REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY CIVIL APPEAL NO. 18 OF 2017

(An appeal from the ruling and orders of Hon. Mohamed S. Mwambele, Kadhi, in Mombasa

KCCC No. 179 of 2016, of 17th February 2017)

GMD alias SMD.....APPELLANT

VERSUS

SAM.....RESPONDENT

(Before Hon. Justice Musyoka and Hon. Sheikh Almuhdhar AS Hussein, Chief Kadhi (as assessor))

JUDGMENT

1. The suit at the primary court was initiated by the appellant herein, on 29th August 2016, against the respondent, seeking, principally, dissolution of marriage, *edda* maintenance and past maintenance till dissolution is officially done, payment of dowry, and release of itemised personal belongings. The respondent filed a defence. He denied the allegations made against him in the plaint, and asked for the dismissal of the suit, blaming the appellant for all the misunderstandings that led up to him giving her *talak* on 1st June 2016. He denied detaining her personal items or belongings, and her entitlement to *edda* maintenance since she had converted to Christianity. He expressed his readiness and willingness to pay her dowry.

2. The matter was canvassed by way of oral evidence, with both sides giving making oral statements, with opportunity for cross-examination. Eventually a judgment was delivered on 17th November 2016. The Kadhi held that the marriage had been dissolved on 1st June 2016, and merely confirmed the said dissolution with effect from that date. The court also held that the appellant was entitled to *edda* maintenance, which it limited to three months, at the rate of Kshs. 10, 000.00 per month. On past maintenance, it was held that she was not entitled to the same, since she had left the matrimonial home, and it was *haraam* for a wife to leave the matrimonial home without the consent of her husband. On payment of dowry, the respondent was ordered to pay *hiba* to the appellant in instalments, excluding the alcohol. On custody of the children of the marriage, the court granted the same to the appellant, on condition that the children attended *madrassa* and did not go to church, with unlimited but reasonable access to the respondent.

3. The appeal before me does not arise from the judgment, but from a ruling that the Kadhi delivered on 17th February 2017, on a review application, dated 22nd November 2016, brought at the instance of the respondent. He had wanted the court to review the custody order, with respect to two of the children, FSA and SSA, by reverting it to him, with unlimited but reasonable access to the appellant. In the alternative, he prayed that the two children be allowed to choose for themselves between the two parents who they wished to live with. He also sought an order that he pays Kshs. 1,000.00 per month, instead of the Kshs. 2, 000.00, to cater for the maintenance of the third child, ASA. The application was allowed, with the result that custody of the two older children was reverted to the respondent with access rights to the appellant. That was done after the trial court had an audience with the children, who expressed that they preferred to be with the respondent. According to the court, the position taken by the children amounted to discovery of new evidence, and the same could also be treated as a sufficient reason for review. The monthly maintenance payable by the respondent for the third child was also revised downwards to Kshs. 1, 000.00 per month.

4. The appellant was aggrieved by the orders made in the ruling of 17th February 2017, hence the instant appeal, vide the memorandum of appeal, dated 18th May 2017. She raises several grounds, as follows, at least from my understanding of them, for they are crafted in a manner that is rather longwinded: that the trial court failed to establish the root cause of the conflict and made the suit contradictory over the children custody issue, the trial court failed to give reasons for its order in the judgment since the matter had already been handled by through proper procedures as per provincial laws, the trial court only reviewed the custody issue instead of the entire judgment, the trial court awarded an amount of child maintenance that was tiny and uneconomical, and the trial court reviewed the custody order in the judgment without taking into account the default clause. He seeks that the judgment of the trial court be set aside and substituted with an order for dismissal.

5. For the purpose of completeness of the record, let me state that there have been a number of applications made in this appeal cause, and a

number of orders have been made. For instance, on 26th January 2018, leave was granted for the appellant to file her record of appeal out of time and for the police to facilitate her access to the respondent's house to collect her personal belongings. Other orders had been made on 17th January 2018 and 23rd January 2018, with respect to the respondent having access to the third child, and on 21st June 2018, with respect to the appellant having access to the two older children. Further orders were made on 31st May 2017, directing that the orders of the trial court of 17th February 2017, be complied with, and that the appellant had been granted leave to file appeal out of time since she had lodged her memorandum of appeal out of time and without leave of court.

6. Directions were taken on 15th July 2020, for disposal of the appeal by way of written submissions. The record before me reflects that the appellant and the respondent have complied for they both have filed written submissions. The appellant's final submissions are dated 4th August 2020, and were filed on even date; while the respondent's final written submissions are dated 12th August 2020 and were filed on even date.

7. In her written submissions, the appellant argued three grounds. The first revolves around jurisdiction of the trial court with respect to child custody and maintenance, and cites Article 170(5) of the Constitution, to argue that the trial court had no jurisdiction to delve into those issues. The second ground is on the amount of child maintenance awarded with respect to the third child, that it was too low and, therefore, inadequate. The final ground is that the review application did not satisfy the requirements of Order 45 rule 1 of the Civil Procedure Rules, although the same was filed timeously, as there was no discovery of new evidence, to warrant review, for the ground relied on to review the order on custody was her conversion to Christianity when in fact that issue was before the trial court during the hearing and was considered in the judgment. The trial court was, therefore, said to have erred in allowing review on the basis of discovery of new evidence. In any event, it is further submitted, that the order on custody was conditional, and in the evident of default, the respondent should have moved the court for execution rather than review.

8. In his written submissions, the respondent addresses the three grounds argued by the appellant in her written submissions. On jurisdiction, he concedes that the trial court did not have jurisdiction over child custody and maintenance, going by the provisions of Article 170(5) of the Constitution and section 5 of the Kadhis' Court, Cap 11, Laws of kenya, but the court did not determine the issues around that, for it merely adopted a consent between the parties. He also points to Article 53(2) of the Constitution and sections 4(3)(4), 6(1), 24(1) and 83 of the Children Act, Cap 141, Laws of kenya, on the paramountcy of the best interests of children. On maintenance, the respondent talks of a consent that the parties had reached on maintenance, and submits that the review orders of 17th February 2017 merely sought to equalise the shared parental responsibility, and was, therefore, not unjust or burdensome on the appellant. On review, he submits that the interview of the children by the trial court was new evidence which was not before the trial court at the time the judgment of 17th November 2016 was being delivered, and, in any event, the orders of 17th November 2016 were unenforceable in view of the views of the minors as expressed in that interview. He cites the decision in *FGN vs. GWN* [2018] eKLR, to support his contention on equality in shared parental responsibility and the best interests of the child.

9. The parties, through their advocates, Ms. Mboku and Ms. Ahmed, highlighted their respective written submissions before me, and the Chief Kadhi, on 9th September 2020. The said highlights were, largely, regurgitations of the written submissions that were already on record, and I need not reproduce them in this judgment.

10. Before I get into the merits of the appeal, let me first of all consider procedural issues that were not raised nor addressed by the parties, but which, I believe, go to the core of the matter, for they touch on jurisdiction, and I can only exercise jurisdiction to determine the appeal on merits if there is a proper appeal before me in the first place. So I am asking myself, is there a proper appeal before me?

11. Section 79G of the Civil Procedure Act, Cap 21, Laws of Kenya, makes provision as to when appeals from subordinate courts to the High Court may be filed, and other related matters. The same says as follows:

> *"Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days of the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery of a copy of the decree or order.*
>
> *Provided that the appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal on time."*

12. According to the memorandum of appeal filed herein, the appeal is against an order made in a ruling that was delivered on 17th February 2017. The memorandum of appeal was lodged herein on 18th May 2017. That would mean the appeal was filed outside the period allowed under section 79G of the Civil Procedure Act. However, that anomaly was cured on 26th January 2018, when this court allowed the application before it, dated 12th June 2017, and granted the appellant time to lodge her record of appeal. The application dated 12th June 2017 had sought leave to file appeal out of time, without a prayer to deem the memorandum of appeal on record as properly filed. I doubt whether the grant of leave to file appeal out of time without deeming the memorandum of appeal on record as properly on record has the effect of validating the said memorandum of appeal. It would mean that the appellant ought to have filed a fresh memorandum of appeal. That was not done, since the memorandum of appeal in the record of appeal, dated 26th February 2018, is still that dated 18th May 2017 and filed in court on even date.

13. More critically, although the heading of the of the memorandum of appeal, dated 18th May 2017, appears to suggest that the appeal is against the ruling that was delivered on 17th February 2017, on an application for review of the judgment of 17th November 2016, the grounds of appeal and the sole principal prayer in the memorandum of appeal appear to be an assault on the judgment of 17th November 2016, instead of the ruling of 17th February 2017. The memorandum of appeal is muddled up, with respect to whether it was an appeal against the judgment or the review orders.

14. Part of the heading of the memorandum of appeal dated 18th May 2017 reads as follows:

> "Being an appeal against the review of the judgment dated 17th November 2016 and then his Ruling delivered on the 17th February 2017 by MSM (KADHI) IN CIVIL CASE NO. 179 OF 2016 BETWEEN GMD ALIAS SMD =VS= SAM"

15. The opening of the body of the memorandum of appeal, dated 18th May 2017, reads as follows:

> "The Appellants being aggrieved by the Judgment dated 17th November 2016 and then his Ruling delivered on the 17th February 2017 over the children's custody and maintenance's by MSM (KADHI) In Civil Case No. 179 of 2016 Appeals to this Court on the following grounds …"

16. The sole principal prayer in the memorandum of appeal, dated 18th May 2017, reads as follows:

> "An order to set aside the Judgment of the lower court and substitute it with an order for dismissal."

17. My appreciation or view of the pleading in the memorandum of appeal, dated 18th May 2017, is that the appellant is mixed up as to whether she is challenging the decree in the judgment delivered on 17th November 2016 or the orders made in the ruling delivered on 17th February 2017. What is clear, to my mind, is that the sole principal prayer in the memorandum of appeal, dated 18th May 2017, is that the judgment of the lower court be set aside. There is only one judgment in Mombasa KCCC No. 179 of 2016, that delivered on 17th November 2016, and I, therefore, understand the appellant to be asking me to set aside that judgment, and not the orders made on review in the ruling of 17th February 2017.

18. What is clear, to my mind, is that the appellant is aggrieved by the orders made in the ruling of 17th February 2017, and not the decree in the judgment of 17th November 2016, for the judgment granted her physical custody of all three children, while the ruling divested her of that custody. She must, in all certainty, be complaining about the ruling and not the judgment. The judgment of the trial court was in her favour, with respect to custody of the children, and dismissing the said judgment would disfavour her, so far as custody is concerned, and would leave her in the same position that the orders of 17th February 2017 placed her. However, parties are bound by their pleadings. The principal pleading in an appeal is the memorandum of appeal. In the instant cause, the memorandum of appeal on record, makes an unambiguous and an unequivocal prayer that the judgment of the lower court be set aside. As an appellate court, I cannot possibly seek to correct that anomaly for her, for I am bound to consider the appeal based on the pleadings, and grant such prayers as are sought in that pleading.

19. I appreciate that the appellant filed the appeal in person. That would explain why it is so muddled up. It also explains the language employed, in articulating the grounds, which is so vague and blurry as to make it impossible for the court to understand what exactly she means by those averments. Yet, the rule that a party is bound by its pleadings applies to all parties, whether they act in person or through an advocate. The court cannot possibly step in and try to amend or rectify pleadings for a party so that they can make sense, for doing so would amount to descending into the arena of conflict, and playing the partisan role of helping out one of the parties. The appellant subsequently engaged an advocate to prosecute the appeal for her, surely the advocate, upon coming on record, should or ought to have taken steps to amend the pleadings to align them with what the appellant desired in moving the appellate court on appeal. As it is, the averments in the memorandum of appeal are so attenuated as to make it completely impossible for me to make any meaningful orders on appeal, for the memorandum of appeal is so mixed up, as to whether the appeal is on the judgment of 17th December 2016 or the ruling of 17th February 2017.

20. On the ground above alone, the appeal herein ought to be dismissed. I shall, nevertheless, proceed to consider the grounds argued in the written submissions, notwithstanding that that the same would be an academic exercise.

21. The first ground revolves around jurisdiction of the Kadhi's court to handle issues around custody and maintenance of children. The issue is that the jurisdiction of the Kadhi's court is limited to the matters set out in Article 170(5) of the Constitution and section 5 of the Kadhi's Act.

22. 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."*

23. 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."*

24. A proper reading of the two provisions would reveal that the jurisdiction conferred on the Kadhi's court 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 to the said court by the Constitution, and the legislation governing it, does not include matters touching on children.

25. The legislation that Parliament has 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."*

26. 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) …"*

27. Parts III, V, VII, VIII, IX, X, XI and XII of the Children Act 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.

28. 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.

29. 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 whom a dispute is placed can only proceed if it has the requisite jurisdiction, properly conferred upon it by the Constitution or statute, and where it does not have it, then it ought to down its tools. For avoidance of doubt the Court of Appeal, in the words of Nyarangi J., 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."*

30. I have perused the original record in Mombasa KCCC No. 179 of 2016, and noted that the issues as to custody and maintenance of children were not placed before that court by the appellant, by way of her plaint dated 24th August 2016. What she sought in those pleadings was dissolution of marriage, her own maintenance, payment of dowry, release of her personal belongings and costs of the suit. The only mention she made of the children was at paragraph 3 of her plaint, where she merely pleaded that her marriage to the respondent produced the three children the subject of these proceedings. The respondent in his defence, dated 13th September 2016, did not make an issue of the children. He only mentioned them in paragraph 3 of the defence, where he pleaded that it was indeed true that the three children were the products of their union. Clearly, therefore, going by the pleadings, the matter of custody and maintenance of the children was not a matter before the Kadhi.

31. The respondent has conceded in his written submissions that the Kadhi's court had limited jurisdiction, and that that jurisdiction did not cover children's matters. He, however, avers that the parties had consented to the matter, and it was on that basis that the trial court dealt with it.

32. In the judgment delivered on 17th November 2016, the trial court conceded that the matter of custody had not been pleaded, but that it was raised during formal hearing. That appears to suggest that jurisdiction was conferred upon the Kadhi by the mere raising of the matter by the parties. From the record of the oral testimonies of the parties I noted that the appellant asked the trial court to award to her custody of the

children. In his testimony, the respondent complained that the children, while in the custody of the appellant, were not attending *madrassa*, and that the appellant had been taking them to church, pointing out that she had converted to Christianity.

33. The respondent, if I understood his submissions well, appeared to say that the issue of custody and maintenance was introduced into the matter through a consent that the parties had worked out through the Ministry of Labour, Social Security and Services, which was, presumably adopted by the court.

34. The Kadhi made reference to that matter in the judgment and purported to adopt the same. I have closely pored through the record, particularly of the handwritten notes made by the Kadhi. It records activities that happened on 10th October 2016, 24th October 2016, 7th November 2016 and 17th November 2016. The parties testified of 24th October 2016, and judgment was delivered on 17th November 2016. According to the handwritten record, none of the two parties made any reference to having referred the matter to a children's officer in the Ministry of Labour, Social Security and Services, nor of reaching any sort arrangement under the auspices of the ministry. The record is silent as to whether an officer testified before the Kadhi or placed any material on such an arrangement before the court. There is nothing on record to indicate that any record of proceedings before an officer of the said ministry was ever placed before the Kadhi. It is a mystery, therefore, how the Kadhi came to refer to and adopt a position in respect of which no evidence was recorded.

35. What I draw from the above is that the judgment of the Kadhi, on custody of the children, was founded on material that was not pleaded, and the court purported to rely on material that had not been pleaded, and which had also not been placed on record.

36. I have seen a document on record, a letter from the Ministry of Labour, Social Security and Services, dated 17th August 2016, filed in court on 7th November 2016. This was after the oral hearing on 24th October 2016 and before judgment was delivered. It is not clear from the record the circumstances under which the said latter found its way into the record. It was not referred to by either of the parties when they testified, nor produced by them. There is no record of an order of the Kadhi authorizing its filing. There is no reference to it in the judgment, nor its identification therein by way of either date or otherwise. If this is the material that the trial court relied one to make orders on custody and maintenance in the judgment, then the court fell into error, for the document had not been properly placed on record. A document can only be placed on record by a party at the oral hearing under oath. The alternative would be to have both parties consent to a document being put in evidence. Neither of that happened, and, therefore, the said document was improperly placed on record, and the trial court ought not to have paid any heed to it.

37. More importantly, jurisdiction is conferred on 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 the court has no jurisdiction whatsoever. 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.

38. In the instant case, it is clear, from the discussion above, that the Kadhi had no jurisdiction, derived either from the Constitution, the Kadhis' Court Act, the Children Act, or any other piece of legislation, to preside over a dispute relating to custody of and maintenance 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 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.

39. The second ground, that the parties argued, was on the orders on quantum of maintenance of the third child. I reiterate what I have stated above. To the extent that the Kadhi had no jurisdiction, and the matter had not even been pleaded in the first place, there cannot have been any foundation for the trial court to purport to make any award relating to maintenance of the said child.

40. Finally, on the issue of review, I similarly reiterate what I have stated above, that the Kadhi had no power or jurisdiction to handle the matter of custody and maintenance of the subject children. He acted in purported exercise of a jurisdiction he did not have. The orders made, in the judgment, on custody and maintenance, were, therefore, null and void, for lack of jurisdiction, and were, therefore, not available for review, and the review orders were, consequently, null and void. Consideration as to whether there was discovery of new evidence that was not available as at the date the judgment was being delivered, or error on the face of the record, or other sufficient reason, is, accordingly, neither here nor there, in the circumstances.

41. As indicated above, I sat with the Chief Kadhi, Hon. Hussein, as assessor, and the Chief Kadhi has furnished me with his opinion on the appeal, dated 30th September 2020, in which he unanimously agreed with me on the matter of jurisdiction, that the Kadhi's court lacked jurisdiction to handle and entertain matters relating to custody and maintenance of children, in view of Article 170(5) of the Constitution, section 5 of the Kadhis' Courts Act and the Children Act.

42. In view of what I have found and held in paragraphs 19 and 20 of this judgment, it is my conclusion that there is no merit in the appeal before me, and I do hereby dismiss the same. This is a family matter, and since the order appealed against is, in any event, null and void, I shall, accordingly, order that each party bear their own costs.

DATED AND SIGNED AT KAKAMEGA THIS 8TH DAY OF OCTOBER 2020

W. MUSYOKA

JUDGE

DELIVERED, DATED AND SIGNED AT MOMBASA THIS…..…22ND....DAY OF…..OCTOBER….2020

P.J. O. OTIENO

JUDGE