



**DGS v ATR (Matrimonial Cause E007 of 2022)  
[2023] KEKC 25 (KLR) (31 August 2023) (Ruling)**

Neutral citation: [2023] KEKC 25 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT MOYALE  
MATRIMONIAL CAUSE E007 OF 2022**

**G ADAN, PK**

**AUGUST 31, 2023**

**BETWEEN**

**DGS ..... PLAINTIFF**

**AND**

**ATR ..... DEFENDANT**

**RULING**

1. On 26<sup>th</sup> October 2022, the plaintiff filed this Matrimonial cause, seeking for the defendant to vacate his matrimonial home, custody of the children, and any other relief deem to be proper to grant.
2. The parties in this suit were married under Islamic shariah in the year 2002 and were blessed with six children aged between 19 to 3 years old.
3. The plaintiff claims having misunderstanding with the defendant over the bad behaviour and indiscipline cases of their children due to lack of guidance on her part. He said some of their children indulged in stealing and became school dropout under her cover. He averse to intervene the issue by involving both the defendant’s and his families regarding the issue but the defendant was found guilty on every time they do intervention, as she became adamant to guide her children.
4. Finally, the plaintiff avers that he issued divorce and gave notice to the defendant to vacate the matrimonial home after the end of her eddat period, but which she refused to vacate after the said period.
5. On the other side, the defendant in her defense, admits the said marriage conducted under Islamic shariah and the children blessed out of their union. But she refutes the allegation over her refusal to honour the plaintiff’s instruction in their day to day domestic activities for their well-being. She further avers that she refuses his plan to sale the only piece of land they have as she claims the plaintiff sold many things without her consent.



6. About the bad behaviour and indiscipline cases of their children she denies it to be the cause, but she blames the plaintiff for staying away at his second wife and visit them once in a month. She accused him of failing to give his parental responsibilities. Hence, she avers that their children found misbehaved as a result of his negligence.
7. She also denies none of them was found guilty during the elders meeting to intervene their issue, it was only that their differences were solved amicably and given a word of advice to stay as husband and wife.
8. But she admits the statements regarding the advice she was given by both parents to respect her husband decision or instruction that she declined. Then she further in contrary avers respecting and obeying his opinions for all those years they have been staying together in their matrimonial home.
9. She also denies the statements, about his sentiment to solve their differences through elders and sheikh intervention, but stating that the petitioner called the said sheikh and his elder brother purposely to divorce her in the presence of the two, but not to solve their differences. She avers that, unfortunately, it didn't work well as the said sheikh was against the divorce that he was intending to do, instead he was asked to remain calm and stay together.
10. She also denies the allegation about her refusal to change her attitude and remained adamant repeating the same mistakes. She avers that she has been staying with her children without any problem since their matter was intervened by family members.
11. She also refutes the allegation that the defendant was divorced not because the several interventions did not work in solving their problem, she said it was the plaintiff's intention to send her off with her children out of the matrimonial home, in order to relocate his second wife to the same matrimonial home.
12. She admits been given 3 months' notice to vacate from the matrimonial house where she didn't comply and instead reported the matter to the respective offices. Reason whereof, she seeks to stay in her matrimonial home with peace of mind, custody of the children, order to restrict the plaintiff not to sold any of their assets, and any other relief deem fit to grant.
13. Before the matter is heard, the defendant filed through her counsel Hassan Ibrahim & Co Advocates, another application under certificate of urgency by way of Notice of Motion dated 11<sup>th</sup> January 2023, in the Principal Kadhi's court at Moyale, seeking the presiding Kadhi, by then Hon. Ali Dida (P.K), to recuse himself on her allegation for been a relative to the respondent, and she is said to be apprehensive to attain any justice from this court given the apparent, probable and possible bias from the presiding Kadhi. She also alleged that the presiding Kadhi ignored the right of refusal by the defendant to submit to the jurisdiction of the honourable court which to her view should have invoke the presiding Kadhi to down his tools, and transfer the suit to a court with competent jurisdiction.
14. She filed this application objecting the jurisdiction of Kadhi's court, long after she admitted and assumed the competent jurisdiction of this court in her defense. She states the Kadhi's court lacks jurisdiction to hear and determine the custody of the minors pursuant to Article 170(5) of *the Constitution* of Kenya and section 73 of the children's act. She also relied on the fact that she does not submit to the jurisdiction of the Kadhi's court, as she alleged her marriage to the plaintiff was solemnized under the Borana customary practice and not the Islamic law. She also stating there exists a court order from the children's court at Marsabit Law Courts, with the competent jurisdiction on the subject matter granting interim orders of custody and restraining the plaintiff from evicting the respondent from her matrimonial home. She averred the suit in this court is abuse of the court process and illegitimate use of the court process, as it has been instituted as a means to evade the jurisdiction of the children's court at Marsabit.



15. On the other side, the plaintiff filed a replying affidavit, in protest to the objection by the defendant to the jurisdiction of Kadhi's court. He averred that he married the applicant / the defendant under Islamic shariah law presided over by one SHEIKH ABDULLAH KALICHA Imam Sololo Jamia mosque on material date in the year 2002 and dowry was paid. He further states that the defendant in her defense paragraph one in respect to this case (Case No. E007 of 2022) the Applicant / the defendant clearly confirmed that she was married under Islamic shariah law. In addition, he states that he married the applicant while she was studying in madrasa and some of her teachers then are still alive and can attest to the same, the respondent wonders why she suddenly refute the faith that she belongs. He as well challenges the applicant to produce evidence confirming how the applicant was married under Borana customary law as the said custom has its own procedures, and as to him it's not possible for a Muslim person to undergo customary marriage, because to his sentiments is a disrespect to Muslim faith and in extension to Borana community.
16. The respondent / the plaintiff also, denies being a relative of the Principal Kadhi, and wish the Applicant / the defendant to proof to this court how the honourable Kadhi is related to him. Also want the applicant to proof the allegation on biasness against the presiding Kadhi. He further denies as not aware of any eviction order given by the Kadhi's court to evict the Applicant from the matrimonial house as alleged and if at all the same exist he must have been aware. Finally, he fully contented with the Principal Kadhi's Court at Moyale for being a Muslim and thus his case can only be heard and determined by the Kadhi's Court.
17. After perused through the plaint and subsequent defense and notice of motion filed by the defendant, it is important that this court has to deal first with the question objecting the jurisdiction of this court. It is clear that the defendant since she filed this application, the matter did not been heard sometimes for the reason of adjournment requested by the respondent / the plaintiff due to his lawyer not present, and on different dates neither party was present to proceed with the hearing.
18. To deal with this question, the defendant who is applicant had already been, submitted in her defense to the jurisdiction of this court, then after the matter set to proceed with the next cause of action she present this instant application to withhold the court process which has already been started and she has already submitted to the court to deal with the matter, for her own reason may be to advance another suit she filed later on 25<sup>th</sup> November 2022, in the Magistrate court at Marsabit law court, when the current case in the Kadhi's Court has already been instituted long before the case in the said Magistrate court.
19. As she filed MCCHCC/E006/2022 in Magistrate Court at Marsabit, seeking under certificate of urgency for custody, care and control of children and restraining orders from evicting and removing the minor children from the matrimonial home at Sololo and custody of the plaintiff without leave of the court. She has not sought the same orders in the Kadhi's court and was denied. She could have sought the same in the Kadhi's Court instead of instituting another case at Marsabit, while there is also another Magistrate courts at Moyale, which is nearer and more accessible than going far to Marsabit. This making justice more expensive and inaccessible, also waste of resources and abuse of court process.
20. At the same time, she has not proceeded to proof her case on her objection. She stopped attending the court while the respondent (the plaintiff) has attended this court several times, just willing to pursue this matter. She proceeded with her case at Marsabit and stop coming for this one in the Kadhi's court, without getting answers to her question. She has not proved her allegations on Kadhi being a relative of the plaintiff, thus being apprehensive to get justice from this court. She also objected to the jurisdiction of the court on unfound grounds, late after she had already submitted to the same court and sought some prayers for determinations. It is therefore, based on the above premises, I struck out



the application by the defendant objecting the jurisdiction of the court, and the plaintiff to continue with the main case without the presence of the defendant with the leave of the court, and since the matter has overstayed.

21. To embark on the main cause, it is evident that the cause of differences between the parties of this marriage arose as a result of indiscipline cases of their children who indulge in stealing and dropped out of the school. They threw the blame to each other as the cause due to lack of good parental guidance and upbringing towards their children. The plaintiff attributes the bad behaviour of the children and their school dropout to the defendant due to her negligence in guiding them whenever they are needed, on contrary, the defendant in her defense blame him for been away from matrimonial home most of the time and visit them once in a month.

Therefore, one of the questions requires determination in this matter;

1. who is to carry blame between the parties of this marriage, for the cause of bad behaviour of their children and their school's dropout?
  2. Another issue is whether the divorce alleged to be issued by the plaintiff has not work-well or effective?
  3. Also, another question is over the matrimonial home, whether the defendant will vacate the matrimonial home or whether she will remain there with her children?
  4. Lastly, the issue of custody of their children, who has the best interest of the children so as to have the right of custody between the two?
22. On the question, who is to be blamed for the misbehaviour of the children of this marriage? To answer this, the plaintiff gave sworn evidences, testifying that his problem with the defendant is that she is not respectful and disobedient to his directives. She refused to guide her children properly. He said to have made effort and intervened the problem even with elders but she become adamant until he divorced her and ordered her to vacate his plot after 3 months' notice but she in the end refused.
23. He presented four witness all testified against the defendant, in all the claims, regarding marriage conducted according to Islamic Shariah, dowry of two cows which were paid, the indiscipline cases of the children as a result of the defendant not cooperating with the plaintiff in giving guidance and proper upbringing of the children, how she had withdrawn some of the children from school, and how she supported some of the bad behaviour of the two boys, who involved in stealing other people's property which she covered them, but later was found wrong after the said properties was recovered from her own house.
24. The plaintiff produced a copy of chief letter explaining how she was rude, when enquired about why her son who did not report to school, she responded rudely and answered that the child is hers and it is none of their business to intervene, where he referred the matter to the children office.
25. He also produces another documentary evidence, such letters from the schools, which appreciates plaintiff's efforts in providing school fees to the children of the marriage. These are all collaborating evidences in support of the plaintiff. Therefore, it is clear evidence that the plaintiff has tried his best towards ensuring their children live a successful life, but his effort did not bear fruits if there is no support from the defendant who is the mother. One person alone cannot achieve everything alone, unless there is join force with like-minded, and trustworthy people. The plaintiff's effort alone will not achieve unless joining effort with the defendant, who has like-minded with him. If she is not joining effort with him in teaching and raising the children to be a successful person in future, there will be fruitless effort at the end.



26. It indicates, from the evidences, the defendant works to undermine the effort of the plaintiff by removing the children from school, and failing in giving proper guidance on her side. She fails to see what will be good and determine the future life of her children, instead she seems focusing on the part of the plaintiff, where did he spent most of his time away from home? This indicates in her defense where she blames him without proof for been away from home and stays at his second wife. If may be God forbid the plaintiff may die, would she leave her children unguided because the plaintiff is not there to guide them? However, it is she must be teaching and guiding her children to be having good character, and abstaining them from bad act, on whether the plaintiff is there or not. She has to carry her own duty towards her children at any time, and in any situation.

27. Islam, holds parents responsible for steering their children's upbringing according to the guidelines of the Quran and Prophet's (P.B.U.H) traditions. The Prophet (SAW) said: "Allah (SWT) will ask every caretaker about the people under his care, and the man will be asked about the people of his household" (Nasa'i, Abu Da'ud). Allah (SWT) states in the Quran about the need to raise families in the light of their end destination, which may be translated in the following words:

"O you who believe! Ward off yourselves and your families against a Fire (Hell) whose fuel is men and stones, over which are (appointed) angels stern (and) severe, who disobey not, (from executing) the commands they receive from Allah, but do that which they are commanded" (Surah Tahrim, 66:6).

Children have the right, therefore, to be raised as responsible Muslim adults and parents must ensure that right appropriately. Parents must be conscious and take an active role in guiding their children and families on the path of truth. The Prophet Muhamad (SAW) said:

"Every one of your (people) is responsible, and every one is responsible for whatever falls under his responsibility. A man is like a shepherd of his own family, and he is responsible for them" (Bukhari and Muslim).

28. In another tradition, "The best gift to children from parents is their correct training" (Tirmidhi). Parents should also recognize that raising good children can be a source of their salvation in the hereafter. This because if parents raise good and God-fearing children, those children can constantly pray to Allah for their parents after their death. The Prophet Muhammad (SAW) said: "Upon death, man's deeds will stop except for three deeds, namely: a continuous charitable fund, endowment or goodwill; knowledge left for people to benefit from; and a pious righteous and God-fearing child who continuously prays to Allah, for the souls of his parents" Muslim).

29. Another issue is whether the divorce alleged to be issued by the plaintiff has not work-well or effective? It is evident that the defendant was divorced as declared by the plaintiff himself. In classical Islamic law, the husband has right to dissolve the marriage by simply announcing to his wife that he repudiates her. When marital harmony cannot be attained, the Quran allows and even advises the spouses to bring the marriage to an end (Q 2:231). Although number of talaqa have not been stated. He testified in court he divorced her before the elders after he made several efforts to resolve their problem and she refused to hear his advises and that of the elders. However, she is not agreeing with the divorce issued, she has been become divorced with a revocable repudiation considered as one talaqa by this court as per shariah, and the eddat period of three months has elapse, and now she has become available for marriage to any other man of her choice, and or the priority is for the plaintiff if he may be wishing to resume the marriage with her but on a new contract and with new dowry.

30. The Quran promote reconciliation, through negotiated settlements between the spouses themselves or the use of arbitrators from their families. However, when mutual good settlement is not possible,



there should be an amicable parting. Thus, the Quran treats divorce as something permitted but not laudable.

31. Another question is over the matrimonial home, whether the defendant will vacate the matrimonial home or whether she will remain there with her children? Matrimonial home is considered part of matrimonial property under Islamic law, and in common law. In section 2 of *Matrimonial property Act*, 2013 (Act No. 49 of 2013), states,

“Matrimonial home means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property”.
32. It also refers to the wealth acquired during the marriage period, which both spouses, directly or indirectly, participated in acquiring and developing (Sahid, 2016). It also includes the property acquired and owned by the spouses through gifting, such as if a real estate has been bequeathed or gifted to them. Such matrimonial property can take the form of visible or invisible, fixed or movable property (Yeates, 1999).
33. In Kenya law, Matrimonial property has a meaning assigned to it in section 6 of the Act, “Meaning of matrimonial property (1) for the purpose of this Act, matrimonial property means: - (a) the matrimonial home or homes; (b) household goods and effects in the matrimonial home or homes; or (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage”. (2) despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property. (3) despite subsection (1), the parties to an intended marriage may enter into agreement before their marriage to determine their property rights. (4) A party to an agreement made under subsection (3) may apply to the court to set aside the agreement and the court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.
34. Section 7 of the same Act, states, “Ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved”. It is permissible for any spouse to claim their share in matrimonial property during the marriage or after its termination, based on the respective share of their contribution to its accrual (El Saadawi, 1982; Majzub & Mansor, 2012). Contribution means, under section 2 of the Act, “...monetary and monetary contribution and includes: -
  - (a). domestic work and management of the matrimonial home;
  - (b). child care;
  - (c). companionship;
  - (d). management of family business or property; and
  - (e). farm work”.
35. The parties in this case, are professing Islamic faith, and they were married under Islamic law, hence their matrimonial property may be governed by Islamic law in all matters relating to it. This as provided under section 3 of the Act, which states. “A person who professes the Islamic faith may be governed by Islamic law in all matters relating to matrimonial property”.
36. The partnership in matrimonial property is established only through the explicit or implicit consent of both spouses (Fremaux & Leturcq, 2018). The scholars unanimously agree that original ruling of partnership is the permissibility. Allah Almighty said: “And certainly many partners wrong each other,



except who believe and do good – but how few are they!” (Sad 38:24). It is also reported from Abu Hurairah that the Prophet (peace and blessing of Allah be upon him) said: “Allah, the Highest, said ‘I am the third (partner) of two partners as long as one of them does not cheat his companion. Then, if he cheats (his partner) I depart from them.’” (Abu Daiwud, n.d.)

37. In Islam, the marriage contract doesn't impose on spouses to have a joint estate; rather, each of them has his / her separate and independent estate that he / she can dispose of as he / she wishes. This adopted by the International Islamic Fiqh Academy in a decision in 23<sup>rd</sup> session in 2018.
38. The property which has disputed by the parties are matrimonial plots at Sololo including matrimonial house and whatever house hold items attached to it. According to the plaintiff that they acquired two plots during their subsistent marriage; one plot that which the plaintiff testified to acquire it through purchasing from one seller “Dida Tadicha Galgalo” at Kshs 15000 in the year 2008. He testified to have bought the said plot using his own money from his hard earning from casual work, which did not been contributed by the defendant any shillings to it. He said to have developed and constructed their residential house in it, which the defendant and her children are now living in. Another one is also given to him by his father in-law the defendant father, he developed by making fence around the plot and protected it for many years. On this second plot it was said to be given to the defendant to be her separate and independent property.
39. The question is whether the said plots constituted the matrimonial property. As per the fore going evidences and in accordance to the mentioned laws the said plots therefore, constitutes matrimonial property of the parties in this suit. Because it is evident that they have acquired and maintained during the existence of their marriage. Despite their extent of contribution for each spouse can defer. Since it is evident that one of the plots bought by the plaintiff's effort, while the second one was given to both of them by the defendant's father. It is also evident that the plaintiff developed both plots using his money in constructing temporary residential home composing of five rooms, stores, and kitchen. Also made fences for each plot.
40. As per these evidences, it indicates that the plaintiff has contributed more efforts towards acquisition and development of the said plots than that of the defendant. It is not stated that she works for gain as she was only a house wife providing companionship as a spouse, doing domestic work at home. It is testified that she failed in providing proper guidance towards her own children. However, this court will consider her none monetary contribution for been in the company of the plaintiff and sired the children together. She therefore, will get a share of the matrimonial property at a rate of 12.5 % percent of the whole property. Thus, the plaintiff should share with her at the said rate by giving her amount equivalent to this rate after making valuation of the said property.
41. Lastly, on issue of custody of the children of the parties in this suit, the principle determinant is the child's best interest to be the primary consideration in all matters involving or affecting the child. This as per Article 53(2) of *the Constitution* of Kenya 2010, international human right instruments such as Convention on the rights of the child (CRC), Article 3(1), which provides that “in all actions concerning children, whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies the best interests of the child shall be a primary consideration.”
42. In Islamic law, all jurists, whether they considered custody of child to be a right of the child or of the custodian, they would agree that the custody of the child is designed for the welfare of the child and therefore, they would not permit custody arrangements to lead to the destruction of the ward or his religion.



43. According to the principle established by Muslim jurisprudence, father is considered to be the child's natural and legal guardian because upon him is the responsibility of nafaqa (maintenance) of his child. Mothers are custodians till a particular age after which the custody either reverts to the father or the child is given option by the court to choose between both parents, though no such age limit is stated in the texts. This clearly shows that the wishes of the minor while deciding his or her custody has always been subject to the principle of welfare of the minor even in classical Muslim legal tradition. Classical scholars have added that when it is detrimental for the child to live with his or her mother due to her remarriage, profession or religion then the custody will transfer to the father.
44. In Nayl al-Autar it is stated that, it is essential to look into the interest of the children before they are given the option to choose between the parents for their custody. If it becomes clear about any one of them that he or she would be more beneficial to the children from the point of view of their education and training then there is no need for qur'a or choice of the children.
45. It is evident that two boys dropped out of school, they are above 18 years hence they will not be under any one's custody. One child already in a learning institution at Nairobi under her uncle's care and protection, therefore, she has to remain there for her best interest until may be orders varied by this court. The defendant is currently holding custody of three minors whom their upkeep and fees are catered by the plaintiff. It is evident that the defendant had failed in guiding and providing proper care to the two bigger boys. Therefore, the three minors are at risk of not given proper care and good character. The fear is they will in future may drop out of school like the bigger boys, if they are to be left under the custody of the defendant. Hence, I oust her custody of the two children who can clean themselves and wash their clothes without the assistant of any body. But the child of 3 years to remain with her mother the defendant until may be otherwise the court give different order to her best interest.

Orders accordingly.

**DATED, DELIVERED AND SIGNED AT MOYALE ON 31<sup>ST</sup> AUGUST 2023.**

**BY HON. GALGALO ADAN – PRINCIPAL KADHI.**

In the absence of the defendant but presence of:

Dulacha - the plaintiff

And

Adho Godana – the Court Assistant

