



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 15 OF 2013

(Appeal from the decision in Civil Case No. 148 of 2012 of the Kadhis Court at Mombasa: Abdulhalim H. Athman – Principal Kadhi)

H M M.....APPELLANT

VERSUS

K J D.....RESPONDENT

JUDGMENT

Before this court is the appeal filed on 7th May, 2013 by the Appellant **H M** against the decision of the Hon. Principal Kadhi which decision was rendered on 11th April, 2013. The Appellant in her Memorandum of Appeal relied *inter alia* on the following grounds

“1. 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 has no bearing whatsoever to Islamic Law and/or rights enforceable thereunder.

2. The Learned Kadhi erred in Law and fact in presiding over a case involving children while not being duly gazetted pursuant to section 73(ii) of The Children Act No. 8 of 2001.”

The appeal was heard in the presence of the Hon. Chief Kadhi as required by Law. **MR. MWANIKI** acted for the Appellant whilst **MR. KHATIB** represented the respondent **KJD**.

The brief facts of the case are as follows. The appellant and the respondent got married under Islamic Law on 12th February, 2003. Their union was blessed with four (4) children as hereunder

1. F 1K born in 2004
2. F2 K born in 2006
3. F3 K born in 2007
4. A K born in 2009

The couple later divorced in 2010. After the divorce the four children remained in the custody of the Appellant (their mother) except for the third daughter F2 who lives with a relative in Lamu. Even after the divorce there appears to have been no dispute over custody. It is only when the appellant re-married

that the respondent moved to the Kadhi Court in Mombasa seeking custody of the four children of the marriage. After hearing both parties the Hon. Principal Kadhi delivered his judgment on 11th April, 2014 in which he awarded custody of two children to the appellant and two to the respondent. Being dissatisfied with this decision the appellant moved to the High Court under certificate and on 12th February, 2014 obtained orders staying the execution of the Hon. Kadhi's decision.

This appeal revolves around only one main issue for determination – whether the Kadhi Court as currently established has jurisdiction to determine issues relating to the custody and maintenance of children. I have carefully considered the submissions of both counsel on this point. The question of jurisdiction was indeed considered by the Hon. Principal Kadhi who on that point rendered himself thus

“The defendant raised the issue of jurisdiction of this court to hear [an] issue of custody of children she stated [that] the court has no jurisdiction to hear custody matters. However she did not advance any reasons. It could be that she holds the notion that the enactment of the Children Act [2001] denies this court jurisdiction on children matters. This is a misapprehension of the Law. Jurisdiction of Kadhi's Court is derived and provided for in the Constitution in Article 170(5) which provides 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.”

By this the Hon. Kadhi appeared to suggest that the reference in Article 170(5) to '*Personal Status*' included issues of custody and maintenance. With respect I do not agree with this finding of the Hon. Kadhi for the following reasons. As stated correctly the jurisdiction of the Kadhi Court is derived from Article 170(5) of the Constitution of Kenya 2010. Article 170(5) provides

“The jurisdiction of the Kadhi Court shall be limited to the determination of questions of Muslim Law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi Court.” [*my emphasis*]

Article 170(5) is couched in mandatory terms and sets a limit on the areas upon which the Kadhi Court would have jurisdiction. Similarly Section 5 of the Kadhi Courts Act Cap 11 sets out the jurisdiction of the Kadhi thus

“A Kadhi's court shall have and exercise jurisdiction, namely the determination of questions of Muslim Law relating to personal status, marriage, divorce or inheritance in proceedings in which all parties profess the Muslim religion”

Once again the provision setting out this jurisdiction is by the use of the word '*shall*' couched in mandatory terms. No mention is made in either the Constitution or in the Kadhi Court Act to '*custody and/or maintenance of children*'. If the drafters of either the Constitution or the Act had intended that custody and or maintenance be included in the jurisdiction of the Kadhi Court then nothing would have been easier than to specifically state so. The exclusion of childrens matters in law is a clear indication that the jurisdiction of the Kadhi Court does not extend to such matters. No doubt the thinking was that the Children Act 2001 provided sufficient and exhaustive legislative cover for children's matters in Kenya.

I have perused the opinion of the Hon. Chief Kadhi and find that he is in agreement with this position. The Hon. Chief Kadhi opines

“Therefore I am of the opinion that the Kadhi Court has no jurisdiction in determining children matters as there is nowhere any written laws of Kenya which gives Kadhi jurisdiction over children matters”

He goes on to conclude thus

“It is therefore my opinion that the Kadhi Court in Kenya lacks jurisdiction by lack of written law giving it the jurisdiction on children matters”

I could not agree more. I am of the opinion that the Children Act grants **exclusive jurisdiction** over all children matters including custody and/or maintenance **only** to Judicial Officers who are gazetted under the said Act. The Kadhi is **not** a judicial officer gazetted to handle children matters. I am buttressed in this finding by the various decisions of fellow High Court Judges on this same point. In the case of **SMH -VS- SAA KISUMU HIGH COURT MISC. 125 OF 2013 [2013] eKLR** my learned brother Hon. Muchelule J. held that

“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 the children. These issues are not among those in respect of which the Constitution and the Act have donated jurisdiction to the Kadhis Court. These issues can only properly be dealt with by a children's court under the Children Act No. 8 of 2001”

Similarly in the case of **GSA -VS- ASA Nairobi High Court Civil Appeal No. 53 of 2013[2014] eKLR**. Hon. Musyoka J. held

“From the wording of Article 170(5) of the Constitution, it would appear that the constitution has not granted jurisdiction to the Kadhi's Court over matters touching on custody and maintenance orders over children”

In the above decisions having been made by the High Court are not binding on this court but they are persuasive. I am persuaded that they do set out the correct position in law. In the case of **ZHZ Vs. SDS Mombasa High Court Civil Appeal No. 45 of 2013 [2014] eKLR** I did myself hold that

“The cited law [Constitution and Kadhi's Court Act] makes 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. 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”

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 made by the Hon. Principal Kadhi in his judgment of 11th April 2013. This being a family matter I direct that each party meet its own costs.

Dated and Delivered in Mombasa this 24th day of September 2014.

M. ODERO

JUDGE

In the presence of:

Mr. Khatib for Respondent

No Appearance by Appellant

Court Clerk Mutisya