



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

MISCELLANEOUS CIVIL APPLICATION NO. 31 OF 2020

AMA.....APPLICANT

VERSUS

YWJ.....1ST RESPONDENT

THE KADHI'S COURT AT KAKAMEGA.....2ND RESPONDENT

JUDGMENT

1. The proceedings herein were commenced by way of a Notice of Motion, dated 2nd July 2020, by the applicant herein, Amina Muchele Alphan, premised on Article 165(6) of the Constitution, and sections 3, 4, 6, 7 and 8 of the Fair Administrative Action Act, 2015. The court is invited to revise the ruling or judgment of the Kadhi in Kakamega Kadhi's Court Miscellaneous Application Cause No. 1 of 2019, and for the vacating of an order that was made in there granting Bazazi Ismael and Fadhya Anyiri to the 1st respondent, Yahya Were Juma. The grounds upon which the orders are sought are set out on the face of the application, as well as in the affidavit that the applicant shows in support. There are two grounds, namely: that the Kadhi's court had no jurisdiction over the matter, and that the order to hand over the children to the 1st respondent was contrary to the wishes of the children.

2. Upon being served, the 1st respondent filed an affidavit in reply, which he had sworn on 4th August 2020. He avers, in the affidavit, that the orders the court made were based on consent orders, which embodied an agreement on custody of children. He states that the Kadhi merely adopted the divorce settlement agreement. He has attached to his affidavit copies of the divorce settlement agreement, dated 7th May 2018. He opines that the the applicant ought to have lodged an appeal against the orders of the Kadhi.

3. The matter was to be argued orally on 30th September 2020, a date that I fixed in open court on 28th July 2020, in the presence of the advocate for the applicant, Mr. Momanyi, and the 1st respondent. Come 30th September 2020, only the 1st respondent was in court. He informed me that he wished that the decision of the Kadhi stood.

4. When, on 30th September 2020, I reserved the matter for ruling on 30th October 2020, I directed that the Deputy Registrar calls for the file in the matter that was before the Kadhi. I see that a letter to that effect was written on 30th September 2020, addressed to the Chief Magistrate, calling for those records. To date the records have not been availed, and I am forced to determine this matter without the benefit of the original records from that court. It would have been useful to have sight of the pleadings that were the foundation of the case before the Kadhi. I shall however, have to content myself with the typed proceedings, minus the pleadings.

5. I see from the record of 4th February 2019 that the Kadhi held a pre-trial conference. A consent agreement on divorce was placed before the court. After hearing the parties and the advocate for the applicant, the court confirmed the settlement on divorce, and directed the parties to file pleadings on the matter of the custody of the children, since the issue was still contentious.

6. Since I do not have the original record before me, I cannot tell whether any plaint was ever filed at the Kadhi's court, but the court did conduct a formal oral hearing on 27th February 2019. Both the applicant and the 1st respondent testified and were cross-examined, and they called witnesses, who were also cross-examined. The Kadhi also had audience with the children. Thereafter, the matter was reserved for judgment. A copy of the judgment was not placed in the record before me, and, therefore, I have no idea what the Kadhi decided, and the reasons that were given for so deciding. Nevertheless, even without the judgment being placed before me, I believe it is still possible for me to decide the matter based on the typed proceedings, since the issue before me is the straightforward question as to whether the Kadhi had jurisdiction to handle the matter of custody of children.

7. Jurisdiction is a critical matter in administration of justice. The Court of Appeal, in *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd* [1989] eKLR, declared that jurisdiction is at the heart of any dispute, and the court before which a dispute is placed can only

proceed if it has the requisite jurisdiction, properly conferred upon it by the Constitution or statute, and where the court does not have it, then it ought to down its tools. For avoidance of doubt the Court of Appeal stated:

“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. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

8. The jurisdiction of the Kadhi’s is set out in Article 170(5) of the Constitution and section 5 of the Kadhis’ Act, Cap 11, Laws of Kenya.

9. The provision in Article 170(5) of the Constitution states that:

“170. (1) ...

(2) ...

(3) ...

(4) ...

(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.”

10. Section 5 of the Kadhi’s Act reads:

“The 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.”

11. A proper reading of the two provisions reveals that the jurisdiction conferred on the Kadhi’s court is very limited, and it does not cover children’s issues, such as custody and maintenance. That would then suggest that the Kadhi’s court has no jurisdiction over children’s matters, or, put differently, the jurisdiction conferred on the said court by the Constitution, and the legislation governing it, does not include matters touching on children.

12. The legislation enacted to govern matters around children is the Children Act, which commenced on 1st March 2002. The scope of that legislation is set out in the preamble, which says as follows:

“An Act of Parliament to make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children, to make provision for the administration of children’s institutions, to give effect to the principles in the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and connected purposes.”

13. For the purpose of operationalization of its provisions, the legislation establishes the Children’s Court and confers upon it jurisdiction with respect to some of the matters provided for under it. The Children’s Court is provided for under Part VI of the Children Act. The relevant provision is section 73 of the Act, which reads as follows:

“Jurisdiction of Children’s Courts

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 XII;

(b) ...

(c) ...

(d) ...”

14. Parts III, V, VII, VIII, IX, X, XI and XII cover parental responsibility, children’s institutions, custody and maintenance, guardianship, judicial orders for the protection of children, children in need of care and protection, foster care and protection, and child offenders.

15. The Children Act should apply to children from all backgrounds, cultures and creeds. The court that that legislation has created and conferred with jurisdiction over children’s matters is the Children’s Court. That is the primary court so far as those issues are concerned. Since the jurisdiction of the Kadhi’s court does not extend to matters touching on children, it would follow that any disputes around children of persons who profess the Muslim faith should be placed before the Children’s Court for disposal in accordance with the Children Act. I

have scrupulously pored through the provisions of the Children Act, and I have not seen any provision which treats the Kadhi's court as a Children's Court for the purpose of the Children Act, or which confers upon the Kadhi's court jurisdiction to exercise the powers that are exercisable by the Children's Court

16. It does not matter that an issue touching on children arises from the areas that fall within the jurisdiction of the Kadhi's court, such as marriage, divorce or inheritance. Anything to do with custody or maintenance of children cannot be addressed by the Kadhi within the context of the matters that fall within its jurisdiction. Once an issue arises in such cases which turn on custody or maintenance of children, the Kadhi should down his tools and refer the parties, with respect to that limited issue of custody or maintenance of children, to the court with jurisdiction.

17. From the typed proceedings, it is clear that the proceedings that the Kadhi conducted on 4th February 2019, 27th February 2019, 4th March 2019, 18th March 2019 and 25th April 2019, turned purely on the matter of custody of the children of the marriage between the two parties. The court even interviewed the children to get their views to assist it make a decision on their custody. Clearly, the Kadhi, by conducting a trial on matters relating to custody of children, was exercising a jurisdiction that he did not have, for neither the Constitution nor the Kadhis' Courts Act, nor any other statute, conferred jurisdiction on him over such matters. He was exercising powers that he did not have, and, therefore, the said proceedings were a nullity.

18. The 1st respondent, in his replying affidavit, averred that the parties had consented to the matter of custody of children, and it was on that basis that the trial court dealt with it. If I understood the 1st respondent well, he appeared to say that the issue of custody was placed before the Kadhi through the said consent, and that all what the Kadhi did was to adopt the consent. Jurisdiction is conferred upon a court by the Constitution or legislation or both. A court cannot confer jurisdiction on itself, neither can it be conferred by consent of the parties. If jurisdiction has not been conferred by the Constitution or legislation, then there would be no jurisdiction whatsoever for the court to exercise. A jurisdiction exercised without conferment by the Constitution or statute or both, amounts to usurpation of power, and it is an abuse of power by the court concerned.

19. From the material before me, and the discussion in this judgment so far, it is clear, that the Kadhi had no jurisdiction, derived either from the Constitution, the Kadhi's Court Act, the Children Act or any other piece of legislation to preside over a dispute relating to custody of children. That jurisdiction could not be conferred on the Kadhi by the parties, whether by consent or by the mere fact of testifying on matters relating to children or by merely raising issues about the children. The Kadhi simply had no jurisdiction whatsoever over the matter. He should not have entertained the matter of custody of the children, nor made any orders on the subject. He should have, instead, referred the parties to the Children's Court. The orders made in respect of the children were made in excess or in usurpation of jurisdiction.

20. Jurisdiction is a constitutional issue, for jurisdiction of courts of law flow from the Constitution. It would amount to a violation of the Constitution for a court to purport to exercise a power or jurisdiction that the Constitution has not reserved for it. Such exercise of power would be unconstitutional.

21. I find merit in the Motion dated 2nd July 2020, and I do hereby allow it in its entirety. The proceedings that the Kadhi conducted in Kakamega Kadhi's Court Miscellaneous Application Cause No. 1 of 2019 are hereby declared a nullity, for they were conducted by a court without jurisdiction. Any orders made by the Kadhi in those proceedings, relating to children, are accordingly hereby quashed. Let the parties place the matter of custody of their children before the court with jurisdiction, that is to say the Children's Court at Kakamega.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 30th DAY OF October 2020

W. MUSYOKA

JUDGE