



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Appeal 120 of 2004

AMIN MOHAMMED HASSANAPPELLANT

VERSUS

ZAHRA MOHAMMED ABDULKADIRRESPONDENT

[Arising from the Ruling of the Chief kadhi in Kadhi's Civil Case No. 356 of 1993]

JUDGEMENT

On the 30th day of November 2004, the Honourable chief Kadhi, vide kadhi's case no. 365 of 1993 dismissed a preliminary objection raised by Amin Mohammed Hassan, the appellant herein. The appellant was dissatisfied with decision hence he filed this appeal. He has listed the following grounds in his memorandum of Appeal dated 7th December 2004.

- “1 That the learned chief Kadhi erred in law and fact in failing to hold that the Kadhi's court has no jurisdiction to hear the matter.***
- 2. That the learned Chief Kadhi erred in law and fact in failing to give reasons for his decision.***
- 3. That the learned chief kadhi erred in law and fact in proceeding thereafter to order that the Appellant's pension be attached when the same is not attachable.***

When the appeal came up for the substantive hearing, the Zahra Mohammed Abdulkadir the respondent herein and her advocate did not turn up despite having been served with a hearing notice. Consequently Mr. Dennis Mabeya, learned counsel for the appellant was granted leave to argue the appeal *ex parte*.

The history leading to the filing of this appeal can easily be deduced from the recorded proceedings filed in this appeal. On the 5th day of October 2004, Mr. Hassan Abdi, learned advocate for the Respondent, appeared before the Honourable Hammad M. kassim, chief Kadhi whereupon he argued a preliminary objection questioning the jurisdiction of the Kadhi's court touching on issues in respect of maintenance of children. The preliminary objection was expressed in the notice dated 28th July 2004 in part as follows:-

“Take Notice that the Defendant herein shall at the hearing of this suit raise an objection that this hounarable Court lacks jurisdiction to entertain the suit in so far as the same touch on maintenance of the children and or issues herein. Such issues are to be ventilated upon by the children's court duly established by law.

It is prayed therefore that this honourable court do dismiss the notice to show cause and to vacate all orders made herein subsequent to the establishment of the children's Court under the Children's Act no. 8 of 2001.”

The Chief Kadhi also heard the respondent in person after which he dismissed the preliminary objection on 30/11/2004. The hounarable Chief kadhi formed the opinion that kadhi's court had jurisdiction to hear such matters so long as the parties before it profess the Muslim faith.

Mr. Dennis Mabeya, learned advocate for the appellant has urged this court to set aside the decision and substitute it

with an order allowing the preliminary objection. It is Mr. Mabeya's submission that the kadhi's court had no jurisdiction to hear and determine any dispute concerning children. It is Mr. Mabeya's argument that the proper court is the children's court.

I have anxiously considered the appellant's argument without the benefit of the Respondent's input in rejoinder. It should be noted that the appellant raised the preliminary objection when a notice to show cause why execution should not issue against him came for hearing. The notice to show cause had been issued after the kadhi's court had allowed an application for maintenance of the children of the marriage. There is no doubt the proceedings before the kadhi's court involved parties who both professed the Muslim faith. The record shows that Zahra Mohamed Abdul, the respondent herein filed the plaint dated 1st November 1993 before the kadhi's court in which she prayed for her marriage with Amin Mohammed Hassan, the appellant herein, to be dissolved. She also sought for an order of maintenance and custody of the children. It should be noted that the children Act came into existence on 31st day of December 2001. The issue touching on the custody and maintenance was therefore properly before the kadhi's court. It is not right to claim that the kadhi's court had no jurisdiction to hear and determine the issue. A critical examination of section 5 of the kadhi's court Act will reveal that the kadhi's court had jurisdiction to determine questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings involving parties who profess the muslim faith. Issues touching on maintenance and custody fall into the category of personal status. The word "**status**" is described in Black's Law dictionary as follows-

"A person's legal condition whether personal or proprietary.

The sum total of a person's legal rights, duties, liabilities and other legal relations or any particular group of them separately considered."

Even if the children Act No. 8 of 2001 was in existence, I do not think the appellant's preliminary objection could have succeeded for two reasons; first, is that the children Act No. 8 of 2001 did not expressly oust the jurisdiction of the kadhi's Court nor did it repeal any of the provisions of the kadhi's Act. A critical look at section 185 of the children Act will reveal that courts other than the children's court were given a discretion to refer matters before them touching on children to the children court. The act uses the work '**may**' instead of "**shall**". It is not therefore true that the kadhi's court has no jurisdiction. Of course it is always incumbent upon such counts to ensure that references are made to the Children Act to ensure that the best interest of the child is taken into account.

Secondly, the preliminary objection was raised too late in the proceedings. The order of maintenance and attachment were made on 6th August 2003. The preliminary objection was raised on 28th July 2004 when the notice to show cause why execution of the orders should not issue came up for hearing. The appellant was guilty of laches. It shows the appellant was indolent. For that reason he lost the right to agitate for a remedy when the home has already bolted.

In the end and for the above reasons this appeal is ordered dismissed. Since the respondent did not turn up to oppose the appeal, I deny her costs of the appeal.

Dated and delivered this 6TH day of May .2009.

J. K. SERGON

JUDGE