

UGANDA / JUDGMENT

Bacho v Bolia (Civil Appeal No. 4 of 1946) [1946] EACA 12 (1 January 1946)

[1946] EACA 12

COURT

East African Court of Appeal

BEFORE

Pearson J, Sheridan CJ, Whitley CJ

CASE / FILE NUMBER

Civil Appeal No. 4 of 1946

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COURT OF APPEAL FOR EASTERN AFRICA

Before SIR JOSEPH SHERIDAN, C. J. (Kenya), SIR NORMAN WHITLEY, C. J. (Uganda), and PEARSON, J. (Uganda)

FATUMA BACHOO, Appellant (Original Appellant-Petitioner)**MAJOTHI KARA JUMA BOLIA, Respondent (Original Respondent) Civil Appeal No. 4 of 1946**

Mohammedan marriage—Divorce—Jurisdiction of High Court of Tanganyika— Tanganyika Order in Council, 1920, Article 17.

Held (26-6-46).—That Article 17 of the Tanganyika Order in Council 1920 does not confer jurisdiction on the Courts to dissolve a Mohamedan marriage.

Appeal dismissed.

Cases referred to: Fatuma binti Athuma v. Ali Baka (1917) 7 E. A. L. R. 171; Madan Lall Kakar v. Nirmal Kumari (1943) 20 K. L. R. Part 34; Hazara Singh v. Amar Singh XIII E. A. C. A. \$18\$.

Paterson, Solicitor General (Tanganyika) for the Appellant.

Respondent absent served.

SIR JOSEPH SHERIDAN, C. J.—The question before the learned Resident Magistrate, Dar es Salaam, was "has a Subordinate Court jurisdiction to hear and determine matrimonial causes arising from non-native Mohammedan
marriages contracted in the district over which it exercises civil jurisdiction delegated to it under the Subordinate Courts Ordinance No. 15/1941". The Magistrate answered the question by holding that Subordinate Courts have no such

jurisdiction for the reason that the High Court not having such jurisdiction could not delegate it to the Subordinate Courts. This decision was upheld by the learned Chief Justice of Tanganyika and the learned Attorney General being dissatisfied with the judgment has appealed to this Court. The question has been fully argued before us by the learned Solicitor General of Tanganyika who has mainly relied on the provisions of Article 17 of the Tanganyika Order in Council, his submission being that the words "save as hereinafter expressed the High Court shall have full jurisdiction civil and criminal over all persons and over all matters in the territory", are all important and confer jurisdiction, a matrimonial cause being a civil matter and there being no limitation of the powers contained in the words quoted in the Order in Council or in any other law applicable. It is agreed, and correctly so, that if the High Court has jurisdiction, the Subordinate Courts also have jurisdiction, by virtue of the provisions of the Courts Ordinance to which I have referred.

The basis of the learned Magistrate's judgment and of that of the learned Chief Justice was that Article 17 (2) of the Order in Council placed a general restriction on the exercise of the jurisdiction given to the Court by Article 17 (1). It is provided by Article 17 (2): $\frac{17}{2}$

"Subject to the other provisions of this Order, such civil and criminal jurisdiction shall, so far as the circumstances admit, be exercised in conformity with the Civil Procedure, Criminal Procedure and Penal Codes of India and the other Indian Acts and other laws which are in force in the territory at the date of the commencement of the Order or may hereinafter be applied or enacted, and subject thereto and so far as the same shall not extend or apply shall be exercised in conformity with the substance of the

common law, the doctrines of equity and the statutes of general application in force in England at the date of this Order and with the powers vested in and according to the procedure and practice observed by and before Courts of Justice and Justices of the Peace in England according to their respective jurisdictions and authorities at that date, save in so far as the said Civil Procedure, Criminal Procedure and Penal Codes of India and other Indian Acts and other laws in force as aforesaid and the said common law, doctrines of equity and statutes of general application and the said powers, procedure and practice may, at any time before the commencement of this Order, have been or may hereafter be modified, amended or replaced by other provision in lieu thereof by or under the authority of any Order of His Majesty in Council, or by any proclamation issued or by any Ordinance or Ordinances passed in and for the territory: Provided always, that the said common law, doctrines of equity and statutes of general application shall be in force in the territory so far only as the circumstances of the territory and its inhabitants and the limits of His Majesty's jurisdiction permit, and subject to such qualifications as local circumstances may render necessary."

The Chief Justice said: "In analysing Article 17 (2) with particular reference to the question in the present case, it may be said at once that there is no help to be found in 'the Civil Procedure. Criminal Procedure and Penal Codes of India' nor in any other Indian Acts and other laws which were in force in this territory at the date of the Order in Council. Nor have I found any Proclamation or Ordinance material to this point. It therefore follows under Article 17 (2) that the

District Court in the present case is bound simply by the restriction that it can exercise its jurisdiction only 'in conformity with the substance of the Common Law, the doctrines of equity and the statutes of general application in force in England at the date of the Order in Council and with the powers vested in and according to the procedure and practice observed by and before the Courts of Justice in England.'

It is convenient here to set out the petitioner's prayer.

"Your Petitioner humbly prays as follows: ---

- (1) That an order be made dissolving the said marriage solemnized between her and the respondent.
- (2) That she be awarded the custody of the said child.
- (3) Such further or other relief as Court may decide.
- (4) That the honourable Court has jurisdiction to decree a dissolution from petitioner's marriage under Article 17 (1) Tanganyika Territory, Order in Council, 1920, when read with section 4 (1) Subordinate Courts Ordinance No. 15 of 1941."

The Order in Council to which I have referred is similar to that in force in Kenya and Uganda and to the best of my knowledge the construction placed upon it by the Magistrate and the Chief Justice is one which has always been put on it. That does not necessarily mean that such a construction is right, but a contrary construction must be very plain before I would accept it. I find some help from a consideration of the position in Kenya. In the case of *Fatuma binti Athuma v. Ali Baka* 7 E. A. L. R. 171 it was held by Hamilton, C. J., that "A marriage by Mohammedan rites at Nairobi is not a marriage according to the marriage law of this Protectorate contained in the Marriage Ordinance, 1902. The High Court has consequently no power to dissolve such a union". The Chief Justice expressed the belief that such a marriage could be perfectly good in Mohammedan law and this would appear to be so for the Mohammedan

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