



REPUBLIC OF KENYA

IN THE KADHI'S COURT AT BUNGOMA

DIVORCE CAUSE 7 OF 2014

BYO.....PETITIONER / APPLICANT

FNRESPONDENT

JUDGMENT

Introduction:

1. The petitioner (hereinafter B) filed a divorce suit together with certificate of Urgency against respondent (hereinafter F) on 9 sept 2014 for divorce, vacation from matrimonial house/home along with their two Issues of marriage – M and A , Costs and other reliefs. Berar and F solemnized an Islamic marriage in 1982, later established their matrimonial home at Bungoma and blessed with eight Issues prior to problems that from basis of this suit.

Petitioner's Case:

2. B in his petition accused Farida of cruelty; desertion to Kampala for 9 years, denial of conjugal rights, witchcraft, misuse of his property, Insulting family members, losing purchase documents for Busia land, allocating / allowing trespass of their two adult and or married son in to rooms in the matrimonial house against their Buganda Customs and tradition thus causing him physical and mental harm.

3. ON 3 October, 2014, B stated; he legally married F, established their matrimonial home in Bungoma and blessed with the eight (8) Issues. Mr. B accused her of desertion to Kampala for about 9 years while in South Africa, misuse of money sent for fees and family maintenance. He further accused F and the two sons of; abuses, insulting him before neighbours, witchcraft instead of known Quran healing procedure (Ruqia) and occupation of the matrimonial house by the two sons against his wish and that of their Baganda customs and traditions thus forcing him cohabit with second wife in a 10/10ft house . He accused them of sale of households which included a generator, radio, computer, Tv and suite case.

4. In cross examination, Mr. B narrated that he removed Farida's matrimonial bed for safe custody in second wife's house to date, she was engaged in Bone-selling business between Bungoma and Jinja before and after leaving for South Africa and used to send about ksh.5,000 monthly through PWI but the Insufficiency of the money was never disclosed to him. He said that he allowed the Quran healing be conducted but later on refused after realizing it was to be conducted by Uganda Sheikhs known for witchcraft and that excessive amount of water spread over the entire home was believed to be witchcraft. He narrated that the five – acre land allocated to MUSA by his grandfather through a written WILL- R.Exh 1 had already been given to him (Berar) first and had since alienated. He admitted use of M'S Bricks and Ksh. 25,000/- for Construction of house for his now deceased mother (M'S grandfather). The house is currently occupied by his second wife. Mr. Berar said was ready to offer any amount as send off to F and subsequently pay fees for his children and submit evidence of payments.

5. It was the narration of PWI that , she used to receive money from Mr. B on behalf of the family for fees and family maintenance between 2005-2006 though the cash was not sufficient . PWI also accused F of desertion to Kampala for business. According to PW3, there existed disagreement between parties herein and the two sons but was not sure F had since remarried. PW2 disclosed that Farida's business between Bungoma and Kampala started in 2005; attended the Quran healing function conducted by Uganda sheikhs and termed it normal though surprised by excessive amount of water used in the process . He further said, adult and or married children are not allowed to stay in same house with parents but may construct own houses in the same compound as according to Baganda customs and traditions and or for privacy. He however said that parties and children have stayed and or brought up in that matrimonial house due to financial constraints.

Response :

6. F in response stated, was legal wife of Mr. B in accordance with Islamic law , blessed with eight Issues all raised in the matrimonial house in question. She narrated that it was upon their agreement and due to poverty that Mr. B left for a job in South Africa and was engaged in Bone- selling business between Kenya and Uganda. Mr. B used to send between 4,000-5,000 ksh. Monthly that was inadequate for both family maintenance and fees for their five children then, this prompted her work hard in business on addition to bursary applications.

7. She further narrated that when MUSA (son) wanted to marry, B denied him space to put up own house. Mr. MUSA opted for rental house but when rent payment proved difficult, he (son) sought the guidance of his grandfather BS (B's father) who allowed him use a room in the matrimonial house, a decision that angered Mr. B. The matrimonial house was built in Swahili style with six rooms on either side. She also said that after death of B's mother in Mombasa, Mr. B and M constructed her resting house with anticipation that after burial the same would revert to M. He instead transferred her matrimonial bed to it since 2012 and started cohabiting with his second wife who used to stay in Kisumu and came back after sale of her land.

8. F told court that in 2010, A (son) was treated by Quran healing (Ruqia) which involved Quran recitation and on water in the presence of Mr B. The Uganda sheikhs conducted the Quran healing procedure in the same way in presence of local sheikhs and family relatives including PW2 among other people with his knowledge. She denied it was witchcraft.

9. In cross-examination she narrated that; lived in Bungoma since 1987 after Kampala (hometown), Busia land purchase documents was in his hands and the land was resold by the owner and all items alleged to have been stolen in house except the generator taken by MUSA and SHARIFF.

10. (i) RW1 told court how he was phoned by Mr B to chase away Uganda sheikhs terming them witchdoctors but refused since all family members were in attendance and the event was normal. This idea was also disclosed by B's sister RW2. RW1 also said bone-selling business was F's business ever since. He however denied knowledge of loss of parties' households.

(ii) It was the testimony of RW3 that; their family was poor and F's business was important for survival. He said B (his father) restrained him from marrying while in matrimonial house, but when rent payment was difficult and in consultation his grandfather (BS) and aunt GW was allowed to use a room in the matrimonial house with Mr B's knowledge. RW3 further stated that in 2006 when his grandmother (B's mother) died in Mombasa, Berar requested him to construct her a resting house before burial. He used his own bricks and ksh 25,000/- yet to be refunded by B.

(iii) RW3 said his paternal grandfather allocated him a five-acre land in Uganda through a written WILL (Rexh.1) in which both B and PW2 witnessed. After death B registered the land in his name and alienated it under the guise that he had been given before the WILL. He lamented why should he be evicted from the current residence when his own land had been alienated by the same person. He said the current residence is $\frac{3}{4}$ of an acre big enough to accommodate them.

(iv) RW3 further narrated that the Quran healing conducted by Uganda Sheikhs was a normal recitation and on water in presence of local sheikhs, PW2, family relatives and other people. He said B had knowledge of coming of the sheikhs but never stopped. He phoned to stop the function on the day when the procedure had already started, it was impossible.

11. It was the petitioner's counsel submission that parties initially settled in Kampala shortly before establishing their matrimonial home in Bungoma. B went to South Africa in 2004 and used to send ksh 4,000/- monthly maintenance on addition to school fees. He came in 2006 and found Farida in desertion, have separated for about 11 years though she occasionally visited Bungoma home and therefore divorce was a relief. The counsel said that since the children herein are over 18 years and working, they should be expelled from the matrimonial house/home. All the parties were in agreement that the evidence adduced in the application be considered for this petition since the issues being canvassed were the same.

12. Having given due attention to documents filed and considering evidences adduced by parties and their witnesses, I believe this court is under the duty to determine:

(I) Whether the petitioner adduced reasonable grounds to guarantee dissolution.

(II) Vacation of the said children from matrimonial house/home.

(III) Parties entitlement upon dissolution.

Determination:

13. The issues in hand therefore, demands reading Article 170 (5) Constitution of Kenya 2010 together with Section (5) and (6) of the Kadhi's Court Act Cap II and Section (3) Matrimonial Property Act No. 49 of 2013.

(i) **Article 170 (5):** 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 the parties profess the Muslim Religion and submit to the jurisdiction of the Kadhi's Courts.

(ii) **Kadhi's Court Act Cap II Section (5) and (6):**

Section (5): The Kadhi's Court has been given jurisdiction to determine questions of Muslim Law relating to personal status, marriage, divorce and inheritance in proceedings in which all parties profess the Muslim Religion.

Section (6): The law and the rules of evidence to be applied in a Kadhi's Court shall be those applicable under Muslim Law.

(iii) **Matrimonial Property Act No. 49 Of 2013,**

Section (3) “A person who professes the Islamic faith may be governed by Islamic law in all matters to matrimonial property.”

(I) Whether the petitioner adduced reasonable grounds to guarantee divorce.

14. Desertion is the intentional permanent forsaking and abandonment of one spouse by the other without others consent and or reasonable cause. B acknowledged that Farida was engaged in bone-selling business between Bungoma and Kampala before leaving for South Africa. He used to send about Ksh 5,000/- monthly for fees and family maintenance through PW1 who confirmed the same. According to B the inadequacy of the monthly subscription was not brought to his attention by either F or PW1. On 26th January, 2016, B through his counsel contradicted earlier statement and said he used to send about Ksh 4,000/- monthly on addition to fees against the testimony of PW1 who used to receive money on behalf of the family. Due to lack of evidence in the later statement the court has not considered it. In the absence of an outstanding solution or substitution to F’s business and considering the inadequacy of the monthly subscription for family maintenance and fees that stopped even before institution of suit, this court holds and which I so believe that F’s business is justified and her occasional absence does not amount to desertion.

15. Witchcraft is a grave sin that renders ones belief and deeds a nullity; it was enough to dissolve the marriage if proved beyond reasonable doubt.

QURAN 4:48; “Verily, Allah forgives not that partners Him in worship but forgives anything else to whom He wills; and whoever sets partners with Allah has indeed inverted a tremendous sin.”

QURAN 6:88; “...But if they had joined in worship others with Allah, all that the used to do would have been of no benefit to them.”

The Quranic healing popular among the Muslim community was allowed by the Prophet (PBUH) free from witchcraft. It involved Quran recitation on the sick and or upon water to be drunk or otherwise. According to B, he allowed the healing procedure and later refused on material day after was to be conducted by Uganda sheikhs known for witchcraft. Apart from the excessive amount of water used, PW2 who was in attendance alongside local sheiks, family relatives and other people termed it normal. It is important to note that the amount of water used in Quranic healing was not prescribed by law but to ones taste. It was therefore not easy for this court to associate it to witchcraft unless proved.

16. It was the court finding that about 2012, B transferred the matrimonial bed to his second wife’s house to date. The court wondered how conjugal rights could be observed under these circumstances.

17. In essence B was aware of Farida’s business trips and made no efforts to stop it and or provide reasonable substitution for fees and family maintenance. He further abandoned his obligation of fees payment to F and instead of mending his family opted to break it. In every family there existed issues that call for a reasonable approach. I do not believe B proved his case to required standards to guarantee divorce in this long-aged relationship. I do believe that since parties cannot be forced to stay together, dissolution is a relief.

(II) Vacation of the two children from matrimonial house/home

18. B argued that it was against Baganda customs and traditions staying with adult and or married children in same house. This was supported by PW2 though said such children may construct own houses in same compound. During a visit to the scene the court observed that; the matrimonial home occupied about $\frac{3}{4}$ of an acre with houses concentrated to the front part leaving a spacious space at the back; the matrimonial house was built in Swahili style with rooms on either sides separating parents and children. It is worth noting that parties herein are bound by Islamic tradition and privacy was of importance.

Construction of houses for the sons in same compound as suggested by PW2 was a good idea to be adopted by court but all depended on financial capability at the moment.

19. B used M’s bricks and Ksh 25,000/- for construction of his mother’s house now occupied by his second wife. He has also denied the existence of a five-acre land allocated to M by his grandfather by way of a WILL he witnessed together with PW2 (Rexh.1). B went ahead to register to himself and alienate the said land arguing it was first given to him before the WLL. If this is true then the WILL supersedes since it was made later. Without prejudicing or being unfair to the two children, Berar could have considered issues surrounding them especially MUSA before agitating their vacation from matrimonial home/house.

20. Apart from M who appeared as RW3, ABDALA never appeared before court. The two children could have been enjoined to the suit as respondents for a fair hearing on issues that directly affect them to enable court reach a fair decision. It will be against the rule of natural justice to order for their vacation unheard. I direct that the be allowed to construct own houses in the compound until they are financially stable.

(III) Parties entitlement upon dissolution of marriage:

21. The issue of custody was not canvassed since it was not contentious. Issues especially school going will still be under F. Irrespective of who has right of custody, the other party has visitation rights according to mutual understanding and consent. Maintenance of children is the duty of the father according to scholarly consensus unless otherwise and according to his means.

QURAN 2:233; “...but the father of the child shall bear the cost of food and clothing on reasonable basis...”

QURAN 65:7; “...let the rich spend according to his means and the man whose resources are restricted, let him spend according

to what Allah has given him. Allah puts no burden on any person beyond what he has given him.....”

It was good and encouraging that B accepted the responsibility of children maintenance which included but not limited to accommodation, food, clothing, education and health services.

22. Division of matrimonial property right is safeguarded by vesting in each spouse ownership according to their respective contribution be it monetary or non-monetary. It is for this reason that I shall strive to give effect to any monetary and non-monetary contribution that F could have proved so far or role played in marriage to guarantee her a sendoff. It is important to note that monetary contribution issue was not brought to the attention of the court and may be discussed in a different forum. However in the absence of clarity on monetary contribution, I have no doubt that F made a non-monetary contribution in this marriage that deserved acknowledgement.

23. Divorced women are entitled to sendoff (gift) as at divorce according to most scholars and depending on husband means. According to Shafi scholars widely spread in Kenya, since a divorced woman was entitled to dowry as at marriage is equally entitled to gift (sendoff) on divorce.

QURAN 33:28; “O Prophet (PBUH) say to your wives ‘if you desire the life of this world and its glitter, then come! I will make a provision for you and set you free in a handsome manner (divorce).”

QURAN 2:241; “And for divorced women, maintenance (should be provided) on reasonable scale. This is the duty on the pious.”

QURAN 2:236; “... the rich according to his means and the poor according to his means, a gift of reasonable amount is a duty on the doers of good.

Mr B told the court that he was ready to give any amount the court would decide and totally hesitated to disclose the exact amount within his capability. Considering the elderly age of F and marriage since 1982, I believe Ksh 100,000/- is fair enough to enable her establish her life especially if paid at once.

24. All other issues raised by both parties had no evidence and therefore dismissed.

25. Orders;

1. Marriage between B and F dissolved.
2. F to observe three months edda under maintenance of B.
3. Custody of school going children to F.
4. Education and health services of school going children responsibility of B.
5. B to submit Ksh 3,000/-being monthly maintenance of school going children w.e.f March 2016.
6. Issues visitation rights allowed.
7. Berar to pay Farida Ksh 100,000/- sendoff within next three months.
8. Musa and Abdala allowed to construct own houses within matrimonial home until financially stable.
9. Parties and children to observe peace.
10. No orders to costs and right of appeal granted.

Delivered and signed this 3rd day of March 2016

D. S. RATORI – KADHI 1

BUNGOMA LAW COURTS

In presence of:

1. CA – Caroline Kimaru
2. Both parties
3. Petitioner’s counsel - present