



REPUBLIC OF KENYA



AS v JAJ (Civil Appeal E022 of 2024) [2024] KEHC 13865 (KLR) (5 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13865 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E022 OF 2024
CJ KENDAGOR, J
NOVEMBER 5, 2024**

BETWEEN

AS APPELLANT

AND

JAJ RESPONDENT

JUDGMENT

1. The Appellant and the Respondent got married under Islamic law in the Republic of Kenya in the year 2015. During the pendency of their marriage, they were blessed with one child and they acquired several properties within Isiolo and Marsabit Counties. However, their marriage broke down and they separated on January, 2023. On 5th October 2023, the Respondent filed a Matrimonial Cause No 18 of 2023 at the Kadhi's Court at Isiolo where he sought several orders against the Appellant. There orders sought by the Respondent were as follows;
 1. The Court to declare the marriage as irretrievably broken down and grant an Order of divorce.
 2. Order declaration that Plot No. 467 Chechelezi within Isiolo together with all developments thereto and Plot No. Marsabit/JIRME/1XX7 within Marsabit County together with all developments thereto are Matrimonial property to be shared on pro rata basis based on the property value.
 3. Order declaration that Plot No.4X7 Chechelezi within Isiolo together with all developments thereto belongs to the [Respondent].
 4. Order of Permanent Injunction restraining the [Appellant] from interfering with the Petitioner Occupation and Possession of Plot No.4X7 Chechelezi within Isiolo County.
 5. The [Respondent] be granted Orders of Actual custody the child.
2. The Appellant filed an Answer to Petition and Cross-Petition on 17th October, 2023. The matter came up for pre-trial directions on 29th November, 2023 and the matter was set for hearing on 19th December,



2023. The matter did not proceed on 19th December, 2023 and was adjourned to 22nd January, 2024. Again, the matter did not proceed on 22nd January, 2024 and it was set for hearing on 21st February, 2024. However, before the matter could be heard, the Appellant brought an application through a Notice of Motion dated 25th January, 2024 questioning the jurisdiction of the Kadhi's Court to hear the Matrimonial cause. In the Application, the Appellant sought the following orders;

1. That the application be certified urgent and be heard ex parte in the first instance.
 2. That pending the inter partes hearing of this application the Honourable Kadhis' Court stays or suspends the hearing of the main suit scheduled for 21.2.2024.
 3. That the Kadhis' Courts issues an order that it has no jurisdiction to hear and determine a matter where a party does not submit to the court's jurisdiction.
 4. That the Matrimonial Case No. E018 of 2023 be struck out for want of jurisdiction.
3. The Appellant swore an affidavit dated 25th January, 2024, in which she stated that she had made a conscious decision to not submit to the jurisdiction of the Kadhi's Court as is her right under Article 170 (5) of the Constitution. She also stated that she wished that the issues raised be determined by the other courts with requisite jurisdiction. She also deponed that the cumulative value of the speculative prices mentioned in the pleadings goes over Kshs.20 million and removes the matter within the pecuniary jurisdiction of any subordinate Court, which includes the Kadhi's Court.
4. The Honourable Kadhi issued a ruling on 1st February, 2024 in which he dismissed the Appellant's application. The Court held that the application of the Appellant not submitting to the jurisdiction of the Kadhi's Court lacked merit. He also held that the Court had jurisdiction to determine issues of children custody and maintenance. Lastly, he held that the Kadhi's Court has no limitation in dealing with any matrimonial property of parties which has cumulative value of over Kshs.20 million, and thus does not remove the matter within the pecuniary jurisdiction of the Kadhi's Court.
5. The Appellant was dissatisfied with the ruling and appealed to this Court through a Memorandum of Appeal dated 13th February, 2024. She listed the following grounds of Appeal:-
1. That the learned Kadhi erred in law and in fact by finding that the Kadhi's Court had Jurisdiction to hear and determine matters between two parties who profess the Muslim religion where one of the parties does not willfully submit to the jurisdiction of the Court.
 2. That the learned Kadhi erred in law and in fact by finding that the Kadhi's Court had jurisdiction to hear and determine issues of divorce where there was clear evidence that the parties in the suit were already divorced.
 3. That the learned Kadhi erred in law and in fact by finding that the Kadhi's Court had jurisdiction to hear and determine issues of division of Matrimonial Property.
 4. That the learned Kadhi erred in law and in fact by finding that the Kadhi's Court had jurisdiction to hear and determine issues of Matrimonial Property where the property in question had a cumulative value of over Kshs. 20 million.
 5. That the learned Kadhi erred in law and in fact by finding that the Kadhi's Court had jurisdiction to hear and determine issues of division of property that did not form part of matrimonial property for purposes of division thereof after dissolution of a marriage.
 6. That the learned Kadhi erred in law and in fact by finding that the Kadhi's Court had jurisdiction to hear and determine issues of custody and maintenance of a child.



7. That the learned Kadhi erred in law and in fact by finding that the Kadhi's Court had jurisdiction to hear and determine issues of divorce where there was clear evidence that the parties in the suit were already divorced.
 8. That the learned Kadhi erred in law and in fact by finding that the Kadhi's Court had jurisdiction to determine issues relating to matrimonial property, land, custody and maintenance of a child under the guise of determination of matters of personal status when the two parties in the suit were clearly divorced.
 9. That the learned Kadhi erred in law and in fact by determining the application dated 25th January, 2024 ex parte without issuing directions that the Respondent be heard in response to the legal and factual matters raised in the application.
6. The Appellant asked the Court to allow the appeal and set aside the ruling dated 1st February, 2024 by the Senior Resident Kadhi Hon. Gavava at the Isiolo Kadhi's Court. The appeal was canvassed by way of written submissions.

The Appellant's Written Submissions

7. The Appellant submitted that the Kadhi's Court does not have jurisdiction where one of the parties fails or refuses to submit to the jurisdiction of the court. She argued that the *Constitution* sets out two conditions that must be satisfied to give the Kadhi's Courts jurisdiction over a matter. According to her, the first condition is that the parties must profess Muslim faith and the second condition is that the parties must submit to the jurisdiction of the Court. She submitted that the mere fact that she filed pleadings and agreed to set the matter down for hearing did not preclude her from raising jurisdictional questions later.
8. The Appellant submitted that she did not wish to submit to the jurisdiction of the Court and that she had the right to raise the issue any time before judgment. She argued that the Act of Parliament and subsidiary legislation establishing the Kadhi's Court do not provide for the manner of submission to the jurisdiction of the Kadhi's Court or at what point that condition is satisfied. She argued that she raised the issue at the earliest opportunity but the Kadhi's Court ignored her wishes and failed to determine the issue of 'submit' in the ruling dated 1st February, 2024.
9. The Appellant also submitted that the Respondent filed a 'multi grill case' that did not fall within the exclusive jurisdiction of the Kadhi's Court. She argued that the Respondent's case calls the Kadhi's Court to determine issues of custody of children, division of matrimonial property, and determination of ownership of land gained through inheritance that are a preserve of other Courts with exclusive Statutory and Constitutional jurisdiction. She argued that the Respondent could not seek an order for dissolution of marriage because he had already divorced her by giving her written Talaq. She also argued that he could not seek actual custody of the minor because there was already in place a duly executed parental responsibility agreement taking care of that.

The Respondent's Written Submissions

10. The Respondent submitted that if indeed the Appellant intended not to submit to the jurisdiction of the Kadhi's Court the same should have been raised at the earliest opportunity. He also argued that the Appellant had not tabled any evidence that she had declined to submit to the Jurisdiction of the Kadhi's Court. He argued that the fact that the Appellant entered appearance, filed an answer to the Petition and Cross Petition illustrated that she had submitted to the jurisdiction of the Kadhi's Court.



He also relied on the fact that the Appellant had complied with Order 11 of the Civil Procedure Rules and had been ready to proceed for a hearing on 2 occasions.

11. He relied on the case of *MAA v SIE (Civil Appeal E009 of 2024)*, ZUDG v SJKUR (2020) eKLR, R.B & R.G.O v H.S.B & A.S.B [2014] eKLR, In re Estate of Wario Guracha Dambi (Deceased) [2021] eKLR.

Issues for Determination

12. Each party identified several issues for determination and made considerable arguments around those issues. However, I have looked at their respective submissions and I find that these are the issues for determination;
 - a. Whether the Appellant had submitted to the Jurisdiction of the Kadhi's Court
 - b. Whether the Appellant could withdraw her submission to the jurisdiction of the Kadhi's Court

The Duty of the Court

13. Being a first appeal, the duty of this Court is to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. This principle was set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123 where the Court held:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”

Whether the Appellant had submitted to the Jurisdiction of the Kadhi's Court

14. There is no dispute that the Appellant entered appearance before the Kadhi's Court and filed an Answer to the Petition and a Cross Petition. However, the parties disagree on the legal implication of the Appellant's conduct. They are not in agreement on whether the fact of filing the pleading should be interpreted to mean that the Appellant had submitted to the Kadhi's Court. On the one hand, the Appellant argues that the mere fact that she filed pleadings did not preclude her from raising jurisdictional questions later. On the other hand, the Respondent argued that the fact that the Appellant entered appearance and filed an answer to the Petition and Cross Petition illustrated that she had submitted to the jurisdiction of the Kadhi's Court.
15. Courts have in the past faced a similar question on when a person is to be deemed to have submitted to the Jurisdiction of the Kadhi's Court. In *re Estate of Wario Guracha Dambi (Deceased)* [2021] eKLR, the Court deliberated a similar question and observed as follows;

“The 1st Respondent deposed in her replying affidavit that the applicant responded to the petition and even filed an application for injunction. The applicant did not dispute those facts. It is then clear that the applicant has submitted to the authority of the Kadhi by responding to the petition”.

16. Based on the above authority, the Court takes the view that the Appellant submitted to the Jurisdiction of the Kadhi's Court when she filed an Answer to Petition and Cross-Petition.



Whether the Appellant could withdraw her submission to the Jurisdiction of the Kadhi's Court

17. The next issue for determination is whether the Appellant can withdraw her submission to the Jurisdiction of the Kadhi's Court. The Court in *IAM v AGH* [2020] eKLR faced a similar question where, a party who had initially submitted to the jurisdiction of Kadhi's Court decided to opt out. The Court considered whether a party's submission to the Kadhi's Court binds the party throughout the petition or whether the party can subsequently opt out of the Kadhi's jurisdiction at any time. The Court held that a party can subsequently opt out of the Kadhi's jurisdiction at any time and observed as follows;

“8. There is no dispute that the applicant had admitted the jurisdiction of the Kadhi's Court, but he now says he has opted out. The Kadhi's Court has jurisdiction to hear and determine a divorce matter between two parties who profess the muslim religion. However, they have to submit to the jurisdiction of the Kadhi's Court. The submission, in my view, has to be voluntary. The applicant may have, at the filing of the response to the petition, submitted to the jurisdiction of the Kadhi's Court, but did this submission bind him throughout the petition? I find not. A religion or faith entails voluntary submission to it. It means that, at any time, one can opt out. One can change the religion or faith, or decide not to be bound by the tenets of the religion or faith, or decide not to have any religion or faith altogether. I do not think he owes anyone, including the court, an explanation. Article 32 of the [Constitution](#) allows for the freedom of conscience, religion, belief and opinion.

9. I find that the applicant has the freedom to opt out of the jurisdiction of the Kadhi's court under Article 170(5) of the [Constitution](#) and section 5 of the Kadhi's Court Act”.

18. The Respondent relied on the case of *In re Estate of Wario Guracha Dambi (Deceased)* [2021] eKLR, where the Court declined to allow a party to opt out of the Kadhi's Court jurisdiction. In that case, the Court held as follows;

“There was no evidence placed before the court that the applicant declined to submit to the authority of the Kadhi's Court at Marsabit. His supporting affidavit does not mention anything to the effect. It is only his advocate who in his submissions stated that the applicant does not agree to so submit. These were only statements made from the bar that are of no effect.

22. The 1st respondent deposed in her replying affidavit that the applicant responded to the petition and even filed an application for injunction. The applicant did not dispute those facts. It is then clear that the applicant has submitted to the authority of the Kadhi by responding to the petition. I agree with the 1st respondent that the act of the applicant in filling the instant application with this court when he had already submitted to the authority of the Kadhi was an abuse of the process of the Court.

19. The decision of the Court in *In re Estate of Wario Guracha Dambi* (above) is distinguishable with the current case. In the *Wario Guracha Dambi* case, the party who sought to opt out of the Kadhi's Court's jurisdiction had not tendered any evidence to show that he had declined to submit to the authority of the Court. In particular, the party's Supporting Affidavit did not mention anything to the effect.



20. This can be contrasted to the current case where the Appellant has tendered evidence that she no longer wishes to be subjected to the jurisdiction of the Court. In her Supporting Affidavit dated 25th January, 2024 and filed at the Kadhi's Court, the Appellant stated as follows;

I have made a conscious decision to not submit to the Jurisdiction of the Kadhi's Court as is my right under Article 170 (5) of the Constitution and I pray that the issues raised be determined by the other Courts with requisite jurisdiction”.

21. Based on the decision in IAM v AGH [2020] eKLR (Above), I hold that the Appellant had the right to withdraw her submission to the Jurisdiction of the Kadhi's Court at any time in the Matrimonial Cause E018 of 2023. I also hold that she produced enough evidence before the Kadhi's Court to show that she no longer wanted to be subjected to the Court.

22. Having so opted out, I find that the petition in Matrimonial Cause No. E018 of 2023 in which the Appellant is the Respondent can no longer be heard and determined at the Kadhi's Court.

Disposition

23. The Appeal is hereby allowed.

24. The ruling of the Senior Resident Kadhi Hon. Gavava in Matrimonial Cause No. E018 of 2023 at the Isiolo Kadhi's Court dated 1st February, 2024 is hereby set aside.

25. I allow transfer Matrimonial Cause No. 18 of 2023 between the parties herein from the Kadhi's Court at Isiolo to the Chief Magistrate's Court at Isiolo for hearing and determination.

26. No order as to costs.

27. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 5TH DAY OF NOVEMBER, 2024.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Ms. Kerubo Advocate (present) holding brief for Mwiti Kinyua Advocate for Appellant

Mr. Mutuma Mwiti Advocate for Respondent

