



SKC v BSCR (Civil Appeal 81 of 2017)
[2022] KEHC 11981 (KLR) (Family) (31 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11981 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY
CIVIL APPEAL 81 OF 2017

AO MUCHELULE, J

MAY 31, 2022

BETWEEN

SKC APPELLANT

AND

BSCR RESPONDENT

*(Being an appeal from the Judgment by Honourable A.I Hussein at Nairobi
Kadhi's Court dated 6th February 2017 in Cause No. 138A of 2013)*

JUDGMENT

1. The appellant SKC and the respondent BSCR. got married under Islamic law in 1999 and got three children who in 2013 when the suit was filed before the Kadhi's court were aged 17½, 12½ and 5, respectively. The plaint dated May 7, 2013 was filed by the respondent seeking the dissolution of the marriage; custody and maintenance of the youngest child; the equal sharing of the matrimonial home; and that the appellant be restrained from interfering with her. The appellant filed a defence and counterclaim. The defence denied the claims in the plaint. In the counterclaim it was pleaded that the marriage had irretrievably broken down and this was blamed on the respondent.
2. The dispute was heard with only the respondent giving evidence. The appellant was not heard as the application to have the hearing adjourned to accommodate him was declined.
3. In the judgment that was delivered on February 6, 2017, the court granted the custody of the youngest child to the respondent; he was ordered to maintain the children; and there was an order that the matrimonial property be sold and the proceeds shared in accordance with each party's contribution toward its purchase, with the provision that either party could buy out the other. Costs were granted to the respondent



4. The appellant was aggrieved by the judgment and its orders and filed the present appeal whose grounds were:-

- “ 1) That the learned Kadhi erred in law and in fact in directing that the custody of the youngest child of the marriage be granted to the respondent thereby separating the children of the marriage without a basis for the so doing;
- 2) That the learned Kadhi erred in law and in fact in that he failed to allow the appellant to give his evidence to the court and hence arrived at the wrong findings;
- 3) That the learned trial Kadhi erred in law and in fact in that he made findings that were not supported by any known provision of the law on matrimonial property and without due regard to the Appellant’s evidence;
- 4) That the trial Kadhi erred in law and in fact in directing that the family/ matrimonial property be valued, sold and the proceeds be shared in consideration of the respective contributions without jurisdiction and/or basis to so do in law.
- 5) That the trial Kadhi failed to consider that the respondent’s evidence on record remained as uncontroverted by the Appellant who had no opportunity to offer his evidence.”

The appellant asked that trial court’s findings on the custody of the youngest child and the division of matrimonial property be set aside and substituted with his prayers contained in the reply to petition for divorce.

5. M/s Guserwa for the appellant and Mr Elkington for the respondent each filed written submissions on the appeal. I have considered them.
6. This is a first appeal. It is the responsibility of this court to reconsider and re-evaluate the evidence that was received by the Kadhi’s court and draw its own conclusions thereon, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses who testified before that court (*Selle & Another v Associated Motor Boat Co Ltd & Others* [1968]EA 123).
7. It was conceded by the appellant that the youngest child of the couple has since been returned to him. It would therefore be an academic exercise to deal with the issue of the child.
8. On the question of the Kadhi’s court having dealt with the parties’ matrimonial property, the appellant urged the court to find that this was done without jurisdiction; that a Kadhi’s court has no jurisdiction under the *Kadhi’s Courts Act*, the *Matrimonial Property Act* and the *Constitution* to hear and determine a dispute relating to the determination and sharing of matrimonial property. The respondent took the position that the Kadhi’s Court had the jurisdiction donated by the law, and cited the decisions in HC Matrimonial Cause No 1 of 2018 *AWA v HDD* and the Court of Appeal decision in *RMM v BAM* Civil Appeal No 267 of 2011.
9. The jurisdiction of the Kadhi’s court is prescribed under article 170(5) of the *Constitution* which states as follows:-

“The jurisdiction of a Kadhis’ 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.”

There is then the *Kadhi's Courts Act* whose section 5 provides as follows:-

“ 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.”

10. It is clear that a question relating to the determination of matrimonial property, or the division of the same, is not one of those that the Kadhi's Court has been given jurisdiction to entertain. Matrimonial property disputes are now governed under the *Matrimonial Property Act* whose section 3 states that a person who professes the Islamic faith may be governed by Islamic law in all matters relating to matrimonial property. This means that where Muslims have a matrimonial property dispute, they will take it to the court with jurisdiction, that is either the High Court or the magistrate's court, in which case the dispute will be governed by Islamic law, unless they opt that they will purely rely on the provisions of the *Matrimonial Property Act*. This is what Justice SJ Chitembwe observed in *MSR v NAB* HC Divorce Cause 5 of 2016 at Malindi in reference to section 3 of the *Matrimonial Property Act*, and I entirely agree with him:-

“ My view on the above section is that it does not expand the jurisdiction of the Kadhi's court as provided under article 170(5) of the *Constitution*. Section 3 of the *Matrimonial Property Act* only gives discretion to a person who professes the Islamic faith to have issues relating to matrimonial property governed by Islamic law. No reference is made to the Kadhi's Court under section 3. The effect would be that a dispute moving the matrimonial property by someone who professes Islamic faith can be determined by any other court provided that the basis of the determination is Islamic Law. Section 3 does not oust the jurisdiction of the subordinate court or High Court in determining matrimonial property disputes involving a Muslim.

11. The respondent sought to rely on the Court of Appeal decision in *RMM v BAM*, Civil Appeal No 267 of 2011 which opined that a Kadhi's Court can deal with a matrimonial property distribution between two muslims. However, the decision was based on the facts of the case in the circumstances where the old *Constitution* and the *Married Women's Property Act*, 1882 were being discussed. In the instant case, it is the new Constitution at play. Along with it is the *Matrimonial Property Act* which replaced the English *Married Women's Property Act*, 1882.
12. The appellant complained that he was not given an opportunity to defend the case before the trial court, and that his application for adjournment was declined unfairly. In effect, he alleged, his right to a fair hearing was compromised. In view of the finding on jurisdiction, I find that there would be no need to deal with the complaint as ultimately the dispute regarding the parties' matrimonial property shall be heard by a court with jurisdiction.
13. Consequently, I allow the appeal with costs, and order that, subject to the value of the property in question, the parties will approach either the subordinate (magistrate's) court or the High Court to have their dispute heard and determined. Otherwise, the Kadhi's courts decision is hereby set aside with costs to the appellant.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY 2022.



A.O. MUCHELULE

JUDGE

