



SK v SM (Miscellaneous Cause 329 of 2022) [2023] KEKC 9 (KLR) (9 March 2023) (Ruling)

Neutral citation: [2023] KEKC 9 (KLR)

**REPUBLIC OF KENYA
IN THE KADHI’S COURT AT UPPER HILL (NAIROBI MILIMANI LAW COURTS)
MISCELLANEOUS CAUSE 329 OF 2022
AH ATHMAN, SPK
MARCH 9, 2023**

BETWEEN

SK PETITIONER

AND

SM RESPONDENT

RULING

1. The petitioner had approached this court through originating summons dated July 28, 2022 for orders for custody of a minor child of the parties herein, authorization to travel and reside with the said minor out of the country without the consent of the minor’s father. She had deposed that the parties were divorced and the child was born prior to the divorce but the father had not been providing for the child. She had further averred that the respondent had no fixed abode, his nationality unclear and his whereabouts are unknown to her. The application was granted on August 24, 2022 precipitating the current application by the respondent dated January 10, 2023.
2. The applicants seek orders that:
 - a. Spent
 - b. Spent
 - c. This honourable court be pleased to vacate or set aside the proceedings and subsequent *ex-parte* orders entered on August 24, 2022.
 - d. This honourable court be pleased to strike out the originating summons dated July 28, 2022 for want of jurisdiction
 - e. This honourable court be pleased to make any other orders in the interest of justice.



3. The application is grounded on the reasons that the court lacks jurisdiction to determine disputes relating to children, that he was not joined or served with the application affecting his fundamental rights as a parent of the child.
4. The applicant deposed that he only found out about the petitioner's application and the subsequent order through her response to his application in the Children's Case No E1565 of 2022 seeking access to the child. He averred that the petitioner knows he is Ugandan, knows his residence in Kampala and has his WhatsApp number through which they have been communicating. He attached screenshots of their communication. He is apprehensive the petitioner will relocate to another country and cut him off from their child.
5. The petitioner opposed the application through grounds of preliminary objection dated January 30, 2023 on the grounds that the court is functus officio in respect of the matter before it and that the application is an abuse of court process.
6. The court on January 18, 2023 restrained the petitioner from travelling with the minor out of the country pending hearing and determination of the application.
7. The application was dispensed with by way of written submissions.
8. Upon reading the application, affidavits and annexures, and reply thereto and upon reading the submissions by counsel of parties herein, the issues for determination in this application are:
 - a. Whether or not this court has jurisdiction to handle disputes relating to children
 - b. Whether or not the court is functus officio
 - c. What orders can the court grant or make in the circumstances of this case.
9. A brief background of the Kadhi's Courts in Kenya is essential to understanding this issue. The Kadhi's Courts have been in existence on the coastal strip of Kenya long before the establishment of Her Majesty's Supreme Court of Kenya in Mombasa in 1901. Imam Al Shams a Din Al Sakhawi reports meeting the Kadhi of Lamu in Mecca in the year 1436 (see Kadhi's Court bench Book_2020 page 13-14). Samuel M. Kimeu, in his *[Historical and legal foundations of Kadhi's Courts in Kenya](#)*, at pg 16 suggests the Kadhi's Courts in the coast of East Africa were established as early as 1330s. He observed that the Moroccan traveller, Abu Abdallah Ibn Batuta travelled the coast of East Africa around 1330 and observed existence of the Islamic legal system in the region. He concluded thus:

'From this we know that long before the modern era an Islamic legal system was already operating'.
10. In 1895 when the coastal strip was declared a British protectorate, Kadhi's Court continued to flourish and were incorporated in the 1963 *[Constitution](#)* with the declaration of independence and later in the 2010 *[Constitution](#)* with the addition of the requirement of submission to the jurisdiction of the court. During all this period Kadhi's Courts have been hearing and making determinations on disputes on questions of children custody and maintenance between parties who profess the Islamic faith. The contestation only came up upon enactment of the *[Children's Court Act](#)*, cap 141 Laws of Kenya on March 1, 2002 and the promulgation of the new Constitution, 2010.



11. The Kadhi's court, under article 170 (5) of the [Constitution](#) of Kenya, 2010 has jurisdiction to hear and determine questions of Muslim law on personal status, marriage, divorce and inheritance between parties who profess Muslim faith. It provides:

'The jurisdiction of a Kadhis' Court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.'

12. The same is replicated in section 5 of the [Kadhi's Court Act](#), cap 11 Laws of Kenya. Under Islamic law, there is consensus among Muslim jurists that issues of children custody and maintenance form part of personal status, it is part of 'ad personam' rights which the apostrophe in the article, clearly indicates it is not interpretive but an independent issue of jurisdiction conferred to the Kadhi's court.
13. Bryan A. Garner, in the [Black's Law Dictionary](#), eighth edition, defined 'law of status' as 'the category of law dealing with personal or non-proprietary rights, whether in rem or personam.' There is no controversy among Muslim jurists on the definition and what constitutes personal status. They concur that it includes all issues related to marriage and divorce. Professor Dr Wahba Al Zuhaily in his Islamic jurisprudence and its evidences defines personal status as:

'the laws that relate with person's relationship with his family from marriage to his death...

14. Dr. Ahmed Al Ghandur in his '[Personal status in Islamic Shariah](#)', Al Falah Publishers- Kuwait at page 21 states:

'the term personal status started to be used in Islamic Shariah when Sheikh Mohamed Qadri Basha wrote his book titled 'Shariah laws on personal status' in the form of statutes comprising of rules on marriage, divorce and issues related thereto, inheritance, wills, gifts ...'

15. It is thus well established in Islamic law, the applicable law in Kadhi's court in Kenya, that personal status includes disputes of custody and children maintenance. Legislations from other jurisdictions strongly support this view. In the United Arab Emirates, the [Federal law](#) No. 28 of 2005 on personal status provides that personal status includes custody, maintenance and guardianship of children. Section 40 of the [Administration of Islamic Law \(federal Territories\) Act 1993](#), conferred on the Syariah Courts with jurisdiction to handle persona; status issues and some criminal offenses involving Muslims exclusively as per list II of the ninth schedule to the Federal constitution of Malaysia, and [Islamic Law \(Federal Territories\) Act 1984](#). Personal status issues include maintenance, adoption, legitimacy and guardianship of children. Section 13 (4) of the [Egyptian Judicature Act](#) of August 28, 1949, provides that personal status includes 'paternity, parenthood, relationships between parents and children and provision of maintenance...' closer home, section 5 (1) (c) of the [Zanzibar Kadhi's Court Act](#) No 9 of 2017 specifically provides that the Kadhi's Courts have jurisdiction on 'maintenances and custody of children.'
16. A critical reading of the origin of the provisions of the [Constitution](#) on jurisdiction, the instruments signed by the two prime ministers of Zanzibar and Kenya in 1963 clarifies the extent of jurisdiction of Kadhi's Courts in Kenya. It suggests that questions of Muslim law on marriage, divorce and inheritance are only part of and not exhaustive of the questions on personal status. It states:

'The jurisdiction of the Chief Kadhi and all Kadhis will at all-time be preserved and will extend to the determination of questions of Muslim law relating to personal status (for



example Marriage, divorce and inheritance) in proceedings in which all parties profess the Muslim religion’.

17. The High Court is clearly split on this issue, depending on a textualist or purposive approach to interpretation of statutes and the *Constitution* by individual judges. The cases cited by Ms Kyalo for the respondent are some of several where the High Court held the Kadhi’s Court lack jurisdiction on this issue due to enactment of the *Children’s Act* and lack of explicit provision from the *Constitution* conferring said jurisdiction to the Kadhi’s Court. There are however many other decisions where the High Court equally held that the Kadhi’s Court continue to have jurisdiction in children custody and maintenance matters between parties who profess the islamic faith. These include HCCA 120 of 20004, *Amin Mohamed Hassan v Zabra Mohamed Abdulkadir* [2009] eKLR, *Mohamed Omar V J.B Mdivo*, Mombasa High Court, Misc civil application No 949 of 2005 [2007] eKLR, *Najma Ali Ahmed v Swaleh Rubea*, Malindi High Court Civil Appeal No 22 of 2007 [2010] eKLR, *Abdirahman Mohamed Abdi & another v Adan Yusuf*, Garissa High Court, Civil appeal No 13 of 2012 [2013] eKLR] and HCCA 85 of 2017 *ZUDG v SJKUR* (2020) eKLR.

18. We are persuaded by the purposive interpretation in HCCA 120 of 2004, *Amin Mohamed Hassan v Zabra Mohamed Abdulkadir* [2009] eKLR where the High Court observed:

“even if the Children’s Act No 8 of 2001 was in existence, I don’t think the appellant would have succeeded for two reasons. First, the Children’s Act No 8 of 2001 didn’t expressly oust the jurisdiction of the Kadhi’s court nor did it repeal any of the provisions of the Kadhi’s Act.

19. In HCCA 85 of 2017 *Zudg v Sjkur* (2020) eKLR, Aroni J (as she then was), observed that children custody and maintenance issues are incidental to divorce and that Kadhis being in the category of Magistrates fall within the meaning of gazettement of all magistrates to hear and determine children custody and maintenance matters. She stated thus:

“Does the Kadhi Court have jurisdiction in matters of children in view of the establishment of Children’s Court? There are varied opinions by courts of concurrent jurisdiction on this matter and it is probably time that the Court of Appeal adjudicates on the same and settles the issue. This court for now, aligns itself, so did the Kadhis who sat in this matter with the thought that the Children’s Act did not oust the jurisdiction of the Kadhi or other subordinate courts in dealing with issues of children. Indeed, lately all magistrates are gazetted to handle children matters and in this court’s considered view, by implication Kadhis too being in the category of magistrates should and ought to hear such matters and more so where the same are connected and incidental to the cause before the Kadhi, so long as the said court applies the principles laid down by The Children’s Act and in particular applies the best interest of the child’s principle as enunciated by the said Act.”

20. Further the enactment of the Children’s Act did not oust the jurisdiction of the Kadhi’s Court and other competent bodies to resolve issue of custody and maintenance. Apart from not listing the Kadhi’s Court Act from the schedule of the legislations repealed by the Act, it used the term ‘may’ instead of ‘shall’. It thus envisaged other courts were competent to continue to hear and determine issues of children. The court of appeal in *TSJ v SHSR* (2019) eKLR, Civil Appeal No 119 of 2017, (Nairobi) the court of appeal, D.K Musinga, S.G Kairu, A.K Murgor JJA, held that there is no stipulation in section 73 of the Act that jurisdiction of the children’s court is exclusive. The court stated:

‘the judge followed that pronouncement with a contradictory but accurate statement that nothing precludes a body such as the arbitration Board over disputes relating to custody and maintenance of children where both parties submit to authority of such a body. There is however nothing in that provision that such jurisdiction is exclusive, Under part vii of



the Children's Act, 'a court' may on application make orders regarding custody, care and control and maintenance of children but again without stipulation that such jurisdiction is exclusive. We reiterate that as the judge correctly noted there is nothing in the Act that would prevent a body such as the arbitration board from arbitrating over disputes relating to such matter where both parties submit to the authority of such body.'

21. An Act of Parliament should not be interpreted to oust the provisions of the *Constitution*. In the Supreme Court petition No 10 of 2013 *Hassan Ali Joho & another v Suleiman Shabbal & 2 others*, Rawal, DCJ, Tunoi, Ibrahim, Ojwang, Ndungu, SCJJ) stated:

'The provisions of the *Constitution* are superior to any legislation. As such, when interpreting the provisions of an Act of Parliament, the Court must always ensure that the same conform to the *Constitution* and not vice versa. In order to ensure that justice is not sacrificed at the altar of technicality, the Court is, however, enjoined to invoke its inherent power while interpreting the *Constitution* and legislation, to preserve the values and principles of the *Constitution*.'

22. Article 159 2 (c) of the *Constitution* of Kenya, 2010 demands the promotion of alternative dispute resolution mechanisms. The law envisages other forums for resolution of disputes. A court established under the *Constitution* should have even mandate in the same. In *Nurani v Nurani* (1981) KLR 87 also reported as *AN v MN* (2008) 1 KLR 65, Madan J, opined that the Aga Khan Shia Imami Ismaili provincial council established under the holy Constitution ordained by the Shia Imami Ismaili Muslim faith spiritual leader His highness the Aga Khan could handle matters of personal law including maintenance and custody among its faithful. He stated:

'I am not aware of any statutory provision which prohibits a sect within the general society from setting up their own tribunal for the settlement of matrimonial or other permitted disputes between its members.'

23. If the law recognises awards of arbitration boards on issues of custody and maintenance of children, it follows, that the Kadhi's court, which for hundreds of years has been resolving such disputes, is more competent to determine same pursuant to the applicable laws. Priscah W. Nyotah, in a detailed paper titled '*Jurisprudence of judicial & other forums in custody & maintenance of children to parents professing Muslim faith*' published in the Kenya Review Journal, volume 7 No 2, (2019) concluded that 'The religious (Kadhi) courts have been clothed with clear and sufficient jurisdiction to handle custody and maintenance cases by legislation.' It is noteworthy that the principle of priority of best interest of children in matters involving them is well established in Islamic law. Article 122 of the *Islamic Charter on Family* (ICF) is very categorical on the issue. It is deeply entrenched and widely applied in Kadhi's Court.
24. The denial of the Kadhi's Court to handle matters of children between Muslims will have the unintended effect of multiple litigation that will invariably increase cost of justice and judicial time thus delaying justice contrary to the provisions of article 159 (2) of the *Constitution* of Kenya (2010). It is further against the people-centered judiciary Social transformation through justice (STAJ) policy that calls for multi-door approach to affordable, timely justice.
25. I find that the Kadhi's Court has requisite jurisdiction to hear and determine disputes of children custody and maintenance between parties who profess the Muslim faith and submit to its jurisdiction.



26. Is the court *functus officio*? *functus officio*, is defined in the [Black's Law Dictionary](#), Ninth Edition as:
- “ [having performed his or her office]” (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”
27. The Supreme Court expounding on the concept in Election petitions Nos 3, 4 & 5 [Raila Odinga & others v IEBC & others](#) [2013] eKLR (of *functus officio*) cited with approval an excerpt from an article by Daniel Malan Pretorius, in “[The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law](#),” (2005) 122 SALJ 832:
- “The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”
28. The court also relied on the holding in the case of *Jersey Evening Post Limited v A1 Thani* [2002] JLR 542 at 550 that:
- “A court is *functus* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus*, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available. [emphasis supplied]”
29. The court in [Leisure Lodge Ltd v Japhet Asige & Another](#) [2018] eKLR emphasized that upon delivery of judgment, courts retain the duty and powers to handle other issues consequent, complimentary, supplementary, necessary and facilitative relating to the matter. Justice Adoyo of the High Court of Uganda in [Transafrica Assurance Co Ltd v Lincoln Mujuni](#), cited with approval by the High Court in the case of [Wachira Karani v Bildad Wachira](#) [2016] eKLR wherein the learned judge stated: -
- “The rationale for this rule lies largely on the premise that an *ex parte* judgment is not a judgment on the merits and where the interests of justice are such that the defaulting party with sound reasons should be heard then that party should indeed be given a hearing
30. The court in [David Kiptanui Yego & 134 other v Benjamin Rono & 3 others](#) [2021] eKLR cited with approval *Mwala v Kenya Bureau of Standards* EA LR [2001] 1 EA 148, where the court stated:
- ‘to all that I should add my own views that a distinction is to be drawn between a regular judgment and irregular *ex-parte* judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance there was no proper service or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was inadvertently overlooked, the same ought to be set aside not as



a matter of discretion but e for a court should never countenance an irregular judgment on its record.’

31. In this matter, the respondent had approached court for orders of custody of the minors. She had deponed and persuaded court that she did not know the whereabouts of the applicant. Her application was granted on that premise. It turns out on the evidence deposed by the applicant that she was either economical with the truth or intentionally misled court under oath. The right to be heard in a competent court is a constitutional and fundamental right, and the basis of fair trial and justice. Section 79 (1) of the Kadhi’s Rules of practice and procedure KCPPR allow the court for reconsideration of its decision on application for sufficient reasons. The rules further retain the courts inherent powers to ensure ends of justice and prevent injustice under section 171. I find that the ruling and consequent orders of this court made on August 24, 2022 is an irregular *ex-parte* judgment obtained through lack of full disclosure of material facts and non-service of the applicant herein
32. What orders should the court give?
33. The applicant had moved to the Children’s Court in case No E1565 of 2022 for orders of access to the child. The paternity of the child is not disputed. That the child is a minor (4 years old) is also not disputed. The issue of actual custody is not contested. Only the issue of access of the contested. The issue of custody being a fundamental right to the child and parents and having found I have jurisdiction to handle the matter, It is prudent and efficacious to proceed to give necessary orders instead of striking out the proceedings or retrial of the matter. Accordingly, the orders made on August 24, 2022 are hereby reviewed as follows:
- a. Both parents share equal legal custody of the minor.
 - b. The petitioner is granted actual care, control and custody of the minor, respondent to get reasonable access; at least one week every month and one holiday (3 weeks) a year.
 - c. The petitioner may only travel with the child out of the country, except to Uganda, with the express consent of the respondent or an order of the court.

Each party to bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON 9TH MARCH, 2023

HON. ABDULHALIM H. ATHMAN

SENIOR PRINCIPAL KADHI

In the presence of:

Mr. Suleiman A. Mohamed, Court assistant

Ms Murangiri holding brief for Mr. Ali for petitioner/Respondent

Ms. Shiko holding brief for Ms. Irene Kiarie for Respondent/Applicant

