



**MASPK v (Y)RWK (Divorce Cause E002 of 2021)
[2022] KEKC 153 (KLR) (5 October 2022) (Ruling)**

Neutral citation: [2022] KEKC 153 (KLR)

**REPUBLIC OF KENYA
IN THE KADHI’S COURT AT UPPER HILL (NAIROBI MILIMANI LAW COURTS)
DIVORCE CAUSE E002 OF 2021
AH ATHMAN, SPK
OCTOBER 5, 2022**

BETWEEN

MASPK APPLICANT

AND

(Y)RWK RESPONDENT

Divorce registration at Kadhi’s Court could only be filed on the presumption that the informal divorce issued by the husband was not contested by the divorced wife.

In a contested divorce in which the wife contested an informal divorce that was registered by the Kadhi’s Court on lack of service and on a challenge on the jurisdiction of the Kadhi’s Court, the court determined that the registration of a divorce at the Kadhi’s Court could only be filed on the presumption that the informal divorce issued by the husband was not contested by the divorced wife.

Reported by John Ribia and James Nginya

Jurisdiction – jurisdiction of the Kadhi’s Court – jurisdiction of the Kadhis’ Court in divorce matters - whether the Kadhi’s Court had the jurisdiction to determine a divorce case in which one of the parties who had entered into the marriage professing Islamic faith had converted to a different faith by the time of the divorce – Constitution of Kenya, 2010, article 170(5); Marriage Act, Act No. 4 of 2017, section 71.

Family Law – divorce – divorce under Islamic law – informal divorce – registration of an informal divorce – requirements - what was the procedure in registering an informal divorce under Islamic law - whether an informal divorce under Islamic law could be registered where the wife contested the divorce - what was the legal status of an informal divorce under Islamic law for which registration was sought and in which the wife had not appended her signature on the application for registration of divorce or consent.

Family Law – divorce – divorce under Islamic law – divorce decree – where a divorce had been decreed but the applicants were cohabiting - whether a couple that continued to cohabit despite a divorce decree being issued under Islamic law vitiated the divorce.

Constitutional Law - fundamental rights and freedoms – right to a fair trial – claim of breach of right to fair trial in divorce proceedings before the Kadhi’s Court - where a party had been served with court papers but



without serving the opposing party with the court's link for virtual court proceedings or a divorce notice - whether such conduct was a breach of the right to a fair trial - Constitution of Kenya 2010, article 50(1); Quran 38.24.

Brief facts

The applicant was a Kenyan national whereas the respondent was a German national. Both converted to Islam on October 25, 2019 in Nairobi and shortly after, on November 6, 2019, entered into an Islamic marriage. On January 4, 2021 the respondent filed for registration of divorce at the Kadhi's Court. He annexed an email of the divorce letter sent to the applicant on the same date. Upon hearing the respondent and consideration of the law, the court observed the respondent sent the applicant the divorce letter through e-mail. The court found the divorce valid and directed it be registered and a certificate of divorce issued.

The applicant filed a divorce case in Germany that would protect her legal rights under German law. However, the respondent produced the divorce decree issued by the instant court. If recognised by the German court, the applicant's petition for divorce at the court in Germany would be rendered inadmissible and jeopardize her legal rights in Germany.

The applicant thus approached the instant court to have the certificate of divorce issued suspended and for the court to dismiss the case. The applicant deposed that she renounced the Muslim faith and reverted to Christianity on December 31, 2019 and had been of Christian faith ever since. She further deposed that the divorce proceedings in Kenya were done without her knowledge and consent. She further argued that the respondent had not informed her of the divorce and only knew about it in the court proceedings in Germany but they had been living together as husband and wife even after it had been issued. She denied that she had consented to the divorce. She averred that if the orders sought were not granted she would suffer immense damage as the court in Germany where they currently both resided, may not adjudicate on the divorce proceedings.

Further the applicant contended that she had not been properly served with the divorce decree and the link to the online proceedings of the Kadhi's Court and as such, lack of service constituted a breach of her right to fair administrative action.

Issues

- i. Whether the Kadhi's Court had the jurisdiction to determine a divorce case in which one the parties who had entered into the marriage professing Islamic faith had converted to a different faith by the time of the divorce.
- ii. What was the procedure in registering an informal divorce under Islamic law?
- iii. Whether an informal divorce under Islamic law could be registered where the wife contested the divorce.
- iv. What was the legal status of an informal divorce under Islamic law for which registration was sought and in which the wife had not appended her signature on the application for registration of divorce or consent?
- v. Whether serving the opposing party with the court papers but not serving the opposing party with the court's link for virtual court proceedings or a divorce notice constituted a breach of the opposing party's right to fair trial during divorce proceedings.
- vi. Whether a couple that continued to cohabit despite a divorce decree being issued under Islamic law vitiated the divorce.

Held

1. Jurisdiction of the Kadhi's court was conferred by article 170(5) of the Constitution of Kenya (2010) to determine questions of Muslim law on personal status, marriage, divorce or inheritance between parties professing the Muslim faith and who had submitted to its jurisdiction. For the Kadhi's Court to exercise its jurisdiction the parties must all be muslims, the subject matter within the four listed issues and the all the parties needed to submit to its jurisdiction.



2. Section 3 of the Marriage Act (the Act) recognized Muslim marriages and gave them the same legal status as the other marriages registered under the Act. It further provided that dissolution of a marriage celebrated under Muslim law shall be governed by the Islamic law.
3. Celebration of a marriage under Islamic law meant submission to its jurisdiction in the event of its dissolution. The marriage between the parties having been celebrated in Kenya under Islamic law and registered under the Marriage Act, 2014, meant that the court had requisite jurisdiction to handle and determine it.
4. The right to fair trial was protected by the Constitution of Kenya, (2010) under article 50(1) and under Islamic law and traditions. It was founded on *Q.38.24* and the prophet's direction to Ali ibn Abu Talib when he appointed him the judge of Yemen. It was a fundamental right and key concept of rules of natural justice
5. The applicant deposed that she had not been served with the court papers. However, the respondent had filed an email to prove he had served her with the divorce notice. There was however no proof she had been served with the hearing of the matter. There was no proof she had been supplied with the court's link for virtual court proceedings. The matter was filed on January 4, 2021 and proceeded to hearing on January 6, 2021. There was no proper or adequate service upon the applicant. Her right to fair trial was infringed. The judgment was irregular. The court as a matter of right set aside the irregular judgment.
6. The husband had original powers to effect divorce upon his wife. Once pronounced and or written it became effective. However, the same had to be communicated to the divorced wife who had some inherent rights after divorce. It was the court's duty to ensure those rights were protected and satisfied. Divorce registration was only filed on the presumption that the informal divorce issued by the husband was not contested by the divorced wife. Both parties appended their signatures to the application for registration of the divorce, otherwise, the husband had to either to file a petition or miscellaneous cause for confirmation of the divorce. In either case the divorced wife would be served with the petition or miscellaneous cause.
7. In the instant case, the applicant did not append her signature on the application for registration of divorce or consent thereto. The application was incurably defective. The issue of the couple having continued to cohabit even after issuance of the divorce decree was not before court for consideration but would, if found as fact, vitiate the divorce.

The suit was struck out.

Orders

Each party was to bear its own costs.

Citations

Cases

1. Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others ([2014] eKLR) — Explained
2. Morris v. United Kingdom ([2005] ECHR 103, para 59) — Explained
3. M.S.R v N.A.B ([2017] eKLR) — Explained

Statutes

1. Constitution of Kenya, 2010 — Article 50 (1); 170(5) — Interpreted
2. Marriage Act — Section 3, 71 — Interpreted

Advocates

Mr. Kamau for applicant



RULING

1. The parties herein then adults of christian faith, reverted to Islam on October 25, 2019 at Jamia Mosque – Nairobi in the republic of Kenya. They then married under Islamic law on November 6, 2019 at Nairobi. On January 4, 2021 the respondent filed for registration of divorce in this court. He annexed an email of divorce letter sent to the applicant on the same date. Upon hearing the respondent and consideration of the law, the court observed the respondent sent the applicant the divorce letter through e-mail. He found the divorce valid and directed it be registered and a certificate of divorce issued. This is the decision the applicant wants suspended.
2. The respondent is German while the applicant is a Kenyan national. The parties moved and are currently in Germany. The applicant filed a divorce case in Germany that would protect her legal rights under German law. However, the respondent produced the divorce certificate / decree issued by this court. If recognised, the applicants petition for Divorce Case No 15UF 33/22 at the Schleswig-Holsten Higher regional court in Germany would be rendered inadmissible and jeopardize her legal rights in Germany. The divorce proceedings in the German court have been stayed pending recognition proceedings in Germany on the divorce granted by this Kadhi's court.
3. The applicant's notice of motion application dated July 27, 2022 seek orders that this honourable court be pleased to dismiss the case in toto on grounds of lack of jurisdiction of the court, lack of knowledge and service of the divorce proceedings and misleading of the court by the respondent.
4. The respondent was served with the application and hearing notice through e-mail by applicant's counsel. Affidavit of service is duly filed. He failed to file reply thereto or appear to defend the application either physically or through the virtual court. Hearing proceeded *ex-parte* under rule 68(1)(b) of the *Kadhi's Court (Procedure & Practice) Rules 2020*. The judiciary has adopted modern technology to facilitate justice. These include e-filing, virtual courts and e-service. Order 5 rule 22(c) of the Civil Procedure (Amendment) Rules (2020) allow service through mobile based applications. Parties can file cases and replies thereto and participate in hearings from anywhere in the republic or the world.
5. The applicant deposed that she renounced the Muslim faith and reverted to Christianity on December 31, 2019 and has been of Christian faith ever since. She further deposed that the divorce proceedings in Kenya were done without her knowledge and consent. She further argued that the respondent had not informed him of the divorce and only knew about it in the court proceedings in Germany but they had been living together as husband and wife even after it had been issued. She denied that she had consented to the divorce. She averred that if the orders sought are not granted she will suffer immense damages as the court in Germany where they currently both reside, may not adjudicate on the divorce proceedings.
6. The application raises some important questions of law on jurisdiction, rights to fair trial and validity of the divorce.
7. Jurisdiction of the Kadhi's court is conferred by article 170(5) of *Constitution of Kenya (2010)* to determine questions of Muslim law on personal status, marriage, divorce or inheritance between parties professing the Muslim faith and who submit to its jurisdiction. For the Kadhi's court to exercise its



jurisdiction the parties must all be Muslims, the subject matter within the four listed issues and the all the parties need to submit to its jurisdiction. It provides:

The jurisdiction of a Kadhis' court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.

8. However, section 3 of the [Marriage Act](#) recognises Muslim marriages and gives them the same legal status as the other marriages registered under the Act. It further provides that dissolution of a marriage celebrated under Muslim law shall be governed by the Islamic law. Section 71 the [Marriage Act](#) No 4 of 2014 it provides:

'The dissolution of marriage celebrated under part VII shall be governed by Muslim law.'

9. The high court dealt with the twin issues of submission to the court's jurisdiction and applicable law on dissolution of an Islamic marriage. It recognised celebration of a marriage under Islamic law to mean submission to its jurisdiction in the event of its dissolution. In the case [MSR v NAB](#) (2017) eKLR, the High Court held:

'the fact that the petitioner converted to Islam and submitted herself to a marriage under Islamic law, I do find that it would be prudent if the issue of the dissolution of the marriage is handled by the Kadhi's court. Issues of a marriage celebrated under Islamic law shall be governed by Islamic law as stated under section 71 of the [Marriage Act](#). The fact that the petitioner no longer professes Islamic faith does not change the situation.'

10. In the instant case, the marriage between the parties having been celebrated in Kenya under Islamic law and registered under the [Marriage Act, 2014](#), the court had requisite jurisdiction to handle and determine it.

11. The second question relates to applicant's right to fair trial. The right to fair trial is protected by [Constitution of Kenya](#) under article 50(1) and Islamic law and traditions. It is founded on Q 38.24 and the prophet's [may peace and blessings be upon him] direction to Ali ibn Abu Talib [may blessings be upon him] when he appointed him the judge of Yemen. It is a fundamental right and key concept of rules of natural justice. Njoki Ndungu SCJ, in the case of [Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others](#) [2014] eKLR stated:

'[257] Fair trial in principle incorporates rules of natural justice, which includes the concept of audi alteram partem (hear the other side or no one is to be condemned unheard) and *nemo judex in causa sua* (no man shall judge his own cause) otherwise referred to as the rule against bias.'

12. This was further emphasized in the case of steel and [Morris v United Kingdom](#) [2005] ECHR 103, para 59 where the court held:

'It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court.'

13. In the instant case, the applicant deposed she had not been served with the court papers. However, the respondent had filed email to prove he had served her with the divorce notice. There is however no proof she had been served with the hearing of the matter. There is no proof she had been supplied with the court's link for virtual court proceedings. The matter was filed on January 4, 2021 and proceeded to hearing on January 6, 2021. In this regard we find there was no proper or adequate service upon the applicant. Her right to fair trial were infringed. The judgment was therefore irregular. The court will,



as a matter of right, as set out in the cases of *Shah vs Mbogo* and *Ongom vs Owota*, which we hereby do, set aside irregular judgment.

14. I agree with the trial Kadhi that the husband has original powers to effect divorce upon his wife. Once pronounced and or written it becomes effective. However, the same must be communicated to the divorced wife who has some inherent rights after divorce. It is the court's duty to ensure those rights are protected and satisfied. Divorce registration is only filed on the presumption that the informal divorce issued by the husband is not contested by the divorced wife. Both parties append their signatures to the application for registration of the divorce, otherwise, the husband has either to file a petition or miscellaneous cause for confirmation of the divorce. In either case the divorced wife would be served with the petition or miscellaneous cause. In this case, the applicant did not append her signature on the application for registration of divorce or consent thereto. The application was thus incurably defective. The issue of the couple having continued to cohabit even after issuance of the divorce decree was not before court for consideration but would, if found as fact, vitiate the divorce.

15. For the reasons afore said, the suit is struck out. Each party to bear its own costs.

Orders accordingly,

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON 5TH OCTOBER, 2022.

HON. ABDULHALIM H. ATHMAN

SENIOR PRINCIPAL KADHI

In the presence of

Mr. Suleiman A. Mohamed, court assistant

Mr. Kamau for the applicant.

