

REPUBLIC OF KENYA

IN THE KADHIS COURT OF KENYA AT NAIROBI

CIVIL CASE NO 50 OF 2012

R W K..... PLAINTIFF

V E R S U S

A M A.....DEFENDANT

J U D G E M E N T

In her plaint filed on 29th February 2012, and amended on 31st, August 2015, R W K (hereafter ‘the plaintiff’) sought order of this court as follows:-

- a) The marriage contracted by defendant to plaintiff is void and hence be nullified.
- b) The legal and actual custody of K.N.A (minor) be given to the plaintiff (sic)
- c) The defendant acknowledges paternity of K.N.A minor (sic)
- d) That the defendant be compelled to register the child K.N.A in the Kenyan Airways Medical scheme.
- e) That the defendant be compelled to provide K.N.A (minor) with quality education in the same standard of school where his other children were educated.
- f) The defendant be ordered to pay monthly maintenance towards the upkeep of K.N.A (minor) and the plaintiff in the sum of Kshs. 200,000/= or such sum as this Honourable court may deem reasonable and just in the best interest of the child.
- g) Past maintenance
- h) Compensation for lost household of Kshs. 500,000/=
- i) Any other relief that this Honourable court may feel to grant
- j) Cost

The plant is based on the ground that on 8th August, 2010 the plaintiff and the defendant celebrated their marriage under Islamic Law on mutual love and affection, as a result of the said union the plaintiff conceived and on 13th August, 2012 gave birth to a bouncing baby girl ‘ the minor’.

On 29th September 2011 the defendant presented a divorce certificate serial number 31242 dated 20th September 2011 to the plaintiff’s advocate who was then on record.

In reply to the plaint the defendant filed a defence on 14th March 2012 and later amended the defence on 11th September, 2015. In his defence the defendant denies the accusation brought against him by the plaintiff. And prays for the plaintiff suit be dismissed with costs to the defendant.

When the matter was called out for hearing on 12th October 2015, after a series of adjournments, the plaintiff sought a stay/adjournment on the ground that she had instituted a subsequent application before the high court and that she is not ready to proceed until the said application is dispensed off with.

The application for stay/adjournment as expected was vehemently opposed by Mr. Ndege who reiterated that it was another stratagem to delay the determination of the dispute as there is no express order from the High Court staying proceedings in this court and that it will be in the best interest of both parties that this matter is ventilated once and for all.

The court was not persuaded by the reasons advanced in seeking stay/adjournment. In dismissing the application the court stated that:

“It is a cardinal principle in the administration of justice that it is in the interest of all persons that there should be an end to litigation; there being no express nor implied order from the High Court barring this court from proceeding; secondly there being no justifiable cause as to why this matter should be stayed and/or adjourned pursuant to CPR; thirdly there being no evidence of substantial loss that may result to the plaintiff unless the order is granted.

In the premises

I decline to grant the stay and/ adjournment and direct the matter to proceed after a break

The public policy calls upon the court to conduct its businesses expeditiously.

When the matter came up for the plaintiff's case she elected not to testify. The defendant testified on oath that he was legally married to the plaintiff on 8th August 2010 witnessed by plaintiff's brother and one Rose Wanjiku from the plaintiff's side after seeking the consent from her parent and the said union was blessed with one issue namely K.N.A (the minor) as it appears in DExhb 1.

He further testified that on 4th June, 2011 he unilaterally terminated the said union by way of verbal/oral talaq due to irreconcilable differences and issued the plaintiff with a written divorce on 20th November 2011 as it appears on DExhb 2.

The defendant further stated that he did pay Kshs. 106,000/= being amount towards eddat maintenance.

The defendant further contended that on 7th October 2011 he paid the balance of Mahr Kshs. 495,000/= that was acknowledged by the plaintiff as shown in DExhb 3 and that he has been religiously remitting the 50,000/= pursuant to the High Court ruling and further he submitted that he has been providing the medical cover for both the minor and the plaintiff.

In his

testimony the defendant submitted that the plaintiff seeking Kshs. 200,000/= monthly as maintenance is an exorbitant and that he cannot afford for the reason that he is married with two school/college going children, as well as attending to his sickly mother.

The defendant declares his readiness and willingness to provide for the minor as well as taking her to school on equal parental responsibility from January 2016 and that if the minor is allowed to *commence school in third term she will not move to another level and as such it will a burden on him* and that he is not objecting to plaintiff staying with the minor till she attains puberty and further ask the court to allow him pay Kshs. 18,000/= monthly towards the maintenance of the minor and not to plaintiff.

The plaintiff elected not to cross-examine the defendant and the defendant closed his case.

I have given due consideration to the pleadings and the ground it's based vis a vis the response of the defendant. It emerges from the evidence that I should shed light on the ground on which the plaint is based on before proceeding in answering the main issues.

On validity of the plaintiff marriage to the defendant:

The court's attention is drawn to the Law of marriage and divorce Pg 36 wherein it states the essential ingredient of Islamic marriage.

The validity of marriage contract depends on the parties or their guardian being of sound mind and mature and on the proposal and acceptance being made by the consenting parties in one meeting.

In presence and hearing of two or more mature and prudent witnesses provided there is no legal disability on the person of any contracting party or parties of a nature that it may prove to be an impediment to the marriage contract.

The Jurist have classified the conditions of a marriage contract as follows:-

The first condition concerning the parties to a valid marriage contract is being of sound mind, a mad or imprudent youth is not competent to contract marriage, and that there should be no legal disability or bar to the union of the parties.

The second condition is the age of the parties. The competence of contracting the marriage depends upon the parties having attained the age of marriage.

The third condition is the consent of the parties to the marriage contract. Marriage contracted without a valid consent of the parties is invalid, thus, the consent of a woman is necessary whether she be a major virgin or with coverture experience. Her guardian, according to Hanafi lawyers, cannot compel her to enter into a marriage contract. Therefore the marriage contract of a major woman/virgin or feme covert, divorced or widowed with her consent in front of her father, grandfather or brother can take effect.

See al-Sarkhasi's almabsut cairo vol 5 pg 2, also in the case of Muhammed Zaman V Naima Sultan PLD 1952, Pashawar, 47.

From the evidence adduced before the court, that the plaintiff got married to the defendant under Islamic Law on mutual love and affection in presence of the plaintiff's brother. From the above, I do find that the marriage celebrated between the parties stands in Law.

In regard to the talaq granted by the defendant orally on 4th June 2011 followed by issuance of a certificate dated 20th November 2011.

There is no dispute that the marriage among Muslim is not sacramental but it is in nature of a civil contract, under the traditional Muslim Law no notice of Talaq was required to be given to the wife and in the case of a written Talaq, the Talaq becomes legally operative from the time it was uttered and not from the time when it was registered. Thus registration will have no effect on the validity of the Talaq nor the date which the Talaq became effective.

From the above I do find that there was a valid divorce between the plaintiff and defendant.

On the custody of the minor Art. 53(2) of the constitution, Al-Mughni and Children Act provide that the best interest of the child should be the paramount consideration in all matter concerning the child. While I agree that the welfare principle is the paramount consideration in deciding the custody of the minor I am also of the view that the welfare of the minor will be served better where both parents are involved in the upbringing.

The roles of both parents should be complimentary and the question of who has a superior right to her

custody should be secondary.

The minor herself need to interact and know both parents so that the current arrangement where the minor almost exclusively stay with the mother with limited or no visitation rights to her father should not be encouraged.

To me the best arrangement would be to allow the minor to spend sometimes with the father because he needs to know her as much as she needs to know him and giving an allowance for each parent to visit the minor during the time she is living with mother or father.

On the issue of maintenance of the minor Sec. 24 of the children act and the Constitution as well as Al hidaya put a duty on parents to maintain their children. 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 children is unconditional and absolute as such no father should be treated unfairly and or harmed on account of his child; physically, mentally or morally.

On the issue of maintenance of the plaintiff as far as the Muslim personal Law is concerned, it is well settled that a divorcee is entitled to maintenance only during the period of eddat. This finds supports from the Holy Quran and also from the classical authorities on this subject matter, see principle of Mohammedan Law at Sec 300-337 by F.B Tayabji.

The foregoing evidence is not challenged or rebutted by the plaintiff.

The plaintiff's case has not been subsequently proved to the required standard.

Upon answering the first two issues in affirmative and there being pleading from the plaintiff and on evidence adduced by the defendant accordingly I make the following order.

- 1) That plaintiff is granted the physical custody of the minor.
- 2) That the defendant is granted the legal custody of the minor.
- 3) That the defendant shall be at liberty to visit the minor at a reasonable and/or an agreed time of the day.
- 4) The defendant shall provide Kshs. 25,000/= toward the maintenance of the minor
- 5) The defendant shall provide 75% towards the school fees of the minor while the plaintiff shall provide 25% as from January, 2016.
- 6) The plaintiff is not entitled to further maintenance and/or support from the defendant.
- 7) The defendant shall continue providing medical cover for the minor.
- 8) No order is to cost.

It is so ordered.

Dated, delivered and signed on this 23rd day of October 2015.

HON. A.I. HUSSEIN

KADHI – NAIROBI