



**In re AMM & AM (Minors) (Miscellaneous Application
E032 of 2021) [2022] KEHC 10851 (KLR) (22 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 10851 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
MISCELLANEOUS APPLICATION E032 OF 2021**

JN ONYIEGO, J

APRIL 22, 2022

**IN THE MATTER OF: TRANSFER OF MATRIMONIAL CASE NO.E10 OF2021
FROM THE KADHI’S COURT TO THE CHILDREN’S COURTS AT VOI**

AND

IN THE MATTER OF: AMM AND AM (MINORS)

BETWEEN

R(R)WW APPLICANT

AND

RMO RESPONDENT

RULING

1. By a plaint dated 5th July, 2021, RM (hereafter the respondent) filed what is described as matrimonial cause number E10 of 2021 before Senior principal Kadhi’s court voi against his estranged wife RW (hereafter the applicant) seeking orders for legal care and custody of their children known as AM and AM. In her defence dated 22nd November 2021 in response to the plaint before the Kadhi’s Court, the applicant raised an objection to the matter being heard and determined by the Kadhi’s Court at Voi for want of jurisdiction.
2. During the pendency of those proceedings, R moved to this court vide a Notice of Motion application dated 3rd December ,2021 seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That this Hon.Court be pleased to remove and transfer the Voi senior principal kadhi court matrimonial case no. e10 of 2021 from the Kadhi Court to the Children’s Court at Meru for hearing and determination.



- d. That costs of this application be provided for.
3. The application is premised on the grounds stated on the face of it and further amplified by averments contained in the affidavit in support sworn by the applicant on 3rd December, 2021.
 4. The applicant's contestation revolves around the question of lack of jurisdiction by the Kadhi's Court in Voi to entertain matters touching on custody, care and control of the minors herein a fact she stated is reserved for the children's court. She further stated that the Kadhi's Court jurisdiction is limited as the respondent questioned her stand on Islamic faith.
 5. The applicant averred that the respondent's suit is mischievously presented as matrimonial cause while the content and substance of the subject matter borders on questions of custody, maintenance, care and protection of children which falls under the jurisdiction of the Children's Court.
 6. In response, the respondent filed a replying affidavit sworn on 28th December, 2021. The respondent stated that he commenced the said proceedings before the Kadhi's Court Voi as a children matter for the interest of the two minors herein who are aged 8 years and 5 years respectively.
 7. He further stated that although the minors and the applicant reside in Meru, the transfer of this suit to Meru would be prejudicial to him and further cause delay in hearing the matter. The respondent averred that the applicant's application is vexatious, brought in bad faith and an abuse of court process hence urged the court to dismiss the same with costs.
 8. When the matter came up for directions, parties' respective counsel agreed to have the application disposed of by way of written submissions. Consequently, the firm of Njeru Nyaga advocates appearing for the applicant submitted that pursuant to Article 170 of *the constitution* and section 5 of the Kadhi's Act, the Kadhi's court is conferred with the power to hear only matters relating to issues relating to muslims in relation to personal status, marriage, divorce, or inheritance and not children matters.
 9. Counsel further submitted that, the *children Act* is applicable to all children regardless of their religious persuasion. To buttress this position, counsel made reference to the holding in the case of *Republic v Kadhis court Nairobi & 2 others Ex parte TL* (2018) eKLR where the court held that the *children Act* was not enacted for any specific category but for all children regardless of their faith and that it is the children court to consider any religious concerns of a child.
 10. On his part, the respondent through the firm of Mutinda and company advocates filed his submissions on 9th February 2022 arguing the case on two aspects. Regarding lack of territorial jurisdiction, counsel contended that the applicant will not be prejudiced by hearing the case in Voi as proceedings can be held virtually hence the aspect of travelling expenses does not arise. Concerning lack of jurisdiction by the kadhi's court, counsel submitted that just like the children's court has jurisdiction, Kadhis' courts have similar jurisdiction. The court was referred to the holding in Civil Appeal no 85 of 2017 *ZUDG V SJKUR*(2020) eKLR which authority was not attached
 11. I have considered the application and the response thereof. I have also taken into account rival submissions by both counsel. Issues that arise for determination are;
 - a. Whether the Kadhi Court in Voi has jurisdiction to hear the subject matter
 - b. Whether Matrimonial Case No. E10 Of 2021 should be transferred to Meru Children's Court.
 12. It is trite law that jurisdiction is not self-acquired by a court of law but rather a product born by either *the constitution* or statute. See the case of *Samwel kamau Macharia & another v Kenya Commercial*



Bank and another SC CA no 2 of 2011 where the court held that jurisdiction flows from the constitution or legislation or both. Further on jurisdiction, the Court of Appeal in the case of Peterson Ndung'u, Stephen Gichanga Gituro, N. Ojwang, Peter Kariuki, Joseph M. Kyavi & James Kimani v Kenya Power & Lighting Company Ltd [2018] eKLR restated itself as follows;

“As was succinctly stated by Nyarangi, JA in the often cited case of *Owners of the Motor Vessel Lillian S' v Caltex Oil (Kenya) Ltd* (1989) KLR 1 :

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence.”

13. The jurisdiction of the Kadhi's Court is provided for in Article 170 (5) of the Constitution of Kenya 2010 which provides;

“The jurisdiction of a Kadhi's court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.”

14. The above constitutional provision is amplified by section 5 of the Kadhi's Courts Act which provides;

“A Kadhi's court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.”

15. The critical question which the court should answer is who between the Kadhi's and children's court has jurisdiction to entertain this matter. It is trite that the primary law governing children matters is the children Act. Section 73 of the children Act is quite emphatic. It provides that “there shall be courts to be known as children's courts constituted in accordance with the provisions of this section for the purpose of;

- a. Conducting civil proceedings on matters set out under parts III,V, VII, VIII,IX,X,XI and XIII
- b.
- c. ...
- d. ...

16. Part VII deals with issues relating custody and maintenance of children. Clearly, there is not mention of Kadhi's court as having jurisdiction over children matters

17. A plain reading of Article 170(5) and Section 5 of the Kadhi's does not leave any remotest imagination that the Kadhi's court was ever intended to hear children matters and more specifically custody and maintenance. Besides, Section 73(d) (ii) of the children Act commands that for a children court to assume authority to hear a children matter, it must be gazetted first by the chief justice through kenya gazette notice.



18. From experience, Kadhis are never gazetted to hear children matters. To that extent, the Kadhi's court whether in voi or anywhere in kanya cannot deal with issues relating to legal and actual custody of children and Maintenance unless filed together with other prayers touching on Islamic law issues specifically mentioned under Article 170 (5)

19. While dealing with a similar scenario, the court in the case of *ABMM v SMY & another* [2019] eKLR had this to state;

“It is therefore apparent from the above Article 170(5) and section 5 of the Kadhi Courts Act, which provisions of the law are couched in mandatory terms that they set the limit on the areas upon which the Kadhi Court would have jurisdiction. The term ‘shall’ is used. However it is notable that nowhere does it mention the aspects of custody and child maintenance.

Thus from the foregoing it is clear that the jurisdiction of the Kadhis court is determined by the existence of three factors; (i). the subject matter of the claim or dispute; (ii) the party's muslim faith; and (iii) the party's submission to the jurisdiction of the Kadhi's Court.

Therefore in my view it is clear that the drafters of the above provisions of the law never intended the Kadhi's Court to handle matters relating to custody and maintenance of the children nothing prevented them from expressively doing so.”

20. In this case the applicant vehemently challenged the jurisdiction of the Kadhi's Court. Her argument being that the Kadhi's Court has no jurisdiction to hear and determine children matters and that the competent court to hear and determine the same is the Children's Court.

21. From the pleadings and evidence on record, it is clear that the applicant is not willing to submit to the jurisdiction of Kadhi's Court thus this court cannot compel her to do so pursuant to Article 170(5) of the constitution. In this regard, I am guided by the wisdom in the case of *ABMM v SMY & another* (supra) where the court stated that;

“It is also noteworthy that even if the Kadhi's court had jurisdiction, for as long as the appellant does not submit to the jurisdiction of the court as stipulated in Article 170(5) of *the Constitution* and section 5 of the Kadhi's Court Act, the court has no power to compel him to appear before that court. The party has the option of heading to the children's Court which is vested with the Jurisdiction to handle children matters.”

22. Accordingly, it's my finding that the Kadhi's Court has no jurisdiction.

23. On Whether Matrimonial Case No. E10 of 2021 should be transferred to Meru Children's Court, the applicant's case is pegged on the fact that the Kadhi's Court Voi has no jurisdiction to hear this matter and the fact that she and the children reside in Meru, it is the children's court meru which has jurisdiction. The same was opposed by the respondent on the ground that it would be prejudicial to him and delay the hearing of the matter.

24. Section 18 of the *Civil Procedure Act* CAP 21 Laws of Kenya gives this court power to transfer a suit instituted in a subordinate court. It provides;

1. On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—



- a. transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - b. withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—
 - i. try or dispose of the same; or
 - ii. transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - iii. retransfer the same for trial or disposal to the court from which it was withdrawn.
2. Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.
25. The court in the case of *Guyo Jarson Daleno v Jamila Mohamed Maalim* [2020] eKLR in dealing with transfer of suit cited the case of *David Kabungu v Zikarenga & 4 others* Kampala HCCS No. 36 of 1995 where it was stated that;

“Section 18 (1) (b) of the *Civil Procedure Act* gives the Court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the Court without application by any party. The burden lies on the applicant to make a strong case for the transfer. A mere balance of convenience in favour of the proceedings in another Court is not sufficient ground, though it is a relevant consideration. As a general rule, the Court should not interfere unless the expense and difficulties of the trial would be so great as to led to injustice. What the Court has to consider is whether, the applicant has made a case to justify it in closing the doors of the Court in which the suit is brought to the plaintiff and leaving him to seek his remedy. In another jurisdiction it is well established principle of Law that the onus is upon the party applying for a case to be transferred from one Court to another for due trial to make out a strong case to the satisfaction of the Court, that the application ought to be granted. There are also authorities, that the principle matters to be taken into consideration are: balance of countenance, questions of expense, interest of justice and possibilities of conduct hardship, and if the Court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused. Want of jurisdiction of the Court from which the transfer is sought is no ground for ordering transfer because where the Court from which transfer is sought has no jurisdiction to try the case, transfer would be refused.”

26. Considering that the case is before a wrong court with no jurisdiction to hear it, I have no reason to retain it there. Had it been filed before Voi children court, the court would have had a different approach as to the applicability of virtual proceedings to avoid unnecessary delay and expense. In the circumstances of this case, Mr. Mutinda’s argument of virtual proceedings cannot apply before a wrong court.
27. The applicant has persuasively given good reasons as to why the children case disguised as Matrimonial Case No.E10 of 2021 should be transferred to Meru Children’s Court for hearing and determination. Accordingly, the Kadhi in charge Senior Principal Kadhi’s Voi court is hereby directed to forward the subject file to the in charge Meru children’s court for hearing and determination. Regarding costs, same shall be in the cause.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22ND DAY OF APRIL
2022**

J.N.ONYIEGO

JUDGE

