



Shakil v Ali (Civil Appeal E040 of 2021) [2024] KEHC 685 (KLR) (1 February 2024) (Judgment)

Neutral citation: [2024] KEHC 685 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL E040 OF 2021
JR KARANJA, J
FEBRUARY 1, 2024**

BETWEEN

SHAHIR SHAKIL APPELLANT

AND

NAZIA ANWAR ALI RESPONDENT

JUDGMENT

1. The appeal arose from the decision of the Senior Resident Kadhi delivered on 22nd September 2021 in Kericho Kadhi Misc. Application No. E006 of 2021 in which the applicant was the respondent herein, Nazia Anwar Ali, and the respondent was the appellant herein, Shahir Shakil.
2. The Notice of Motion dated 31st May 2021, was presented by the applicant/respondent under Order 37 Rules 1 & 2 of the Children Act 2010 (Sic) for the benefit of a child named AS, aged five (5) years old at the time.

The basic order sought against the respondent/appellant was essentially for child support and upkeep.

3. The respondent was thus being called upon to provide for the child's school fees and medical needs as well as to ensure that the child is provided with a safe and friendly living environment. The applicant further sought an order for maintenance of the child under her care and custody until the determination of the matter.
4. In essence, the application specifically related to the child and his welfare as opposed to that of the parents i.e the applicant and the respondent.

The Kadhi's court record shows that the application was heard by way of "*viva-voce*" evidence and was in the process referred for mediation which apparently collapsed and/or failed.

5. After the failure of the mediation, the matter seems to have taken a different trajectory clearly prompted by the proceedings before the mediator or mediators such that the issues relating to the welfare of the



child subject of the material application were somehow enjoined with issues relating to the marriage of the child's parents and dissolution thereof.

6. This resulted in the impugned ruling or Judgment delivered by the trial Kadhi court on the 22nd September 2021 under the heading "Divorce Cause No.6 of 2021" rather than Misc. Application No. E006 of 2021" thereby implying that the court was ruling not on the application but a Divorce cause which was non-existent as borne by the record.

7. Nonetheless, issues pertaining to the welfare of the child for whom the application was all about were co-opted into the impugned judgment alongside issues relating to the marriage and divorce of the child's parents.

Being aggrieved with the Judgment, the respondent in the application preferred this appeal on the basis of the grounds set out in the memorandum of appeal dated and filed herein on 4th October 2021.

8. The appeal was canvassed by way of written submissions which were filed on behalf of the appellant by Okoth Pauline & Co. Advocates and on behalf of the respondent by Kipngeno & Associates Advocates.

Having considered the appeal on the basis of the supporting grounds and the rival submissions the duty of this court was to reconsider the matter and arrive at its own conclusion bearing in mind that the trial court had the benefit of seeing and hearing the parties.

9. In that regard, the evidential statements made by the parties at the hearing of the application and the pleadings on which the application was made have been given due consideration by this court.

From the pleadings and evidence, what emerged as a crucial issue for determination was whether the application was competent and proper before the Kadhi court for granting the orders sought.

10. The material Notice of Motion dated 31st May, 2021, was anchored on the provisions of the [Children Act](#). Indeed the issue in dispute between the parties was essentially on the welfare of their subject child who became a "victim" of their frosty marital relationship.

This being the position, the competency and propriety of the application before the Kadhi's court would be dependent on whether the Kadhi's court is possessed of jurisdiction to deal with children matters.

11. A court's jurisdiction to decide or rule on a matter before it invariably flows from the [constitution](#) or statutory law. With regard to the Kadhis court; Article 170 (5) of the [Constitution](#) provides for the jurisdiction of the court in the following terms:-

"The Jurisdiction of a Kadhi's Court shall be limited to the determination of question 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 courts"

12. Such is a constitutional jurisdiction specific to matters of personal status, marriage, divorce or inheritance.

The statutory jurisdiction of a Kadhi's court is dictated by Section 5 of the [Kadhi's Court Act](#) to wit:-

"A Kadhi's court shall have and exercise the following jurisdiction, namely, 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, but nothing in this section



shall limit the jurisdiction of the high court or of any subordinate court in any proceeding which come before it”.

13. It is notably that in both the aforementioned constitutional and provisions of the law, a Kadhi’s court is not conferred with jurisdiction to deal with children matters similar to those brought into this court in the Notice of Motion dated 31st May 2021.

Such matters fall within the domain of the *Children Act* No.8 of 2001 which is:-

“An Act of Parliament to make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children: to make provisions for the administration of children’s institutions; to give effect to the principles of the convention on the Rights of the child and the African Charter on the Rights and Welfare of the child and for connected purposes”

Section 73 of the Act specifies the jurisdiction of children’s courts in both civil and criminal matters.

14. This means that any matter to do with a child must be directed to the children’s court without any discrimination on the basis of race, gender and religion.

It would follow therefore that the impugned application ought to have been presented to a children’s court rather than a Kadhi’s court. That, the application was incompetent and improper before the Kadhi’s court for want of jurisdiction thereby rendering the proceedings null and void together with the accruing impugned judgment.

15. On account of jurisdiction this court upholds and sustains ground three (3) of the grounds of appeal thereby rendering it unnecessary to delve into the rest of the grounds.

In sum, the appeal is allowed to the extent that the impugned judgment and all consequential orders are hereby set aside with directions that the parties may, if necessary, move the children’s court for orders pertaining to the welfare and protection of the child and may also institute a proper suit before the Kadhi’s court for dissolution of their marriage and related orders.

The appellant shall have the costs of the appeal.

Ordered accordingly.

[DELIVERED, DATED AND SIGNED AT KERICHO THIS 1ST DAY OF FEBRUARY, 2024.]

J. R KARANJAH

JUDGE

