



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 123 OF 2014

J A O O APPLICANT

V E R S U S

H S A RESPONDENT

RULING

1. The application dated 30th June 2014 seeks in principal transfer of the suit relating to custody and control of the minor, S H S which is pending before the Kadhi's Court in **KCC No. 345 of 2012** to Nairobi Children's Court **Children's Case No. 355 of 2014**.
2. The grounds upon which the application is premised are set out on the face of the application and the factual background stated in the affidavit in support sworn by the applicant, A O O.
3. It is stated that the case before the Kadhi's Court was originally a divorce matter. The pleadings were then amended on 25th February 2014 to include prayers for the custody, care and control of the subject child.
4. There is a pending Children's cause in the **Nairobi Children's Cause No. 355 of 2014**, filed on 6th March 2014 on the same child. Orders were obtained in the Nairobi cause on the custody of the minor in favour of the applicant. The children's case before the Children's Court has been stayed to await the outcome of the instant application.
5. The applicant has attached to her affidavit several documents to buttress her case. There is a copy of the plaint filed in **Kadhi's Case No. 345 of 2012** to prove that the same seeks orders on custody of S H S. There is also copy of the plaint in the **Children's Court Cause No. 355 of 2014** seeking custody, care and control of the same child, S H S. There is also the order of 17th June 2014 in **Cause No. 355 of 2014** staying the proceedings before that court.
6. The respondent replied to the application through his affidavit sworn on 8th July 2014. He is the father of the subject child, the husband of the applicant and Muslim by faith. He explains that the applicant converted to Islam and thereafter contracted marriage with him under Islamic law. He asserts that the custody of the child is issue in the pending divorce proceedings in the Kadhi's Court. He argues that the Kadhi's Court has jurisdiction to deal with issues touching on custody of children. He asserts that the Children Act does not grant the Children's Court exclusive jurisdiction over children's matters.
7. He has attached several documents to his affidavit. There is a certificate of reversion to Islam as evidence of the applicant's conversion to Islam. There are too documents that prove the marriage

celebrated between the two. The children's certificate of birth is also attached. He has also attached copies of decisions by the High Court at Eldoret and Mombasa where it was held that the Kadhi's Court had jurisdiction despite what other statutes provided.

8. I directed on 25th September 2014 that the application be disposed of by way of written submissions. Both sides complied with the said directions. The applicant's submissions are dated 3rd October 2014 and were filed on 6th October 2014, while the respondent's submissions are dated 14th October 2014 and were filed in court the same date. Both sides have submitted largely along the lines of the arguments set out in their respective affidavits – on the issue of jurisdiction.
9. The determination of the application dated 30th June 2014 turns on the question of jurisdiction. The Kadhi's Court is established in Article 169(1) of the Constitution of Kenya, 2010, as one of the Subordinate Courts. Its jurisdiction is then defined in Article 170(5) of the Constitution, as limited to determination of questions of Muslim law referring 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.
10. The provisions of Article 170(5) of the Constitution are echoed in Section 5 of the Kadhi's Court's Act which states that the said court shall determine questions of Muslim law relating to personal status, marriage, divorce, or inheritance in proceedings in which all the parties profess the Muslim religion. The said provision does not however limit the jurisdiction of the High Court or of any subordinate court in any proceedings which comes before it.
11. The jurisdiction of the Children's Court is set out in the Children Act. The scope of the Children Act is stated in the preamble - to make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children and to give effect to the principles of the Convention on the Rights and Welfare of the Child. The jurisdiction of the said court is set out in Section 73 of the Children Act, covering the matters set out in the preamble to the Act.
12. Clearly, the law confers concurrent jurisdiction on the two courts so far as issues touching on status of children are concerned. It should be noted, however, that the provisions of the Children Act are more elaborate. More importantly, the latter legislation was passed specifically to domesticate international treaties and conventions on children's rights. It can therefore be said that the jurisdiction of the Children's Court is broader than that of the Kadhi's Court. In cases where the two courts have matters pending before them in respect of the same child, the Kadhi's court must of necessity give way to the Children's Court.
13. Furthermore, under Article 170(5) of the Constitution, the Kadhi's Court would have jurisdiction over a matter where all the parties profess the Muslim faith and submit to the jurisdiction of the Kadhi's Court. It is not in dispute that the applicant at one time converted to Islam and went through a ceremony of Islamic marriage with the respondent. However, she now claims to have renounced the Muslim faith and reverted to Christianity, according to paragraph 5 of her affidavit of 30th June 2014. Therefore, not all the parties to the dispute confess the Islamic faith. Article 170(5) envisages submission to the jurisdiction of the Kadhi's court by the parties. The applicant does not submit to such jurisdiction. She demonstrated that by filing a Children's case at the Children's Court despite pendency of a suit on same issue at the Kadhi's Court. That was clear indication of her non-submission to the jurisdiction of the Kadhi's Court.
14. In view of the above, it is my finding that the Kadhi's Court does not have jurisdiction to determine the question of the custody of the subject child as between the applicant and the respondent as such jurisdiction resides with the Children's Court. I am unable to grant the order sought in prayer 3 of the Motion dated 30th June 2014 as the suit in **Kadhi's Court Case No. 345 of 2012** is not exclusively on custody of the subject child, for there are other prayers sought therein which have nothing to do with custody. Instead, I shall declare that the Kadhi's Court is

barred from determining any matter touching on the custody, care and control of S H S.

15.It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 2ND DAY OF OCTOBER, 2015.

W MUSYOKA

JUDGE