

In the name of Allah; Most Merciful & Gracious

Supreme Honorable Court

Personal Status Circuit

Decision No. 164/2015

The order is issued by the Supreme Court, Personal Status Circuit on 02/04/2015.

Under presidency of Mr. Al Tayeb Abdul Ghafour Abdul Wahab

Membership of Mrs. Faiza Ibrahim Zain Al Abedeen & Mrs. Nemaat Abdullah Mohammed Kheer (Judges of the Supreme Court)

The papers of the appeal No. 134/S/2014 Northern Court of Appeals were submitted – Dongola

The papers of the lawsuit No. 75/S/2014 Karima Court were submitted.

Both were registered under number 793/Cassation/2014.

Appellant: Etidaal Hassan Abu Karouq

Appellee: Gaafar Ahmed Al Haj Al Toom, Lawsuit/ Karima, lawsuit No. 75/2014

Judgment

The facts, to the extent of the necessary damage to settle this appeal, are summarized in that the plaintiff Etidaal Hassan Abu Karouq has filed a lawsuit against the defendant/ Gaafar Ahmed Al Haj Al Toom under number 75/S/2014 before Karima Personal Status Court for divorce for damage.

The lawsuit was deliberated before the summary court during the hearings as mentioned in its minutes, during which the plaintiff presented in person and explained her lawsuit stating that she is the lawful wife of the defendant and under his bond of marriage and obedience. Further, she left the matrimonial dwelling one month prior to the date of filing this lawsuit so that he did not escort her during her visits to the doctor, and the defendant drinks beers in the home with his friends who come to drink at home. She suffered for ten years as she is married but does not have children, and he did not go with her to the doctor neither in Karima nor in Khartoum. As a result of such damage, she requested divorce for damage and added that such damage is not suitable for her and is not acceptable in the term of Sharia.

During the hearings, the defendant also attended in person and replied to the lawsuit. He confirmed the bond of marriage, copulation and obedience. He also confirmed that she left the

matrimonial dwelling for more than one month, and that they are married since ten years during which he did not went to the doctor due to the conditions of his work. He also acknowledged that he was drinking beers but he left it now, and requested the refusal of the lawsuit.

In her comment on the reply to the lawsuit, the plaintiff insisted on her lawsuit. Then, the court requested her to prove her lawsuit and that the defendant used to drink beers and invite his friends to the matrimonial dwelling. She brought two witnesses, and the court heard to their statements.

On 25/06/2014, the Summary Court of First Instance rendered a ruling for the favor of the plaintiff against the defendant to be divorced from him by the virtue of one irrevocable divorce effective from 25/06/2014 and order her to count her waiting period as lawfully specified.

The defendant was not satisfied with such judgment and then he appealed thereto by the appeal number AOU/134/2014 before Northern Court of Appeals dated 17/09/2014. The Court of Appeal rendered the revocation of the ruling issued by the summary court, and the referral of the papers thereto to follow its memorandum according to the opinion of the majority in the Circuit.

This plaintiff was not satisfied with this judgment, and then she filed the current appeal number 793/Cassation/2014 by the virtue of a statement of claim represented through her advocate on 04/11/2014, at the end of which she requested the announcement of the invalidity of the judgment of the Northern Court of Appeals, revocation thereof and re-adoption of the judgment of the summary court as it was in consistency with the proper law.

Whereas the file contains the acknowledgment of the appellant of his knowledge of the appealed ruling dated 23/10/2014, the appeal shall be deemed as submitted within the specified time after the fulfillment of all its legal requirements that justify the acceptance thereof prima facie. Then, it is accepted in the form.

Whereas the court deemed that the statement of appeal raises points that require reply and discussion, then it rendered its preliminary order with regard to the announcement of the appellee of a copy of the statement of appeal to reply thereto. The petition was announced and the defendant's advocate (appellee) deposited his reply to the memorandum ending up with the affirmation of the judgment of the Dongola Court of Appeal, or the issuance of the proper order to achieve justice as it deems proper to the court.

With regard to the subject and having perused all papers, it is evident that the plaintiff alleged that, since the inception of the lawsuit and upon the submission of her petition dated 01/06/2014, her husband drinks beer and invite foreign friends to the matrimonial dwelling. In addition, she asked him to refrain from drinking beer with his bad friends, but he refused and continued drinking to date. A Conciliation Committee and Board was formed from their families to settle such dispute, but the endeavors of the Committee failed, and she concluded her petition with a claim for divorce for damage. She also added that the defendant insults her sometimes, and they do not have children to date. According to this petition, a lawsuit of divorce for damage was registered. In explaining the lawsuit by the plaintiff before the court, she noted the reasons of her request for divorce which include his failure to escort her to the doctor, drinking beer at home and bringing his friends to drink with them. She noted that she suffered for ten years and she does not have children, and he did not escort her to the doctor whether in Karima or in Khartoum.

It is evident from his minutes of reply to the lawsuit that he acknowledged the marriage since ten years, and that they have no children. He also acknowledged that he did not escort her to the doctor during the ten years due to his work conditions, and that he used to drink bear but he left it now. Further, he requested the refusal of the lawsuit.

From the above-mentioned, it is evident that the lawsuit shall be described as a lawsuit of divorce for damage and not divorce for sterility or disease, so that the plaintiff did not request the registration of the lawsuit of divorce for sterility and did not allege the same. Therefore, the court shall not describe the lawsuit as divorce for sterility as an extraction from the statement contained in the lawsuit. The plaintiff is free to register the lawsuit depending on the reason in the line with her interest.

It is also evident from the minutes that her lawsuit of divorce for damage is built on two reasons; the first is her allegation that the defendant drinks beer and brings foreign people to the matrimonial dwelling, and the defendant acknowledged that he used to drink beer. However, the court did not ask him about the other part in the lawsuit, which is inviting foreign people to the matrimonial dwelling. There is no doubt that beer is one of the grievous sins, but a crime for which the legislator set forth as specific penalty. In this regard, I would like to express a jurisprudential opinion which considers divorcing the wife of the alcohol drinker as one of these penalties.

Civ. P. S. /793/Challenge of Cassation/ 2014 AD (P. 4) (Cont'd)

It is not disputed that the alcohol may lead the drinker to commit acts that are to be deemed as harmful and make granting divorce permissible, inter alia, the drinker may be led by his addiction to alcohol to drink inside the house, resulting the violation of the sanctity of the house and the inconvenience to residents as well as misconduct that could have drawn from the drinker. The drinker may insult, hit and break the pots, in addition to other reasons that make granting divorce permissible.

The Court, pursuant to the provisions of the 28 Civ. table III attached to the Civil Procedure Act 1983 AD, should have obtained clarification from the Plaintiff concerning the harm falls upon her as a result from the Defendant's drinking of alcohol, and should have cross-examined the Defendant for his response to the claim in this regard .. If one of these damages was proven true, she Court shall deliver a judgment granting divorce. If, however, none of the above is proven to be true, the Court shall make it clear to the Plaintiff concerning her right to demand the oath to be taken from the Defendant on the denial of her claim, accordingly, the Court shall adjudicate the lawsuit in accordance with Articles 85 to 89 of the same table.

The second ground on which the Plaintiff made her claim is that the Defendant did not accompany her to go to the doctor. To clarify such ground, she said that she was harmed because of the same, as she has been married for ten years and does not have children, and he refuses to go with her to the doctor.

In my estimation, such ground does not fall within the permissible reasons for granting divorce. The reason for the fault-based divorce is sustained by the impossibility of the spouses to continue to live together and preserve a family. However, the Plaintiff admitted to have lived with the Defendant for ten years with the said ground being existed. Moreover, the Plaintiff can go to the doctor alone. If proven that her husband is the party who cannot have kids, and that caused her harm, she may then file for divorce on such ground and the Court shall order the Defendant to go to the doctor with her for examination.

There remains another issue that must be addressed is that through the investigation initiated by the Court, it is clear that there is a claim of a reconciliation between the two parties and therefore the Court shall conduct the necessary investigation in this matter with the two parties. If proven to the Court that there is reconciliation, then the conciliation cancels what precedes it and the Court shall discuss with the Plaintiff in this case the date of the Plaintiff's leaving from the marital home and the reason for leaving after the conciliation and then the Court delivers its judgment according to as evidenced to it.

Civ. P. S. /793/Challenge of Cassation/ 2014 AD (P. 5) (Cont'd)

Whereas, the Trial Court delivered its judgment on granting divorce before investigating the lawsuit as mentioned above, its judgment is accordingly deficient and is not legally established and shall be overturned and the papers of the lawsuit shall be returned to the Trial Court for further investigation in the lawsuit, as stated in this brief.

Whereas, the Challenged Judgment (the judgment of the Court of Appeal) has overturned the judgment of the Court of Trial and ordered with the return of the papers of the lawsuit to the Trial Court to act in accordance with the note of the Challenged Judgment. The Challenged Judgment it is therefore worthy to be confirmed, which decides the overturn of the judgment of the Court of Trial and the return of the final papers of the lawsuit to the Trial Court for further investigation in the lawsuit, and not according to the guidance of its statement of claim, but in accordance with the note of this challenged judgment.

Therefore, I decide, if the Honorable two Judges in the Circuit agree, to deliver our judgment to confirm the Challenged Judgment that orders with the overturn of the judgment of the Trial Court and the return of the final papers of the lawsuit to the same Court for acting as established in the note of this judgment.

Al Tayeb Abdul Ghafour Abdul Wahab

Judge of the Supreme Court

18/3/2015 AD

Faiza Ibrahim Zain Al Abdeen

Judge of the Supreme Court

22/3/2015 AD

Nemat Abdullah Mohammed Kheir

Judge of the Supreme Court

29/3/2015 AD

The final order

To confirm the Challenged Judgment, which decides the overturn of the judgment of the Trial Court and the return of the final papers of the lawsuit to the same for action as established in the note of the Challenged Judgment.

Al Tayeb Abdul Ghafour Abdul Wahab

Judge of the Supreme Court

2/4/2015 AD