



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CIVIL APPEAL NO. 7 OF 2017

ABMM.....APPELLANT

VERSUS

SMY.....1ST RESPONDENT

MY.....2ND RESPONDENT

(Being an appeal from Judgement/Decree of the Senior Resident Kadhi

Hon. Habib Salim Vumbi delivered on 18th May, 2017)

JUDGEMENT

A. Background:

1. The genesis of this appeal is the Kadhi's Court decision sitting at Mandera, where after hearing evidence on both sides, the Hon. Kadhi on 18th May, 2017, delivered judgment concluding the case as follows:

i. The marriage between the appellant and the 1st Respondent is hereby resolved with effect from 18th May, 2017. The 1st Respondent to observe iddah for divorce which is relevant to her, probably three menstrual period.

ii. The petitioner to make monthly payment of Kshs. 6000/= for each of the three menstrual periods of idda making the total amount to be Kshs. 18,000/=.

iii. The petitioner to pay the plaintiff her pending dowry which is one(he) cow of three years old.

iv. The custody of the child is vested to the mother, 1st Respondent herein. However, the petitioner to have reasonable access to the child.

v. The petitioner to make a monthly payment of Kshs. 4000/= for the maintenance of the child. The petitioner is also obliged to take care of education and medication of the child.

vi. That each party shall bear the cost of their suit.

2. Aggrieved by the decision of the Hon. Kadhi, the appellant preferred this appeal. The Appeal is on the following grounds:-

i. The Learned Senior Resident Kadhi erred in law and in fact in finding that the Kadhi Court has Jurisdiction to hear and determine questions of custody, maintenance, care and protection of children matters.

ii. That the Learned Senior Resident Kadhi erred in law and in fact in finding in ordering that the Respondent is entitled to monthly payment of Kenya shillings six thousand for each of three menstrual (period of iddah, making the total amount of Kenya shillings Eighteen Thousand(Kshs.18,000/=).

iii. That the Learned Senior Resident Kadhi erred in law and in fact in finding in ordering that the Respondent is entitled to monthly payment of Kenya Shillings Four Thousand(Kshs. 4000/=)for maintenance of the child.

3. The Appellant seeks the followings orders from this Court:-

1. The appeal be allowed with costs to the appellant.

2. A finding that the Kadhi's Court does not have jurisdiction to hear and determine questions of custody, maintenance, care and protection of children matters.

4. This appeal was heard by way of written submissions. The Respondent did not file their submissions and neither did they participate in this appeal. The Appellant filed their submissions dated 26th April, 2019 and filed on 3rd May, 2019.

Submissions:

5. The appellant submissions centered on mainly one issue, being as to whether the Kadhi Court has the jurisdiction to determine the issues of Children and if so whether it was entitled to make the orders in its Judgment.

6. It was submitted that the Jurisdiction of the Kadhi Court emanates from Article 170(5) of the Constitution which provides:

“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 courts”.

7. The appellant argues that based on the above provision of the Constitution and section 5 of the Kadhi's Court Act, it is their position that Kadhi's jurisdiction does not extend to contractual relations between parties but deals with questions relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim profession.

8. It is their contention that the Kadhi Court erred in making orders as to custody and maintenance of the child of the appellant marriage with the 1st Respondent arguing that it did not have the Jurisdiction to do so as the same is the preserve of the Children's Court.

9. To buttress their case, the appellant relies on the following authorities where the respective courts found that the Kadhi Court lacks jurisdiction to determine matters custody and maintenance of children. These are **AAI V HAD(2018)e KLR, JA00 vs HAS(2015)e KLR, HMM vs KJD(2014)e KLR, GSA vs ASA Nairobi, High Court Civil Appeal No. 53 of 2013(2014)e KLR , ZHZ vs SDS Mombasa High Court Civil Appeal No. 45 of 2013(2014) eKLR and the case of OMS vs Principal Magistrate Marsabit Civil Appeal No. 23 of 2015(2016)e KLR**, which Authorities have been considered.

B. Issues and Analysis:

10. In purview of the appellant appeal and written submissions and the legal authorities relied thereto, it is my view that the main issue for determination before this court is whether the Kadhi's Court had the jurisdiction to hear and determine the issues before it relating to custody, maintenance and control of the minor child.

11. The jurisdiction of the Kadhi Court as cited by the appellant is derived from Article 170(5) of the Constitution of Kenya 2010. Article 170(5) provides

“The jurisdiction of the Kadhi 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 Court.”

12. Section 5 of the Kadhi Courts Act Cap 11 sets out the jurisdiction of the Kadhi thus: -

“A Kadhi's Court may 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.”

13. The Appellant has argued that it is the Children's Court that has the Jurisdiction to determine matters relating to custody and maintenance of children and not the Kadhi's Court. In this regard it is necessary to look at the relevant sections of the Law relating to the same.

14. The long title to the Children's Act stipulates that it is:

“ 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 of the convention on the Rights of a child and the African Charter on the Rights and welfare of the Child and for connected purposes.

15. Section 73 of the Children's Act provides:

“There shall be courts to be known as children’s courts constituted in accordance with provisions of this section for the purpose of;

e. Conducting civil proceedings on matters set out under parts III, V, VII, VIII, IX, X, XI and XIII.

f. Hearing any charge against a child, other than a charge of murder or a charge in which the child is charged together with a person or persons of or above the age of eighteen years

g. Hearing of a charge against any person accused of an offence under this Act.

h. Exercising any other jurisdiction conferred by this or any other written law;

III. Reference to subordinate courts of any class, in the first schedule to the criminal procedure code, shall include children’s court.

IV. The Chief Justice may, by way of notice in the gazette, appoint a magistrate to preside over cases involving children in respect of any area of the country.”

16. Part III of the children’s Act provides for parental responsibility and Part VII provides for custody and maintenance of a child.

17. Further, **Section 30** of the Children’s Act establishes the National Council for Children’s Services and its composition under section 31 thereof includes a representative of the Supreme Council of Kenya Muslim. This leads to a conclusion that the Children’s Act, 2001 relates to all children irrespective of their religious affiliations and or cultural background.

18. **Section 82** of the Children’s Act provides for applications for custody and section 83 on the other hand is clear as to the factors that the court shall take into account in granting the custody order including.

(d) The ascertainable wishes of the child

(f) The customs of the community to which the child belongs

(g) the religious persuasion of the child

(j) The best interest of the child

19. It is therefore apparent from the above **Article 170(5)** and **section 5** of the Kadhi Courts Act, which provisions of the law are couched in mandatory terms that they set the limit on the areas upon which the Kadhi Court would have jurisdiction. The term ‘shall’ is used. However it is notable that nowhere does it mention the aspects of custody and child maintenance.

20. Thus from the foregoing it is clear that the jurisdiction of the Kadhi’s court is determined by the existence of three factors; (i) the subject matter of the claim or dispute; (ii) the party’s muslim faith; and (iii) the party’s submission to the jurisdiction of the Kadhi’s Court.

21. Therefore in my view it is clear that the drafters of the above provisions of the law never intended the Kadhi’s Court to handle matters relating to custody and maintenance of the children nothing prevented them from expressly doing so.

22. It is noteworthy that in this instant case, the appellant has refused and or disputed the jurisdiction of the Kadhi Court regarding the issue of maintenance and custody of the minor child, thus even if we were to argue the Kadhi Court had the Jurisdiction, then the same has been vacated by one of the parties being the appellant refusing to submit to the jurisdiction of the Kadhi in respect to the issues of Children on Custody.

23. As was stated by **Nyarangi JA** in the **“Owners of Motor Vessel “Lilian S” vs Caltex Oil (K) Ltd [1989] KLR 1** that:

“Jurisdiction is everything. Without it, a court of law 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 movement it holds the opinion that it is without jurisdiction.”

24. Further, In **Samwel K. Macharia & Another v Kenya Commercial Bank & 2 Others, SC CA 2/2011**, the Supreme Court noted that the court’s jurisdiction flows from either the Constitution or the legislation or both.

25. It is therefore my opinion that the Children’s Act, 2001 relates to all children irrespective of their religious affiliations and or cultural background. It does not distinguish between a child of Muslim parents from any other child for purposes of protection under the law-custody, guardianship and maintenance.

26. It is also noteworthy that even if the Kadhi’s court had jurisdiction, for as long as the appellant does not submit to the jurisdiction of the court as stipulated in Article 170(5) of the Constitution and section 5 of the Kadhi’s Court Act, the court has no power to compel him to appear before that court. The party has the option of heading to the children’s Court which is vested with the Jurisdiction to handle children

matters.

CONCLUSION:

27. It is my considered view that the instant appeal is meritorious and therefore the same should succeed to the extent that matters relating to the custody of the minor issue of the marriage are concerned. It is clear that the Appellant in his submission never challenged the other aspects of the Kadhi's decision as to his marriage being dissolved, thus the same should stand and the only aspect affected by this appeal relates to custody and maintenance of the minor child.

28. Thus the court makes the following orders ;

i. Appeal is allowed on the aspects of the custody and maintenance of the child but fails on challenge on divorce and dowry payment.

ii. The respondent is at liberty to refer the dispute on custody and maintenance of the child before children's court.

iii. No orders as to costs.

DATED, DELIVERED AND SIGNED IN OPEN COURT AT GARISSA THIS 20TH DAY OF JUNE, 2019.

.....

CHARLES KARIUKI

JUDGE