



REPUBLIC OF KENYA
IN THE KADHI'S COURT AT ISIOLO
DIVORCE CASE NO 52 OF 2018

DBD PLAINTIFF

VERSUS

HDW..... DEFENDANT

JUDGMENT

This is a child maintenance matter. The plaintiff prays for orders that the defendant be compelled to pay children and past maintenance and for the plot in Merti town to be registered in their eldest son's name. She claimed that the defendant divorced her in 2009 and they are blessed with three children from their legal wedlock but does not provide children maintenance although he is Primary school [particulars withheld] teacher in [particulars withheld] county. She further stated that their second born - a girl FHD, has been ill for more than one year but he does not cater for her medication. She further claimed she contributed in the development of the matrimonial plot in Merti.

The defendant denies the claims of lack of children maintenance and payment of school fees. He stated the he pays school fees of the first and last born and the second born has a full scholarship at [particulars withheld] secondary school. On the plot at Merti he stated that it was a family plot and it is his sole responsibility.

Background

The parties were married under Islamic law in April 1996 were blessed with three children and divorced on 22nd December 2008, first revocable divorce. Both parties are Primary school teachers, the defendant a [particulars withheld] teacher at [particulars withheld] Primary school, within Isiolo County. The defendant remarried to another wife and has five other children. The parties had married when the defendant was a university student. He became ill and dropped out of university. They used to live in Merti within Isiolo county.

Issues

The issues for determination in this matter are children maintenance and matrimonial property

Children Maintenance

The plaintiff reiterated under oath in her that through elders intervention, after their divorce, the defendant agreed to pay KES 6,000.00 per month as children maintenance, that he continued to pay

albeit irregularly but since 2014 he completely stopped paying the children maintenance. The plaintiff called two witnesses. Muktar Idi Abudo's [PW1] and ABD's [PW2], evidence is that the plaintiff had problems getting adequate maintenance and school fees of the children from the defendant, her husband. PW1 testified that he was a living with the parties at Merti as a student. PW2, a sister of the plaintiff testified that she was the one supporting the plaintiff and her children from her funds in food, education as well as medication of their ailing daughter FHD. The defendant called one witness Habiba Duba Wanga [DW1]. Her evidence is that the defendant was mentally unwell for some time and even dropped from university as a result of his sickness, that he used to support his children with KES 5,000.00 p.m. regularly from the time he got employed but that he was suspended from work and could not provide maintenance for his children but resumed provision after the suspension was lifted. She testified that the defendant provided school fees for their first born son to join secondary school. It is her evidence that the defendant suspended providing the KES 5,000.00 p.m. since he started educating the son and that she heard dispute on this issues between the parties. She further stated the defendant has five other children from another marriage and also has a farm in Gambela. The defendant stated under oath that he earns KES 40,000.00 p.m.

It is clear from the evidence that the defendant had been providing up to when the eldest son joined Form one in 2015, when the defendant only pays school fees for the son but no maintenance of the children. He argued that that was his ability based on his income. It is evident also that the plaintiff and her family also assist in sustenance and education of the children.

Unlike statutory law, Islamic law provides that the responsibility of providing of children belongs entirely to their father, in this case the defendant. Section 90 of the children's Act, Cap 141 Laws of Kenya provide

"Unless the court otherwise directs and subject to any financial contribution ordered to be made by any other person, the following presumptions shall apply to the maintenance of a child:

(a) where the parents of a child were married to each other at the time of birth of the child and both are living, the duty to maintain a child shall be their joint responsibility".

A child, under Islamic law, is entitled to supported to have a reasonable standard of living. Article 107 (1) provide:

The child shall have the right to a standard of living that befits his physical, mental, religious and social growth.

The Qur'an places the responsibility of children maintenance on the child's father. The Qur'an:2:233 provide:

' their mothers shall give suck to their children for two whole years (that is) for those (parents) who desire to complete the term of suckling, but the father of the child shall bear the cost of the mother's food and clothing on a reasonable basis. No person shall have a burden laid on him greater than he can bear. No mother shall be treated unfairly on account of her child; nor father on account of his child. And on the (father's) heir is incumbent the like of that (which was incumbent on the father). If they both decide on weaning the baby by mutual consent and after due consultation, there is no sin on them. And if you decide on a foster suckling mother for your children, there is no sin on you, provided you pay (the mother) what you agreed (to give her) on reasonable basis. And fear Allah and know that Allah is All Sear of what you do'

Article 106 (6) of the Islamic Charter on Family [ICF] provide both parents are responsible of physical care of the child.

"Through mutual consultation, both parents are responsible for caring for the child, his interests and living conditions".

Article 107 (2) places the financial responsibility of care of the child on his father. It provides:

In the case the child possesses no property or finances, the obligation to provide financial support shall be borne by his father, unless he is unable, in which case it shall be borne by other relatives who are financially capable, in accordance with the provisions of Islamic Shariah.

The law is however silent on the quantum of children maintenance. It is left to *Urf* custom, needs of the child and financial ability of the father. Islamic law does not oblige a person to do any act or pay more than his ability. Qur'an :65:6 -7 provide:

'Lodge them (the divorced women) where you dwell, according to your means, and do not harm them so as to straiten them (that they be obliged to leave you house). And if they are pregnant then spend on them till they lay down their burden. Then if they give suck to your children for you, give them their due payment, and let each of you accept the advice of the other in a just way. But if you make difficulties for one another, some other woman may give suck for him (the father of the child). Q:65: 6

"Let him who hath abundance spend of his abundance and he whose provision is measured let him spend of what Allah gave him, Allah asketh naught of any soul save that which He hath given it, Allah will vouchsafe after hardship ease". Q:65:7

The defendant as the father has practical challenges to meet his financial obligations towards the children both of his ex and current wife. In considering issues relating to children I am guided by the mandatory constitutional and Qur'anic guidelines to protect the best interests of the child. Article 53 (2) of the Constitution of Kenya (2010) provide:

"A child's best interests are of paramount importance in every matter concerning the child".

Abdallah Ibn Amr Al Aas narrated that the Prophet [PBUH] said, **'It is a serious sin for one to abandon [not maintain] his dependants'** Abu Daud [3/118]. It is authenticated by Al Albany in Al - Mishkaat [3/340]

considering the needs of the eight children, their best interest and financial ability of the defendant, I find the defendant's lack of provision of maintenance in order to focus of payment of school fees of the children unjustified and unwarranted. He owns a farm and is [particulars withheld] teacher of a primary school, a permanent and pensionable job. The six thousand the elders had directed was reasonable. If KES 30,000.00 [leaving KES 10,000.00 for his personal requirement] was to be equally distributed to each of the eight children, the plaintiff's three children with the defendant would be entitled to 11,250.00 per month. However this will not leave the defendant with any savings to cater for the children's education. In the circumstances, I hereby order that the defendant do pay the plaintiff KES 6,000.00 per month as children maintenance and continue paying school fees for all his children as necessary.

Matrimonial property

On this issue, the plaintiff stated under oath that she contributed in the development of the matrimonial house at Merti by fetching water, putting the fence, toilet and supervision of the project while the defendant was a student at university. The defendant admitted that the plaintiff did the floor and repaired the fence. He denies she made any other contribution to the development of the Merti house. None of the plaintiff's two witnesses gave any evidence on the plaintiff's contribution to the house in Merti. She produced no documents to support her claim. On the other hand, DW1, the defendant mother's evidence is that the plot belonged to her and she gave it to her son who built the house standing on it. Under cross examination, admitting she did not know how the construction was financed, she stated *"I don't know how the house was financed. You were husband and wife"*.

Under Islamic law of evidence it is the obligation of the claimant to prove his or her claim.

" ...say produce your proof if you should be truthful". Qur'an [Al Naml]:27:64 Ibn Abbas [R.A.] narrated that the prophet PBUH] said: 'The onus of proof lies on the plaintiff and the oath is to be taken by the defendant. Reported by Bukhari [4552], Muslim [1/1711], Al Baihaki [10/252]

On this issue, the plaintiff is the claimant. She failed to demonstrate any substantial contribution to the construction of the house. It is however factually correct and I do hereby find, that the house was constructed during their legal matrimony and she made minor contribution in terms of improving the house by making the floor and repairing the fence.

Both Statute and Several decisions of Superior Courts indicate, the Kadhi's court may hear and determine disputes on matrimonial property matters between parties who profess the Muslim faith. Section 3 of the Matrimonial Property Act, 2013 provide:

A person who professes the Islamic faith may be governed by Islamic law in all matters relating to matrimonial property.

In **R.M.M v B.A.M [2015] eKLR, CIVIL APPEAL NO. 267 OF 2011, WAKI, G.B.M. KARIUKI, MWILU, M'INOTI & MURGOR, JJ.A;** the Court of Appeal held:

'At the root of the issue is whether it was the High Court or the Kadhi's Court which has jurisdiction to determine the matter of distribution of the matrimonial property...."..If their marriage was purely Muslim, and the property in issue was acquired during the currency of that marriage, the Kadhi's Court would be the most efficacious in handling and determining the dispute.

In **Salim Ali Amran v Officer Commanding Police Division Kisauni & 4 others [2015] eKLR, Emukule J, held:**

'I also direct that the motor vehicle (which was detained pending the determination of the Petition herein) be released forthwith to the Fifth Respondent, pending any further orders from the Kadhi's Court, in Kadhi's Court Civil Case No. 198 of 2014, on the determination of the division of matrimonial property under Islamic law, between the Petitioner and the Fifth Respondent.

Statutory and case law therefore envisage that disputes of division of matrimonial property of Muslim spouses shall be governed according to Islamic law by the Kadhi's court.

In common law, matrimonial property refers to the property acquired during the marriage either by joint effort or sole effort of the parties.

Lord Denning in the case of *Wachtel v. Wachtel* [Fam. 72 at p. 90, 1973] stated '**matrimonial property refers to the things which are acquired by one or the other or both parties**'.

Lord Diplock in *Pettit v. Pettit* [AC 777, 1970] agrees with him and adds '**.. [the property] was intended for the common use and enjoyment of both spouses or their children**'.

Muslim scholars have conflicting opinions on the issue of matrimonial property. However the maxim of Islamic jurisprudence "**In contracts effect is given to intention and meaning and not to words and phrases**" [section 3 of the Ottoman courts manual (Hanafi)] gives prominence generally in Islamic law not to titles and terms but to the meaning and actual practice of an issue. It is therefore important to have the right perspective of such contemporary and emerging issues and give effect to the spirit of Islamic law and not dwell too much on text which might not explicitly exist.

The proponents against matrimonial property argue there is no legal authority providing for matrimonial property in Islamic, that there already exist remedies in Islamic law to compensate a divorced women specifically *mata'a* [conciliatory gift] and that it is a new transaction and concept of non Muslims based on their faiths and cannot be Islamised. The Al Qbas magazine reported the Department of Fatwa and edicts, Egypt to have stated:

'Matrimonial property is a new transaction that has started to enter Muslim society. It is a transaction of non Muslims based on their faith which preclude the principle that marriage is for eternity - till death do us part - and impossibility of divorce. Divorce, among these societies is only possible under civil legislation where the properties. It is also based on the general principle that a large portion of husband's wealth goes to his widow and vice versa. Muslims have been affected by this concept through globalization, communication and interaction with other societies. We are unable, though Islamic jurisprudence principles to Islamize this concept or refer it to any of the Islamic transactions. It does not resemble partnerships, gifts, or delegation [power of attorney] or any other transaction under Islamic law.'

The proponents for divorced wives to have a share in matrimonial property rely on general provisions recognizing women's right to ownership, protection of individual wealth and prohibition to unlawfully eat other's wealth. They contend that the wife has an independent financial status and capacity just as the man^[1] and that the capacity is not extinguished by marriage. The wealth and properties of a wife are illegal to be used by her husband without her express consent. The Qur'an asserts that men have a share of their earnings and women have a share of their earnings . Thus' the Qur'an treats a wife equally with man on financial capacity.

"And wish not for the things in which Allah has made some of you to excel others. For men there is reward for what they have earned, [and likewise] for women there is a reward for what they have earned, and ask Allah of his Bounty. Surely Allah is All Knower of everything^[2]."

The Qur'an and Sunnah prohibit unlawful use of another's wealth without his or her consent.

'O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent. And do not kill yourselves [or one another]. Indeed, Allah is to you ever Merciful'. Q:4:29

Narrated Ibn Abbas [R.A] the prophet [PBUH] gave a sermon on *yaum al nahr* [Eidul Adh'ha] saying: **'O people, what is day is today", they said it is a sacred day, he asked what town is this", they replied, it is a sacred city [Maka], he asked them, what month is this", they replied, it is a holy**

month [Dhul Hajj], he then said: 'surely, your life [blood], your wealth, your dignity is sacred, like the sanctity of this day, in this city, in this month. He repeated it several times then raised his head and said, 'O Allah Have I delivered the message''. [Bukhari 1652]

Islamic law recognizes that where properties of two persons are merged, each is entitled to his or her share. In ' **Bughyatul Mustarshidin at p. 159**, Sheikh Abdulrahman Muhammad al Ba'lawy states:

When the property of a husband and wife has merged and it is not known whose property is more, there are no signs to differentiate the property from one to the other, and then divorce or death occurs between the two, it is therefore unlawful for one or both (spouses or heir) to rule over (utilise) part of the property before it can be differentiated or before conciliation (al-sulh)

Ibn Al Qayyim, in Al-Turuq al-Hukmiyyah Fi al-Siasah-al-Syar'iyah, p. 24[3], alludes to the right of a wife to a share in matrimonial property acquired during marriage based on her contribution even if title is in the name of the husband.

"It cannot be assumed based purely on what is held in hand or having authority over a name by having the name on a land title and the likes becoming the rights of only a single person if the property is acquired during the duration of the marriage, in fact its existence is of no consequence. In relation to this, an allusion can be made to the appliances in the house and other properties for example a house, a piece of land and the likes that are acquired during the time when both are still husband and wife unless there is proof to show that the properties were divided or the rights of each one separately".

The concept of matrimonial property is complete separation of the wealth of the husband and wife and independent financial identities of the husband and wife[4]. The Moroccan Code of Family Rules provide recognition and consideration of contribution of each spouse during distribution of properties acquired and developed during their marriage. Section 49 of the Moroccan Code of Family Rules provide:

'Each spouse has independent financial status save that they are allowed , during the marriage to contribute and invest and eventually distribute properties and investments'.

The concept of matrimonial property as understood in common law has no legal foundation in Islamic law. However Islamic law prohibits consumption of each other's wealth unjustly. It is factual that during the period of marriage, spouses either directly or indirectly contribute to the acquisition of property. Such contribution of each spouse, whatever name given to it, must, of necessity and justice, in the event of divorce, be returned to him or her. To say otherwise is to unjustly consume effort and wealth of others which is prohibited in Islam in the strongest terms possible. Accordingly, a divorced wife, in my opinion, is entitled to a fair compensation of the matrimonial property based only on her proven contribution, directly or otherwise, to its development during the marriage.

The basis of division of the matrimonial property in common law, is the recognition of the division of labour between husband and wife, without which the accumulation of the wealth is not possible. Burge, in Colonial & Foreign laws, London 1838, as quoted by J Gray in Reallocation of property on divorce, p. 34. stated:

'Men can only earn their income and accumulate capital by virtue of the division of labour between themselves and their wives. The wife spends her youth and early middle age in bearing and rearing children and in tending the home. The husband is thus freed for his economic activities. unless the wife plays her part, the husband cannot play his. The cock bird can feather his nest precisely because he is

not required to spend most of his time sitting on it'.

In Islamic law, division of matrimonial property is based on direct or indirect, determinable individual contribution of each spouse. In Malaysia as practiced in Syariah Courts based on the concept of *harta sepencarian*, a Malay customary law, in division of matrimonial property, due consideration is given to the extent of contribution of each spouse. The Islamic Family Law [Federal Territories] Act, 1984 [IFLA] provide:

76(1) The court shall have power, when granting a decree of divorce or judicial division to order the division between the parties of any asset acquired by them during the marriage by their joint efforts or the sale of any such assets and division between the parties in any proceeds of sale.

(2) In exercising the power provided by subsection (1) of this section, the Court

have regard to:

(a) The extent of the contributions made by each party in terms of money,

property or work towards the assets; ...

(4) and subject to those considerations the court may divide the assets or proceeds of sale in such proportions as the court think reasonable but in any case the party whose effort the assets were acquired shall receive greater proportion.

In the instant case therefore the plaintiff having made minimal contribution in construction of the matrimonial property in Merti, is entitled to equally a minimal, fair and just compensation commensurate with her contribution. I direct and hereby order that she be paid KES 60,000.00 as her share of contribution thereof.

This being a family matter, I make no orders as to costs.

Orders accordingly.

Dated, signed and delivered in open court in ISIOLO on 12th February 2019.

HON. ABDULHALIM H ATHMAN

PRINCIPAL KADHI

ISIOLO LAW COURTS

In the presence of

Mr. Denge Boru court assistant

Plaintiff

Defendant

[1] Assembly of Islamic Jurisprudence, Organisation of Islamic co-operation.

[2] Qur'an:4:32

[3] Matba'ah Al-Madani, Egypt,1961

[4] Abdulatif Hamza, Mufti with the Department of Fatwa, Egypt states on the issue, [www.islamic-council.com



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