



**ZZI v ASY (Divorce Cause E157 of 2022)
[2023] KEKC 6 (KLR) (Family) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEKC 6 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT NAIROBI (MILIMANI COMMERCIAL COURT)
FAMILY
DIVORCE CAUSE E157 OF 2022
AH ATHMAN, SPK
FEBRUARY 16, 2023**

BETWEEN

ZZI PETITIONER

AND

ASY RESPONDENT

RULING

1. The petitioner’s application dated October 12, 2022 for orders:
 1. Spent
 2. That pending the hearing and determination of the application and suit, the petitioner be vested with actual or physical custody of the minor herein, TAS, with reasonable access to the respondent if he so wishes.
 3. That pending hearing and determination of the suit the respondent be compelled to cater for the sustenance of the minor at Kshs 55,000.00 per month being food, clothing, shopping and house help expenses
 4. That pending hearing and determination of the suit the respondent be compelled to provide to the petitioner Edda maintenance at the rate of Kshs 77,000.00 per month.
 5. Costs
2. It is supported by the even dated affidavit of the applicant, a further affidavit dated November 7, 2022 and a supplementary affidavit dated December 14, 2022.



3. The respondent opposed the application through a 48-paragraph replying affidavit dated October 27, 2022.
4. The application was disposed of by way of written submissions. Mr. Yusuf represented the petitioner / applicant while the respondent was represented by Mr. Ali.
5. The applicant deposed that she was married to the respondent in Nakuru under Islamic law on December 5, 2022 and are blessed with one issue from their legal wedlock (DOB September 13, 2021). She averred that the respondent divorced and issued her with a divorce note on September 25, 2022. She stated that he threw her out of the matrimonial home in Kitengela while pregnant. She deposed that she is currently not employed and the respondent has not provided for her during edda as required by law or for the child. She deposed if the orders sought are not granted the child's welfare will be in jeopardy.
6. On his part the respondent deposed that the applicant disrespected him prior to and after the marriage. He deposed that she has been economical with truth regarding her health and has not been truthful to him. He averred she did not inform him she is epileptic, had an accident and secretive communications with other men. He contends she is nashiza as she deserted the matrimonial home and didn't chase her away. He stated he has providing for his family even after she deserted the matrimonial home and she is the one who demanded he divorces her which he did after failure of elders' talks and her hostility towards him. Upon giving her the talak note, he said he sent her dowry of Kshs 150,000.00 through m-pesa. He requests to pay maintenance of Kshs 5,000.00 per month because he is servicing a mortgage for the Kitengela house, supporting his ailing mother, and educating 4 siblings. He deposed further that the applicant being a politician is often times away from home and therefore not fit to be granted actual custody of the minor.
7. The applicant further and supplementary affidavits are explanations or rebuttals to the respondent's replying affidavit.
8. Mr. Yusuf for the applicant submitted that the mother is best suited to be vested with actual custody of minor under the *Constitution*, the children's Act and Islamic charter on Family. He further submitted that no evidence has been adduced to demonstrate the applicant is unfit to be granted actual custody of the minor. He stated that the respondent is a man of means, working as a senior supervisor with NHIF but conveniently chose not to declare his income. He submitted further that a divorced woman is entitled to edda maintenance. He relied on Qur'an.2.228, 65.6.
9. The issues for determination in this application are:
 1. Whom between the two parents should be given actual custody of the minor.
 2. Rate of interim child maintenance
 3. Whether the applicant is entitled to edda maintenance
10. The applicant was a politician, [Particulars withheld] at Nakuru county and the respondent an employee of NHIF.
11. At the interlocutory stage, the court should always be careful not to give substantive orders whose facts need to be ascertained and / or tested. Interim orders are discretionary to ensure ends of justice. They should not have a sense of finality or prejudice the other party's fundamental and constitutional right to a fair hearing. The art of trying to steal a match is discouraged and offends the right to fair trial contemplated by the provisions of Islamic law of evidence and the *Constitution*. The general rule is that the claimant must, even in unopposed petition or application, discharge his or her burden of proof.



12. In this application is not disputed that the parties are now divorced, living apart and have an infant (one year and 4-month-old daughter). It is trite law that the best interests of the welfare of infant at such is tender age is to be with the mother. The only exception is when it is proven that the mother is unfit to have custody because the same will endanger the child's welfare. No evidence has been adduced and tested in this regard. Accordingly, interim actual care, control and custody of the minor is vested in the petitioner / applicant. The respondent to get reasonable access, at least three times a week during the day.
13. The financial responsibility of child's maintenance is fully on his or her father based on the needs and the father's ability under Q.65.35 as read together with Q.2.233. The applicant is seeking 55,000.00 per month but the respondent argues this is exaggerated and he has other financial commitments to his mother, siblings, and a mortgage. He claimed his net income is Kshs 84,000.00 but failed to annex his payslip to his replying affidavit on the application. It is clear from his averments he was sending the applicant money through m-pesa ranging from 5,000.00 to 10,000.00 per month. From the available evidence balancing the needs of the minor and the ability of the respondent, we order that the respondent pays Kshs 25,000.00 per month as interim child maintenance.
14. The issue of edda maintenance is predicated on the husband's availing the divorced wife access and free and full enjoyment of the matrimonial home for a specific period not exceeding (90 days) subsequent to the divorce in a normal (initiated and effected by the husband) divorce. In this application the issue is contested. It can only be established after evidence is adduced at trial. It cannot be granted at this stage. Accordingly, it is rejected.

Costs be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY ON 16TH FEBRUARY, 2023.

HON. ABDULHALIM H. ATHMAN

SENIOR PRINCIPAL KADHI

Mr. Suleiman A. Mohamed, Court assistant

Mr. Yusuf for Petitioner / Applicant

Mr. Ali for respondent

