



AJN v MAM (Divorce Cause E408 of 2025) [2025] KEKC 13 (KLR) (17 April 2025) (Judgment)

Neutral citation: [2025] KEKC 13 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT MOMBASA
DIVORCE CAUSE E408 OF 2025
AH ATHMAN, CK
APRIL 17, 2025**

BETWEEN

AJN PETITIONER

AND

MAM RESPONDENT

JUDGMENT

1. The question in this matter is whether or not a wife is entitled to a separate and independent accommodation or she may be compelled to live with her husband with her mother in law.
4. The petitioner deposed that the respondent is arrogant, rude and treated her with harshness. She deposed further that did not appreciate her and once returned her to her parents allegedly to be taught manners without her breastfeeding infant. She further deposed that living with her mother in law in the same house exacerbated the problem. She deposed further that the respondent’s family molested her. She prays for reconciliation and physical custody of the child.
5. The respondent denies the claims save that he admits he returned the petitioner to her parents allegedly for her ‘ to realizes her behavior and rectifies the same and to allow her time to reflect and ponder.’ He further stated that she was aware prior to their marriage that she will be living with the defendant’s family. He further stated that he is the breadwinner of the family and has to live with his mother due to her old age and needs.
6. The parties were married under Islamic law in 2023 at Mombasa and are blessed with one child, a son (AMA) aged (2) years old. The petitioner is unemployed but relies on hinna application to ladies at home to fend for herself. The respondent is a billing clerk at Al-Farooq Hospital Mombasa.
7. The petitioner appeared in person while the respondent is represented by Ms. Fraitham of Omar Said & company advocates.



8. The parties were referred to Sheikh Hammad M. Kassim, Chief Kadhi emeritus for reconciliation. He narrowed down their differences except the issue of the accommodation or where the matrimonial home should be. While the petitioner is ready to return to her husband, she insisted it be at an independent accommodation and not a family house while the respondent is would like to return to live at the same house with his mother. At the petitioner was ready to live in a bedsitter whose rent is KES 8,000.00 per month; the respondent was ready to provide independent accommodation of only KES 2,500.00 per month and was not ready to 'leave' his mother.
9. Every wife, unless she otherwise consents, is entitled to a separate accommodation. Living in parent's house is the exception rather than the rule. Allah in Q. Talak, 65.6 provides:
- 'Lodge them (the divorced women) where you dwell, according to your means, and do not harm them so as to straiten them (that they be obliged to leave you house). And if they are pregnant then spend on them till they lay down their burden. Then if they give suck to your children for you, give them their due payment, and let each of you accept the advice of the other in a just way. But if you make difficulties for one another, some other woman may give suck for him (the father of the child).'
10. The entitlement to accommodation is so strong that the matrimonial house is regarded as the wife's house even during edda upon divorce. Qur'an in .65.1 provides.
- "O Prophet, when you divorce women, divorce them for [commencement of] their waiting period and keep count of the waiting period and fear Allah your Lord. Do not turn them out of their [husband's] houses, nor should they [themselves] leave [during that period] unless they are committing a clear immorality, and those are the limits set by Allah and whoever transgresses the limits of Allah has certainly wronged himself. You know not perhaps Allah will bring after that a [different] matter.'
11. Islamic marriages are potentially limited polygamous; the husband has to be competent to contract such marriage by fulfilling the requirements of ability (both financial, physical and psychological) and equity and fairness between the wives. This aligns with the key objective of tranquillity, affection and mercy in an Islamic marriage enunciated in Qur'an, 30.21. Independent accommodation lets spouses explore full potential of their love and marital responsibilities and gives the marriage highest chances of success.
- 'And of His signs is that He has created for you from yourselves mates that you may find tranquility in them; and He placed between you, affection and mercy. Indeed, in that are signs for a people who give thought'. Q.30.21
12. The respondent as a son, is obligated to care for his mother and father especially at their old age and if they are needy. Care and respect to parents comes second only to worship of Allah the almighty. In Q.17.23 Allah states:
- 'And your Lord has decreed that you not worship except Him, and to parents, good treatment. Whether one or both of them reach old age (while) with you, say not to them (so much as) 'uff' and do not repel them but speak to them a noble word.'
13. Where there is agreement for spouses to live with the parents in law in the same is house, it is both laudable and commendable as it serves the twin purposes of good treatment to parents and spouses. In such cases, the wife should always enjoy her respect and independence as a legally married wife. Where there are is no agreement or living in such arrangement has failed, the wife should not be compelled



to live with her in-laws. It should however, not be the reason to annul the marriage. The husband is obligated to provide separate accommodation for both his parents and wife according to his means. Many families have successfully navigated living in such arrangements, many others have failed and regrettably it has been a cause of divorce.

14. The petitioner successfully proved incompatibility with life with her mother in law. She has tried her best and has been perverting for some time. Insistence to compel her to live with her mother in law puts her to emotional and psychological harm and offends her marital right to independent accommodation. Rule 5 (2) (d) the Kadhi's Court (practice & procedure) rules_ 2020 'injury is removed' is one of the overriding objectives of the rules. This juristic maxim is a provision of section 20 of the Majalla, the Ottoman Courts manual founded on public policy and the hadith narrated by (May Allah be pleased with him) and reported by Imams Malik, Al Muwatta' vol 2. pp 352), Ahmad, Al Musnad pp 239 hadith No. 6865), Baihaki, Sunanul Kubra vol. 6 pp 257 hadith No. 1909, Ibn Majah, 2340, that the Prophet (may Allah's peace and blessings be upon him) said:

'There should be neither harming nor reciprocating harm.'

15. In the instant case, the respondent earns KES 35,000.00 per month as a billing clerk at Al- Farooq Hospital. He had been living with her parents but in a smaller apartment at Mwembe Tanganyika, in Mombasa. On planning to marry, he looked up for and moved to a bigger apartment in Ganjoni whose rent is KES 23,000.00 per month. It is his obligation, not the respondent's, to look for independent accommodation for both his mother and wife. He is hereby ordered to look for one-bedroom self-contained apartment within Mombasa as their matrimonial house within sixty (60) days from date of this judgment.
16. The court notes the parties had a child access arrangement where actual custody is shared between them. The child is an infant and needs breastfeeding. This arrangement offends the best interests of the child under Section 76(3) of The Children's Act, Article 53 of *the constitution* of Kenya (2010), and Article 120 of the Islamic Charter on Family [ICF], section 83 (1) of the Children's Act Cap 141, Laws of Kenya, ruling of the Prophet Muhammad (may peace and blessings be upon him) on a complaint over custody by a divorced wife (Reported by Abu Daud [2276] through Abdallah ibn Amr (may Allah be pleased with him) and Article 106 (1) of the Islamic Charter on Family. The child needs continued breastfeeding by his mother. Accordingly, in the interests of justice and the best interests of the child the child access agreement between parties herein is hereby revoked. While the parties are separated, as they now are, the actual physical custody of the child is granted to the petitioner, the child's mother. The respondent to get access on weekends from 9:00 am to 6:00 pm but will always return the child to the petitioner. The respondent will further provide for the mother and child's maintenance at KES 10,000.00 per month until they move to their new matrimonial home.

No orders as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA ON 17TH APRIL, 2025

HON. ABDULHALIM H. ATHMAN

CHIEF KADHI

In the presence of

Mr. Salim Kerrow, Court assistant

Petitioner



Ms. Fraitham for the respondent

