



**DSS aka HSS v IMI (Miscellaneous Cause E232 of 2023)
[2025] KEHC 4527 (KLR) (Family) (8 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4527 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MISCELLANEOUS CAUSE E232 OF 2023
HK CHEMITEI, J
APRIL 8, 2025**

BETWEEN

DSS AKA HSS APPLICANT

AND

IMI RESPONDENT

RULING

1. In her Notice of Motion dated 26th October 2023 the Applicant seeks orders that:-
 - (a) Spent
 - (b) Divorce Cause No. E164 of 2023 before the Senior Resident Kadhi at Kadhis court at Nairobi be transferred for trial and disposal at the Chief Magistrate court at Milimani commercial courts Nairobi.
 - (c) Upon prayer (b) being granted the Applicant be granted leave to file an answer to the petition and cross petition out of time.
 - (d) The issues raised in the Divorce Cause No. E164 of 2023 that touch on the custody maintenance and welfare of the infant minor child known as Zunaisha Irfan Iqbal be ventilated in children's courts cause also filed by the Applicant herein.
 - (e) Costs be provided for.
2. The application is based on the grounds thereof and the Applicant's sworn affidavits dated 26th October 2023 and the annexures thereto.



3. The Applicant and the Respondent are husband and wife having married under the Mohamedan laws. They have been blessed with one child. The Applicant averred that she renounced the Islamic faith and return to her Hindu faith.
4. For the above reason therefore, she is seeking that this court orders the divorce cause now pending before the Kadhis court to be transferred to the Commercial Court at Milimani.
5. She deponed that although Article 170(5) of *the Constitution* permits the Kadhis court to deal with matters under Islamic law, by virtue of her renouncing the Islamic faith she was no longer bound by the Kadhis courts jurisdiction and thus the issues relating to her divorce proceedings and the custody of the minor now before Kadhi ought to be ventilated in the commercial court.
6. The Respondent in his replying affidavit sworn on 29th February 2023 opposed the said application on the grounds among others that at the time the suit was filed at the Kadhis court both of them profess the Islamic faith and were therefore subject to the Kadhis court's jurisdiction.
7. That the Applicant ought to have contested the said jurisdiction immediately but she waited until the matter proceeded very far and that this application is a scheme to deny him parental rights over the minor.
8. He further deponed that the Applicant had filed Children's Case No. E1800 of 2023 at Milimani Magistrates Court and he had raised a preliminary objection arguing that the matter was subjudice. The court on 22nd November 2023 struck out the said case on the grounds that the Kadhis court was seized of jurisdiction to deal with the issues before it.
9. It was his response therefore that the Applicant was simply forum shopping by filing multiplicity of suits.
10. The court directed the parties to file written submissions which they complied.
11. The Applicant relied on Article 170(5) of *the Constitution* and the case J.A.O.O v H.A.S (2015) eKLR among others.
12. On the issue of custody of the child she submitted that by virtue of the above jurisdictional question it was appropriate that the issue relating to the minor be dealt with at the Chief Magistrate's Court.
13. The Respondent relied among others on the case of Kenya Wildlife Services v James Mutembei, Civil Appeal No. 40 of 2018.

Analysis And Determination

14. I have perused the submissions on record by the parties and I think the issue basically for determination is whether in light of the changes in her faith midstream the matter ought to be transferred to the Chief Magistrate Court from the Kadhis court.
15. It is true that Article 170(5) of *the Constitution* which mandates the Kadhis courts states as hereunder:-

“The jurisdiction of a Kadhi's 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 Kadhis' courts.”



16. Whereas the above position is true I do not have any evidence that the Applicant renounced her Islamic faith and reverted to Hinduism. That is a factual issue which can only be determined by way of evidence. None has been presented before this court.
17. At the same time, it appears to me that the matter had proceeded so far that raising the jurisdictional issue via this application is too late in the day. I state so for the reason that the Respondent's averments in the replying affidavit were not controverted.
18. The Applicant went as far as filing a suit at the Chief Magistrates Children's Court which was dismissed and the court directed the parties to submit themselves to the Kadhis court and deal with the matter there exhaustively.
19. The ruling in suit number E1800 of 2023 at the Children's Court was not appealed against by the Applicant. This is the same issue which she wants this court to deal with. I think and I agree with the Respondent that this is forum shopping to say the least. If she was not happy with the said decision, she should have preferred an appeal against it.
20. Equally, asking this court to transfer the matter to the Chief Magistrate court and filing a suit before the said court was very ingenious but the court will not fall for it.
21. The best approach is for the Applicant to exhaust all the issues before the Kadhis court including her argument on her faith and the changes she had gone through and if the said court is not persuaded then she moves to this court by way of appeal. The same goes with the issues surrounding the custody and maintenance of their minor child.
22. This court will be doing a disservice to both parties noting the stage at which the matter at the lower court had reached. The court will always interrupt the proceedings at the trial court if it is proved beyond peradventure that there is need to stay the same.
23. Staying of proceedings midstream is ordinarily not an issue to be taken lightly noting as stated above that there is an opportunity for the parties to approach the appellate court at appropriate time. It will be exercised where it is established that the proceedings are manifestly vexatious and frivolous and allowing it to proceed will be prejudicial to the Applicant.
24. In the premises I find the application not meritorious and I dismiss it with no orders as to costs.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS

8TH DAY OF APRIL, 2025.

H K CHEMITEI

JUDGE

