THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

FAMILY DIVISION

DIVORCE CAUSE NO. 39 OF 2011

SUMAYA NABAWANUKA :: PETITIONER

VERSUS

MED MAKUMBI :: RESPONDENT

BEFORE HON. JUSTICE B. KAINAMURA

RULING

The Petitioner filed this Petition on 2nd December 2011 seeking for:

a) A decree nisi dissolving the marriage between the Petitioner and the Respondent.
b) Custody of the child
c) Maintenance of the child
d) Alimony
e) Share of the Matrimonial property
f) Costs
g) Any further order as Court deems it.

On 16th January 2012, the Respondent filed his reply refuting the allegations in the Petition and by way of a preliminary objection applying that the Petition be dismissed because it is *re-judicata* since the matter before Court had been finally

determined by the Sharia Court of the Muslim Supreme Council in Divorce Cause No. SC/MDO 65/10/2011.

At the commencement of the hearing, indeed Counsel for the Respondent-John Mike Musisi raised a preliminary objection to the effect that the matter before Court is *res-judicata.* In his submission he relied on Section 7 of the Civil Procedure Act Cap 71 which is to the effect that a matter is *res-judicata* if the issue before Court is directly and substantially the same as an issue between the same parties which has already been determined by a Court with competent jurisdiction to try the suit. Mr. Musisi went on to urge that a Sharia Court is a court of competent jurisdiction as provided for Under Article 129 (1) (d) of the Constitution 1995. He further contended that the Sharia Court of the Muslim Supreme Council is such Court that is envisaged under the Marriage and Divorce of Mohammedans Act Cap 252 Law of Uganda.

Mr. Musisi further urged that the Petition was incompetent in as far as it sought reliefs under the Divorce Act Cap 249 even though the marriage between the parties was celebrated under Mohammedan law. He relied on Section 18 of the Marriage and Divorce of Mohammedan Act Cap 252 which specifically excludes the application of the Divorce Act in granting reliefs under that Act where the marriage between the parties has been declared valid under the Marriage and Divorce of Mohammedans Act.

In her reply, Ms Harriet Nabankema Learned Counsel for the Petitioner refuted the assertion that the Sharia Court of the Muslim Supreme Council is a Court of competent jurisdiction as envisaged under Article 129 (1) (d) of the Constitution. She urged that Parliament has not yet operationalised Art. 129 (1) (d) of the Constitution which requires Parliament to establish Qadhi’s courts and that if there are such Courts in operation they are operating outside the dictates of

Art.129 and are consequently incompetent. Counsel further urged that in absence of a forum for dissolving Mohammedan Marriages, recourse should be by invoking the provisions of Section 8 of CPA which gives Court inherent powers to give remedies to all aggrieved parties before it.

On the question of whether the suit is barred by *res-judicata,* Counsel urged that the Petition before Court has not been adjudicated upon by a Court of competent jurisdiction since the Sharia Court of the Muslim Supreme Council has no jurisdiction to act as such. As to whether the Petition is incompetent as it seeks relief under the Divorce Act, Ms. Nabankema urged that in as much as the marriage between the parties was celebrated under Mohammedan Law, the Marriage and Divorce of Mohammedan Act gives the High Court power to dissolve such marriages. She referred Court to Section 18 of the Act which read together with Sections 14 and 33 of the Judicature Act would have the effect of giving the High Court powers to grant the reliefs sought. She called upon Court to dismiss the PO.

The law relating to *res-judicata* is well settled and I won't delve into it here. What is pertinent for Court to determine in whether the Sharia Court of the Muslim Supreme Council is a Court of judicature as contemplated Under Article 129 of the Constitution. The relevant sub-article of Art 129 provides:-

> ***d) Such subordinate Courts as Parliament may by law establish including Qadh's Courts for marriage, divorce, inheritance of property and guardianship as may be prescribed by Parliament.***

Ms. Nabankema urged that Parliament has not yet operationalised the provisions of Art 129 (1) (d) of the Constitution and as such the Sharia Courts now operating are operating outside the law. On his part Mr. Musisi urged that the

Sharia Courts do exist and are indeed envisaged under the Marriage and Divorce of Mohammedans Act.

Whereas indeed it's true that Qadhis Courts envisaged under Art 129 (1) (d) of the Constitution have not yet been established, I do not agree with Ms. Nebankemas view that the Sharia Courts currently operating are operating outside the law. My position is premised on the import of Article 274 of the Constitution which provides:-

274 Existing law

(i) "Subject to the provisions of this article, the operation of the existing law after the coming into force of this Constitution shall not be affected by the coming into force of the Constitution but the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this constitution".

It is not in dispute that the Marriage and Divorce of Mohammedans Act Cap 252 is on our statute book. Section 2 thereof provides:

> ***"All Marriages between persons professing the Mohammedan religion and all divorces from such marriages celebrated or given according to the rites and observances of the Mohammedan religion customary and usual among the tribe and sect in which the marriage or divorce takes place shall be valid and registered as provided under the Act.***

Consequently my view is that the Sharia Courts of the Muslim Supreme Council are operating within the law and are competent courts to handle divorce cases and grant relief.

From the pleadings, it's on record that the Sharia Court of the Muslim Supreme Council considered Divorce Case No. SC/MDO65/10/11 and made its findings. Divorce Certificate No.165/2011 was subsequently issued on 9th December 2011 notwithstanding the fact that the Petitioner in this cases, Ms. Nabawanuka- had through the Fida Uganda Legal Clinic attempted on 29th November 2011 to halt the proceedings.

My view is that the matter was heard and determined by a competent Court and an attempt to resurrect the matter in his Court would surely run foul of Section 7 of CPA. Accordingly this matter is *res-judicata* and I so hold.

Although the holding above effectively disposes of the PO, I believe it's pertinent to touch on the issue of the competence of this Divorce Cause as filed. At the beginning of this ruling I set out in detail the orders sought by the Petitioner from this Court.

In his submissions Mr. Musisi urged that reliefs sought by the Petitioner are those under the Divorce Act. On her part Ms. Nabawanuka urged that Cap 252 has not barred the High Court from determining this case which under Sections 14 and 33 of the Judicature Act Cap 13 is given unlimited original jurisdiction in all matters. Whereas I agree with her that the High Court has un limited Jurisdiction, what Counsel does not address is which law empowers the High Court to apply the provisions of the Divorce Act to Mohammedan Divorces. I know of none.

My reading of Section 18 of the Marriage and Divorce of Mohammedans Act is that whereas it empowers the Court to handle divorce matters under the Act, the law applicable in such cases must be Mohammedans law. Accordingly since the orders sought for from this Court by the Petitioner from this Court are not in sync

with Section 18, I agree with Learned Counsel for the Respondent that the Petition in Divorce Cause No. 39 of 2011 is incompetent.

In the result the preliminary objection succeeds and the Petition is dismissed with costs to the Respondent.

B. Kainaumra
Judge
13.02.2013