



**REPUBLIC OF KENYA**

**IN THE KADHI'S COURT AT ISIOLO**

**MATRIMONIAL CASE NO 12 OF 2019**

**AMK .....PETITIONER /APPLICANT**

**VERSUS**

**JKK.....RESPONDENT**

**RULING**

1. In her Notice Motion application under certificate of urgency dated 27<sup>th</sup> May, 2021 the applicant seeks orders for dissolution of marriage, visitation rights of the minors.

2. The respondent filed a replying affidavit dated 14<sup>th</sup> June, 2021 in opposition to the application. He also filed a preliminary application also dated 14<sup>th</sup> June, 2021 on the grounds that the application is fatally defective and res judicata. This is a ruling on the preliminary objection.

3. Mr. Ashaba for the respondent submitted that the matter of the divorce was well determined by this court, which judgment has not been appealed against or challenged. He further submitted that the supporting affidavit on which the application relies, is undated, is not commissioned and does not show where it was drawn contrary to the provisions of the Oaths and statutory declarations Act, Cap 15 Laws of Kenya. He submitted that the defect is incurable and therefore the application ought to be dismissed with costs.

4. The petitioner / applicant did not reply on the questions of law raised by counsel. It is understandable being a lay person. She opposed the preliminary objection stating that the respondent has abandoned her, threatens her life and denies her access to the children.

5. A preliminary objection is raised on pure points of law. It cannot be raised if the issues relate to facts that have ascertained. This matter is settled in the celebrated case of *Mukisa Biscuits Vs West End Distributors Limited (1969 EALR)* where the court held:

*“raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”*

6. On the issue of the supporting affidavit, it is commissioned but not dated. It is also true it does not indicate where it was drawn. To this end it is defective. Is the defect incurable" I do not agree with counsel. The stamp of commissioner indicates his address and town. The place where it was drawn could be easily surmised. So too could be the date from the receiving stamp of the registry. Further the Article 159 (2) (d) of the Constitution of Kenya (2010) demands that justice be administered without undue regard to technicalities. In my view this is such a technicality that can be easily cured by ascertaining the date and place the affidavit was drawn. Further the rules of practice and procedure under section 8 of the Kadhi's Act, Cap 11 Laws of Kenya were gazette on 6<sup>th</sup> November, 2020 vide Kenya gazette supplement No. 193 and legal Notice No. 203 of 2020. Thus, applicable rules of procedure in the Kadhi's Court are the Kadhis' Court (procedure & practice) Rules, 2020 (KCR\_2020). Section 142 (2) of the rules provide:

**‘Notwithstanding sub rule (1), the court may, in its discretion, accept an affidavit notwithstanding any non-compliance in the form thereof.’**

7. The second issue of law is whether or not the issue in the application is *res judicata*. This is a matrimonial cause matter. The prayers in the main petition were for order for custody and maintenance of children on grounds that the respondent does not observe the tenets of Islamic faith including praying and fasting. The court observed the issue of divorce had not been specifically pleaded but only came out from the parties during the proceedings. Nevertheless, it considered the issue and declined to grant divorce.

8. One of the overriding objectives of the Kadhi’s Court (procedure & practice) rules, 2020 rule 4 (2)(d) is **‘Injury is removed.’** Both spouses have equal right under Islamic law to annul the marriage mutually through *talaq*, *Khul’u* or stipulation or through *faskh* (for the wife) in a court of law.

9. Divorce issue may be reviewed if the objectives of marriage are not attainable in a marriage or where there is eminent danger to the dignity and spiritual, physical and psychological wellbeing of the spouses. This would, in my view, qualify as ‘sufficient reason’ contemplated in rule 79 (1) (d) of the rules for reconsideration of the judgment or ruling of the court. This is more so section as the Kadhi’s court is the most competent court to determine issues of annulment of a marriage celebrated under Islamic law under part VII of the Marriage Act, No 4 of 2014 and section 71 of the Act thereof.

10. That said, however, the issue of divorce was not a specifically pleaded issue in this matter. This denies the respondent his constitutional right to fair trial protected under articles 25 (c) and 50 of the Constitution of Kenya (2010). It ought to be filed in a divorce matter.

11. The upshot is that the application is dismissed, not for want of form of the affidavit or it being *res judicata*, but because it is fundamentally in the wrong cause and had not been specifically pleaded in the main cause.

12. The applicant is at liberty to file a proper divorce cause.

No order as to costs.

Orders accordingly,

Dated, signed and delivered at ISIOLO on 7<sup>th</sup> July, 2021

**HON. ABDULHALIM H. ATHMAN**

**SENIOR PRINCIPAL KADHI**

In the presence of

Plaintiff

Mr. Ashaba for the defendant



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy](#) | [Disclaimer](#)