IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A.)

CIVIL APPEAL NO. 119 OF 2017

BETWEEN

TSJ.....APPELLANT

AND

SHSR.....RESPONDENT

(Being an appeal from the Ruling and Orders of the High Court of Kenya at Nairobi (Kimaru, J.) dated 5th June 2014 in H.C.Misc.Appl. No. 8 of 2013)

JUDGMENT OF THE COURT

1. The parties to this appeal belong to the Shia Imami Ismailia Muslim faith. They got married on 2nd May 1992 in accordance with the principles of that faith, the Islamic law and rites, and were duly issued with a marriage form certifying the marriage by the H.H. The Aga Khan Shia Imami Ismailia Provincial Council. Prior to the marriage, they had each taken an oath of allegiance affirming that they are true Shia Imami Ismailia's and affirming their "*entire and complete faith, devotion and loyalty in His Highness The Aga Khan*".

The marriage was blessed with two children, ZS, who was born on 26th July 1994, and SM, who was born on 9th April 2003.

2. The marriage was troubled. On 3rd November 2010, the husband (the respondent) applied to the H.H. The Aga Khan Shia Imami Ismailia National Conciliation and Arbitration Board, Nairobi (the Arbitration Board) for prayers that the wife (the appellant) should leave the matrimonial home on grounds of irreconcilable differences. In the alternative, he applied for the dissolution of the marriage.

3. The Arbitration Board is an organ established under the constitution of Shia Imami Muslims by which Shia Imami Ismaili Muslims are ordained by their spiritual leader to be bound and governed. Under Article 13 of that constitution, the Arbitration Board is empowered "*to act as an arbitration and judicial body and accordingly to hear and adjudicate upon.*" "*(ii) domestic and family matters including those relating to matrimony, children of a marriage, matrimonial property, and testate and intestate succession*."

4. After hearing the parties and the children on diverse dates between December 2011 and April 2012, the Arbitration Board published an arbitral award dated 15th September 2012 in which it ordered, amongst other things, that "*the marriage be and is hereby dissolved*"; that the parties shall have joint parental responsibility of the children with actual custody, care and control, being given to the wife, and the husband having access and visitation rights; that the husband would be responsible for school fees, medical insurance cover and medical expenses for the children; that the husband would pay Kshs.50,000.00 in monthly spousal and child maintenance; that the husband would pay to the wife, *mehr* (a mandatory payment in the form of money paid by the groom to the bride at the time of marriage) in the amount of Kshs.300,000.00 within 30 days; that the husband should vacate the matrimonial home within 30 days; and that the matrimonial home should be valued and sold within 12 months and the proceeds, after deduction of costs and taxes, be shared equally between the parties.

5. It would appear that the husband did not comply with the award.

On 18th February 2013, the wife presented an application to the High Court at Nairobi under Section 36 of the Arbitration Act, Rule 4 of the Arbitration Rules, 2007 seeking an order that:

> ***"…this Honourable Court be pleased to forthwith recognize and enforce the arbitral award dated 15 September 2012 and delivered by His Highness Prince Aga Khan Shia Ismailia conciliation and arbitration board for Nairobi (the Board) and to issue a decree forthwith in terms of the findings of the arbitral award."***

6. In the same application, the wife prayed for the release of outstanding monthly spousal and child maintenance due from the husband.

7. In opposition to that application, the husband filed grounds of opposition and a replying affidavit asserting that the Arbitration Board has no powers to dissolve a marriage or to issue orders of maintenance and custody of children and its award cannot therefore be enforced. He deposed that he had in fact petitioned the High Court, in Divorce Cause No. 118 of 2013 seeking dissolution of the marriage. At the same time, he presented an application to the court dated 17th June 2013 under Section 35 of the Arbitration Act, amongst other provisions, seeking an order to set aside the arbitral award.

8. That application was based on the grounds that matters of divorce, division of matrimonial property, and custody and maintenance of children were matters that lay in the exclusive jurisdiction of the courts. It is not clear from the record what became of the husband's application of 17th June 2013. However, the wife's application of 18th February 2013 was heard before ***Kimaru, J.*** who delivered the impugned ruling on 5th June 2014, upholding the husband's contentions and dismissing the wife's application of 18th February 2013.

9. In dismissing that application, the learned Judge held that the Arbitration Board "*can only deal with matters which are not within the exclusive jurisdiction of either the ordinary courts or the Kadhis' courts*"; that although it is not expressly stated in the Arbitration Act, "*disputes envisaged to be resolved by arbitration under the said Act are essentially disputes of a commercial nature and not of a personal nature*"; and that the Arbitration Board "*had no jurisdiction or power to grant an order of divorce purportedly pursuant to an arbitration agreement*".

10. The court further held that the Arbitration Board "*did not have jurisdiction to make orders of custody and maintenance of children*" as that jurisdiction is "*specifically reserved to (sic) the Children's court under Section 73 of the Children Act*". At the same time the court expressed that, "*this does not however preclude a body such as the board from arbitrating over disputes relating to custody and maintenance of the children where both parties submit to the authority of such a body by agreement*." The Judge concluded as follows:

> ***"In the premises therefore, this Court holds that the arbitral award made by the Board on 15th September 2012 is null and void and is not capable of enforcement as it purported to grant an order of divorce which is within the exclusive jurisdiction of either the ordinary courts or the Kadhis' courts. The Board did not have jurisdiction to grant orders relating to custody and maintenance of children. That jurisdiction is within the exclusive jurisdiction of the Children's Court as established under the Children act. The application filed by the applicant dated 18th February 2013 is therefore dismissed with costs to the Respondent. The orders granted by the Board cannot be enforced because the Board exceeded its jurisdiction when awarding the same."***

11. Dissatisfied, the wife lodged this appeal. In her memorandum of appeal, she has faulted that ruling on grounds that the Judge failed to appreciate that the marriage contract between the parties provided for arbitration in the event of any matrimonial dispute; that the award of the Arbitration Board fell within the meaning of an arbitral award under Section 3 of the Arbitration Act and was therefore enforceable; that the Judge erred in holding that the dispute fell within the jurisdiction of the Kadhis Court; that the Judge failed to appreciate that the marriage was terminable in accordance with principles of customary law; failed to appreciate that under Muslim law, marriage creates rights which are "*in personam*" and are *"arbitrable in respect of matters such as monetary awards and grants of divorce";* wrongly divested the Arbitration Board of jurisdiction to deal with matters of personal law affecting members of the Shia Imami Ismaili faith; disregarded binding precedent; contradicted principles under Article 159(2)(c) of the Constitution of Kenya and public policy that encourages the use of mediation and arbitration as dispute resolution mechanisms; erred in failing to find that the award recognized the provisions of the constitution of the Shia Imami Ismaili Muslims, the Arbitration Act, 1995, the Children Act, 2001; and that the award therefore respected all ambits of the law and was valid and enforceable.

12. Urging the appeal before us, ***Mr. Jackson M. Kisinga***, learned counsel for the appellant, submitted that the principal question in this appeal is whether the Arbitration Act, 1995 is applicable in resolution of personal law matters. In that regard, counsel submitted that the Arbitration Act is not limited to commercial matters; that the arbitral award of the Arbitration Board is an award within the Act which is enforceable under Section 36 of the Act and the Judge gave a narrow and erroneous construction to Section 3 of the Act as it does not limit the types of disputes that are arbitrable.

13. It was submitted that the husband voluntarily submitted to the Arbitration Board and the conclusion by the Judge that he withdrew from the process was erroneous. Having voluntarily submitted to the jurisdiction of the Arbitration Board, and having participated in the arbitration process fully, the parties are bound by the outcome, it was submitted. Reference was made to the case of ***Nurani vs. Nurani [1981] KLR87***, (also reported as ***AN vs. MN (2008)1KLR 65)***

14. Counsel cited a decision of the High Court in ***Council of County Governors vs. Attorney General & another [2017] eKLR***, to support the argument that courts must presume that a legislature says in a statute what it means and means in the a statute what it says; that the plain words in Section 3 of the Act referring to *"any arbitration"* must be given their natural and ordinary meaning with the result that any dispute can be referred to arbitration.

15. It was urged that the Judge erred in applying a restrictive interpretation to Article 159 of the Constitution and to Section 3 of the Arbitration Act; that the Act provides that parties may refer *"all or certain disputes"* which may arise without limitation as to the *genre* of disputes and that his decision is antithetical to Article 159 of the Constitution.

16. It was submitted further that the Judge failed to adhere to the principle of *stare decisis* which required him to follow the binding decision of this Court in the case of ***Nurani vs. Nurani*** *(above)* where the Court upheld a High Court decision staying a divorce petition pending the hearing of the matter by the Ismailia Provincial Council which, the Court held, "*has jurisdiction because Ismailis submit to it in respect of their personal law, but Council is always subject to the supervisory jurisdiction of the High Court should it not act according to law*"; that the court therefore erred in concluding that only the High Court and the Children's court can adjudicate on personal law matters raised by the parties.

17. It was urged that the impugned decision has far reaching consequences beyond the parties as it has rendered the Arbitration Board impotent and as a result of the decision, several other cases have been instituted challenging decisions of the Arbitration Board.

18. Counsel concluded by urging that the appellant had complied with all requirements for the enforcement of an award under Section 36 of the Arbitration Act and her application for recognition and enforcement of the arbitration award dated 15th September 2012 should have been allowed.

19. Although the advocates on record for the respondent had been served with notice of hearing, there was no appearance for the respondent at the hearing of the appeal.

20. We have considered the appeal and the submissions. The main issue for determination is whether the ordinary courts or the Kadhi's courts have exclusive jurisdiction to grant divorce and orders relating to maintenance and custody of children. Within that, questions arise as to whether, as the Judge found, the genre of disputes capable of settlement by arbitration under the Arbitration Act are limited to commercial disputes; whether personal law matters are arbitrable; and whether in granting the orders that it did, the Arbitration Board exceeded its jurisdiction. There is also the question whether the Judge was bound by the decision of this Court in the case of ***Nurani vs. Nurani*** *(above)*.

21. We begin with the aspect of the question whether, as the Judge concluded, the genre of disputes capable of settlement by arbitration under the Arbitration Act are limited to commercial disputes and whether disputes of a personal nature are arbitrable. Put differently, are disputes relating to divorce, maintenance and custody *"capable of settlement by arbitration"* under the law of Kenya? Is marriage and divorce a fit subject for decision by arbitration?

22. The position taken by the Judge in that regard is that:

> ***"Although it is not specifically stated in the arbitration Act, this court is of the view that disputes envisaged to be resolved by arbitration under the said act are essentially disputes of a commercial nature and not of a personal nature as is the case in the present application."***

23. As already noted, the appellant has submitted there is nothing in the Arbitration Act limiting the class of disputes that are arbitrable to commercial disputes, and the Judge was therefore wrong in the conclusion that he reached. The respondent on the other hand maintains that the Judge was right.

24. A brief background to the Arbitration Act 1995 is pertinent. That Act came into force on 2nd January 1996. The Bill preceding it provided in the memorandum of objects and reasons that the object of the Bill was to repeal the Arbitration Act, chapter 49 of the Laws of Kenya which had become outdated and out of step with current trends in international commercial arbitration and replace it with a new Arbitration Act providing for both international and domestic arbitrations. It was stated further in that memorandum that the Bill *"adopts substantially the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (UNCITRAL)"*.

25. When moving the Bill for enactment before Parliament, the then Attorney General, Amos Wako, had this to say:

> ***"Since commercial arbitration has now assumed great importance in the area of international commerce and trade, the United Nations itself has been at the centre of drafting what is normally called the modern law on arbitration. A modern law which hopefully will be adopted by those countries which are serious about commercial arbitration, and in particular with regard to international commercial arbitration. Therefore, the Bill that is before you is a Bill which follows very closely the modern law on international commercial arbitration of the United Nations Commission on International Trade Law. It follows that one very closely."*** (Parliamentary Debates Hansard Report, 5th July 1995 at page 1353).

26. And later, in making his pitch for the adoption of the Bill, the Attorney General continued:

> ***"In passing this Bill, I would very much hope that Advocates and people in the private sector who are involved in commercial disputes should try to make full use of the arbitration process in view of the congestion that we have in our courts today."***
>
> (Parliamentary Debates Hansard Report, 5th July 1995 at page 1357).

27. Supporting the Bill in Parliament, the then Assistant Minister in the Office of the President, Mr. Sunkuli stated:

> ***"The second reason why this Arbitration Act is to be amended is that we intend to incorporate international law into the municipal law of Kenya. This Bill has been drafted by the International Commercial Arbitration Commission of the United Nations and International Trade law. We intend to incorporate it into our municipal law so that our courts are able to put into effect arbitration awards touching on the particular commercial enterprises."*** (Parliamentary Debates Hansard page 1358)

And later:

> ***"Would like to introduce into our municipal law more comprehensive law that deals with arbitration. This law will be able to deal with the rise in commercial law of new factors…***

…Mr. Speaker Sir, the question of arbitration has become important because the courts can no longer deal with the amount of civil cases that are referred to them all the time."

28. Given that background, the Judge of the High Court was indeed right that the disputes that were envisaged for resolution under the regime of that Act were disputes of a commercial nature. Indeed, as this Court observed in the case of ***Kenya Oil Company Ltd & another vs. Kenya Pipeline Company Ltd [2014] eKLR***:

"The Arbitration Act, 1995 adopted the Model Law on International Commercial Arbitrations that was adopted in 1985 by the United Nations Commission on International Trade Law (UNCITRAL). In addition to improving, simplifying and harmonizing practices in international commercial arbitration, the Act recognizes the principle of party autonomy and limits the role of the courts in commercial arbitration."

29. Equally, in ***Nyutu Agrovet Limited vs. Airtel Networks Limited [2015] eKLR***, the Court (per, ***W. Karanja, J.A***) referred to arbitration as "*an internationally recognized form of dispute resolution particularly in the area of trade and commerce*".

30. Despite that background and the considerations that informed the enactment of the Arbitration Act 1995, there is nothing in the Act itself that limits the application of arbitration process to commercial disputes. Furthermore, the Constitution of Kenya, 2010 has extended the application of arbitration beyond the traditional (in a western sense) commercial sphere. Beyond the command under Article 159(2) of the Constitution that courts should promote arbitration and other dispute resolution mechanisms when exercising judicial authority, there is for instance recognition, under Article 189 of the Constitution, of arbitration and other alternative dispute resolution mechanisms in settlement of intergovernmental disputes.

31. In the context of matrimonial disputes, Section 72 of the Marriage Act provides, in relevant part, that *"where a Kadhi, sheikh, imam or person authorized by the Registrar grants a decree for the dissolution of a marriage…"*, thereby recognising that the power to dissolve an Islamic Marriage can reside outside of the courts.

32. The matter at hand has precedent. The issue under consideration arose in ***Nurani vs. Nurani*** (above). The facts in that case have striking resemblance to those in the present case. The parties there were husband and wife of the Shia Imami Ismailia Muslim faith who, like here, were married in accordance with their personal law as enunciated in their constitution. The husband presented a petition to the Ismailia Provincial Council, Kisumu, seeking dissolution of the marriage, custody and control of the children. The wife, in her reply, admitted the jurisdiction of the Council and prayed for restitution of conjugal rights, custody of the children and maintenance. She subsequently filed suit in the High Court seeking the same reliefs. The husband applied to have that suit struck out. Satisfied that the Council had jurisdiction, the High Court stayed that suit. In upholding that decision, this Court held that the Council has jurisdiction because Ismailis submit to it in respect of their personal law. In relation to children matters, the Court rejected the argument that the High Court had exclusive jurisdiction under the then Guardianship of Infants Act.

33. That was long before the promulgation of the Constitution of Kenya 2010 which, as already noted, has given arbitration and other alternative dispute resolution mechanisms the pride of place. The visionary ***Madan J.A*** stated in that case:

"I am not aware of any statutory provision which prohibits a set (sect) within the general society from setting up their own tribunal for the settlement of matrimonial or other permitted disputes between its own members; a tribunal thus constituted has a duty to act fairly and justly."

And later in the same case, ***Madan J.A*** went on to say that:

"In an orderly society the High Court gives, as it ought to give, recognition to a tribunal which is set up by the consent of members of the sect to administer their personal law. Such a non-statutory tribunals are useful adjuncts to courts of law which administer justice under their inherent and statutory jurisdictions. They usefully reduce the burden of the courts of law in an ever-increasing complex society."

34. The same holds true today. Moreover, in light of the current constitutional and legislative framework, it cannot be said that the use of arbitration in the sphere of personal law disputes is either against the law or against public policy. The converse is indeed true. We are unable to conclude, as the Judge did, that personal law disputes fall exclusively within the domain of the courts to resolve. To borrow the words of Stewart E. Sterk, Associate Professor of Law, Benjamin N. Cardozo School of Law, in his article published in Cardozo Law Review, Volume 2, page 481 under the title, ***Enforceability of Agreements to Arbitrate: An examination of the public policy defense***, we are in an era where "*arbitration is no longer an unwelcome stepchild in the courts"*. We are in an age where, *"Judicial jealousy and mistrust of the arbitration process have been replaced by an era in which arbitration is embraced as an effective and efficient mechanism for resolving disputes*".

35. It is not apparent why, despite reference having been made by counsel to the decision of the Court in case of ***Nurani vs. Nurani***, the learned Judge gave it a wide berth. In our view, despite the fact that it was decided long before the 2010 Constitution, it represents the state to the law. It is our view therefore, and we hold, that there is nothing in the Arbitration Act that would prevent disputes "*of a personal nature*", as the learned Judge put it, being resolved under the framework of that Act.

36. Did the Arbitration Board exceed its jurisdiction? As already noted, Shia Imami Ismaili Muslims, of which the parties hereto are members, are ordained by their spiritual leader to be bound and governed by their constitution. The Arbitration Board is established under that constitution. As already noted, under Article 13 of that constitution, the Arbitration Board is empowered "*to act as an arbitration and*

judicial body and accordingly to hear and adjudicate upon" "*(ii) domestic and family matters including those relating to matrimony, children of a marriage, matrimonial property, and testate and intestate succession*;" Under its constitutive instrument therefore, it is within the mandate of the Arbitration Board to adjudicate on all aspects of matrimonial disputes.

37. As the Court noted in ***Kenya Oil Company Ltd & another vs. Kenya Pipeline Company Ltd*** (above) arbitration is underpinned by the principle of party autonomy that as long as it does not offend the strictures imposed by law, parties in a relationship have the right to choose their own means of resolving disputes without recourse to the courts. Indeed, the learned Judge of the High Court appears to have been alive to this principle when he expressed, in somewhat contradictory terms to what he concluded, that his decision;

> ***"…does not however preclude a body such as the Board from arbitrating over disputes relating to custody and maintenance of children where both parties submit to the authority of such a body by agreement."***

38. That was precisely the situation here. The learned Judge appears to have overlooked that the parties had indeed submitted to the authority of the Arbitration Board by dint of their religious edict under their constitution. Instructively, it was the husband who had approached the Arbitration Board and commenced the divorce proceedings before it. The same person was to turn around later, perhaps not happy with the arbitral award, to claim want of jurisdiction. The Arbitration Board exercised its powers in accordance with its mandate under its constitutive instrument. The Judge erred in holding that it exceeded its mandate.

39. We have, to a large extent already addressed the question whether the power to grant orders relating to maintenance and custody of children is within the exclusive jurisdiction of the Children court established under the Children's Act. In that regard, the Judge expressed:

> ***"Similarly, the Board did not have jurisdiction to make orders of custody and maintenance of children. That jurisdiction is specifically reserved to the children's court under section 73 of the Children Act."***

40. As already indicated, the Judge followed up that pronouncement with a contradictory, but accurate statement, that nothing precludes a body such as the Arbitration Board from arbitrating over disputes relating to custody and maintenance of children where both parties submit to the authority of such a body by agreement.

41. Section 73 of the Children Act cited by the Judge provides that *"there shall be courts to be known as Children's Courts constituted"* for the purpose, *inter alia*, of conducting civil proceedings on matters set out thereunder; hearing any charge against a child (subject to exceptions); hearing a charge against any person accused of an offence under the Children Act; and exercising any other jurisdiction conferred by that Act or other written law. There is however no stipulation in that provision that such jurisdiction is exclusive. Under part VII of the Children Act, *"a court"* may on application make orders regarding custody, care and control, maintenance of children but again without stipulation that such jurisdiction is exclusive. We reiterate that as the Judge correctly noted there is nothing in the Act that would prevent a body such as the Arbitration Board from arbitrating over disputes relating to such matters where both parties submit to the authority of such a body.

42. On the whole therefore, there is merit in this appeal.

43. The foregoing notwithstanding, there is in our view, an argument for law reform in the area of enforcement of awards of this nature. In ***Nurani vs. Nurani*** (above) ***Madan J.A*** suggested that enforcement of such awards should be through filing of fresh enforcement actions in the High Court. He stated,

> ***"Although there is no provision in the statutory law for the direct enforcement of a maintenance order made by the Council, it would be a simple matter to have it enforced, not directly, but by a fresh suit in the High Court."***

44. Perhaps an amendment to Part VI of the Civil Procedure Act on Special Proceedings or enactment of specific rules to expressly provide for the recognition and enforcement of decisions such as emanate from such bodies as the Arbitration Board, in the same way settlements arising from other alternative dispute resolution mechanisms are recognized, registered and enforced by the court, may provide a more direct process for recognition and enforcement of the same. Meanwhile, we see no reason why such awards cannot be recognized and enforced under the existing procedural machinery under either the Civil Procedure Act and the Rules or under the Arbitration Act. Needless to mention, the role of the court when considering such application is not to merely rubberstamp decisions of such bodies. Such decisions must accord with the law to be recognized and enforced.

45. Consequently, we allow the appeal and set aside the ruling of the High Court given on 5th June 2014. We substitute therefor an order allowing the appellant's application dated 18th February 2013 in terms of prayer 2 thereof that the arbitral award dated 15th September 2012 given by His Highness Prince Agha Khan Shia Ismailia Conciliation and Arbitration Board for Nairobi be forthwith recognized and enforced as an arbitral award.

46. The appellant shall have the costs of the appeal and of the proceedings before the High Court.

Dated and delivered at Nairobi this 8th day of November, 2019.

D. K. MUSINGA

JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

JUDGE OF APPEAL

A.K. MURGOR

JUDGE OF APPEAL

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

DEPUTY REGISTRAR