



**ZSI v AMO (Civil Appeal E007 of 2024)
[2025] KEHC 15116 (KLR) (24 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15116 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CIVIL APPEAL E007 OF 2024
JN NJAGI, J
OCTOBER 24, 2025**

BETWEEN

ZSI APPELLANT

AND

AMO RESPONDENT

(Being an appeal arising from the ruling of Hon. Swaleh Mohamed Ali, Principal Kadhi in Garsen Kadhi's Court KCDRC No. E002 of 2021 delivered on 24/8/2024)

JUDGMENT

1. The Respondent herein purported to divorce his Islamic wedded wife, the Appellant herein by issuing a unilateral talak divorce. He then filed an application for registration of the divorce at the Kadhi's court at Garsen Kadhi's court situate in Tana River County though the parties were previously residing in Lamu county but were at the time of the talak residing in the US. The Honourable Kadhi granted the application and issued divorce certificate No. Dxxxxx.
2. It was the contention of the appellant that she was not served with the application for registration of divorce nor was she served with the divorce certificate. She on her part filed a divorce cause in the United States. It is after that that the respondent in his court papers indicated that he had already divorced the appellant in Kenya. The Appellant then filed a Notice of Motion application seeking for review of the Kadhi's ruling on the divorce registration and striking out of the divorce registration proceedings. The application was heard by a different Kadhi who found the application without merit and dismissed it. The appellant was aggrieved by the ruling dismissing the review application and filed the instant appeal.
3. The grounds of appeal are that:
 - 1) That the learned Honourable Principal Kadhi erred in law and in fact by failing to appreciate that the former Kadhi who presided over the Divorce registration application cause on 22nd February 2021 failed to conduct a proper verification of the unilateral divorce (Talaq)



pronounced by the Respondent as was required of him under the Muslim law and in particular Section 152 of the Kadhi's Court Act Cap 11 Laws of Kenya.

- 2) The learned Honourable Principal Kadhi erred in law and in fact by failing to appreciate that the application for registration of divorce and issuance of the divorce Certificate was incurably defective ab initio since it was filed outside the area where the divorce took place as required by Muslim law as provided under Section 152 of the Kadhi's Court Act Cap 11 Laws of Kenya.
 - 3) The learned Honourable Principal Kadhi erred in law and in fact by failing to appreciate that the former Kadhi who presided over the divorce registration application cause on 22nd February, 2022 failed to demonstrate whether the alleged divorce (Talaq) was oral or written as prescribed under Muslim law.
 - 4) The learned Honourable Principal Kadhi erred in law and in fact by failing to appreciate that the former Kadhi who presided over the divorce registration application cause on 22nd February, 2021 failed to demonstrate in his proceedings whether he was satisfied that the alleged divorce (Talaq) was witnessed by two adult male witnesses as required under Muslim law.
 - 5) The learned Honourable Principal Kadhi erred in law and in fact by failing to appreciate that, the divorce certificate issued by the former Kadhi who presided over the divorce registration application cause on 22nd February, 2021, was fatally defective, irregular and invalid under Muslim school of jurisprudence since it was issued in defiance of Muslim law in particular the requirements of Section 152 of the Kadhis Court Cap 11 Laws of Kenya.
4. The appellant sought for orders that:
- (a) That the ruling of the Honourable Swaleh Mohamed Ali, Principal Kadhi sitting at Garsen in Tana River County dated 2nd August 2024 in Garsen Divorce Registration Cause No. CDRC/E002/2021 – AMO – versus – ZSI be set aside.
 - (b) That the purported Certificate of Divorce No. Dxxxxx issued to the Respondent on 22nd February 2021 be declared null and void ab initio.
5. The Respondent on the other hand contended that the Divorce Certificate was procedurally issued.
6. The appeal was canvassed by way of written submissions.

Appellant's submissions

7. The appellant submitted that her issue is that the unilateral divorce or talak pronouncement was not conducted in accordance with the principles of Muslim law. That the application presented before the Kadhi's court was defective and the presiding Kadhi did not conduct the proceedings as provided for under the provisions of section 152 of the Kadhi's Court Rules.
8. It was submitted that before the Respondent filed the Divorce Registration cause, he was obligated to ensure that he adhered to the requirements and procedures for pronouncing the unilateral talak against the appellant. That at the time of pronouncing the talak, a husband is required to satisfy the following:
 - (i) must conduct the pronouncement in the presence of two or three male adult witnesses of sound mind.
 - (ii) must make a written document indicating:
 - (a) The date, month and year of pronouncing talak;



- (b) The place and time of doing so;
 - (c) The names of 2 or 3 male adult witnesses and their personal identification; and
 - (d) immediately after the pronouncement notify the wife of his pronouncement of talak.
9. It was argued that the husband is on pronouncing talak required to maintain the wife for a period of 3 months during which time she would be observing the iddah (the waiting period). That during that period the husband must provide her with a house to live in, food and money for subsistence. That the Respondent did not comply with the above before he moved to the Kadhi's Court.
10. On the role of the Kadhi during the divorce certificate hearing, it was submitted that the Kadhi, under the provisions of section 152 of the Kadhi's Court Rules, was required to first verify whether the unilateral talak issued by the husband was valid by satisfying the conditions as to maintenance as set out in the preceding paragraph. That there is no record that the Kadhi verified whether the talak was valid.
11. It was submitted that the Kadhi was required to summon the Appellant and accord her an opportunity to be heard as required under the principles of natural justice which the Kadhi failed to do.
12. The Appellant submitted that the Kadhi's court at Garsen had territorial jurisdiction to entertain the Divorce Registration cause. It was submitted that the Appellant and the respondent are natives of Lamu island in Lamu county though now residing in the US. That their marriage was solemnized and celebrated in Malindi. It was submitted that the respondent ought to have disclosed the place where the pronouncement of talak was done in order to clothe the Kadhi's court with the territorial jurisdiction to entertain the application as section 152 requires the afore mentioned cause to be filed at the area in which the divorce took place.
13. The appellant further submitted that failure to comply with the conditions and requirements stated above made the orders issued by the Honourable Kadhi to be unenforceable, illegal, null and void. Consequently, that the Certificate of Divorce has no legs to stand on and should be declared invalid.

Respondent's submissions

14. The respondent submitted that under sharia law, a muslim husband has a unilateral right to issue a divorce without the need of witnesses or presence of his wife as long as he has the capacity and acts of free will. Nor does he require leave of the court. Reliance in this respect was placed in the case of NAS V IMR 72 others, Civil Appeal No. EO45 of 2020 (2022) KEHC 15768 (Family) (28 November 2022) (Judgment) where it was held that:
- It follows that in Sharia law, a man can validly divorce his wife by pronouncing "talak" to her, but he can validly divorce her through the phone or in the absence of witnesses or in her absence provided he categorically indicated that he has divorced her. The divorce takes effect immediately it is pronounced and when the information gets to the wife.
15. The same proposition was held in the case of DAM v ASI (Misc. Cause E800 of 2023 (2023) KEKC 14 (KLR) (10 July 2023) (Ruling). Therefore, that the appellant did not have a right of audience.
16. The respondent submitted that the pronouncement of a talak and the subsequent registration are two separate matters wherein the latter has no effect on the validity of the former. Reliance was placed in



the case of *RWK v Ama* (2015) KEKC 32 (KLR) where the court held that registration of a talak had no effect on the validity of the talak. Said the court:

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.

17. It was submitted that the law requiring registration of divorce is merely a technicality and has no effect on the validity of the talak.

Analysis and determination

18. As the first appellate court, this court is mandated to subject the whole evidence to fresh and exhaustive scrutiny and make its own findings of fact and conclusion as stated in *Selle & another v Motor Boat Co. Ltd & others* 1968 EA123.

19. I have considered the grounds of appeal, the record of the trial court and the submissions by the respective counsels for the parties. The issue for determination are:

- (1) Whether the Kadhi's court had requisite territorial jurisdiction to entertain the matter.
- (2) Whether the respondent pronounced talak on the appellant.
- (3) Whether the certificate of divorce was properly issued.

20. This court had the advantage of receiving an opinion from the Chief Kadhi, the late Abdulhalim Athman.

The jurisdiction of the Kadhi's Court is provided for under Article 170(5) of *the Constitution* of Kenya 2010 that provides as follows:

- “(5) The jurisdiction of a Kadhis' 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.”

21. Section 5 of the Kadhi's Court Act provides that:

- “5. 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.”

22. It is clear from *the Constitution* and the Kadhi's Court Act are silent on the issue of territorial jurisdiction of the Kadhi's Court. The High Court in the case of *Farzila Hasham v Kadhi's Court, Narok /Kericho &another; Katijabhai Essak Musa (Interested Party)* (2020) eKLR, Bwononga J. (as he then was) pronounced himself as follows on the issue of territorial jurisdiction of the Kadhi's Court:

It is clear from the foregoing Constitutional provisions that the Kadhi's court is only limited in terms of the subject matter and the religion of the parties, who must profess the Muslim



faith. Unlike magisterial courts whose jurisdiction is governed as to the place of filing by sections 11 to 15 of the *Civil Procedure Act* (Cap 21) Laws of Kenya; and section 5 of the *Magistrates' Courts Act* (Cap 5) Laws of Kenya in terms of pecuniary jurisdiction, the Kadhi's court is not limited in terms of both territory and pecuniary jurisdiction.

23. However, Section 36 of the Kadhi's Court Rules of Practice and procedure (2020) (herein referred to as the Kadhi's Court Rules) sets out guidelines for place of suing as follows:

A suit shall be filed where the cause of action arose, or in the case of divorce and matrimonial proceedings, where either of the parties habitually resides.

24. A divorce cause is therefore required to be filed where either of the parties habitually resides. The rule is meant to, among other reasons, stop parties from forum shopping. It is not disputed that the parties habitually live in Lamu and in the United States. The respondent did not give any reason why he filed the matter at the Kadhi's Court at Garsen instead of Lamu. That amounted to forum shopping.
25. The next issue is Whether the respondent pronounced talak on the appellant. A question arises whether a Muslim man may divorce his wife without her knowledge. The Kadhi who determined the review application held that a husband can utter divorce in the absence and or without the knowledge or consent of his wife. The court cited the authority of `A` Aishah that the prophet said: Any woman who marries without the consent of her guardian, her marriage is invalid.
26. The court further held that a Muslim man has a right to pronounce divorce on his wife. That after uttering the divorce there is a procedure to register the said divorce. However, that the fact that the applicant has not served or involved the wife in the process does not the make the divorce invalid. Therefore, that the registration in this case was proper and did not render the divorce certificate invalid.
27. I have considered the issue. The law is that a Muslim husband has an inherent right to pronounce divorce on his wife. He does not need the leave of the court or any authority to exercise this right.
28. There need not be witnesses to the pronouncement. The divorce is effective upon being pronounced by the husband.

Section 372 of the Kadhi's Court Bench Book states as follows:

“Once uttered by the husband through the express announcement, divorce becomes effective. However, in using symbolic words, the husband must have intended the divorce for it to be become effective.”

29. In the case of *NAS v IMR & 2 others* [2022] KEHC 15768 (KLR), Muchelule J. (as he then was) held as follows in a muslim divorce cause:

It is common ground that in *Al-Fatawa Al-Almagriyah* it is stated that:-

“A person asks a man; Have you divorced your wife? And he answers; “Yes”, she is divorced.”

It follows that in Sharia law, a man can validly divorce his wife by pronouncing “talak” to her, but he can validly divorce her through the phone or in the absence of witnesses or in her absence provided he categorically indicated that he has divorced her. The divorce takes effect immediately it is pronounced and when the information gets to the wife.

30. In this appeal, the right of a Muslim man to divorce his wife is not disputed. What is at dispute is the right of his wife at the pronouncement of the divorce (talak) and during registration of divorce.



31. The respondent herein maintains that he pronounced talak on his wife after which he filed an application before Kadhi's Court at Garsen requesting the court to issue him with a divorce certificate which was issued on 22/2/21. The Appellant contends that the application for divorce certificate was faulty and that the procedure adopted by the court in issuing the certificate was irregular. That she was not made aware of it and therefore the same was irregularly issued.
32. The procedure for confirmation of divorce is set out in section 152 (1), (2) and (3) of the Kadhi's Court Rules which provide that:
- (1) A husband may divorce his wife in accordance with Muslim law.
 - (2) Within reasonable and practicable time after any divorce, a party to a divorce shall apply by way of an application to the Court in the area in which the divorce took place with all necessary particulars and shall pay to the Court the prescribed fees and the Court shall verify on whether the unilateral Talaq issued by the husband is valid in accordance with the Muslim school of jurisprudence of the parties and upon satisfaction forthwith register the divorce and issue a certificate of divorce:

Provided that in the case of a revocable divorce no certificate of divorce shall be issued until after the expiration of the period of Idda.
 - (3) The Court shall retain the role of verifying whether the unilateral Talaq meet the standards of Muslim law.
33. The duty of the court in an application for confirmation of divorce where the husband has declared an unilateral divorce (talak) on his wife is to verify on whether the unilateral divorce issued by the husband is valid and meets the standards of Muslim law.
34. I have examined the application form for registration of divorce that was filed before the Kadhi at Garsen. The design of the form is as follows:
- “We humbly petition to register the particulars relating to our divorce solemnized onat.....”.
35. It is clear to me from the design of the form that an application for confirmation or registration of divorce is required to be made by both the husband and the wife where divorce is not contested and talak has already been pronounced. In that case both parties are required to append their signatures to the application. Alternatively, the application can be filed by one party after which the other party is served with the application. Where divorce is contested or has not taken place, a party cannot move under section 152 of the Kadhi's Court Rules to seek for registration of divorce.
36. In the present case, the application was made by only one party, the respondent and the other party, the appellant, was excluded in making the application. There was no service of the application on the Appellant. This made the application irregular. An application for registration of divorce under section 152 of the Kadhi's Court Rules cannot proceed in the absence of the other party. Section 152 (2) of the referred to rules talks of a “party to a divorce...”, meaning that any of the parties may file the application. The holding by the Honourable Kadhi that an application for registration of unilateral divorce can proceed in the absence of the wife was legally untenable and a misdirection on his part. I find the application to have been irregular for lack of participation by the appellant.
37. Further to this, the respondent indicated in the divorce registration application form that the divorce was pronounced of 22/2/2021 at Garsen town yet that is the day the respondent appeared before



the Kadhi's court seeking to be issued with a certificate of divorce. A question then arises as to when the divorce was pronounced because the same ought to have been pronounced prior to the filing of the application. The respondent did not disclose in the application the date when the divorce was pronounced prior to the filing of the application. Neither did he in his address to the Kadhi in the proceedings conducted before the Kadhi at Garsen on 22/2/2021 tell the court when the divorce was pronounced. He instead told the Kadhi that:

“.....I have come before you seeking for a divorce certificate. I am ready to divorce my wife before Shariff and today I want to send it to y wife.”

38. The court upon considering the application stated that:

“ After listening to the applicant and verifying a lack of dispute and decided (sic) to divorce his wife without forcing from any one (sic) the court hereby grants the application ...the applicant to complete the necessary requirement.”

39. What was before the Kadhi at that time was an application for registration of divorce that had purportedly taken place. Instead of the respondent telling the Kadhi the date when he pronounced talak on his wife, he seemed to be making an application to divorce his wife when he stated that, “I am ready to divorce my wife before Shariff...”. That statement connotes an intention to divorce his wife before the Kadhi and a witness called Shariff and does not signify that divorce had already taken place.

40. It was the duty of the Kadhi to verify and satisfy himself that there was a valid divorce before issuing the certificate of divorce. The court said that there was no dispute on the application. How did the court know of lack of dispute when the appellant had not signed the application nor had she been served with the same? The Kadhi did not inquire on the date the talak was issued, if at all it was issued. Failure by the respondent to disclose in the application the date the talak was issued and the failure to inform the court of such a date during the oral hearing in court would lead to a conclusion that no talak had been issued on the appellant before the application for registration of divorce was filed. It was thus not proved that the respondent had pronounced talak on his wife. There having been no talak pronounced by the respondent on his wife, the application for registration of divorce was null and void.

41. A divorced wife under Islamic law is entitled to several rights upon divorce including unpaid dowry, eddah maintenance, conciliatory gift etc. The Kadhi did not inquire whether these had been complied with. The Honourable Kadhi failed in his duty of verifying whether a valid divorce had been issued. The certificate of divorce was irregularly issued.

42. The respondent says that he gave a copy of the divorce certificate to a sister to the appellant to hand it over to the appellant. The appellant denies ever being served with a copy of the divorce certificate. The respondent did not file any document to show that the appellant was served with a copy of the divorce certificate. There was no affidavit from the sister of the respondent indicating that she served the appellant with the same as contended by the respondent. I therefore find that the appellant was not served with a copy of the divorce certificate. In view of the fact that a Muslim woman has some legal rights after divorce as observed above, it is important for her to be served with a certificate of divorce after unilateral divorce. The divorce cannot take effect until it is served or brought to the attention of the other party.

43. The upshot is that I find the appeal to be merited and the same is allowed as prayed in Paragraph 4 of this judgment. The appellant to have the costs of the appeal.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 24TH DAY OF OCTOBER 2025.



J. N. NJAGI

JUDGE

In the presence of:

No appearance for Appellant

Ms Aliya Respondent

Court Assistant – Ms Rahma

