



**NIKH v MPKD (Divorce Cause E034 of 2021)
[2022] KEKC 7 (KLR) (Family) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEKC 7 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT NAIROBI (MILIMANI COMMERCIAL COURT)
FAMILY
DIVORCE CAUSE E034 OF 2021
AH ATHMAN, PK
JUNE 23, 2022**

BETWEEN

NIKH PETITIONER

AND

MPKD RESPONDENT

RULING

1. The petitioner approached this court through petition for divorce for orders:
 - i. The Honourable Court be pleased to confirm the divorce issued by the applicant to the respondent by way of one talak and the same be declared valid
 - ii. The Honourable court be pleased to confirm registration of the divorce
 - iii. Certificate of divorce on the aforementioned be issued
 - iv. Reasonable provision of maintenance for the respondent during he eddat period.
2. The petitioner deposed that he was married to the respondent in Nairobi under Islamic law in 2008. He stated that the marriage irretrievably broke down and he divorced her by pronouncement of talaq on the 10th November, 2021 in the presence of two witnesses namely TA and TIHK. He deposed that he will leave the respondent to observe her eddat period in his dwelling and shall provide reasonable maintenance during the eddat period.
3. The respondent did not file a formal reply to the petition. Mr. Wanyanga then her advocate on record stated his instructions were not to oppose the divorce but the respondent’s rights upon declaration of divorce. He applied for and was granted leave to file written submissions on the same. The respondent changed her advocate after her first advocate had already filed the written submissions.



4. The main issue for determination in this matter is whether the divorce pronounced by the petitioner is valid and rights of the respondent arising thereto.
5. Dr. Hashim for the petitioner submitted that under Islamic law, once a divorce is pronounced by a husband it becomes effective. He submitted that the respondent received her dowry in full and eddat maintenance.
6. Mr. Wanyanga then counsel for the respondent submitted that the petitioner did not load evidence on his case notwithstanding the respondent not filing a response to the petition. He submitted that the court granted the divorce suo moto without according the respondent opportunity to cross examine the petitioner on the averments in the petition. He further submitted that upon divorce, the respondent is entitled to custody of the minors and division of the matrimonial property. He argued that the parties have been living in a rented house where both have made contributions to the household items; upon divorce, he contends the petitioner should be ordered to find alternative housing.
7. Divorce though eschewed is legal under Islamic law. It is often a last resort and there are inbuilt mechanisms within Islamic marriage and divorce laws which if, properly followed, would lead to minimal divorce rates. The general rule, a covenant taken in public at marriage specifically by the husband, is to treat her with kindness and in the event of divorce to also treat her with kindness. Q.2.228 provide

‘The divorce may be pronounced twice, then keep them in good fellowship or let them go with kindness’
8. Section 359 of the Kadhi’s Court bench book [2020] KCBB, aptly captures the rationale of divorce:

“Despite the revered status of marriage, Islam recognizes the necessity for divorce in cases when marital relations become bitter to a degree which makes a peaceful home life impossible. Divorce in Islamic law is considered in accordance with the legal maxim of the lesser of the two evils (aqalla al dararayn) in that divorce puts an end to the hatred that may occur between the husband and his wife before it is aggravated to larger extents of harming and creating mischief in society.”
9. In a petition or application for confirmation of divorce such as this, it is not necessary, nay it is offensive and ungentlemanly for the husband to cite grounds for divorce especially where same cannot be proven on the required standards of evidence under Islamic law. It offends the principle set on good public policy of divorcing in kindness. For avoidance of doubt and record, none of the claims set out by the petitioner as grounds of the divorce are held as facts of the case. They remain unsubstantiated claims and have no bearing whatsoever on the confirmation of the divorce. The petitioner is faulted on his disparaging and distasteful strategy.
10. Under Islamic law, upon pronouncement by the husband, divorce is effective. It should be written, dated and witnessed to authenticate it. Part IX, Section 57 [1] of the *Marriage Act* No. 4 of 2014 requires it be registered within reasonable time.

Narrated Abu Huraira [R.A.] that the Prophet [PBUH] said: Three issues are considered effective upon pronouncement, whether one is serious or joking: marriage, divorce and raj’at [returning wife to marriage contract after divorce before expiry of edda period in a revocable divorce]. Reported by the five Imams of Hadith except Al Nasa’i.



11. Section 372 of the KCBB states:

“Once uttered by the husband through the express pronouncement, divorce becomes effective. However, in using symbolic words, the husband must have intended the divorce for it to become effective.”

12. In the instant petition, the language of the divorce letter attached thereto is clear and unambiguous. It is signed, dated and witnessed by two witnesses and delivered to the respondent. It satisfies all the requirements of a valid divorce under Islamic law. It is hereby confirmed. Divorce certificate to issue.

13. The rights accruing to a divorced wife upon divorce are primarily dowry and eddat maintenance. The petitioner’s claim having paid the same were not challenged. The marriage certificate serial number xxxx confirms it had been fully settled. We find and hold that the respondent received her dowry and eddat maintenance for the specified period of three months under Q.2.228.

14. The issues raised by respondent through her advocate on custody and division of matrimonial property are not issues in this matter especially as admitted by respondent, the same are issues in KCMISC Exxx of 2021 in the Kadhi’s Court at Upper Hill, Nairobi before another bench. Nothing estops the respondent to file any matter not therein pleaded. It is trite law that parties are bound by their specific pleadings and same cannot be brought through submissions. These issues are not for determination in this matter.

15. No orders as to costs.

DATED AND DELIVERED AT NAIROBI ON 23RD JUNE, 2022.

HON. ABDULHALIM H. ATHMAN

PRINCIPAL KADHI

In the presence of

Ms. Judith Ndori, Court Assistant

Dr. Hashim for Petitioner / Respondent

Ms. Kirui for Respondent / Applicant

