



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT GARISSA
CIVIL APPEAL NO. 3 OF 2016
(From the original Civil Case No. 88 of 2016 of Kadhis
court at Garissa – Hassan O. Daffa Kadhi 2).

K I H.....APPELLANT

V E R S U S

A A H.....RESPONDENT

JUDGMENT

This matter arose from the Hon. Kadhis Court in Garissa. After the Hon. Kadhi heard witnesses in Hon. Kadhi Court Case No. 88 of 2016 between K I H the plaintiff and A A H the defendant, the Hon. Kadhi made a consent judgment dated 17th May 2016. The said consent Judgment was signed by the parties as well as other witnesses. On the 7th June 2016 however, the same Hon. Kadhi made a ruling slightly altering the terms of the consent judgment.

The appellant who was the plaintiff in the Hon. Kadhis Court, then came to this court on appeal through counsel C. K. Nzili and company Advocates on the following grounds:-

1. That the learned trial Hon. Kadhi erred in law and in fact entering a purported consent order which the appellant did not agree to.
2. That the learned trial Hon. Kadhi erred in law and in fact by making orders contrary to the consent agreement made on 17th May 2016.
3. That the learned trial Kadhi erred in law and in facts in accepting monies on behalf of the appellant which is contrary to the aforesaid agreement.
4. That the learned trial Kadhi erred in law and in fact in accepting an order contrary to be best interests of the children.
5. That the learned trial Hon. Kadhi erred in law and in fact in ordering the appellant to comply with orders which fly in the face of the Children's Act.
6. That the learned trial Hon. Kadhi erred in law and in fact in showing open bias and favourism in the matter.

In the said petition of appeal counsel for the appellant asked for vacation of the orders of 17th May 2016 which were the consent orders, and that the case be heard afresh, and that custody of the minors be given to the mother, and that the respondent be ordered to maintain the minors.

During the hearing of the appeal, Mr. Nzili counsel for the appellant made extensive submissions on how the proceedings in the Hon. Kadhi's court were conducted. Counsel emphasized that the Kadhi did not take into account the best interest of the children when he made the orders. In addition, counsel faulted the Kadhi for varying the consent orders because of the convenience of the respondent. Counsel emphasized that the consent of the parties did not take into account the best interests of the children and as such the Kadhi's Court should have protected the children. Counsel for asked for a retrial.

The respondent also made extensive submissions on how the proceedings in the Hon. Kadhi's court were conducted. He stated that the brothers of the appellant wanted his family to break up, and that though he consumed alcohol and had been to a drug rehabilitation center for 3 months in 2014, he maintained his family as he worked as a medical practitioner. According to him, it was only during a short period when the County Government failed to pay them on time that he did not provide financially for the family. He stated that he took his wife to her original home when she was 8 months pregnant as a custom to deliver, and that though he regularly sent Kshs 10,000/= per month his wife's brothers prevented him from visiting her, and that was the reason why he was kept away from the last born child whom the appellant abandoned him in court. As a consequence, the Hon. Kadhi ordered that he keeps custody of that child. He stated also that he had offered to pay Ksh. 200,000/= which was the value of 4 camels because it was Ramadhan time and there was a shortage of camels. He complained however that the family of his wife refused to take the Kshs 200,000/= and he thus paid the same in court. According to him, that was the only alteration that a Kadhi made to the consent judgment.

I will put it on record here that the appeal was heard in the presence of M.S. Hassan Kadhi I at Garissa who gave his opinion as an assessor. He stated that though the appellant said in court that she was giving the child to the respondent, that such action was not acceptable under Islamic law. The Kadhi further stated that it was prohibited for a mother to make such an agreement and that such an agreement was therefore annuity. The Kadhi stated that the order of the trial Hon. Kadhi in converting the value of camels to Kshs 200,000/= was proper as 4 camels would have the value of Kshs 160,000/- and that the additional Kshs 40,000/- would take care of the contingencies. The Hon. Kadhi's suggested that the appellant should of take the money and buy the camels from the market.

This is a first appeal. As a first appellate court, I am required to reconsider what transpired in the trial court and come to my own conclusions and inferences- see the case of ***Selle -vs- Associated Boat Company Ltd (1968) EA 123.***

I have perused the proceedings. Both the appellant and the respondent gave their evidence in court. The appellant also called one witness. After that, both the parties came up in court with a consent agreement and the Hon. Kadhi recorded the same. Later the Hon. Kadhi changed the payment of dowry from strictly being in terms of camels and provided for an alternative of payment of Kshs 200,000/=. This appeal arose after that variation.

A consent between parties is an agreement, and if it is recorded in court it becomes the decision of the court. It binds all parties like any judgment. The consent included agreement on the custody of the children, but counsel for the appellant has maintained that the welfare of the children was not taken care of in the consent. The Kadhi/assessor has stated that on appeal purported to abandonment the child by the appellant is not acceptable as under Islamic and was null and void.

I have taken into account that the Children Act and the Constitution requires that the welfare of the children be given paramount importance, in any matter involving children. In the case of ***B.W.M -vs- S. K. J Nairobi High Court Family Division Civil appeal No. 24 of 2014***, cited by counsel for the appellant, the issue of welfare of the child was considered. I agree with the reasoning. Article 53 (2) of the Constitution provides as follows:-

“A child’s best interest are of paramount importance in every matter concerning the child. Section 4 of the Children’s Act No. 8 of 2001 also emphasizes the same point.”

In my view sending the matter to the Hon. Kadhi’s court for fresh trial will not be the best interest of the children. It will in my view worsen the situation for the children. Custody of a child is not ownership of a child. It only means having the child under one’s care.

In my view the best order that this court can make, is to vacate the order for the respondent having the custody of the child and awarding the custody of all the children to the appellant. I will thus order that the child who was said to have been abandoned by the appellant in court be and is hereby put under the custody of the mother the appellant. The respondent will have a right of access to all the children of the marriage.

As to the issue of the conversion of the camels to Kshs 200,000/-, I find no prejudice caused to the appellant. All things ordinarily have a monetary value, camels included. There is no dispute that the amount of Kshs 200,000/= is the approximate value of the 4 camels. I thus find no basis for finding that the Hon. Kadhi erred in translating the value of the camels into money. In my view the Hon. Kadhi did the best he could to in the circumstances.

Consequently I order as follows:-

1. The appeal herein is allowed in part.
2. The orders of the Kadhi's court are changed to the extent that the appellant is granted custody of all the children of the marriage, and the respondent will have a right of access to the said children.
3. I uphold the order of the Hon. Kadhi with respect to the conversion of the value of the camels to Kshs 200,000/- and also uphold all the other orders of the Hon Kadhi’s Court.

Parties will bear their respective costs of the appeal.

Dated and delivered at Garissa this 13th December 2016.

GEORGE DULU

JUDGE