



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**MISC. APPLICATION NO. 22 OF 2020**

**IAM.....RESPONDENT/APPLICANT**

**VERSUS**

**AGH.....PETITIONER/RESPONDENT**

**RULING**

1. The jurisdiction of the Kadhi's court is derived from **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 courts.”**

It also flows from **section 5** of the **Kadhi's Court Act** that states that:-

**“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 comes before it.”**

2. The Court of Appeal in **Genevieve Bertrand –v- Mohamed Athman Maawiya & Another [2014]eKLR** noted that the Constitution and Kadhi's Court have set out the factors that must exist for a Kadhi's Court to assume jurisdiction over a matter. It stated as follows:-

**“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.”**

3. The applicant and the respondent got married in 1998 in Eldoret under muslim law. They have 4 children. The applicant lives in Eldoret and the respondent lives in Nairobi. The latter petitioned for the dissolution of the marriage at the Kadhi's Court at Nairobi. The applicant opposed the petition. The matter is pending hearing and determination.

4. The applicant brought the present application seeking the transfer of the petition to the High Court or to the Chief Magistrate's Court at Nairobi. His reasons were that he had, under Section 5 of the Kadhi's Court, opted out of the jurisdiction of the Kadhi's Court and that he did not think he would get a fair trial at the Kadhi's Court. He stated that, although the parties were muslims they were not practicing the religion; that they have lived a secular life and taken their children to secular schools.

5. The respondent opposed the application. She swore that the Kadhi's Court had jurisdiction under **section 5** to hear and determine this divorce dispute. She denied that there was any time they had lived a secular life. She pointed out that in the applicant's response to the petition he had admitted the Kadhi's Court's jurisdiction to hear and determine the matter. Lastly, her case was that the applicant had not demonstrated that he had a reasonable apprehension that he will not get a fair and impartial hearing or trial before the Kadhi's Court.

6. I agree that, save for the allegation by the applicant he would not get a fair trial before the Kadhi's Court, there was no material placed on record from which the court could accept that the applicant had any reasonable basis to fear that he would not get a fair and impartial hearing

before the Kadhi's court. In **Muriithi –v- Attorney General [1981]KLR 767**, it was held that before a case is transferred on the application of a party, a clear case must be made out that the applicant has a reasonable apprehension in his mind that he will not get a fair and impartial hearing before the judicial officer from whom he wants the case transferred. The court observed that a reasonable apprehension of bias meant an apprehension on reasonable ground which had to be a real apprehension honestly held and reasonably based.

7. In this case, the applicant has not demonstrated that the Kadhi's court will in any way be biased, and has not shown any grounds that may lead to any fear that he will not get a fair and impartial hearing before the court.

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**. Having so opted out, the petition in which he is the respondent can no longer be heard and determined at the Kadhi's Court.

10. These are the reasons why I allow the application dated 7<sup>th</sup> February 2020 and filed on 10<sup>th</sup> February 2020, and transfer **Divorce Case No. 156 of 2019** between the parties herein from the Kadhi's Court at Nairobi to the Chief Magistrate's Court at Milimani for hearing and determination.

**DATED and DELIVERED electronically, following consent of the parties, at NAIROBI this 7<sup>TH</sup> day of MAY, 2020.**

**A.O. MUCHELULE**

**JUDGE**