



**HSM v MOA (Miscellaneous Civil Application E012 of 2025)
[2025] KEKC 6 (KLR) (10 February 2025) (Ruling)**

Neutral citation: [2025] KEKC 6 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION E012 OF 2025
AH ATHMAN, CK
FEBRUARY 10, 2025**

BETWEEN

HSM APPLICANT

AND

MOA RESPONDENT

RULING

1. The Applicant’s amended Notice of Motion dated 31st January, 2025 seeks orders the Court do order the respondent to give consent to the marriage of the applicant to IMO or in the alternative the court to assume guardianship of the applicant in that marriage.
2. The applicant deposed that she is a divorcee with young children. That she desirous to be married to one IMO, who is a practicing Muslim from the Nubian Community; that he is a person of good character and employed. She contended that her father refused to grant the consent merely on the difference of tribe with his prospective husband. She averred that his father’s male children, siblings and friends tried to intervene to convince him to give the consent without success. He is of the view she should wait till he is dead for her to marry again.
3. The respondent duly served failed to appear or reply to the application.
4. A Waliy is defined by the *Muslim Marriage Rules, 2017* (legal Notice No 288, Kenya Gazette No 182 of 1st December, 2012) as ‘a person recognised by any of the Muslim schools of jurisprudence as a guardian of the bride for purposes of contracting a Muslim marriage’.
5. The preponderant opinion of all Muslim jurists except Hanafi is that consent of father is a pre-requisite to marriage. A marriage without the father’s consent is a nullity. The holy *Qur’an*: Nisa: 4:25 provide:



You [believers] are of one another. So marry them with the permission of their people and give them their due compensation (i.e. mahr) according to what is acceptable. [They should be] chaste, neither [of] those who commit unlawful intercourse randomly nor those who take [secret lovers].

6. This is further clarified and emphasised in many Hadiths. Prophet Muhammad (may peace and blessings of Allah be upon him) said: “a marriage without father’s consent is a nullity’, Narrated by Aisha, Ibn Abbas & Abu Musa, reported by Ahmad and four reporters of hadith.; Nusbul Raya 3/182, Subulul Salam 3/117
7. In yet another Hadith, the prophet Muhammad (may peace and blessings of Allah be upon him) said: “a marriage is not legal unless it is witnessed by at least two competent witnesses and waliy (parent/legal guardian), any woman who married while her father is opposed to the marriage, the marriage is a nullity” Narrated by Ibn Abbas, Al Sana’ny, Subulul Salam,3/187.
8. The holy *Qur’an* emphatically directed guardians to seriously consider the interests of their daughters or sisters with regard to marriage. Q.2.232 provides

“And when ye have divorced women and they reach their term, place not difficulties in the way of their husbands if it is agreed between them in kindness. This is an admonition for him among you who believe in Allah and the last Day. That is more virtuous for you and cleaner. Allah knoweth and ye know not”.
9. Imam Al Qurtuby, Abu Abdallah ibn Muhammad ibn Ahmad ibn Abubakar, in his Al Jami’ li ahkam al *Qur’an*, (Encyclopaedia of Islamic rulings) vol. q at page 122 in commentary of this verse states:

“the verse provides that a marriage without consent of the parent is not legal, if it were, there would have been no need to direct waliy of Mi’kal’s sister to consent to her marriage”.
10. Dar al Qutny elucidating on the reason of revelation of the verse reported from Al Hassan saying: Mi’kal Ibn Yasar said: “I had a sister. she had many marriage proposals that I turned down. Then my cousin brother Abu al Badah asked her hand in marriage. I accepted and married her to him. They lived for quite a while then he divorced her a revocable divorce. He didn’t remarry her during the eddah period. upon expiry of her eddah period other suitors came to ask for her hand in marriage and so did Abu al Badah, my cousin. I told him “I turned down many proposals to my sister and married her to you then you divorced her; you could have remarried her during her eddah but didn’t, the eddah period has expired; now that other suitors have proposed you are also proposing to marry her. I swear that I shall not marry her to you”. Then Allah revealed the verse ‘... and when you have divorced women and they reach their term, place not difficulties in the way of their marrying their husbands if it is agreed between them in kindness ...’, I atoned for my oath and married her to him; It is reported by Bukhari in the chapter of Commentary of *Qur’an* hadith No 4529.
11. Strictly under Islamic law, the requirement of guardian’s consent is mandatory for the validity of marriage. However, where the parent or guardian and the lady wishing to be married differ on the issue of consent, the guardian (waliy) of lesser degree or the ruler has been conferred with powers to solemnize the marriage, upon application duly served upon the guardian. Guardians in exercise of their power to consent are obliged to take the best interests of their daughters or relative under their and not use it arbitrarily to deny them their fundamental rights to marriage. When guardian’s consent is denied arbitrarily or contrary to the best interest of the daughter or female relative, the guardian is regarded transgressor fasiq and the consent may be issued by the waliy next in line or the Kadhi as the ruler.



12. In hadith reported by Ahmad and four reporters of hadith except al Nasaiy; Nusbul Raya 3/184, Subulul Salam 3/118 on the authority of Aisha (my Allah be pleased with her) the prophet Muhammad (may peace and blessings of Allah be upon him) said:

“any woman married without her father’s consent, her marriage is a nullity; a nullity, a nullity; if they had intercourse she is entitled to dowry, if there are disagreements, the ruler (Amir/judge) is the legal guardian of any person without a (legal) guardian).

13. For purposes of the exercise of this power, the term ruler, sultan, refers to a Kadhi appointed by the Judiciary of the Republic of Kenya under Article 169 and 170 of the *Constitution* of Kenya (2010) and sections 3 and 4 of the *Kadhi’s Court Act*, Cap 11 laws of Kenya. It does not include Muslim Marriage officers, Sheikhs or Imams of Mosques.

14. In a public Notice signed by Sheikhs Mohamed bin Kassim, Kadhi (as he then was) and Abdulrahman bin Ahmad, Sheikhu Islam (as he then was) and approved by J.W. Tritton, Sub-commissioner and R.B.P. Cator, H.M. Judge on 7th December, 1903, they notified the public of not only the illegality of a marriage performed without the consent of a waliy but also the criminality of solemnization of marriage without legal right and alluded to the correct interpretation of the term sultan or ruler with respect to the issue of solemnizing of Muslim marriages, who they referred to as ‘Kathi government’. It stated thus:

‘It is reported that a common practice is going on in the town of Mombasa, which is unlawful according to Shariah. Let it be known that a man who has a right to perform a marriage is a guardian, which is according to shariah:

1. Father; in his absence,
2. Grandfather; in his absence,
3. Full brother; in his absence,
4. Son of brother, in his absence,
5. Uncle on father’s side; in his absence, Nearest relative on father’s side.

Where there is no near relative, the marriage should be performed by a Kathi government. Further, let it be known that after this notice, anyone who performs a marriage without right according to Shariah will be punished’.

15. More recently, the law provided that only Sheikhs appointed by the Registrar of Marriages in the office of the Attorney General, have jurisdiction to officiate and solemnize Muslim marriages. Section 49 (I) of the *Marriage Act*, No 4 of 2014, provide:

‘A marriage under this Part shall be officiated by a Kadhi, sheikh or imam as may be authorized by the Registrar and celebrated in accordance with Islamic law’.

16. In the instant case, the applicant is a (37) years old lady. She is a divorcee whose edda has lapsed. She is a working lady employed as revenue officer with Kenya Revenue Authority. She has young children, boys who she needs assistance to care for. The prospective husband is a practicing Muslim, apparently hardworking as he is gainfully employed by Rural electrification Authority and of good character. Differences of tribe or color is not basis for rejection of a marriage proposal. The piety and character of the prospective husband are the key elements for consideration in a marriage proposal. It was reported by In Majah (1084) on the authority of by Abu Hurairah, that the Messenger of Allah said: ‘If there



comes to you one with whose character and religious commitment you are pleased, then marry (your daughter or female relative under your care) to him, for if you do not do that there will be Fitnah in the land and widespread corruption.’

17. Further the applicant is divorcee, she has priority to explicitly give her consent to marriage. Her own consent is equally mandatory for purpose of marriage. She is entitled to enjoy marital life. Having been previously divorced is not a hindrance for her to be married again. This right is fundamental and inherent and can only be limited by clear provisions of the law. There is no legal basis for the respondent, the applicant’s father to deny the consent for her marriage. In the circumstances, the application be and is hereby granted. The court assumes guardianship and grants consent for the applicant’s marriage to IMO, on the dowry to be agreed between them.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON 10TH FEBRUARY, 2025.

HON. ABDULHALIM H. ATHMAN

CHIEF KADHI

In the presence of

Mr. Salim Kerrow, Court Assistant

Applicant.

