



**REPUBLIC OF KENYA**

**IN THE KADHI'S COURT**

**AT NAIROBI**

**CIVIL CASE NO. 84 OF 2017**

**AGC .....PLAINTIFF**

**-VERSUS-**

**SSS.....DEFENDANT**

**JUDGMENT**

By his plaint, AGC, the plaintiff seeks *inter alia* a declaration of the unilateral divorce issued upon the defendant on 6<sup>th</sup> January 2017 as valid, a declaration that the two (2) issues born out of the illicit affair are illegitimate, issuance of divorce certificate, division of matrimonial property, deduction of all the assets squandered by the defendant from her rightful share, cost of the suit and any further relief that this honorable court may deem just and fit to grant.

The brief facts are that the plaintiff and the defendant got married under Islamic law sometimes in January 1995 at Nakuru. Five issues aged 22 years and 5 years were begotten during the subsistence of the marriage. That during the marriage, the parties jointly and severely acquired properties in Nairobi.

The defendant in answer to the petition, denied all the allegation raised by the plaintiff and counter-claimed that the marriage between the plaintiff and the defendant be dissolved on the grounds set out in the counterclaim and set off, the plaintiff be ordered to provide maintenance for the defendant and their children in line with paragraph 35 of the Amended Statement of Defence and counter-claim dated 15<sup>th</sup> March, 2019, the plaintiff be ordered to pay alimony to the defendant in the sum of Kenya Shillings One Hundred Thousand (Kshs.100,000/-) and the amended plaint be dismissed with costs.

There was no reply to the counterclaim by the defendant and the failure on the part of the plaintiff in replying to the counterclaim was occasioned by the defendant's utter disregard to court's directions to serve the plaintiff before the close of business on the 15<sup>th</sup> March, 2019 but instead they served him on 19<sup>th</sup> March, 2019 the day meant for the hearing of the suit thus the plaintiff was unable to respond to the counterclaim hence it is non-procedural for this court to admit a counterclaim against the plaintiff/defendant in defiance of the direction of the court which was meant to achieve the realization of rule of natural justice.

The matter proceeded for trial on 19<sup>th</sup> March, 2019 both parties choose not to call any witness, PW1 and DW2 presented evidence vide witness statements, documentary evidence and oral testimony. Written submissions were filed in which several issues were raised for determination, and after a consideration the following issues falls for determination:

1. Whether the unilateral divorce issued by the plaintiff upon the defendant is valid?
2. Whether the last two (2) issues of the marriage were born as a result of illegitimate intimacy?
3. Whether the plaintiff/defendant is entitled to a share in the matrimonial property?

**ISSUE 1**

The plaintiff in his evidence adhered to the averments in paragraphs 3,15, and 23 of his plaint. The petitioner submitted that the parties lived as husband and wife from 12<sup>th</sup> January 2007 till the 6<sup>th</sup> January 2017 when the plaintiff unilaterally issued a talak as appears in PE1 (Talak notification letter), and, that they are no longer legally married under the law. Therefore he asks the court to declare the unilateral divorce issued by himself on the 6<sup>th</sup> January 2017 as valid.

On contrary the respondent refuted the allegation raised by the petitioner and submitted that on or about the month of January, 2015 the

plaintiff deserted the matrimonial home with no explanation whatsoever and that he declined to support the defendant and the children of the marriage and that they are still legally married.

It's now settled in our courts that there are two categories of dissolution of marriage under Islamic law: Extrajudicial divorce and Judicial divorce. Under extrajudicial divorce the law placed the unilateral and extra-judicial power of pronouncing a talak on husband with a firm expectation that in the first place he will not exercise it ordinarily at all and secondly that if he finds it avoidable to have recourse to it, he will do so with a sense of Justice and rationality, which are the basic demands of law from every God fearing Muslim. There is nothing in the law suggesting that the husband can exercise the power of talaq in an arbitrary, irrational or unreasonable manner. The husband may only seek judicial intervention in regard to confirmation and/or declaration and registration of the unilateral talak.

**In Asha Bibi v. Kadir Ibrahim Towther** (1910) ILR 33 Mad 22, His Lordship Justice Munro and Abdul Rahim, JJ., at page 25 held as follows :- **“No doubt an arbitrary or unreasonable exercise of the right to dissolve the marriage is strongly condemned in the Koran and in the reported sayings of the prophet (Hadith) and is treated as a spiritual offence. But the impropriety of the husband's conduct could in no way affect the legal validity of a divorce duly effected by the husband.”**

On judicial divorce that emanates from the judicial tribunal where either spouse file petition for dissolution of marriage and in most cases either of the party/claimant is required to adduce evidence of fault or otherwise.

In the present case there is no serious evidence to rebut that unilateral talak to dissolve the marriage between the parties never took place. The defendant only offered a general denial of the talak stating that she's legally married to the plaintiff. Further, there's a contradiction in the statements of the defendant, at Paragraph 3 of her pleadings she vehemently denies the plaintiff's averment that he issued a divorce declaration which purportedly ended the union and at Paragraph 4 of the same pleadings the defendant averred that it is indeed the plaintiff who has issued a divorce declaration and not the defendant.

From the above, would there have been any doubt that a talak subsists between the parties, the documentary evidence marked PE1 confirming the operationalization of divorce would erase such doubts, and I therefore declare the validity of the unilateral talak issued upon the defendant on 6<sup>th</sup> January 2017.

## ISSUE 2

The plaintiff contended that after the marriage the parties lived as husband and wife at South C, Nairobi until sometimes in 2015 when the defendant moved out of the matrimonial home and that it's at that time plaintiff has raised issues regarding the issue of accountability and the status of the two (2) youngest minors namely: N & W after he discovered that both were sired as a result of the defendant's extra-marital affairs with two different men as it appears in Kadhi's Court (NRB) Miscellaneous No. 276 of 2017.

Save for the fact that the two youngest minors were born within the subsistence of the marriage; there is no serious rebuttal by the defendant against those grave allegations of extra-marital affairs. The defendant also did not rebut the evidence that sired the two youngest minors as a result of extramarital affairs.

The importance of the paternity is exemplified in the fact that it defines and determines several legal rights and obligations created by Islamic law. The grand principle that establishes paternity of a child born during the subsistence of marriage, in Islamic law is drawn from a Prophetic report that **“the paternity of the child is for the owner of the conjugal bed or the rightful owner of the bed (al-walad lil-firash).”** The Jurist disagreed over the exact meaning of the term 'firash'. Ibn Qayyim al-Jawziyya recorded three leading opinion on the meaning of the term 'firash': the marriage contract itself, according to Hanafi lawyers; the marriage contract with feasibility of consummation of marriage, according to Shaf'i and Hambali lawyers; and the marriage contract with verified consummation of marriage, according to Ibn Taymiya. According to Islamic law the presumption of the legitimacy will arise in the following: -

- I. A child born after six months of the marriage is legitimate unless the father denies it with a proof.
- II. A child born after the dissolution of marriage is legitimate if born:
  - a. Within 10 months of the dissolution (Shia lawyers)
  - b. Within 2 years of the dissolution (Hanafi lawyers)
  - c. Within 4 years of the dissolution (Shafi & Maliki lawyers)

The above provision is kin to section 118 of the Evidence Act which provide that:

**“The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.”**

The section is based on the principle that when a particular relationship, such as marriage is shown to exist, then it continuous must prima facie be presumed. Under this section the fact that any person was born -

1. During the continuous of a valid marriage between his mother and any man, or

2. Within two hundred and eighty days after its dissolution, the mother remained unmarried.

When comparing this provision of the evidence Act with the classical rules of Legitimacy under Islamic law the difference are two fold:

a. Under classical Islamic rules of legitimacy a child should not be born but also conceived during a valid marriage whereas under the evidence Act a child born even after a day of marriage may be presumed legitimate.

b. Under classical Islamic rules of legitimacy a child born within or even beyond 2 years under Shafi and Maliki schools, of the dissolution of marriage may be presumed legitimate but under the Evidence Act a child born after two hundred and eighty days of the dissolution of marriage may not be presumed as legitimate.

The intention of law regulating the presumption of paternity is meant to prohibit unscrupulous father from: making bald accusation against the child and mother and failing to undertake his parental duties.

Notably, the grounds offer by Islamic law in ascertaining the paternity through a principle of 'conjugal bed' by and large are quite lenient. A child born within six months of marriage and/or beyond two years after the dissolution of marriage, when a mother is not married, is presumed to be legitimate. It's within the knowledge of Jurists the normal period of gestation then why did they allow a longer period? Through such clemency the law attempted to preserve the social values and order by shielding the mothers and their children from possible censure. However, the effect of the presumption of legitimacy created by law must not override the principle of the best interest of the child.

In the instant case, attaching the paternity of the two minors to plaintiff will result in the deprivation of the blameless minors from the right of paternity, through which they enjoy parental care and protection, which subjects him to unfair treatment in consequence of acts done by others.

### ISSUE 3

The plaintiff testified that he was the sole breadwinner of his family and that his was gainfully employed as a private contractor offering security service abroad whereas the defendant was a house wife taking care of the family and investing the income generated out of the his salary which she wholly accessed in Gulf African Bank Limited, account number 01107099101, Eastleigh Branch by dint of being a joint signatory due to the fact that the defendant was geographically and conveniently in a better position to pay family expenses and bill and that he remitted monthly loan repayments that was utilized to acquire various property including the following assets: -

- a. MAISONETTE ON LR NO. NBI/BLK xxxx/xxxx,
- b. SOUTH C PLOTS NO. LAND REFERENCE no xxx/xxxx,
- c. Motor Vehicle Registration Number KBH xxxxN, Mercedes Benz, Tractor Head;
- d. Motor Vehicle Registration Number KBT xxxxG, Mercedes Benz, Tractor Head;
- e. Motor Vehicle Registration Number KBT 587G, Mercedes Benz, Tractor Head;
- f. Motor Vehicle Registration Number KBT xxxxxQ, Mercedes Benz, Tractor Head;
- g. Trailer Registration Number xxxxxx;
- h. Trailer Registration Number xxxxxxx;
- i. Trailer Registration Number xxxxxx;
- j. Nissan x trail KBN xxxxY
- k. Shares in Muhsina agencies limited
- l. Shares in Nanai somu (k) limited and
- m. Shares in Sororo transporters limited
- n. Funds in GULF AFRICAN BANK Limited, dollar account number xxxxxxxxx,
- o. Funds in Kenya shillings Account Number xxxxxxxxx

The plaintiff further stated that all the property were mainly registered in the name of the defendant due to the nature of his occupation and he further submitted that parties to the matrimonial property be shared in the ratio of 80:20 in his favour as he has proved his contribution to acquisition of the same.

The defendant disputed that she was a housewife thus unemployed and produced alleged sale agreement of land worth 450,000/- whose proceeds after the sale were the seed capital plus the loans acquired from the bank, enabled her accumulate all the assets in her name. She further submitted that the said motor vehicles were repossessed, save as Motor Vehicle No. KBN 887Y that is garage and KBT xxxxxG and KBT xxxxG that had accidents and burnt down, sold by First Community Bank to recover its loan debt.

The defendant further contended that the companies listed herein above are not and have never been family business and that companies are regulated under Companies Act, and/or partnership Acts and can only be dealt with in accordance with dictates of the company law and doesn't therefore fall for determination in a family property proceedings. She further stated that the monies (USD 4600/-) that she was withdrawing monthly from the plaintiff's account were meant for upkeep of the family including the plaintiff's extended family and payment of the children's fees and that the only property left for distribution includes; their matrimonial home MAISONETTE ON LR NO. NBI/BLK xxx/xxx, in regard to which she had made repayment of over one million shillings and SOUTH C PLOTS NO. LAND REFERENCE no xxx/xxxxx jointly acquired by both parties. Lastly, she ask the court to take into account that she has been educating and continue to educate the children of marriage and that the matrimonial properties should be shared in a ration of 80:20 in her favor.

In **AWA v HDD [2018] eKLR** the court stated that “ **As held in the case of MSR VS NAB, a dispute involving Matrimonial Property of a Muslim can be heard by either the subordinate court including the Kadhi's Court or the High Court provided that the Islamic law is used as the determinant factor. ....**

**Section 3 of the Matrimonial Property Act allows for the application of Islamic Law on Matrimonial property. The window granted to Muslims to have their disputes on matrimonial property does not mean that matrimonial property belong to a spouse. Even under Islamic Law the Contribution of each spouse has to be determined depending on the circumstances of the case. The Matrimonial Property Act does not define the Court where such disputes are to be heard. Section 17 of the Act provides that a person may apply to a Court for a declaration of rights to any contested property.”**

So, while I agree that Article 45(3) of our Constitution guarantees equality in treatment of either the wife or husband at the time of marriage, during the marriage and at the dissolution of marriage as read together with Article 24(4) of the Constitution, it does not, in my opinion, require that all property either individually or jointly acquired before or during the subsistence of a marriage should in all cases be shared equally upon divorce. This means that even in the context of marriage the right to own property individually is preserved by our Constitution as is the right of an individual to own property in association with others who may include a spouse, children, parents among others. The above principle is fortified by Chap 4 v 32 of the Holy Qur'an.

In Al-Turuq al- Hukmiyyah Fi al-Siasah-al-Shariyyah Regarding the property registered under the name of either the husband or wife, during the subsistence of marriage, Al – ImamIbnu Qayyim Stated that;-

**“It cannot be assumed based purely on what is held in hand or having authority over a name by having the name on a land title and the likes becoming the rights of only a single person if the property is acquired during the duration of the marriage, in fact its existence is of no consequence. In relation to this, an allusion can be made to the appliances in the house and other properties for example a house, a piece of land and the likes that are acquired during the time when both are still husband and wife unless there is proof to show that the properties were divided or the rights of each one separately”.**

When dealing with matrimonial property, the Court has to take into consideration –

- a. To what extent are the contributions made by each party in terms of money, property or work to acquire the properties;
- b. Any debts owed by one of the parties made for their joint venture; and
- c. The needs of the children from the marriage, who are not yet of age, if any, and subject to those considerations, the Court must, as much as possible, make a fair division according to each person's effort or capital.

Bearing in mind the above principle on how to treat and divide property upon divorce I will now apply the principles to each property in issue.

#### CLUSTER A

From the evidence on record, the properties acquired during the subsistence of marriage where parties jointly contributed are the following: -

- a. MAISONETTE ON LR NO. NBI/BLK xxx/xxx,
- b. SOUTH C PLOTS NO. LAND REFERENCE no xxx/xxx,
- c. Nissan x trail KBN xxxY

#### CLUSTER B

The matrimonial property registered in the defendant name SSS T/A S TRANSPORTERS,

- a. Motor Vehicle Registration Number KBH xxxN, Mercedes Benz, Tractor Head;

- b. Motor Vehicle Registration Number KBT xxxxG, Mercedes Benz, Tractor Head;
- c. Motor Vehicle Registration Number KBT xxxG, Mercedes Benz, Tractor Head;
- d. Motor Vehicle Registration Number KBT xxxQ, Mercedes Benz, Tractor Head;
- e. Trailer Registration Number xxxx;
- f. Trailer Registration Number xxxxx;
- g. Trailer Registration Number xxxx;

#### CLUSTER C

Property in joint names of the parties

- a. Shares in Nanai somu (k) limited

#### CLUSTER D

Property in joint names of the defendant and another

- a. Shares in Muhsina Somu (k) limited

#### CLUSTER E

Property disputed which has not been proved

- a. Funds in GULF AFRICAN BANK Limited, dollar account number xxxxxxxx,
- b. Funds in Kenya shillings Account Number xxxxxxxx

The finding of the court in consideration of the direct and indirect contribution in Cluster A, Cluster B are matrimonial property and should be put in a pool to be shared on the ration of 60:40 respectively including share of respective parties on liabilities. Property in cluster C and Cluster D is not proper in proper forum before the court (See AKK V PKW (2018) eKLR. The properties in Cluster E are not proved and court makes no order relating to them.

#### **DISPOSITION**

In the result, I make the following orders:

1. That the unilateral divorce issued upon the defendant on the 6<sup>th</sup> of January, 2017 be and is hereby declared as valid,
2. That arising from (1) above the certificate of divorce be issued.
3. That I declare that the two issues of marriage namely; N and W were sired as a result of illegitimate affairs.
4. That matrimonial property shall be divided in the following terms;

I. That MAISONETTE ON LR NO. NBI/BLK xxx/xxx, SOUTH C PLOTS NO. LAND REFERENCE no xxx/xxx, and Nissan x trail KBN xxxY to be shared in a ratio of 60:40 in a favor of the plaintiff,

II. The matrimonial property registered in the defendant name SSS T/A S TRANSPORTERS to be shared in a ratio of 60:40 in a favor of the defendant,

5. No orders as to cost.

**DELIVERED AND SIGNED AT NAIROBI THIS 16<sup>th</sup> May, 2019.**

**A.Ishaq Hussein**

**Senior Resident Kadhi**

**In the presence of:**

**Mr. Timon – C/A**

**Ms. Cherop hlb for Mr. Marete for the Plaintiff**

**Mr. Lakicha for the defendant**