



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 191 OF 2007

(Arising from K.C.C.244 OF 2005 of the Kadhi's Registry at Mombasa)

U.A.H.APPELLANT

VERSUS

M.O.M.RESPONDENT

JUDGMENT

This is an Appeal against the decision of the Kadhi's Court at Mombasa dated 25th October, 2007 delivered by Hon. Twalib Mohammed in Kadhi's Civil suit No. 244 of 2005.

The appellant cites four grounds of Appeal in her Memorandum of Appeal dated 28th October, 2007. There are:-

“

- 1. THAT the Honourable Kadhi erred in law and fact in finding that the Respondent has a right of access into the Appellant's house.**
- 2. THAT the honourable Kadhi erred by seeking to determine the issue of ownership of plot No. 24/29 Chaani when the same was not an issue before the court.**
- 3. THAT the Honourable Kadhi erred in finding that the Respondent was the owner or entitled to the Rents from the premises standing on plot No. 24/29, Chaani without any or any sufficient evidence.**

4. THAT the Honourable Kadhi erred in failing to find that the Respondent was guilty of desertion and deliberate abandonment of the Appellant and their child.

The appellant filed the aforesaid Memorandum of Appeal by herself and at the hearing she acted in person. The Appeal was opposed by the Respondent who was represented by Mr. Khatib, Advocate. The Appeal was heard on 16th august, 2010 in the High court.

The court was constituted of myself as presiding judge sitting together with Hon. Sukyan Hassan Omar, Kadhi of Malindi and Hon. Sheikh Abdulhalim H. Athman, the Kadhi, Kwale.

In view of the grounds set out in the Appeal and the submissions by the parties directly or through counsel respectively, it is pertinent that the pleadings in the Kadhi's court case be set out here in full.

In the plaint dated 8.11.2005, the appellant pleaded *inter alia* as follow:-

PLAINT

.....

.....

- 1) *Plaintiff is legally married to the Defendant since 1977 upto date and Defendant has neglected to take care of the Plaintiff for the last six months subjecting the plaintiff to much suffering.*

- 2) *The plaintiff has one issue with the Defendant, one child namely H. aged 9 years.*

- 3) *The plaintiff seeks leave of the court "order" or compel the maintenance of both plaintiff and the child for food, shelter, school fees and clothing and any basic needs of the plaintiff.*

In an Amended Defence and Counterclaim dated and amended on 26th May, 2006, the Respondent who was then the Defendant, pleaded as follows:-

“

1)

2)

3) ***The Defendant denies that he has failed to maintain the plaintiff and puts the plaintiff to strict proof. Further the Defendant states that he bought plot No. 24/29 Chaani, whereupon he built a house which is rented to the tenants. The plaintiff has been collecting the rent and using it to the exclusion of the Defendant.***

4) ***That the Defendant has no other income apart from the above property, Chaani plot No. 24/29, for which the Plaintiff acts as a landlord.***

- 5) *The Defendant states that the Plaintiff used the rent proceeds from the house to construct another flat at old town from which she is also collecting rent.*
- 6) *The Defendant is currently jobless and depends on well wishers and left the matrimonial home house because of persistent insults and abuses from the plaintiff.*

COUNTERCLAIM

- 7) *The Defendant reiterates the contents of paragraph 1 to 6 of the Plaint.*
- 8) *The defendant states that the Plaintiff has been collecting the rent from the house on Plot no. 24/29 Chaani since 1992 and has refused and/or neglected to pay any share to the Defendant.*
- 9) *The defendant counter-claims for payment of all rents collected from the said house since 1992 to date.*
- 10)

REASONS WHEREOF the Defendant prays that the plaintiff's case be dismissed with costs and judgment entered for :-

- i. Rents collected from 1992***
- ii. Costs of the suit***
- iii. Any other and further relief this honourable court deems fit to grant.***

.....”

After hearing the parties the Honourable Kadhi Twalib Mohammed held and ordered that:-

- *The Plaintiff (Appellant herein) do allow the Defendant to take charge of his rental house at Chaani.*
- *The defendants (Respondent) do provide maintenance to his wife and daughter. These will allow resumption and restitution of the parties' marital relationship.*
- *That the way the parties were living separately, defeats the purpose of a Muslim working marriage, which has vital ingredients as love, understanding, care, tranquility and/or peace of mind.*

The Honourable Kadhi held as follows:-

“

We therefore order that the Plaintiff to hand over the charge of the defendant’s rental house at Chaani on plot 24/29 to the Defendant and also stop her acts of closing their house door for the Defendant instead allow him in as her legal husband. We further order once the Defendant has received the charge of his rental house to be providing maintenance to the plaintiff, his legal wife and their child as required of him in the Muslim law. On the issue of and/or claim by the Plaintiff that the Defendant has not been providing maintenance to her and that he be ordered to do so, the same is not attainable on ground that the Plaintiff in her own defense to the counter-claim paragraph (b) admits to have been collecting rent for her house and their child’s care. On the prayer by the Defendant in his counterclaim that the Defendant should be ordered to refund to him the rents she collected from 1992, it’s equally unattainable. This is so as the maintenance responsibility of one’s wife is upon her legal husband and for the child his/her legal father”

At the end the Honourable Kadhi dismissed the Appellant’s suit and instead ordered **that** the Appellant, U.A., hand over the house on plot No. 24/29 Chaani to the Defendant Muhidin Omar Mohammed, his husband. The husband was ordered to pay maintenance to the appellant. Being aggrieved with this decision, the Appellant lodged this Appeal.

At the hearing of this Appeal it became clear that during the pendency of the Appeal the parties’ marriage had been dissolved on 10th December, 2008 through another suit i.e. KCC No. 331 of 2008, Mombasa. A copy of Divorce Certificate No. [particulars withheld] dated 10th December, 2008 containing all the necessary details was produced. There was no dispute of this fact.

The two Kadhi’s who sat with me at the Appeal hearing each duly submitted and lodged into this court their respective assessment reports and opinions. The said assessment reports and opinions are very well written and formulated. They set out the facts in dispute and the law. Each of the Kadhi’s herein assessed and evaluated the evidence and gave their respective well argued and reasoned assessment, opinion and recommendations. They both refer to and rely on the Holy Quran.

I have considered the record of Appeal, the pleadings therein, the proceedings and judgment. I have also carefully perused the submission at the Appeal and the assessment and recommendations of the two Honourable Kadhis.

As the dissolution of the marriage is an undisputed fact and a common ground at the Appeal, it is my opinion that the questions relating to desertion, cruelty and other related allegations and counter-allegations have been over-taken by events i.e. the dissolution of the marriage. The allegations and counter-claim allegations as to who was to blame for the estrangement of the spouses is a non-issue and water under the bridge. It would not be proper in law to revisit these issues as they are deemed to have been decided and ought to have been decided by the divorce court.

In the case before the Kadhi leading to this Appeal, the Respondent as the father did not deny or dispute his parental responsibilities as a father to maintain both the appellant as his wife and his child. In the judgment, the honourable Kadhi ordered the Respondent to provide to provide maintenance to his wife and child as decreed by the holy Quran. The only defence that the respondent raised is that the Chaani property which was his, was in control of the Appellant who has collected rent since 1992 without his involvement and any sharing of the income. He said that he was unemployed and that his only receivable income was from the house. It is for this reason that he sought the court’s intervention for an order that his wife, the appellant, account for the rents collected from the tenants from 1992.

From the foregoing, I do find and hold that strictly, the issue of maintenance is not one of the issues for determination. This has been resolved substantially and due to the dissolution of the marriage, it is clear that what is now enforceable for the future is the respondent's maintenance of the child of the marriage. The net result in this regard is that the question of past maintenance and whether there should be an inquiry of how much the Respondent as father should pay for any failure or omission in the past may not be delved into or direction to the children's Court or the Kadhi's Court be given at this stage. This is now outside the ambit of this Appeal.

What remains for the determination of this court as a consequence of the foregoing, is in respect of the House on Plot No. 24/29 Chaani and the rents that have been and continue to be collected there from.

Upon consideration of all relevant material presented to the Court, I find that the main questions remaining for the determination of this court is whether the question of ownership of the House of Plot no. 24/29 Chaani was one of the issues in dispute and for the determination of the Kadhi's Court as to justify any finding on this question and the order that the Appellant hand over the house of the Respondent.

It is trite law that while the Civil Procedure Act and Civil Procedure rules are not part of Islamic law and provided for in the Quran yet under Kenyan Law through the Kadhi's Act, the said court is bound to apply and use the said rules.

As a result it is in this Court's view that the parties in the Kadhi's court were bound by their respective pleadings. It is the pleadings which placed before the court the issues in dispute and the determination thereof by the Court.

The appellant in her plaint prayed for maintenance and restitution of conjugal rights. There was no prayer in her plaint that she be declared to be the owner of the house. While she pleaded in her reply to defence that she is the one who constructed the house and that the proceeds have been used to her benefit and the child, she did not deny that the Respondent is the one who bought the plot and she did not seek to be declared the owner of the house. This means that while the pleadings raised a dispute as to who built the house, the plaint did not seek a resolution of the dispute of ownership. The purported counter-claim in her reply is not sustainable since a Plaintiff in a suit cannot in law at the same time set up a counterclaim. On his part, after pleading that he bought the plot and that he built the house thereon, the Respondent did not expressly seek any order/prayer to be declared the owner of the property and for him to be given control and possession thereof. Instead in his counterclaim; he only asked the judgment for the rents collected from 1992 and costs of the court.

In the light of the foregoing, I do find and hold that the pleadings did not constitute specific pleadings for ownership of the plot and house. The proceedings clearly show that the Plaintiff did not pursue or give any evidence in respect of the question of ownership of the plot and house. The Plaintiff's evidence and that of her witness were confined to the question of maintenance while the respondent in his testimony told the court that the Appellant should leave his house and account for the rent she had been collecting yet he did not tender any documentary evidence of ownership and construction of the house. This was consistent with his prayer for rents collected from 1992.

During the submissions in this Appeal, counsel for the respondent Mr. Khatib submitted that the question of ownership did not arise before in Kadhi. However, he added that the appellant did not deny or rebut the question of ownership. He said that ownership was not disputed.

I think that a possible perception or impression that the question of ownership was not in dispute could have arisen. There are suggestions that the appellant may not have strictly questioned the issue of ownership of the plot or who purchased it. However, there is no doubt that at all material times she made statements that she is the one who built the house or that she contributed towards its construction. However, any such oral evidence which could have gone on record did not give the Kadhi court the jurisdiction or mandate to proceed to make findings on ownership and to declare or order who should be given possession or control of it. This is not borne by the pleadings and it is clear that there was no fair and just trial on this question.

While ignorance of the law is said to be no defence, yet this court cannot shut its eyes to the fact that the Appellant was unrepresented at the trial and the Respondent was ably represented by a senior advocate, she may not have been equipped to appreciate the pleadings and the adversarial nature of the proceedings. Any inaction or failure to raise challenge/objection during the trial are therefore understandable to this court in the circumstances.

The upshot is that the finding on ownership of the property in the circumstances is not justifiable and was based on a misapprehension of the law. There was no counterclaim in which the Respondent sought the orders granted in his favor.

The court ably assisted by the two Honourable Kadhis does hereby find the Appeal must succeed. The judgment in the Kadhi's court is therefore set aside and substituted with judgment for the Plaintiff that the Defendant shall provide for and pay maintenance for the child of the parties, H. in accordance with Islamic law

In exercise of this Court's discretion and in fairness to the parties and considering that that the appellant has been collecting the rents from the disputed property, it is directed that the enforcement of the maintenance order be suspended and put in abeyance pending the resolution of the dispute on ownership as in law, rents are ordinarily payable to the owner/s of the property in question. The parties are therefore, granted the liberty to mutually agree on this upon mediation and in default refer the matter to the Kadhi's court for determination in fresh proceedings in this regard. Each party shall bear his/her own costs in case before the Kadhi's court which has been the subject of this Appeal. Equally, each party shall bear his/her own costs of this Appeal.

I wish to sincerely thank the Honourable Kadhis who sat and assisted this court in this Appeal for their commitment and invaluable assessment and judicial input in this Appeal.

Orders accordingly.

Dated and delivered at Mombasa this 14th day of March, 2011

M. K. IBRAHIM

J U D G E

Coram:

Ibrahim, J

Court clerk – Kazungu

Mr. Khatib for the Respondent
Mrs.U.A.H.
Judgement delivered in their presence.

Ibrahim, J