



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 37 OF 2020

MNO.....APPELLANT

VERSUS

SJM.....RESPONDENT

(Being an appeal from the Judgment of Hon. Kadhi Salim S. Mohamed

given on the 14th November, 2019 in the Kadhi's Court at Malindi,

Kadhi's Case No. 39 of 2019)

Coram: Hon. Justice R. Nyakundi

A. I. Hayanga advocate for the appellant

Abdulatif Abdallah About advocate for the respondent

J U D G M E N T

This is a first appeal against the decision of the Kadhi's Court granting the following orders:

- (a). The custody of the children of the marriage is given to the plaintiff.*
- (b). The defendant is committed to pay one third of his salary or Kshs.13,000 per month whichever is more.*
- (c). The defendant is committed to meet school fees, medical bills and other needs of the children of the marriage.*

The background of the case regarding the claim arose before the Kadhis Court in Divorce No. 39 of 2019

In that trial, the petitioner J had sued N for divorce which apparently was granted minus her rights as stipulated under Islamic Law and religious codes. Part of the rights which the petitioner invoked before the Kadhis Court included maintenance of the minor children and her personal maintenance. It was on that premise the aforementioned orders were granted by the Kadhis Court.

The respondent being aggrieved with the Judgment preferred an appeal to this Court on the following grounds:

- 1. That the Honorable Kadhi erred in law in acting without jurisdiction in deciding upon custody and maintenance of minors.*
- 2. That the Honorable Kadhi erred in law and in fact in failing to take into consideration the appellant's financial position as opposed to the financial obligation that was placed upon him, and in considering irrelevant matters without proof, which led to a miscarriage of justice.*
- 3. That the Honorable Kadhi erred in law and in fact in rejecting the appellant's evidence without legal reason and authority.*
- 4. That the Honorable Kadhi erred in law in excluding imperative evidence tendered in Court contrary to the procedural requirement set in Kadhi's Court Act Cap 11, Laws of Kenya, requiring facts in issue to be determined by all evidenc before him*

in its entirety, thus causing a miscarriage of justice.

The appeal was agreed to be disposed of by way of written submissions which also incorporated the litigation history of the issues culminating in the instant appeal. Having distilled the impugned Judgment and the appeal before me, the fundamental issue which arise on this whole concerns by the appellant, may therefore be summarized as follows:

(1). Whether the Kadhis Court had the jurisdiction to hear and to grant orders on custody and maintenance of children of the marriage.

(2). Whether the Kadhi's Court was the appropriate forum in which to determine the welfare and best interest of the children of the marriage.

Determination

This Court as a first appeal sitting with the assistance of the Chief Kadhi has the duty to reconsider and re-evaluate the evidence adduced and come to its own conclusions. However, we are also to bear in mind that we did not see or hear the witnesses. That is the position in Law as stated in the case of **Mwangi v R {2004} 2 KLR 28**. In the realm of pure fact, the advantage which the trial Court derives from seeing and hearing the witnesses must always be respected by an appellate Court.

Thus, the limitations upon an appellate Court's ability to review the findings of fact are severe and well established as stated in **Ephantus Mwangi v Duncan Mwangi Civil Appeal No. 77 of 1982, Bundi Maribe v Joseph Mkoba CA No. 8 of 1983**:

"That a Court on appeal will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."

In this appeal apart from the evidence and facts, the primary grievance by the appellant falls within the scope of jurisdiction. Accordingly, this Court as premised on the two issues revolve around jurisdictional of the Kadhis Court. First, the appellant's place reliance on the Constitution, which establishes the Court, the Kadhis Court Act which confers jurisdiction on the Court. In addition, there is also the Childrens Act to the extent that any of its provisions are expressly incorporated to hear and determine the welfare and best interest of the children. It can safely be stated that unlike all other branches of Law, Islamic Law is a source of Law which is peculiar and special and is commonly presided over by a Kadhi. In ordinary way the Kadhis Court is a subordinate Court and as such is a creature of Article 169 of the Constitution. ***"It is expressly prescribed that 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 Kadhis Court."*** It is accepted that the Court can only exercise power and jurisdiction which is given by the Constitution and enabling statute. This Court was established with the objective to ensure justice between litigants involved do profess and adhere to Islamic Law.

The second objective is to ensure public confidence in the administration of justice not only remedying wrongs that arise between parties who profess Islamic religion and submit themselves to Muslim Law, but also clarify and develop the Law. In that branch of Law there can , of course be an appeal to the High Court from decisions of the Kadhis Court. There can be no doubt that a Court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction.

In answer to the issues raised in this appeal, there is no lacunae in the Law for the Court to exercise jurisdiction outside the bounds of the Constitution or statute. Clarity is to be found in the cases of **Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 others {2012} eKLR** in which the Court held interalia:

"A Courts jurisdiction finds 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 unpaid by Law..... jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matters, for without jurisdiction the Court cannot entertain any proceedings"

Therefore, by this dicta if any order is passed without jurisdiction, it becomes a nullity and not enforceable by Law. In one way, jurisdiction describes, the outer limits of an institution's reach. In another sense, jurisdiction describes the allocation of adjudicatory competences of a Court to hear and determine disputes between parties. Unlike the Magistrates Court, the jurisdiction exercised by Kadhis Court is narrower. Those rules and principles that determine the circumstances under which a Kadhis Court is entitled to adjudicate and render a substantive Judgment with regard to Muslim Law are to be found in the Kadhis Court Act.

The issue whether the Kadhis Court has adjudicatory jurisdiction over children matters becomes relevant at two different stages in our system of Courts. The first stage concerns the proceedings before the Court that renders the decision, hereinafter called the session Court. The session Court will not hear a case, much less render a decision, unless first it determines that it has the jurisdiction.

The second stage concerns personal and subject matter jurisdiction to adjudicate and enforce the rendered decision. These levels facilitate a structured jurisdictional regime based on the Constitution and Statute Law. Its crystal clear that a higher Law being the Constitution limits jurisdiction for the Kadhis Court to hear and determine children matters on welfare and their best interest. Parliament has laid down mostly strict rules on jurisdiction of Court in so called legislative regime of in a number of statutes of regulation on jurisdiction of Courts and enforcement of Judgments. Functionally, the most important discretionary basis for a Court to decline jurisdiction is the doctrine of forum non conveniens: on this doctrine, it would be appropriate for a Court to decline to exercise jurisdiction when the forum is inappropriate and an alternative forum in another Court is clearly better settled to adjudicate over the claim.

In the instant appeal, the paradigm is not on a forum of conveniens but the jurisdiction on children disputes on custody, maintenance, protection, welfare and best interest are determined by the children Courts. The question is whether the dispute on custody and maintenance brought to the Kadhis Court lies within that forum or outside other state's legal organ.

In reply, the Constitution and Kadhis Court Act remain crystal clear that the appropriateness of jurisdiction issues on children remain vested in the Children Court. There is no philosophical jurisdiction in a Kadhis Court dealing with such claims, either by invoking consent, proximity, convenience or any other extra ordinary circumstances. Viewed as such, the appeal succeeds for the Kadhis Court exercised jurisdiction it did not have or acquired by the Constitution or enabling statute which put in place the extent and limits of their jurisdiction. I agree with the appellant counsel that the assessment of damages or any other orders in relation with the welfare and best interest of the minors of the marriage emanates from an erroneous jurisdiction. The relevant factors taken into account on such matters ought not to have been considered by the Kadhis Court for want of jurisdiction.

Therefore, this appeal must be allowed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 24TH DAY OF DECEMBER, 2021

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R. NYAKUNDI

JUDGE