

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPL. NO. 45 OF 2013

Z.H.S.....PLAINTIFF

VERSUS

S.D.S.....DEFENDANT

RULING

Before me is the notice of motion application dated 26th November, 2013 filed under certificate of urgency. The court did grant interim orders on 13th February, 2014. The application was listed for inter partes hearing on 17th March, 2014. Despite having been properly served the respondent filed no reply to the application neither did he appear on the hearing date. As such the matter proceeded *ex-parte*. Counsel for the applicant **MS. V. OKATA** filed her submissions with respect to the application on 26th March, 2014. The application basically revolves around one main point for determination – Does the Kadhi Court have jurisdiction to make orders for the custody and maintenance of children in a divorce petition filed before that court.

The applicant and the respondent are a couple who got married under Islamic Law on 8th April, 2006. In the year 2013 the applicant filed Divorce Cause No. 1130 of 2013 before the Kadhi's Court in Mombasa. The Kadhi granted the prayer for divorce. Thereafter the applicant moved back to her parents' home with the couple's child, a son (then aged 5 years old). Later on 19th November, 2013 the respondent went back to the Kadhi's Court seeking orders of access to his son. The Kadhi made orders allowing the respondent access to the child. The petitioner complains that the respondent has been visiting the child erratically without giving her advance notice. She also complains that the respondent has provided no maintenance for the child leaving her to cater for his needs single handedly. The applicant filed a case in the Children's Court No. 486 of 2013 seeking to be awarded custody of the child and seeking orders that the respondent provide for the child's maintenance. She therefore prays that the Kadhi's order of access be stayed pending the determination of the Children's case.

The Kadhi's Court has constitutional backing by virtue of Article 170 of the Constitution. Article 170 provides for the jurisdiction of the Kadhi Court as follows

“(5) The jurisdiction of a Kadhi's Court shall be limited to the determination of questions of Muslim Law relating to a 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.”

More specifically the Kadhi's Courts Act Cap 11 Laws of Kenya sets out the jurisdiction of the Kadhi's Court in section 5 which provides

“A Kadhi shall have and exercise the facts owing 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.” [my own emphasis]

The cited Law makes it clear that the jurisdiction of the Kadhi's Court is limited 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. It is only in a Children's Court and with reference to the Children Act that decisions respecting custody, access and/or maintenance of children can properly be made. The orders made by the Kadhi granting the respondent access to the child were therefore made in excess of jurisdiction and are null and void. I therefore set aside the orders made by the Kadhi granting the respondent access to the child. I note that the respondent chose not to participate in these proceedings. If he desires access the proper forum he must approach is the Children's Court to seek the same. I further direct that the applicant's prayer for custody and maintenance be determined at the first instance in the Children Court. It is so ordered. No order on costs.

Dated and delivered in Mombasa this 18th day of July, 2014.

M. ODERO

JUDGE

In the presence of:

No Appearance by either side

Court Clerk Mutisya