



REPUBLIC OF KENYA



**MAAA (Suing in his capacity as the administrator of the Estate
of Abubaker Mohamed Al Amin (Deceased) v FSS (Civil Appeal
E043 of 2021) [2022] KECA 166 (KLR) (18 February 2022) (Judgment)**

Neutral citation: [2022] KECA 166 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E043 OF 2021
SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA
FEBRUARY 18, 2022**

BETWEEN

**MAAA (SUING IN HIS CAPACITY AS THE ADMINISTRATOR OF THE
ESTATE OF AMAA (DECEASED) APPELLANT**

AND

FSS RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Mombasa (Njoki Mwangi, J.) delivered on 21st May 2021 in High Court Family & Succession Appeal No. 48 of 2018)

JUDGMENT

1. The appellant, MAAA (suing in his capacity as the administrator of the Estate of AMAA, deceased) is dissatisfied with, and has appealed against the judgment of the High Court at Mombasa (Njoki Mwangi, J.) delivered on 21st May 2021. In that judgment, the High Court upheld a judgment of the Senior Resident Kadhi given on 27th March 2017 in a matrimonial cause between AMAA, the deceased, and his wife FSS, the respondent.
2. In the said judgment, the Senior Resident Kadhi (the trial court) determined: that the divorce pronounced by the deceased (to whom we also refer as the husband) on 29th June 2011 was “not a valid one in Islamic law” on the basis that a divorce pronounced by an individual whose mental faculty is lacking or questionable is not valid; that nonetheless, the respondent was entitled to dissolution of the marriage on account of her “marital rights, security, peace and stability” having been violated by the husband. In that regard the trial court pronounced, “the parties’ marriage is hereby dissolved with one Talak with effect from this 27th day of March 2017 corresponding with 28th Juma Akhir 1438 A.H”.
3. The trial court then proceeded to award the respondent “Eda maintenance for 3 months” comprising food, Kshs.90,000.00; medical care, Kshs.45,000.00; housing Kshs.60,000.00; and



clothing Kshs.30,000.00; and past maintenance of Kshs.3,200,000.00 for a period of 64 months at the rate of Kshs.50,000.00 per month. Other awards in favour of the respondent were: “alimony/Mut’ah of Kshs. 2,500,000.00” “for the period she spent with the defendant as his wife”; and Kshs.1,000,000.00 “as compensation of all her personal belongings and effects.” The trial court directed that a divorce certificate should issue upon payment of the stated amounts. The total amount of Kshs.6,925,000.00 was ordered to be paid within 7 days.

4. Before the High Court, the trial court was faulted for: failing to find that the respondent had been divorced by the husband despite her admission that she was divorced on 29th June 2011; and in granting the respondent awards that were not pleaded, sought for, or supported by evidence.
5. Having reviewed the evidence, the High Court concluded that: “it cannot safely be concluded that the [husband] communicated to the respondent of his intention to divorce her as required under Muslim law”; that the submission that the respondent admitted that she

“had been divorced cannot hold in light of her averments in her amended plaint”; and that the trial court did not err in finding that the respondent had not been divorced by the husband on 26th June 2011.
6. The High Court also upheld the award for mut’ah of Kshs.2,500,000.00 stating that from the evidence adduced, the deceased “is not a pauper” and the amount awarded was reasonable in the circumstances. Also upheld was the award of Kshs.225,000.00 for Eda for 3 months; the award of past maintenance for 64 months in the amount of Kshs.3,200,000 based on what the court referred to as “a modest figure of Kshs.50,000.00 per month”; and the award of Kshs.1,000,000.00 for her personal belongings. In the result, the High Court upheld the award of Kshs.6,925,000.00 and in addition awarded interest and costs.
7. In this second appeal, the appellant complains that the learned Judge erred in: failing to find the judgment of the trial court was a nullity as it was entered against a person of unsound mind; finding that the marriage had not been dissolved; upholding the awards made by the trial court when the same had not been pleaded, prayed for or supported in evidence; and awarding the respondent costs and interest.
8. Urging the appeal before us, learned counsel for the appellant Mr. Mwanzia in highlighting his written submissions submitted that the husband, being of unsound mind, had no capacity to sue or be sued but the Judge of the High Court erroneously found that he was of sound mind at the time; that an appeal filed by the husband in Civil Appeal No. xx of 2017 as well as his application for extension of time to appeal were struck out and dismissed respectively on account of the deceased being of unsound mind; that when the husband instructed the firm of Gikandi & Co advocates in Civil Appeal No. xx of 2018, this was well after the trial court had given its judgment and at this point there was evidence that the husband had recovered.
9. As regards the divorce, counsel submitted that the letter of divorce issued to the respondent by her husband was wrongly disregarded despite the fact that it was witnessed by the Chief Kadhi.
10. Turning to the awards, counsel submitted: that in her amended plaint, the respondent abandoned the claim for Mut’ah yet the trial court awarded the same; that the trial court had no jurisdiction to grant what was not pleaded and erred in granting relief that was not sought. In that regard the case of *Housing Finance Company of Kenya vs. J. N. Wafubwa* [2014] eKLR and the case of *Caltex Oil (Kenya) Limited vs. Rono Limited* [2016] eKLR were cited; that even though the respondent did not cross appeal against the judgment of the trial court, the High Court wrongly awarded interest and costs on appeal; that in



any event interest is not recognized under Islamic law and in that regard reference to the case of *Gideon Nassim Kiti vs. Faiza Oscar Meuli & another*, Malindi Civil Appeal No. 35 of 2013 (unreported) was made. With that, counsel urged us to allow the appeal, set aside the judgment of the High Court and substitute therefor an order allowing the appeal from the judgment of the trial court.

11. Opposing the appeal, learned counsel for the respondent Mr. Mkhani submitted that there was no evidence that the husband was of unsound mind; that the doctor's medical report that had been produced before the trial court was expunged and there was therefore no material on the basis of which to hold otherwise.
12. Regarding the awards, counsel urged that the evidence given in support was not controverted; that the husband did not call any witness and the trial court was entitled, upon pronouncing divorce, to grant reliefs which automatically follow such pronouncement in accordance with the Holy Koran; and further that the reliefs were sought in the amended plaint. It was submitted that the High Court was right in affirming the judgment of the trial court and that under Section 6 of the Kadhi's Courts Act, the decision is not reviewable on appeal unless there is a failure of justice which has not been demonstrated in this case.
13. We have considered the appeal and the written and oral submissions by learned counsel. Section 6 of the Kadhi's Courts Act provides that the law and rules of evidence to be applied in a Kadhi's court shall be those applicable under Muslim law with a proviso that "no finding, decree or order of the court shall be reversed or altered on appeal or revision on account of the application of the law or rules of evidence applicable in the High Court, unless such application has in fact occasioned a failure of justice."
14. The broad question in this appeal, therefore, is whether the appellant has demonstrated that there has been a failure of justice. More particularly, there are two issues for determination in this appeal. The first is whether the proceedings before the trial court are invalid on basis of the husband's alleged insanity. The second issue is whether the High Court erred in affirming the awards by the trial court in the amount of Kshs.6,925,000.00 as set out above. There is also the question whether the Judge erred in awarding interest on the amount awarded by the trial court as well as costs.
15. We begin with the question whether the proceedings before the trial court are invalid on account of the husband's state of mind. In addressing this issue, a brief procedural history of the matter is pertinent. In her plaint filed before the Kadhi's Court on 12th July 2011, the respondent pleaded that the husband "is an adult male Muslim of sound mind" and that they were "wife and husband married at Mombasa sometime on 17th November 2005 in accordance with Muslim law" and that the husband "then divorced the [respondent] sometime on 29th June 2011"; that upon the divorce the husband and his children threw the respondent out of the matrimonial house contrary to Muslim law on the issue of accommodation while in Edda (waiting period).
16. In the plaint, the respondent also made reference to proceedings in Misc. Civil Application No. xx of 2011 instituted by the husband seeking a divorce certificate. She prayed for stay or consolidation of those proceedings. Included in the prayers in the plaint was a prayer for issuance of divorce certificate. The respondent confirmed the facts in the plaint in her affidavit of verification sworn on 12th July 2011.
17. In her application (filed simultaneously with the plaint) for stay of proceedings, dismissal or consolidation of the proceedings instituted by the husband, the respondent contended that it was Islamically unfair for the husband to demand a Divorce Certificate when he had not fulfilled the Islamic requirements or procedures. In her replying affidavit in Misc. Civil Application No. xx of 2011 sworn on 12th July 2011, the respondent deposed that the Islamic requirements or procedures the husband had failed to fulfil were that he had "failed to provide accommodation and provide edda maintenance"



to her as required in Muslim law; that as a result she had filed her independent case to address the husband's failure "and equally requested for a Divorce Certificate upon fulfillment of the required condition". The husband, in his application in Misc. Civil Application No. xx of 2011, had prayed for a Divorce Certificate on the basis that he had been forced to give the respondent "Twalaqa (divorce) on the 29th June 2011 witnessed by the former Chief Kadhi of Kenya and another person due to the respondent's "gross difficult conducts and behavior".

18. The respondent appeared before the Kadhi's Court on 13th July 2011 and stated that the previous month, on 29th June 2011, the husband had divorced her and that she did not "refuse him to have the Divorce Certificate but he has to fulfil his religious obligations"
19. In October of 2012, the respondent through her advocates moved the Kadhi's court with an application seeking leave to amend her plaint on the ground that she had established that the husband "did not sign the Declaration of Talak and it was necessary to make the amendment to reflect that position". In her amended plaint, the substantial amendment which was a departure from her previous plea was that the purported divorce (talak) by her husband was prepared by her husband's children and that "the alleged divorce is of no consequence and is therefore null and void." The averment, as contained in the plaint, that the husband "is an adult male Muslim of sound mind" was retained in the amended plaint. The amendment was allowed without objection on 11th February 2013.
20. The respondent testified before the Kadhi's Court on 22nd April 2013. It was her testimony that they lived together for eight years; that the husband was about 60 years old whilst she was 39 years old at the time of her testimony; that the husband became unwell and was hospitalized and after discharge quarrels started after she asked for maintenance; that the husband's children incited him to divorce her; that the letter of divorce purportedly signed by her husband was forged.
21. Under cross examination, the respondent stated that,

"when the letter of divorce was brought to me, the defendant [the husband] was hospitalized in Port Reitz Hospital, how could he sign a divorce letter"; that the husband told her that, "he was confused, he loved me, but also wanted his children", and that the husband, "suffered from depression" and that if he suffered from depression, "he would not be able to sign a divorce letter" and maintained that "he was confused."
22. The respondent's witness ABS who described the respondent as his "cousin sister" stated that he was present when the respondent's husband stated that,

"he still loved his wife" and that he requested her to return but on returning found a divorce letter, that the husband had "psychological problem"; that between 2005 and 2011 he was lonely and "at times talks alone".
23. After close of the respondent's case, the trial hearing was adjourned several times as the husband was said to be overseas.

On 17th March 2014, his advocate informed the court that the husband was back in the country but sought adjournment on grounds that the husband "is yet to have fully recovered from his illness" and that "if he is put under any stress, he may suffer set back."

In response, counsel for the respondent stated that the respondent had seen the husband and that "he is in full health" but was avoiding trial. Thereupon, the Court ordered that the defence case should "proceed in camera at noon on 24/3/2014".



24. During the camera session, counsel for the husband presented him to the court but indicated that he (the husband) was not in a position to testify as “he appears disturbed”. Counsel for the respondent then put a question to the husband who in response stated, “I did divorce the plaintiff, the signature on the certificate is mine.” Counsel for the respondent is then recorded as having stated that he thought the husband’s “mental capacity is questionable” and doubted his “mental ability”. On the same day, the Court ordered that the husband “be examined to establish his mental capability”.
25. The husband was examined by Dr. Omar J. Aly whose report dated 12th May 2014 was filed in court. On 21st May 2014 the Court directed the parties to make submissions on that report and at the same time rejected an application by counsel for the respondent to have the husband subjected to “a medical examination by a psychologist”. Dr. Aly had concluded in his report that the husband was “not fit to appear before the Court till his current problem is sorted out” having diagnosed him with “depression and /or early dementia.” The respondent appealed to the High Court against the ruling of the Kadhi’s Court declining her application to have the husband undergo a second medical examination by a psychologist. That appeal was dismissed in a ruling of the High Court (M. Thande, J.) delivered on 14th July 2016 in Civil Appeal No. xx of 2014.
26. When the trial was scheduled to resume for defence case before the Kadhi’s Court on 22nd February 2017, counsel for the husband stated that the husband was in U.K, “is unwell and is suffering from depression”. He applied to close the husband’s case “basing on the evidence adduced and the file on record 22 of 2011”. At that point, counsel for the respondent Mr. Mkan applied to recall the husband to cross examine him on a statement he had made earlier during the in-camera session on 23rd March 2014 (to which we have already referred) that, “I did divorce the plaintiff, the signature on the certificate is mine” and urged that by virtue of the psychiatrist report, then that statement “must be expunged from the proceedings” should there be objection to availing the husband. In response counsel for the husband stated that he (the husband) was in UK, “is unwell and is suffering from depression.” Although the record of proceedings of 22nd February 2017 is not entirely clear, it would appear that the Court allowed the application by counsel for the respondent to expunge the statement by the husband. Judgment in the case was then reserved for delivered on 27th March 2017.
27. In the judgment, the learned Kadhi in summing up the parties’ respective cases noted, with respect to the defence case, that no witnesses were produced; that the husband was produced in court “but he was not in a proper mental capacity to testify as stated by his counsel”; that although he was examined by a doctor identified by his family, the medical examination report prepared by Dr. Omar J. Aly was expunged from the proceedings because the doctor did not attend court to be examined on it and no submissions were made by counsel on the same.
28. The Court found that the husband was hospitalized at the Port Reitz Hospital a day before the respondent received her divorce letter and that it was evident that “the defendant was not in a good state of mental faculty when the divorce was issued” and consequently “the divorce issued by the husband on 29th of June 2011 is not a valid one in Islamic law”; that “a man in depression with hussy (sic) memory cannot expressly issue a divorce and understand the conditions attached to it.” However, the court went on to decree, as we have already indicated, that the respondent was entitled to “dissolution of marriage” on grounds that her “marital rights, security, peace and stability have been violated by the [husband]”
29. Based on foregoing, it is clear that even though the divorce pronounced by the husband was vitiated by the court on grounds that he was not “in a good state of mental faculty”, it is not the basis on which the court ordered the dissolution of the marriage. As stated, the dissolution of the marriage was on grounds that the husband had violated the respondent’s marital rights, security, peace and stability.



30. Throughout the proceedings the husband was represented by counsel. At no time was an application made before the Kadhi's court to discontinue the proceedings on the basis that husband "was not of sound mind". We think it was late in the day for the matter to be taken for the first time on appeal. Furthermore, the trial court gave counsel an opportunity to submit before him on the report of Dr. Aly. No submissions were tendered and eventually the learned Kadhi was constrained to disregard that report. The trial court cannot therefore be faulted for not addressing a matter that neither party raised. Moreover, based on the history we have set out above, it would appear that the issue of the husband's state of mind would only be raised by either side when it suited them but was not seriously pursued. We are therefore not persuaded that there is merit in the complaint that the judgment of the Kadhi's Court is a nullity as it was entered against a person who was not of sound mind.
31. We turn to the question whether the High Court erred in affirming the awards by the Kadhi's court in the amount of Kshs.6,925,000.00 made up of: Kshs.225,000.00 Eda maintenance for 3 months; Kshs.3,200,000.00 past maintenance for a period of 64 months at the rate of Kshs.50,000.00 per month; Kshs.2,500,000.00 for alimony/Mutah; and Kshs.1,000,000.00 compensation for personal effects. We will address that alongside the question whether the High Court erred in awarding interest and costs.
32. In addressing this issue, we reiterate that under Section 6(iii) of the *Kadhis' Courts Act* that "... (iii) no finding, decree or order of the Court shall be reversed or altered on appeal or revision on account of the application of the law or rules of evidence applicable in the High Court, unless such application has in fact occasioned a failure of justice." [Emphasis added]. With that in mind, we first consider the claim and award of Kshs.225,000.00 for "edda maintenance for three (3) months". The claim for that amount was pleaded and itemized in the respondent's plaint as follows: Food provision 1,000 per day for 90 days, Kshs.90,000.00; medical care at Kshs.15,000 per month, Kshs.45,000.00; Housing at Kshs.20,000.00 per month, Kshs.60,000.00 and clothing at Kshs.10,000.00 per month, Kshs.30,000.00. In her testimony, the respondent stated, "we were spending around less 1,500/ per day. We were eating well. Now I spend around 800/= . I pay rent Kes. 6,000/= rent where I am staying. Edda should be assessed based on where I was staying not where I am now staying. I used to get medication."
33. Evidently, even though the testimony on the figures did not entirely tally with the pleading, the trial court considered and awarded that amount based on the pleading and its appreciation of the evidence tendered. We are unable to fault the trial court for awarding that amount or the High Court for upholding that award.
34. Turning to the awards for past maintenance of Kshs.3,200,000.00 for 64 months, alimony/Mut'a of Kshs.2,500,000.00, and Kshs.1,000,000.00 compensation for personal effects, the respondent in her plaint, had, alongside the prayer for issuance of divorce certificate, sought provision of Mut'a (compensation) of Kshs. 2 million and release of personal effects. However, in her amended plaint, amended on 18th October 2012, in which she departed from her earlier position and averment that the husband divorced her on 29th June 2011, the respondent abandoned the claim for issuance of divorce certificate and in lieu sought a declaration that the divorce is a nullity. In the amended plaint, she also abandoned the claim for Mut'a (compensation) of Kshs. 2 million, which was crossed out in the amended plaint.
35. In her testimony, the respondent stated that she "did ask for Kes 2 million as Mut'a compensation" when the letter of divorce was brought to her wanting to confirm that the husband had divorced her. She stated that the husband bought a plot and developed it in Nyali while they were married and that he has other properties.



36. Based on the foregoing it is not evident from either the pleadings, the evidence, or the analysis, how and on what basis the learned trial court arrived at the awards. The court simply pronounced in the judgment that, “this court is also awarding her past maintenance of Kshs.3,200,000/-for a period of 64 months @50,000 a month and alimony/Mut’a of 2,500,000/- for the period she spent with defendant as his wife. The husband or his counsel had clearly no prior notice of those claims and had no opportunity to address the court on the same.
37. Article 86 of the Islamic Charter on Family, in reference to what is referred to as a conciliatory gift for divorce states thus:
- “Islamic Shariah encourages the man to give his wife a material gift, known as al-mut’ah, when he divorces her. The value of the gift should be in proportion to the husband’s financial abilities and the duration of the marriage. The purpose of the gift is to console her and to lessen the harm that she endures as a result of the divorce.” [Emphasis]
38. The High Court of Kenya (Onyiego, J.) in *AA vs. HSS* [2021] eKLR, an appeal arising from a judgment of a Kadhi’s Court, held that a consequence of divorce sanctioned by Islamic law is
- “payment of alimony or maintenance otherwise known as mutah under Islamic law and Edda”; that the requirement for an award of mutah was as old as the Islamic religion and it was expressed in the holy book of the Quran at chapter 2 (Al Baqara) verse 236. Further chapter 2 verse 241 provided that for divorced women, maintenance should be provided on a reasonable scale; that the objective of mutah payment was for a man to give some token of appreciation according to his financial ability to enable the divorced woman restart, reorganize and continue with life. The court further held that “The Quran chapter 2 verse 236 imposed a duty upon a man divorcing a woman to honour his obligation gifting her especially where he was responsible for the divorce. The only benefit a divorcing man had was to establish his financial status by filing an affidavit of means to justify what was reasonable to pay as mutah.”
39. The financial ability or financial status of the husband is therefore an important consideration in that regard. In the present case, the learned Judge of the High Court, in upholding the awards by the trial court found that the deceased was not a pauper and that there was no reason therefore to interfere with the awards.
40. In our view, it was incumbent upon the trial court to undertake an inquiry as to the means of the husband to ascertain his financial status on the basis of which the awards could then be based. Apart from the fact that there was no prayer by the respondent for Kshs.3,200,000.00 or for 2,500,000.00 it is not clear how or on what basis the trial court arrived at those figures that it did. The husband and or his household ought to have been given an opportunity to address the court on the ability of the deceased to pay compensation. At the very least the Kadhi ought to have directed questions to the parties that would guide the court on the financial ability of the deceased. In the end, the awards for maintenance and compensation were plucked from the air without any basis. To that extent, there was, in our view, a failure of justice.
41. In relation to her prayer for release of personal effects, the respondent pleaded that the husband and his grown-up children had refused to allow her to collect her personal effects itemized in the amended plaint as including dining table, saloon equipment, kitchenware items, water dispenser, carpets, curtains, Sony TV, shoe rack, child study table/chair and personal clothes including shoes and sandal. In her testimony the respondent stated that she was forced out of the matrimonial home; that



the husband had built and equipped a saloon for her and that she had “not gotten anything” that was itemized in her amended plaint and urged that,

“I also pray for my personal belongings to be returned and costs.”

42. Under cross examination, the respondent stated that she had receipts for the effects she was demanding but the same were at the matrimonial home. She stated that she used Kshs.20,000 of her dowry to buy certain equipment; that the bed belonged to her; and that she bought the Sony TV at Kshs.20,000.00 from a person.

43. In the judgment, the learned Kadhi found, citing the Holy Koran, that the respondent was “thrown out of her matrimonial home, was never given any of her personal belongings and other items, her salon and all the items therein were confiscated by the [husband’s] children”; that the respondent’s “marital rights have critically been infringed”; that the harm must be removed; that in the interest of natural and social justice:

“...this Honourable court is also awarding the plaintiff a sum of 1,000,000 as compensation of all her personal belongings and effects”

44. The trial court was alive to the plea by the respondent that she had been chased from the matrimonial home and that there was no prospect of physically recovering her personal effects. There was a basis, therefore, for ordering payment of compensation in lieu. As the learned Judge of the High Court stated:

“The evidence adduced by the respondent was that when she was forced out of the matrimonial home, she was under the impression that the issue between her, the appellant and his children would be resolved and she would go back to the said home.

That was not to be. She left only with the clothes on her back. Her evidence was that she had receipts for some of the items at the said home but she had no access to them. Noting that she left all her personal effects and some items for her saloon in in the said home, the award made by the Hon. Kadhi the respondent in the sum of Kenya shillings 1,000,000 to compensate for her loss, was a reasonable.”

We respectfully agree.

45. As regards the award of interest, it is noteworthy that the trial court did not award this in its judgment. Apart from the fact that interest is not permitted under Islamic Law, there was no cross appeal before the High Court challenging the decision of the trial court in any respect. The decision of the High Court in that regard must therefore be set aside.

46. As regards costs, the power to award costs is discretionary. It has not been demonstrated that the learned Judge wrongly exercised her discretion in that regard.

47. In conclusion therefore:

- a. We uphold the awards in favour of the respondent for Kshs.225,000 and Kshs.1,000,000.
- b. We set aside the awards for Kshs.3,200,000 and 2,500,000.
- c. The matter is remitted back to the trial court, in accordance with Rule 31 of the Court of Appeal Rules, with directions that that court should undertake an inquiry as to the financial ability of the estate of the deceased so as to assess and arrive at a fair award for alimony and compensation.



48. We make no orders as to costs of this appeal.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF FEBRUARY 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

