IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OUKO, (P), MAKHANDIA & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 87 OF 2016

BETWEEN

SYT.............................APPELLANT

AND

TA...........................RESPONDENT

(Being an appeal from the Judgment and Order of the High Court of Kenya at Mombasa (M. Thande, J.) made on 4th May, 2018

in

Civil Appeal No. 7 of 2016)

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JUDGMENT OF THE COURT

This is a second appeal from the decision of the High Court in which the appellant's first appeal was dismissed. The dispute was filed in the Kadhis' Court at Mombasa by the respondent who had petitioned to divorce the appellant under Islamic law, accusing him of cruelty and infidelity; that he had married a woman who was HIV positive; and that as a result of all these their marriage had irretrievable broken down.

The appellant for his part had also accused the respondent of infidelity and in his counter-claim demanded that the respondent should return to him household goods worth Kshs. 600,000/= taken from the matrimonial home, personal documents and documents of ownership of a house in Mikindani and land in Samburu, the sum of Kshs. 800,000/= being security for a loan taken by the respondent. He also prayed that the respondent be ordered to account for rent collected from a shop in the matrimonial home from May 2014.

Only upon satisfaction of the counter-claim, would the appellant accept the prayer for the dissolution of the marriage. He prayed also that the respondent be restrained from disposing of the assets in question.

The trial Kadhi in dissolving the marriage noted that although Islam prefers that a marriage should be a lifetime commitment, if it is impossible to sustain, **"Islam cannot force a woman to stay with a man who she does not like"**. He went on to explain that in respect of the matter before him, due to strained relationship between the parties, the respondent **"could no longer bear in patience, while she is very aware that the defendant is no longer interested in her. The only solution for their future life is the permanent separation....."**

As regards the counterclaim, the Kadhi found that the matter before him was not about matrimonial property but dissolution of marriage; and that in any case, the appellant having failed to support his claim by presenting evidence in support thereof, was not entitled to any of the reliefs in the counter-claim.

This determination aggrieved the appellant who preferred first appeal to the High Court. That court (Thande, J), sitting with the Chief Kadhi, as an assessor under **section 65(1)(c)** of the Civil Procedure Act, formed the opinion, upon consideration of the record before her that, there was no material upon which she could interfere with the decision of the Kadhi; that though the respondent did not file submissions or attend court in person or through her advocate for hearing of the first appeal, the court was nonetheless satisfied that the Kadhi properly proceeded

to issue a date for delivery of the judgment after the appellant, on several occasions failed to attend court to prove his counter-claim; that the Kadhi considered the prayer for *khulu* and properly rejected it after the appellant failed to offer any evidence in support of his defence and counter-claim, which remained unsubstantiated. Based on this the learned Judge found that *khulu* was not proved.

The Chief Kadhi, as an assessor, however took a different view, suggesting that the appeal ought to have been allowed and the appellant given another chance to defend himself in a retrial; that the trial Kadhi erred in granting the divorce to the respondent unconditionally, while the appellant had made it clear in his counter-claim that, if the court was to grant a divorce, he would be entitled to *khulu*.

The appellant was once again dissatisfied with the judgment of Thande, J. and brings this appeal on four grounds, arguing that the Judge erred in finding that *khulu* was not established; that the burden of proving *khulu* was on the appellant; that there was no proof that the appellant's constitutional rights were violated at the trial; and that she erred in failing to be guided by the sentiments of the Chief Kadhi.

We reiterate that this is a second appeal where our mandate, as has been said many times is confined to matters of law only, and unless it is shown that the court below considered matters it should not have considered or failed to consider matters it should have considered or that its decision is perverse, an appellate court has loyally to accept the findings of fact of the lower court and should not interfere with its decision. See **Maina V. Mugiria** [1983] KLR 78 and **Kenya Breweries Ltd V. Godfrey Odongo,** Civil Appeal No. 127 of 2007.

The jurisdiction of a Kadhis' court in terms of **Article 170 (5)** is 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 Kadhis' courts. What is in contention in this appeal is what should happen to the bride price after the dissolution of the marriage between the appellant and the respondent.

Starting with the last ground where the appellant alleges that the Judge improperly disregarded the opinion of the Chief Kadhi, sitting as an assessor, we start by explaining the use of assessors in some cases. Under **section 87** of the Civil Procedure Act, a trial court may, in any a case in which questions regarding "**the laws or customs of any tribe, caste or community, summon to its assistance one or more competent assessors, and such assessors shall attend and assist accordingly".** The law on assessors and expert witnesses is settled, that, though their opinions are important, the trial court retains the ultimate power to state the outcome. It is a good practice where the court arrives at a different opinion from that of the assessor for the court to assign the reason or reasons for not agreeing with the opinion of the assessor or expert. See **Dickson Mwaniki M'obici & another v Republic**, Criminal Appeal 78 of 2006, where this Court stated thus:

> **"In the event that the opinions of the assessors are at variance with the court's judgment, this Court has stated that a judge who disagrees with the unanimous opinion of the assessors should explain sufficiently his reasons for so disagreeing. See Kihara v R [1986] KLR 473. In Kinuthia v R (supra) the Court held: -**
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> **"In a case involving controversial evidence which might be decided either way, it would be a strong action to overrule the unanimous opinion of the assessors on some points. It is therefore fundamental that a court gives its reason for disagreeing with the assessors."**

The Court of Appeal in **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros V.**

Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139

said that;

> **"Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."**

The second and third grounds can be considered together as they seek to answer the question whether *khulu* was established and on whose laps was the burden to prove its existence. The answer we shall provide will in turn illustrate whether or not the appellant's constitutional rights were violated at the trial.

Apart from **FAA V. RAD** [2019] eKLR, a decision of the Kadhi's court at Garsen and the decision of the High Court, **S Y T V. T A** [2018] eKLR, from which this appeal has arisen, we are not able to get any other local authority on the doctrine of *Khulu*.

However, from the material relied on by the parties and cited by both courts below, we take the following view of the matter.

To begin with, Islam just like Christianity and secular laws insists that marriage is supposed to be a permanent relationship. But (Islam) also takes a realistic view of human affairs and attaches great importance to the happiness of the spouses in marriage and requires that every attempt be made to preserve a marriage. However, once it is established that marriage has broken down irretrievably Islam allows the parties

to separate from each other. *Talaq* or *talaka* (divorce) is therefore permitted in Islam as a matter of necessity for the avoidance of greater evil, which may result from the continuance of a marriage. It is regarded, though in Islam as the most abominable of all legitimate acts.

Just as the Islamic law allows a husband to release his wife by way of pronouncement of *talaq*, a wife has also the right to release herself from the marriage by way of *khulu*. Technically speaking *khulu* is a procedure of divorce in Islam initiated by a wife on condition that she returns the bride price or something else that she may have received from the husband.

In the Quran, it is enunciated in ***surah al-Baqarah,*** verse 229 that;

> **"And it is not lawful for you that you take from women whatever that has been given to them (as dower) except in the case where both fear that they may not be able to keep within the limits imposed by Allah. And if you fear that they may not be able to keep the limits of Allah, it is no sin for either of them if the woman ransoms herself."**

In other words, and as a general rule, in Islam it is not lawful for husbands to take back from their wives any of the marriage gifts or bride price, except when both fear that they would be unable to keep the limits of the law to deal with each other on a fair basis; that in such a case then there is no sin on either of them if the wife gave back the bride price or a part of it for divorce.

Khulu therefore indicates the dissolution of marriage by the consent of the wife who pays or agrees to pay a consideration to the husband for releasing her from the marriage tie by refunding the bride price or making any other agreement for the husband's benefit. There must be reasonable and valid ground before a wife can ask for *khulu* and it is morally unacceptable for the husband to receive more than the amount of bride price paid to the wife.

In view of paucity of local authorities, we have looked at the practice in Pakistan where the courts have decided in several cases that the wife may obtain *khulu* even if the husband does not agree to it. For example, in **Balqis Fatima V. Najm-al-Ikram Qureshi,** PLD 1959 Lah. 366, the High Court of Lahore held that if the court arrived at the conclusion that the couple would not be able to maintain the limits set by the Holy Quran, it could get *khulu* effected even without the consent of the husband. The decision in **Balqis Fatima** (supra) was endorsed by the Supreme Court of Pakistan in **Khurshid Bibi V. Muhammad Amin**,PLD 1967 S.C. 97. In 1985 the Supreme Court in the case of **Abdul Rahim V. Shahida Khan** [1985] 1 MLJ cxxvii, once more affirmed this view when it declared that;

> **"It would be more consistent with the letter and spirit of the Qur'an which places the husband and the wife on an equal footing to construe the classical incident of Sabit bin Qais as meaning that the person in authority, including the judge, can order separation by *khulu'* even if the husband is not agreeable to that course."**

Khulu is not therefore *per se* the refund of bride price or any gift to a wife, as parties argued before us, but the process of divorce initiated by a wife.

In allowing the dissolution of the marriage, *khulu* as explained above was granted by the dissolution of the marriage. What was not granted were the prayers in the appellant's amended statement of defence and counter-claim, that after dissolving the marriage the court ought to have ordered the respondent to

> **"give back all the defendant's properties she had been holding, a house at Mikindani, Mombasa, and a shamba at Samburu of 6 acres, among other belongings as well as custody of the child."**

The appellant also applied that the respondent be restrained from accessing the matrimonial house, ordered to return all matrimonial goods worth Kshs. 600,000, the respondent's personal documents and documents of title to the matrimonial property and thereafter to be directed to transfer the property to the appellant and to account for rent collected from the shop from May, 2014 to the date of judgment.

That was the appellant's case stated in summary.

In this dispute the Hon. Kadhi was persuaded by the material presented by the respondent that the grounds for dissolution of the marriage had been proved to the required standard; that the marriage had irretrievably broken down; that attempts at *sulhu* (reconciliation or arbitration) had failed; that due to the complaints listed in the plaint by the respondent, she **"could no longer bear in patience, while she is very aware that the defendant is no longer interested in her".**

The trial court made a factual finding that was confirmed by the first appellate court that the respondent's claim against the appellant was not controverted after the former failed to tender evidence to the contrary. It follows that the respondent's contention that the appellant had failed to perform his marital duties, deserted the respondent and was a womanizer remained unchallenged. But above all we cannot interfere with them for they are findings of fact.

Although the appellant had prayed in the counter-claim for, among other things the return by the respondent of all his properties in her possession and transfer of a house at Mikindani, Mombasa, and a shamba at Samburu, he did not present evidence in support of those prayers, and as the old adage goes, as a rule of evidence he who asserts must provide proof.

By **section 6** of the Kadhi's Court Act, the law and rules of evidence to be applied in a Kadhi's Court are those applicable under Muslim law:

"Provided that—

(i) all witnesses called shall be heard without discrimination on grounds of religion, sex or otherwise;

(ii) <u>each issue of fact shall be decided upon an assessment of the credibility of all the evidence before the Court</u> and not upon the number of witnesses who have given evidence;

(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".** (Our emphasis)

It is established that where a party fails to call evidence in support of his case, that party's pleadings remain mere unsubstantiated statements of fact, and conversely the evidence adduced by the other side therefore remains uncontroverted. See **<u>Trust Bank Limited V Paramount Universal Bank Limited & 2 others</u>**, Milimani HCCC Civil Suit 1243 of 2001, where the High Court expressed itself as follows:

"It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein, the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged."

See also **<u>Motex Knitwear Limited V. Gopitex Knitwear Mills Limited</u>** Nairobi (Milimani) HCCC No. 548 of 1998.

Quite apart from the fact that there was no proof of any of the facts alleged in the counter-claim, the trial court when dealing with the appellant's notice of preliminary objection dated 2nd February, 2014 found that the issues relating to matrimonial property beyond the jurisdiction of that court. No appeal against that decision has been lodged.

The trial court granted the appellant more than enough opportunity to prove his case but he failed. For example, the record shows the appellant was granted 8 adjournments between 9th September, 2015 and 27th January, 2016. We do not think the Hon. Kadhi could be blamed for finally setting down for delivery the impugned judgment. No rights were violated thereby.

For the foregoing reasons, this appeal lacks merit and accordingly we dismiss it with no orders as to costs.

Dated and delivered at Mombasa this 26th day of September, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

<u>DEPUTY REGISTRAR</u>