



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**ORIGINATING SUMMONS NO. 13 OF 2012**

**IN THE MATTER OF: SECTION 17 OF THE MARRIED WOMEN AND PROPERTY ACT 1882**

**AND**

**IN THE MATTER OF: QUESTIONS ARISING BETWEEN A A M AND M S M CONCERNING  
OWNERSHIP AND DIVISION OF LAND, HOUSEHOLD GOODS AND ACCOUNTS  
ACQUIRED DURING MARRIAGE**

**BETWEEN**

**A A M.....PLAINTIFF**

**VERSUS**

**M S M.....DEFENDANT**

**RULING**

Before court is the Notice of Motion dated 16<sup>th</sup> July, 2013 by which the applicant seeks the following prayers

- “1. THAT the Honourable court be pleased to transfer this suit and all proceedings herein to the Kadhis Court at Mombasa for trial and disposal.**
- 2. THAT the ruling delivered on the 11<sup>th</sup> June, 2013 and all proceedings herein be stayed set aside pending the hearing and determination of this application.**
- 3. THAT costs of this application be provided for.”**

The application was supported by the affidavit of the applicant **M S M** sworn on 16<sup>th</sup> July, 2013. The respondent **A A M** opposed the application and filed her Grounds of Opposition dated 25<sup>th</sup> August, 2013. The application was disposed of by way of written submissions which were duly filed in court by both parties. I have carefully considered this application as well as the submissions filed in court by both parties.

It is not in dispute that the applicant and the respondent are married couple who both ascribe to the Muslim faith. It is also not in dispute that they conducted their marriage under Islamic Sharia Law, and that they have lived and raised their children in adherence to the Islamic faith. On 14<sup>th</sup> December, 2012

the respondent (being the wife) filed in the High Court this Originating Summons seeking for the distribution of their matrimonial property. The respondent opted to file her cause in the High Court. The applicant seeks to have the matter determined in the Kadhi's Court on the basis that the parties are both adherents of the Muslim faith. He submits that the Kadhi Court is the right and proper forum for the adjudication of disputes involving parties who are Muslims.

The crucial question here is whether an adherent of the Muslim faith is under an **obligation** to refer all their disputes to the Kadhi Court for adjudication and/or determination? In order to answer this question it is necessary to look closely at the constitutional provisions establishing up the Kadhi Court and from which the Kadhi court derives its jurisdiction. This is Article 170(3) of the Constitution of Kenya 2010 provides as follows:

**“170(3) Parliament shall establish Kadhi’s courts each of which shall have the jurisdiction and powers conferred on it by legislation, subject to clause (5).”** [my own emphasis]

Article 170(5) of the Constitution goes on to clarify that:

**“170(5) The jurisdiction of a Kadhi’s court shall be limited to the determination of a question of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi Court.”** [my emphasis]

These provisions are very clear and in my view are not ambiguous at all. There are two conditions upon which a dispute may be referred to the Kadhi Court – firstly that the parties profess the Muslim faith which is the case here and secondly and more importantly that the parties **submit** themselves to the jurisdiction of the Kadhi Court. Here the respondent who is the person who has instigated or filed this suit makes it abundantly clear that she **does not** wish to submit her dispute to the Kadhi Court. This does not leave her without remedy or without a forum in which her matter can be heard and determined. Article 165(3)(a) of the Constitution provides as follows:

**“165(3) Subject to clause (5) the High Court shall have –**

**(a) Unlimited original jurisdiction in criminal and civil matters.”**

Thus in a case where a Muslim faithful does not wish to submit to the jurisdiction of the Kadhi, that Muslim being a citizen of Kenya is at liberty to seek remedy in the High Court which has unlimited original jurisdiction in all matters. In other words the existence of the Kadhi court **does not** oust the jurisdiction of the High Court in matters of marriage, divorce, and inheritance involving Muslim faithful.

The applicant has cited the decision of **HON. IBRAHIM (J)** (as he then was) in **Re: the Estate of Ali Shitilo Ibrahim 2006 KLR**, where Hon. Justice Mohamed ruled that the estate of a deceased Muslim was to be determined in the Kadhi court in accordance with Islamic Sharia Law. That case is distinguishable from the present one in one major way. The deceased who was a Muslim had not at any time expressly declared a desire not to have his estate distributed in accordance with Islamic Law. Even in this case Hon. Justice Ibrahim did hold that

**“The Kadhi’s court has been given jurisdiction to determine questions of Muslim Law relating to personal status, marriage, divorce and inheritance in proceedings in which all parties profess the Muslim religion, but nothing limits the jurisdiction of the High Court or of any subordinate court in any proceedings which come before it.”** [my emphasis]

Thus even in this case the Hon. Judge recognized that the existence of the Kadhi court does not oust the jurisdiction of the High Court in matters involving persons who profess the Muslim faith.

The respondent/applicant under the Constitution has a choice as to where she wishes to have her cause determined. She has opted to file her cause in the High Court. The fact that she is a Muslim and was

married to a Muslim does not oblige her to file her cause in the Kadhi Court neither can the applicant/respondent insist that the applicant must sue him in the Kadhi Court. The choice as to which forum to seek relief lies entirely with the person filing the suit. I therefore decline to transfer this matter to the Kadhi Court and I direct that the originating summons dated 14<sup>th</sup> December, 2012 shall be heard and determined in the High Court. The Notice of Motion dated 16<sup>th</sup> July, 2013 is hereby dismissed in its entirety and I award costs to the respondent/applicant.

**Dated and delivered in Mombasa this 31<sup>st</sup> day of March, 2014.**

**M. ODERO**

**JUDGE**

In the presence of:

Mrs. Kipsang for Applicant

No appearance for Respondent

Court Clerk Mutisya