



**AA v KAB (Civil Appeal E031 of 2023)  
[2023] KEHC 26053 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26053 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E031 OF 2023  
EM MURIITHI, J  
NOVEMBER 30, 2023**

**BETWEEN**

**AA ..... APPELLANT**

**AND**

**KAB ..... RESPONDENT**

*(Being an Appeal from the ruling of A.J. Ishaq Hussein Principal Kadhi at Isiolo delivered on 23/2/2023 in Isiolo Kadhi's Court Divorce Cause No. E007 of 2021)*

**JUDGMENT**

**The Appeal**

1. Before the court is appeal as expressed in the recital

“from the ruling of A.J. Ishaq Hussein Principal Kadhi at Isiolo delivered on 23/2/2023 in Isiolo Kadhi's Court Divorce Cause No. E007 of 2021”, which committed the apeplalnt to civil jail for failure to pay maintenance orders for child support, seeking the following specific relief that “the ruling of the principal Khadi be set aside and the appellant be released from civil jail.””

2. The Memorandum of Appeal dated 4/3/2023 sets out the grounds of appeal as follows:

“Memorandum of Appeal

The appellant being dissatisfied/aggrieved with the ruling of AJ Ishaq Hussein principal Khadi at Isiolo Khadi's court delivered on 23/02/2023 in Isiolo Khadi's court divorce cause No. E007 of 2021 appeals against the whole ruling and puts forth the following grounds:



1. That the Honorable principal Khadi erred in law and in fact in committing the appellant to civil jail for the 2nd time.
2. That the Honorable principal Khadi erred in law and in fact in failing to take into consideration that the appellant had ran into arrears since he was committed to civil jail for 6 months on 24/01/2022 and released on 23/07/2022.
3. That this being a children's matter parental responsibility is shared and that punishing one parent because of poverty is unconstitutional.
4. That the whole of the ruling was against the weight of the evidence before the Kadhi.
5. That the Honorable Khadi failed to appreciate that the appellant was making some effort to clear the arrears upon release from civil jail just on 23/07/2022.

The appellant prays that the ruling of the principal Khadi be set aside and the appellant be released from civil jail.”

3. On the 6/6/23 the appellant filed a Supplementary Memorandum of Appeal dated 5/6/23 with leave of court and introduced a new ground of Appeal that the Kadhi's Court had no jurisdiction in children matters and prayed for the setting aside of the entire judgment of the Court as follows:

“Supplementary Memorandum of Appeal

- 1) That the Honorable principal kadhi erred in law and in fact in deviating from the main issues which were before him and dealt with irrelevant issues which were not before the court.
- 2) That the Honorable principal kadhi had erred in law and in fact in dealing with the children's matter when the kadhi's court has no jurisdiction to deal with children's matters
- 3) That whole judgment on maintenance was against the weight of the evidence in divorce matters as arrived by the Honorable kadhi.

The Appellant prays that the whole judgment of the principal Kadhi be set aside forthwith, with costs to the appellant.”

4. The Appellant's Counsel filed written submissions on 4/7/2023 urging illegality in multiple committal to jail in execution of judgment, and further taking up objection to the Kadhi's Court in children matters, principally, as follows:

“Ground one in the main memorandum we submit that once the appellant was committed to civil jail for a period of six months the Kadhi erred in law and in fact in recommitting him for the 2nd time and the law prohibits such.

This was a divorce case and it's our submission that the Kadhi's court has no jurisdiction to hear children matters, in his judgment the Kadhi has quoted article 170 of *the constitution* of Kenya 210 that it has given the Kadhi's court jurisdiction over children matters, it's our submission that article 170(5) of *the constitution* is very clear.



That the jurisdiction of the Kadhi's court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings of the Kadhi's court' clearly my lord children matter and maintenance is not one of them and we submit that the Kadhi's court over stretched its jurisdiction which was clearly an error.

Even if your lordship the Kadhi had jurisdiction which he didn't have parental responsibility is a shared responsibility and ought to have apportioned the same 50:50 but not to leave all the responsibilities upon the appellant alone.

Further your lordship at Page 13 of the record of appeal it has been indicated that the amount owing is kshs 18,000/= per month x 17months, it's our submission that assuming the Kadhi had jurisdiction over children maintenance still the decree is very clear kshs 10,000/= per month and kshs 8,000/= per term. We have 3 terms per year, how then did the respondent arrive at kshs 18,000/=per month, from which judgment? It's our submission that there was a travesty of justice and we pray that the Kadhi's judgment be set aside and the parties be advised to follow the right channel in pursuing this matter in the right court with jurisdiction."

5. Despite directions for the filing, and opportunity granted by adjournment of the hearing of the appeal, the Respondent did not file any submissions.

#### **Issue for Determination in the Appeal**

6. The Counsel for the appellant sought to introduce for determination the wider issue of the jurisdiction, or lack of it, of the Kadhi's Court to deal with children cases. The matter was discussed by the trial Court which found jurisdiction in the judgment making the award of maintenance orders the execution of which by multiple orders of committal to civil jail in subsequent proceedings was the subject of the current appeal.
7. The ground of want of jurisdiction of the Kadhi Court as ground of appeal was not properly taken before this Court as the leave of court to amend the Memorandum of Appeal had not been obtained in accordance with section of the *Civil Procedure Act* and the appeal before the court is not as against the judgment of the Kadhi's Court which made the determination on maintenance but rather on the challenged multiple execution of the order for maintenance.
8. Such a ground would have been appropriate in an appeal against the said judgment not against an order in execution of the judgment. It is clear from the recital to the Memorandum of Appeal filed herein that the appeal before the court is

“the ruling of AJ Ishaq Hussein principal Khadi at Isiolo Khadi's court delivered on 23/02/2023 in Isiolo Khadi's court divorce cause No. E007 of 2021”.

The judgment awarding maintenance dues was delivered by Senior Principal Kadhi Abdulhalim H. Athman (as he then was) of 11/3/2023 where he determined that the Kadhi's Court had jurisdiction over children matter as follows:

“Court's jurisdiction on Children custody & Maintenance



8. The Kadhi's court has been conferred with jurisdiction to hear and determine disputes on children by *the Constitution* of Kenya (2010) under Article 170 (5), and Section 5 of the *Kadhis court Act*, Cap 11 whose preamble declares:

“Act of Parliament to prescribe certain matters relating to Kadhis' courts under *the Constitution*, to make further provision concerning Kadhis' courts, and for purposes connected therewith and incidental thereto”

9. Child custody maintenance issues being incidental to the issue of marriage and divorce falls directly within the jurisdiction of the court. The matter is not settled. The High Court being divided on the issue. I am persuaded by a recent decision conferring jurisdiction to the court on the issue. Ali-Aron J. in HCCA 85 of 2017 ZUDG v SJKUR (2020) eKLR, stated:

“This court for now, aligns itself, so did the Kadhis who sat in this matter with the thought that the Children's Act did not oust the jurisdiction of the Kadhi or other subordinate courts in dealing with issues of children.”

9. In addition, the jurisdiction issue was taken up in the written submissions filed before this court and it was not properly and sufficiently canvassed before this court to enable a well-considered view on such an important question as the jurisdiction of the Kadhi's Court over children matters. And needless to say, the best interests of the child are for a final substantive determination of the question of jurisdiction of the Kadhi's Court in children matters after full argument on the constitutional provisions and applicable law.
10. This Court will, not having been served with argument on such important jurisdictional question, decline the invitation to consider the issue and or find that the Kadhi's Court has no jurisdiction in children matters related to cases of matrimonial disputes before the court, or at all.
11. Moreover, a challenge on the Judgment of the Kadhis's Court being in the nature of a final Decree, and not an order as in this case, is appealable to the High Court with a special bench in terms of section 65 of the *Civil Procedure Act* as follows:

“Appeal from other courts

1. Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—
  - (a) deleted by Act No. 10 of 1969, Sch.;
  - (b) from any original decree or part of a decree of a subordinate court, on a question of law or fact;
  - (c) from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.”

An appeal from the Judgment of Senior Principal Kadhi Athman delivered on 11/3/ 2023 may, therefore, only be taken before the special bench of the High Court in accordance with the law, which was not the case before me which was an appeal from an order by the ruling in post judgment execution/committal proceedings.



12. The determination of the jurisdiction of the Kadhi's Court to deal with issues of children in matters of personal law affecting the parents in proceedings properly before it will await deliberation and determination in a suitable proceedings properly taken before the High Court or higher courts.
13. For now, having considered the question whether a judgment debtor may in successive execution proceedings be committed to civil jail, as a method of enforcement of decree or order for the payment of money or performance of other obligation, for more than one occasion, this court finds the issue to be statutorily settled by the provisions of section 42 (2) of the [Civil Procedure Act](#), provides as follows:

“ 42. Detention and release

- (1) Every person detained in prison in execution of a decree shall be so detained—
  - (a) where the decree is for the payment of a sum of money exceeding one hundred shillings, for a period not exceeding six months; and
  - (b) in any other case, for a period not exceeding six weeks:  
Provided that he shall be released from such detention before the expiration of the said period of six months or six weeks, as the case may be—
    - (i) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the prison; or
    - (ii) on the decree against him being otherwise fully satisfied, if the court so orders; or
    - (iii) on the request of the person on whose application he has been so detained, if the court so orders; or
    - (iv) on the omission of the person, on whose application he has been so detained, to pay subsistence allowance.
- (2) A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be rearrested under the decree in execution of which he was detained in prison.”

14. The Court, therefore, finds merit in the appeal and it shall be allowed to the proper extent.

**Orders**

15. Accordingly, for the reasons set out above, the court makes the following orders:
  1. The Court the appellant's appeal herein dated is partly allowed.
  2. The Order for the committal to jail of the appellant for the second time over the execution of the order for maintenance dues made by the Kadhi's Court on 23/2/2023 in Isiolo Kadhi's Court Divorce Cause No. E007 of 2021 is set aside.



16. There shall be no order as to costs owing to the matrimonial nature of the matter.

17. File closed.

Order accordingly.

**DATED AND DELIVERED THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

**APPEARANCES:**

Mr. J. O. Ondieki for the Appellant.

Mr. H. Kirimi for the Respondent.

