife, whether or not the marriage was consummated. It is one of the views of Shaf'ites. Malikites are of the view only when a marriage is consummated is the divorced wife entitled to mata.'

16. Imam Ibn Jarir Al Tabary while commenting on Q.33.28 stated the verse implied it is obligatory for Muslim husbands to provide mata' upon divorcing their wives. He commented thus:

'I shall gift you what has Allah the almighty has commanded men to gift their wives at divorce when He stated 'but give them [a gift of] compensation – the wealthy according to his capability and the poor according to his capability – a provision according to what is acceptable, a duty upon the doers of good' and ' O prophet say to your wives, "If you should desire the worldly life and its adornment, then come, I will provide for you a gracious release"

17. The parties' marriage was consummated. They have been married for ten (10) years and have four (4) children together. The petitioner sufficiently demonstrated she sought divorce due to the cruelty of the respondent and for her own safety. The prayer for Mata' is merited. We award the petitioner Ksh 150,000.00 as mata'

Children maintenance.

18. The petitioner prayed for children maintenance as follows:

- i. Ksh 100,000.00 per month food and shopping
- ii. Ksh 95,000.00 per month for rent
- iii. Medical expenses and / or provide medical insurance cover
- iv. School fees and related expenses as per the school structure
- v. Ksh 50,000.00 per month clothing and shoes
- vi. Ksh 32,000.00 per month for electricity, water and gas bill
- vii. Ksh 10,000.00 per month for house help salary
- viii. Ksh 70,000.00 per month for fuel and driver's salary and availing motor vehicle KCZ 823G Toyota Ractis, for transportation of the child to and from school

19. The amount applied for as interim children maintenance is more than 357,000.00 per month apart from motor vehicle and school fees. She contends the respondent is able to so provide. It has been sufficiently demonstrated that the respondent is a man of means and has been taking care of them at the said standards. Unfortunately, the respondent failed to file affidavit of means. The petitioner confirmed he has three other wives and children. Accordingly, we award children maintenance as follows:

- i. Accommodation Ksh 95,000.00
- ii. School fees as per school fees structure of their current school
- iii. School transport or fuelled motor vehicle.
- iv. Ksh 200,000.00 per month as consolidated expenses for food and other bills.
- v. Medication and / or medical insurance



- vi. Actual custody, care and control of the minors is granted to the petitioner, respondent to get reasonable access.
- vii. Parties share equal legal custody of the minors.
- viii. No party shall not take the child(ren) out the jurisdiction of this court without consultation and consent of both parents and / or express order of the court.

Division of Matrimonial property

20. 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.'

21. This was further held by the court of Appeal in the case of *R.M.M v B.A.M* [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.'

22. 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

23. 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

24. 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].

25. 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.’

26. 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.’

27. In the instant case, the petitioner annexed documents of the matrimonial properties. The parties were married on September 15, 2013. Three properties were registered in 2005 and 2008 before the marriage of the parties herein. These are:

- i. Ruraim investment company limited (2008)
- ii. Kokab construction limited (2008)
- iii. Inter-middle enterprises limited (2005)

28. These properties, we find and hold do not form part of the matrimonial properties.

29. The property known as Ismal Holdings company limited was registered on February 20, 2013. The directors and shareholders are indicated as Ismael Ibrahim Durow and Umalkheyr Mohamed, the respondent owning 4999 shares while the petitioner owning one (1) share. It is declared a joint property in the said indicated shares.

30. The following properties in the name of Ismail Ibrahim Durow only, were registered and / or acquired during the subsistence of the parties’ marriage:

- i. Ismariot Hotel Resort limited (2018)
- ii. Ismariot Destinations limited (2018)
- iii. Ismariot Holdings limited (2020)
- iv. Mobitel Express limited (2014)
- v. Beyun Construction and General supplies limited (2014) (with Ismail Holdings ltd)
- vi. Motor vehicle registration KCZ 823G Toyota Ractis (July 22, 2020)

31. The petitioner admitted she made no monetary contribution to the acquisition or development of these properties save to help in the running of the Ismariot company without receiving a salary. She was married to the respondent while still a student at university. This evidence was not controverted. It is however noted that the respondent has three other wives, who would, upon divorce, also be entitled to a share of the matrimonial property. Distribution of the matrimonial must consider them as potential partners in the properties listed hereinabove. Accordingly, I award the respondent ten percent (10%) of the properties listed hereinabove (the respondent retaining 60% and 10% to each of his other wives).

32. The respondent made Ksh 2.6 million deposit payment for House No B 9-5 to Taroot company. As the receipt suggest, the transaction is not complete until full payment is made. It is not certain the



final payment has been made or sale agreement signed. The court can only consider as matrimonial properties, those that were fully acquired during the pendency of the marriage. Accordingly, we do not consider this property as part of the estate.

33. Three motor vehicles were registered and owned by the respondent during the pendency of the parties' marriage.
- i. KDE 156Q, Toyota Succeed (November 24, 2020)
 - ii. KCV 922U Toyota S. Wagon (July 29, 2019)
 - iii. Motor vehicle registration No KDA 223V Prado (November 24, 2023)
34. However, according to the official search with NTSA, they have been transferred to third parties; the first to Al Husnain motors limited and the second one to Ismail I. Durow and Fanaka Tele Self-help group and Dennis Mwangi Kirari and the third to respondent and Platinum credit limited. They were disposed in 2020, 2021 and 2019 during the pendency of the marriage and therefore do not form part of the matrimonial properties, save for respondent's share in the motor vehicle registration No KDA 223V Prado, where the petitioner is awarded 10% share thereof.
35. Each party to bear its own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON 10TH AUGUST, 2023.

HON. ABDULHALIM H. ATHMAN

CHIEF KADHI

In the presence of

Mr. Suleiman A. Mohamed, Court assistant

Mr. Fareed for Petitioner

Mr. Yusuf for Respondent

