



**SYT v MMB (Family Appeal E078 of 2024)
[2025] KEHC 8693 (KLR) (Family) (11 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8693 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

FAMILY APPEAL E078 OF 2024

CJ KENDAGOR, J

JUNE 11, 2025

BETWEEN

SYT APPELLANT

AND

MMB RESPONDENT

JUDGMENT

1. The parties herein got married to each other on 28th December, 2019 under Islamic Law. The Respondent claimed that their marriage has irretrievably broken down and cannot be salvaged. She filed a Divorce Petition against the Appellant at the Kadhi’s Court, where she sought dissolution of the marriage and issuance of a divorce certificate. The Appellant filed a Defense to the Petition in which he stated that he would not submit to the jurisdiction of the Kadhi’s Court, and thus asked the Court to down its tools. Before hearing the Petition, the Kadhi’s Court made a determination on the issue of jurisdiction.
2. It delivered a ruling on 14th June, 2024, in which it found that it had jurisdiction. The Court held that a party, who has decided not to submit to the jurisdiction of the Kadhi’s Court, must give compelling reasons for that decision. It reasoned that the Appellant had failed to give compelling reasons on why he had decided not to submit to its jurisdiction. It ordered the matter to proceed to hearing and directed the parties to take a hearing date.
3. The Appellant was dissatisfied with the ruling and appealed to this Court vide a Memorandum of Appeal dated 20th June, 2024. He listed the following Grounds of Appeal;
 1. That the Learned Honourable Deputy Chief Kadhi erred in Law by forcing the Appellant to submit to the jurisdiction of the Kadhi’s Court.



2. That the Learned Honourable Deputy Chief Kadhi erred in Law by overturning decisions of superior courts on the subject of submission to the Jurisdiction of the Kadhi's Court by holding that Judges of Superior Courts opted for literal interpretation of *the Constitution*.
 3. That the Learned Honourable Deputy Chief Kadhi erred in Law and fact by holding that non-submission to the jurisdiction of the Kadhi's Court ought to be brought by way of Application and not in the main pleadings.
 4. That the Learned Honourable Deputy Chief Kadhi erred in Law by holding that the Appellant did not submit any compelling reasons as to why he does not submit to the jurisdiction of the Kadhi's Court.
 5. That the Learned Honourable Deputy Chief Kadhi erred in Law and fact by holding that the Appellant non submission to the Kadhi's Court jurisdiction may have very disastrous impact on his faith.
 6. That the Learned Honourable Deputy Chief Kadhi erred in Law and fact by failing to base its ruling on express provisions of *the Constitution* and the Law but on other extraneous issues.
4. He asked the Court to allow the appeal and set aside the ruling delivered on 14th June, 2024 and substitute by a judgment of this Honourable Court confirming a party's right not to submit to the jurisdiction of the Kadhi's Court.
 5. The Appeal was canvassed by way of written submissions.

Parties' Written Submissions.

6. The Appellant submitted that the ruling of the Kadhi's Court should be set aside. He argued that the law does not require a litigant, who has decided not submit to the Kadhi's Court, to give reasons for that decision. He submitted that it is enough for such a litigant to just state in their pleadings that they will not submit to the Court. He therefore argued that he was not mandated to give reasons on why he had chosen not to submit to the Kadhi's Court. He cited several authorities to support his position and arguments and the Court has carefully considered the same.
7. On the other hand, the Respondent submitted that the ruling of the Kadhi's Court should be upheld. She argued that a litigant, who had decided not to submit to the Kadhi's Court, should give compelling reasons as to why he does not want to submit. She argued that such a litigant cannot merely say that he does not want to submit to the jurisdiction of the Kadhi's Court without giving reasons. Thus, she argued that the Appellant was under a duty to give reasons for his decision not to submit because they are both practicing Muslims and their marriage was celebrated under Sharia Law. She too cited several authorities to support her position and the Court carefully considered the same.

Issues for Determination.

8. I have considered the Grounds of Appeal and the submissions by Counsels for the parties. The issue for determination is whether the law requires a litigant, who has decided not to submit to the Kadhi's Court, to give reasons for that decision.
9. The issue at hand concerns the jurisdictional limit of the Kadhi's Court. The High Court and other superior Courts have in the past interpreted Article 170 (5) of *the Constitution* of Kenya, 2010, concerning the jurisdiction of the said Courts. In *Genevieve Bertrand v. Mohamed Athman*



Maawiya and Another, Malindi Civil Application No. 24 of 2013 [2014] eKLR, the Court of Appeal interpreted the said Article and held as follows;

“23. In the case of the Kadhi’s Court, it is a creature of *the Constitution* (section 66 of the retired Constitution and article 169 of the current Constitution). The jurisdiction of the Kadhi’s Court is specifically defined under Article 170 (5) of *the Constitution* and section 5 of the Kadhi’s [Court] Act, as “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’s Court.” Thus the jurisdiction of the Kadhi’s Court is determined by the existence of three factors. That is the subject matter of the claim or dispute, the party’s Muslim faith, and the party’s submission to the jurisdiction of the Kadhis Court.”

10. Similarly, the Court in R.B & R.G.O v H.S.B & A.S.B [2014] eKLR interpreted Article 170 (5) of *the Constitution* of Kenya, 2010, with a special focus on the ‘requirement for submission’ to the Kadhi’s Court. The Court interrogated whether litigants have a right ‘not to submit’ to the Kadhi’s Court. The Court observed as follows;

“18. I do not agree with the suggestion by counsel for the Interested Parties that Muslims have no choice of the forum for determination of their personal law matters.... While the parties before the Kadhi’s Court must all be Muslims, no party who has not submitted to the jurisdiction is compelled to litigate before that court. That the 1st Petitioner converted to Islam only satisfies the second ingredient for the jurisdiction of the Kadhi’s Court which must be complemented by the Petitioner’s choice to submit to the Court.

19. The requirement for submission to the Jurisdiction of the Kadhi’s Court is an addition by *the Constitution* of Kenya 2010. The Former Constitution had under section 69 (3) (d) provided only for appointment to the office of the Chief Kadhi and Kadhis with their jurisdiction being given by the *Kadhis’ Courts Act* cap. 11 under section 5 thereof as set out above. In interpreting Article 170 (5) of *the Constitution* the court must purposefully give effect to the tenor of the addition of the requirement of submission of the Muslims to the jurisdiction of the Kadhi’s Court by the new Constitution of Kenya 2010 by upholding choice of the Court before which to file proceedings of personal nature.

20. The word ‘submit’ is defined by The Concise Oxford Dictionary as a verb meaning ‘give way, resign oneself, yield, cease or abstain from resistance’. Accordingly, in my view, the right to ‘submit’ must be taken to contain an opposite inbuilt right to choose ‘not to submit’. I consider that in providing as a prerequisite that the Muslims submit to the jurisdiction of the Kadhi’s Court, *the Constitution* was upholding the choice that Muslims have traditionally exercised as noted by the Court of Appeal in the decision of Saifudean Mohamedali Noorbhai v. Shehnaz Abdehussein Adamji, supra.”



11. Lastly, the Court in O M H v B J K [2017] eKLR faced a similar question and observed as follows;

“ 18. The parties herein profess the Muslim faith. The subject matter of the dispute is divorce. However, the Appellant has chosen not to submit to the jurisdiction of the Kadhi’s Court thus stripping the Kadhi’s Court of jurisdiction over the matter. The question that arises is who then would grant a decree for the dissolution of the marriage herein. It is clear from Section 72 of the Marriage Act that other than a Kadhi, the persons who may issue a certificate of dissolution of an Islamic marriage are a Sheikh, Imam or Mukhi.”

12. This Court associates itself wholly with the reasoning of the Courts in the above cited authorities. In my view, the law does not require a litigant, who has decided not to submit to the Kadhi’s Court, to give reasons for that decision. Consequently, I find that the Appellant did not have to give reasons as to why he had chosen not to submit to the Kadhi’s Court. His mere statement as captured in his Defense dated February 29, 2024 was sufficient to strip the Kadhi’s Court of jurisdiction over the matter. The Appeal is hereby allowed.

13. The Respondent is at liberty to move any authority or Court of competent jurisdiction for the dissolution of the marriage.

14. There shall be no order as to costs.

15. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 11TH DAY OF JUNE, 2025.

.....

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Mr. Mwadzogo Advocate for the Appellant

Ms. Akinyi Advocate holding brief for Mr. Yusuf Advocate for the Respondent

