



REPUBLIC OF KENYA



KENYA LAW
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**HA v AH [2019] eKLR (Civil Appeal 42 of 2018)
[2019] KEHC 12484 (KLR) (14 June 2019) (Judgment)**

Neutral citation: [2019] KEHC 12484 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 42 OF 2018**

**M THANDE, J
JUNE 14, 2019**

BETWEEN

HA APPELLANT

AND

AH RESPONDENT

*(An Appeal from the Ruling of Hon. Abdulla M. Salim, Senior Resident
Kadhi delivered on 11.10.18 in Kadhi Court Cause No. 69 of 2018)*

JUDGMENT

1. The Appeal herein arises from the Ruling of Hon. Abdulla M. Salim, Senior Resident Kadhi delivered on 11.10.18 in Kadhi Court Civil Cause No. 69 of 2018. The civil cause was instituted by the Respondent AH by a plaint dated 6.4.18 seeking an order compelling the Appellant HA to handover and/or return to him motor vehicle and tuk tuk registration numbers KCJ xxxx and KTWA xxxx respectively as well as a plot in Mshomoroni (the properties). The Respondent also sought an injunction restraining the Appellant from disposing of the said properties as well as costs.
2. The Respondent averred that the parties were married under Islamic law and were blessed with 1 child. During their marriage, the Respondent worked in [Particulars Withheld] as a security guard for several years while the Appellant was a stay-at-home mum. The Respondent further claimed that while in Qatar, he periodically sent money to the Appellant for upkeep and for the purchase of the properties. The Appellant however purchased the properties in her name. In February 2018, when the Respondent issued the Appellant with a divorce, she took away the properties leaving the Respondent destitute with no income.
3. The Appellant opposed the suit by way of a statement of defence dated 25.4.18. She also filed a notice of preliminary objection of even date challenging in the main, the jurisdiction of the Court to hear and determine the matter.



4. In his Ruling of 11.10.18, the Hon. Kadhi dismissed the preliminary objection.
5. The Appellant was aggrieved by the decision of the Hon. Kadhi and has filed the appeal herein, the grounds of which are reproduced hereunder:
 1. The Kadhi erred in fact and in law by dismissing the appellant's Notice of Preliminary Objection dated 25/4/2018 without considering the applicable law.
 2. The Kadhi erred in law by assuming jurisdiction when such is not granted by *the Constitution* nor the Kadhi's Court Act. The Hon. Kadhi misapprehended the law thus arriving at a wrong finding.
 3. The Kadhi erred in law and in fact by failing to consider the Appellant's submissions and authorities supplied.
 4. The Kadhi erred in law and fact by presiding over proceedings not relating to personal status of the parties, divorce, marriage or inheritance as per article 169 of *the Constitution* of Kenya or under section 5 of the Kadhi's Court Act. The Kadhi acted outside the Statute governing proceedings in his Courtroom.
 5. The Kadhi failed to realize and give a finding that the appellant herein had not agreed to submit to the jurisdiction of the Court considering the subject matter was not matrimonial property; the Court thus arrived at a wrong conclusion.
6. The Appellant prayed that the ruling of the Hon. Kadhi be set aside and that the preliminary objection be allowed. She also prayed for costs for the preliminary objection and of this Appeal.
7. Directions were taken and parties filed their respective written submissions. At the hearing, the Hon. Chief Kadhi sat as assessor in compliance with Section 65(1)(c) of the *Civil Procedure Act* which provides as follows:
 - “(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—
 - (c) from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.”
8. After considering the appeal, the record and submissions, I find that the only issue that falls for determination is whether the Kadhi's Court has jurisdiction to entertain the Civil Cause No. 69 of 2018 before it.
9. 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 succinctly stated as follows:

“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.”



10. The jurisdiction of Kadhi Courts flows from *the Constitution* of Kenya, 2010 and from the Kadhi's Court Act. Article 170(5) of *the Constitution* provides:

“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.”

Section 5 of the Kadhis' Court Act is couched along similar terms.

11. The Appellant contends that the subject matter of the suit before the Kadhi's Court did not relate to personal status of the parties, marriage or divorce and the properties in the matter were not described as matrimonial properties. In particular, the Appellant takes issue with the finding by the Kadhi's Court that the matter was in respect of “legal relations between husband and wife.”
12. *The Constitution* and the Kadhis' Court Act have both set out the factors that must exist for a Kadhi's Court to assume jurisdiction over a matter. The Court of Appeal in *Genevieve Bertrand v Mohamed Athman Maawiya & another* [2014] eKLR noted 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.

13. In the matter before the Hon. Kadhi, it is not disputed that both parties profess the Muslim faith. The factor relating to the religion professed by the parties is thus satisfied.
14. On the subject matter of the dispute, the Appellant contends that it is not clear why the Hon. Kadhi arrived at the conclusion that the issue before him was of a Muslim marriage yet no issue touching on marriage was presented in the plaint. A look at the plaint however clearly indicates that the Respondent pleaded that he and the Appellant had contracted an Islamic marriage. They cohabited as husband and wife in Mombasa County and were blessed with 1 child. The Respondent further pleaded that he lived and worked in [Particulars Withheld] for a few years during which time he financially supported the Respondent and child as the Appellant was a stay-at-home mum. He alleged that he sent money to the Appellant for purchase of the properties. His claim against the Appellant is the return of the properties which she registered in her name and further took with her upon divorce. In her statement of defence, the Appellant admits the fact of the Islamic marriage between herself and the Respondent. She however denies however that the Respondent sent her any money to buy the properties and claims that she purchased the vehicle and tuk tuk from the proceeds of her boutique business.
15. Having considered the facts pleaded by the parties and noting that it is trite law that parties are bound by their pleadings, it is clear in my mind that the claim by the Respondent against the Appellant arose from assets acquired during their marriage. Unlike the *Genevieve Bertrand* case (supra), where the appellant's interest arose out of a contractual transaction, the Respondent's claim arose from a marital relationship. In my view therefore the subject matter in the Kadhi's Court falls within the jurisdiction of that Court as conferred by *the Constitution* and the Kadhis' Court Act.
16. The third factor of the jurisdiction of the Kadhi's Court is that all parties must submit to the jurisdiction of the courts. A party may not be compelled to submit to the jurisdiction of the Kadhi's



Court against their will. In this regard, I follow Murrithi, J in R.B & R.G.O v H.S.B & A.S.B [2014] eKLR where he observed:

While the parties before the Kadhi's Court must all be Muslims, no party who has not submitted to the jurisdiction is compelled to litigate before that court.

17. In the instant case, the Appellant averred in paragraph 10 of her statement of defence as follows:

The jurisdiction of this Court is denied, the Defendant shall raise an objection on a point of law at the earliest opportune time.

18. The Appellant did indeed file a preliminary objection. However, her objection is not on her lack of submission to the jurisdiction of the Kadhi's Court. The Appellant's objection was confined to the subject matter of the suit before the Court. This Court has found that the subject matter meets the threshold required to enable the Kadhi's Court assume jurisdiction over the matter.

19. The 3 factors on jurisdiction of the Kadhi's Court are not disjunctive but conjunctive. They must all exist together for the Court to have jurisdiction. Where they do not, the Kadhi's Court is stripped of jurisdiction. In the present case, all 3 factors exist together and thus the Respondent's case falls within the jurisdiction of the Kadhi's Court.

20. Hon. Sheikh Al Muhdhar A. S. Hussein, Chief Kadhi was of the opinion that the Appeal should be allowed. The Hon. Chief Kadhi's opinion is reproduced in part:

The main contention in this case is over ownership of the properties in dispute, according to *the Constitution* of Kenya 2010, Article 170(5) and Kadhi's Court Act Chapter 11, Section 5 of it, the Kadhi Court lacks jurisdiction to entertain disputes over ownership, and the same should have been filed at a competent Court.

21. With profound respect I disagree with the finding of the Hon. Chief Kadhi. The contention is whether the assets were purchased with funds sent to the Appellant by the Respondent from Qatar during their marriage or with proceeds of the Appellant's boutique business. Accordingly, for the reasons stated above, I find and hold that the Appeal lacks merit and the same is hereby dismissed. As the parties herein were once married, I direct that each party bears own costs.

DATED, SIGNED AND DELIVERED IN MOMBASA THIS 14TH DAY OF JUNE 2019

M. THANDE

JUDGE

In the presence of: -

.....for the Appellant

.....for the Respondent

.....Court Assistant

