



THE REPUBLIC OF KENYA
IN THE KADHI'S COURT AT NAIROBI
DIVORCE CAUSE NO. 106 OF 2018

SAK.....APPLICANT

VERSUS

DA RESPONDENT

RULING

Vide this ruling I shall dispose off an application brought under Article 45(3) of the Constitution, Section 4,6,7,9,25(1)(a),76(1)(2)(3a,b,e,f,i) and 82 of the Children's Act 2001, Section 1A and 1B of the Civil Procedure Act.

The applicant sought for the following orders inter alia:

1. That this Honorable Court be pleased to review it's judgment dated 14th December 2018 by granting the respondent both the actual and legal custody of the minors N. D (9 years), M.D (8 years) and N.D (6 years).
2. That this Honorable Court be pleased to grant the Applicant her divorce by way of Khul'a as an alternative directed in the judgment dated 14th December 2018.
3. That upon grant of order number 2 above, the applicant be allowed to settle the unpaid mahr of KES. 30,000/- in monthly installments of KES. 3,000/- for a period of 10 months.
4. That the cost of this application be in cause.

The application is supported by the affidavit of SAK, the applicant, sworn on 21st December, 2018.

The respondent opposed the applications vide a notice of preliminary objection dated 4th January and filed on the same date, submitting that the court is *functus officio* and that no legally recognized grounds for review have been laid out in the face of the application thus he prayed for the dismissal of the application.

Issues for determination

Having considered the submission by both parties herein, the issues for determination are;

- a) Whether the applicant has established grounds for review;
- b) Whether the court is *functus officio*

It is well settled that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 45 Rule 1 of the Civil Procedure Rules, 2010 and Section 80 of the Civil Procedure Act.

Section 80 of the Civil Procedure Act^[8] provides as follows:-

80. Any person who considers himself aggrieved-

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, May apply for a review of judgment to the court which passed

the decree or made the order, and the court may make such order thereon as it thinks fit.

11. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows:-

45 Rule 1 (1) Any person considering himself aggrieved-

a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay.

Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; **(a)** *discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;* **(b)** *on account of some mistake or error apparent on the face of the record,* or **(c)** *for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.*

The argument by the applicant that the minors are not attending school and madrassa on account of respondent failure to abide by his parental responsibility is never a valid ground for review. Further, the record of the court condemns the applicant for unlawfully and without justification uprooting the issues of marriage out of their matrimonial home and school to Somalia. I must add that this court accordingly addressed the issue of the school and madrassa. To me, that is not a ground for review at all.

Thus, I am not persuaded that the applicant has offered *grounds* within the meaning of the provisions of Section 80 of the Civil Procedure Act or the Order 45 Rule 1 of the Civil Procedure Rules, 2010.

b) Whether the court is *functus officio*

This court had already pronounced it self within the Applicant’s pleadings. Further, by arguing for a dissolution of marriage by way of khul’ beyond what was duly prosecuted before this court at the trial would go contrary to the general principle of finality which prevents the court from re-opening a case whose final decision and judgment has been made. The applicant only prayed for a fault based divorce and, thus she wasn’t entitled to non-fault based divorce (khul’). The alternative granted by the court is purely based on academic discourse and further on the point of information but she can still pursue her desire by instituting another cause.

In the premises, this court is *functus officio* and cannot revisit the judgment on merit and/or it cannot purport to exercise a judicial power over the same matter, save as provided by law.

Consequently, the application is hereby dismissed.

DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF MARCH 2019.

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Hon. A.I. Hussein

Senior Resident Kadhi

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF MARCH 2019.

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Hon. S.H. Omar

Deputy Chief Kadhi