



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**EAM v MS (Family Appeal E145 of 2021)  
[2022] KEHC 11521 (KLR) (Family) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11521 (KLR)

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

**FAMILY**

**FAMILY APPEAL E145 OF 2021**

**AO MUCHELULE, J**

**JULY 28, 2022**

**BETWEEN**

**EAM ..... APPELLANT**

**AND**

**MS ..... RESPONDENT**

*(Being an appeal from the Judgment of the Kadhi's Court at Nairobi by Hon.  
S.H. Omar given on the 12th day of November 2021 in CS E083 of 2021))*

**RULING**

1. The applicant E.A.M. and the respondent M.S. are wife and husband, respectively. They got married under Islamic law on June 27, 2020. They set up their matrimonial home in Pangani. They have one child A.M. who was born on April 1, 2021.
2. In a plaint dated April 23, 2021 and filed before the Kadhi's Court, the respondent alleged that the applicant had treated him with cruelty and contempt, had deserted their matrimonial home on January 28, 2021 while expectant and had since got the child whom he had been denied access or given opportunity to give a name. The suit was brought to compel the applicant to return to their home, to compel her to give him access to the child, and so on.
3. The plaint was filed along with a notice of motion in which the respondent sought interim access orders to the minor in a neutral place. The applicant opposed the application and filed a defence and counterclaim. She sought the annulment of the marriage and a maintenance order. She pleaded that the respondent was cruel and has become a threat to her and to her pregnancy, and that was the reason why she had left the matrimonial home. She said that the respondent wanted unnatural sex which had caused her trauma and severe stress leading to postpartum depression. She had been treated with



contempt and abuse. She asked that access to the child be allowed to the respondent but after he had sought psychiatric help.

4. The Kadhi's Court granted the respondent access to the minor, at the home of the applicant, at least once every week. Parties failed to agree on the modalities of access. The applicant was fearful of the Covid-19 pandemic, and refused to grant access to the minor as the respondent had wanted to visit with his family members.
5. On August 17, 2021 the respondent filed a notice to show cause why execution by way of committal to civil jail should not issue for the applicant's failure to allow him access. The court heard the notice to show cause and on November 12, 2021 delivered a ruling finding that the applicant was in contempt of the order to grant the respondent access to the child. The contempt was under rule 120 of the *Kadhi's Court Rules*. The court fined her Kshs.20,000/= to be paid within 24 hours or she serves jail term for 3 months. The applicant was aggrieved by the ruling and filed an appeal to this court seeking that the orders be quashed and set aside. The appeal was dated December 14, 2021 and its grounds were as follows:-

- “ 1) That the Learned Magistrate erred both in law and in fact by hearing and determining the case since the court had no jurisdiction over children matters;
2. That the Learned Magistrate erred in law and in fact by not considering the best interests of the child as priority and as such by not heeding to the appellant's issues raised in her testimony and failing to consider facts raised by the appellant;
3. That the Learned Magistrate erred in law and in fact in failing to consider the evidence presented by the appellant in support of her case;
4. That the Learned Magistrate erred in law and in fact in failing to consider that the respondent herein is a violent person and therefore not capable of giving the child maximum care and attention;
5. That the Learned Magistrate erred in law by issuing contempt orders relying on bad law which was declared unconstitutional;
6. That the Learned Magistrate erred in law and in fact as he misdirected himself in his interpretation of the law and thus arriving at a wrong, erroneous and unjust conclusion and hence illegal orders;
7. That the decision in its entirety is against the law, best interests of the child and is travesty of justice;
8. That the entire decision is both contrary to law and a misapprehension of the law.”

6. The applicant then filed the present application dated December 14, 2021. It was poorly crafted but essentially sought the stay of the execution of the orders the ruling pending the hearing and determination of the appeal. She thought that she had a good appeal, and that being jailed would not be in the best interest of the child. One of the grounds in the appeal was that the Kadhi's Court had no jurisdiction to hear the dispute regarding the child or grant the above orders; that the dispute belonged to the Children Court under the *Children Act*.



7. The application was opposed by the respondent who maintained that the Kadhi's Court was right in punishing the applicant who had gone against the order to allow him to access the child. He deponed that her actions were callous, deliberate and in bad faith, and that she was not deserving of the orders sought in the application. It was his case that the best interest of the child dictated that it is accessed by the father.
8. Counsel for the applicant and counsel for the respondent filed written submissions on the application. I have read and considered what each counsel had to say.
9. Usually, an application for the stay of execution of decree or order pending the hearing and determination of the appeal is brought under Order 42 rule 6(2) of the *Civil Procedure Rules*. Under the provision, the applicant has to show that he will suffer substantial loss if stay is not granted and the appeal ultimately succeeds. The applicant has to offer such security for the due performance of the decree or order that may ultimately be binding. He has to show that the application was brought without undue delay. No security was offered, but there is no claim that the application was brought late.
10. The court will be mindful that, this is a dispute over a child. Under article 53(2) of the *Constitution* and section 4(2) of the *Children Act* its best interests should be the paramount consideration.
11. Both counsel spent considerable amount of time in their submissions on the question whether it is the Kadhi's Court or the Children Court that has jurisdiction to deal with the question of whether or not the respondent should be allowed access to the child. The question regarding the jurisdiction of the Kadhi's Court was raised in the grounds of appeal. It is a question that the court will finally address when dealing with the appeal.
12. The question whether or not a person who has been found to be in contempt of a court order can benefit from stay pending appeal was raised in this application. The principle is that a court order has to be obeyed once issued. It does not matter that the contemnor thinks that it was illegal or void, or was issued without jurisdiction. Until it is reviewed and/or set aside, it has to be obeyed (*Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning & 3 others* [2017]eKLR).
13. The question that this application has to deal with is, what happens before the appeal has been heard and determined. This is because, over and above the question of jurisdiction, the applicant complained that the Kadhi's Court had not considered her evidence before reaching the decision that she was in contempt, and that the court had misconducted itself on the interpretation of the law regarding contempt of court order and consequently arrived at a decision that was erroneous, unjust and illegal. If the punishment is allowed to be executed, with the prospect of the applicant going to jail, I determine that substantial loss will have been occasioned to her. She may go to jail with the child, or leave it behind. Either way, I find, that would not be in the best interests of the child.
14. Consequently, I allow the application and stay the execution of the orders contained in the ruling delivered on November 12, 2021 by the Kadhi's Court until the appeal is heard and determined.
15. Given the nature of the dispute, costs shall await the appeal.

**DATED and DELIVERED at NAIROBI this 28<sup>TH</sup> day of JULY 2022.**

**A.O. MUCHELULE**

**JUDGE**

