



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

MATRIMONIAL CASE NO. 1 OF 2018

AWA.....APPLICANT

VERSUS

HDD.....RESPONDENT

RULING

The application dated 19th May 2018 seeks the following orders: -

1. The honorable court be pleased to transfer this matter to Kadhi's court Marsabit for hearing and final determination.

2. Costs.

The application is supported by the applicant's affidavit sworn on 19th of May 2018. Mr. Mukira appeared for the Applicant. Counsel submit that the subject matter of the dispute is some residential property where the applicant is residing. The Plaintiff in the main cause resides elsewhere with her current spouse. Counsel submit that the respondent previously filed Matrimonial Cause Number 1 of 2016 before the Isiolo Chief Magistrate Court. The Isiolo court ordered the respondent to file her claim before the Kadhi's court. Instead of complying with that order the respondent has opted to file the current suit. Counsel submit that the current application seeks to have the matter heard by the Kadhi's court. This will be in compliance with the order issued by the Isiolo Chief Magistrate Court. The application seeks to give effect to the ruling delivered by the Isiolo court.

Mr. Mukira submit that the main cause is premised on Section 3 of the Matrimonial Property Act, 2013. That section gives a party the right to choose the applicable law. In his replying affidavit to the main cause the applicant herein states that he elected to be governed by Islamic law in the resolution of the matrimonial disputes. Counsel contend that Section 3 of the Matrimonial Property Act recognizes the right to freedom of religion conferred under Article 32 of the Constitution. The applicant is simply exercising his constitutional right. The respondent is of the same Muslim faith and has not shown any misgivings about applying Islamic Law. It is the Kadhi's court that is appropriate in determining the rights of the parties under Islamic Law with regard to the Property dispute. It is the same Marsabit Kadhi that the respondent presented her Divorce Petition. It is not clear whether a Divorce has been granted. According to the respondent the parties are separated. It would be cheaper for the parties in terms of legal fees as well as faster in terms of time if the matter is heard before the Kadhi's court. Counsel relies on the case of **MSR VS NAB, MALINDI HIGH COURT DIVORCE CAUSE NO. 5 OF 2016 (2017) eKLR**.

Mr. Kiogora appeared for the respondent. Counsel maintains that Article 170 (5) of the Constitution provides for the jurisdiction of Kadhi's court in the following terms: -

“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.”

Mr. Kiogora maintains that Section 3 of the Matrimonial Property Act does not prevent the respondent from seeking legal remedy from this honourable court. The originating summons are properly before the Court. It is the respondent who filed this suit and chose to be governed by this court and not the Kadhi's court. No particular prejudice will be suffered or shown to be suffered by the respondent if the matter is heard and determined by this court. Both parties are looking for justice and this court is well able to deliver that. The jurisdiction of the Kadhi's court is limited to four issues namely, personal status, marriage, divorce and inheritance. The dispute herein involves the matrimonial property and does not fall under the above category. Counsel also relies on the case of **MSR VS NAB (supra)**.

The main issue for determination is the place where the dispute can be heard. Whereas the respondent filed her originating summons before this court the applicant seeks to have the dispute referred to the Kadhi's court. Both counsels have made reference to my decision in the case

of **MSR VS NAB (supra)**. That case involved a divorce dispute that had been filed before the Malindi High Court. The petitioner got married under Islamic Law. She had converted to Islam but reverted to her former religion. She sought the divorce cause to be heard by the High court. I held that the Kadhi's court was the proper place for the determination of the dispute since the marriage had been conducted by a Kadhi. That dispute is a bit different from the current one. In my view in that case the dispute on matrimonial property could not have been handled by the Kadhi after granting the parties the divorce. That was the case because soon after the divorce one of the parties would have contended that she did not submit to the Kadhi's jurisdiction as she was not a Muslim. The current dispute involves two people who professes the Islamic religion. The parties are not formally divorced. However, that does not bar the respondent from seeking orders relating to distribution of the property.

Section 3 of the Matrimonial Property Act, 2013 (**Act No. 49 of 2013**) states as follows: -

A person who professes the Islamic faith may be governed by Islamic law in all matters relating to matrimonial property.

I did express my view on the above section in relation to the jurisdiction to the Kadhi's court as follows: -

My view on the above section is that it does not expand the jurisdiction of the Kadhi's Court as provided under Article 170(5) of the Constitution. Section 3 of the Matrimonial Property Act only gives discretion to a person who professes the Islamic faith to have issues relating to matrimonial property governed by Islamic Law. No reference is made to the Kadhi's Court under section 3. The effect would be that a dispute involving the matrimonial property of someone who professes Islamic faith can be determined by any other court provided that the basis of the determination is Islamic Law. Section 3 does not oust the jurisdiction of the Subordinate Court or High Court in determining matrimonial property disputes involving a Muslim.

In the same case I further stated as follows: -

The wording of section 5 of the Kadhi's Court Act is to the effect that nothing in that section shall limit the jurisdiction of the High Court or Subordinate Courts in any proceedings which comes before it. In essence therefore, the jurisdiction of the High Court is not limited by the provision of section 5 of the Kadhi's Court. The jurisdiction of the Kadhi's Court is clearly stipulated under Article 170 (5) of the Constitution. Briefly, that jurisdiction is limited to four issues, personal status, marriage, divorce and inheritance.

Although Article 170 (5) of the constitution gives the Kadhi's jurisdiction to determine only four issues namely personal status, marriage, divorce and inheritance, section 3 of the Matrimonial Property Act add another jurisdiction to the Kadhi's court to deal with matters relating to the matrimonial property where a person profess the Islamic faith. It is true that section 3 of the Matrimonial Property Act does not limit the power to determine matters relating to matrimonial property of a Muslim to the Kadhi's court only, it is clear to me that the best court that can determine issues involving the Islamic faith is the Kadhi's court. As held in the case of **MSR VS NAB**, a dispute involving Matrimonial Property of a Muslim can be heard by either the subordinate court including the Kadhi's Court or the High Court provided that the Islamic law is used as the determinant factor. In this case both parties profess the Islamic faith. There is a dispute relating to one house. Whether the dispute is heard by this court or by the Kadhi's court it does not matter. I do find that both courts have the jurisdictions to determine the dispute.

Section 3 of the Matrimonial Property Act allows for the application of Islamic Law on Matrimonial property. The window granted to Muslims to have their disputes on matrimonial property does not mean that matrimonial property belong to a spouse. Even under Islamic Law the Contribution of each spouse has to be determined depending on the circumstances of the case. The Matrimonial Property Act does not define the Court where such disputes are to be heard. Section 17 of the Act provides that a person may apply to a Court for a declaration of rights to any contested property. To say that section 3 of the Act does not confer jurisdiction to the Kadhi's Court is tantamount to clawing back the underlying principle of applying Islamic Law to matrimonial property to the Muslim faithful.

I do observe that the applicant is a staff in this court. If the respondent is worried that the Marsabit Kadhi's court may not be impartial, she is at liberty to request this court to transfer this matter to either the Moyale or Isiolo Kadhi's court. Once the matter is heard by the Kadhi's court parties shall have an opportunity to prefer an appeal to the High Court If not satisfied by the decision of the Kadhi. That will give the parties a second chance.

In the end it is my finding that both the High Court and the Kadhi's Court have jurisdiction to determine the dispute. This matter is hereby transferred to the Marsabit Kadhi's court for hearing and final determination. The respondent is at liberty to apply to this court and have the matter referred to the Kadhi's court in Moyale or Isiolo. Parties shall meet their respective costs.

Dated, Signed and Delivered at Marsabit this 21st Day of November 2018.

S. CHITEMBWE

JUDGE