**Damji v Damji**

[1974] 1 EA 511 (HCK)

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 22 May 1974

**Case Number:** 77/1972 (11/75)

**Before:** Miller J

**Sourced by:** LawAfrica

*[1] Muslim law – Matrimonial causes – High Court has jurisdiction to hear – Mohammedan Marriage,*

*Divorce and Succession Act* (*Cap.* 156), *s.* 3 (*K.*).

*[2] Muslim law – Matrimonial causes – Procedure – Petition incorrect and struck out – Mohammedan*

*Marriage, Divorce and Succession Rules, r.* 2 (*K.*).

**Editor’s Summary**

The petitioner and the respondent were married by muslim ceremony. The wife filed a petition for

judicial separation. The husband contended that the court had no jurisdiction to hear a petition and that

the proper procedure had not been followed.

**Held –**

(i) the court has jurisdiction to grant matrimonial relief to muslims;

( ii) application by petition is incorrect (*E. v. E*. (5) considered).

Petition struck out.

**Cases referred to Judgment:**

(1) *R. v. Loxdale* (1758), 1 Burr 447; 97 E.R. 394.

(2) *Sutton v. Sutton* (1883), 22 Ch.D. 511.

(3) *Goldsmiths Co. v. Wyatt*, [1907], 1 K.B. 95.

(4) *Mohamed v. Bimji* (1956) 23 E.A.C.A. 369.

(5) *E. v. E*., [1970] E.A. 604.

**Judgment**

**Miller J:** The wife of a marriage celebrated in accordance with rites recognised as constituting a valid

marriage in Pakistan has petitioned this court for an order of judicial separation, alimony pending suit

and permanent alimony on the grounds of alleged adultery on the part of the husband with a woman

named in the petition. The petitioner claims in the petition that the parties are domiciled in Kenya and the

marriage having been solemnised at Garden Jamat Jurisdiction, Karachi, Pakistan in 1928, they have

resided in Kenya since 1947. Counsel for the respondent husband entered appearance in the following

terms:

“Memorandum of Appearance (under Protest)

Enter an appearance under protest for Hassanali Sajan Damji the respondent in this cause generally, the

petition herein under the Matrimonial Causes Act (Cap. 152) being misconceived and incompetent in law, the

said Act being inapplicable to the parties, the proceedings between the parties by their personal law and

customs being referable to the Communal Tribunal, the procedure followed in this cause being irregular and

unauthorised, the court having no jurisdiction to entertain proceedings between the parties, and the petition

having mis-stated the effect of the ruling dated 22 September 1972 by Chanan Singh, J.”.

A stay of proceedings pending determination of the issues raised in the above protest appearance was

secured and the matter argued as to whether or not this court has jurisdiction to hear and determine the

petition when resort to the

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personal law of the parties is set up in bar as being the appropriate law to deal with the petition. I think it

proper in the first place to dispose of the portion of the protest which alleges mis-statement of a ruling of

another court of the High Court. The relevant portion of the Petition is as follows:

“6. That there has been previous proceedings with reference to the marriage in this Honourable Court,

namely Miscellaneous Cause 213 of 1971. A Ruling was made on 22 September 1972 that the

application made to the Court therein should have been made by petition and not originating summons.

The parties have not cohabited since the date of ruling”.

Mr. D. N. Khanna for the respondent in the arguing of the present objection to jurisdiction urged that the

petitioner should have approached the court by way of plaint and not a petition and in this regard

submitted that the above reference to the ruling in Miscellaneous Cause 213 of 1971 constituted a

mis-statement. He emphasised that all that took place on that occasion was that there was before the court

an Originating Summons for maintenance under s. 26 of the Matrimonial Causes Act and the decision of

Chanan Singh, J. “was a limited decision”. Reference to the record in Miscellaneous Cause 213 of 1971

shows that Chanan Singh, J. referring to an Appeal Case 67 of 1964 pointed out that his original decision

in *Maniben v. Hansraj Murji* was unanimously confirmed by the East Africa Court of Appeal, i.e. that “a

claim for maintenance simpliciter by a wife of a Hindu marriage is a claim under s. 26 of the Matrimonial

Causes Act and must be commenced by petition”. He therefore ruled the then application for

maintenance by the present petitioner as incompetent having been brought by originating summons under

s. 26 Matrimonial Causes Act (Cap. 152) there being at the time no pending cause. It was not clear to the

court precisely what Mr. Khanna meant by referring to the decision in the ruling as being “a limited

decision”. It may well be that he intended that the then application for maintenance simpliciter did not

exhaust the matrimonial unrest between the parties or that it was restricted to a relief “inferior” to

judicial separation which is now being sought as judicial separation is a matter which affects the status of

the parties as opposed to ancillary relief or that a different branch of statute law was involved. It appears

that the latter proposition was intended since the record in Miscellaneous Cause 213 of 1971 does not

reveal any objection to the jurisdiction of the High Court to entertain that application. These are the

principal submissions of Mr. Khanna:

“A marriage celebrated at the Mosque is governed by s. 2 of the Mohammedan Marriage Divorce and

Succession Act (Cap. 156) Laws of Kenya and s. 3 of this Act excludes the Matrimonial Causes Act (Cap.

152).

From the filed admission of facts by the petitioner it was a marriage of the sect to which the parties belong

and we must assume a valid Mohammedan marriage.

The present reliefs must be sought under Mohammedan Law under Chapter 156.

It must be shown that judicial separation is obtainable under Mohammedan Law and this is a matter of proof;

the other two reliefs, i.e. alimony pending suit and secured provision or permanent alimony in lieu, are alien

to Mohammedan Law.

Since we have a special Act, Chapter 156 they should not come under Chapter 152; it matters not whether this

particular marriage is within or without the definition of marriage within Chapter 152 of the general Act; see

s. 3 (3) of Chapter 156.

Subs. (4) is also of importance because only the legislature can engraft Chapter 152 on to Chapter 156.

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See that under s. 7 there is a special procedure and the Chief Justice has not yet made the necessary rules; he

has not assimilated the rules of the Matrimonial Causes Act.

See s. 3 of the Civil Procedure Act; there are two things wrong: (1) they have come by petition instead of

plaint and (2) they have come under the Matrimonial Causes Act (Cap. 152).”

In support of one or other of his submissions Mr. Khanna cited *Mohamed v. Bimji* (1956), 23 E.A.C.A.

369, but with respect that case is totally unrelated to the issues before this Court. If anything, all it shows

is that from an original Uganda High Court case on a petition for judicial separation involving an alleged

marriage under Muslim law the appellate court ruled as follows at p. 377:

“It is common ground that, if the appellant should succeed to the extent of establishing that there was a valid

marriage in 1952, the basis of jurisdiction is similarly established, and the case must be remitted to the High

Court to hear and determine on the merits the petition (for judicial separation) and the cross-prayer. I would

therefore set aside the judgment and decree of the High Court, and order that the appeal be allowed, and that

the matter be remitted for the purpose indicated.”

Mr. Khanna did however cite *E. v. E*., [1970] E.A., 604 which I find in that by interpretation of r. 2 of the

Mohammedan Marriage Divorce and Succession Rules under Cap. 156 an application for the dissolution

of a Mohammedan marriage made by way of originating summons was struck out; an originating

summons having been distinguished from a summons directed to “issue” by the court for purposes of the

said r. 2. This rule provides:

“A summons shall issue in all suits under the Act.”

Indeed, the following portion of the judgment in that case may be seen as a forerunner to the two main

issues before this court, i.e. jurisdiction and the appropriate mode of initiating proceedings for relief. It is

as follows:

“In the present case, I am satisfied that the proceedings have not been properly commenced by originating

summons. The proper form of proceedings might be a plaint or a petition depending on the nature of the

union that subsists between the parties. I am not required to decide the proper form of proceedings, nor

indeed to decide whether this court has jurisdiction at all to entertain proceedings. Those questions will

receive consideration if and when they fall for decision.”

The time for deciding these questions has arrived and I propose to deal with the question of jurisdiction

first because it is the sine qua non in relation to any contemplated relief or procedural matter for the

securing of such relief and in my opinion the decision must be based solely upon an interpretation of

existing and operative written laws touching these questions. The Mohammedan Marriage, Divorce and

Succession Act (Cap. 156) (hereinafter referred to as the Act) is a personal statute and has been

promulgated for nearly 50 years no doubt in accordance with the concept of extra-territorial recognition

of rights but certainly by virtue of the territorial sovereignty and competence of the legislature to legislate

with respect to matters affecting persons within Kenya. It retains its operative force as existing written

law within the provisions of the Constitution and the Interpretation and General Provisions Act. The

following portions are relevant:

“2. In this Act, except where the context otherwise requires–

‘matrimonial cause or suit’ means any cause or suit relative to the

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validity of a marriage according to Mohammedan law, and any cause or suit relative to or claiming any

species of relief, whether by way of divorce or otherwise, in respect of Mohammedan marriages,

recognised or given by Mohammedan law.’

‘Mohammedan marriage’ means any marriage contracted in accordance with and recognised as valid

by Mohammedan law.

3. ( 1) M ohammedan marriages, whether contracted before or after the commencement of this Act,

shall be deemed to be valid marriages throughout Kenya, and the parties thereto shall, subject

to the provisions of this Act, be entitled to any relief by way of divorce or otherwise which can

be had, granted or obtained according to Mohammedan law, and such law shall apply

accordingly.

( 2) T he High Court and every judge thereof shall, subject to the provisions of this Act, have

jurisdiction to hear and determine all matrimonial causes and suits arising out of Mohammedan

marriages, whether contracted before or after the commencement of this Act.

Provided that the High Court shall not exercise any jurisdiction as is hereby conferred unless

the petitioner is resident in Kenya at the time of the institution of such matrimonial cause or

suit.

( 3) I n all such matrimonial causes or suits as are mentioned in subsection (1) of this section, the

Court shall exercise its jurisdiction and act and give relief upon the principles of Mohammedan

law applicable to the same respectively or otherwise.”

Mr. Khanna has not attempted to suggest that the marriage in this case is not a marriage recognised as

valid by Mohammedan Law; nor has he put forward any disability or circumstance affecting either of the

parties per se which may render resort to the High Court improper or impossible. His submission is that

because the parties are Mohammedans and were married at a mosque then by the provisions of ss. 2 and

3 of the Act they must either of them seek matrimonial relief somewhere other than in this court and

under Mohammedan law. With all respect I can only say that this construction springs from a

misunderstanding of the portions of the Act reproduced above if they are read grammatically and

construed according to ordinary rules. I cannot but borrow the words of Jessel, M.R. in *Sutton v. Sutton*

(1883), 22 Ch.D. 511 at p. 516:

“That construction puts words there which are not to be found in the sections and more than that, it gives no

meaning to words which are found in the sections.”

I rule that on a proper construction of these sections, the High Court has jurisdiction to hear and

determine all matrimonial causes and suits arising out of Mohammedan marriages. It is perhaps a more

rewarding exercise to examine the second aspect of the submissions, i.e. that the petitioner has come to

the court by petition as under the Matrimonial Causes Act (Cap. 152) instead of by plaint. This court has

the authority to express opinion where it finds a statutory provision useless, inadequate or ultra vires but

such opinion is not recklessly or capriciously expressed and I address my mind to the following passage

of *Maxwell on Interpretation of Statutes*, 11th Edn. at p. 350:

“Where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or empowering

such means, as are essentially necessary to its execution.”

I believe and rule that the Matrimonial Causes Act of 1941 and the Mohammedan Marriage and Divorce

Act of 1920 are Acts in pari materia and their

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conjoint nature together with the dates of their coming into operation throw some light upon the

intentions of the legislature. “Where there are different statutes in pari materia, though made at different

times, or even expired and not referring to each other, they shall be taken and construed together, as one

system and as explanatory of each other” per Lord Mansfield in *R. v. Loxdale* (1758), 1 Burr. 447

adopted in *Goldsmiths Co. v. Wyatt*, [1907] 1 K.B. 95. It is also settled law that the title of a statute is of

importance for purposes of construction and the ascertaining of its general scope. The Mohammedan

Marriage and Divorce Act designated “An Act to amend the law relating to divorce and matrimonial

causes in the cases of Mohammedan marriages, and relating to intestate succession in certain cases” was

already on the statute books when the Matrimonial Causes Act intituled “An Act to consolidate and

amend the law relating to *matrimonial causes*” came into operation. The legislature must therefore be

presumed to have contemplated the existence and actual state of the former Act and the practice of the

courts at the time of the bringing of the latter Act into operation its s. 3 providing:

“Subject to the provisions of the African Christian Marriage and Divorce Act, jurisdiction under this Act shall

only be exercised by the High Court (hereinafter called ‘the court’) and such jurisdiction shall, subject to the

provisions of this Act, be exercised in accordance with the law applied in matrimonial proceedings in the

High Court of Justice in England.”

I am in no doubt with respect to the High Court’s jurisdiction over Mohammedan matrimonial causes;

and it can be seen from the section immediately above that the legislature, apart from the conference

expressio verbis in s. 3 (2) of the Act has as it were reviewed jurisdiction in the later Act (Cap. 152)

thereby making the presumption of legislative cognisance stronger particularly when it went to the extent

of treating of the African Christian Marriage and Divorce Act of 1931 nominatim and in special manner,

this latter Act providing for concurrent jurisdiction in the High Court and subordinate courts in s. 14. The

relevant and cognate statutes move on the principles of regard for the religious, customary and statutory

rights of individuals to contract marriages on the one hand and on the other the treatment of “matrimonial

causes” with the common or underlying meaning which these words import. It is this, the meaning and

treatment of matrimonial causes, with which we are primarily concerned and further to my view as to

legislative cognisance of the Mohammedan matrimonial causes at the time of the enactment of the

Matrimonial Causes Act (Cap. 152). I feel fortified by the following in *Maxwell on Interpretation of*

*Statutes*, 11th Edn. p. 302 and a perusal of a few of the cases cited in connection therewith:

“Where it is gathered from a later Act that the legislature attached a particular meaning to certain words in an

early cognate one this would be taken as a legislative declaration of its meaning there. Subsequent legislation

on the same subject may be looked into in order to see what is the proper construction to be put upon an

earlier Act.”

The next matter which must be considered is the submission that since there are no rules made by the

Chief Justice in accordance with the Act, the Matrimonial Causes Rules are inapplicable. S. 7 of the Act

provides:

“The Chief Justice shall have power to make rules of court for the better carrying into effect of the provisions

of this Act; and, in particular, for regulating the exercise of the jurisdiction by this Act conferred,

assimilating, if he deems fit, as far as may be, the existing practice under the Matrimonial Causes Act to all or

any of the matrimonial causes or suits under this Act.”

There are no rules made expressly stating or demonstrating an adoption of the practice under the

Matrimonial Causes Act in relation to “matrimonial causes”

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arising from Mohammedan marriages; but there are a few rules (three in number) expressed to be “Rules

of Court under s. 7”. The rules appear in the 1948 laws as having been made by the Chief Justice by

authority of the s. 7 of the Act; and despite various legislative treatment of both the Acts and the rules

under the Matrimonia Causes Act between 1963 and 1972 the Mohammedan Marriage, Divorce and

Succession Rules have remained unchanged and the only rules so far made in exercise of the rule making

power conferred by s. 7 of the Act and r. 2 provides:

“A summons shall issue in all suits under the Act.”

If by this rule or the joint interpretation of these rules there was the resultant effect of depriving the

petitioner of the right to resort to this court in the face of the conferred jurisdiction, I would not have

hesitated to ignore them and lean towards the meaning of the words “matrimonial causes” in the two Acts

under consideration and by way of the principle of interpretation imposed by statutes in pari materia give

effect to the Matrimonial Causes Rules machinery of the High Court and the principal object which the

legislature may be seen to have sought to attain when conferring the jurisdiction. Similarly, had the

statute books been so far devoid of a set of rules for regulating the exercise of the jurisdiction expressly

conferred by the Act, I would have ruled resort to the Matrimonial Causes Rules as a matter of necessary

implication and the unification of practice in matrimonial causes in the High Court, but I feel compelled

to rule that the tenor of s. 7 of the Act which cannot be considered meaningless, plus the existence and

nature of the rules thereunder, preclude any such construction on the principles “Ad ea quae frequentius

accidunt jura adaptantur” and “Expressum facit cessare tacitum”. Further to these reasons and adhering

to the basic rules of construction the very wording of s. 7 of the Act does not promote presumptive

construction if the court is to avoid the risk of legislating instead of interpreting the law as it stands. It

can be seen that apart from the obvious omission of the word “necessary” in its text, the section speaks of

“the better carrying into effect”, thereby presupposing the existence at least pro tem of a good or

satisfactory set of rules; then, “as far as may be” (necessary) which to me envisages that the practice

under the Matrimonial Causes Act may not be found totally appropriate at all stages and finally, whereas

s. 7 speaks of “all or any of the matrimonial causes or suits”, r. 2 above deals with “all suits under the

Act”. S. 3 of the Civil Procedure Act provides that “suit” shall mean all civil proceedings commenced in

any manner prescribed” and although there is judicial authority for contending that the term “suit” is

wide enough to include proceedings on a petition, r. 2 under the Act is the manner to date “prescribed”.

The power to make rules under s. 7 of the Act is in my view a power of a latent nature and the legislature

clearly anticipated its exercise depending upon progressive need or otherwise. The procedural system

under the Act having remained static when there is this power to amend, unify in part or expressly adopt

in toto as circumstances dictate is not a matter for the court. It may well be urged that the Matrimonial

Causes Act being an Act to consolidate and amend the law relating to matrimonial causes its rules of

procedure automatically prevail but this is not an instance where the purported consolidation is for the

purpose of consolidating in one Act the provisions contained in a number of statutes. The most that can

be said is that the Matrimonial Causes Act deals with matrimonial causes an incident common to other

statutes dealing with marriage, divorce *Hansraj Murji v. Maniben* and matrimonial relief. I have read the

judgment of the East African Court of Appeal in, C.A. 67 of 1964 (unreported) and in my view the

considerations in that case were in fact and of necessity different from the present inquiry. In the first

place jurisdiction was not directly in issue and secondly the provisions of the Hindu Marriage and

Divorce Act (Cap. 157) were there involved and ss. 7 (2) and 9 to 12 inclusive

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of that Act should leave no room for the procedural objection here raised in that ss. 7 (2) and 9 expressly

adopt the provisions of the Matrimonial Causes Act. Returning to s. 7 of the Act (Cap. 156) and the rules

made thereunder I find the following provisions of the Interpretation and General Provisions Act (Cap. 2)

relevant:

“31(*a*) When any subsidiary legislation purports to be made or issued in exercise of a particular power or

powers, it shall be deemed also to be made or issued in exercise of all other powers thereunto

enabling.

“32. Any reference to a written law in any other written law shall include a reference to any subsidiary

legislation made under the written law to which reference is made.”

With these provisions in mind and further to my opinion on the wording of s. 7 (Cap. 156) I can only add

that the generality of the power to make rules with or without reference to other written law may be quite

a different question from that of the results of the nature of the actual exercise of that power. The

important question before the court is jurisdiction and the mode of attracting it in this particular case; and

this has been treated in *Craies on Statute Law*, 6th Edn. at p. 226 under the heading “Statutes giving

jurisdiction to courts are usually absolute” in these terms:

“As a general rule statutes which enable persons to take legal proceedings under certain specified

circumstances must be accurately obeyed notwithstanding the fact that their provisions may be expressed in

merely affirmative language.”

I find that in s. 7 of the Act which confers the jurisdiction even if it can be said that the language is

affirmative or “merely affirmative” this would relate to the ambit of the power but I rule that the meaning

of the section as a whole leaves the power suspensory and that until necessary action is taken to absorb

the practice under the Matrimonial Causes Act the practice prescribed in the existing rules made under

the section must be adhered to. R. 2 of the rules prescribes the appropriate procedure. For the above

reasons I find the procedure adopted by the petitioner incorrect and strike out the petition with costs to

the respondent.

*Order accordingly*.

For the petitioner:

*AA Lakha*

For the respondent:

*DN Khanna* (instructed by *Ahamed & Ahamed*, Nairobi)