



REPUBLIC OF KENYA



AGH v FAS (Civil Appeal E033 of 2023) [2025] KEHC 6042 (KLR) (8 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6042 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E033 OF 2023**

AM MUTETI, J

MAY 8, 2025

BETWEEN

AGH APPELLANT

AND

FAS RESPONDENT

JUDGMENT

Introduction

1. The appellant in this matter is aggrieved by the decision of the Hon. Kadhi in Kisumu Kadhis Court Cause No. KDC E016 of 2021 in which he granted the following orders;-
 - a. That the marriage between the Petitioner and the Respondent be and is hereby dissolved and a decree nisi of 3 months to issue.
 - b. That the Petitioner is entitled to Eddah maintenance of Ksh 200,000 per month for three months of Eddah amounting to a total figure of Ksh.600,000.
 - c. That the Petitioner is entitled to her mahr balance of Ksh 20,000 to be payable within the next 3 months.
 - d. That the prayer for mata's is hereby denied.
 - e. That the prayer for the refund for the school fees of the children is hereby denied.
 - f. That the prayer for the maintenance of the Children is beyond the scope of the court.
 - g. That the Petitioner to return the documents that belong to the respondent within 3 months of Eddah



- h. That the petitioner is entitled to a total of Kshs. 4,413,300 as rent refund, contribution to matrimonial property and compensation for being denied the benefit from her investment in the plots.
 - i. Each party to bear their own costs.
2. The appellant aggrieved by the decision filed the instant appeal raising the following grounds:-
 - a. The learned Kadhi erred in both law and fact in compelling the Appellant to pay the Respondent mahit alleged balance of Ksh. 20, 000/= to be payable within 3 months.
 - b. The learned Kadhi erred in both law and fact in compelling the Appellant to pay the Respondent Ksh. 4, 413, 000/= as rent refund, contribution to matrimonial property and compensation for allegedly being denied the benefit from her alleged contribution to matrimonial property and compensation for being denied the benefit from her investment in the plots.
 - c. The learned Kadhi erred in both law and fact in failing to appreciate that the Respondent had not demonstrated its case on a balance of probabilities.
 - d. The judgment of the learned trail Kadhi was based on no evidence and a misinterpretation of the law.
 - e. The learned trail Kadhi acted on wrong principles and misdirected himself in considering irrelevant issues while arriving at his finding.
 - f. The learned trail Kadhi erred in law and in fact in failing to consider the Appellant's evidence during trial before arising at her decision.
 - g. The Judgment was against the weight of evidence.
3. The issues that this court is called upon to determine are whether:-
 - a. The respondent was entitled to a refund of Kshs. 4,413,000 as rent refund, contribution to matrimonial property and compensation for allegedly being denied the benefit from contribution to matrimonial property.
 - b. Whether the respondent had established her case on a balance of probabilities
 - c) Whether the learned Kadhi misdirected himself on the principles applicable in the distribution of matrimonial property.

Background Of The Case.

4. The instant appeal arises out of a situation where the Appellant and the Respondent were married under the Muslim faith and they were blessed with two issues. The two lived together and during the subsistence of the of their union they went into business jointly with an understanding that all the income generated therefrom would be for the benefit of the family.
5. However, as does happen with life their relationship became rocky when the appellant decided to marry another woman and moved away from the respondent leaving her with the issues of the marriage which she contends she was forced to fend for as the appellant shifted attention and interest to the newly married woman.



Appellant's Case

6. The Appellant's case that that the Appellant had failed to prove her claim against the Respondent on a balance of probabilities for reason that there was a 2004 divorce cause in the Kadhis court of Kisumu in which the court granted divorce hence there existed no marriage and the there was no evidence of desertion and cruelty.
7. On whether the marriage between the Petitioner and the Respondent should be dissolved the appellant submitted that there was no marriage that subsisted between the Appellant and Respondent since in the year 2004, the Respondent brought an initial divorce proceeding vide Kisumu Kadhi Court Civil Case Number 10 of 2004 Farida Ahmed Salim v Ali Gadafi Hamisi wherein both parties are in agreement that the divorce was granted and that they were only later reconciled by family and moved in back together but never officiated their union after the divorce in accordance to Section 49 of Marriage Act hence there was no marriage to be dissolved as prayed by the respondent in the instant proceedings.
8. In the alternative the appellant submitted that in the event that the Honorable court is inclined to grant the divorce it should make a finding that the Respondent failed to lead any evidence that amounts to grounds of granting divorce under the Muslim law as set out by Section 71 of the Marriage Act.
9. The appellant cite the case of HAA vs JOG (2018) e KLR where it was held that the grounds of divorce under Muslim law is; desertion, inability to maintain the family and cruelty.
10. According to the appellant, the respondent failed to lead evidence to prove the above grounds as on dissertation.
11. The Respondent in her amended petition averred that the Appellant had stopped providing any companionship to the Respondent ever since he married a second wife..
12. Further during the hearing the Respondent failed to indicate the period of the alleged desertion to qualify as a ground of divorce.
13. The Appellant on his part stated in court that he had not abandoned the Respondent and had been visiting the Respondent's house and continues to educate their children all who are now adults in university.
14. Further prior to the institution of the suit the Appellant had paid the Respondent's house rent for the previous month hence has not abandoned the Respondent and family.
15. Further, the appellant submitted that on the issue of provision, the Respondent in her pleadings averred that when they got married they stayed at the Appellant's parents' house peacefully without challenges however the Respondent voluntarily decided that they should move out to Migosi, Kenya-Re and eventually to Milimani yet she was well aware of the Appellant's financial situation and catered for their lifestyle on her own volition thus the Appellant cannot be faulted to have neglected his duties as a husband.
16. . The appellant went further to contend that the Respondent's claim that she has been footing the children's school fees is unsubstantiated hence no basis for claiming a refund of the same and in any case the children also belong to her as well thus no point for asking for a school fees refund.
17. According to the appellant the Respondent's motive behind asking for a divorce is as a result of the Appellant's move to marry a second wife which is well within his rights as he is allowed to marry up to four wives under the Islamic law and that the Respondent knew that the marriage was potentially polygamous having been procured under the Islamic law.



18. . The Respondent has therefore not proved on a balance of probabilities any

grounds for dissolution of marriage if at all the marriage existed.

19. On whether the two parties made any financial investments in any family business and if so whether the Respondent is entitled to the same the appellant submitted that the issue of joint investments was beyond the jurisdiction of the Kadhi's court as it involved matters of commerce while according to Article 170 (5) of *the Constitution* of Kenya and Section 5 of the Kadhis Court Cap 11 limits the jurisdiction of the Kadhi to determination of Muslim Law issues relating to personal status, marriage, divorce and inheritance hence the Kadhis Court ought not to have pronounced itself on the same.

20. . In support of the argument on jurisdiction the appellant cited the case of Motor Vessel M.V Lillians -vs- Caltex Oil (Kenya) Limited (1989) LLR 1653 where the Court of Appeal held;-

“Jurisdiction must be acquired before judgment. It is for this reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on evidence before court.....the moment the court determines that it has no jurisdiction it has to down it's tools and proceed no further.”

21. According to the appellant the Kadhis Court ought not to have pronounced itself on the issue of investment.

22. On Whether the Appellant should maintain the Respondent in the event that divorce is granted, the Appellant stated that he was agreeable to maintain the Respondent as the same is provided for in Nikah-Nama in the sharia laws in that the wife has the right to ask for her full mahr at anytime during her marriage or upon dissolution, save that the court should take into account the fact that the Respondent is currently a Chief Executive Committee Member in the county government of Kisumu hence earning high perks while the Appellant is a mere "hustler" living in [Particulars Withheld] Estate unlike the Respondent who resides in [Particulars Withheld]Kisumu.

23. On Whether the Appellant should maintain the children of the marriage, the Appellant does not equally dispute the same as the Koran mandates muslim fathers to support their children after divorce whether poor or rich hence the Appellant is committed to doing so.

Respondent's Case.

24. It was the Respondent's case that after the couple moved in together at Kaloleni Kisumu where the Appellant's parents resided and later on the Respondent secured employment and was able to invest in a number of projects through her first salary and loans from various facilities and established a shop at jubilee market which was run down by the Appellant.

25. The Respondent also contended that she further took a loan from Mwalimu Sacco which she advanced to the Appellant to restock the shop at jubilee market and instead, the Appellant rented the same to a 3rd party where he had been collecting rent from the same.

26. . It was also the Respondent's case that she further took another loan from her employer the County assembly which she used to put up rental houses at plot xx K which belongs to the Appellants family where they opened a joint account for the deposit of the rent from the rentals to the tune of Kshs. 70,000/= per month which sum was to cater for the family's rent, electricity, water and education related expenses for the children.



27. That instead of depositing the money in the joint account as agreed the Appellant used the same for personal gain leaving the Respondent to cater for the children and pay the loans single handedly where she incurred Kshs. 292,000 and Kshs. 660,000/= as costs of educating the issues and Kshs. 200,000/= for the policy for the children when the Appellant did not contribute to family nor parental responsibilities.
28. . Further it was also the Respondent's contention that the Appellant after all that went ahead and married another wife secretly and since abandoned the matrimonial home hence the petitioner prayed for dissolution of the marriage payment of mutah compensation, Eddah maintenance, return of her investment and compensation for single handedly educating her kids.
29. . The respondent submitted that the Appellant has since the delivery of judgement and service of the decree never paid a single cent to the Respondent herein.
30. It is the respondent's case that during the course of their marriage she invested in a number of projects with the Appellant through her salary and even took out loans from various facilities for these investments.
31. . The loans she took were for over Ksh.4,000,000 (four million) for these investments whereby the Appellant was the only person reaping or gaining from them. The Appellant neither contributed to the school fees for their issues neither towards their maintenance nor medical requirements.

Issues For Determination.

32. The issues that arise in the appeal are;-
 - a) whether there was a marriage that the Kadhi could dissolve as prayed for by the respondent
 - b) whether the respondent was entitled to an order for refund on contribution amounting to Ksh 4,413,300 was merited.
 - c) whether the respondent was entitled to her mahr balance of Ksh 20,000.

Analysis And Determination.

33. The duty of this court as a first appellate court is well settled that it is to re-evaluate and reconsider the evidence adduced before the Kadhi and draw its own conclusions on all the matters raised in the appeal. See *Selle and Another vs Associated Motor Boat Ltd \$ others* {1968} E.A 123 at 126
34. The first issue that the appellant has raised for determination is whether there was a valid marriage for dissolution by the Kadhi since according to him they had been married and divorced with the respondent.
35. I have examined the record carefully and the evidence of the appellant amounts to an admission that they were in a marriage and that problem started when he got married to a second wife.
36. The respondent tendered evidence that clearly indicated that they were married and that all that made her to seek dissolution was the desertion by the appellant.

The respondent testified;-

My name is FAS I live in Milimani, Kisumu. I work with the [Particulars Withheld] Kisumu, a minister in charge of roads and public work. The Respondent is my husband we married in 1999. The marriage was solemnized at my father's place. After the solemnization we moved in together. Now we don't



stay together. We separated in the year 2020. We have two children from the marriage a boy and a girl. HA and BA. HA was born in 1999 and B is 2001. HA and BA. H was born in 1999 and B is 2001. H has finished University. B is at [Particulars Withheld] University 2nd year. I have been financially responsible for taking care of the children since from birth. Hospital bills school costs. I employed a househelp. Paid for her. I have been the one taking care of them. Textbooks, uniforms I have fully been involved financially. I have also made investments in this marriage. I married him he was not stable financially.

37. The appellant on his part testified;-

‘ My name is AGH. I am the Respondent in this case. The petitioner is my wife. I was present when evidence was being adduced in court. I have read the petition. The petition is unfounded we married in 1999. We had family tyres worn out, the engine was weak within a week the engine knocked. She was then working at the [Particulars Withheld] office of MP Shabbir. I bought a new engine 65,000/- new tyres 25,000/- I did service of vehicle and asked her to use it for going to work instead of using the dangerous bike. In 2013 she wanted to vie for MP Kisumu Central, we contributed a lot for her campaign. She did not get it, she was afterwards nominated as an MCA. Before then I had struggles in life. I had started to rear German Shepherd (the dog) for sales one could fetch Kshs.30,000/- or even 20,000/-.

38. The submission by the appellant that they were not married was without merit and this court finds that the Hon. Kadhi was right in making the order fo dissolution because from the testimonies of the appellant and the respondent their marriage was irretrievably broken down. In any event from the appellants submission, he did not mind the dissolution and he accepted the responsibility to maintain his family even after divorce.

The appeal must therefore fail on that ground.

39. . On the second issue of Eddah, the union between the two having been a union made under Islamic law, a divorced woman is entitled to eddab maintenance for the three months after the issuance of a divorce as is the law according to the Quran 2:228.

40. The respondent in this matter was within her right to demand the same and the appellant was under duty to honor the same. The decision of the Kadhi on this issue was in keeping with Islamic law and the appellant could not run away from his spiritual, moral and legal duty to pay the same.

41. The claim by the respondent that she had invested jointly with the appellant was not denied by the appellant. The properties acquired with the respondent’s input were properties that fell within the ambit of matrimonial property the ambit of matrimonial property as envisioned in section 6(1) of the *Matrimonial Property Act* and thus the returns should have been shared equally amongst the parties.

42. The appellant having appropriated them to his own benefit could not be heard to say that the respondent was not entitled to a refund or share of the same. The law on division of matrimonial property is settled that once a party proves contribution, she must by operation of the law get his or her fair share of the property. In *Mary Ann Kivuitu vs Samuel Mutua Kivuitu Civil Appeal No 26 of 1985* where the court laid down the rule that where property acquired during coverture is registered jointly, it shall be presumed to be held in equal shares.

43. .The Kadhi in arriving at his decision upheld the letter and spirit of Article 45 of *the Constitution* which states that all parties in a marriage have equal rights during and at the dissolution of the marriage’.

44. The respondent was within her right to claim the return of the value of her contribution since under Section 14 of the *Matrimonial Property Act* there is a rebuttable presumption that;-



- (a) the property is held in trust for the other spouse and;
 - (b) their beneficial interest in the matrimonial property are equal.
45. It was also held in *Federation of Women Lawyers Kenya (FIDA) vs. Attorney General & Another* [2018] eKLR that: -
- “The law recognizes equal worth and equal importance of the parties in marriage. Thus, the beneficial share of each spouse as the law on the division of matrimonial property stands in Kenya ultimately depends on the parties proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. First, the Act recognizes monetary and non-monetary contribution which is clearly defined. By providing that a party walks out with his or her entitlement based on his or her contribution, the section entrenches the principle of equality in marriage.”
46. Islamic Law, Islam recognizes the right to own property to both man and woman. And wish not for the things in which Allah has made some of you to excel others. The court therefore agrees with the submission by counsel for the respondent thus:-
- [For men there is reward for what they have earned. [and likewise] for women there is a reward for what they have earned, and ask Allah of his Bounty. Surely Allah is All Knower of everything.’ Q4.32
- Abu Huraira (May Allah be pleased with him) narrated that the prophet (PBUH) said the life, wealth and dignity of a Muslim are sacred’. [Muslim 2564].
47. It follows therefore that since Islam recognizes the right of husband and wife to own properties and enter financial transactions either independently or with others including with their spouse. Where a spouse made contribution to the acquisition or development of a property, he or she is entitled to a commensurate share thereof.
48. The burden to prove the specific share of contribution rests with the claimant. The Supreme court of Kenya in *Petition No. 10 of 2020 Joseph Ombogi Ongetoto v Martha Bosibori Ogentoto* [2023] agreed with *Echaria* case on the principles applied for distribution of matrimonial property. It stated thus: [78]to our minds the finding in *Echaria* was essentially that a spouse does not acquire any beneficial interest in matrimonial property by fact of being married only and that specific contribution has to be ascertained to entitle such a spouse a share of the property.”
49. The respondent through her testimony was able to discharge that burden and as such the Kadhi made the correct decision in law the appellant did not also dispute that she contributed towards the acquisition of the property. The respondent’s sweat cannot have been in vain and appellant cannot seek to wrestle all the properties from her hands for benefit of himself and his other households. That would not only be unjust but also unequitable.
50. The parties have held themselves out to the outside world as being a married couple as the two must have acquired the properties with the intention of their own benefit so that when they chose to separate and go different ways the appellant must accept that the respondent is entitled to her rightful share.
51. The *Black’s Law Dictionary* 9th Edition at pg 1649 defines a constructive trust as “the right, enforceable solely in equity, to the beneficial enjoyment of property which another person holds the legal title. The fact that the appellant holds the titles to the properties cannot defeat the respondent’s interest.



52. In England and Wales Court of Appeal's Lord Justice Browne in *Eves v Eves* [1975] 1 WLR 1338 quoted with approval the decision in *Cooke vs. Heard* [1972] WLR 518 where it was held;

“... whenever two parties by their joint efforts acquire property to be used for their joint benefit, the courts may impose or impute a constructive or resulting trust. The legal owner is bound to hold the property in trust for them both. This trust does not need any writing. It can be enforced by an order for sale, but in a proper case the sale can be postponed indefinitely. It applies to husband and wife, to engaged couples, and to man and mistress, and may be to other relationships too.”

53. The appellant ought to have known that whatever properties that they jointly acquired were held in trust for each other by either of them depending on whose name appeared on the title. See the decision of the Supreme Court of Queensland in *Barker vs. Linklater & Another* [2007] QCA 363 quoted with approval in *Baumgartner vs Baumgartner* [1987] 164 CLR 137 where the court held:

‘ Their contributions, financial and otherwise, to the acquisition of the land, the building of the house, the purchase of furniture and the making of their home, were on the basis of, and for the purposes of, that joint relationship. In this situation the appellant’s assertion, after the relationship had failed, that the Leumeah property, which was financed in part through the pooled funds, is his sole property, is his property beneficially to the exclusion of any interest at all on the part of the respondent, amounts to unconscionable conduct which attracts the intervention of equity and the imposition of a constructive trust at the suit of the respondent.

54. Finally, in the case of *FW v NA* [2017] eKLR, where the High Court stated that,

This verse is addressed to either the husbands or the guardians. It is addressed to the husbands because it is their responsibility to pay the dowry. It could also be addressed to the guardians, not because they have to pay the dowry, but because in pre-Islamic jahiliya (and in much of today's "post-Islamic" jahiliya), they used to take the dowry of the women and not give it to them. This verse shows that the dowry must be given to the women and not kept by the guardians. The following verses also shows the obligatory nature of paying the dowry to the women: "...So for that pleasure which you have enjoyed from them, give them their prescribed compensation. " [Noble Quran 4:24] "...All others have been made lawful for you provided you seek (them in marriage) with your property..." [Noble Quran 4:24]

“The mahr (dowry) is something that is paid by the man to his wife. It is paid to the wife and to her only as an honour and a respect given to her and to show that he has a serious desire to marry her and is not simply entering into the marriage contract without any sense of responsibility and obligation or effort on his part. It has been referred to by many names in the texts and the books of fiqh: Proof that the Mahr is Obligatory Allah says in the Qur’an: "And give the women their dowries with a good heart..." [Noble Quran 4:4]

I therefore don't understand whether this one hundred and forty thousand (140,000/=) was a gift or a debt. If it is a debt, then this is the wrong forum. I advise the defendant to take the matter to the right court."Also, the High Court in affirming the mandatory nature of mahar, in *MEM v AD* [2015] eKLR, held that,



And give to the women (whom you marry) their mahr obligatory bridal money given by the husband to his wife at the time of marriage) with a good heart but if they of their own good pleasure remit any part of it to you take it and enjoy it without fear of any harm (as Allah has made it lawful) Sura 4 an Nisai 4.

“In Islamic law and practice a man is only allowed to pay dowry. Dowry is the right of the women upon the man. Dowry has no specific minimum or maximum. It can be delayed or given in advance. Allah says,

55. The decision by the Kadhi to award the Mahr balance to the respondent was in line with the law and the appellant could not avoid paying the same having admitted that the respondent was his wife under Islamic law.

56. In conclusion this court finds that the appeal has no merit and the same is dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF MAY 2025.

A. M. MUTETI

JUDGE

