



ORIGINAL

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. 125 OF 2013

S M H.....APPLICANT

VERSUS

S A A.....RESPONDENT

RULING

The applicant and the respondent are husband and wife. They married in 2007 under Muslim Law. They have three children as follows:

- a. K A W 4 years;[minor]
- b. K A W aged 2 years; and[minor]
- c. S A W aged 6 months[minor].

The respondent filed a case before the Kadhi's court at Kisumu seeking:

- a. divorce;
- b. return of her goods including jewelry;
- c. custody of the children; and
- d. maintenance.

The case was scheduled for hearing when the applicant came to this court seeking its transfer from the Kadhi's court to

“any other court competent to hear and determine.”

it. The parties come from Mbita township in Homabay County. The applicant essentially wants the case transferred to a court near where they reside. In paragraphs 12 and 13 of the supporting affidavits it was deponed as follows:

“12. THAT it is in the interest of justice and fairness that this case is heard near home as the issues of custody and maintenance can be heard by any court of competent jurisdiction and not necessarily the Kadhi's court.

13. THAT in any case the welfare of the children must be looked into hence children may not be subjected to travel for distances as far going to Kisumu and back to Mbita when their can be heard by the Children Officer in charge of the district or the nearest court.”

It would appear that the Children's Officer in Mbita dealt with the issue of the children and found that the respondent was unsuitable to have their custody because she has been threatening to burn herself and them. She has also been abandoning them. It was decided that the applicant has custody of the children and that the respondent gets access rights but under supervision. It was further deponed that on 18-9-2012 the respondent attempted to commit suicide by pouring paraffin on her body and setting herself ablaze. She did this in a house where she had locked the children. The applicant was called and rushed to the scene. In effort to save her, he got burnt on the hands.

There is, lastly, a complaint against the Kadhi. The applicant is apprehensive of the manner the Kadhi is conducting the case and fears that

“justice may not be properly dispensed with.....”

The reason for the complaint is that:

“4 The Hon. Kadhi has fixed the case for hearing even before pleadings are closed raising fears that the case is being rushed even without following the proper procedures.”

The respondent filed grounds of opposition whose main ground was that the parties profess Muslim faith and therefore the Kadhi's court is the legal forum for the resolution by their dispute. Counsel for the parties filed written submissions which I have considered.

The Kadhi's court at Kisumu is the nearest Kadhi's court to the parties. It is not in dispute that the parties profess Muslim faith and are married under Muslim law. Under Article 170 (5) in the Constitution of Kenya, 2010

“(5) 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.”

Section 5 of the Kadhi's Courts Act (Cap 11) provides 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”.

My understanding is that the Kadhi's court is properly seized of the divorce matter, but may not deal with the issues of custody and maintenance of the children. These issues are not among those in respect of which the Constitution and the Act have donated jurisdiction to the Kadhi's court. The issues can only be properly dealt with by a Children's Court under the Children Act, No. 8 of 2001.

The other issue is that the Kadhi's court can only deal with the matters that the Constitution and the Act have conferred jurisdiction to it if the parties submit to its jurisdiction. The case before the Kadhi's court is ready for hearing. It means that the applicant has submitted to jurisdiction. His problem, according to the application, is that the court cannot deal with children matters; that Kisumu is far from Mbita; then his apprehension about the Kadhi. I have found that the Kadhi's court cannot deal with the children matters. I have also noted that, now that the applicant has submitted to jurisdiction, the Kadhi's court, being his nearest court, will hear the divorce matter.

As for the apprehension, I have not seen anything in the supporting affidavit that would give the impression that the Kadhi cannot fairly and impartially adjudicate upon the dispute. If the court fixed a hearing date before pleadings were closed, that may not necessarily lead to any anxiety. It should always be remembered that the court is enjoined to do substantial justice without being unnecessarily fettered by procedural technicalities (Article 159 (2) (d) of the Constitution of Kenya, 2010). Once the pleadings

show the complaint and the response, the court is ready to fix a hearing date.

The applicant states that when he complained about the fact that pleadings had not closed and yet a hearing date had been taken, he was granted adjournment, but ordered to pay costs of Kshs. 10,000/=. Costs are a desecration of the trial court. A party who is aggrieved by the exercise of that discretion can appeal.

In Murithi -VS- Attorney General [1986] KLR 767 it was held that before a transfer of a case is granted 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. A reasonable apprehension of bias means an apprehension on reasonable grounds which has to be a real apprehension honestly held and reasonable based. I find that the applicant has not discharged the burden and would therefore not be entitled to the transfer of the divorce case from the Kadhi's court in Kisumu.

The result is that the application is allowed in part. The Kadhi's court shall proceed to hear and determine the divorce cause, but the dispute regarding the custody and maintenance of the children shall be filed before the Children's court nearest to the parties. I order that each party bears the costs of this application.

Dated, signed and delivered at Kisumu this 5th day of July, 2013.

**A.O.
JUDGE**

MUCHELULE