



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**MISC APPLICATION NO. 15 OF 2020**

**ABDIRIZAK MOHAMED IBRAHIM .....APPLICANT**

**VERSUS**

**NASTEHA MUKTAR ALIO.....RESPONDENT**

**RULING**

1. Before this court is the Notice of Motion dated **29<sup>th</sup> January 2020** by which the applicant **ABDIRIZAK MOHAMED IBRAHIM** seeks the following orders:-

**“1. SPENT**

**2. SPENT**

**3. THAT pursuant to Article 165 (6) of the Constitution of Kenya, 2010, this honourable court be pleased to exercise its supervisory jurisdiction over the Kadhi’s Court at Nairobi in regard to Divorce Cause No. 144 of 2019 to ensure fair administration of justice.**

**4. THAT the costs of application be provided for.**

**5. THAT costs of this application be provided for.”**

2. The Application was premised upon **Sections 1A, 1B, 3A, and 15** of the **Civil Procedure Act, Cap 21 Laws of Kenya, Order 51 Rule 19** the **Civil Procedure Rules 2010. Article 165 (6) (7)** of the **Constitution of Kenya 2010** and all other enabling provisions of the law. It was supported by the Affidavit of even date as well as the supplementary Affidavit dated **18<sup>th</sup> February 2021** both sworn by the Applicant.

3. The Respondent **NASTEHA MUKTAR ALIO** opposed the application through her Replying Affidavit dated **12<sup>th</sup> February 2020**. The application was canvassed by way of written submission. The Applicant filed the written submissions dated **24<sup>th</sup> June 2021** whilst the Respondent relied upon her written submissions dated **6<sup>th</sup> August 2021**.

**BACKGROUND**

4. The Respondent herein filed at the **Kadhi Court** in **Nairobi** a Divorce Petition dated **4<sup>th</sup> July 2019** together with a Notice of Motion of the same date.

5. The Applicant filed in the Kadhi Court a Preliminary Objection dated **11<sup>th</sup> July 2019** challenging the jurisdiction of the Kadhi Court to determine the Petition. The Applicant argued that since the cause of action arose in **Elwak** in **Mandera County** where both parties reside then the matter ought to be heard by the Kadhi Court in **Mandera** and not by the Kadhi in **Nairobi**.

6. However, vide a Ruling delivered on **25<sup>th</sup> September 2019** the **Hon Kadhi** dismissed the Preliminary Objection and found that he had jurisdiction over the matter.

7. The Applicant avers that the **Hon Kadhi** misinterpreted the law and misdirected himself in coming to that decision hence the present application.

8. The Respondent confirmed that she had indeed filed in the **Kadhi Court in Nairobi, Divorce Cause No. 144 of 2019** seeking orders for divorce, custody of the minor children of the marriage and maintenance. The Respondent averred that after the marriage broke down she was forced to move from **Mandera County** to **Eastleigh in Nairobi County** where she had friends and relatives who were willing to assist her make a living and provide for her children. That having the Petition heard in **Elwak in Mandera County** would be oppressive to her as she is now resident in Nairobi and is not in a position to afford the expenses involved in travelling back and forth between the two counties. The Respondent urges the court to let the matter proceed before the **Hon Kadhi in Nairobi**.

### **Analysis and Determination**

9. I have considered the application before this court, the Affidavit in Reply as well as the written submissions filed by both parties. Although the suit initially filed by the Respondent involved prayers for custody and maintenance, it has been conceded by both parties that the issues of custody and maintenance of the children of the marriage have already been dealt with, therefore the only issue which remains outstanding is the question of divorce.

10. The main issue for determination here is the question of the ‘**territorial**’ jurisdiction of the **Hon Kadhi** sitting in **Nairobi** i.e., does the Kadhi in **Nairobi** have jurisdiction to handle a divorce petition where the cause of action arose in **Elwak in Mandera County**.

11. The Applicants position is that since the marriage between the couple was solemnized **Elwak** and since the Applicant permanently resides in that town, the divorce petition ought to be heard by the **Kadhi in Mandera**.

12. The Respondent on the other hand argues that she now resides with the children in **Nairobi**. That to have the petition heard in **Mandera** would prejudice her as she would be unable to afford the fare required to travel back and forth from **Mandera to Nairobi**. The Respondent submits that the Applicant is a man of means who is quite capable of attending the court proceedings in Nairobi.

13. The **Hon Kadhi** in his Ruling of **25<sup>th</sup> September 2019** dismissed the Preliminary Objection filed by the Applicant in effect, finding that the **Kadhi in Nairobi** was clothed with requisite jurisdiction to hear and determine the Divorce Petition.

14. It is important to note that the Applicant has not filed an **appeal** against the Ruling of the Kadhi. Rather the Applicant has come to the High Court seeking to have it exercise its ‘**supervisory**’ jurisdiction over the Kadhi.

15. The scope of the Kadhi’s Court jurisdiction is spelt out under **Article 170 (5)** of the **Constitution of Kenya** as follows: -

**“The jurisdiction of a Kadhis’ 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 Kadhi’s courts.”**

16. In **R.B. & R.G.O. v H.S.B. & A.S.B. [2014] eKLR**, the court stated as follows:-

**“It is clear from the textual provision of Article 170 (5) of the Constitution that the jurisdiction of the Kadhi’s Court is limited to questions relating to personal status, marriage, divorce or inheritance, in proceedings where all the parties profess Muslim religion and submit to the jurisdiction of the Court. It appears to me that the primary purpose of the Article 170 is to preserve a forum for the resolution of disputes as to personal law matters of Muslims as existed before the Constitution of Kenya 2010 under section 69 of the former constitution. The new Constitution, however, recognized and gave effect to the right of Muslims to choose to utilize the regular system of adjudication through the High Court.”**

17. In **Genevieve Bertrand v Mohamed Athman Maawiya & another [2014] eKLR** the **Court of Appeal** observed as follows: -

**“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 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 Kadhi’s Court”.**

18. The parties in this suit both profess the Muslim faith – As for as the court can tell they are both willing to submit to the jurisdiction of the Kadhi’s Court. The Applicant has not in any of his Affidavits averred that he disputes/rejects the jurisdiction of the **Hon Kadhi** over the Divorce Petition.

19. The applicant filed in the Kadhi Court a Preliminary Objection. The same was heard and determined by the Hon Kadhi.

20. It is not clear to the court exactly why the applicant has requested that the file be placed in the High Court. **Article 165 (b)** of the **Constitution of Kenya 2010** clothes the High Court with supervisory jurisdiction over subordinate courts which include the **Kadhi’s Court**. This supervision will ordinarily be exercised in situations where there has been a breach in procedures or an obvious error in law by a subordinate court.

21. However, the supervisory role of the High Court does not override clear provisions of statute or procedure. The Applicant cannot resort to invoking this court supervisory role merely because he is aggrieved by the decision of the Kadhi. The proper procedure would be to file an appeal and/or seek a review of that decision.

22. In the case of Asha Hamisi Nimutende v Mwaronga Nassoro Nassoro & another [2019] eKLR the court held that: -

**“In Fredrick Karanja Mbui v Simon Ndichu Nyiha & 2 Others [2013] eKLR, Ogola J had this to say:-**

**“It is true that the High Court has supervisory powers and jurisdiction over the lower court. This power is exercisable with caution and only where the inferior court has exceeded its jurisdiction or where a party’s constitutional rights are being or about to be abrogated through the process in that inferior court.**

**However, there is no power granted to this court to transfer the matter from an inferior court to this court simply because the applicant is unhappy with the decisions made by the inferior court. In such circumstances, the option for the Applicant is to appeal to this court through the normal appellate procedure. This application if granted, would amount to this court giving appellate reliefs to party through the back door. (own emphasis)**

**11. I agree with the Ogola, J that Article 165 of the Constitution Court does not empower this court to exercise its supervisory jurisdiction over a lower Court simply because a party is aggrieved by the decision of that court. No evidence has been placed before this court to demonstrate that the Kadhi’s Court exceeded its jurisdiction or that the Applicants constitutional rights have been abnegated, through the proceedings in the Kadhi’s Court”**

23. Finally, I find no merit in this application. I see no reason to call for the file from the **Kadhi’s Court**. Having submitted to the jurisdiction of the Kadhi Court in the matter this court deems it best to leave the **Hon Kadhi** to hear and determine the Divorce Petition save for the right of Appeal against any decision made by the **Hon Kadhi**.

24. This application is therefore dismissed in its entirety. Costs will be borne by the Applicant.

**DATED IN NAIROBI THIS 5TH DAY OF NOVEMBER 2021.**

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**MAUREEN A. ODERO**

**JUDGE**