



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. 47 OF 2017

V.K.....APPELLANT

VERSUS

S.A.....RESPONDENT

(Being an appeal arising from the judgment/order by Honourable D.S. Dabasoo (Kadhi)

delivered in Kibera Civil Case No. 11 of 2017 on 20th July 2017)

JUDGMENT

1. The applicant V.K. and the respondent S.A. got married in 2008 under Islamic law. In the course of the marriage they got a child F.S. who is now about 9 years. On 10th April 2017 the respondent filed a petition before the Kadhi's court at Kibera seeking the dissolution of the marriage and custody of the child. The petition was not defended. The Kadhi heard the respondent on 28th April 2017, and on 20th July 2017 delivered a judgment dissolving the marriage. The respondent was granted the legal custody of the child with visitation rights to the appellant.

2. The respondent was aggrieved by the decision and filed this appeal. Her first contention was that the Kadhi's court had no jurisdiction to hear and determine any claim relating to the custody of the child; that the court's jurisdiction was limited under **Article 170(5)** of the Constitution which provides that:-

“The jurisdiction of a Kadhi's 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 court.”

3. The respondent opposed the appeal. His case was that the appellant should have raised the issue of jurisdiction before the trial court; that she cannot be allowed to raise it on appeal. Secondly, that the Kadhi's court had power to grant custody as that was in the best interest of the child under **sections 4(2) and 76(1)** of the **Children Act, 2001**.

4. The appellant's second ground of appeal was that the Kadhi's court did not have jurisdiction over the dispute relating to the marriage as she was herself a christian and not a muslim; that the court could only have jurisdiction over the marriage if both parties professed muslim religion, and had submitted to the jurisdiction of the court. Once again, the respondent argued that the issue of jurisdiction, if any, ought to have been taken up before the Kadhi's court.

5. The question of jurisdiction is fundamental, and a judgment rendered by a court that does not have jurisdiction to hear it is void *ab initio* (**The Owners of the Motor Vessel “Lilian S” –v- Caltex (Kenya) Limited [1989]KLR 1**). It is also trite that, since jurisdiction goes to the question of judicial authority to decide a matter on merits, it can be properly raised by a party or the court at any stage, including on appeal (**Floriculture International Ltd. –v- Central Kenya Ltd & 3 Others [1995]eKLR**).

6. I have read the record of the trial court. The respondent informed the court that when he met the appellant she was a christian. He is a muslim. Somewhere along the line, she converted into a muslim and a conversion certificate was issued. After the couple stayed together for several years the appellant changed. She began wearing short dresses, including mini-skirts. He found out that she was attending prayers in a catholic church. When he confronted her, the response was that she had converted to muslim to get a husband. Now that she had got him she had decided to go back to christianity.

7. It was clear from the respondent's own evidence, because the appellant did not testify, that the appellant had gone back to christianity. She had abandoned muslim religion. With that evidence, the Kadhi's court ought to have downed its tools, as it were. It had no jurisdiction over the marriage. It could not therefore dissolve the marriage.

8. Under **Article 170(5)** of the Constitution, the Kadhi's court's jurisdiction is limited. It can only deal with questions of muslim law relating to personal status, marriage, divorce, or inheritance. It has no jurisdiction to hear and determine matters concerning children. In **A.A.I. –v- H.A.D. [2018]eKLR**, a Kadhi's court in Mombasa had dissolved the marriage between the parties and granted custody of the children to the respondent with reasonable access to the appellant. The High Court determined that the Kadhi's court's assumption of jurisdiction over the issue of custody of the children was unlawful. The court had exceeded its jurisdiction.

9. Under **section 73** of the **Children Act**, Children's courts have been constituted under the **Act** to hear all matters concerning children, including custody and maintenance of children. Such courts are, by a Gazette Notice, appointed by the Chief Justice. There was no evidence that the Kadhi's court that heard and determined this dispute was a children's court, properly so designated.

10. In conclusion, I allow the appeal. The whole judgment delivered by the Kadhi's court on 20th July 2017, and the subsequent decree, are set aside, and are substituted by a judgment dismissing the respondent's petition with costs.

11. Costs of the appeal shall be paid by the respondent.

DATED and DELIVERED at NAIROBI this 20TH FEBRUARY 2020

A.O. MUCHELULE

JUDGE