



REPUBLIC OF KENYA



ASK v MSN (Civil Appeal 19 of 2021) [2022] KEHC 14909 (KLR) (21 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14909 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 19 OF 2021
JN ONYIEGO, J
OCTOBER 21, 2022**

BETWEEN

ASK APPELLANT

AND

MSN RESPONDENT

(Being an appeal from the whole of the judgement of the Hon. Juma Ali Abdalla Senior Principal Kadhi delivered on the 23rd June, 2021 in Mombasa Kadhi's Court Civil Suit No.227 Of 2019 Mohamed Salim Ndaro-v-aziza Sera Kadzo)

JUDGMENT

1. Before this court is an appeal arising from the judgment of the Senior Principal Kadhi delivered on June 23, 2021 in Mombasa Kadhi's Civil Case No.227 of 2019 in which the respondent herein through a plaint filed on October 23, 2019 sought orders against the appellant for vacant possession of the house in Kisauni and custody of the children born out of their Marriage.
2. The claim was based on grounds that the suit property (house) which has no registration description number was acquired by the respondent long before they got married. That having officially divorced on March 28, 2008, the appellant had no business staying in his house hence the prayer for orders for the appellant to vacate from the premises.
3. In response, the appellant filed a memorandum of appearance on November 8, 2019 and a preliminary objection dated November 15, 2019 challenging the jurisdiction of the kadhi's court in entertaining a claim touching on matrimonial property which is a preserve of the high court.
4. After canvassing the preliminary objection, the hon. Kadhi delivered his ruling on March 18, 2021 thus dismissing the same on grounds that under section 3 of the Matrimonial property Act, the Kadhi's court has jurisdiction to determine disputes touching on matrimonial property where both parties profess Islamic religion.



5. Subsequently, the court directed the appellant to file her defence within 14 days which direction was not complied with. The matter then proceeded without the appellant filing any defence. However, having entered appearance, she was allowed to cross examine the respondent and for unexplained reasons, the court allowed her to give her defence against which she was cross examined thus admitting that the property was acquired by the respondent before coverture.
6. Consequently, judgment was delivered on June 23, 2021 in favour of the respondent after finding that the property in question was acquired long before the parties contracted their Marriage and that there was no proof of any contribution or improvement done on the building during the subsistence of the marriage. Accordingly, the court ordered the appellant herein to give the respondent vacant possession of the house within 30 days from the day of judgement. Regarding custody of the children, all parties were in consensus that the children had already attained the age of majority hence not subject to anybody's custody.
7. Dissatisfied by the judgement of the Kadhi, the appellant filed a memorandum of appeal dated July 5, 2021 seeking orders that; the entire judgement be set aside; a declaration that the house at [particulars Withheld] is joint matrimonial property; a declaration that the Kadhi's court had no jurisdiction in hearing and determining Civil Suit No.227 Of 2019 and; costs of the appeal.
8. The appeal is based on the following grounds;
 - a. The learned Kadhi erred in fact and in law in proceeding with a civil suit that is outside his jurisdiction.
 - b. The learned Kadhi erred in fact and in law in proceeding with full hearing of the suit despite the fact that the defence was not on record which is a total disregard of the applicable law.
 - c. The learned Kadhi erred in law and in fact in finding that the appellant did not contribute in acquiring the house at [particulars Withheld] Mombasa and that the house remains sole property of the plaintiff.
 - d. The learned Kadhi erred in law and in fact in ordering the appellant to give the respondent vacant possession of the house within 30 days whereas kadhi's court has no jurisdiction over issues pertaining to eviction or dispute of properties.
9. Parties canvassed the appeal by way of written submissions.
10. The appellant through her advocate J.K Mwarandu & Company Advocates filed written submissions dated April 26, 2022 thus submitting on four grounds. Firstly, learned counsel submitted that kadhi's courts exercise jurisdiction only on matters relating to succession and divorce in accordance with Islamic law. That the court has no jurisdiction over civil cases involving eviction.
11. Secondly, it was counsel's position that the appellant was locked out of her constitutional right to be heard as she was denied an opportunity to tender her defence. Thirdly, counsel submitted that the subject of the suit was not a bout subdivision of property and if it was, it should have been within the divorce proceedings and not a civil suit seeking eviction.
12. Fourthly, the court was urged to find that the hon. Kadhi did exercise his discretion wrongly in ordering the appellant to give the respondent vacant possession of the house within 30 days whereas he didn't have jurisdiction on the same.
13. On the other hand, the respondent through his advocate Barayan & Associates filed his written submissions dated May 24, 2022. Regarding the question of lack of jurisdiction, it was argued that the



Kadhi's court was properly seized of jurisdiction pursuant to section 3 of the Matrimonial Property Act and article 170(5) of the Constitution. To buttress the position that jurisdiction is a creature of the Constitution or statute, the court was referred to the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR where the Supreme Court stated that a court's jurisdiction is from either the Constitution or legislation or both.

14. The Kadhi did state that he had jurisdiction donated by Section 3 of the Matrimonial Property Act 2013; Counsel further submitted that the parties herein were married under Islamic sharia law and later divorced in 2008. That both parties professed Islamic faith during the subsistence of their marriage and in the circumstances the kadhi's court has the jurisdiction to hear and determine matters of matrimonial property.
15. On the allegation that the appellant was denied the right to defend herself, counsel submitted that the appellant was duly represented by the firm of Oluoch Karori when she was given an opportunity to be heard by filing her defence but she chose not to. That she was accorded an opportunity to cross examine the respondent and tender her defence hence she was not completely locked out as alleged.
16. Concerning the question whether the house in question constitutes matrimonial property, counsel submitted that it was the appellant's evidence that the suit house was in existence even before her marriage hence cannot be classified as constituting matrimonial property for division pursuant to section 7 of the matrimonial Property Act.
17. Counsel relied on section 7 of the matrimonial property act which provides;

“Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”
18. Regarding the claim that the appellant did contribute towards renovation of the house, counsel opined that there was no proof of such renovation hence the honourable court properly exercised its jurisdiction to enter judgment in favour of the respondent.
19. I have considered the record of appeal, grounds of appeal and the rival submissions by counsel for both parties. Issues that emerge for determination are;
 - a. Whether the Kadhi had jurisdiction to hear and determine Civil Case No.227of 2019
 - b. Whether the suit property is a matrimonial property.
 - c. Whether the appellant was given the right to be heard.
20. This is a first appeal. As the first appellate court, I am duty bound to re-evaluate, re-consider, re-assess and make an independent determination without losing sight of the fact that the trial court had the opportunity to listen to and see the witnesses testify to be able to assess their general demeanour. See Mbogo v Shah (1968)EA93
21. The issue of jurisdiction has been at the centre stage of these proceedings both before the lower court and now this court. It is trite that jurisdiction is everything and without it a court cannot move any further step hence must down its tools. See Owners of Motor Vessel "LillianS" v Caltex Oil (Kenya) LTD (1989) eKLR...Equally, it has been held in several authorities that jurisdiction is a creature of the constitution or statute hence a court cannot arrogate itself jurisdiction where there is none. See the case



of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* (supra) where the court held;

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

22. There is no doubt the Kadhi’s Court derives its jurisdiction from article 170 (5) of the Constitution and section 5 of the Kadhis’ Court Act which provide:

Article 170(5)

- (5) 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.

Section 5

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.

23. In this case, the matter before the Kadhi was in respect to custody of the children of the marriage which was not dealt with due to the fact that the children were of the age of majority and vacant possession of the house in [particulars Withheld], Mombasa. The remaining issue for determination before the Kadhi being the issue of vacant possession, the Kadhi in his judgement delivered on June 23, 2021, directed the appellant to give the respondent vacant possession within 30 days from the date of the judgement.
24. The Kadhi relied on section 3 of the matrimonial property Act to assume jurisdiction. That issue of jurisdiction was raised via preliminary objection dated November 15, 2019 whereby in determining the same the Kadhi in his ruling delivered on March 18, 2021 stated that,

“According to the court record, both parties are Muslims. The jurisdiction of this court to entertain prayer no.1 emanates from section 3 of the Matrimonial Property Act.”

25. My understanding of the dispute between the parties was whether the suit property was a matrimonial property or not and whether the appellant made contribution towards acquisition or improvement of the same. Although not clearly stated and specifically prayed for in the prayers section, the body of the plaint and testimony of both parties is clear on the subject being division of what the appellant refers to as matrimonial property.
26. The Kadhi relied on section 3 of the Matrimonial Property Act which provides;
- “A person who professes the Islamic faith may be governed by Islamic law in all matters relating to matrimonial property.”
27. Pursuant to section 3 of the Matrimonial Property Act, it’s my finding that the hon. Kadhi had jurisdiction to hear and determine Civil Case No.227 of 2019.
28. On whether the suit property was matrimonial property, I seek refuge in the definition under section 6 of the Matrimonial Property Act which provides;



1. For the purposes of this Act, matrimonial property means—
 - a. the matrimonial home or homes;
 - b. household goods and effects in the matrimonial home or homes; or
 - c. any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
 2. Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.
 3. Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.
 4. A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.
29. The respondent (the plaintiff then) herein in his evidence before the Kadhi told the court that he built the house in dispute way before marrying the defendant thus it cannot be referred to as matrimonial property for the defendant to demand a share of it. He urged the court to order the appellant herein to move out of the house since they were divorced.
30. On the other hand, the appellant (the defendant then) in her evidence admitted that the house was built before she got married and that she only contributed towards renovating the house.
31. Section 9 of the *Matrimonial Property Act* does give guidance on property acquired before marriage as follows;
- “Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.”
32. Unfortunately, as per the record, none of the parties produced any documentary evidence to support their claim. In dealing with same issue the Kadhi in his judgement of June 23, 2021 stated as follows;
- “In the instant case, it is agreed that the house was built by the plaintiff before marrying the defendant. The defendant’s argument that she renovated the house at some point is not supported by any evidence. She did not produce any evidence in court to support her claim.”
33. In consideration of the above analysis, it’s my view that there is no evidence to show that the suit property was a matrimonial property and that the appellant contributed towards its acquisition or improvement. Thus, the said property cannot be said to be matrimonial property.
34. On whether the appellant was given the right to be heard, it’s her argument that she was locked out of her constitutional right when the court proceeded with the full hearing of the suit despite the fact that her defence was not on record.
35. From the court record, it is evident that the appellant filed a Memorandum of Appearance under protest dated November 7, 2019 through the firm of Oluoch Kimori Advocates. She later filed a preliminary objection dated November 15, 2019 on the November 19, 2019. On March 18, 2021 the



appellant was given 14 days to file defence which she did not. When the matter came up for hearing the defendant was given a chance to ventilate her case before court through her viva voce evidence.

36. Regarding the issue of fair hearing, the court in the case of *JMK v MWM & another* [2015] eKLR state that;

“The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made. In *Onyango v Attorney General* (1986-1989) EA 456, Nyarangi, JA asserted at page 459:

“I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly.”

At page 460 the learned judge added:

“A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.”

And in *Mbaki & others v Macharia & another* (2005) 2 EA 206, at page 210, this court stated as follows:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

37. Accordingly, it’s my finding that the appellant was granted her right to be heard and defend the suit.
38. Concerning the appellant’s contention that the issue of division of matrimonial property ought to have been deliberated during the divorce proceedings, the same is not the correct position of the law. Courts have held time and again held that division of matrimonial property can only be done after parties have divorced. See *PWM v EM* (2014) e KLR where the court held that division of matrimonial property cannot be done before divorce.
39. Although the actual description of the property is rather vague as no registration number of the property was cited, parties are in agreement on the subject disputed property. The omission perhaps can be excused as the respondent had filed the suit in person. Nevertheless, it is clear that the property being claimed was acquired before coverture hence cannot be classified as matrimonial property. The allegation of contribution in terms of renovation, the same is far-fetched hence unsubstantiated. It is common logic that he who alleges must prove. In this case, I do agree with the hon. kadhi that there was no proof of contribution in terms of renovation.
40. Concerning the issue whether the Kadhi had powers to order eviction, the order was the Natural course of events hence not necessary to file a separate suit to execute orders made in this suit. The respondent could not be left to occupy somebody’s house without authority especially after being declared a stranger in the property following their divorce.
41. The upshot of the above holding is that this appeal lacks merit and it’s hereby dismissed. This being a family related issue, I will order each party to bear own costs.

DATED, SIGNED AND DELIVERED IN MOMBASA THIS 21ST DAY OF OCTOBER, 2022

.....



J.N.ONYIEGO
JUDGE

