



**NMO v AHO (Matrimonial Cause E001 of 2024)
[2024] KEKC 19 (KLR) (7 August 2024) (Ruling)**

Neutral citation: [2024] KEKC 19 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT KERICHO
MATRIMONIAL CAUSE E001 OF 2024
IN NYABOGA, SRK
AUGUST 7, 2024**

BETWEEN

NMO PETITIONER

AND

AHO OBJECTOR

RULING

1. The Applicant/Objector, under Sections 1A, B, 3A, and 63(e) of the Civil Procedure Act Cap 21 and Order 51 of the Civil Procedure Rules and other applicable Law seeks from the Honorable Court for the following orders inter alia:
 - a. That the Matrimonial Cause No. E001 of 2024 – Kadhi, Kericho be dismissed with costs in the cause for lacking competence in jurisdiction as prescribed by Cap 11(5) and Cap (21) of the Statutory Provisions respectively.
2. Grounds for application/objection as outlined are:
 - a. That the marriage between the parties was celebrated in Mombasa County where the Applicant/Objector is domiciled.
 - b. That the parties throughout their relationship, cohabited in Kisii County as husband and wife.
 - c. That the Provisions mentioned above, Cap 11(5) and Cap (21) define in law where to institute a case.
 - d. That the Hon. Kadhi’s Court- Kericho is a stranger to both parties.
 - e. That there are functioning Kadhis’ Courts in Kisii, Kisumu and Mombasa.



3. Attached to the Application/Objection were and an Affidavit sworn by the Applicant/Objector, a Special Power of Attorney whereby the Applicant/Objector has donated powers to one SHO to represent her in this suit, a Medical Report from Mariakani Sub-County Hospital and other annexures.
4. The Application/Objection came up for hearing on 23rd July, 2024 and proceeded inter-parte.
5. The Applicant/Objector through her Agent submitted that Cap 21 of the Civil Procedure Act, Section (15) states that suits should be instituted at the place where the Defendant resides or where the cause of action arose from and the place where the Defendant resides is Mombasa and the place where the cause of action arose from is Kisii.
6. The Applicant/Objector went on to state that there are only two options in regard to where to file this matter, either in Mombasa or Kisii and that when you look at the data base of Judiciary, Kisii does not have a Kadhi's Court.
7. She further stated that the Respondent/Petitioner decided to file the case in Kericho which is in Rift-valley away from Kisii which is in South Nyanza without any specific reason while there are four (4) Kadhis' Courts in Mombasa.
8. The Applicant/Objector stated that the Petitioner has his own motives in filing the case at Kericho Kadhi's Court which has no jurisdiction over this case and it does not find logic why he left all Kadhis' Courts around and went to Kericho.
9. The Applicant/Objector further stated that during a fight between the parties in Kisii, the Respondent/Petitioner repeatedly told her that he socially knows the Honorable Kadhi at Kericho and she thinks that is the reason why he went to Kericho.
10. The Petitioner/Respondent in his submission stated that the reason he instituted the matter before Kericho Kadhi's Court is because Kericho is nearer to him than Kisumu by 25 Kilometers.
11. He further stated that he could have instituted the matter in Kisumu Kadhi's Court but he understood that the distance from Mombasa to Kisumu is longer than from Mombasa to Kericho and he did that to reduce the travelling distance for the Applicant/Objector.
12. On the claim that he repeatedly told the Applicant/Objector that he and the Honorable Kadhi at Kericho Kadhi's Court, the Respondent/Petitioner said that those were false allegation since there was no time he ever sat down and told her that he knows the Kadhi.
13. He asked what circumstances would have let him tell the Applicant/Objector that he knows the Kadhi.

Determination:

14. The main issues to address in this ruling are two. First, whether the Kadhi's Court at Kericho has jurisdiction over this matter or not and the second is the claim that the /Respondent and the Honorable Kadhi socially know each other.
15. In Owners Of Motor Vessel "Lilian S" Vs Caltex Oil (K) Ltd [1989] KLR 1, Hon Nyarangi JA then stated that: "Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."



16. The Applicant/Objector in supporting her position that this Court has no jurisdiction (territorial) over the matter, cited Section fifteen (15) of the [Civil Procedure Act](#) and Section five (5) (should be 4 and not 5) of the [Kadhi's Court Act](#) of the Laws of Kenya.
17. Section fifteen (15) (a) of the [Civil Procedure Act](#) provides that, every suit shall be instituted in a court within the local limits of whose jurisdiction— the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain;
18. From the above, the Applicant/Objector concludes that since Kisii County which is the residence of the Petitioner/Respondent does not have a Kadhi's Court, the only courts do deal with the matter are in Mombasa County which implies that the Act did not confer jurisdiction to Kericho Kadhi's Court.
19. The [Civil Procedure Act](#) in its long title “An act of Parliament to make provision for procedure in Civil Courts.”
20. In [Ruth Gathigia Kamunya & another v George Kimani](#) [2015] eKLR, Honorable Aburili J in regard to the [Act](#) held that “it is not the legal instrument that confers jurisdiction upon Magistrate's Courts since the jurisdiction of Magistrate's courts is governed by the [Magistrate's Courts Act](#) Cap 10 Laws of Kenya”
21. And in [Mohamed Sitaban Vs George Mwangi Karoki](#) CA No.13/2002, Ringera J then held that: “There may be sound administrative reasons for filing suits in administrative Districts in which the Defendant resides as the cause of action but those reasons cannot oust the statutory jurisdiction.”
22. The [Civil Procedure Act](#) does not confer jurisdiction either to the Magistrates' Courts nor the Kadhis Courts and instead, the Territorial Jurisdiction of the Kadhis' Courts is conferred by Section four (4) (2) of the [Kadhi's Court Act](#) Cap 11 Laws of Kenya which the Applicant/Respondent cited in her Affidavit but failed during the hearing and which states *inter alia* that: “one court shall have jurisdiction within (i) Nyanza Province; (ii) Western Province; and (iii) the following districts of Rift Valley Province— West Pokot District; Trans Nzoia District; Elgeyo-Marakwet District; Baringo District; Laikipia District; Nandi District; Uasin Gishu District; Kericho District; Nakuru District;”
23. Some provisions in the [Kadhis' Courts Act](#) which was enacted in 1967 became long overdue and seem to be impractical as a result of the many developments that have taken place in the History of the Country and especially after the promulgation of the 2010 constitution which *inter alia* divided the territory of Kenya from Provinces to Counties as stipulated by Article (6).
24. The fact that there are no Kadhis' Courts in some Counties in the Republic of Kenya does not mean that the Muslims in those regions cannot access the services of the Kadhi's Court as they have always been going to the nearest one and the same way, the Muslims who reside in the County of Kisii have a Kadhi's Court even though it is outside their geographical boundaries and that is their Kadhi's Court.
25. The Petitioner/Respondent states that he chose to file the matter before Kericho Kadhi's Court because Kericho is nearer to Kisii by 25 Kilometers compared to Kisumu which too has a Kadhi's Court but he did not substantiate that Kericho is nearer to Kisii than Kisumu.
26. There are many sites on the internet which reveal distances between locations and the same sites reveal that Kericho is nearer to Kisii than Kisumu though they don't exactly agree on the distances between the two Counties, Kisumu and Kericho from Kisii, but the following: <https://www.viamichelin.com> is the most interesting as it gives the shortest and alternative routes to a destination and their distances.



27. The question of proximity to courts nowadays is rarely put into consideration as a result of the automation of court services throughout the Republic of Kenya which as a result enables citizens to access the services from anywhere without necessarily appearing physically at the courts.
28. It is important to state that we have reached the time referred in *PCK v IKS* (Miscellaneous Civil Application E006 of 2021) by W. Korir J then in paragraph 19 that: “In view of the rise in the use of virtual courts to dispense justice, I foresee a situation in the near future where courts with heavy caseloads will offload their matters to courts with lesser case traffic thereby rendering the question of territorial jurisdiction a thing of the past.”
29. Comparing caseloads between the three Kadhis’ Courts, Mombasa, Kisumu and Kericho, Kericho’s caseload is lower than the first two.
30. The second question which need to be addressed is the claim by the Applicant/Objector that the Petitioner/Respondent socially knows the Honorable Kadhi who the matter is before him and thus should not handle it.
31. Rule (75) of the *Kadhis’ Courts (Procedure and Practice) Rules*, 2020 outlines reasons that shall disqualified a Kadhi from considering and hearing a case and it states in clause (f): “if enmity or friendship exists between the Kadhi and a litigant such that it is likely to affect the Kadhi’s impartiality.”
32. In paragraph (9) of her supporting Affidavit, the Applicant/Respondent states that the Respondent/petitioner had repeatedly told her that he’s socially known to the Honorable Kadhi in Kericho which statement she reiterated during the hearing.
33. Did the Petitioner/Respondent really tell the Applicant/Objector that he is socially known to the Honorable Kadhi? What circumstances led to the Petitioner/Respondent say that? The Applicant/Objector states during the hearing that they were fighting. But why will he tell her that and then institute a case before the same Kadhi? The Petitioner/Respondent denies ever telling her wife that he socially knows the Honorable Kadhi at Kericho and thus the burden of proof is upon the claimant which she failed to proof.
34. The Affidavit of the Applicant/Objector tells something in regard to the claim that the Petitioner/Petitioner socially knows the Honorable Kadhi at Kericho. First, she was ignorant that there was no Kadhi’s Court in the County Of KisII which the Petitioner/Respondent should have instituted the case. The confidence that there is a Kadhi’s Court in the residence of Petitioner/Respondent which he failed to institute the case and instead went to another jurisdiction, led the Applicant/Objector to a notion that there must be something which is not okay and to make it seem a reality, she had to allege that the Petitioner/Respondent told her that he is socially known to the Kadhi.
35. Assuming the case was instituted in the County Of Mombasa which is the residence of the Applicant// Objector, furthest away from Kisii than from Kericho and Kisumu. She would have alleged that the Respondent/Petitioner is socially known to the Honorable Kadhi in Mombasa or worse than that. And she will ask herself, “why would he leave a Kadhi’s Court in his residence which has same jurisdiction to hear the case and travel all the way to Mombasa?”
36. That said, this Application/Objection is hereby dismissed.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 7TH AUGUST, 2024

IDRIS N. NYABOGA

SENIOR RESIDENT KADHI



In the presence of:

NMO –Petitioner &

SHO, agent for the Applicant/Objector

