



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW CASE NO. 55 OF 2016

IN THE MATTER OF: ARTICLE 165(6) OF THE COMSTITUTION OF KENYA 2010

AND

IN THE MATTER OF : AN APPLICATION BY T.L. FOR LEAVE TO COMMENCE JUDICIAL REVIEW PPROCEEDINGS

AND

IN THE MATTER OF : SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

BETWEEN

T.L.....EXPARTE APPLICANT

VERSUS

THE KADHIS COURT NAIROBI..... 1ST RESPONDENT

THE HON. ATTORNEY GENERAL..... 2ND RESPONDENT

M.A.A.....INTERESTED PARTY

JUDGMENT

1. The Ex-parte Applicant in these proceedings is a Muslim lady **T.L.** (name withheld for privacy reasons) She was married to the interested Party herein **M.A.A (name withheld for privacy reasons)** in accordance with Sunni Islamic Sharia rites on 9/9/2007.
2. It is alleged that due to persistent misunderstandings and marital differences with her spouse, the ex-parte Applicant left her matrimonial home and went to live with her new found lover and boyfriend one **F.(name with held for privacy reasons)** and they allegedly married and/or started living together even before the 1st Talaq (divorce) eddat was completed.
3. As a result of the applicant's marriage to the interested party, they had only one issue **A.M.A.A** (daughter name withheld for legal reasons) born on 2/11/2008 who, upon the applicant leaving her matrimonial home, was left in the custody of the child's maternal grandfather's house.
4. According to the interested party father to the minor, the child severally missed school and/or her best welfare and interests were not well taken care of leading to the interested party taking the minor and living with her between the end of May 2015 to 3rd December 2015 when the ex-parte Applicant took custody of the minor.
5. It was at this point that the interested party moved to the Kadhi's Court Nairobi, exparte, under a certificate of urgency and secured interim

orders for custody of the minor pending inter partes hearing on 22/2/2016.

6. Upon effecting of service of the interim custody orders upon the ex-parte applicant, she moved to the **High Court under High Court Civil Appeal No. 14 of 2016(T.L vs M.A)** seeking orders of stay and also appealing on the ground that the Kadhi's court did not have jurisdiction to hear children's matters by dint of Section 73 of the Children's Act 2007. Simultaneously, these proceedings for judicial review were filed seeking orders of certiorari and prohibition against the Kadhi's court proceedings and Orders.

7. The ex-parte Applicant's case is that the Kadhi's Court is divested of jurisdiction or acted in excess of jurisdiction and that the interim orders granted were ultra vires premised on Section 73 of the Children's Act 2007, which orders could only have been made or issued by a children's court as stipulated in the Children's Court Act,2001.

8. By a Notice of Motion dated 19th February 2016, the Ex-parte Applicant herein T.L moved this Court seeking the following orders:

i. A Judicial Review Order of CERTIORARI bringing into this Honorable Court the 1st Respondent's Orders issued on 3rd February 2016 for Purposes of quashing and to quash the same in so far as the said orders relate to the custody, care and control of A.M.A. (minor).

ii. A Judicial Review Order of PROHIBITION prohibiting the 1st Respondent from proceeding with Kadhi's Court Civil Case No. 14 Of 2016 A.M.A. Vs T. L. in so far as the said proceedings relate to the custody, care and control of the minor, A.M.A.A.

iii. Costs of this application and interest thereon be provided for.

iv. Any other and further relief that this Honorable Court May deem fit and just to grant in the circumstances.

9. The Notice of Motion application is predicated upon the grounds set forth in the statutory statement filed on the 15th February 2016 and the verifying Affidavit of the exparte applicant **T.L** filed on 15th February 2016 accompanying the chamber summons for leave to apply.

10. The main ground for the judicial review application is that the 1st respondent Kadhi's Court Nairobi is assuming jurisdiction which he does not have in violation of the law and the Constitution of Kenya, 2010. Further, that therefore the orders of interim custody of the minor issued by the said 1st respondent on 3rd of February, 2016 are *ultra vires* and in excess of jurisdiction.

11. The 1st respondent and the Interested Party filed replying Affidavits opposing the application. In his replying affidavit sworn and filed on 15th February, 2016, the interested party deposes that he moved to the KADHIS Court seeking for custody orders because the exparte applicant had been using coercion and intimidation to take the minor from him and that instead of living with the child, the exparte applicant had left the minor with her elderly parents who are habitual *khat* chewers till the wee hours of the night leaving the minor on many occasions to miss school as there is no one to wake her up in the morning. Further, that the minor would most of the occasions go to school unkempt, without showering after bedwetting among many complains received from her school.

12. The interested party claims that he was compelled to seek protection as the applicant had choreographed his illegal incarceration at Kisumu Police station and framed him up charges of terrorism after luring him through court summons to attend Kadhi's court Kisumu.

13. It was further contended that the Children's Act never amended or repealed the Kadhi's Court Act as children's matters are perfectly under the personal law and hence the Kadhi's court has jurisdiction to hear and determine children's matters.

14. In addition, it was deposed that the interested party had besides the prayers for custody, care and control of the minor in the plaint before the Kadhi's court, the interested party had also sought for dissolution of his marriage to the exparte applicant which had not been challenged hence the reliefs sought herein to stop the proceedings before the Kadhi's court cannot lie and that therefore the orders of 3rd February 2016 are not illegal ultra vires or in excess of jurisdiction.

15. The 1st respondent who is the Chief Kadhi's Court Nairobi entered an appearance through the law firm of Musalia Mwenesi Advocates after declining legal representation of the Attorney General as shown by a protest letter on record written by the Kadhi himself who is the presiding officer of the Court intimating that his court has a right to hire an advocate of their own choice.

16. In the replying affidavit sworn on 4th October, 2016 and 26th October, 2016 by AbdulJabar Ishaq Hussein, Kadhi, Nairobi, vehemently opposing the exparte applicant's notice of motion, it is contended that the 1st respondent has the necessary jurisdiction to hear and determine the dispute before him as filed by the interested party herein seeking to annul the marriage with the exparte applicant and orders for custody of the minor child.

17. According to the Kadhi, the exparte applicant's motion is defective as it is not accompanied by the chamber summons for leave as stipulated in the Law Reform Act and Order 53 Rule (4) of the Civil Procedure Rules. Further, that the relief sought in the Notice of motion is different from the relief set out in the statutory statement accompanying the chamber summons for leave to apply. In the view of the 1st respondent, Article 159(2)(d) of the Constitution cannot cure the identified defect in the proceedings herein as it touches on the validity of the judicial review proceedings which are not properly anchored in law. It was contended that therefore there is no proper notice of motion before the court for consideration.

18. That the case before him touches on divorce with incidence of custody of the minor child and that the child's right to religious education

and her personal status is a matter within his jurisdiction hence the leave obtained to commence these proceedings should be set aside. That he is a qualified Muslim Kadhi who was appointed in accordance with Article 170 of the Constitution to preside over cases such as the dispute between the parties hereto.

19. It was further deposed that the applicant ought to have moved to the High Court on appeal and not seek judicial review of the orders made on 1st February, 2016. That when the 1st respondent set the suit before him for interpartes hearing on 15th February, 2016 the parties consented to 22nd February, 2016 and that there was no objection to the date on the ground of jurisdiction taken by the exparte applicant.

20. That on 22nd February 2016 and 18th March, 2016 the parties failed to attend court because the High Court had issued orders staying any further proceedings in that court.

21. That the matters at hand touch on religious beliefs and practices and that albeit the Kadhi's Courts are part and parcel of the Judiciary, they are a special category of courts with the mandate to enforce religious practices and incidents of those religious practices with jurisdiction extending to questions relating to personal status and that children of Muslim parents are persons within the personal status hence entitled to propagate Islam religion.

22. That the Kadhi's court has superior authority to hear and determine the disputes relating to custody of Muslim Children.

23. That the child in issue is not attending Madrassa despite the fact that her mother is receiving financial assistance for that purpose.

24. Other depositions by the 1st respondent are verbose matters of law and citations of decided cases which ought to be found in the submissions and not in an affidavit.

25. In the further affidavit filed on 26th October, 2016, the Hon KADHI deposes that the applicant had appealed to the High Court Family Division on the question of jurisdiction although the court file number was not available for perusal. Further, that there are other proceedings vide Kadhi's court case no 360 of 2012 where the applicant sought annulment of the marriage to the interested party.

26. Parties filed written submissions which they also highlighted orally before the court and cited several authorities, statutory, case law and Constitutional provisions among other scholarly writings and journals.

SUBMISSIONS

27. The parties' advocates filed written submissions which they also highlighted.

The ex parte applicant's submissions.

28. The exparte applicant through her counsel Mr Danstan Omari filed written submissions and framed the one main issue for determination namely: *Is the Kadhi's Court Vested with jurisdiction to hear and determine issues relating to the custody, care and/ or control of children?* According to Mr Omari, the answer to the above single question is in the negative and broken down as follows:

a. JURISDICTION

29. It was submitted that it is trite law that a court of law derives its jurisdiction either from the constitution, statute or both and that in the instant proceedings, Article 170(5) of the Constitution 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”.

30. Further, that the said provision is replicated in section 5 of the Kadhis Courts Act in the following fashion;

A Kadhis 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.

31. It was submitted that the provision setting out this jurisdiction is by issue of the word 'shall' which is couched in mandatory terms and that there is no mention in either the Constitution or in the Kadhi's Court Act to "custody, care and/or control of children".

32. The exparte applicant submitted that if the drafters of either the Constitution or the Kadhi's Court Act had intended that *custody care and/or control of children* be included in the jurisdiction of the Kadhis courts then nothing would have been easier than to specifically state so. In addition, it was contended that the exclusion of children matters in law is a clear indication that the jurisdiction of Kadhis courts does not extend to such matters, with the thinking that the Children's Act, 2001 provided sufficient and exhaustive legislative cover for children's matters in Kenya.

33. The exparte applicant's counsel submitted that the court that is vested with original and exclusive jurisdiction to hear and determine children's matters is the Children's Courts and that the said children's courts derive their jurisdiction from the Children's Act. Counsel cited

the Preamble to the Children's Act which provides 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.*

34. The ex parte applicant's counsel cited Section 73 of the Children's Act which provides:

There shall be courts to be known as children's courts constituted in accordance with 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 XIII**
- b. 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**
- c. Hearing of a charge against any person accused of an offence under this Act**
- d. Exercising any other jurisdiction conferred by this or any other written law;**

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

II. 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.

35. According to the ex parte applicant, Part III of the children's Act provides for parental responsibility, Part V provides for Children's Institutions, Part VII provides for custody and maintenance, Part VIII provides for Guardianship, Part IX provides for judicial orders for the protection of children, Part X provides for children in need of care and protection Part XI provides for foster care placement while Part XIII provides for child offenders.

36. That if the Chief Justice has not gazetted a particular Magistrate to handle children's matters, a Magistrate cannot handle children's matters. A case in point was cited to be Kenya Gazette Vol. CXI-No. 18- 27th February 2009 where the Gazette notices number 1751, 1752 and 1753, the then Chief Justice J.E Gicheru appointed Hon. Evans K. Makori, Hon. David W. Mburu and Hon. Elizabeth K. Usui to preside over cases involving children in their respective provinces, and that to date, the Chief Justice has never gazetted any Kadhi's court to handle children's matters.

37. Further, that it is instructive to note that nowhere in the children's Act does the said Act confer Jurisdiction upon Kadhi's courts to hear and determine children matters either expressly or impliedly.

38. It was submitted that the superior courts of record have consistently held that Kadhi's courts do not have Jurisdiction to hear and determine children's matters. Reliance was placed on **Mombasa Civil Appeal No. 15 of 2013 H M. M. v K J D (2014) eKLR; Kisumu High Court Misc. Application no. 125 of 2013 S M H vs. S. A. A. (2013) eKLR; Nairobi High Court Misc. Application No. 123 of 2014; and Mombasa High Court Misc. Application No. 40 of 2013.**

39. It was therefore contended that from the foregoing, it is apparent that the Kadhi's court assumed Jurisdiction not conferred on it either by the Constitution or the law.

40. On the prayer for Certiorari, it was submitted that it is settled law that the circumstances under which an order of certiorari may issue include: where an inferior court or public authority **acted without jurisdiction, or exceeded its jurisdiction**, or failed to comply with the rules of natural justice in a case where those rules are applicable, or where there is an error of law on the face of the record, or the decision is unreasonable. Reliance was placed on the case of **Pastoli vs. Kabale District Local Government Council and others (2008) 2 EA 300, where** the court adopted the decision in the **Council of Civil Unions Vs. Minister for the Civil Service (1985) AC 2** and **An application by Bukoba Gymkhana Club (1963) EA 478, 479** held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety....illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission.... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards... procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision”.

41. It was submitted by the interested party that the orders issued on 3rd February 2016 by the 1st respondent relating to the custody, care and control of the minor were illegal, ultra vires and the said orders were issued in excess of its jurisdiction by the 1st respondent and as such they

are proper candidates for being quashed by this court.

42. On the prayer for prohibition, it was submitted relying on **Halsbury's Laws of England, Fourth Edition, and Reissue Volume 1 (1) page 202 Para. 109**, where it is observed that:

“The order of prohibition is an order issuing out of the High Court and directed to an inferior Court or tribunal or public Authority, which forbids that court or tribunal, or authority to act in excess of its jurisdiction or contrary to law. Prohibition is employed for the control of inferior courts, tribunals and public Authorities. Prohibition is concerned with decisions of the failure. Prohibition will issue to prohibit a determination in excess of jurisdiction, error of law on the face of the record or breach of the rules of natural justice”.

43. Further reliance was placed on the case of **Kenya National Examination Council Vs. Republic ex-parte Geoffrey Gathenji Njoroge and 9 others Nairobi CA No. 26 of 1996 (1997) eKLR** where the High Court interrogated the applicability of the relief of prohibition and made the following observations:

“What does an order of prohibition do and when will it issue? It is an order from the High Court directed to an inferior Tribunal or body which forbids that Tribunal or body to continue proceedings therein in excess of jurisdiction or in contravention of the law of the land. It lies not only in excess of jurisdiction or absence of it, but also for a departure from the rules of natural Justice. It does not however, lie to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings...”

44. It was submitted by the ex parte applicant that in the most likely event that this honorable court finds that the 1st Respondent does not have jurisdiction to hear and determine matters relating to the custody, care and control of children then an order of **PROHIBITION** does issue prohibiting the 1st respondent from proceeding with **Kadhis Court Civil Case No. 14 of 2016 M. A.A vs T. I.** in so far as the proceedings relate to the custody, care and control of A.M.A (minor).

45. On who should bear the costs of this proceedings it was submitted that costs follow event, and that as the successful litigant, the ex parte applicant should be granted costs of the Notice of Motion Application dated 19th February 2016 together with interest.

The 1st Respondent's Submissions

45. The 1st Respondent opposed the Application for Judicial Review and relied on the Replying Affidavit of Honourable Mr. Abduljabar Ishaq Hussein the Kadhi Nairobi. The Hon Kadhi raised a jurisdictional objection as spelt out in paragraphs 5 – 14 of his replying Affidavit contending that the Supreme Court in Application No. 2 of 2011 at paragraph 68 held and observed authoritatively as follows:

“(68) 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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law. (Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR)”

47. It was submitted that this holding by the Supreme Court is important in the determination of this matter from two perspectives. On the first score is the question whether the Judicial Review Court has jurisdiction to entertain the matter presented to it in these proceedings by the Applicant, and that the Supreme Court has ruled that matters of jurisdiction are not matters or issues of mere procedural technicality, which ruling binds the Judicial Review Division of the High Court under Article 163(7).

48. It was submitted that the Applicant has approached this Court under the Law Reform Act, Cap 26 and the Civil Procedure Rules, 2010. These laws require that at the hearing of an application for judicial review the relief on which submissions may be validly made and a determination made is the relief set out in the Statement accompanying the application for leave to apply for judicial review. The requirement is in mandatory terms.

49. It was further submitted that the Applicant commenced her judicial review proceedings with a Notice of Motion under Order 53 of the Civil Procedure Rules, which Notice of Motion does not reflect or carry the relief set out in the Statement accompanying the application for leave hence the Judicial Review Court has no jurisdiction on the Notice of Motion.

50. The court was urged to take cue and find and hold that it cannot entertain any proceedings founded on the Applicant's Notice of Motion dated 19th February, 2016 and filed on 22nd February, 2016. It was contended in submission that the second perspective of the Supreme Court decision in the **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [supra]** case was said to be that if the judicial Review Court holds that it has jurisdiction to entertain the Notice of Motion then it has to deal with the question advanced by the Applicant, whether the Kadhi Nairobi was completely divested of jurisdiction on the case before him.

51. On the ex parte Applicant's submission that the Kadhis had no right to deal with any issue touching on custody of the child of the marriage of the Plaintiff and Defendant before the Kadhis Court, it was submitted that the decision by Hon. Mr. Justice Muchelule in **SMH v SAA, Kisumu High Court Miscellaneous Application No. 125 of 2013** where the judge made the following observation, **"My understanding is that the Kadhi's court is properly seized of the divorce matter, but may not deal with the issues of custody and maintenance of children. These issues are not among those in respect of which the Constitution and the Act have donated jurisdiction to the Kadhi's court. The issues can only be dealt with by a Children's Court under the Children's Act, No. 8 of 2001"**; according to the 1st interested party, Honorable Muchelule was only pointing out that unless jurisdiction is donated by the Constitution or legislation a court has no jurisdiction in the matter and that the Learned Judge's decision has been followed by other judges such as Honorable Lady Justice Maureen Odero in **HMM vs. KJD Mombasa High Court Civil Appeal No. 15 of 2013** determined on 24th September, 2014 and cited by the Applicant.

52. It was submitted that Honorable Lady Justice Odero followed an earlier decision of hers and observed and held:

"... In the case of ZHZ Vs. SDS Mombasa High Court Civil Appeal No. 45 of 2013 [2014]eKLR I did myself hold that." That the cited law [Constitution and Kadhi's Court Act] make it clear that the jurisdiction of the Kadhi's Court is to matters of personal law e.g. marriage, divorce and inheritance. No mention is made of children's matters like custody access and/or maintenance of children of a marriage. Matters relating to children are special and exclusive and this is why there exists a specific Act to deal with such matters being the Children Act 2001. Further, it is only in a children's court and with reference to the Children's Act that decisions respecting custody, access and/or maintenance of children can properly be made" My position has not altered. My finding is that the Hon. Principal Kadhi had no jurisdiction to determine the issue of custody in this case. His orders purporting to do so were ultra vires his jurisdiction and were therefore null and void. As such I do hereby allow this appeal and set aside the orders of the Principal Kadhi in his judgment of 11th April 2013."

53. It was submitted by the 1st interested party's counsel that in a contextual situation the decisions of both Mr. Justice Muchelule and Lady Justice Odero cannot be questioned. However, that every case depends on its own circumstances and context.

54. Counsel's submission was that Hon. Muchelule was faced with a judicial review question of whether the Kadhi Kisumu was the proper court to deal with a matter and whether the matter could be transferred to a court nearer where the parties resided. The Judge's ruling was to this effect: "The case before the Kadhi's Court is ready for hearing. It means that the Applicant has submitted to jurisdiction. His problem, according to the application, is that the court cannot deal with children matters; that Kisumu is far from Mbita; then his apprehension about the Kadhi. I have found that the Kadhi Court cannot deal with children matters. I have also noted that, now that the applicant has submitted to jurisdiction, the Kadhi's court, being his nearest court, will hear the divorce matter."

55. That Hon. Muchelule ordered the Kadhi to continue with the divorce aspect of the matter and the parties or whichever party to file the dispute regarding custody and maintenance of children of the marriage before the Children's Court nearest the parties.

56. In the instant case the 1st Respondent argued that the Applicant for judicial review had submitted to the jurisdiction of his court. The Court had gone ahead to order a hearing inter-partes. Furthermore, that there is the issue of the dissolution of the marriage between the parties, which issue the court has jurisdiction under the Constitution and the legislation and following Honourable Muchelule J decision in **SMH v SAA, Kisumu High Court Miscellaneous Application No. 125 of 2013**.

57. It was submitted that the Applicant in the instant case is not querying the 1st Respondent's jurisdiction to deal with the annulment of marriage, but whether the Kadhi Court is vested with jurisdiction to hear and determine issues relating to the custody, care and/or control of children. Reliance was placed on **HMM vs KJD Mombasa High Court Civil Appeal No. 15 of 2013** where Odero J was faced with the issue of **"[Whether] the Learned Kadhi erred in Law and fact in entertaining and purporting to adjudicate a claim relating to custody of children which does not fall under the jurisdiction of his court as the claim had no bearing whatsoever to Islamic Law and/or rights enforceable thereunder."**

58. It was submitted that Odero J framed one issue thus– whether the Kadhi Court as currently established has jurisdiction to determine issues relating to the custody and maintenance of children. And held that **there was nowhere in any "written laws" of Kenya which gives Kadhi jurisdiction over children matters** and considered as inconsequential the views of the Court appealed from that under the jurisdiction granted under Article 170 of the Constitution the Kadhi deals with questions of Muslim law (Islamic law) relating to **"personal status"** and that **"Under Islamic Law, questions of custody and maintenance of children fall and is specifically provided for under personal status. It is also the direct result of divorce."**

59. It was further submitted that the Children Act has not set itself up as the exclusive law on children matters and the Children Court as the sole forum for arbitration on children questions and that as far as Muslim law on children is concerned, the Court of Appeal decided in **SAIFUDEAN MOHAMEDALI NOORBHAI vs SHEHNAZ ABDEHUSEIN ADAMJI CIVIL APPEAL NO. 142 OF 2005 [2011] eKLR** that Muslim law is constantly growing; it is an ideal, a code on virtually everything in creation including the status of children and their care custody and maintenance.

60. Counsel for the 1st respondent submitted that it is a law where primacy is on interpretive practice rather on sophisticated treatment of texts and the dry word of the law. Hence the Evidence Act does not apply in the Kadhi courts.

61. Further, that every Muslim is a Muslim because he or she submits to the will of the Almighty God Daily in prayer and supplication making the commitment and submission through the recitation of *Surah Al Fatiha* in the Holy Qur'an whose first *ayat* (or "verse" for want of a better word) is an acknowledgment of the "supremacy of the Almighty God of all creation," which is an acknowledgment in daily deed of that which "We, the people of Kenya" have acknowledged in the Preamble to the Constitution of Kenya, 2010.

62. It was submitted that the Constitution holds the Islamic faith in the highest esteem by establishing courts presided over by persons versed

in that religion and capable of rendering justice according to the teachings and tenets of Muslim law and religion and jurisprudence. Reliance was placed on **Nyeri Civil Appeal No. 22 of 2015 Mohamed Fugicha vs the Methodist Church in Kenya** (Suing through its Registered Trustees) and 3 Others where it was held that:

“It is important to observe at this point that it is not for the courts to judge on the basis of some ‘independent or objective’ criterion the correctness of the beliefs that give rise to Muslim girls’ belief that the particular practice is of utmost or exceptional importance to them. It is enough only to be satisfied that the said beliefs are genuinely held.”

63. Further reliance was placed on **REGINA WILLIAMSON & OTHERS VS. SECRETARY OF STATE FOR EDUCATION AND EMPLOYMENT [2005]2 AC 246** a case involving the clash between parents’ religious beliefs that children should be subjected to corporal punishment and those children’s rights to dignity and personal integrity, where Lord Nicholls of Birkenhead of the House of Lords stated the role of the courts as:

“When the genuineness of a claimants’ preferred belief is an issue in the proceedings the court will inquire into and decide this issue as a question of fact. This is a limited enquiry. The Court is concerned to ensure an assertion of religious belief is made in good faith ‘neither fictitious nor capricious, and that it is not an artifice’ to adopt the felicitous phrase of Iacobucci, J. in the decision of the Supreme Court of Canada in *Syndicat Northcrest vs Anselem* (2004) 241 DLR (44)1,27 para 52. But emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its validity by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant’s belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of the individual. As Iacobucci, J. also noted, at page 28, para 54, religious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising.”

“Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification. The language used is often the language of allegory, symbol and metaphor. Depending on the subject matter, individuals cannot always be expected to express themselves with cogency or precision. Nor are an individual’s beliefs fixed and static. The beliefs of every individual are prone to change over his lifetime. Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the [European] Convention...[our Constitution].”

64. It was further submitted that all persons, those in authority more so, must approach the issue of religious belief with a measure of deliberate caution and circumspection. That a person’s religious convictions need not make sense to us in order for us to accord them the necessary respect and space for them to flourish. An issue that may appear trifling to one may be of monumental value to another in the realm of religious beliefs, as their validity and the right of their holders to hold religious beliefs are not dependent on general acceptance or majority vote, as they are personal to the individual in accordance with their own inner light and must be respected because they are clear, not to the observer, but to the believer as was captured by the US Supreme Court Justice Jackson for the **Court in WEST VIRGINIA BOARD OF EDUCATION V BARNATTE, 319 US 624, 319 U.S. 638 (1943)** that:

“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One’s right to ... freedom of worship ... and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”

65. It was submitted that the above view resonates with Judge Dickson’s seminal idea in **BIG M. DRUG MART** (supra) that **“the Charter [the Constitution] safeguards religious minorities from the ‘tyranny of the majority.’”**

66. Further, that the Court of Appeal rightly calls on us to approach the issue of religious belief with a measure of deliberate caution and circumspection. It was submitted that it seems odd and clumsy and costly that parties to a Muslim marriage may submit to the Kadhis Court for divorce proceedings and literally pretend that there are no children to their marriage; determine the marriage and divorce proceedings; then decide whether and where to file for custody, care and maintenance and visiting rights.

67. It was submitted that the Applicant in these judicial review proceedings had not given any reason other than that the High Court has previously ruled on various occasions that the Kadhis Court does not have jurisdiction to entertain any question relating to custody care and maintenance of children.

68. The 1st Respondent submitted that he appreciates that he is the presiding judicial officer in that case. He also appreciates that as such presiding judicial officer and because of the nature of judicial review proceedings he cannot delve into the merits of the case. He, nevertheless, believes that he is right to draw attention of the Court to the higher principles involved in Constitutional interpretation in Kenya and to call upon the Court not to willy-nilly follow the courts that have not taken the historical and religious angle of the Kadhi courts and their entrenchment in the Constitution since independence into account and accorded these aspects the due consideration they deserve.

69. On the advisory by the Chief Kadhi that the Kadhis court has no jurisdiction it was submitted that the opinion of the Kadhi that was made **not** in the context of any case cannot be the basis for the High Court to overrule a Kadhi who is of equal jurisdiction and judicial authority as the Chief Kadhi pursuant to Article 170(3) and (4) of the Constitution of Kenya, 2010. That it was not right for Odera J to appear to set up the Chief Kadhi as the overlord in judicial matters over the other Kadhis as neither was he sitting as an adjunct High Court Judge in the matter handled by the Honorable Lady Judge, which he was not, nor as he an assessor whose opinion binds the High Court, which he was not).

70. According to the 1st respondent, time had come for this Court to take cue from the Court of Appeal and give the consideration of the

matter of questions of custody of minors before the Kadhi court the religious flavour and seriousness it deserves. Doing so, he opines that the Court will see that the child as a “minor” has that personal status of minor over which the Kadhi has jurisdiction and that if there is a dispute as to who should have custody care and control in a Muslim setting where the parties profess Muslim religion and submit to the Kadhi court, the Kadhi court should be allowed to determine.

71. It was submitted that Muslim law and religion has prescriptions on child custody and care and maintenance hence it should be allowed to develop in accordance with Article 259 (1) (a), (b) and (c) of the Constitution of Kenya, 2010.

72. Reliance was placed on Aisha Stacey’s writings “What Islam says about children: custody & fairness” where she states:

“Custody The main issue in custody disputes is what is in the best interest of the child. Ibn Qudaamah al-Maqdisi, Islamic scholar of the 12th century said, “Custody is aimed at looking after the child, so it should not be given in a way that will be detrimental to his welfare and his religious commitment. ... If a marriage ends and there is a dispute about who should have custody of the children or who should financially support them; then the solutions can be found within the teachings of Islam. Until the child reaches the age of discernment, the mother is more entitled to custody than the father, unless the mother remarries, in this case the custody belongs to the father. That is unless he agrees with the mother on something that is better for their child. Muslim scholars over the centuries have differed in their views regarding child custody; however, they have all agreed that the child’s best interests must be the primary concern.”

73. It was submitted that the principles involved are not at variance with those enunciated in the Children Act and that answers can be found in Islam, in the teachings of the Muslim religion and Muslim law hence the better approach is *to allow the courts versed with questions relating to Islam or Muslim law and religion to deal with the matter of custody, care and maintenance, especially as incidents of divorce or marriage or inheritance (as for example under section 76(1) of the Children Act) which stipulates “(1) Subject to section 4 where a court is considering whether or not to make one or more orders under this Act with respect to a child it shall not make the order or any other orders unless it considers that doing so would be more beneficial to the welfare of the child than making no order at all.”*

74. It was submitted that that paragraph (iii) of the Proviso to section 73 of the Children Act gives jurisdiction to courts other than Children Courts which would have to be guided by the principles in section 76 stipulates *“(iii) where in the course of any proceedings in a Children’s Court it appears to the court that the person charged, or to whom the proceedings relate, is over eighteen years of age, or where in the course of any proceedings in any court other than a Children’s Court it appears to the court that the person charged or to whom the proceedings relate, is under eighteen years of age, nothing in this section shall prevent the court, if it thinks fit, from proceeding with the hearing and determination of the case.”*

75. It was submitted that therefore, proceeding and determination, if in a Kadhi Court would be guided, in addition by principles of Muslim law concerning the person with status of minor.

76. Reliance was placed on the Treatise **“Family Structure in Islam” by Hammudah ‘Abd al-‘Ati at page 198** where it is observed that *“To take good care of and show compassion toward children is one of the most commendable deeds in Islam. ... It is a charity of a higher order to attend to their educational needs and teach them proper manners. Interest in and responsibilities for the child’s welfare are questions of first priority. ... The parents’ responsibility for the child’s welfare remains binding as long as the child is a minor or incapable of taking care of itself. When both parents are Muslims and fulfil their parental obligations adequately, the child’s socialization to the Islamic environment will in all probability be successful. Every child is, as the Prophet implied, born into the true religion, the natural state of Islam. It is the parents who reinforce this propensity or change it. Part of their religious responsibility is to try to raise the child as a Muslim and in the best Islamic way. However, they may not, even if they could, impose their religion on the child, which becomes accountable upon reaching the age of majority, usually marked by puberty.”*

77. That Hammudah ‘Abd al-‘Ati goes on to observe (at page 202) that when divorce or widowhood is involved the children’s custody shall be determined solely in terms of their own welfare. The cardinal concern is to safeguard their interest and promote their well-being. Similar views were made by Imam Al-Hussein of the Mosque, South Circular Road, Dublin 8, Ireland.) in his talk while discussing Hidana **“THE CUSTODY OF CHILDREN IN SHARI’AH”** that: *“Hidana is derived from the word ‘hadana’ which literally means to embrace or hug. In the Shari’ah it means raising or bringing up of a child. Hidana is a form of guardianship which women are more suitable to assume because they are more experienced in the area of looking after children, and they are generally more caring and compassionate.*

78. It was submitted that Muslim jurists gave preference as to who has the right to care for a child taking into consideration the interest of the child that . women are preferred over men, and within the same gender preference has been given to those who are closer to the child and who are expected to be more compassionate and merciful.”

79. It was submitted that the Kadhi courts are as strong as the community in which the courts operate. In this regard and with Article 170(5) of the Constitution of Kenya, 2010 worded as it is, the vibrancy and effectiveness of the courts to develop the law will depend on whether parties submit to the courts or not.

80. The 1st Respondent Kadhi believes that in the case before him parties had submitted and a date for inter-parte hearing had been taken in the matter. The Court’s jurisdiction had therefore been acknowledged.

81. On Justice Muriithi’s discussion **in Mombasa succession cause no. 301 of 2014 – the estate of S.P.B-** deceased it was submitted that the learned judge argued that the former constitution had under section 69(3) (d) provided only for appointment to the office of the Chief Kadhi and Kadhis with their jurisdiction being given by the Kadhis’ Courts Act, Cap. 11, under section 5 thereof. The Learned Judge asserted that, *“In interpreting Article 170 (5) of the Constitution the court must purposefully give effect to the tenor of the addition of the requirement of submission of the Muslims to the jurisdiction of the Kadhis Court by the new Constitution of Kenya 2010 by upholding choice of the Court before which to file proceedings of personal nature.”*

82. The learned Judge was quoted at paragraph 20 of his decision where his Lordship stated: ***“The word ‘submit’ is defined by The Concise Oxford Dictionary as a verb meaning ‘give way, resign oneself, yield, cease or abstain from resistance’. Accordingly, in my view, the right to ‘submit’ must be taken to contain an opposite inbuilt right to choose ‘not to submit’. I consider that in providing as a prerequisite that the Muslims submit to the jurisdiction of the Kadhis Court, the Constitution was upholding the choice that Muslims have traditionally exercised as noted by the Court of Appeal in the decision of Saifudean Mohamedali Noorbhai v. Shehnaz Abdehussein Adamji, supra, cited in the passage quoted above.”***

83. His Lordship had observed in the above matter that, ***“While the parties before the Kadhi’s Court must all be Muslims, no party who has not submitted to the jurisdiction is compelled to litigate before that court. That the 1st Petitioner converted to Islam only satisfies the second ingredient for the jurisdiction of the Kadhi’s Court which must be complemented by the Petitioner’s choice to submit to the Court.”***

84. It was contended that the question that is unresolved is what happens if one party or several parties to a dispute who are Muslims choose not to submit in the manner described by Judge Muriithi and the party who submitted the dispute to the Kadhi Court insists that he cannot take the dispute to any other court on account of Article 32(4). Further, that, based on that Article, he is being true to his belief and religion and will not be forced to submit to any forum where the presiding officer is not a Muslim who would *respect and give dignity to the religion and belief of that party*. It was submitted that would appear that the matter is not simply one of freedom of choice of forum, but is all about *“upholding choice of forum.”*

85. It was submitted that Judge Muriithi would deal with this situation and say that the Kadhi Court should in such a situation be bound under the principle of stare decisis and should let the High Court or other subordinate Court where the matter may have been taken for adjudication deal with the matter. But that that may be true if the dispute involves section 48(2) of the Law of Succession Act. However, that where the questions of “personal status” of a child born of Muslim parents is involved, that is the sort of question that the Kadhis Court have jurisdiction over since a child cannot “submit” to the jurisdiction, except through a next friend, a parent or a person with parental responsibility under Muslim law.

86. It was submitted that the fundamental right to insist on one’s religion under Article 32(4) as a Muslim cannot be curtailed by clause (5) of Article 170 and that the parent or person in loco parentis can resist any court other than the Kadhi Court and be in his right to do so on religious grounds backed by the Court of Appeal decision **in Nyeri Civil Appeal No. 22 of 2015 Mohamed Fugicha vs the Methodist Church in Kenya (Suing through its Registered Trustees) and 3 Others.**

87. The 1st respondent insisted that since parties in the instant case had submitted to the Kadhi who had set an inter-partes hearing date, the case should be heard to final determination before the Kadhi.

88. However, the 1st Respondent believes that Article 24 on limitation of fundamental rights carries the injunctions that a provision that purports to limit a fundamental right or freedom “shall not limit the right or fundamental freedom so far as to derogate from its core or essential content”.

89. That Clause (4) of Article 24 thus re-enforces Article 32(4) in respect of persons who profess the Muslim religion concerning the resolution of their disputes according to the principles of their religion by persons or arbiters versed in Muslim religion and Muslim law.

90. It was submitted that furthermore, clause (1) of article 24 calls for an assessment of the limitation of any fundamental right or freedom to see that it is a limitation that is reasonable and justifiable in an open and democratic society based on human dignity, equality (as qualified by clause (4)), and freedom taking into account all relevant factors, including:

- a. the nature of the right or fundamental freedom;**
- b. the importance of the purpose of the limitation;**
- c. the nature and extent of the limitation;**
- d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**
- e. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.**

91. In addition it was submitted that the injunction under Article 20(1) that “The Bill of Rights applies to all law and binds all State organs and all persons.” Thus, that Article 32(4) right is thus superior to the jurisdictional question under Article 170(5), and that if the jurisdictional question in any way undermines the right of a person to enjoy the right and fundamental right in the Bill of Rights then the Court is called upon by Article 20 to develop the law and adopt the interpretation that “most favours the enforcement of a right or freedom; which interpretation would have to accord with clause (2) so that ***“Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the fundamental right or freedom.”***

92. According to the 1st respondent, Article 32(4) is a right not to be compelled to act, or engage in any act, that is contrary to the person’s belief or religion. That Justice Muriithi says that the purpose of Article 170(5) is “to uphold choice of the Court before which to file proceedings of personal nature” hence that would be true if the right to choose was a right open to all persons regardless of their religion or belief. That it does not seem to be a wise view when the effect of the choice of judicial forum impacts negatively for those Muslims who hold dear their religion and belief and wish to express and manifest it effectively including by following the religion’s dictates on dispute resolution, especially on issues of personal status such as custody of minors.

93. It was contended that the choice of judicial forum will mean that those who prefer to submit to the Kadhis court would be disadvantaged because (in matters relating to personal status and touching on child custody, care and maintenance) Article 170(5) and the Children Act do not carry a provision similar to section 48(2) of the Law of Succession Act which Muriithi J was faced with and considered that section mandatorily directs every forum to apply Muslim law to Muslims on inheritance.

94. It was contended that section 48(2) of the Law of Succession Act is mandatory that Muslim law applies no matter the forum when succession or inheritance between or involving Muslims is concerned, which position is acknowledged by the High Court (M. Muigai J) in **Nazima Jammohammed Nassar v Nasreen Kauser [2015] eKLR** (supporting and adopting Muriithi J's views but curiously elevating the freedom to choose an adjudicating forum to a "fundamental right").

95. It was submitted that clause (4) of Article 24 is a call to equality of arms for Muslims to prefer the court with jurisdiction in the listed matters as the court of first instance, much in the way Meoli J at Naivasha resolved the question before her in **SHH vs MHY 2015 eKLR (Naivasha High Court Matrimonial Cause No. 1 of 2015)**, dealing with incident of a marriage dispute, maintenance, and where the learned judge held:

"For the sake of good order in the administration of justice, however, it may be prudent that a party seeking maintenance should approach the lowest court in the first instance, save where circumstances otherwise dictate. The circumstances of the matter before me are not exceptional. I do therefore decline to assume jurisdiction in respect of the application for maintenance, but instead, direct that it be filed afresh before the court of first instance under the Marriage Act, as the Applicant may elect, whether the Kadhi's or Resident Magistrate's Court."

96. This court was urged to find that in other incidents of marriage or divorce or inheritance disputes, affecting children the Courts should be more inclined to this approach especially if there is a stalemate and one party sticks fervently to his Article 32(4) right; and that it would be just and fair. On the other hand, it was argued that it would not be fair for a High Court, for instance, to issue summons and where a party declines the court's jurisdiction on account of Article 32(4) to proceed with the matter ex-parte while knowing that an issue of religion and belief is rife in the matter.

97. The 1st respondent took umbrage in the fact that the matter of the Kadhi Courts is a matter steeped in the history of Constitutional law of Kenya, which history is similar to that of Israel and its Qadi courts. Reference was made to a discussion, "**PERSONAL STATUS**" AND "**STATUT PERSONNEL**" in **McGill Law Journal [Vol. 15 No. 3] Gad (Guido) Tedeschi (1907–1992)** a Professor of Civil Law at Hebrew University of Jerusalem who wrote and wondered why not just call a spade a spade rather than tumble about all over the place wondering what "personal status" is, just call it "**personal law**." The good Professor drew his conclusion from examination of international instruments that, like the exchange of letters between Kenya and Zanzibar to secure the Kadhi Courts in independent Kenya referred to by the 1st Respondent in his Replying Affidavit, secured for the Muslims in Palestine their right to their religion and their personal status under British rule e.g. The Mandate for Palestine [rather like the Mandate for Tanganyika] in which Article 9 stated:

"ART. 9. The Mandate shall be responsible for seeing that the judicial system established in Palestine shall assure to foreigners, as well as to natives, a complete guarantee of their rights. respect for the personal status of the various peoples and communities and for their religious interests shall be fully guaranteed. In particular, the control and administration of Wakfs shall be exercised in accordance with religious law and the dispositions of the founders."

98. Tedeschi also referred to the Palestine Order in Council of 1922 which continues to govern the existence of Qadi courts in Israel to date where Article 51 provided for jurisdiction of Religious Courts for Muslims, Christians and Jews and provided for matters of children's guardianship, adoption and all aspects of personal law pertaining to religious belief.

99. It was therefore submitted that the matter before this court deserves careful consideration and therefore the Court was urged to find and agree with Professor Tedeschi that: "**Status according to customary usage is a specific status, one or other of the several status to be found in a given juridical system, such as the status of a married person, of a legitimate child, etc. ... So much the more so that every status is different from every other by reason of its origin. But when it comes to describe, more or less, the field of application of the "personal law", it is understood that it is a single whole (comprising the several individual status or the different matters of personal status, however they may be described).**"

100. It was submitted that the listing of matters falling within the jurisdiction of Kadhi Courts under Article 170(5) and under the Kadhi Courts Act is not a tightly described and defined list.

101. It was further submitted that even though Tedeschi was writing before the Constitution of Kenya, 2010 and its formulation of Article 170(5), his views on the philosophical or jurisprudential approach with historical perspective to understanding what "**questions of Muslim law relating to personal status**" means and includes are relevant.

102. It was submitted that the Committee of Experts on Constitutional Review (**CoE**) explained that they anchored the Article on Kadhis' Courts on the undertaking at international law level between Kenya, Zanzibar and Britain that:

"The jurisdiction of the Chief Kadhi and of all the other Kadhis will at all times be preserved and will extend to the determination of questions of Muslim law relating to personal status (for example marriage, divorce and inheritance) in proceedings in which all parties profess the Muslim religion."

103. That the High Court must of necessity allow the law in this area to grow by encouraging steps such as Meoli J. took in SHH vs MHY 2015 eKLR (Naivasha High Court Matrimonial Cause No. 1 of 2015) (at paragraph 57 above). That This will encourage reform and reformist approach by Kadhi courts along the lines observed by Aharon Layish in his paper **REFORMS IN THE LAW OF PERSONAL**

STATUS OF THE MUSLIMS IN ISRAEL LEGISLATION AND APPLICATION published in *Recht von de Islam 12(1994)*, pp 45-57 [accessed in September,2016 at http://www.verenigingrimo.nl/wp/wpcontent/uploads/recht12_layish.pdf]. The Kadhi courts' jurisdiction is expected to "at all times be preserved". They must be trusted that they will apply their interpretive skills to Muslim law bearing in mind Article 53 where children rights are concerned and mindful of section 22 of the Children Act.

103. The 1st respondent submitted that matters of personal law and religion are too sensitive to be brushed aside and called on this Judicial Review Court to dismiss the Application dated 19th February, 2016 with costs because The Kadhi had and has jurisdiction on the marriage annulment matter and incidents thereof including determining who between the parents is best suited to have custody of the child of the marriage should the marriage be annulled. Section 22 of the Children Act recognizes other actions lawfully available; which must include actions in religious based courts like the Kadhi's courts and the arbitral Board of the Ismailia sect of Muslims in Kenya.

The interested party's submissions.

105. The interested party filed his submissions opposing the ex parte applicant's notice of motion that challenges the jurisdiction of the Kadhis Court to hear and determine matters relating to the custody, maintenance and control of children.

106. On the jurisdiction of the Kadhis' court which is the core issue for determination in this matter, it was submitted by the interested party that the Kadhis court is a creature of the law and its jurisdiction is provided under Section 5 of the Kadhis Court Act (Chapter 11 Laws of Kenya) which stipulates:

"A Kadhis 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 proceedings which comes before it."

107. That the above Act was assented to on 14/6/1967 and gazetted on 01st August 1967 the date of commencement. It was contended that the Kadhis court Act was enacted pursuant to provisions of the repealed Constitution of Kenya which under Section 66(5) in providing the Jurisdiction of the Kadhis Courts states:

".....shall extend 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."

108. Further, that the Constitution of Kenya 2010 under Article 170(5) 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 Court".

109. It was the Interested Party's submission that this court does interpret Section 5 of the Kadhis Court Act and Article 170(5) of the Constitution aforesaid on the extent of Jurisdiction of the Kadhis Court under the Constitution of Kenya and the statute as to whether matters relating to children if they fall within the ambit of personal law and to which he considers the answer to the question to be in the affirmative.

110. The interested Party further submitted that it is only the Kadhis Court that has primary Jurisdiction to determine matters relating to Muslim Personal Law and incidental matters and that other courts (even High Court has unlimited jurisdiction is divested of this primary Jurisdiction).

111. In interpreting the said provisions the court was invited to look at the historical context and legal context surrounding the inclusion of the Kadhis Courts in our independent constitution, the pre-cursor of the new constitution.

112. It was submitted that the Court needs to take Judicial notice that in ceding the Coastal Mile Strip to the independent Kenya, the Prime Minister of Zanzibar the late Shamte signed an agreement on the 5th of October 1963 while in London with the Prime Minister of Kenya, the then Late Mzee Jomo Kenyatta through exchange of letters wherein among other things the government of Kenya gave undertakings on several issues regarding the protection of the rights of the Sultan subjects under the coastal strip and also the preservation of matters under the jurisdiction of Kadhis Court. In particular, Clause 2 of the undertaking by the Prime Minister of Kenya which provided:

" The Jurisdiction of the Chief Kadhis and all other Kadhis will at all time be preserved and will extend to the determination of questions of Muslim law relating to personal status(for example marriage, divorce and inheritance) in proceedings in which all parties profess the Muslim religion." (emphasis added)

113. It was contended that the British, Kenya and Zanzibar officials who drafted the agreement (undertakings) were alive to the fact that marriage, divorce and inheritance were only examples of personal status.

114. In asking the Court to look at the historical context in enacting and or providing for the Kadhis Court in independent Kenya laws premised on the above quoted Agreement the court was urged to note that it was not being invited to look at the legislative history as we are not looking at the legislative records (Hansard) of Parliamentary proceedings, but circumstances leading to the bilateral agreement between the late Shamte and Mzee Jomo Kenyatta.

115. The interested party submitted that **non legal considerations** have been used by our courts in constitutional interpretation and that in this case (in respect of our case the Kenyatta/Shamte agreement should be used) and this court was invited to look at Article 170 (5) of the

constitution of Kenya 2010 and Section 5 Kadhi's Court Act Cap 11 purposively and with a keen eye on Article 32(4),24(4) and 50 in the words of Supreme Court in the matter of **The Interim Independent Electoral Commission [2014] 1EA 1** at page 23 that:

“.....The Constitution has incorporated non legal considerations, which we must take into account in exercising our jurisdiction. The constitution has a most modern Bill of Rights that envisions a human-right based and social justice oriented state and society. The values and principles articulated in the Preamble in Article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the courts.

“In Article 259(1) the Constitution lays down the rule of interpretation as follows:

“This Constitution shall be interpreted in a manner that (a) promotes its purposes, values and principles (b) advances the rule of law, human rights and fundamental freedoms in the Bill of Rights (c) permits the development of the law , and contributes to good governance” Article 20 requires the courts , in interpreting the Bill of rights ,to promote :(a)the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and (b) the spirit ,purport and objects of the Bill of Rights.

“These constitutional imperatives must be implemented in interpreting the provisions of the [Constitution].....Article 10 states clearly the values and principles of the constitution, and these include: patriotism, national unity sharing and devolution of power, the rule of law, democracy participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized good governance, integrity , transparency and accountability , and sustainable development.

“It is for these reasons that the Supreme Court while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting the Constitution, is a task distinct from interpreting the ordinary law. The very style of the Constitution compels a broad and flexible approach to interpretation.”

116. It was the interested party's submission that pursuant to Article 2(6) of the Constitution of Kenya 2010, the Agreement between Kenyatta and Shamte has the same status of a treaty and as a consequence forms part of the laws of Kenya of course as read with provisions of Sections 7 of Schedule 6 of the Constitution of Kenya 2010 with necessary adoptions qualifications and exceptions to be in conformity with the constitution for the Agreement to include other Muslim fraternity in interior Kenya.

117. It was further submitted that the decisions coming from the High Court concerning matters relating to Jurisdiction of Kadhis Court in children matters have been confusing with no consistent jurisprudence as there seems to be two schools of thought; with the first school of thought confirming that Kadhis Courts have Jurisdiction to hear and determine children matters as was held in **Amin Mohammed Hassan –vs- Zahara Mohamed Abdulkadir [2009]eKLR** by Hon. Justice Serگون that Kadhis courts have Jurisdiction on children matters for the reason that:

i. Children Act No.8 of 2001 did not expressly oust the jurisdiction of Kadhis court nor did it repeal any of the provisions of the Kadhis Court Act.

ii. Secondly he held that a critical look at Section 185 of the Children Act reveal that Courts other than the Children court were given discretion to refer matters before them touching on children to children courts but the Act uses 'may' and not shall.

This is besides holding that issues touching on maintenance and custody all are in category of personal status.

118. The other school of thought from case law is that the Kadhis courts do not have jurisdiction on children matters. It was submitted that from the two schools of thought, it is imperative that the matter should have been referred to the Chief Justice to constitute a full bench to deliberate on the issue which should be binding and further the principle of stare decision on the subordinate Court once and for all.

119. It was submitted that on the same *ratio* as was held by Serگون J in **Amin Mohammed's** case (Supra), section 73 of the Children Act (as relied on by the ex-parte Applicant) as read together with Section 158 of the Act provides in permissive language 'may' that the Chief Justice may by notice in gazette appoint magistrates to preside on children matters therefore it was urged that what needs to be noted is that under Article 260 as read together with Article 161 of the Constitution of Kenya 2010, a Kadhi and a Magistrate are distinguished as judicial officers and Section 73 of the Children's Act does not in any way envisage Gazettement of Kadhis to hear children matters.

120. It was also submitted that if an inference is made on the Ex-parte Applicant's argument should be made that, since a High Court Judge is not envisaged under Section 73 of the Children Act, will it mean that a High Court will not have jurisdiction on children matters (outside personal status law despite provisions of Article 165(3)(a) of the Constitution ?the interested party's answer is in the negative.

121. On the issue of personal law/ personal status it was submitted that from the provisions of Section 5 of Kadhis Court and Article 170(5) of the Constitution of Kenya, the Jurisdiction of Kadhis courts has been provided as- Muslim law questions relating to personal status, marriage, divorce or inheritance in proceedings where all the parties profess the Muslim religion. That from their submissions herein and on reliance of Kenyatta/Shamte Agreement, personal status is not limited to marriage, divorce and Inheritance which are only examples. Reliance was placed on **Hon. Sukyan Principal Kadhi 1 in his LLM thesis (Jurisdiction of Kadhis Courts in Kenya on Children Related Matters, University of Nairobi, 2015)** where he alludes at page 13 thereof that there is no jurisprudence in Kenya clarifying the

meaning of the phrase 'personal status.' However that the Hon Kadhi has stated therein that the law of personal status of **Iraq** covers rules governing marriages, divorces, children and their rights, maintenance and custody and rights of children with special needs. That the said Law is similar to **Sudan** and **Tunisia** but for Tunisia it also includes wills and gifts. That the said Hon Kadhi proceeds to quote a decision of an Egyptian Court of Cassation which defined Personal status in 1934 as:

“Personal status is the sum total of the physical or family descriptions of a known person which distinguishes him from others and give legal effect under the law in his social life such as being male or female, married or widowed or divorced a parent or legitimate child, being of full legal capacity or defective capacity due to minority, imbecility or insanity, being of absolute or limited legal capacity.

122. It was submitted that in Kenya, Serگون J held in **Amin Mohamed Hassan –vs.- Zahara Mohammed Abdulkadir [supra]**:

“Issues touching on maintenance and custody fall into category of personal status.

The word status has been described in Black’s Law dictionary as follows;

‘A person’s legal condition whether personal or proprietary. The sum total of a person’s legal rights, duties and other legal relatives or any particular group of them separately considered.....’

123. Further reliance was placed on the report titled **‘Study of Discrimination in the Matter of Religious Rights and Practices’** by Arcot Krishnaswami the UN Special Rapporteur of the Sub-Commission of Prevention of Discrimination and Protection of Minorities, of 1960 which also produced the **Draft Principles of Freedom and Non –Discrimination In the Matter of Religious Rights and Practices, at page 10** thereof, making reference to matters of personal status “such as marriage, divorce, alimony, guardianship, succession and testaments.” That by implication it shows that marriage divorce and inheritance are NOT the only limbs of personal status.

124. The court was told To note that the *Muslim Personal Law Shariat (Application) Act 1937 of India* at Section 2 provides:

“2.Application of Personal Law to Muslims notwithstanding any custom or usage to the contrary, in all questions(save questions relating to agricultural land)regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of personal law, marriage,dissolution of marriage including talaq, ila, zihar, lian, khula and mubaraat, maintenance,dower, guardianship, gifts, trusts and trust properties and wakfs (other than charities and charitable institutions and charitable and religious endowments)the rule of decision in case where parties are Muslim shall be the Muslim Personal Law (Shariat).

125. It was therefore submitted that the above proviso confirms that Personal law is not confined to marriage, divorce and inheritance but is wider contrary to submissions by the Ex-parte Applicant. Reliance was placed on **Fazelabas Mohamed Chandoo –v- A.I.Hussein, Kadhis Court & 4 others [2015] eKLR**, where Onguto J. in his judgment at paragraph 54 was emphatic to add that Kadhis Courts have jurisdiction to deal with any matter incidental to the exercise of jurisdiction over matters within its exclusive jurisdiction.

126. Further reliance was placed on the writings by **Professor G. Tedeschi** in his article, **“Personal Status” and “Statut Personnel” (McGill Law Journal No.3 Vol. 15)** where he discusses various writings and discussions by several scholars from civil and common law Jurisdictions. He writes that Cleveland *affirms consistently*: **“.....marriage isthe province of home law and is therefore a status.”**

“.....once a proper law has said that a child is legitimate there is a principle of common law of conflicts which says that whatever is now the home law of this child will be borrowed....We shall, therefore, call legitimacy a status....”

He further writes that *Beale looks continually to the “Personal Law” to decide whether a given question is a question of status and draws his reply from that criterion: “insanity is not a status. If insanity is found at the domicile it does not affect the condition of the person in another state.”*

“.....the unification of the various status in a single whole called precisely personal status.”

“.....In the common law countries, traditionally at least, ‘the doctrine of personal law as a unified conception is seldom explicitly formulated and has never been systematically elaborated.” (Nussbaun, Principles of Private International Law, 1943).

127. He further states that, **“what is apparently a motivation (they are matters of personal status and are therefore subject to the personal law of the parties) amounts to a tautology.”**

128. It was therefore submitted that the Jurisdiction of Kadhis Court as provided in Kenya as relating to questions of Muslim Personal Law, marriage, divorce and Inheritance do amount to a tautology.

129. On interpretation, it was submitted that in interpretation of statute, some of the commonly used in aid of interpretation and construction of statutes is the use of literal, purposive and contextual approaches and use of intrinsic and extrinsic aids like punctuations.

130. The interested party urged the court to give the Constitution a purposive interpretation in a liberal manner rather than in a restrictive

and conservative manner as was held in **Timothy Njoya Case(High Court Miscellaneous Application No. 82 of 2004(OS))** where Ringera J. stated;

“The Constitution is not an Act of Parliament and it is not interpreted as one. It is the supreme law of the land; it is a living instrument with a soul and a consciousness; it embodies certain fundamental values and principals and must be construed broadly, liberally and purposely to give effect to those values and principles and must be construed broadly, liberally and purposely to give effect to those values and principlesand what are those values and principles? I would rank constitutionalism as the most important. The concept of constitutionalism betokens limited government under the rule of law. Every organ of government has limited powers, none is inferior or superior to the other and none is supreme the constitution is supreme and they bow to it.I would also include the thread that runs throughout the constitution the equality of all citizens, the principle of non-discriminationand the employment of fundamental rights and freedom.

131. The court was therefore urged to take a purposive liberal and non restrictive approach in interpreting Article 170(5) of the Constitution and Section 5 of the Kadhis Court Act and Section 73 of the Children Act.

132. On the best court forum for Muslim personal status matters it was submitted that the Kadhis Court is a specialized court with expertise on Islamic law matters, and consistent with Article 162 (2) of the Constitution establishing the Employment and Labour Relations Court and the Environment and Land Court as read together with Article 170 of the Constitution establishing the Kadhis Court Act, though the High Court has unlimited original jurisdiction in civil and criminal matter and also appellate jurisdiction as conferred under Article 165 (3)(a) of the Constitution.

133. It was the interested party’s further submission and contention that premised on the jurisprudence of this court, it is only the Kadhis Court that has jurisdiction as a special court to hear and determine matters relating to Muslim law personal status, marriage and divorce where all parties profess the Muslim faith. And that in this case, children matters in an Islamic marriage being incidental and/or falling within the ambit of personal status, the children court and High court cannot assume the jurisdiction of the special court of the Kadhis Court.

134. The court was invited to also apply conflict of laws rules as a guidance in deciding which is the choice of law in Muslim personal law matters and also decide on which forum is best suited to handle Muslim personal vis a vis common law/statutory/international law principles status matters or rather what is referred to as *forum non conveniens*.

135. The interested party submitted that he was alive to the judgment of the court of appeal in **Karisa Chengo, Jafferson Kalama Kerigha & Kitsao Charo Ngati –vs- Republic [2015]eKLR** where it was held that the Chief Justice though had good intentions to appoint judges of employment and labour court and of environment and land court to hear criminal cases to clear back log, he could not on his fiat confer jurisdiction on a judge or a judicial officer which in law he does not have as the jurisdiction was only conferred and reserved for High Court as stated:

“We think that the Chief Justice in appointing judges from the two specialized courts to hear matters specifically reserved for the High court was conferring jurisdiction in these judges through judicial craft and innovation the very vice the supreme court warned against.”

136. The court was also urged to take cognizance and follow the route taken by Meoli J. in the case of **SHH v. MHY** and that of **Karisa Chengo** (supra) allow courts with special knowledge in matters within their jurisdictions to handle the said matters even if another court may have concurrent jurisdiction and only deal with such case in exceptional grounds or on appeal.

137. It was submitted that one of the factors to be considered in granting of custody orders under the Children’s Act is the religious persuasion of such a child- which in this case is Islam. It was submitted that the High Court or a Children Court did not have specialized knowledge in Children’s Islamic matters (Muslim Personal law).

138. It was submitted that in this case, if the ex-parte Applicant refuses to submit to Jurisdiction of Kadhis Court and the Interested Party refuses to be compelled to go against his religious practices it would be blasphemous against his religion.

139. On the alleged threatened infringement of interested party’s constitutional rights, it was submitted that Article 22(1) of the Constitution envisages a right to institute proceedings claiming that a fundamental right in the bill of rights has been denied, violated or infringed or threatened.

140. A pertinent question was posed as to whether the High Court or any party in proceedings in the High Court can coerce or force a Muslim to abandon Islam in matters of personal status which are governed by law and for that matter children matters arising out of a marriage conducted under Islamic Sharia; and whether any statutory provision whether Section 5 of the Kadhis Court Act or Section 73 of the Children Act override Article 32(4) of the Constitution of Kenya which prohibits in mandatory terms that;

“A person shall not be compelled to act or engage in any act that is contrary to the person’s belief or religion.”

141. It was submitted that the interested Party declines Jurisdiction of any other Court (Children Court, Magistrate Court and High Court) in matters of children which are personal law issues and that any order by the High Court for the matter to be decided by any other Court will be tantamount to the High Court compelling the Interested Party to apply law other than Islamic law which compulsion would be unconstitutional and threatens the rights of the interested Party under Article 32 of the Constitution on the right of conscience and freedom of religion and in essence any such proceedings at any other forum compelled will be unfair proceedings under Article 50(1) as read together with Article 25 of the Constitution.

142. It was submitted that it is an injunction and an act of obedience to Allah and His Messenger as ordained in Holy Quran Chapter 33:36 that;

“It is not for a believer, man or woman when Allah and His Messenger have decreed a matter that they should have an option in their decision. And whoever disobeys Allah and His Messenger has indeed strayed in a plain error.”

143. In conclusion, it was submitted on behalf of the interested party that the parties to the dispute at the Kadhis Court are all Muslims and having contracted their marriage in accordance with Muslim law, then anything incidental to the marriage falling under the personal law and for this matter children matter, the primary and only court best placed to handle any issue arising thereof is the Kadhis Court.

144. It was therefore submitted that the Ex-Parte applicant’s prayers for orders of certiorari cannot apply as the Kadhis Court never acted in excess of jurisdiction or illegally as alleged and hence her application should be dismissed with costs and the Court be pleased to hold that children matters are within the realm of personal status and that Kadhis Court has jurisdiction on such matters.

DETERMINATION

145. I have carefully considered the exparte applicant's notice of motion and the oppositions thereto together with the parties' advocates written submissions as highlighted orally. I have given equal consideration to the cited constitutional, legal and scholarly material placed before me by the parties' advocates.

146. In my humble view, the questions for determination before this court are whether the exparte applicant’s notice of motion is competent before the court and secondly, whether the Kadhi’s Court has jurisdiction to hear and determine the dispute before it which relates to custody, maintenance and control of the minor child whose parents are of Islamic religion and professing Islam; and therefore whether the judicial review orders herein are available to the applicant. There are other important ancillary questions which this court will endeavor to answer.

147. On the question of jurisdiction, according to the exparte applicant, section 73 of the Children's Act establishes a Children's court to deal with matters affecting children and that the children's court does not include the Kadhi’s Court.

148. It is further averred that section 73 of the said Children’s Act empowers the Chief Justice to appoint by Gazette Notice a Magistrate to preside over cases involving children in respect of any area in the country and that there is no mention of a Kadhi.

149. Further, that Article 169 of the Constitution distinguishes subordinate courts being the Magistrates' courts and Kadhis court and therefore there is no envisaging that a Kadhis court is a Magistrate's court. That only the Magistrate's court has jurisdiction to interpret the Children's Act and not the Kadhis court.

150. It is also asserted that only the Magistrate's court has jurisdiction to deal with matters under Part 7 and 8 of the Act which is custody, guardianship and maintenance of children.

151. The 1st respondent whose decision and jurisdiction is impugned and the interested party who is the applicant in the Kadhis Court matter between him and his spouse the exparte applicant herein are vehemently opposed to the motion on the main common ground that the Kadhis court has jurisdiction to hear and determine the matter before it and they go further to contend that this court has no jurisdiction to hear and determine any matter relating to Muslim personal law or status which includes custody and guardianship of children of Muslim parents.

152. The preamble to our 2010 Constitution acknowledges our pride in our ethnic, cultural; **and religious diversity, and determination to live in peace and unity as one indivisible sovereign nation.**

153. Article 2 of the Constitution stipulates that:

(1) The Constitution is the supreme law of the land and binds all persons and all state organs at both levels of government.

(2) No person may claim or exercise state authority except as authorized under this Constitution.

(3) the validity or legality of this constitution is not subject to challenge by or before any court or other state organ (4) any law including customary law, that is inconsistent with this constitution is void to the extent of the inconsistency, and any act or omission in contravention of this constitution is invalid.

(5) The general rules of international law shall form part of the law of Kenya.

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

154. Article 170 establishes the Kadhis courts and confers jurisdiction to the court, under clause 5, **limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance relating to proceedings in which all parties profess Muslim religion and submit to the jurisdiction of the Kadhis courts.**

155. Kadhi’s Court is a subordinate court established under Article 169(1) (b) of the Constitution.

156. Neither the Constitution nor the Kadhis' courts Act define what personal status is, and neither do the relevant provisions mention the words "protection, custody, guardianship maintenance or control of a child."

157. The Children's Act, 2001 relates to all children irrespective of their religious affiliations and or cultural background. The Act does not distinguish between a child of Muslim parents from any other child for purposes of protection under the law-custody, guardianship and maintenance.

158. 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.

159. 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.

160. Part III of the children's Act provides for parental responsibility, Part V provides for Children's Institutions, Part VII provides for custody and maintenance, Part VIII provides for Guardianship, Part IX provides for judicial orders for the protection of children, Part X provides for children in need of care and protection Part XI provides for foster care placement while Part XIII provides for child offenders.

161. It is worth noting that the Children's Act came into effect in 2001 upon the acknowledgment of the need for a child focused international law that addresses the peculiar needs of children. On 20th November, 1989, the United Nations General Assembly adopted the convention on the Rights of the Child (CRC) and in July, 1009, the Organization of African Unity (OAU) now African Union (AU) Assembly of Heads of States and Governments adopted the African Charter on the Rights and Welfare of the Child (ACRWC).

162. Both international instruments contain universal set of standards and principles for survival, development, protection and participation of children. Subsequently, Kenya ratified both instruments and following its commitment Parliament enacted the Children's Act, 2001. The Act incorporates all the rights and responsibilities of the children and consolidates all laws relating to children into a one stop single statute.

163. Case law in Kenya on the issues raised is not settled as there are differing schools of thought from the High Court with one school stating that the Kadhis' court has jurisdiction to hear and determine matters relating to custody and maintenance of children since they fall within personal status whereas another school of thought believes that there is no jurisdiction for the Kadhis court to hear and determine matters which are reserved for the Children's court.

164. Whereas the ex parte applicant believes in the latter position, the 1st respondent and the interested party maintain that only the Kadhis court has jurisdiction to hear and determine such matters and even go further and urge that for that matter not even the High Court has jurisdiction to hear and determine matters affecting Muslim personal law involving custody, guardianship and protection of children and that it would be blasphemous to do so, besides being unconstitutional and in violation of Article 32 of the Constitution on the right of conscience and freedom of religion and that in essence any such proceedings at any other forum compelled will be unfair proceedings under Article 50(1) on the right to a fair hearing as read together with Article 25 of the Constitution which stipulates that the right to a fair hearing shall not be limited.

165. The main question for determination in this matter is whether the Kadhi's court has jurisdiction to hear and determine the dispute before it relating to the custody of the minor Child A..M.A.A. It is not about the rights of the parents of the minor child. In other words, this court in these judicial review proceedings brought by the ex parte applicant who is the biological mother to the minor child has not been asked to determine the substantive issue whether the rights of the child have been violated by having the Kadhi's Court hear and determine the dispute regarding custody of the minor.

166. However, the interested party and the 1st respondent have introduced an interesting perspective to this matter with the interested party claiming that this court has no jurisdiction to hear and determine the matter and that by this court hearing this matter, it is infringing on the

interested party's rights to a fair hearing because he is being compelled to appear before a court which does not have jurisdiction and the specialty to hear matters of Islamic personal law and status. Further, that it is blasphemous for this court and the Children's court to purport to have jurisdiction to hear and determine the issue of custody of the minor child since the issue of custody is a matter of Islamic personal law and status.

167. A jurisdictional question goes to the root of the court and so the court must take it seriously. For it is not a mere procedural technicality since a court of law cannot arrogate itself of jurisdiction it does not have. Jurisdiction is conferred by statute or the Constitution but the statute cannot confer jurisdiction beyond the scope defined in the Constitution. **See S.K. Macharia v KCB & 2 OTHERS [2012]EKLR.**

168. A litigant who approaches the court must be clear which jurisdiction he wishes to invoke. The High Court is established under Article 165 of the Constitution as a superior court, which Article also confers jurisdiction on the court.

169. The jurisdiction of this court to hear and determine judicial review matters can be found in Articles 22,23,47,165 of the Constitution and Sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules and the Fair Administrative Action Act, 2015.

170. Although the 1st respondent appeared to challenge jurisdiction of this court on the ground that the motion is not properly before this court, I have perused the motion as filed and in line with Order 53 of the Civil Procedure Rules, I am satisfied that the motion is properly before this court for reasons that the motion was grounded on the statutory statement and verifying affidavit sworn by the exparte applicant accompanying the chamber summons for leave to institute these proceedings. Order 53 is clear as to what should support the motion and in my view, the intention of that provision is to avoid verbosity and repetition of the same pleadings which were filed in the application for leave by requiring the motion to be filed in the same matter for leave.

171. However, the 1st respondent raised a very important issue regarding prayer 1 of the motion contending that there were no orders made on 3rd February 2016 capable of being quashed. I shall return to that question later.

172. It is common knowledge that child custody is a legal term used to describe the relationship between a parent and a child such as the right of the parents to make decisions for the child, and the parent's duty to care for the child. However the terminology **"personal status" is not defined in our statutes. I would therefore adopt the definition given by** Seron in **J Amin Mohammed Hassan –vs- Zahara Mohamed Abdulkadir [2009] eKLR.**

173. The 1st respondent heavily relied on scholarly writings on the subject, and which I have examined in detail. However, it should be noted that those scholarly writings are authored in the context of a pure system of sharia law.

174. My humble view is that a religious state, where religion is the law, unlike a secular state, establishes religion as pertinent differentiating factor. In religious states, and more so in predominantly Islamic countries, the legal regime is divided into two-one for Muslims and the other for non-Muslims and the differentiation also applies to political and social life of the people.

175. Kenya is a secular state. Article 8 of the Constitution is categorical that **"There shall be no state religion."** Therefore it is of cardinal necessity that except where it is expressly provided by the Constitution or the statute, religion must be distanced from the law. Therefore, the task before this court is to interpret the law of the land, not in light of the tenets of the parties' religion or religious affiliations but in keeping with legislative intent and the letter and spirit of the Constitution.

176. Section 22 (1) of the Children's Act is clear ***that if any person alleges that any of the rights of the child as stipulated in the Act have been or are being or are likely to be contravened, then, without prejudice to the matters in issue, that person may apply to the High Court for redress on behalf of the Child.***

(2) the High Court shall hear and determine an application made by a person in pursuance of subsection (1) and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 4-19 inclusive.

(3) the Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it or under this section including rules with respect to the time within which applications may be brought and references shall be made to the High Court.

177. The above provision makes it clear that where there is violation or threatened violation of the rights of a child ***including the right to religious education and to fulfillment of their own culture, practice, language and religion as stipulated under section 8 of the Act***, then any person may bring an application before the High court for an appropriate order, writ or direction.

178. In the present case, there is no application seeking for declaration of any of the rights of the minor and neither is there an application alleging that the minor's rights are being violated by being subjected to proceedings before the Kadhis Courts or if taken before the Children's Court. The above provision of section 22 is in material particulars similar to Article 22 of the Constitution on enforcement of the fundamental rights and freedoms espoused in the bill of Rights.

179. Section 30 of the Children's Act establishes the National Council for Children's Services and its composition under section 31 thereof includes ***three persons representing religious organizations, nominated by the Episcopal Conference, the National Council of Churches of Kenya and the Supreme Council of Kenya Muslim, respectively.***

180. The question that I pose here is, why would the law provide for inclusion in the National Council for Children's Services of religious organizations including **SUPKEM** if the Act was inapplicable to the Muslim Children in matters of custody, guardianship, maintenance and

generally the welfare of children whose parents profess the Islamic religion? The answer to that question in my view is that the intention of Parliament was to enact an all-inclusive piece of legislation to apply to all categories of children without distinction as to their religious persuasion.

181. The court also notes that the *purposes and objectives of the Council include to exercise general supervision and control over the planning, financing and coordination of Child rights and welfare activities and to advise the government on all aspects thereof. Further to ensure full implementation of Kenya's international and regional obligations relating to children and facilitate the formulation of appropriate reports under such obligations among other many functions of the Council.*

182. Article 169 (1) of the Constitution establishes subordinate courts which are:

a. The magistrates courts

b. The Kadhis Courts

c. The Courts Martial;

d. And any other court or local tribunal as may be established by an Act of Parliament, other than the courts contemplated in Article 162 (2) of the Constitution.

183. Section 173 (1) of the Children's Act stipulates that:

1. There shall be courts to be known as Children's Courts to be constituted in accordance with the provisions of this section.

184. In my view, Children's courts, just as other subordinate courts established under the Constitution including the Kadhis court enjoy constitutional protection.

185. Section 82 of the Children's Act provides that on application of either a parent or guardian the court may grant custody of a child to that person. Section 83 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

186. From the above section 82 and 83 (g) of the Act, I have no doubt in my mind that the Children's' court is given the power and jurisdiction to deal with matters of custody of children irrespective of the religious persuasion of that child. This, therefore, in my view, is a matter that needs no interpretation.

187. It therefor follows that in the absence of any specific application by the interested party or 1st respondent asserting that the rights of the minor have been or are being violated as stipulated in section 22 of the Act and Article 22 of the Constitution, this court would be overstepping its mandate if it was to wade into the arena of determining the question of rights of the interested party to appear before a court other than a Kadhis court.

188. I reiterate that Jurisdiction is a crucial issue that cannot be ignored by any court or Tribunal. As was stated by Nyarangi JA in the "Owners of Motor Vessel "Lilian S" vs Caltex Oil (K) Ltd [1989] KLR 1:

"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."

189. In *Allarakhia v Aga Khan* [1969] EA, 613, it was held that parties cannot by mutual consent confer jurisdiction upon a court which has no such jurisdiction. 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.

190. In the recent case of *Republic vs. Karisa Chengo, Jafferson Kalama Kerigha & Kitsao Charo Ngati* [2017] eKLR the Supreme Court upheld the decision of the Court of Appeal and reiterated that jurisdiction is everything without which a court of law acts in vain. The Supreme Court also stated in no uncertain terms that "*status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the Court's operation.*"

191. The Kadhis Court is a creature of the Constitution (Article 169 of the 2010 Constitution. The jurisdiction of the Kadhi's Court is specifically defined under Article 170(5) of the Constitution and Section 5 of the Kadhi's Court Act as- "*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 Court.*"

192. Thus, the jurisdiction of the Kadhis 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 Kadhis court.

193. In the instant case, all the parties are Muslims and profess the Islamic faith. The exparte applicant and the interested party were married under the Islamic law. Their marriage seems to be on the verge of collapse and there is a dispute as to whether custody and guardianship of the child, issue of their marriage is a question of Muslim law of personal status within the meaning of Article 170 (5) of the Constitution and section 5 of the Kadhis Courts Act; or is an issue that falls within the jurisdiction of the Children's courts established under the Children's Act,2001.

194. In my humble view, there is no dispute that courts which are specialized in Islamic law in other jurisdictions have the jurisdiction to hear and determine disputes relating to custody, guardianship and control of children. There is also no dispute that from a plethora of useful persuasive authorities and scholarly articles from journals and elsewhere relied on by the 1st respondent, in countries where Islam is the state religion, the applicable law to Muslims is Sharia law and therefore there is no way a dispute such as the one before us would be handled in a different court than a religious court.

195. In the Kenyan situation, however, even going by the decision in **RMM v BAM** citing **Amina O. Abdulkadir v Ravinder N. Shah**, (**supra**) it was clear that the Court of Appeal refused to be persuaded that the English law did not apply to Muslims.

196. The exparte applicant, though professing Islamic faith, is unwilling to submit to the Kadhis Court's jurisdiction and asserts that the child custody dispute falls within the jurisdiction of the Children's Court. On the other hand, the interested party believes that children's matters fall exclusively within the jurisdiction of the Kadhi's Court established under Article 170 of the Constitution and that the court should go ahead and interpret that section and the Kadhi's Court Act to the effect that a question of Muslim law relating to personal status includes custody of Children.

197. From the submissions of the 1st respondent and the interested party, there appears to be some misconception that the exparte applicant is saying that the Kadhis court would not give justice to the case before it. That is not what I understand her to be saying. In my view, she is challenging the jurisdiction of that court and not its capability to determine the dispute.

198. In my view, there is absolutely no infringement of rights of the child or the interested party where it is clear that unless both parties professing Islam submit to the jurisdiction of the Kadhis court then the matter will be resolved in the conventional courts (**see international Journal of Humanities and Social Sciences: Islamic Family Law in Kenya, 2014**). I therefore refuse to be persuaded that the parties will be prejudiced or that their rights will be infringed or violated at all by the conventional courts hearing a dispute which though falling within the jurisdiction of the Kadhis Court, one of the parties refuses to submit to the jurisdiction of the Kadhis Court. It should further be appreciated that the Constitution and Kadhis Court Act limits the jurisdiction of the Kadhis Court. The law does not confer sweeping jurisdiction to the Kadhis Court.

199. In the reply to the application for stay in this matter, the interested party annexed to his affidavit copy of application for interim custody orders before the Kadhis court and in that application, it was expressly filed under Sections 24, 82,83 and 88 of the Children's Act. In my humble view, what the interested party was doing was to ask the Kadhis court to invoke the children's Act in determining temporary custody of the minor but he is not willing to invoke the same Act which stipulates that Children's matters shall be heard and determined by Children's court presided over by a duly appointed and gazetted children's magistrate by the Chief Justice.

200. In my humble view, the Kadhi's court cannot claim unlimited jurisdiction which is not granted to it by the Constitution or the statute. The legislature in enacting the children's Act was alive to the importance of religious issues and that is why the Act is so comprehensive that it takes into cognizance religious persuasion and the customs and cultures of the all children who are in contact or in conflict with the law. The Act also creates a National institution-Council for Children's Services and incorporates the top most organ of Kenya Muslims-SUPKEM.

201. I find the argument by the interested party and the 1st respondent dangerous as what they are asking this court is to attempt to confer on the Kadhi's court jurisdiction of a children's court.

202. Although the 1st respondent claimed that the applicant had submitted to the Kadhi's jurisdiction, what he exhibited was only a plaint and an interlocutory application seeking for interim orders of the Kadhis court including temporary custody of the minor child. He also exhibited an order which he issued exparte on 1/2/2016. He then fixed the matter for interpartes hearing on 15/2/2016 on 10/2/2016.

203. The applicant approached this court seeking to stop the proceedings before the Kadhi's court. No defence or replying affidavit was exhibited to show that the applicant had agreed to participate in the proceedings before the Kadhi's court at the interpartes hearing. The court notes that these proceedings were initiated to stop the proceedings before the Kadhi's court and therefore the burden of proof lay on the person alleging that the applicant had submitted to the jurisdiction of the Kadhi's court.

204. Furthermore, even if there was a replying affidavit or grounds of opposition which were not exhibited before this court, nothing bars a party who is challenging jurisdiction of the court to say so through a reply and that should therefore not be construed to mean submission to the jurisdiction of the court.

205. The interested party in seeking interim custody orders before the Kadhis court, I note, did not seek to rely on any provisions of the

Kadhis court Act and albeit failure to cite provisions of the law would not in itself be fatal to the proceedings, it is my view that the interested party did not find any provision in the Kadhi's court Act or the Constitution relevant. I find none either.

206. The Children's Act is of universal character and in my humble view, that is the very reason why the application of Muslim law is not injected in the Act and the Constitution, to extend to matters of parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of Muslim children. And unless the Constitution or the law are amended, in my humble view, this is not the right forum to exhaustively determine the legitimacy of the Children's Act, the Kadhis court Act and or to determine the matter under Article 165(3)(b) of the Constitution as no substantive petition by the parties was placed before this court for consideration.

207. As earlier stated, the Constitution and the Kadhi's Court Act do not define what **"a question of Muslim law relating to personal status"** means. It should however be noted that even assuming that the Kadhi's Court has jurisdiction to hear and determine cases involving custody of children, both disputants being Muslims, must submit to the jurisdiction of Kadhi's Court, failure to which, the jurisdiction of the Kadhi's Court in the matter is expressly ousted.

208. It is for that reason that Section 5 of the Kadhi's Court Act enacts:

"A Kadhis 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."

209. The above Section which replicates Article 170 (5) of the Constitution in part is couched in permissive terms to allow flexibility and discretion on the part of either party to a dispute raising *questions of Muslim law relating to personal status, marriage, divorce or inheritance* and who profess the *Islamic religion to submit or not to submit to the jurisdiction of the Kadhis Court*. Nonetheless, the Section and constitutional provision do not leave such party who declines to submit to the jurisdiction of the Kadhis Court empty handed. Under the Kadhis Court Act, an avenue is provided for resolution of the dispute either in the High Court or any subordinate court.

210. Article 170(5) of the Constitution provides for the jurisdiction of the Kadhis court in the following terms: ***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."***

211. It should be noted that the mandatory use of the word **shall** comes before the limitation of the specified jurisdiction: shall be limited to In my humble view, the word **shall** is used **to limit** the jurisdiction **not to confer** the jurisdiction.

212. Furthermore, even where the parties profess the Muslim religion in matters relating to personal status, marriage, divorce or inheritance, and even assuming that custody of the child falls within the question of Muslim law relating to personal law status, a party who does not wish to submit to the jurisdiction of the Kadhis Court may nevertheless file their proceedings before the High Court or a subordinate court as nothing in Section 5 of the Kadhis Court's Act bars them from so doing.

213. In my humble view, the spirit of the Constitution at Article 170(5) and Section 5 of the Kadhis Court's Act is to encourage parties who are professing Muslims to file proceedings relating to matters affecting them and specified therein, before the Kadhis Courts, but not to oust the jurisdiction of the High Court and or any other subordinate Court from hearing and determining any question, especially where one of the parties does not submit to the jurisdiction of the Kadhis court.

214. In other words, it is not mandatory jurisdiction conferred on the Kadhis Court. There must be consensus between the parties that a matter of Islamic law of inheritance, divorce, marriage or personal status be determined in the Kadhis Court and where no such consensus exists, the party cannot be compelled to subscribe to the jurisdiction of the Kadhis court over the matter.

215. In the premises, I do not buy the argument by the interested party and the 1st respondent that the Kadhis court is a specialized court just as the courts contemplated in Article 162(2) of the Constitution. If that were to be the case, nothing prevented the makers of the Constitution and the Kadhis Court Act or even the Children's Act from stating so since the Kadhis Court Act preexisted the 2010 Constitution and has to date not been amended to confer it with exclusive jurisdiction in the matters under consideration and more so on the issue of jurisdiction of the court.

216. I reiterate that the Constitution does not oust the jurisdiction of the High Court or other subordinate court (Children's court which latter court)is a creature of statute as contemplated in Article 169 of the Constitution from hearing matters which the Kadhis court is given jurisdiction to hear and that is why in my view, section 5 of the Kadhis court Act has remained intact.

217. In the instant case, and as stated earlier, the issue at hand is not clearly defined by any law of the land and although this court has been urged to look elsewhere for the definition such as Sudan, Iraq, Tunisia and Egypt, my humble view is that the jurisdictions referred to are predominantly Muslim Countries practicing Sharia Law unlike Kenya which is a secular state.

218. Further, whereas I appreciate the work of scholars like the Kadhis LLM Thesis on the subject, this court is not bound by the writer's personal views and his religious dispositions which have not influenced policy and legislative making processes and which are therefore not binding on this court and I would hesitate to adopt the views of the learned Kadhi as the law applicable in Kenya, especially when the thesis acknowledges the limited jurisdiction conferred upon the Kadhis Courts in Kenya and advances the view of what the law ought to be as opposed to what it is.

219. Law making process in Kenya is participatory and not through desk research conducted by one individual for academic achievements. And if the learned Kadhi persuades the electorate to adopt his views on this matter then the courts will be more than glad to apply the law if enacted.

220. This court has been urged to interpret the Constitution and the law liberally so as to accord with the wishes of the two protagonists that the Children's court has no jurisdiction to hear and determine matters that are before this court; And that the interested party feels discriminated and his rights violated by being compelled to appear before the Children's court. I am not persuaded to go in that direction, especially in the absence of any specific application seeking to declare the Children's Act unconstitutional or discriminatory.

221. In the same vein, this court is unable to find that the cited **Draft Principles of Freedom and Non-discrimination in the matter of Religious Rights and practice** cited by the 1st respondent are principles of law of universal application that this court would apply to such circumstances as those in this case.

222. In my humble view, the best forum for the 1st respondent and interested party to agitate for such principles is via a constitutional petition where they will have an opportunity to articulate what they consider to be discrimination in the matter of religious beliefs, rights and practices.

223. The other irony in the interested party's argument is that the High court is divested of jurisdiction to hear and determine matters which are impugned before this court and as stipulated under section 5 of the Kadhi's court Act and Article 170 of the Constitution, yet the appeals from the Kadhi's court go to the High Court for determination and all the way to the Supreme Court which are not specialized courts in matters religion

224. In my humble view, nothing stopped the Constitution makers from placing the Kadhi's court at the level of the High Court and courts of equal status established under Article 162(2) of the Constitution, and even making it clear in Article 165(5) of the Constitution that the High Court's jurisdiction in the matters falling under the jurisdiction of the supreme Court and the courts contemplated under Article 162(2) of the Constitution is expressly ousted, if it was the wishes of the people of Kenya to oust the jurisdiction of the High Court in such matters where the Kadhi's court has jurisdiction.

225. In the instant case, nonetheless, the Children's Act is clear that in considering whether or not to grant custody of a child to one parent where there is a dispute, the **court shall take into account the religious persuasion and the best interests of the child**. In my humble view, there is no religious blasphemy as there is no evidence or allegation that the ex parte applicant has ceased being a Muslim. This court is therefore not prepared to accept the persuasion to decline jurisdiction and to declare that it or the Children's court have no jurisdiction to hear and determine the issues relating to the minor child subject of these proceedings. It is not parties who decide the jurisdiction of the court but the law and the Constitution.

226. And as stated earlier, even if the Kadhi's court had jurisdiction, for as long as the ex parte applicant 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, this court has no power to compel her to appear before that court. The section creates an avenue for the parties in this case to appear before the subordinate court –Children's court or the High Court.

227. The law does not contemplate a situation where the other party refuses to appear before the High Court or the subordinate court. The jurisdiction of the High Court and subordinate courts is conferred and limited by the statute laws and the Constitution. The Supreme court in **Yusuf Gitau Abdalla v Building Centre (K) Ltd & 4 Others [2014]EKL** held that the court would not assume jurisdiction by way of a litigant's pestering but that the court's mandate is to do justice through an established legal framework

228. Although there was an argument as to whether the advisory by the Chief Kadhi to the High Court (Meoli J) was binding, I have no doubt in finding that indeed, the Chief Kadhi's advisory made to the High Court (Meoli J) is only persuasive to this court.

229. In this case, it is my humble view that the Children's court has elaborate provisions on what orders the court can issue and what factors it should take into account in issuing such orders. The Children's Act, like other statutes, was not enacted to apply to specific children of certain religious faiths. It applies to all persons who are defined as children. It is therefore my humble view that the best forum for determination of the custody of the minor irrespective of her religious persuasion is the Children's court, which has the duty of taking into account the religious persuasion of the minor.

230. I am so persuaded that the interpretation of Article 170 (5) of the Constitution favours this approach because the Kadhi's court would not have jurisdiction to determine a matter where only one party accepts to submit to the jurisdiction of the court which then would leave out the other party who is equally entitled to access justice through the courts.

231. Article 165 (6) of the Constitution confers on this court supervisory jurisdiction over subordinate courts and the Kadhi's Court is one such court. Judicial review process challenges the lawfulness of the decisions of subordinate courts or tribunals or persons, bodies or authorities exercising judicial or quasi-judicial authority.

232. Having found that the Kadhis court has no jurisdiction to hear and determine the dispute over custody and guardianship of the minor child where one of the parties to the dispute has not submitted to the jurisdiction of the Kadhi's court and this being the case because Article 170(5) of the Constitution which is the Supreme Law of the land gives the choice to parties notwithstanding that they are all Muslims, to either subscribe to the jurisdiction of the Kadhi's Court or of the regular courts(High Court or subordinate Court), I hold that the judicial review application herein has merit.

233. The question of the proceeding before the Kadhis Court which also concern dissolution of marriage is not for this court to make any decision on as it is in the discretion of the parties to decide whether they wish to be heard by the Kadhis Court or by any other court. The

exparte applicant, however, did not challenge the jurisdiction of the Kadhi's court to hear and determine the aspect of the case that concerns the marriage between the exparte applicant and the interested party.

234. However, prayer No 1 of the motion cannot be granted as there was no order issued on 3rd February, 2016 capable of being quashed. The only order on record is that of 1st February 2016. The applicant never sought to amend her pleadings not even in her counsel's submissions to correct the date on the prayer. Accordingly, I decline to issue certiorari in the manner sought

235. Nonetheless, having found that the Kadhis court had no jurisdiction to preside over the matter as a whole in the circumstances of the case, I invoke the provisions of Article 165(6) and (7) of the Constitution and issue judicial review order of certiorari bringing into this court for purposes of quashing and I hereby quash all the proceedings and orders made or issued by the Kadhi's Court Nairobi in Kadhi's Court case No. 4 of 2016 between the exparte applicant and the interested party in as far as those proceedings touch on the custody, control and welfare of the minor A.M.A.A.

236. I must however mention that albeit there is an appeal filed by the exparte applicant on the same issue of jurisdiction of the KADHIS Court in Children's matters governed by the Children's Act, none of the parties was opposed to this court hearing and determining the application herein. And as the existence of an appeal did not oust the jurisdiction of this court, I saw no reason to stay this matter suo motu.

237. Having quashed the proceedings and orders of the Kadhi's Court, there is nothing left to be prohibited as there are divorce proceedings pending before the Kadhis Court in the same matter. I therefore find that the prayer for prohibition is unnecessary. I decline to grant it.

238. Finally I appreciate the submissions by the 1st respondent and interested party who assisted the court greatly in understanding the various aspects of Islamic faith and law as practiced in other jurisdictions where Islam is the state religion.

239. As the dispute involves the custody and welfare of a minor, each party to bear their own costs of these proceedings.

Dated, signed and delivered in open court at Nairobi this 25th day of January, 2018

R.E.ABURILI

JUDGE

In the presence of:

Miss Apolot h/b for Mr Omari for exparte applicant

Miss Guya h/b for Mr Mwenesi for the 1st Respondent

N/A for the 2nd Respondent

N/A for the interested party

CA: Kombo