



N H A v M M M S A (Civil Case 224 of 2014) [2015] KEKC 47 (KLR) (26 March 2015) (Ruling)

N H A v M M M S A [2015] eKLR

Neutral citation: [2015] KEKC 47 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT MOMBASA
CIVIL CASE 224 OF 2014
AH ATHMAN, SPK
MARCH 26, 2015**

BETWEEN

NHA PLAINTIFF

AND

MMMSA DEFENDANT

RULING

Introduction

1. The defendant in his preliminary objection dated March 4, 2015, raises the following as his grounds:
 1. That the plaintiff lacks locus standi to prosecute this suit
 2. That the suit is misconceived and fatally defective for non disclosure of material facts
 3. That the plaintiff has not established a prima facie case to warrant divorce

The plaintiff opposes the preliminary objection. She states the issue of prima facie case is a matter of evidence at the hearing of the case. She contends she has locus standi and the objection is a gimmick to delay trial contrary to article 159 [2][b] of the *Constitution of Kenya* [2010].

Submissions

3. The applicant submitted there are several types of divorces under Islamic shariah: talak, i'la', Dhihar, Li'an, Al Mubara', apostasy and Khul'u. He submitted none of these is applicable in the plaintiff's case as pleaded. He further submitted that section 3 of the *Mohammedan marriage and divorce Act* lists the grounds for filing a divorce, none of which is applicable in the plaintiff's case.
4. The defendant/ respondent on her part submitted the list in section 3 of the Act is not exhaustive, that she has set out crucial grounds for her prayer for divorce in her prayer and a right to divorce is a right



of the wife under Islamic law. She argues she has been suffering for three years and nothing in her life is moving during this period.

Analysis

5. A preliminary objection is defined in the well known case of *Mukisa Biscuits Vs West End Distributors Limited* (1969 EALR) as that which:

“raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

6. I have checked Section 3 [and indeed the entire Acts] of the *Mohameddan marriage and Divorce registration Act*, cap 155 [1906] and *Mohameddan, marriage and divorce Act* Cap 156 [1920], there is no list of the grounds for divorce as listed by the applicant. The write up clearly stated:

'... Both Acts do not provide grounds for divorce but refer to the principles of Islamic law, and under Islamic law, according to scholars grounds for divorce include...'

7. The list given is according to scholars and the word 'include', denotes it is not exhaustive. In any case cap 155 and 156 have been repealed by the enactment of the *Marriage Act* No 4 of 2014, which provide at section 71:

The dissolution of marriage celebrated under Part VII shall be governed by Islamic law.

Section 5 of the *Kadhis court Act*, Cap 11 provides:

" 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".

8. The law question of divorce is a question of Muslim law falling under the jurisdiction of this court. The types of and grounds for divorce are issues of law to be argued at trial. The law left it to the court to determine the same under Islamic Shariah.
9. The right to be heard by a competent court is a constitutional right enshrined in Article 50 of the constitution. Article 50 [1] provides:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body

10. The issues of whether or not the plaintiff is entitled to divorce involves issues of fact and law which are clearly contested. The consequence of granting the preliminary objection is to shut out the plaintiff's case from being heard by the court. It is drastic and offends the constitutional rights of the plaintiff.

Finding

11. The preliminary objection raised no point of law. It relied mainly on a write up from the internet. It lacks merit. It is hereby dismissed with costs.

Orders accordingly.



DATED AND DELIVERED IN MOMBASA ON 26TH MARCH 2015.

ABDULHALIM H. ATHMAN

PRINCIPAL KADHI

In the presence of:

Mr. Yusuf K. Abdulrahman, Court assistant

Plaintiff

Defendant

