



**SWW v MAJ (Matrimonial Case E014 of 2021) [2023] KEKC 8 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEKC 8 (KLR)

**REPUBLIC OF KENYA**  
**IN THE KADHI'S COURT AT UPPER HILL (NAIROBI MILIMANI LAW COURTS)**  
**MATRIMONIAL CASE E014 OF 2021**  
**AH ATHMAN, SPK**  
**MARCH 9, 2023**

**BETWEEN**

**SWW ..... PETITIONER**

**AND**

**MAJ ..... RESPONDENT**

**JUDGMENT**

1. The parties herein were married under Islamic law on 4<sup>th</sup> December, 2000 and divorced on 1<sup>st</sup> March, 2021. They are blessed with three children from their legal wedlock. One, a daughter, is an adult. The other two are aged 15 and 10 years old, a son and daughter respectively. The respondent was working in Somalia where he married another wife, M. It is this second marriage that precipitated divorce to the petitioner. He had two children with his second wife. They are divorced and is now married to a third wife. The respondent has since returned and lives with the two minor children in a 5-bedroom apartment at Doonholm estate, Nairobi with his wife and 60-year old mother. The respondent is not employed and lives in a one-bedroom house in [particulars withheld], Kayole Nairobi.
2. The petitioner prayed for orders that:
  - a. Full custody of the children
  - b. Children maintenance including housing, food, clothing, entertainment, school fees, medical.
  - c. 50% share in the matrimonial property
  - d. Petitioner's clothes, ring payment in lieu of conjugal rights.
3. The respondent opposed the petition through answer to petition dated 27<sup>th</sup> February, 2022. He deposed that the petitioner is the one who asked for the divorce and granted it to her without requesting his dowry as provided by law. He further deposed that the respondent had declined his request for her to take custody of the children compelling him to have his mother move in to his house to take care of them. He averred that the respondent is not fit to be granted custody because of her lifestyle, partying



out and coming home at 2 a.m. in the morning. He claimed the petitioner on two occasions came home in the company of men in full view of the children and neighbours. He denies the petitioner contributed anything to the acquisition of the properties. He argued the houses were gift from his second wife.

4. The petitioner was represented by M/S Morara Apiemi & Nyangito advocates while the respondent was represented by M/S Alosa Advocates LLP.
5. The issues for determination in this matter:
  - a. Custody of the minor children and maintenance
  - b. Whether or not the properties listed in the petitioner constitute matrimonial property and whether the petitioner is entitled to a share thereto.

### Children Custody

6. The case of *Mebrunisa v. Pravez* (1982-88) 1 KAR 18 among other case law, settled with finality the issue of the mother getting priority on children custody unless there exist proven special or peculiar circumstances to disqualify her. The court held:

“The general principle of law is that custody of such children shall be awarded the mother unless special or peculiar circumstances exist to disqualify her from being awarded custody.’

7. The same is in tandem with the principle of best interests of the child being paramount under Article 53 of the *Constitution of Kenya* (2010), Section 4 of the *Children’s Act*, Cap 141 Laws of Kenya, Article 19 of the *United Nations Convention on the rights of the Child* (CRC), Article 106 (1) of the *Islamic Charter on Family* (ICF) and 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] on the authority of Abdallah ibn Amr (may Allah be pleased with him).
8. While a mother gets priority on right to custody of minor children, that right is subject to the best interests of the children. A mother may be disqualified from getting custody of minors if she is negligent, endangers the security of the minors or her custody is not conducive to the physical, moral and intellectual welfare of the child. The key factor in custody under Islamic law is the best interest of the children based on the juristic maxims ‘Repelling an evil is preferred to securing a benefit’, ‘Latitude should be afforded in the cause of difficulty.’
9. Section 103 (2) of the *children’s Act* demand of all courts and agencies to give the best interests of the child paramount importance in every matter concerning them. Their best interest supersedes that of the parents. It includes but is not limited to their physical comfort. In *Bhutt v. Bhutt*, the court held:

“the best interest of the child are superior to rights and wishes of parents and they incorporate not just the physical comfort of the child but the welfare of the child in its widest sense.’ See *Atwal v. Amrit* (2011) 2 EA 20.
10. Islamic law also recognizes that a person vested with custody may be disqualified and lose the right to custody owing to factors impacting on the interests of the children. Ibn Al Qayyim Al Juzzy (693-741 A.H.) in his '*Al Qawanin al Fiqhiyyat*' (Juristic statutes) at pp 366-367 stated:

“a person granted custody may be lose it on four grounds: travel to a distant place, contagious or serious sickness (such as insanity, leprosy...), immorality, lack of piety marriage to another husband, except if she later divorced (in a dissenting opinion). Period of custody of minors



extend to puberty in males and up to marriage in females and consummation of marriage. Imam Shafie' said: 'when a child reaches seven years old, he/ she is left to choose between his parents. Whoever he/ she chooses, gets custody of the child'

11. The same principle applies in common law based on consideration of the best interests of the minors at all times while making decisions on issues relating to children. Unless specifically proven to be unqualified, the mother gets priority of custody of minors. In [SOSPETER OJAAMONG vs. LYNETTE AMONDI OTIENO](#) Civil Appeal 176 of 2006, the Court of Appeal held;

“The general principle of law is that custody of such children should be awarded to the mother unless special and peculiar circumstances exist to disqualify her from being awarded custody. The case of *Martha Olela & Another Vs. Jackson Obiera* Civil Application No. Nairobi 16 of 1979 was cited as one authority for such principle. The mother’s disgraceful conduct, say her immoral behavior, drunken habit, bad company are some of the factors which would disqualify her from being awarded custody of a child of tender age.”
12. In instant case, the children are aged, 15 and 10 respectively. They have been living with their father since the parties divorced in 2021. They go to private schools and live in a larger more spacious house. The petitioner failed to demonstrate why she failed to take up custody when it was offered at divorce and wishes to get it now. There is no evidence that the respondent took forcefully took up the custody of the children. Further the environment at Doonholm is better for the upbringing of the children than at Kayole. If granted in favour of the petitioner, the children will have to move houses and school impacting negatively on their development and welfare. It is noted with regret that petitioner failed in the proper guidance of the adult child who was under her care and control. She left college, was disrespectful to her father and almost committed suicide. Disregard of this fact could be fatal to the children’s development.
13. The Children’s officer recommended the respondent be given custody of the minors among other reasons due to his better financial position. The financial position of a father is not the only determinant factor in grant of custody as the father would still, according to his means, be obligated to provide for their maintenance. Generally, according to the children officer’s report, the children are happy and well to live with their father, a few challenges notwithstanding.
14. This is such a situation where we are inclined to rule, which we hereby do, for custody in favour of the father against the general rule considering the best interests of the children. The respondent shall have unlimited access of the children provided it does not interfere with their educational schedules both secular and madrasa. Further the respondent is directed to ensure the children are never mistreated by their step mother. The children officer is directed to make follow up on children’s wellbeing and development at least biannually.

### **Division of Matrimonial property**

15. The Kadhi’s Court has jurisdiction to hear and determine issues of division of matrimonial property where both parties are Muslims and subject to the jurisdiction to the court. Section 3 of the Matrimonial Property Act, 2013 provide:

“A person who professes the Islamic faith may be governed by Islamic law in all matters relating to matrimonial property.’



16. This was further held by the court of Appeal in the case of *R.M.M v B.A.M* [2015] eKLR, Civil Appeal No. 267 Of 2011, Waki, G.b.m. Kariuki, Mwilu, M'inoti & Murgor, JJ. A; where it was held:

“At the root of the issue is whether it was the High Court or the Kadhi’s Court which has jurisdiction to determine the matter of distribution of the matrimonial property....” ...If their marriage was purely Muslim, and the property in issue was acquired during the currency of that marriage, the Kadhi’s Court would be the most efficacious in handling and determining the dispute.’

17. Matrimonial property may be defined as property acquired by the husband and wife during the subsistence of the marriage in accordance with conditions stipulated by Islamic Law. Islam recognises the right to own property to both man and woman.

“And wish not for the things in which Allah has made some of you to excel others. For men there is reward for what they have earned, [and likewise] for women there is a reward for what they have earned, and ask Allah of his Bounty. Surely Allah is All Knower of everything.’ Q.4.32

18. Islamic law has provided protections to one’s wealth and prohibited unlawful use of another’s wealth and property.

“O you who have believed, do not consume one another’s wealth unjustly but only [in lawful] business by mutual consent. And do not kill yourselves [or one another]. Indeed, Allah is to you ever Merciful’. Q.4.29

19. Abu Huraira (May Allah be pleased with him) narrated that the prophet [PBUH] said: ‘...the life, wealth and dignity of a Muslim are sacred’. [Muslim 2564].

20. Islam thus recognises the right of husband and wife to own properties and enter financial transactions either independently or with others including with their spouse. Where a spouse made contribution to the acquisition or development of a property, he or she is entitled to a commensurate share thereof. The burden to prove the specific share of contribution rests with the claimant. The Supreme court of Kenya in Petition No. 10 of 2020 *Joseph Ombogi Ongetoto v Martha Bosibori Ogentoto* [2023] agreed with Echaria case on the principles applied for distribution of matrimonial property. It stated thus:

“[78] to our minds the finding in Echaria was essentially that a spouse does not acquire any beneficial interest in matrimonial property by fact of being married only and that specific contribution has to be ascertained to entitle such a spouse a share of the property.’

21. The court went on to emphasize that the spouse seeking a share in the matrimonial property has to prove the extent of his or her contribution to the acquisition or development of the property. It stated:

“[83] the guiding principle again should be the apportionment and division of matrimonial property may only be done where parties fulfil their obligation of proving what they are entitled to by way of contribution.’

22. In the instant case, the parties were married for twenty (20) years. The petitioner claimed the following are part of the matrimonial properties:

- a. House No. 106 at Komarock estate Phase 5B on Title No. Nairobi/Block121/2XX



- b. Plot Title No. Ruiru East/ Juja East/Block/2/25XX8
  - c. Plot No V/ 15765 Ruai, Embakasi Ranching Co. ltd.
  - d. Motor vehicle Registration No. KCP XXXX
  - e. Motor vehicle Registration No. KBL XXXC
  - f. Kitchen utensils
  - g. Home theater
  - h. Television
  - i. Beds
  - j. Refrigerator
  - k. Microwave
  - l. Sofa set
  - m. Tables
23. The petitioner failed to demonstrate any contribution to the acquisition or development of the properties listed. She admitted to have made no monetary contribution towards acquisition of any of the properties. She stated that her contribution was by way of showing the respondent one of the properties for him to buy. She made no mention of any other means of contribution either in terms of development, supervision during the purchase or development of any of the properties. The immovable properties (plots) and two vehicles are registered in the name of the respondent alone. No evidence or documents was produced on the household items.
24. The properties were acquired during the parties' marriage. The respondent however had other wives. He argued the plots were acquired as gift from his second wife from Somalia.
25. As held by the Supreme court, a wife does not have a share in properties acquired during marriage only because of the marriage. The claimant has to prove the extent of their contribution. This conforms with Islamic law in rights of spouses to independent ownership and transactions even during marriage. On the evidence in this matter, we cannot find for the petitioner that she has any share in the properties listed.
26. On account of being married to the respondent for twenty years, under Islamic law the petitioner would be entitled to *mata'* conciliatory gift under Q:2:241. It is also Allah's command to divorce in amicable terms, a vow taken at the celebration of the marriage. Al Qurtuby, in his '*Commentary of the Holy Qur'an*' at vol. 2 pp 895 while commenting on Q.2.241, opined:

“Scholars differed on the provision verse ‘And for divorced women maintenance (should be provided) on reasonable scale. This is a duty on al Muttaqeen the pious’. Abu Thaur, Al Zuhry, Saeed ibn Jubair are of the view that the verse "affirmed conciliatory gift mut'a for any divorced wife, whether or not the marriage was consummated. It is one of the views of Shafi'ites. Malikites are of the view only when a marriage is consummated is the divorced wife entitled to conciliatory gift.’



27. Enunciating on the conditions for entitlement to *mata*' Muhammad ibn Ahmad ibn Juzy (d.741) in '[al Qawanin al fiqhiya](#)' at page 352 stated:

“Mata’ is the benevolence to wives according to the financial ability of divorcing husband, it is encouraged, Al Shafiy made it obligatory ... Scholars are agreed that it is a right entitlement to all wives whose marriage was consummated whether the dowry was ascertained before or after the consummation of the marriage. It is not entitled to wives who elected to be divorced; such as wives of husbands suffering insanity, leprosy, impotence, emancipated female slave married to male slave, judicial dissolution (faskh), a wife who requested Khul’ divorce, and dissolution through execution of curses in denial of marital infidelity. Scholars differed whether or not wives whose husbands gave them power to divorce themselves are entitled to *mata*.’

28. Although not pleaded, in the special circumstances of this case, in exercise of the powers conferred by section 5 (2) and 171 of KCPFR to do good and prevent injustice, I grant the petitioner KES 300,000.00 as *mata*' conciliatory gift.

29. The respondent alluded to existence of petitioner's personal belongings at his place. He should release the same soonest possible.

Each party to bear its own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON 9<sup>TH</sup> MARCH, 2023**

**HON. ABDULHALIM H. ATHMAN**

**SENIOR PRINCIPAL KADHI**

In the presence of

Mr. Suleiman A. Mohamed, Court assistant

Mr. Mugambi for Petitioner

Mr. Alosa for Respondent

