



REPUBLIC OF KENYA



**KENYA LAW**  
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**ZAG v VOM (Divorce Cause E087 of 2022)  
[2023] KEKC 20 (KLR) (7 November 2023) (Judgment)**

Neutral citation: [2023] KEKC 20 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHI'S COURT AT UPPER HILL (NAIROBI MILIMANI LAW COURTS)  
DIVORCE CAUSE E087 OF 2022  
AH ATHMAN, CK  
NOVEMBER 7, 2023**

**BETWEEN**

**ZAG ..... PETITIONER**

**AND**

**VOM ..... RESPONDENT**

**JUDGMENT**

1. The parties, married under Islamic law on 15<sup>th</sup> March, 2015 at Nairobi. They are blessed with two children aged 6 and 8 years from their legal wedlock. Their matrimonial home was in Golden gate estate, South B in Nairobi. The respondent is a trained Engineer.
2. The petitioner through petition dated 11<sup>th</sup> May, 2022 prayed for orders that:
  - a. Dissolution of the marriage through faskh
  - b. Issuance of divorce certificate
  - c. Edda maintenance
  - d. Children maintenance
  - e. Outstanding maintenance
  - f. Physical / actual custody of the minors AM and RM
  - g. Dowry payment KES 150,000.00
  - h. A declaration that the properties listed in para 9 of the petition constitute matrimonial property
  - i. The Court be pleased to determine the shares of the petitioner in the business listed in para 9 of the petition



- j. A reasonable amount of mata' compensation for the pain suffered by the petitioner under the hands of the respondent.
3. The petitioner was represented by Mr. Yusuf while the respondent was represented by Mr. Ambala.
4. The petitioner claimed the respondent moved out of the matrimonial home, had extra-marital affairs, physically and verbally assaulted her in the presence of minors, failed to provide her and the children with basic necessities of life, causing her mental and psychological torture. She claimed they formed 'Amiraza' a water purification business through joint efforts in South B from where she received an allowance to fulfil their parental responsibility agreement. However, she stated that the respondent prevented her from accessing the business.
5. The respondent denied the claims through reply to petition and cross petition dated 14<sup>th</sup> March, 2023. He averred that it was the petitioner who constructively evicted her from the matrimonial home and denied him access to the minors and that it is in fact the petitioner who treated him with disdain and cruelty. He contends the petitioner is not fit to be granted custody of the minors. He deposed that he has always taken care of the children but the petitioner converted him to a beast of burden. He cross-petitioned for dissolution of marriage, physical / actual custody, care and control of the minors, that the parental responsibility agreement be adopted as an order of this court with regard to maintenance of the minors and that the water purification business is no longer matrimonial property.
5. The issues 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**

5. Both parties are agreed the marriage has irretrievably broken down. Both prayed for its dissolution. The respondent pronounced it in court on 8<sup>th</sup> May, 2023. The parties' marriage be and is hereby annulled, first (revocable within 90 days) divorce with effect from 8<sup>th</sup> May, 2023 Divorce certificate to issue.

### **Dowry**

7. 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.

8. 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.
9. The petitioner claimed that the dowry of KES 150,000.00 is not paid. The respondent contends he paid the dowry totalling KES 250,000.00 to the petitioner's parents on her own instructions. During trial, the petitioner admitted KES 150,000.00 was actually paid to her parents. The certificate of Marriage serial No. A 018823 registered on 15<sup>th</sup> March, 2015 at Makina Jamia Mosque (Kibra) indicates the dowry as 'as agreed' and the space to indicate whether it or part of it was paid is not filled. It is also neither signed by the then assistant registrar of Mohammedan marriage nor stamped with court seal and name stamp of the registering officer as required by the rules. It is inadmissible. The petitioner's claim on this issue is not supported by credible evidence. In the circumstances, we construe petitioner's admission of her parent's receiving KES 150,000.00 as full settlement of the dowry. The claim fails and is hereby dismissed.

### **Edda maintenance**

10. 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

11. The divorce has been granted by court on the petitioner's own petition. The general rule 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. The marriage in this case broke down due to discord from both parties. In any case, the respondent has been paying for accommodation and sustenance for more than the required period of about three months. We find and hold that the petitioner is not entitled to edda maintenance.



## Mata'

12. 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 Shafi'ites. Malikites are of the view only when a marriage is consummated is the divorced wife entitled to mata.'

13. 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 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"

14. In the instant case, the parties have been married for eight years. The marriage broke down due to discord from both parties. Accordingly, I award the petitioner KES 50,000.00 as mata'

## Custody

15. We note that the respondent raised the issue of jurisdiction on children custody and maintenance only at in his final written submissions. It is not in his pleadings on the record, was not raised at the pre-trial conference or framed by court as an issue for determination. It is trite law that issues flow from and parties are bound by their pleadings. They cannot be raised at the submission stage especially by a respondent when the petitioner cannot have a right and opportunity to test them. It offends the rule of natural justice. In *Grandy v Caspair [1956] EACA 139* and *Fernandes v people Newspapers Ltd [1972] EA 63*, the Court stated:

"The issue of determination in a suit flowed from the pleadings and a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as were framed for the court's determination. Unless pleadings were amended, parties were confined to their pleadings.

16. Having said that, I am of the view that a purposive interpretation of article 170 (5) of *the constitution* Kenya (2010) as held in the case HCCA 85 of 2017 *ZUDG v SJKUR* (2020) eKLR confers jurisdiction of the Kadhi's court to determine disputes of children custody and maintenance because the same are incidental as in this case, to divorce and there is nothing in the *Children's Act* that makes the jurisdiction to handle children matters exclusive to the Children's' court. The court of appeal in *TSJ v SHSR* (2019) eKLR, Civil Appeal No. 119 of 2017, (Nairobi) the court of appeal, D.K. Musinga, S.G. Kairu, A.K. Murgor JJA, held that there is no stipulation in section 73 of the Act that jurisdiction of the children's court is exclusive. The court stated:

'the judge followed that pronouncement with a contradictory but accurate statement that nothing precludes a body such as the arbitration Board over disputes relating to custody



and maintenance of children where both parties submit to authority of such a body. There is however nothing in that provision that such jurisdiction is exclusive, Under Part VII of the Children's Act, 'a court' may on application make orders regarding custody, care and control and maintenance of children but again without stipulation that such jurisdiction is exclusive. We reiterate that as the judge correctly noted there is nothing in the Act that would prevent a body such as the arbitration board from arbitrating over disputes relating to such matter where both parties submit to the authority of such body.'

17. The case of *Mehrunisa v. Pravez* (1982-88) 1 KAR 18 settled with finality the issue of the mother getting priority on children custody unless there exist proven special or peculiar circumstances to disqualify her. The same is in tandem with the principle of best interests of the child being paramount under Article 53 of *the Constitution* of Kenya (2010), Section 4 of the Children's Act, Cap 141 Laws of Kenya, Article 19 of the *United Nations Convention on the rights of the Child* (CRC), Article 106 (1) of the *Islamic Charter on Family* (ICF) and ruling of the Prophet Muhammad (may peace and blessings be upon him) on a complaint over custody by a divorced wife (Reported by Abu Daud [2276] through Abdallah ibn Amr (may Allah be pleased with him).
18. While a mother gets priority on right to custody of minor children, that right is subject to the best interests of the children. A mother may be disqualified from getting custody of minors if she is negligent, endangers the security of the minors or her custody is not conducive to the physical, moral and intellectual welfare of the child. The key factor in custody under Islamic law is the best interest of the children based on the juristic maxims "Repelling an evil is preferred to securing a benefit", "Latitude should be afforded in the cause of difficulty" and "Difficulty begets facility".
19. Islamic law also recognizes that a person vested with custody may be disqualified and lose the right to custody owing to factors impacting on the interests of the children. Ibn Al Qayyim Al Juzzy (693-741 A.H.) in his 'Al Qawanin al Fiqhiyyat' (Juristic statutes) at pp 366-367 stated:

"a person granted custody may be lose it on four grounds: travel to a distant place, contagious or serious sickness (such as insanity, leprosy...), immorality, lack of piety marriage to another husband, except if she later divorced (in a dissenting opinion). Period of custody of minors extend to puberty in males and up to marriage in females and consummation of marriage. Imam Shafie' said: 'when a child reaches seven years old, he/ she is left to chose between his parents. Whoever he/ she chooses, gets custody of the child'
20. The same principle applies in common law based on consideration of the best interests of the minors at all times while making decisions on issues relating to children. Unless specifically proven to be unqualified, the mother gets priority of custody of minors. In *Sospeter Ojaamong vs. Lynette Amondi Otieno* Civil Appeal 176 of 2006, the Court of Appeal held;

"The general principle of law is that custody of such children should be awarded to the mother unless special and peculiar circumstances exist to disqualify her from being awarded custody.
21. Nothing was produced in this case to prove the petitioner is not qualified to have custody of the children. Both parents share equal legal custody. Physical and actual custody and care of the minors is granted to the petitioner, the respondent to get unlimited access, provided it does not affect their school and madrasa tuition.



## Children maintenance.

22. The petitioner prayed for children maintenance KES 70,000.00 for food, KES 8,000.00 house help, KES 64,000.00 (KES 142,000.00) for accommodation, school fees and related expenses and NHIF medical insurance. The respondent offered to pay KES 10,000.00 per month for food. He undertook to pay school fees and accommodation and urged the court to confirm the parental responsibility agreement dated 14<sup>th</sup> March, 2022 made by the parties before Starehe sub-county children office. The said agreement provided that
- i. The petitioner will cater for clothing shelter and half of food
  - ii. The respondent will cater for education, medication and half of food
  - iii. That the respondent will have access of the children any of the weekends.

The court in a ruling given on 21<sup>st</sup> July, 2022 granted interim maintenance order of KES 25,000.00 per month plus accommodation and school fees.

23. Unlike in statutory law, under Islamic law the financial responsibility of provision for the children is a full responsibility of the father of the child, irrespective of the mother's financial ability. It is well founded on the provisions of Q.4.4 and numerous Islamic tradition and there is juristic consensus among Muslim jurists on its prerogative.
24. The Quantum on children maintenance is predicated on a balance between the twin factors of needs of children and the financial ability of the husband as espoused under Q.65.7 read together with Q.2.233 which provide:

“Let the rich man spend according to what Allah has given him and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what He has given him. Allah will grant after hardship, ease.”. Qur'an.65.7

“...No person shall have a burden laid on him greater than he can bear. No mother shall be treated unfairly on account of her child; nor father on account of his child.” Q.2.233

25. Ibn Kathir (d.774H) in his commentary of the verse Q.2.233 stated:

‘The father of the child is obligated to provide food and clothing (of the child) according to custom of her peers in her community without extravagance or stinginess, according to his means in times of abundance, moderation or want.’

26. The parental responsibility agreement was not made by a court of competent jurisdiction. Though persuasive it is not binding to this court.
27. In the instant case, the respondent did not dispute being an engineer. He alluded that he had lost his job with his employer but same was not supported by any proof. He certainly has also been running and managing the water company. He is a person of stable financial ability. It has also been alluded that the petitioner misuses the funds given to her for child maintenance. He had ample opportunity to produce evidence to support the claim. None was given. In the circumstances, I make children maintenance orders as follows:



- i. Food KES 40,000.00 per month sent directly to the petitioner through mobile money platform or bank account
- ii. Accommodation of at least one two-bedroom apartment in South B.
- iii. School fees and related expenses
- iv. NHIF Medical insurance cover for the children.

### **Division of Matrimonial property**

28. 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.'

29. 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'inoti & 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.'

30. 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

31. 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

32. 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].

33. 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.’
34. 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.’
35. There are two properties in dispute: the ‘Amiraza’ water purifying company and ‘Fashion Blast’ shop. On the latter property, the arguments were semantics as the respondent reiterated in his submissions that he does not want any share in the said property. The key function of courts is to resolve disputes and not engage in academic exercise. The dispute on division of matrimonial property relates only to the ‘Amiraza’ company.
36. It is not disputed that the business name ‘Amiraza purified water’ was registered by the petitioner on 29<sup>th</sup> November, 2019 about three years into their marriage. The couple had marital problems and disagreements affecting the business and needing police interventions to enable it to continue.
37. Apparently, the respondent registered another company ‘Amiraza ventures limited’ on 28<sup>th</sup> April 2022 and claims it no longer exists as he sold it to one Walter Omondi Ochieng. The sale agreement, on close scrutiny is not registered, signed, commissioned or executed. It is inadmissible and not credible as evidence. Further, the evidence of the respondent’s witnesses is that the premises is the same, the respondent is still in charge of the company and most of the documents for the company were registered using the names of the petitioner. It cannot be said that the petitioner made zero contribution towards operations of the company. She did not give sufficient evidence on her actual financial contribution to the company. Her contribution to the establishment of the company, I would estimate to be about 10%.
38. Having said that, the dispute on the property involves other laws that can only be fully settled by a court of competent jurisdiction. Because of the nature of the dispute involving company law, the effect and relationship between the two companies, the extent of the value thereto and lack of jurisdiction to determine these questions, we cannot make a finding on whether or not it is part of the matrimonial property.

Each party to bear its own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON 7<sup>TH</sup> NOVEMBER, 2023**

**HON. ABDULHALIM H. ATHMAN**

**CHIEF KADHI**

In the presence of

Mr. Yusuf for Petitioner

Mr. Odindo holding brief Ambala for Respondent

