



REPUBLIC OF KENYA
IN THE KADHI'S COURT AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 1 OF 2016

N A H.....PLAINTIFF

-VS-

S B K.....DEFENDANT

J U G D E M E N T

The parties were married on 28th December 2010 at Ewaso Nyiro, in Narok, in terms of the Mohammedan Marriage and Divorce Registration Act Cap.155 (repealed) as it appears in "NAH1" .On around April 2014 the defendant terminated the said marriage unilaterally with single talaq in Gilgil, Consequently they were not issued with a certificate of divorce. The said union was blessed with one issue namely;

1. D Y S - born on 9th December 2011.

On 6th January 2016, the Plaintiff filed her Complaint dated 6th January 2016 against the Defendant for a decree for a dissolution of the marriage, an order for issuance of divorce certificate, an order for maintenance and custody of the minor, an order for unpaid mahr amounting to Ksh. 50,000/- with a set of gold, an order for payment of eddat maintenance at the rate of Kshs. 20,000/- per month and any further relief that this Honorable Court will deem fit. This Complaint was founded on the ground of negligence and cruelty.

In response to the Plaintiff's pleadings the defendant filed a defence on 15th January, 2016, in the defence the defendant denies the accusation, brought against him by the plaintiff. However acknowledges the existence of Matrimonial problems .The defendant in his plea conceded that the marriage had irretrievably broken down and that he terminated the nuptial tie unilaterally in April 2014 . He further contended that he has not yet paid the dowry as agreed but he left furniture worth 30,000/- to offset the claim of unpaid dowry. On the maintenance and school fees of the minor he suggested that he can only support her if he is granted the custody.

At the pre-trial conference the issues for trial were framed as follows:-

- I. Who gets custody of the child?
- II. What constitute reasonable maintenance in respect of the minor?

III. The status of unpaid dowry.

Dowry

In regard to 'dowry' a number of aspects were common cause as evident from the submission of the both parties .

The following factors were common cause, the parties were married under Islamic law at Narok, they later moved to Nakuru. The said union was blessed with one issue. That the marriage was terminated unilaterally by the defendant. The parties are as well on a common ground that the dowry was never paid as agreed during the marriage.

They only disagreed on the form of the dowry payable to the plaintiff, according to the plaintiff her dowry was Kshs. 50,000/- and a set of gold as it appears from the certificate of religious marriage conducted by one Khadar Sheikh. On his part, the defendant contended that he had agreed with the plaintiff at the time of the divorce to grant the plaintiff the possession of furniture to offset her claim of dowry.

The court attention was drawn to Holy Quran Chapter 4, verse 4 where it is stated that:

“And give to the woman (whom you marry) their Mahr (obligatory bridal – money given by the husband to his wife during marriage) with good heart.....”

It is the opinion of the court based on the above source that dower is enjoined by the law merely as a token of respect for its object (the woman) therefore the mention of it is not absolutely essential to the validity of a marriage and for the same reason, a marriage is also valid although the man is obliged in the contract to give out consideration as an essential condition for the validity of marriage.

Unpaid Mahr (dower) is considered as an unsecured debt payable to wife by the husband or from his estate therefore Muslim widows and divorcees have a right to recover the debt during the life time of husband or his estate, if she predeceases her heirs are entitled to the dower and such right is enforceable upon the termination of the marriage between the husband and wife.

The Court' attention was drawn to the decision of Eunice Karimi Kibuja V Mwirigi M'ringera Kibunja Court of Appeal case No. 103 of 1996 wherein it is stated that;

‘A Court should not make a finding without evidence before it’.

It is the view of the Court that sufficient evidence has been adduced by plaintiff as to the form of the dowry and in absence of the defendant's evidence to support his assertion the assertion of the plaintiff shall stand.

Custody.

The plaintiff's evidence was to the effect that she is the more suitable parent to have custody of the child. She has more time for the child than the defendant. The defendant initially did not ask for the custody of the minors. Later he opted for her custody on the ground that he will only provide for her if she is under his control.

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 is stated that;

“A child's best interest is of paramount importance in every matter concerning the child.

The defendant's contention for seeking custody of the child of marriage is primarily because he is not

willing to look after the child if they are placed under the custody of the plaintiff. After all has said I am of the view that plaintiff has not been shown to be an unsuitable parent to have the custody of the child of the marriage. It has not been shown that granting custody to the plaintiff will not be in the best interest of the child of the marriage. Plaintiff will thus be awarded custody of the child of the marriage.

Maintenance.

The plaintiff's claim was to the effect that the defendant be ordered to provide for the child with school fees, medical cover and food. Currently the plaintiff has been meeting the child's all need single handedly without the defendant support. She tendered some document in support of her assertion.

The defendant declared his readiness to look after the child of the marriage on condition that he be granted the custody of the minors.

On the issue of maintenance of the minor Sec. 24 of the child 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.

The issue of equal responsibility has not been equated to only direct contribution towards the monthly up-keeping, it also encompasses non monetary contribution meted by a parent who has a physical custody of the minor.

Thus a father according to his means is responsible for the maintenance (monetary) of his sons till they attain the age of maturity and of his daughters till they are contracted into marriage. See Holy Quran Chap 2 V 233. 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 defendant is ordered to look after the child of the marriage unconditionally.

Accordingly it is hereby ordered that:-

1. That the divorce certificate be issued.
2. That the defendant shall pay the unpaid mehr , being Kshs. 50,000/- and a set of gold within 6 months from the date of judgment..
3. That the custody and care of the child of the marriage is granted to the plaintiff.
4. That the defendant shall be at liberty to visit the minor at a reasonable and/or an agreed time of the day.
5. The defendant shall provide Kshs. 7,000/= toward the maintenance of the minor.
6. The defendant shall provide 85% towards the school fees of the minor while the plaintiff shall provide 15%.
7. The defendant shall cater for medical expenses as and when they arise.
8. No order as to costs

It is so ordered.

Dated, Signed and Delivered in Nairobi this 23rd day of March, 2016.

A.I. Hussein

Kadhi II

In presence:

Plaintiff