



REPUBLIC OF KENYA

IN THE KADHI'S COURT AT GARBATULLA

KCDC 16 OF 2016

FAJ PETITIONER

VERSUS

SJH RESPONDENT

JUDGEMENT

1. On 10th day of October 2016, the Petitioner filed this suit asking for;

- a) Dissolution of marriage,
- b) Ownership of the plot and the house for her children,
- c) Custody of the children,
- d) Maintenance of the subject.

2. The petitioner and the respondent were married for over twenty three years ago, according to Islamic Shariah at the dowry of one she cow which was paid. The marriage which was blessed with eight children, namely;

- 1) HS (married with children)
- 2) ZS – 16 years
- 3) MS – 14 years
- 4) SS– 12 years
- 5) NS – 8 years
- 6) AS – 6 years
- 7) AS – 3 years

3. The Petitioner claims that the respondent did not provide for her basic needs for three years ago, always uses abusive terms against her in the presence of children and family members, denied his daughter SS that he had not fathered her, saying that the said S is born out of wedlock. The Petitioner also claims that the Respondent has plan to sell the land which she alleged to be bought and developed it, using her own money, and she further asserts no support she got from the Respondent. The Petitioner also states that the Respondent issued threats to her, confiscated her documents including her identity card, voter's card, birth certificates and clinic cards of the children. She further complains of suffering due to burden and stress caused by the Respondent, she said he chased her from matrimonial home and now she has no place to sleep, the petitioner finally states that the elders were called upon to mediate on the matter but never succeeded.

4. On 25th October 2016, the Respondent appeared for his case and filed the response, he deny the allegations on not providing for the basic needs of his family, he states that it is only in the months of May and June 2016 when he was hospitalized, that the petitioner was left with the Responsibility of looking after the children. The Respondent also deny that he never ignored any of his children, It is only one time when his daughter S abused the teacher thus he told her that none of his children has such bad habit, it was misinterpretation of information. The Respondent again deny that the petitioner never bought any land, he further states that the plot she refers to, belong to him and the house also belongs to him. He says he has witnesses who can confirm the land issue. The Respondent further deny that he has never threatened the

petitioner either verbally or physically, he says that he deny taking the petitioner's identity card and voter's card. Additionally he contest that she never applied for birth certificate, and concerning clinic cards for the children, the Respondent avers that the clinics cards is always been with him and whenever she needs them he gives out to her.

5. The Respondent again denies that no elders have ever been called for the purpose of this matter. The cause of action arose in Kulamawe location of Garbatulla, where both parties reside. The parties herein have agreed that this matter to be decided in this court.

6. It is hereby the duty up on this court to determine on:

- a) Whether the Respondent did not provide for the maintenance of his family, and uses abusive terms against the Petitioner,
- b) Whether the Respondent denied his daughter that he did not fathered her,
- c) Issue of the plot and the house on who is the owner?
- d) The custody of the minor children in the event that this marriage may come to end.

7. The matter was called for hearing on 11th day of January 2017, but the parties resolve their disputes with elders before the matter proceed for hearing. However the petitioner raised the question on whether their marriage still exist for the reason the Respondent had already issued two talaka. The Respondent also respond that he has revoked the talaka in the same day by uttering the word rajaátu meaning "I return back" the wife to be in the marriage.

8. The Petitioner admit to have heard that revoke of talaka from sheikh Hussein Ali Tacho who is acting in the name of a Kadhi just purposely to conduct muslim marriage and solves family matters locally. In this case, the Respondent has that provision in Islamic shariah to return back his wife to the marriage so long the number of talaka has not reach to the maximum of three talaka.

9. Any way the Petitioner further insisted for dissolution of the marriage though she has no ground for the same; she has not supported her claims with satisfactory evidence. She left her matrimonial home for long away from her children who are in dire needs of her care and protection as their mother.

10. After considering both sides, and situation surround this marriage, and further taking into account the best interest of the children of this marriage, because this matter also involve the minor, this court opined that the petitioner to resume back to her marital home until the time may be the problem will arise from the Respondent's side, after which the elders refer the matter again to the court. This was as temporary orders entered on 21st February 2017 to protect the marriage, and to give space for the parties to rest of or bring down their temper, pending the case set for mention on 25th April 2017.

11. The parties never appeared on the date fixed for mention until on 17th October 2017, which the case was not on cause list. The court allowed the parties to proceed with the case.

12. The Petitioner report that she has not resume back to her matrimonial home, she has been away from home but resides in the same location where her matrimonial home exist. She wished to be divorce completely and be given the custody of her two minor children.

13. In respond to what is reported, the Respondent paves way for the Petitioner to be free for divorce other than says not to give away the children to her, because she had abandoned the same children since June 2015. He further states that the Petitioner ask for custody after he entered to a new marriage with another woman, she has been quit all through without mentioning the issue of the children. She is prompted to ask for divorce and custody by his (Respondent) move to marry another wife, He justify his action that he just entered a new marriage for the safety of his children, since they need someone to take care of them as their mother.

14. Later on, the Respondent informs the court a new issue which was not part of prime claims, though it happened to be more vital to be dealt with. He says that the Petitioner got pregnant out of illegal sexual intercourse with another man within the duration which the case is pending before the court and as a result she delivered a child which was not his child. Immediately, the Petitioner respond verbally to the claims that she admit to have had the pregnant away from legal marriage and she further admit to have delivered a child who is of her own.

15. Nevertheless, this court finally perceive that this marriage has reach nowhere to be repaired due to the Petitioner's act of committing adultery out of legal marriage, which action she admit to, and the Respondent has lost hope to continue with the marriage. Therefore, the marriage is no longer in existence.

16. To deal with the issue of the custody of the children, the court find no best interest of the children is placed with the Petitioner, since she abandoned the said children as young as they are with the Respondent for now close a year. For this reason and the other, she is not good place where the custody of the children is entrusted. The Respondent who is father has the right to the custody; however the Petitioner has the right to access the children any time.

17. Pertaining to the child born out of this marriage, the court find that this child is illegitimate, but the said child has nothing to do with the crime committed by her mother, and that the said child has all the rights as any other child.

18. The question to whom this illegitimate child who born to the respondent's wife is attributed to who? According to scholarly consensus the child is to be attributed to the husband and the adulterer deserves nothing, as narrated by al-Bukhari, 2053; Muslim, 1457. Because, the child born attributed to the owner of the bed the respondent.

19. Ibn Qudamah said: “the scholars were unanimously agreed that if a child is born to one man’s wife, and another man claims it is his child, the child is not to be attributed to the latter, the difference of opinion arises when a child is born outside the marriage”

20. The child is therefore attributed to the Respondent because the Petitioner was married to the Respondent at the time she get pregnant and the child is born to him, however the child is born as a result of illegal sexual intercourse with an adulterer. The said child has all the rights from both the petitioner and the Respondent.

21. The claim to ask for ownership of the land and the house by the petitioner not granted. The land and the house mentioned are obtained through the subsistence marriage period which is not clear by whose effort the land and the house are acquired. Consequently, its matrimonial property, which belongs to every member of this family; bearing in mind that the Petitioner has left the matrimonial home long before the divorce, without due cause, she has been away for close to a year. As well according to the finding, she is found to be part of this problem. Hence, she is entitled to personal items like her ornaments, clothes and other items which suit her and the needs of the newborn child who is at her custody.

22. The Respondent is far better entitled to the said property, since he manage to maintain the children of this marriage at the time when the Petitioner (mother) who is in charge of house in terms of taking care of the children left the matrimonial home. The Respondent took the charge of caring the children alone. The Petitioner caused him to engage in another marriage by being away from the marriage for long. He occupied the same plot and the house which was initially belongs to both the Petitioner and Respondent. Therefore, he has the right to continue occupying the plot and the house with his children and the new wife, until the time the children of this marriage grow up and ready enough to air their intention on whether to claim the rights or leave it between the two parties in this case. It’s not a matter of the petitioner and the Respondent alone to decide on what to do with the said property.

23. On issue of maintenance in this case, this court finds that the Petitioner left the matrimonial home without reasonable ground and has been away for long, therefore this court find no way to grant her orders for maintenance.

24. No further orders as to this case.

25. Right of appeal within 30 days from this judgement.

Dated and Delivered at Garbatulla on 1st day of November 2017.

By Galgalo Adan – Senior Resident Kadhi

In the presence of

1. Petitioner – FAJ

2. Respondent – SJH

3. Court Assistant – Rukia H. fugicha