



THE REPUBLIC OF KENYA

IN THE KADHIS COURT

AT KISUMU

KMC 14 OF 2020

IN THE MATTER OF THE ADVISORY OPINION OF JIA.....APPLICANT

RULING

Facts

1. The marriage of the applicant herein, JIA to his wife, DAE was dissolved by consent between the parties on 18th April 2019 before the Deputy Chief Kadhi Hon. Sukyan Hassan Omar of Kadhis Court at Upper Hill, Nairobi. There were other orders pertaining to maintenance of the two issues of marriage, but that is not the subject of this application.

2. The Applicant herein has been in talking terms with the former wife, and have agreed to come back together as husband and wife. The main hurdle is that the wife's *walii* (guardian) is adamant that the two cannot re-marry since, according to him, the court's order on the dissolution of marriage was absolute-what is known in *fiqh* parlance as *baynunah kubra*.

3. In making this application, the Applicant seeks this court's interpretation of the orders dissolving his marriage, and declaratory orders as to whether the law allows them to re-marry.

Analysis

4. I have perused the application, and the attached judgement dissolving their marriage in the Divorce Case No. 268 B of 2018 rendered in the Kadhis Court Nairobi, at Upper Hill. Among the orders of the Honourable Deputy Chief Kadhi was the following:

“By consent the marriage between the parties is hereby dissolved and the same be registered” [Emphasis mine]

The use of consent, alongside dissolution, and the subsequent registration of marriage have deeper meaning within the literature that form the corpus of Islamic law and within the practice of the Kadhis courts in Kenya. For example, in the latter, when a Kadhi orders for registration of a divorce, it is understood that the parties are in an irrevocable (*Baain*) divorce/dissolution, regardless of whether the irrevocability (*baynuunah*) is minor (*Sughraa*) or major (*Kubraa*). Minor irrevocability is where the man is allowed to enter into a new contract of marriage with the wife without her having to marry another man, divorce this other man before marrying him. The major irrevocability is what Qur'an 2:230 alludes to:

[And if he has divorced her (for the third time), then she is not lawful to him afterward until after she marries another husband other than him...]

5. In denying re-marriage of the two, we must have only one scenario: That the dissolution by the court had the effect of a major irrevocability (*baynuunah kubraa*) which meant that the two cannot re-marry until the wife marries another man, lives with him ordinarily, and divorce ordinarily afterwards. There, and then is when she can become lawful to him with a new marriage contract.

6. The questions this court will proceed to answer are as follows:

a) Whether the parties' mutual consent to divorce was enough to end the marriage and the courts work was only to approve of their consent, Or

That their consent notwithstanding, the court was still going to dissolve the marriage based on its discretionary powers.

b) How does the dissolution affect re-marriage between the parties?

The law

7. From the onset, it is acknowledged that there is difference between Talaq(Divorce) and Faskh(Dissolution of marriage). Talaq pronouncement originates from the husband, and can be counted as one, or two and three. Faskh is from the Hakamain(Arbitrators) or the Kadhi(Judge) and cannot be numbered. When the Qur'an talks about major irrevocability, it says so, with reference to the three Talaqs and not with reference to Khul' or Faskh. This is the position of many scholars including Al Shafii in *Al-Umm* [Vol 6: 309, 472, Dar al-Wafaa, 2001]

8. It also follows from the above that raj'ah(return to the marital fold) is in two ways: That which follows talaq and that which follows faskh. Raj'ah in the first and second talaq should be within the stipulated eddah period, or else the divorce becomes that of minor irrevocability. Raj'ah in Khul' or faskh does not happen until a new marriage contract, with new mahr is entered into.

9. Let us now turn to the question of consensual divorce. In the *Z?d al Ma'?d* of Ibn Qayyim al Jawziyya [Vol 5: 599, Al Resalah Publishers, Beirut, 1998], there is a question on Raj'ah:

[About the return(to the marital fold during eddah): Is it the husband's right and as such is entitled to relinquish it by pronouncing an one irrevocable divorce, or it is Allah's right and therefore the husband cannot relinquish it? ...There are 3 opinions...

The preponderant opinion is that the Raj'ah is Allah's right, and the two parties cannot agree to relinquish or drop it, and it does not behove him to divorce her irrevocably, even if the wife consents to. Then, the law also does not allow them to consent to dissolve their marriage without (payment of) consideration].

10. In essence, Ibn Qayyim says that the spouses have no right to drop the legal requirement for raj'ah, and the husband has no right to pronounce an irrevocable divorce and in the same way, the spouses have no right to dissolve their marriage by mutual consent without payment of consideration. What therefore follows, for this particular case is that there was no dissolution of marriage by mutual consent since no consideration was paid. That now leaves us with the option that it was the court which dissolved the marriage owing to the facts presented by the parties before it, and the Kadhi exercised his discretion judiciously, mutual consent to divorce was not the primary fact considered in dissolving the marriage.

11. Judicial dissolution of marriage when it occurs, is it considered like revocable talaq or irrevocable talaq and if it is considered as irrevocable, is it a minor or a major irrevocability? This is the gist of this application.

The most profound pronouncement on the same comes from *Wahbah Al- Zuhayli* in well- known work *Fiqh al-Islam wa Adillatuh* (Vol 7: 510). He says:

[Judicial dissolution can be considered (to have the effect of) talaq, and that entails dissolution based on lack of maintenance, or iytaa, or constant disputes among spouses, or missing spouse, or imprisoned...and can also be considered (to have the effect of)faskh since it renders the contract of marriage void *ab initio* like in a defective contract like the contract that is void because of apostasy, or one of the parties embracing Islam]

In the *Mawsuah al Fiqhiyya al Kuwaitiyya* (The Kuwaiti Fiqh Encyclopedia) vol 32: 112, in is stated that:

[Dissolution (of marriage) for reasons of constant disputing between spouses is (regarded as equivalent to) irrevocable talaq according to majority of jurists]

To be more specific, in the *Fatawa of ibn B?z*, the eminent Saudi jurist says:

[If a judge dissolves the contract of marriage for reasons such as lack of maintenance or for (other) reasons calling for dissolution, then the dissolution would be regarded as a minor irrevocable dissolution (*baynuunah sughrraa*), and she can return to him and he can return to her through a new marriage contract and new mahr even if it is within her eddah period]

12. Furthermore, the Qur'an, in the ordinary revocable divorces *prioritizes* the return of husbands- as against a new marriage by other men-to their divorced wives during the eddah period.

[And their husbands have more right to take them back (in this period) if they want reconciliation] Quran 2: 228

This would mean that the husband would still have priority of return to his former wife as the kind of revocation of divorce in this application does not need that the wife marries another husband for her to qualify to re-marry the former husband.

Determination

The upshot of all of the above is as follows:

THAT the **judicial dissolution** of the marriage between Jamil Ibrahim Ali and Delailah Ayub Ebrahim by the Hon. Deputy Chief Kadhi on 18th April 2019 at the Kadhis court Nairobi at Upper Hill, is **valid as a minor irrevocable dissolution (*baynuunah sughrraa*)** and this therefore means that the two are free to enter into a new marriage contract with a new mahr agreement between them.

IT IS SO RULED.

DATED DELIVERED AND SIGNED AT KISUMU THIS 8TH of SEPTEMBER 2020

Before

Hon. T.J. Kunyuk

SENIOR RESIDENT KADHI

KISUMU LAW COURTS

In presence of the Applicant