



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 17 OF 2020**

**IK.....APPELLANT**

**VERSUS**

**RMS.....RESPONDENT**

*(An appeal from the ruling and order of the honourable Kadhi A.I. Hussein given on*

*3<sup>rd</sup> September 2018 in Kadhi's Court in Civil Case No. 69 of 2018)*

**JUDGMENT**

1. **Article 170** of the Constitution creates the Kadhis' Courts. **Article 170(5)** provides the jurisdiction to those courts in the following terms:-

**“170(5) 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.”**

2. Parliament enacted the **Kadhis' Courts Act (Cap. 11)** whose **section 5** gives the court's jurisdiction as follows: -

**“5. 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.”**

3. The facts of this appeal are that the appellant and the respondent are Muslims. They got married under Islamic law on 18<sup>th</sup> March 2005. The marriage was blessed with three sons. The sons are AIK. (now aged 14), SIK. (now aged 14), SIK. (now aged 12) and AIK. (now aged 10). On 1<sup>st</sup> March 2018 the respondent left the matrimonial home with the children and without the appellant's knowledge or permission. She removed the children from school. These acts aggrieved the appellant who filed a cause at the Kadhi's Court (**Civil Case No. 68 of 2018**) at Nairobi seeking full custody of the children and their equal maintenance on a 50/50 basis. With the cause was a notice of motion seeking the custody of the children and their return to the home and school. The Kadhi's Court on 3<sup>rd</sup> September 2018 delivered a ruling, following oral hearing, in which it granted actual custody of the children to the respondent, legal custody to the appellant and granted access to the appellant and his parents. The court ordered that the appellant provides school fees and related expenses, food, utility bills and medical expenses, and the respondent provides shelter and clothing.

4. This appeal is by the appellant who is challenging the whole of the ruling. In the Memorandum of Appeal dated 11<sup>th</sup> July 2019, the ruling was challenged on the following grounds:-

**“1) THAT the Honourable Kadhi erred in law and in fact by holding that the appellant had not proved his case to the required threshold;**

**2) THAT the Senior Resident Kadhi erred in law and in fact when he gave final orders in an interim application bestowing custody of the children to the Respondent;**

3) THAT the trial learned Kadhi erred in law and in fact in giving two conflicting orders dated 8<sup>th</sup> March 2018 and 22<sup>nd</sup> March 2018 respectively;

4) THAT the Senior Resident Kadhi erred in fact and in law by failing to consider the children officer's report which had recommended that the children should live with the Appellant and not the Respondent;

5) THAT the Senior Resident Kadhi erred in law and in fact when he condemned the appellant to pay costs and expenses to the respondents when he lacked jurisdiction to so order as the children's court is exclusively well placed to preside over children's matter;

6) THAT the Senior Resident Kadhi erred in law and in fact when he granted the Respondent the children without an evaluation report as to the conduciveness, inspection and aptness of the environment, house where the Respondent and the Children would stay thus exposing the children to a hostile environment;

7) THAT the Honourable Court erred in fact and in law when he held that the best interest of the children would be served if the children were surrendered to the Respondent; and

8) THAT The Honourable Kadhi was biased as against the Appellant.”

5. The appellant was represented by Billy Amendi & Co. Advocates and the respondent by Ali & Co. Advocates. Counsel agreed to have the appeal heard and determined on written submissions. Each counsel filed written submissions. Since the appeal raised the issue that the Kadhi's Court had no jurisdiction to hear and determine the dispute because it related to the custody and upkeep of the children, and that the dispute ought to have been filed before the Children Court under **Children Act (Cap. 141)**, this court has to deal with and determine the issue first. Depending on the determination, the court will then determine the other issues raised by the appeal. The reason for this is that, it has been held repeatedly that where during any proceedings the issue whether or not the court dealing with the matter has jurisdiction has been raised, the court has to determine that issue first before the rest of the matter is dealt with on its merits. Where the court determines that it has no jurisdiction it cannot deal with the merits. It has to stand down, as it were.

6. In the celebrated case of **“Owners of Motor Vessel “Lillian” v- Caltex Oil (Kenya) Ltd 1989 eKLR”**, the Court of Appeal observed as follows: -

**“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”**

7. A court may only exercise such jurisdiction as has been conferred upon it by the Constitution, statute or both. In **Samuel Kamau Macharia & Another –v- Kenya Commercial Bank Limited & 2 Others [2012] eKLR**, the Supreme Court emphasised this point in the following terms: -

**“A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”**

8. I agree with the respondent that it was the appellant who took his case to the Kadhi's Court. He knew he wanted the court to determine the question of the custody and upbringing of the children; the question included the education and maintenance of their three children. It was because the determination by the court went against him that he filed this appeal to complain that, among other things, the court he had himself filed the dispute in had no jurisdiction to hear and determine the same. According to the respondent, the appellant should be estopped from raising the issue of jurisdiction, that, by raising the issue on appeal, he is engaged in the abuse of the process of the court. In any case, the respondent went on, the issue of custody of the children was incidental to the question of marriage which the Kadhi's court had jurisdiction to hear and determine (**ZUDG –v- SJKUR [2020]eKLR**). Quite unfortunately, the Kadhi's Court was not dealing with the question of marriage between the appellant and the respondent. The parties were agreed that they were a married couple. The dispute was the children's custody and upkeep, including their education.

9. It is notable that the respondent filed a preliminary objection before the Kadhi's Court on the question of jurisdiction, but apparently abandoned. She even indicated that the question relating to the children was pending before the Children Court at Nairobi. She did not pursue this issue. Both parties were represented. I am certain the issue of jurisdiction was on their mind throughout. They decided not to confront it.

10. A party, or parties, to a suit cannot confer on a court a jurisdiction it does not have. Infact, every court has the responsibility, on its own without being prompted by the parties, to ascertain that it has jurisdiction to hear and determine the dispute placed by the parties before it. Otherwise it risks engaging in proceedings that may be null.

11. The Constitution and the **Kadhis' Courts Act** have limited the jurisdiction of the Kadhi's Courts. A dispute relating to children and their rights is not one of the disputes Kadhis' Courts can hear and determine.

12. The **Children Act** was enacted to deal with all matters relating to children. The **Act** applies to all children in Kenya regardless of their religious background, or the religious background of their parents. The **Act** sets out the purposes for which it was enacted as follows:-

**“An Act of Parliament to make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; to make provision 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.”**

13. **Section 73** of the **Act** provides as follows:-

**“There shall be courts to be known as Children’s Courts constituted in accordance with the provisions of this section for the purpose of—**

**(a) conducting civil proceedings on matters set out under Parts III, V, VII, VIII, IX, X, XI and XIII.”**

**Part VII** deals with custody and maintenance of children. There can be no doubt that the Kadhi’s Court herein had no jurisdiction to hear and determine the children dispute that the appellant placed before it. The importance of matters relating to children under the **Act** is such that not every magistrate can sit to hear and determine them. The magistrate has to be designated as a Children Court under **section 73(d)(ii)** of the **Act** by the Chief Justice in a Gazette notice.

14. That being the case, this court cannot deal with the merits of the appeal. On account of lack of jurisdiction by the Kadhi’s Court, the appeal is allowed. The proceedings before the Kadhi’s Court and the ruling rendered by the Court on 3<sup>rd</sup> September 2018 were all a nullity.

15. On the question of costs, the appellant was the author of the circumstances the parties find themselves in. Usually costs follow the event, but in this case he (the appellant) is ordered to pay the costs of appeal and at the Kadhi’s Court.

**DATED and DELIVERED at NAIROBI this 2<sup>ND</sup> DECEMBER 2020.**

**A.O. MUCHELULE**

**JUDGE**