



AMH v SGF (Divorce Cause E046 of 2023) [2023] KEKC 16 (KLR) (17 August 2023) (Ruling)

Neutral citation: [2023] KEKC 16 (KLR)

REPUBLIC OF KENYA
IN THE KADHI'S COURT AT UPPER HILL (NAIROBI MILIMANI LAW COURTS)
DIVORCE CAUSE E046 OF 2023
AH ATHMAN, CK
AUGUST 17, 2023

BETWEEN

AMH APPLICANT

AND

SGF RESPONDENT

RULING

1. The respondent filed Notice or preliminary objection (P.O.) dated 7th June, 2023 on the following reasons:
 - i. That this Honourable court does not have jurisdiction to entertain this petition since the petition offends sections 14 and 15 of the [civil procedure Act](#) and rule 36 of the Kadhi's courts (procedure and Practice) rules, 2020.
 - ii. That the cause of action arose in Garissa and that the matrimonial home of the parties is in Garissa where the parties live together with children.
 - iii. That there is a Kadhi's court that is competent to hear and determine this matter, and that the filing of the suit in Nairobi is malicious and bad in law.
 - iv. That the petitioner is forum shopping and has no right of audience before this Honourable court and the petition constitutes a gross abuse of the court process and should be struck out with costs.
 - v. That the petition is incompetent, incurable and bad in law.
2. The respondent opposed the PO through replying affidavit dated 19th June, 2023. The petitioner/respondent deposed that rule 36 (b) of the KCR provide for claimant to file case where either party habitually resides. She stated that she currently lives and works for gain in Eastleigh - Nairobi county and both counsel for parties are based in Nairobi and that unlike the court in Garissa, the court in



Nairobi has virtual forum where parties can participate easily. She stated further that the issues raised are not pure points of law and require factual consideration.

3. The application was disposed by way written. The issues for determination in this preliminary objection is the right place of suing.
4. Mr. Abdirazak for the applicant submitted that the respondent resides in Garissa, where the matrimonial home situate and the children reside and that under section 15 of the *civil procedure Act* matters are limited to a geographical area. He averred that the petitioner was out of the jurisdiction of the court at the time of swearing the affidavit. He deposed further that the virtual courts are not reliable due to challenges on power and connectivity. He argued the matter could be resolved faster at Garissa due to the lower number of filed cases than in Nairobi.
5. Mr. Yussuf for the petitioner / respondent submitted that preliminary objection does not raise a pure point of law. He argued that the issue does not qualify as a point of law, that the *civil procedure Act* does not apply to the Kadhi's court. He further submitted that the unlike the Magistrates court, the Kadhi's court is not limited to a place of suing, that the Kadhi's Court Rules is the applicable law on the matter and not *Civil procedure Act*. He contends the rule 36 (b) of the rules give this court with jurisdiction to handle this matter as the petitioner currently resides in Garissa.
6. A preliminary objection is defined in the well-known case of *Mukisa Biscuits vs West End Distributors Limited* (1969 EALR) as that which:

“raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

7. In the case of *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd.* (1969) EA 696, where Law J.A. and Newbold P. (both with whom Duffus V-P agreed, respectively at 700 and 701, held as follows:

Law, JA. stated:

“So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued ass a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Newbold, P. stated:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing butt unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

8. The issues whether the petitioner is resident at Garissa or Nairobi is an issue of fact that needs ascertainment. It is central to the application in this matter, not being a pure point of law, it does not qualify as a ground for preliminary objection.



Jurisdiction is everything. A court only acts within the confines of jurisdiction conferred to it by the Constitution of statutes. In the case of *Owner of the Motor vehicle Lilian 'S' vs Caltex Oil Kenya Ltd* (1989) eKLR, held:

‘jurisdiction is everything. A court has no power to make one more step where a court has no jurisdiction that could be no basis for a continuation of proceedings pending other evidence. A court of law down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.’

9. The Kadhi’s courts have jurisdiction to determine questions of Muslim law relating to personal status, marriage, divorce and inheritance where all parties profess the Muslim faith and submit to its jurisdiction. These appear and are in fact the only limitations to the jurisdiction of the Kadhi’s courts. The Constitution of Kenya (2010), Article 170 (5) 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.

10. The High Court in *Farzila Hasham v. Kadhi’s court, Narok / Kericho & Another; Katijabhai Essak Musa (interested Party)* [2020] eKLR, Bwongonga J, pronouncing itself on this issue held as follows:

‘It is clear from the foregoing constitutional provisions that the Kadhi’s court is only limited in terms of the subject matter and the religion of the parties, who must profess the Muslim faith. Unlike magisterial courts whose jurisdiction is governed as to the place of filing by section 11 to 15 of the civil procedure act, (Cap 21) Laws of Kenya; and section 5 of the Magistrates court Act (cap 5) Laws of Kenya in terms of pecuniary jurisdiction, the Kadhi’s court is not limited in terms of both territory and pecuniary jurisdiction.’

11. The applicable rules of procedure in the Kadhi’s court are the Kadhi’s court (procedure & practice) rules – 2020 (the rules) unless there is a vacuum, then the Civil procedure Act applies under rule 173 of the rules. Rule 36 is very clear the place of suing is determined by several factors including where the cause of action arose, where the parties reside and normally work for gain, where the estate situate and where most of the beneficiaries of the estate normally reside. Further, the court has discretion to make direction on the issue where parties disagree on this issue. Rule 36 of the Kadhi’s court rules provide

‘A suit shall be filed where:

- (a) a cause of action arose or in case of divorce and matrimonial matter, where either of the parties habitually reside,;
- (b) in case of inheritance proceedings, either where most of the estate is situated or where the majority of the beneficiaries reside.
- (c) In cases of conflict, the court may direct a convenient place of hearing.’

12. Unless both parties reside out of the jurisdiction of the court, having the other criteria on place of suing, a matter should not be transferred to another court merely on the reason the cause action or even estate properties situate. Kadhi’s courts have not been limited by the constitution regarding territorial jurisdiction. The rule, a departure from the provisions of the civil procedure Act was aimed at deepening access to courts especially by vulnerable groups. The rule ensures, especially at times of divorce of parties hailing from different regions, the place of suing does not become a hindrance to access of



justice. *The constitution* and rules being clear a claimant may initiate a case from the nearest Kadhi's court to the place of their normal residence, the preliminary objection fails. It is hereby dismissed. Costs be in the cause.

DATED, SINGED AND DELIVERED VIRTUALLY ON 17TH AUGUST, 2023

HON. ABDULHALIM H. ATHMAN

CHIEF KADHI

In the presence of

Mr. Suleiman A. Mohamed, court assistant

Mr. Yusuf for the petitioner / Respondent

Mr. Abdirazak for the Respondent / Applicant

