



REPUBLIC OF KENYA

IN THE KADHI'S COURT

AT KISUMU

KISUMU LAW COURTS

DIVORCE CAUSE NO. 05 OF 2018

SIB.....PETITIONER

V E R S U S

EAM alias N.....RESPONDENT

J U D G E M E N T

INTRODUCTION

1. This divorce filed on 15/5/2018 by SIB seeking interalia:-

- 1.1. Confirmation of the divorce and issue divorce certificate.
- 1.2. Custody of the child of the marriage JS.
- 1.3. Eviction orders be issued to the respondent to vacate the matrimonial home for succession process to commence.

2. The brief back ground of the couple is that they got married under Islamic law sometimes in the year 2008. They cohabited together in Kisumu at different places. The marriage was blessed with one issue namely:-

2.1. JS

3. PLAINTIFF'S CASE:-

3.1. The petitioner states that this marriage was never a happy one. He listed the claims of cruelty as:-

3.2. Denial of conjugal rights. Desertion/leaving the house without permission expressed that she was found at sunspot night club; Drunkardness and coming home late. Company of strange men. Threats of killing him.

3.3. That on 29/10/2014 a divorce was issued to the respondent on her own request.

3.4. The petitioner following the dissolution of the marriage paid Edda maintenance for three months totaling to Kshs. 22,500/=.

3.5. The utilized the water vendor project for the daily provision and the child is now 17 years old. He demands custody.

3.6. The effort of the petitioner to make the respondent vacate the house turned futile. She became violent and urged the police to protect herself.

3.7. The respondent has turned the home a local pub where she sells alcohol and flirts with different men.

3.8. Several advices to vacate and stop the behavior were futile which prompted him to break the doors which caused him be arrested at bus park police station and later booked at Kondele police station. Was later released on a cash bail of Kshs. 10,000/=.

3.9. That the respondent has turned the matrimonial house into her own, despite being divorced. Chased away the petitioner's mother and delayed the process of succession of the estate on which the house stands. She has caused the petitioner's mother High blood pressure.

3.10. The respondent has 2 children from the previous marriage and have damaged the petitioner's reputation and caused him a lot of anguish.

3.11. Threats from the respondent that if he dared step in the house he will be buried without the head.

3.12. The right of the petitioner ended after divorce and the child in question is 17 years.

4. Respondent was served with the petition and summons to enter appearance. She entered appearance on 22/5/2018 and filed her defence on 5/6/2018. Therein she avers and denies all the averments of the petitioner.

4.1. She states that the marriage was solemnized on 24/1/2007. She came with 2 children. The marriage was blessed with 3 issues:-

4.1.1 J S – Born on 7th July 2010

4.1.2. FA – Born on 4th May 2004

4.1.3. J S – Born on 24th July 1998 (Adult)

4.2. Hell broke loose sometimes when the petitioner started treating the respondent with cruelty. Including: - Emotional and physical abuse – occasionally. Became un- caring and open hostility to her and the children. Extra marital affairs and negligence. Denying the defendant consortium. Denial of freedom and peace to live in the matrimonial home. Non – provision. Harassment. Treating the defendant with contempt. The Parties separated in 2014.

4.3. The plaintiff has come to court with unclean – hands and undeserving.

4.4. The defendant denied in totality the contents of the paragraphs 4,5,6,8,9,10,11,12,13, and fourteen. She states at paragraph 7 that she is legally water vendor which was gotten from KIWASCO single handed without the assistance of the petitioner.

4.5. She also had Counter claim: in which she states as thus; Got married with 2 children and therefore the marriage blessed with 3 issues. The children who she was seeking maintenance are minors and are still minors 8 and 17 years and still need parental care.

4.6. She avers that there is not time Edda was issued. On 13/5/2018 petitioner went to the home, turned violent tried to demolish the house and this led to his arrest,

4.7. 7 years of marriage the petitioner started treating the defendant with cruelty just enumerated above.

4.8. The plaintiff had extra marital affairs and deserted the home leaving the defendant with actual custody of the children. She single handedly provided for the children of the marriage.

5. Counter claim: Dissolution of the marriage and custody of the children. This claim is against the plaintiff's. Avers that she in legal water vendor and tried to settle the matter amicably but in vain. The marriage has broken down irretrievably and cannot be salvaged. She has not connived and not an assessors to the plaint.

6. The court has jurisdiction

7. The orders against the petitioner:-

7.1. Dissolution of the marriage

7.2. Legal custody of the minor children

7.3. Any such other or further orders that the court deems fit to grant in circumstances.

7.4. Cost be bore by the petitioner.

8. The case came up for mention on 5th July 2018 and a leaving notice issued for a hearing on 10/7/2018. When the matter came up the parties identified (3) contentious issues namely:

8.1. Divorce

8.2. The matrimonial house

8.3. The custody of the children of the marriage,

9. 21. The above issues remained only two after the agreement on the issue of divorce. The respondent agreed to it and in her counter claim she accepted it. This has left us with the two contested issues. They custody of the child and the matrimonial home (house).

10. The parties appeared in person. The petitioner gave viva – voice evidence just the same as the written petition. He states that the marriage was blissful with a lot of love. The problem emanated from the defendant who changed the behavior and resorted to consumption of alcohol to the extent that the defendant could not perform her marriage obligations as required. The petitioner turned to be the husband and wife.

11. Another issue cropped up from his statement not in the plaint. That the respondent was tested with HIV and found positive while the petitioner was negative. This rendered the union impossible. From here he accused her of planning to infect him with the deadly disease. He asked her to vacate the house peacefully but the respondent demanded one million which was very high and could not afford.

12. He called four witnesses, to testify.

12.1. **PW2:** states that he is the brother. He informed the court that the respondent was married as 2nd wife and they lived happily at first. They built a house together in which the respondent is staying. He further stated that the brother divorced the respondent after marrying a third wife. The matter before the court could not be settled at home because after divorce the respondent demanded one million as his compensation to the house before she vacates which was too high and not affordable to his brother. That matter would be overlooked but the respondent has turned the house into a brothel sells alcohol and invites men of all kind which has ruined the reputation of the petitioner's family. It has also ruined Islam which is the religion and further stated that the respondent has left Islam. The child should be left to the brother.

12.2. **PW3** testified as the person who used to take money to the respondent when they were building the house.

12.3. **PW4** K J petitioner's mother. Testified and stated that the main dispute was on the plot. This belonged to her late husband. On which the respondent built a house. She says that the respondent was divorced by her son. The house has been turned into a club. The house sells alcohol and adulterous activities. Bad to a Muslim home. She stressed that they should remove/demolish the house and leaves her the plot. It has caused her trauma and heart attack. It is also unreligious unreasonable to the owner who was a staunch Muslim and he is not happy wherever he is.

13. The respondent also gave vivo – voice evidence on the hearing. She contends that:-

13.1. On extra – marital allegation was false – no witness was produced. The child alleged being 17 years is only 8 years therefore a minor and of tender age. She had not caused the mother any sickness. The allegation of being found in a bar was false with no evidence. On marriage she agrees that the marriage was good and happy but changed after the petitioner married another woman who caused his arrest. She agrees that they came to the Kadhi's court where the petitioner was compelled to maintain the respondent at Kshs. 250/= paid only one month.

13.2. In October, 2017 the petitioner served her with a notice of vacation to expire at 21/7/2017 but for she didn't vacate. He again returned to the house to forcefully evict her but it was impossible.

13.3. She in a lengthy narration explained the occurrence of the petitioner trying to remove her from the house in vain. She concludes by demanding that she is ready to move out on the compensation of her contribution and payment of past maintenance and the custody of the child.

14. On submissions which were done orally. The petitioner submits and acknowledges that the respondent contributed towards the building of the house but what she is asking is unreasonable. He also submits that the respondent should abstain and stop doing the business she is doing in the alternative should leave the house. On the child he reiterates that the water vending is a project which they undertook through a loan and was being utilized by the respondent to take care of the child expenses. She should not ask for any assistance.

14.1. The respondent counter claimed and asked the court to consider her contribution. Be paid. The child is taken care of to settle the dispute.

Issues for determination

15. After the discussion of the pleadings, arguments on record and the submissions of the petitioner and the respondent I consider the following to be the issues of determination.

15.1. Whether the divorce issued in 2014 was valid or not

15.2. What is the jurisdiction of the Kadhi's court in relation to matrimonial property after divorce?

15.3. The quantum of sharing the matrimonial property and laws applicable.

15.4. Who is entitled to the custody of the children of the marriage?

15.5. What order should the court make.

Divorce

16. It is the law that a husband or wife may petition the Court for nullification of marriage. It is in **doubt** whether marriage between the parties was terminated by this court in absence of any record. The petitioner has stated that a divorce was issued on 29th October 2014 at the instigation of the respondent but was not documented. The respondent repudiated it and labeled it a separation. However the response in her counterclaim prayed for the dissolution of the marriage.

17. A court may grant a decree of divorce on the grounds of irretrievably breakdown of the marriage if it is satisfied on evidence adduced that the marriage relationship between the parties has broken down to such an extent that there is not sensible view of the reinstatement of a normal marriage relationship between the parties.

18. where marriage is beyond repair on account of resentment generated by the acts of the husband or the wife or of both, the courts have always taken irretrievable breakdown of marriage as a very weighty circumstance amongst others necessitating severance of martial tie. A marriage which is dead for all purposes cannot be revived by the court's verdict, if the parties are not willing.

19. From the submissions of both parties, it is apparent they are in agreement on the fact that they no longer have love and affection for each other. The petitioners claim is accepted by the respondent. Their marriage has irretrievably broken down and cannot be retrieved. Neither of them is interested in reconciliation. In short the marriage is in existence in name and nothing more. It's a shell and hence it serves no useful purpose for it to stand.

20. When a divorce is initiated by the husband, it is known as talaq. The pronouncement by the husband may be verbal or written, and should only be done once. Since the husband is seeking to break the marriage contract, the wife has full rights to keep the dowry (mahr) paid to her. The petitioner is the husband and has expressed that he undeniably pronounced the divorce although it was not written. After the filing he has reiterated the same coupled with the above findings I agree with the petitioner that the divorce took place at that time as seen in the agreement to divorce.

The Question of Matrimonial Property and Kadhi Court

21. I would like to start with the expression of the judges in the case of RMM v BAM [2015] eKLR. Civil appeal H.C.C.C. NO. 139 OF 2007 at paragraph 25 where in it describes acquisition of jurisdiction.

22. At the root of the issue is whether it was the High Court or the Kadhi's Court which has jurisdiction to determine the matter of distribution of the matrimonial property. As was stated by the Supreme Court in Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR

23. *"A Court's jurisdiction flows from either the **Constitution** or **legislation** or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law... The issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings....Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within this authority to prescribe the jurisdiction of such a court or tribunal by state law."*

24. When exercising jurisdiction we look at the provisions of Section 3(1) the judicature Act, which outlines thus; "The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised **in conformity** with— a. the Constitution; b. subject thereto all **other written laws**, including the Acts of Parliament of the United kingdom cited in Part I of the schedule to this Act, modified in accordance with Part II of that schedule; c. subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the **doctrines of equity** and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date; Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as **the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.**"

25. The first consideration therefore is what the expression of the constitution on this matter is. The Constitution at Article 170(5). Provides as follows: The jurisdiction of a Kadhi's 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 parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's Court. The Kadhis court act reiterates the same in Section 5, A Kadhi's court **shall have and exercise the following jurisdiction, namely 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;** but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it."

26. Considering the above provisions it is obvious that Kadhi's court have been given the mandate to handle question of law relating to the items mentioned. I am aware that it is not an ouster of the HC to handle the matter but it is properly before this court and after its proper decision it is equally binding and without doubt as articulated in some High court decisions.

27. The same is covered in legislation in Matrimonial property Act 2013 at section 3. States that; 3. Application of Islamic law A person who **professes the Islamic faith may be governed by Islamic law in all matters relating to matrimonial property.**

28. In other jurisdiction as outlined by the Judicature Act those using common law in Malaysia Kadhis Courts are called Shariah Courts. They are available at both subordinate and appellate levels. The jurisdiction of the shariah courts under Islamic Family Law (Federal Territories) Act 1984 covers marriage, divorce, maintenance of wife, children and others, guardianship which include management of the person and property affairs of the minors, question of legitimacy of a child among others. In the following pages we will briefly discuss few selected countries in relation to personal status law.

29. In *Eggers v Eggers*, 82 S.D 675 (S.D 1967) held that: "It is well settled that a divorce court has **continuing jurisdiction** (My emphasis) over its decrees for alimony, separate maintenance, and custody and support of children."

30. In *Abdirahman Mohamed and another v Adan Yusuf*(2013)eKLR the Court stated that; "...paternity and custody of the child in this case are **incidental** to the issues of marriage and divorce between the Appellants and thus it falls under the jurisdiction of the Kadhi's court." Matrimonial property is also incidental to the divorce. Matrimonial property dispute are one of area of law which is daily litigated before the court. It's observed that a part from maintenance and custody of children, division of the matrimonial property is also one of the ancillary claims which are frequently involved by the wife after/upon the dissolution of marriage or when spouse dies and no agreement on the property can be reached in sulh (Reconciliation)

31. The Provision in the Books on Islamic Jurisprudence in *The Bughyah at-Mustarshidin* book , page 159 stated: “ *When the property of a husband and wife has merged and it is not known whose property is more, there are no signs to differentiate the property from one to the other, and then divorce or death occurs between the two, it is therefore unlawful for one or both (spouses or heir) to rule over (utilize) part of the property before it can be differentiated or before conciliation (al-sulh) unless together with the owner because there is no murajjih (signs to differentiate).*”

32. In the premises given above, the issues of matrimonial property , custody , care and control of the minors not only falls under the garb of personal status, but this court as a divorce court has a continuing and exclusive jurisdiction to deal with any matter incidental to divorce such as maintenance, custody, guardianship , paternity among others. I think on my part, that this court, faced with such complexity, should opt for the law that best accords with the Constitution and is protective of the interests of both parties. There is no paucity under Islamic laws and the High court opinions of doubts on whether a Kadhi can competently adjudicate this question of law is not an impediment as this does not oust the jurisdiction of Kadhi court. Rather it is set as a court of first incidence.

33. The correct position, in my view, on the share of the respondent on the house built can be dealt with as provided by matrimonial property act which does not contrary to Islamic law. In the *Al-Turuq al- Hukmiyyah Fi al-Siasah-al-Syariyyah* Regarding the property registered under the name of either the husband or wife , during the subsistence of marriage, Al – Imam Ibnu 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*”.

34. Direct financial Contribution should be considered while dealing with such disputes, which includes; direct financial contribution made, in absence of contrary evidence it's presumed that the parties intended that property to be jointly owned. Financial Contribution is an important element for consideration in dividing the joint property regardless of the quantum. However the amount that the party will get depends on the contribution made in acquiring it. In *Haji Abdul Rahim v Isngaton*; the Court decided that since there was sufficient evidence of the wife's financial contribution in buying the land as well as working on it, her claim for half share of the land as M.P was therefore allowed.

35. Further we must look at Indirect Contribution. Court is placed in a difficult situation if the contribution made by the spouse is indirect. For example, that the husband should pay the monthly installments on the house while the wife mainly contribute to the payment of the utility bills. This assumption is based on the fact that without the wife payment of the utility bills the husband would not have been able to pay the Mortgage. In other words the wife's payment of other household expenses would enable the husband's contribution to be directed towards the acquisition of the asset. In *Haminah Bee v Shamsudin* , “ *Haminah throughout her marriage with has acted as a wife and performed the duties usually performed without getting any assistance from servant and because of that it can be inferred that the assets acquired during the marriage were acquired by their joint efforts. This is further support by Section 7, Matrimonial property act which is of paramount significance. It provides: - “7. Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.” Contribution is defined by Section 2 to mean monetary and non-monetary contribution. And non-monetary contribution includes:- a. Domestic work and management of the matrimonial home; b. Child care; c. Companionship; d. Management of family business or property; and e. Farm work; “Family business” means any business which- a) is run for the benefit of the family by both spouses or either spouse; and b) generates income or other resources wholly or part of which are for the benefit of the family;” 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.*”

36. That leads me to the last major contention of the parties on the evaluation of the evidential material on record. I have carefully re-examined the record There is ample evidence on record to prove on a balance of probability that the house was jointly built by the parties in equal terms and this is a case where in my humble view accords each party a 50 / 50 share. Therefore the value of the house will be shared equally.

CUSTODY.

37. The Respondent's evidence was to the effect that she is the more suitable parent to have custody of the children who are three. She has been staying with children than the petitioner. The petitioner prayed for the custody of the child claiming he was 17years. This was countered

by the respondent and correctly asserted that the child was 8years old though no birth certificate was produced the years of marriage shows that.

38. In ascertaining which parent to award custody, court must be guided by what is in the best interest of the child. See Art 53(2) of the constitution where it's stated that; "A child best interest are of paramount importance in every matter concerning the child. The above principle has been corroborated by Sharia; see Ibn Qudama; Al Mughni pg. 613-14, which state that; ' Principles of custody have been introduced in view of the welfare of the children. Hence their enforcement shall not be proper in a way that shall put in jeopardy the person and faith of the children'. While I agree that the welfare principle in the paramount consideration in deciding the custody of the minors I am also of the view that the welfare of the minors will be served better where both parents are involved in the upbringing. The roles of both parents should be complimentary and the question of who has a superior right to her custody should be secondary.

39. After all has said I am of the view that respondent has not been shown to be an unsuitable parent to have the custody of the children of the marriage who has been staying with the children all along. Further it has not been exposed that granting custody to the respondent will not be in the best interest of the children of the marriage. Respondent will thus be awarded physical custody of the children of the marriage.

MAINTENANCE

40. The respondent's counter claim was to the effect that the petitioner be ordered to provide for the children with school fees, medical cover and food and past maintenance. Issues maintenance is captured in Sec. 24 of the Children Act and the Constitution as well as Al hidaya put a duty on parents to maintain their child. That duty gives the minor a right to education and guidance, immunization, adequate diet, clothing, shelter and medical. If the husband is healthy, able bodied and is in a position to support himself is under the legal obligation to support his children, for children's right to receive maintenance under Chap. 2 V 233 of the Holy Qur'an, unless disqualified, is an absolute right. Grant of maintenance to children should be perceived as a measure of social justice Chap. 2 V 233 of the Holy Qur'an is a measure of social justice and is specially enacted to protect children and falls within constitutional sweep of Article 19(2) reinforced by Article 21(3) and Article 53 of the Constitution . It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the Children. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. Thus the responsibility of the father for the maintenance of his child is unconditional and absolute as such no father should be treated unfairly and or harmed on account of his child; physically, mentally or morally. In the circumstances petitioner is ordered to look after the children of the marriage unconditionally.

41. For the reasons given above, I would I make the following orders;

41.1.1. That the marriage solemnized between the petitioner and the respondent was terminated by the petitioner on 29th of October, 2014.

41.1.2. In relation to (i) above the divorce certificate to be issued forthwith

41.1.3. The petitioner to pay the remaining amount of Mahr.

41.1.4. iv). the custody, care and control of the minor is hereby vested to the respondent the petitioner will have unlimited access as per their own arrangement.

41.1.5. The petitioner shall contribute towards the maintenance of the child in terms of Education and medical care

41.1.6. In the instant case, this Court after weighing all evidence reaches a decision that Eunice made a monetary contribution to the development of the house. Of significance is that the house is the matrimonial home in which she resides. The offer made by Suleiman of Kenya Shillings two hundred thousand (Kshs. 200,000) would not be satisfactory to settle this matter. On my part, I have no doubt that Eunice's contribution monetary and non- monetary towards the building of house deserves more than that. I cannot be sure that an offer is good enough. To enable this Court make an informed decision herein I now order that valuation be conducted of the house within 30 days hereof. The costs of valuation shall be shared equally by the parties. The Court shall after receiving the valuation Report give its final orders on the exact amount to be paid off to the respondent. Since the house was built the petitioner's plot the respondent must after adequate arrangement of payment vacate the house.

41.1.7. No order as to costs

Delivered, Dated and Signed at Kisumu this 1st day of November 2018.

In the presence of all the parties

C/A Rehema Akidah

Hon R.K. Otundo

Senior Resident Kadhi

01/11/18