



REPUBLIC OF KENYA

IN THE KADHI'S COURT AT BUNGOMA

CIVIL SUIT 6 OF 2015

AMH.....PLAINTIFF

VERSUS

AOF.....DEFENDANT

JUDGMENT

Introduction:

1. The plaintiff (hereinafter A) filed divorce suit against the defendant (hereinafter A) on 20th April, 2015 for divorce, custody and maintenance, costs and other reliefs. A and A solemnized an Islamic marriage at Bungoma on 20th July, 2008 and later established their matrimonial home at Lukoye – Mumias. The marriage was blessed with two issues – SN and SO aged about 4 years 7 months and 2 years respectively.

Plaintiff case:

2. A in her plaint accused A of cruelty; desertion since January 2015, cohabiting and or engaging in adultery with one D, denial of conjugal rights and general family maintenance.

3. On 3rd June 2015, A stated was married to A in 2008 when he was a student at [Particulars Withheld] University. The marriage was blessed with the two issues and stayed peaceful prior to problems that form basis of this suit.

She narrated that in 2012, when A came back from University and secured a job in Nairobi, started treating her like a foreigner. He abandoned family maintenance and responsibilities, poor communication, ate from his mother's house, prepared himself water for bathing, and thus denied her chance to serve him as expected of husband and wife.

4. A further accused A of denial of conjugal rights for he used to sleep facing a different side on the matrimonial bed with her. She lamented that they married under Islamic Law and wondered why A changed to musician and forced her to wear tight, short, transparent dresses and move with uncovered hair contrary to their religion.

5. In cross-examination A said; A colluded with his father to send her back to her parents on 25th March, 2015 shortly after a meeting held on 20th March, 2015, matrimonial house was built from her Chama Funds and mother-in-law's contribution of about 80%, engaged in mandazi selling business that earned her Kshs. 300/= a day, had no intention of leaving to Saudi Arabia for a job and no longer loved A. She further said was ready for another possible parents/ elders reconciliation meeting, prayed for custody and maintenance citing ages of issues and demanded her dowry balance of Kshs. 6,000/=.

Response.

6. A in response stated; he married A in 2008 when he was a student at [Particulars Withheld] University, blessed with the two issues aged 4 years and 2 ½ years respectively. He disclosed that he used to send A Kshs. 5,000/= to Kshs. 6,000/= monthly for family maintenance out of his savings.

7. It was the testimony of A that in July 2012, was attached to grand Tinton in Nairobi as auditor at a monthly pay of Kshs. 15,000/=, that was equivalent to his monthly rent and left with nothing to send to A.

8. A admitted they differed with A and occasionally slept facing different sides of matrimonial bed, denied her conjugal rights from March 2015 especially when she proved to be very arrogant after introducing her to D – his girlfriend at his grandmother's funeral. This arrogance prompted A's father send her home but denied chasing her away.

9. It was the narration of A that the construction of their matrimonial house was funded by his mother and that Chama contribution of A was also sourced from his mother. He further said they depended on family account from Barclays Bank for food that was normally cooked by family workers. He saw no need of buying A food to cook on her own.

10. In cross-examination A said; had never bought A food, attended grandmother's funeral with D (his girlfriend) and introduced her to A, A's family was poor to raise the issues in question; he owned a personal account of about Kshs. 60,000/= with Bank of Africa (dexh.1) for children maintenance by his mother and was able to make Kshs. 15,000/= monthly.

11. He further disclosed that only the last born could be released to A for custody and was ready for another elders/ parents meeting at a convenient place.

12. On the request of the defendant counsel the court referred the matter to parties' parents/elders for purposes of reconciliation and or mending the fragile relationship. However the meeting aborted after they differed over the venue. This court later on ordered for another meeting with consent of the parties and report of the same tabled for consideration. According to the report and on examining the parties herein, the court found out that the meeting held provided no remedy to the marital relationship. Both A

13. and A insisted on divorce as their only relief prompting this court proceed on disposal of the matter at hand.

14. Having given due attention to documents filed and taking into account evidences educed by both parties, I believe I'm under a duty to determine three main issues;

(i) Whether A adduced reasonable grounds to guarantee divorce

(ii) Custody and maintenance

(iii) Plaintiff entitlement upon dissolution of marriage.

Determination:

15. 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 Court.

(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."

Whether plaintiff adduced reasonable grounds to guarantee divorce:

16. It was the testimony of A that while in school; he used to send about Kshs. 5,000/= or Kshs. 6,000/= monthly for family maintenance out of his savings to A which she acknowledged. He said after school, he was employed as an auditor in Nairobi at a monthly pay of Kshs. 15,000/= but could not be able to submit anything to his family arguing that it was an equivalent of his monthly rent.

This court wondered why one could earn monthly pay of Kshs. 15,000/= and rent a house of an equivalent amount without due regard to other necessities. Apart from being unpractical, it amounted to desertion of family that tantamount to total repudiation of the matrimonial ties.

17. MR. A, head of his family and responsible of putting his house in order admitted that he slept facing different sides of matrimonial bed every time they differed. He later denied her conjugal rights when she turned arrogant after introducing her to his girlfriend – D at his grandmother's funeral. He further allowed his father to send her away to her parents. The court found out that A'S action amounted to mental cruelty and a violation of matrimonial ties.

It is important to note that MR. A had no respect, interest and commitment to existence of the marriage and is to blame for its collapse.

Custody and maintenance:

18. In Islamic Law and with due regard to the ability and capability of the parties, the mother has more right to custody of her children regardless of sex until the age of understanding recognized at seven or so provided she has not re-married. This is because of the report narrated by Ahmad (6707) and Abu Daud (2276) from Abdullah Ibn Amr (RA) according to which a woman said; "O messenger of Allah, my womb was a vessel for this son of mine and my breasts gave him to drink and my lap was a refuge for him, but now his father has divorced me and wants to take him away from me." The messenger of Allah (PBUH) said to her; "you have more right to him so long as you do not re-marry."

The reason for this is that, in early years, the mother is more suitable for raising the young child (regardless of sex) with love, mercy, attention and motherly care than the father.

19. It should be noted that custody is keeping and raising the child. Hence a person's right to custody is lost if she/ he is immoral and corrupt, or careless and heedless, or travels a great deal which will harm children's interest or be detrimental to the child's upbringing.

MR. A introduced a girlfriend to his family, stayed away and left maintenance of his family in the hands of his parents. Apart from being irresponsible, the court found him immoral and corrupt and therefore cannot be entrusted for custody of issues herein.

20. Irrespective of who has the right of custody, the other party has visitation rights according to mutual understanding and consent.

21. Generally, maintenance of the children is a duty of the father, according to scholarly consensus unless otherwise.

In the event custody is with her, then the children's maintenance MUST be paid by their father on reasonable basis and depending on his circumstances or means.

Quran; 2:233: "...but the father of the child shall bear the cost of food and clothing on a reasonable basis..."

Quran; 65:7:"...let the rich man 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. Allah will grant after hardship ease..."

22. It should however be noted that maintenance of children include providing accommodation, food, drink, clothing, education and health services, and everything that they need on a reasonable basis.

A allowed Kshs. 60,000/= on his personal account at Bank of Africa be used for maintenance by his mother if offered custody. He further disclosed that was able to make a monthly income of Kshs. 15,000/=.

For the best interest of the issues herein, this court directs that Kshs. 6,000/= monthly be immediately submitted for maintenance of the children starting with what is on the said account. This will exclude education and health services to be borne separately by the defendant.

Plaintiff entitlement upon dissolution of marriage:

23. It is clear that A owed A a dowry balance of Kshs. 6,000/= (see marriage certificate Bxxx issued at Bungoma) PExh. 1 that deserved consideration upon dissolution of marriage.

24. 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 or non-monetary contribution that AISHA would have proved in construction of their matrimonial house and or role played in marriage to guarantee her a sendoff.

Quran;2:236: There is no blame upon you if you divorce women you have not touched nor specified for them an obligation BUT GIVE THEM (A GIFT OF) COMPENSATION – the wealthy according to his capability and the poor according to his capability – a provision according to what is acceptable, a duty upon the doers of good.

25. It was the testimony of A that the construction of matrimonial house was from her "Chama" funds and mother-in-law's contribution of about 80%. A though was in Nairobi during the construction, said, was wholly funded by his mother. Aisha disclosed her contribution in percentage and failed to give the exact figure. On a balance, I do not find that she made monetary contribution towards construction of matrimonial house.

26. In the absence of monetary contribution, I have no doubt that A made a non-monetary contribution towards the construction of the matrimonial house and marriage as a whole that deserves acknowledgment. The house was built in absence of defendant.

For a fair send off and to enable this court make an informed decision and give final order on this particular matter, I order that valuation of matrimonial house be conducted within the next 21 days. The cost of valuation be shared equally by both parties.

ORDERS

1. Marriage between A and A dissolved.
2. A to pay Aisha dowry balance of Kshs. 6,000/= immediately.
3. Custody of issues to plaintiff until age of 18 years or otherwise.
4. Visitation of issues on Saturdays and Sundays between 3.00pm to 5.00pm at plaintiff's home.
5. Issues will not be travelled out of locality without written consent of the defendant.
6. A to submit monthly maintenance of Kshs. 6,000/= with effect from July, 2015.
7. Education and health services of issues be borne separately by Asman.
8. Cost of valuation of matrimonial house be shared equally by parties.
9. Parties and their agents to observe peace.
10. No orders to costs.

DATED, DELIVERED AND SIGNED THIS 16TH DAY OF JULY, 2015.

HON. D.S.RATORI

KADHI 1

Delivered in presence of:

- 1. Caroline Kimaru – CA**
- 2. Mr. Ombito – Defendant counsel**
- 3. Aisha – Plaintiff**
- 4. Asman - Defendant**