



HJA v AIG (Divorce Cause E081 of 2022) [2022] KEKC 9 (KLR) (23 June 2022) (Judgment)

Neutral citation: [2022] KEKC 9 (KLR)

REPUBLIC OF KENYA
IN THE KADHIS COURT AT NAIROBI (MILIMANI COMMERCIAL COURT)
DIVORCE CAUSE E081 OF 2022
AH ATHMAN, SPK
JUNE 23, 2022

BETWEEN

HJA PETITIONER

AND

AIG RESPONDENT

JUDGMENT

1. The plaintiff prays for dissolution of marriage, issuance of divorce certificate, dowry, custody and children maintenance and return of matrimonial household items.
2. The petitioner claimed the respondent was assaults her, neglected and does not support the children and does not respect her and her family.
3. The respondent filed response to petition in opposition to the petition. He denied all the claims of the petitioner. He stated that they were heard by the area chief on her claim of assault but it was found to have no merit. He filed bundle of statements to prove he provided adequate financial support. He stated that the petitioner's mother gave him conditions for their re-union. In compliance with the conditions set by the petitioner's mother, he making a formal apology to the petitioner's family, getting another home in Donholm area, Nairobi but needed time to comply with the third condition, buying the petitioner 50gms of gold.
4. The parties were married on 23rd May 2017 at Nairobi. The petitioner is Kenyan while the respondent is a Swedish. Both are of Somali origin. They are young couples in their twenties. They are blessed with two children and another one is expected in about seven months, the petitioner being four months pregnant. The respondent was a student and now works for gain in Sweden where he resides and comes to Kenya for three months every year. The area chief unsuccessfully tried to resolve the marital dispute of the parties herein. Owing to limited time available to the respondent who is scheduled to return to Sweden soon, the court also compelled parties to engage and settle out court. It was also not fruitful.
5. The issues for determination in this matter are whether or not the petitioner is entitled to divorce.



6. The petitioner did not call any witness or file any document in support of her claims. Rule 123 of the KCRPP demand the person making a claim to furnish proof. It states thus:
 1. The burden of proof of any fact rests with the claimant (al - mudda'i) and the person who denies or disputes a fact (al Mudd'a alaih) takes oath.
 2. Whoever desires any court to give judgment as to any legal right or liability which is dependent on the existence of facts which he or she asserts, must prove those facts.
7. 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 settled law in civil cases a party who wishes the court to give judgment or to declare any legal rights dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue.’
8. The respondent filed a bundle of receipts of money transfer transactions indicating he regularly sent the petitioner monies for maintenance. In the absence of any evidence to support any of her grounds for dissolution of marriage and evidence of respondent’s financial support to his family, we find no legal basis to grant the prayer for divorce.
9. We appreciate that it is difficult and may even be counterproductive to compel two individuals to live together. In its recognition of this fact Islamic law provided a wife married under Islamic law the right to terminate the marriage through the Khul’u instrument under Qur’an 2.229, prophet Muhammad’s [may peace and blessings be upon him] ruling in the case of in the celebrated case of wife of Thabit Ibn Qays Ibn Shimas (Bukhari: 4990, Al Shaukany, Nail Al Awatar, 6/246) and article 89 of the Islamic Charter on Family. It is a legal recourse available for the petitioner. It is noted that the dowry of USD 3,000.00 had been fully paid in petitioner’s own admission.
10. The petition fails. It is hereby dismissed. No orders as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI ON 23RD JUNE, 2022

HON. ABDULHALIM H. ATHMAN

SENIOR PRINCIPAL KADHI

In the presence of

Ms. Judith, Court assistant

Petitioner

