IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Law & Potter JJA)

CIVIL APPEAL NO. 52 OF 1981

BETWEEN

N.....APPELLANT

AND

N.....RESPONDENT

JUDGMENT

Madan JA The appellant (wife) and the respondent (husband) are husband and wife of the Shia Imami Ismaili Muslim faith. They were married in 1972 in accordance with their personal law as enunciated in the Holy Constitution ordained by their spiritual Leader His Highness The Aga Khan (hereafter referred to as the constitution).

After their marriage the parties lived at Eldoret with the husband's family. There are two children of the marriage, a daughter Farah born on January 25, 1973 and a son Faisal born on June 24, 1974.

On September 2, 1980, the husband presented a petition, as he was entitled to do under the Constitution, to HH The Aga Khan Shia Imami Ismailia Provincial Council, Kisumu (hereafter referred to as the Council), paragraph 5 of which reads as follows:

"5. The parties withdrew from cohabitation in November, 1979 and the said marriage has irretrievably broken down. Your applicant therefore prays that the marriage be dissolved under Art 284, Holy constitution, and the custody care and control of the children be awarded to the Applicant and Mohr be reduced to nil"

The expression "Mohr" in this context means the sum of money or other property which the wife is entitled to receive on dissolution of marriage.

The wife put in a Reply and Cross-Prayer from which the following relevant excerpts are summarised:

"1. The wife admits the jurisdiction of this Council to hear the Petition

2. The wife denies the averments contained in paragraph number 5 of the Petition. The wife was tricked by the Applicant (husband) into leaving the matrimonial home and was deprived of the care, control and

custody of the children of her marriage in the following circumstances (particulars followed).

3. The husband has notified the wife not to attempt to return to the matrimonial home.

4. The husband has in the premises deserted the wife and has failed to provide for her maintenance, and the wife prays that the husband's petition be dismissed. Cross-Prayer for Restitution of Conjugal Rights under Article 301 of the Constitution

5. The wife repeats the foregoing and states that the husband withdrew from cohabitation with her at the end of September, 1979, and has refused, and still refuses, to render her conjugal rights (of which she is desirous, and which she herself is willing to render to the husband).

6. The wife claims legal custody of her said children and maintenance for herself and the children pending restitution."

The wife's prayers were that the council order (a) the husband to recall and render her conjugal rights (b) that she shall have custody of the children with maintenance provided for them and herself, pending restitution, (c) any other or further relief, and

"(d) As regards prayer number (b), the Respondent (wife) states that she is about to commence court proceedings against the applicant (husband) for legal custody of her said children and for her and their maintenance, and the respondent prays that in the event of the court granting her such custody and maintenance this Council will note that the same instead of making a separate and independent order in that behalf."

The wife filed a plaint dated October 21, 1980, in the High Court in which she repeated what she had said in her reply and crossprayer to the Council, and prayed for judgment for (a) custody of the children (b) maintenance, (c) costs and (d) any further or other relief. This plaint was said to be instituted under the provisions of the Mohammedan Marriage and Divorce Registration Act (Cap 155) and the Mohammedan Marriage, Divorce and Succession Act (Cap 156).

The husband entered an appearance under protest accompanied by an application which was heard by Cotran J, for the wife's plaint to be struck off as being incompetent, misconceived and/or an abuse of the process of the court; in the alternative for the proceedings to be stayed until the final disposal of the Divorce Petition and Cross-Prayer pending between the parties before the Council.

Cotran J in his ruling recounted the arguments addressed to him on behalf of both the husband and the wife. On behalf of the husband, that the constitution is the personal law of the parties which contains detailed rules in regard to reconciliation, nullity, maintenance and guardianship, and it provides rules of procedure for the hearing and determination of petitions; that while the High Court has jurisdiction to hear and determine all matters arising out of Mohammedan marriages, it should not do so where a litigant has submitted to the jurisdiction of the Council, as the wife did in this case, and proceedings are pending before the Council. A litigant must opt to go to the Council or the High Court but not have "two bites of the cherry."

On behalf of the wife, it was submitted that she was not having "two bites of the cherry." It was made clear to the Council that so far as maintenance and custody of the children were concerned the wife was going to the High Court and she did not want separate orders from the Council regarding these two matters. She was, however, content to let the Council deal with the question of divorce sought by the husband and the question of conjugal rights sought by her. An order from the council, so far as concerns

maintenance, was not as effective as a judicial order from the High Court since it could not be enforced or executed in the same way. As regards custody the council could not apply the guardianship of Infants Act, ie the general law of the land. Generally, a litigant before the council is at a further disadvantage since

(i) he cannot have counsel of his choice, but only an Ismail advocate and

(ii) the Tribunal has no power to compel the attendance of a non Ismaili witness.

So far as maintenance and custody of children is concerned the wife would thus be at a disadvantage before the Council; since the High Court has jurisdiction over these matters, there was nothing to prevent her from bringing her suit.

Their marriage being in a shambles the cherry is not sweet either for the husband or the wife to bite it.

The learned judge said that a litigant having submitted to the jurisdiction of the Council (as the wife undoubtedly had in this case), the proceedings were before a Tribunal with concurrent jurisdiction; that under Article 311 of the constitution the council was bound to decide the question of custody of children "in accordance with the law relating to guardianship of infants for the time being in force", ie in the case of Kenya, the Guardianship of Infants Act. As regards maintenance a wife may at any time apply for it under Article 305 to 308 of the constitution which makes provision for Disciplinary Action to be taken against a recalcitrant husband who fails to comply with any order made by the Council; that 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.

The learned judge also considered that it would be undesirable to allow the suit to continue in the High Court then because Article 288 of the constitution provided for the appointment of conciliators to settle matrimonial differences between parties; that conciliators had in fact been appointed in this case but they had reported yet. If the attempts at reconciliation proved successful or if not successful, and the Council refused to grant a divorce and acceded to the wife's cross-prayer for restitution of conjugal rights, in either situation the questions which formed the subject matter of the plaint, ie maintenance and custody of children, would become academic. The learned judge refused the first but granted the second order sought by the husband. He refused to strike out the plaint but stayed the suit until the Council decided the principal question before it, ie whether to grant a divorce or restore conjugal rights.

The wife has appealed. Her memorandum of appeal argues that the learned judge erred in concluding that (1) the proceedings for custody and maintenance before the council were of concurrent jurisdiction vis-a-vis the proceedings before the High court because (a) the exclusive jurisdiction of the High Court under the Guardianship of Infants Act cannot be impugned or curtailed by any law of the parties (b) the High Court cannot divest itself of jurisdiction relating to custody and maintenance of children on account of proceedings before a tribunal not recognized by the statute law of the land (c) the appellant had expressly reserved and exercised her unfettered right to come to the High court for issues relating to custody and maintenance of the infant children of the marriage (2) that disciplinary action powers of the Council are not synonymous with or equivalent to the powers of the High Court to execute its orders, nor would another suit be sufficient to enable a party to execute orders of the Council because (i) the council cannot effectively deal with issues as regards injunctions against taking infants out of the jurisdiction of the High court (ii) the Council cannot effectively order the arrest of a party (iii) generally Court orders are far more effective than any morally binding orders (3) the learned judge failed to appreciate that the fundamental right of a party of being represented by a counsel of her own choice is denied in the Council in that can only engage an advocate of the Ismaili sect before the council, and,

generally in such circumstances, justice may appear not to have been done; that the appellant's prayers in the suit could not be excluded by proceedings pending before another Tribunal (4) there was nopower arising out of any law or procedure nor any warrant to invoke any provision of law or procedure to stay the proceedings before the High Court (5) there was no warrant to assume that the High court may be dealing with issues of academic interest only.

The High Court has jurisdiction over all matrimonial causes and suits arising out of Mohammedan marriages. In absence of express legislation to that effect, the High court cannot be divested of jurisdiction in any matter because similar proceedings are pending before a quasi-judicial or non-statutory tribunal howsoever constituted.

It was, however, the position that proceedings for custody of children and maintenance were in fact concurrently before the court and the council. The court has jurisdiction vested with under statute and the council because Ismailis voluntarily submit to its jurisdiction in respect of the subjects relating to their personal law as stated in their constitution.

I am not aware of any statutory provision which prohibits a set 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. If it fails to do so there are ample safeguards, and remedial actions are available, for example, it would be the easiest of matters to obtain an order for a prerogative writ under the Law Reform Act (Cap 26) to quash its decision or to compel it to act according to law. It is laudable if such a non-statutory tribunal functions impartially and as an independent forum as the High court in the exercise of its jurisdiction. There is nothing derogatory in that to the powers of prestige of the High Court. The council remains subject to the supervisory jurisdiction of the High Court. The council's jurisdiction does not impugn or curtail, nor could it do so in any way, the jurisdiction under the Guardianship of Infants Act, or any other jurisdiction, of the High court. The High Court did not, and it cannot divest itself of any part of its inherent or statutory jurisdiction.

It is an incorrect statement of the law that the High Court has exclusive jurisdiction under the Guardianship of Infants Act. By definition in Section 2 "Court" means the Supreme court, now the High Court, and certain matters specifically stated in the provisions of the Act are brought under its jurisdiction. Section 17 states that where in any proceedings before any court (italics mine) the custody or upbringing of an infant, etc., is in question, the court shall decide the question as directed in that section.

The Council is empowered under the constitution to entertain proceedings relating to custody of children. It is incorrect to argue that the Council cannot apply the provisions of the guardianship of Infants Act. Under Article 311 of the constitution the council is expressly enjoined to decide questions of custody of children in accordance with the provisions of the Act. It may not deviate without acting in breach of the constitution. If it were to do so the High Court could either rectify the situation itself, or order the Council to desist and act in compliance with the provisions of the Act.

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 a sect to administer their personal law. Such 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.

The only unfettered right which the wife had was to have the existence or extent of any civil right or obligation determined independently and impartially by an independent court or other adjudication authority prescribed by law for that purpose as stated in Section 77(9) of the constitution of Kenya

provided she chose to submit it for determination to such court or other adjudicating authority. A person is free to have, or not, a legal representative in civil proceedings. He is free to chose. The wife did not have the fundamental right to be represented by a legal representative of her own choice like a person charged with a criminal offence under Section 77(1)(d)(ibi). Whether the proceedings are of a civil or criminal nature the court will not protect an imaginary deprivation of a fundamental right or allow it to be capriciously pushed to absurd lengths like importing a legal representative from Peking or Pakistan. The basis of good reasoning is to disregard absurdities which are usually trite and unimportant and which obscure the point and purpose of life. The foundation for the stability and progress of the human society is the observance of rules of conduct which are the subject of laws. The society needs stability for its continuance.

The wife freely submitted herself to the jurisdiction of the Council to hear the Petition. The choice was her own. She did not have a fundamental or unfettered right to split up her matrimonial disputes and inflict upon her husband the inconvenience and expense of pursuing and defending himself half in the High Court and half before the Council. The reservation made by her in regard to the issues of maintenance and custody of children could not, and it did not, oust the inherent jurisdiction of the High Court to exercise its overall supervisory powers to ensure the smooth and orderly operation of institutions administering justice in the general interest of the society. This was the power of the High Court which the learned judge invoked to avoid both a deviation and a disruption. Although not applicable in this case Section 6 of the Civil Procedure Act clearly indicates the policy of the law that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties. The limited right to be represented before the Council by Ismail advocates whether an advantage or a disadvantage, applies equally to both parties, just as it also applies equally to the proceedings for the two important issues of divorce and conjugal rights which the wife freely accepted should be decided by the Council. It is not as if she had no confidence in the Council.

True, orders made by the court are effective, because once made, they are enforceable as they brook of less argument than a morally binding order though also effective. A court order is backed by the authority and administrative power of the state. A Disciplinary Action, ordered by a sectarian tribunal, carries behind it the certainty of obedience arising from the immense might of moral sanctions which may be imposed by the united society backed through its power to order ostracism, excommunication, economic boycott, etc. It is a power which has been, and still is, practiced effectively since the early days of human history. It is a truism, for it is the fact that morally binding orders are usually obeyed and rarely disobeyed. That is something which also happens to court orders.

The husband and wife have ceased to think of the present jointly. The agony of divorce between a married couple must be the worst of all. What better than that the Conciliators or the Council should succeed, in which event the Court’s task will happily turn into one of academic interest only. The Council should expedite its task.

To sum it up, if occasion arises necessitating an injunction, or an order for the arrest of a party, or to enforce an order made by the council, the court could and would make an appropriate order. Always alert, justice never sleeps.

The learned judge felt concerned about the wife’s welfare till the very last. He declined to strike out the plaint saying that a situation may well arise in future, depending on the outcome of the proceedings in the Council, when the wife may be able to argue that she should proceed with the matter in the High Court. The learned judge did not really stay but adjourned the hearing of the suit before him until the council decided the principal question before it.

The learned judge made no order as to costs. It is not the usual practice of the court to condemn a wife in costs in matrimonial proceedings, except where it is shown that she has sufficient separate estate, which had not been shown here. *Patel v Patel* [1965] EA 560.

I would amend the order of the High Court (1) by substituting for the word “stayed” the words “adjourned generally” (2) Delete the order relating to costs and substitute therefore an order that upon the final termination of these proceedings the wife shall have costs of the suit and also the husband’s application in the High Court.

I would dismiss the appeal. I have had some difficulty in deciding what would be a proper order to make as regards costs of the appeal. It can be said that the appeal was unnecessary. If the learned judge had made an order adjourning the suit instead of staying it, perhaps an appeal would not have been filed. Wishful thinking! On the other hand, in so far as I know, it is the first time that the issues ventilated here have been considered and decided by the Court of Appeal; perhaps a service has been rendered to jurisprudence in Kenya. I would give half costs of the appeal to the wife.

Law JA. I have had the advantage of reading in draft the judgment prepared by Madan JA. I agree with his conclusions and with the orders proposed by him.

I would only add that, so far as the welfare of the children of the marriage is concerned, I see no reason at this stage to think that the Council will not properly discharge its duty, laid down in Article 311 of the constitution, to

“… decide the matter in accordance with the law relating to the guardianship of infants being in force … If the council fails to discharge that duty, the wife will be able to proceed with her suit in the High Court.

Potter JA. I also agree.

Dated and Delivered at Nairobi this 12th day of February 1982.

C.B.MADAN

.....

JUDGE OF APPEAL

E.J.E.LAW

.....

JUDGE OF APPEAL

K.D.POTTER

.....

JUDGE OF APPEAL

I certify that this is a true copy of

the original.

DEPUTY REGISTRAR