



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

Civil Appeal 22 of 2007

NAAAPPELLANT

VERSUS

SR.....RESPONDENT

JUDGMENT

NAA (the appellant) has challenged the finding of Ismail Abdallah (Kadhi) Lamu in which he entered judgment as follows;

- 1 The respondent to pay the appellant a total of Kshs. 6900/-
- 2 The defendant to provide child maintenance with effect from August 2007 being kshs. 1500/- per month till further orders
- 3 The issue of uniform and documents have not been proved.
- 4 Both parties get a share at the rate of 50% from both a house and foundation.

The circumstances leading to these findings were presented before the Kadhi as follows;

The parties were husband and wife who got married in April 2001 at Mi village. Dowry was paid in the sum of Kshs. 10,000/- a bed, dressing table, cupboard and a sofa set. On 23rd December 2006, the respondent divorced the appellant – by which time they had already had one child. After observing the waiting period – a month later, the respondent sent her Kshs. 3000/- which she rejected as being inadequate for her and the child named AS then aged 5 years.

The child was being taken care of by appellant's sister named MA and would continue living there. However it was the appellant's evidence that she was the one taking care of M who was widowed, and in fact lived with her. Ever since the divorce respondent only gave appellant kshs. 500/- in January 2007, and Kshs. 1000/- in March 2007.

So she decided to file the suit before the Kadhi seeking for:-

- (1) Eddah allowance
- (2) Child maintenance
- (3) Personal belongings
- (4) Custody of the foundation of the house
- (5) Costs of the suit

The defence was that discussion held during the divorce process resolved the issue of the child care and the respondent even sent one Khadija Shebe with some money to hand over to the appellant but the latter rejected the same. When they lived together, he constructed a building foundation, and four years later, he constructed another house. When appellant demanded a share of the foundation and plot, they went

before the M Chief on 10th February 2007 – the matter was heard but the decision has never been communicated.

He termed the appellant's suit as unfounded and baseless and urged the court to dismiss it.

At the hearing, appellant told the trial court that she works in Lamu. She wanted respondent to return to her certain documents relating to a house her father sold to her as well as her clothes and uniform.

They disagreed over the foundation which had already been constructed with each claiming ownership. She urged the court to award eddah maintenance in the sum of Kshs, 4500/-, and maintenance for the child in the sum of Kshs. 1500/- with effect from May 2007, and that respondent be ordered to stop interfering with the foundation of her house.

On cross-examination appellant insisted that respondent had undertaken to continue child support.

As for the foundation it was her evidence on cross-examination that her parents gave her a mud house and appellant assisted her with 55 (fifty five) bags of cement only as his wife and for the rest of the expenses for materials, she used her own money from a self help group (merry go-round) and a bank loan.

The plaintiff's witness A A (her uncle) told the trial court that appellant approached her three years before the hearing of the case i.e 2004 and told him she wanted to develop a plot which was behind his, and he later saw her make the foundation and build.

On cross-examination A clarified that in 2001, appellant and respondent wanted his home and it was appellant who told her she wanted to build.

Misa M (a minor in Lamu) testified that he was called by the plaintiff in 2001 or thereabouts and she requested her to build her a house. So he laid the foundation and put two rounds of material but did not lay the slab and thereafter the work stopped. Mohamed Famau (a relative to both appellant and respondent) testified that his brother AF gave a plot to the appellant, who had requested for the same. On that plot stood a tamarind tree which A allowed her to cut down and to this end she engaged the services of Omar Khamis (PW4) and he cut down the tree at a fee of Kshs. 4500/.

PW5 Famau Athman is the one who assisted Omar Khamis (PW5) in cutting down the tree.

Respondent in his defence told the trial court that he is a teacher at

M Primary School and he insisted that after the divorce, he provided appellant with Eddah, but she rejected it – he had given out Kshs. 3500/- through Khadija Shebe, a workmate.

As for the child, it was his testimony that it was appellant who insisted on being left with the child and that respondent was simply to provide what he could. He was surprised to find out that what they had agreed on had turned out to be the basis for the case before the Kadhi and he urged the court to grant him custody of the child so as to release the burden from appellant.

He denied taking appellant's uniforms or house documents, which he said were with one Zahra (who had taken them after arbitrating and reconciling him and appellant earlier on)

As regards the house foundation, it was his evidence that in the year 2001, they got information about government land which had someone's tree – so he sought advise from AF who directed him to his father since respondent had political differences with some leaders in M, he allowed the appellant to go and see AF and gave him a feedback and they were permitted to cut down the tree. It was his evidence that he is

the one who spoke to Mzee Omar and requested him to cut down the tree.

He then borrowed money and brought in lime, sand and stones so as to begin work on the foundation and that is when differences arose between him and appellant as they could not settle on a particular fundi – each had their own choice.

In 2003, appellant decided that the plot foundation was too big for this and since she had been given a house, she took a loan of kshs. 80000/- he also took a loan of shs. 200,000, and they developed the foundation.

During the divorce, he left without demanding anything because in his mind, he had a foundation upon which he would one day build. After the divorce, appellant's sisters vowed to take the foundation. He sought custody of the child, the foundation and a share from the developed house.

His defence witness Abubakar Bwana Hani Simita (related to both respondent and appellant) testified that both parties requested him to supply him with stones and he obliged. His cousin – brother named Salim B. Baisha told the trial court that respondent requested him to assist build the house and he participated in building the foundation.

AF's (DW4) evidence was that respondent was the one who had approached him about the tamarind tree which he had wanted cut down and since respondent could not go to his father, appellant went to see him over the same issue and he took her to his father.

Khadija Abdalla Fadhili (DW5) is the one who lent respondent Kshs 3000/- to enable him buy stones and Hamed Rubea (DW6) is the one who sold two boat loads of stones to respondent.

DW7 Barke Omar also confirmed that respondent borrowed kshs. 5000/- from him, saying he wanted to build.

Mbwanahaji Harun (DW8) confirmed that he supplied respondent with 80 bags of lime and a further 120 bags of lime and 700 blocks.

Ali Bakari Badi (DW9) supplied respondent with mangrove poles on his order and was paid kshs. 10,000/- by the respondent. However on cross-examination he confirmed that appellant also ordered for some mangroves later on.

In his judgment, the honourable Kadhi said that the witnesses called by both appellant and respondent did not give any useful evidence on the issue of Eddah maintenance. He found that from the pleadings and evidence, the respondent actually made attempts to pay Eddah maintenance but his efforts were in vain as appellant admitted rejecting the money.

The learned Kadhi considered the respondent's monthly earnings, as supported by the payslips he produced and which showed that by March 2007, respondent was earning 6,301/30cts, he also bore in mind the status and positions of both parties and considered different views by different scholars of Islamic law, on the issue and the quran verse 65:7

The Kadhi took into account that appellant is a nurse by profession employed by the Ministry of Health and attached to

Lamu District Hospital whereas respondent is a teacher employed by Teachers Service Commission at M Primary School and being heavily guided by the verse in the quran, he awarded eddah at shs. 6900/- comprising:-

Food at the rate of kshs. 2000 per month for three months = 6000/-

Shelter at shs. 200/- per month for three months = 600/-

Clothing for three months at 300/- being kshs = 300/-

As for the child's maintenance, the Kadhi recognized that the responsibility of a father for the maintenance of his children is both unconditional and absolute and notwithstanding that the child may be under the mother's custody.

He also considered that under Sharia law the father has a duty to maintain his sons until they attain the age of majority and he directed

respondent to pay child maintenance of Kshs. 1500 per month from the month of August (presumably 2007)

As for the clothes, uniforms and documents, the Kadhi's findings were that the burden of proof was on the appellant and she had failed to discharge that burden.

With regard to the house foundation, the Kadhi noted that respondent greatly contributed toward its construction and as well as the other house, and so he was entitled to a share.

He then directed that the house be apportioned at 50:50 %, and that the properties be valued and appellant do buy respondent out of the house, and respondent do buy out appellant out of the foundation.

The appellant challenged the kadhi's findings on grounds that:-

- (a) The Honourable Kadhi failed to consider the weight of the evidence by finding that appellant was entitled to eddah of Ksh 6900/-.
- (b) The Hon. Kadhi failed to consider that apart from being a teacher, respondent had a fishing boat which earned him extra income.
- (c) The Kadhi should not have made a finding regarding custody of the child as that was contrary to the provisions of the Children Act.
- (d) The Kadhi erred in finding that there wasn't ample evidence about the uniform and documents
- (e) The Kadhi erred in ordering both parties to have an equal right to the house which was given to appellant by her father.
- (f) The Kadhi erred in finding that the respondent was entitled to the disputed foundation yet the entire space for the foundation was sourced for and the structure built solely by the appellant.
- (g) The judgment was against the weight of the evidence.

At the hearing of the appellant, Mr. Kaburu for the appellant submitted that the sum awarded as maintenance is too little and it should be raised.

As for the orders on maintenance and custody of the child, he urged this court to expunge the same, saying the matter should only be dealt with by the children's court.

While recognizing that the evidence presented before the trial court was to the effect that the documents appellant was complaining about were with one Zahra, Mr. Kaburu argued that Zahra is a relative of the respondent who acted as a mediator in attempts to reconcile the pair and so the court should direct the respondent to get the documents from her and give them back to the appellant.

He also faulted the findings regarding the house awarded to both parties arguing that the same was a family house which belonged to appellant's father, and the respondent just moved to live there and contributed to its renovation and under Islamic Law it remained family house and should not be shared at 50:50% and that in any event, there was no prayer for that house, the only claim was the foundation for the other house.

Mr. Kaburu submitted that appellant is he one who sourced for that plot and that although each contributed towards that construction of that foundation, it cannot be shared equally as it belongs to appellant who had sourced for it.

He urged the court to find that whatever contribution respondent made towards building of that foundation was done in his capacity as the husband and not owner.

Mr. Hamza for the respondent submitted that defendant in his pleadings made reference to the foundation. He termed the findings by the Kadhi as well thought out and it addressed each issue. As for Eddah, Mr. Hamza submitted that it was not too little bearing in mind that appellant is a nurse and is literate and educated, and that Islamic law recognizes that if a marriage has broken down, then the husband must leave the wife with a portion of maintenance and in this the Kadhi was guided by the evidence of what respondent was earning.

As regards the child, Mr. Hamza pointed out that even at the time of divorce, appellant did not have the child, who was living with her sister M and there was no evidence that the child was neglected or was not attending school. He pointed out that it was appellant who introduced

the issue of the child's maintenance in the pleadings before the Kadhi, and cannot now begin to complain that it should have been dealt with by the children's court – in any event that would only prolong the acrimony existing between the parties.

With regard to the house and foundation, Mr. Hamza pointed out that: The Kadhi had considered the physical and financial contribution by the parties and made a reasonable and fair finding because these were joint property acquired during subsistence of the marriage.

What is eddah? This is detailed in the holy quran, and chapter 2 – as the prescribed period of waiting during which a woman may not remarry after being widowed or divorced – and verse 228 provides that divorced women must observe Eddah for three months.

This is what the honourable Kadhi used as a guide in setting out the period of payment. Was the sum awarded too low?

The Kadhi took into account the fact that:

- (a) Both couples were in gainful employment – indeed appellant did not disclose to the court what her earnings were.
- (b) The respondent's earnings as reflected on his payslips and that appellant had already received a total of kshs. 500 in January and March 2007.

The upshot of these considerations clearly disclosed that the appellant was not a destitute and the eddah allowance was simply to cushion her during the transition period of her new status as a divorced woman. She does not state why she considers the sum awarded as too little – too little in relation to what? Her needs, her pleasures, her desires, her status? Nothing is disclosed so as to demonstrate to the court and persuade me of the argument that the kshs. 6900 Eddah allowance is too little.

The Chief Kadhi who sat with me as an assessor stated his views to the effect that the hon. Kadhi used his discretion properly. From my own analysis, the Hon. Kadhi was properly guided by Islamic principles as set out in the holy Koran, reference to chapter 65 verse 7 of the Holy Quran on paying regard to a man's means.

Legal principles of equity and fairness and I find no fault in his reasoning and approach in awarding eddah maintenance.

As regards the house and foundation, from the evidence each party demonstrated their contributions towards renovating the house and constructing the foundation. Respondent did not lay any claims to the house, nor did he contest the allegation by appellant that she bought the house from her father – indeed the defendant's refer to "*four years later, we managed to construct another house of which the divorce took place*" – in no way suggests that he was claiming ownership of that house – it was not a prayer either in his pleadings or evidence. The mere fact that he contributed towards renovation of the same did not transfer part ownership to him – indeed he did so as a co-occupant and husband of the appellant.

This was property acquired by the appellant from her father, and to which respondent made no claims whatsoever and it is not clear why the trial court decided that the respondent was entitled to ownership of the house - which even the Hon. Kadhi recognized as having been offered to appellant by her father. To that extent the trial Kadhi erred both in law and fact by ordering for a 50:50% share of the house and I interfere with this finding by setting the same aside – the house was never an issue for the court to decide.

The Hon. Kadhi correctly analysed each party's contribution to the construction of the foundation – non could demonstrate to having "purchased or being allotted the plot – it was government land – they had an interest in it and both developed it, and the Kadhi rightly found that each was entitled to 50:50 share of the foundation.

Since the house is already with the appellant and this court has already interfered with the direction of the Kadhi as regards buying out of the same, it would only be fair to then direct that foundation be valued by an independent valuer, and the respondent do buy out the appellant's valued share of the same – that way each party will have a place to live in – that is the most equitable way to go about it.

As regards the uniform, clothes and documents, the Kadhi rightly found that there wasn't adequate evidence presented as to demonstrate that respondent had any of these items and I think it is misplaced for Mr. Kaburu to insist that respondent should be directed to go and get the documents from one Zahra and give them to the appellant – appellant knows who has the documents, and if she has difficulties obtaining them then surely she ought to pursue them through legal avenues of redress. I find no reason to fault the Kadhi's finding on this.

Custody of the child?

- (a) There was never an issue of who should have custody of the child.
- (b) The Kadhi's findings were not in relation to custody, but rather maintenance of the child, which had been prayed for by the appellant.

It is therefore misplaced (with all due respect) for Mr. Kaburu to begin poking holes at what is not even in existence – there was no order regarding custody.

Did the Kadhi exceed his jurisdiction by making a finding regarding maintenance of the child?

Under Islamic teachings, the Kadhi considered the duty of a father in maintaining his son till he attains the age of majority.

- (1) It is not however what consideration the Kadhi had when awarding the sum of kshs. 1500/- as maintenance for the child. Ideally in arriving at what ought to be paid as maintenance for the child a court should consider;
 - (a) the earning capacity, property and other financial resources of the parties
 - (b) their financial needs, obligation or responsibilities
 - (c) financial need of the held and the child's current circumstances.
 - (d) Medical needs and education.

The over-riding factor being the welfare and best interest of the child as envisaged under the Children's Act.

- (2) Should the issue have been redirected to be dealt with by the Children's act?

The Chief Kadhi in his assessment opines that there was no error occasioned by the Kadhi as he had jurisdiction to deal with the issue of child maintenance – he stated that these orders were given pending further orders. He supported this by citing section 73(II) of the Children's Act which addresses the jurisdiction of the Children's Court.

That provision states as follows;

“There shall be courts to be known as Children's Courts, constituted in accordance with the provisions of this section for the purpose of
(a) conducting civil proceedings on matters set out under parts III, V, VII, VIII, IX, XI, and XIII.”

Part III deals with parental responsibility which is defined in section 23(1) of the Act as duties, rights, powers, responsibilities and authority why by law a parent of a child has in relation to the child.

Those duties are then outlined in section 23(2) as a duty to maintain the child including;

- (h) adequate diet
- (i) shelter
- (j) clothing
- (k) medical care
- (l) education and guidance.

Part VII of the Act deals with custody and maintenance of the child and gives the children's court provision to make orders of maintenance for the child. However it must be borne in mind that the child's maintenance is incidental to the marriage and this thus falls under the jurisdiction of the Kadhi's court which addresses matters of personal law on members of the muslim faith. Indeed the teachings of the quran are so specific even as

regards provision by fathers for their sons and there was no error by the Kadhi.

For clarity then, the appeal succeeds only in part of the orders as follows;

- (1) On Eddah – there is no basis for interfering with the finding made by the trial court and this limb is rejected.

- (2) On return of uniform and documents, there is no merit on this limb of the appeal and it fails.
- (3) The house – the Kadhi made an error in awarding the said house to the respondent and his orders thereto are quashed.
- (4) The foundation – the Kadhi’s finding that each was entitled to 50:50 shares was proper and I uphold it. The only departure is that the same will be valued by an independent valuer to be agreed on by both parties within 30(thirty) days hereof and the respondent will buy of the appellant’s share of the foundation, so that respondent retains that foundation.

This purchase must be made within three months (3months) after the valuation.

In the event that respondent is unable to buy off the appellant’s share then appellant shall be at liberty to buy off the respondent’s share within three (3) months after expiry of the initial three months available to the respondent. In the event that neither party is able to buy off the other, then the property to be sold and the proceeds be shared between the parties on a 50:50 basis.

- (5) The order on maintenance of the child is upheld.

Each party will bear its own costs of this appeal.

Delivered and dated this 27th day of **May 2010** at Malindi.

H. A. Omondi
JUDGE