



REPUBLIC OF KENYA
IN THE KADHI'S COURT AT NAIROBI
DIVORCE CAUSE NO. 9 OF 2013

A S R.....PETITIONER

VERSUS-

A A.....RESPONDENT

Coram: Before Hon. A.I. Hussein

C/clerk – Chai

Petitioner – A S R

Respondent – A A

JUGDEMENT

The Petitioner in this Divorce cause is one Asia Suleiman Ramadhan.

She filed her petition dated 29th May 2013 in this court the same date.

In her petition the petitioner prays that the marriage to the Respondent be dissolved. Secondly the Petitioner Prays for Maintenance for her and the issues. Thirdly, the petitioner prays for custody of the issues and last the petitioner prays for any other relief that the court may deem fit.

The parties herein married on 28th November 1997 under the Mohammedan Marriage, Divorce and Succession Act (cap 156).

Their Marriage Certificate was annexed to the defence filed by the Respondent and veracity thereof is not objected to, by both Petitioner and Respondent. Similarly it's also not in dispute that the Union was blessed with two issues namely;

1. M A age 14 years old.

2. A A age 11 years old

The Petitioner herein listed three (3) main grounds, namely lack of Maintenance, Infringement on her privacy (right) and lack of affection towards the Respondent as a grounds to seek Judicial rescission.

The Petitioner testified in the court with other two (2) witnesses in support of the petition.

The petitioner asserts that in the last two years of Marriage the Respondent has not been maintaining the

family as required and the Respondent has never bothered to assist the petitioner in meeting the numerous needs, of the home, thus leaving petitioner to struggle to meet the same alone, causing her suffer stress and anguish. Though the petitioner acknowledges the fact that for thirteen (13) years both petitioner and respondent had been struggling together in meeting numerous needs of their marital home.

The petitioner further told this court that the Respondent intrude into every aspect of the Petitioner's life and seeks to control and limit everything the petitioner does to such an extent that the Petitioner feels like a slave in her own marital home.

The petitioner further told the court that she no longer hold any love and affection towards the Defendants.

In response to the Petitioners above pleadings/complaints the Respondent filed a defence on 4th June, 2013, in the defence the Respondent denies the accusation, brought against him by the petitioner. However acknowledges the existence of Matrimonial problems between the Petitioner and Respondent that Respondent described them as a trivial and capable of resolution.

The Respondent further testified with other two witnesses in support of the defence. The Respondent stated that the Petitioner has absolutely been un-corporative with the Respondent and the Petitioner has despised and undermined efforts by the Respondent to sort out their problems through family members.

The Respondent further stated that the Petitioner deserted the marital home without Respondent's permission and acknowledges that there have since been reconciliation attempts for the Petitioner and Respondent *,and still it's not yet exhausted* to iron out their differences which have apparently not been successful. The Respondent further stated that the petitioner has denied his conjugal right for about a year and further threaten to hurt him with a knife whenever he tries to have his conjugal right.

The Respondent declares his readiness and willingness to take a step in a bid to solve their marriage. And, prays for referral to counseling center and the Petitioners suit be dismissed.

I have given due consideration to the application and the ground it's based on vis a vis the response of the Respondent. It emerges from the evidence on record, before the court the Petitioner's petition be treated as Khul (stripping off) and Petitioner is legally rightful before the court to seek Judicial separation with the Respondent.

The court attention was drawn to Q2:229, where in stated that:

“.....then if you fear that they would not be able to keep the limits, ordained by Allah then there is no sin on either of them, if she gives back, Mahr (dower) or a part of it for her Al-khul' (divorce).....

It's clear that a wife has a right to seek for divorce. The Petitioner's wish for Khul may be driven by Irrationality and jealousy, having taken into account the fact that polygamous marriage cause severe marital harm to the first marriage as the husband lost interest in his first wife and children and mere often than not reduce the money he spends on them and in some case he completely stop providing for them and this has forced Petitioner to shoulder the financial responsibility for the family.

The court attention was also drawn to Abdulrahaman's. 'The Islamic law' (1997 Reprint) pg. 168 where its stated that;

In Islam marriage is a contract and the contract s should be made to work but, not when it becomes humanly impossible to do so. It's only in such unavoidable circumstances that divorce is permitted under shariah.

And that:

“When a Marriage becomes impossible to work it's better to separate amicably rather than drag on indefinitely making the family home a hell”.

The court attention was drawn also to Bukhari's, 'Sahihul – Bukhari, 'Vol.7 Hno.197 and also, As Suyuti's sinnanu-Nisaa'i vol. 8 page 5-16 also Sunnanu - abu dawud vol. 4 page 268-69 in case of **Habiba** versus **Thabit (R.a)**,

The wife of Thabit (Habiba) came to the prophet (S A W) and said 'O' Messages of God. I don't hate Thabit neither because of his faith nor his nature except that I fear unbelief (If I remain with him). On that God's messengers (S A W) said (to her) “will you give back his orchard? She said 'Yes and she gave it back to him and He (Prophet) ordered him and so they separated.

In the above H. the prophet ordered him to divorce his wife, after she returned to him the orchards which he gave her, as a dower. But the consent of Thabit was sought after.

In this case the Petitioner had developed an aversion towards the Respondent, a dislike that prevented the Petitioner from having Sexual relations with the respondent, thus compelling her to fail in her wifely duties.

In this regard I am satisfied that the Petitioner failed to fulfill the standard ordained by God- a duty to provide Sexual gratification to the Respondent (husband).

It is my view that the Petitioner has failed to prove the Respondent as a recalcitrant (naashiz) and it's further clear that the Petitioner simply wishes to release herself from a marriage contract.

And in such a case the Petitioner shall ransom herself to secure a way out of marriage due to an aversion for her blameless husband and hence the petitioner will gain a total control over her own self and freedom.

I have also considered the fact that Divorce since its disintegrate the family union is of course a social evil, in itself but it's a necessary social evil. It's better to wreck the unity of the family than to wreck the future happiness of the party by bonding them to a companionship that has become odious!

As regard to the issues of custody the court attention was drawn to Al-Bayhaquees' ' Al- Kubra 8/4 and also Abdulrazaq's 'Mussanaf's' No. 12605. In case of **(Umar (R.A) v umm Asim (R.A)**.

Abubakar (R.A) gave Judgment in favour of Umm Asim and stated that she is more compassionate, gentler, more tender – hearted and more merciful (mother-nature) and she is more entitled to have custody of her son as long as she doesn't get married.”

The court attention was also drawn in support of the above case to constitution , Art 53(2) where its stated that;

“A child best interest are of paramount importance in every matter concerning the child”.

The court attention was also, drawn to Art 3(1) of the UN convention on the right of the child. 1989 (to which Kenya is a party) which states;

“In all actions, concerning children whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies the best interest of the child shall be the primary consideration”.

It's very much clear on record that to the both children petitioner is not a stranger and bears all responsibility pertaining their welfare as the Respondent and hence the petitioner has a right to live with them, however, the Respondent is not denied his right of access and visitation.

The upshot of all the above is, that I make the following orders.

1. The marriage solemnized in respect of the petitioner and Respondent on November 17 be dissolved in way of Khul.

(That the petitioner ransoms herself to secure a way out of marriage)

2. Divorce certificate be issued

3. The custody care and control of the children of the marriage named herein before be granted to the Petitioner.

The respondent shall have unrestricted access of the children.

The modality of such access be agreed upon or ordered upon after.

5. The Respondent shall contribute towards the maintenance of the children. The modality of such maintenance be agreed upon or ordered upon after.

6. Order as to cost each party shall bear his/her own cost.

Ordered accordingly.

N/B: Aggrieved party has a right to file an appeal within a period of 30 day

DATED and SIGNED at NAIROBI this 28th day of June, 2013.

A. I. HUSSEIN (MR)

KADHI

KIBERA LAW COURTS