FAS v FAE & another (Divorce Cause 07 of 2015) [2022] KEKC 148 (KLR) (Family) (28 July 2022) (Ruling)

Neutral citation: [2022] KEKC 148 (KLR)

REPUBLIC OF KENYA

IN THE KADHIS COURT AT NAIROBI (MILIMANI COMMERCIAL COURT)

FAMILY

DIVORCE CAUSE 07 OF 2015

AH ATHMAN, SPK

JULY 28, 2022

BETWEEN

FAS .... APPLICANT

AND

FAE .... 1ST RESPONDENT

HAG .... 2ND RESPONDENT

RULING

1. The applicant married the first respondent in Uganda. They were blessed with one child, a daughter Z F hereinafter referred to as the 'minor') born in Kenya in 2006. They travelled to the United Kingdom leaving the minor with the 2nd respondent. The couple had had three other children, all male, in the U K. The 1st respondent is 2nd respondent's niece who took her in care from a tender age upon death of her mother Aisha Guyatu Abdi. The minor is essentially a maternal grandchild of the 2nd respondent. The applicant and the 1st respondent divorced in 2015 and are not living together. Both are in the U K. The minor and the applicant's relatives, the paternal relatives of the minor are resident in Kenya.

2. The applicant had moved this court in 2016 for orders of custody of the minor and that the 2nd defendant is not a biological grandmother of the minor and therefore not entitled to custody. The court in judgment dated March 16, 2018 vested physical custody of the minor to the 2nd respondent and legal custody to the applicant and directed the applicant to continue providing for the minor. The court also gave the applicant visitation rights of the minor during the schools and holidays and on alternative weekends from lunch time to Saturday or Sunday till 6:00 p.m. Aggrieved by the orders on access of the minor, the petitioner filed the current application.

3. The petitioner's Notice of motion application dated October 18, 2021 the petitioner's applicant prays for orders that:

i. Spent

ii. The orders issued on March 16, 2018 limited to access and or visit of the minor Z F. be reviewed or set aside.

iii. That the applicant and or his representative Abusufian be granted unlimited access and or visitation of minor Z F at any school she may be attending

iv. That an order do issue for equal sharing of access of minor Z F on all school holidays and or the right of sleep over at the applicant's family residence.

v. That the respondents be compelled to refund to the applicant the sum of kes 85,900.00 paid as school fees of Z F by consent but transferred to a different school without knowledge or consultation of the applicant.

4. The respondent opposed the application through her replying affidavit dated November 22, 2021.

5. The applicant deposed that it is in the best interests of the minor that both families have shared access to allow her to bond and know his larger family. He argued that one of the Maqasid al Shariah is protection of lineage, which objects cannot be realised in the circumstances of the orders given. He averred that the minor has now matured and can therefore also live with her father and his relatives. He stated that he paid kes 85,900.00 being the minor's school fees at Nairobi Muslim Academy but the respondents took her to another school, St [particulars withheld] High School.

6. In opposition to the application, the 2nd respondent deposed that she has been having custody of the minor since she was an infant and her father had left for the United Kingdom; that the applicant has been denied custody or access of his other children in the United Kingdom due to his domestic violence. She further stated that the applicant is a flight risk, his address is unknown and may disappear with the minor for good. She stated that the minor is no longer of tender age and her wishes must be ascertained. She stated that, contrary to the applicant's assertions, he and his sibling are allowed unsupervised access of the minor. She stated that the reason they enrolled the child at St. [particulars withheld] High School, was because it was the original school the child had been selected for admission but they had agreed to have her admitted to Nairobi Muslim Academy. However, the applicant failed to pay fees at the Academy in time compelling them to report to the original school the child had been selected to. She averred that the school records do not show any monies were paid in respect of the minor at the Nairobi Muslim Academy.

7. The matter was disposed of by way of written submissions. However, the respondents failed to file their submissions.

8. Mr Fareed for the applicant argued that the orders on access and visitation of the minor are too restrictive and do not accord the minor, the applicant and his family sufficient time to familiarise with each other and offends the doctrine of protection of lineage and kinship, one of the Maqasid al Shariah. He contends the court misapprehended the facts, the law or both and arrived at a decision that is prejudicial to the minor. He submitted that the 2nd respondent is not a biological grandmother of the minor and therefore not entitled to custody of the minor. He argued the social enquiry report was biased as he was not interviewed.

9. I have carefully read to the parties' depositions and submissions by learned counsels. The key issue for determination in this application is whether it satisfies the requirements for a review or reconsideration. It should be noted that the bench that handled and determined the main matter and the one handling this application are different officers.

10. Order 45, *Civil Procedure Rules*, cap 21 Laws of Kenya provides three grounds for review of the court's orders. These are:

    1. discovery of new and important evidence that was not within his knowledge or could not be produced by him

    2. and error apparent on the face of the record

    3. any other sufficient reason.

11. The same is replicated in rule number 79 (1) of the *Kadhi's Court (practice and Procedure) rules 2020* (KCPPR) which adds another ground, that is 'if the ruling or order requires clarification'. Parties are therefore entitled to apply for review if they can successfully demonstrate the four grounds; demonstration of important new evidence that was not within their knowledge or ability at trial, a clear error on the face of record or an issue needing clarification. An error would normally be self-evident and would not require elaborate submissions to discern.

12. The applicant made copious submissions, heavy on what would qualify as grounds of appeal but thin on evidence of any error on the face of the record or new evidence that could lead the court to give a different decision on the issues in the matter. He has failed to demonstrate any of the above cited requirements for review. The lengthy submissions on the centrality of kinship in Islamic law is not disputed. They are submissions that ought to have been made at trial stage. The learned trial Court applied his mind to the facts and the law and entered a considered decision. It could, in the applicant's view be faulty. Even if that were the case, a wrong application of law or wrong finding does not qualify as a ground for review although it may qualify as a ground for appeal. In the case of *Pancras T Swai v Kenya Breweries ltd* [2014] eKLR, the court of appeal NAI, the court held:

    > "...the appellant's right to seek review, though unfettered, could not be successfully maintained on the basis that the decision of the court was wrong either on account of wrong application of the law or due to failure to apply the law at all....'an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal."

13. That said, though, the KCPPR_2020, the applicable rules of procedure in the Kadhi's court, envisages unlimited review of children custody and maintenance matters in the best interests of children. The applicant has to demonstrate the review sought is not merely for his convenience but is predicated on the best interests of children and upon credible proof of material change of circumstances. Rule 162 (1) of the rules provide:

    > "The court may, at any time, on an application and for sufficient reasons, from time to time, revoke, review, suspend or vary any order, where the order is in respect with the status of children and / or any financial provisions for the spouse or children."

14. Rule 162 (2) provide:

    > "Any order made under this part of these rules may be rescinded or varied upon the application of any person interested thereunder and upon proof of change of material circumstances."

15. In the instant application, the minor is now aged (16) and in boarding secondary school. She is above the age of discernment and an adolescent. Strictly under Islamic law, she is allowed to make her own

decision on the preference of custody between her parents. Ibn Qudamat al Maqdisy, in Al Mughni at 9 pg 273 opined that children have freedom to choose custody of their preferred parent. He stated:

> " where parents fight over custody of a child who has reached seven years and is free of any mental disorder, custody shall be given to the preferred choice of the child. It was the ruling of Omar, Ali and Shuraih and is the view of the Shafi' (and Hanbali) schools of thought based on a precedent on the same issue by the prophet Muhammad (may Allah's peace and blessings be upon him) as reported in hadith by Saeed and Shafi' on the authority of Abu Huraira."

16. Al Shaukany in Nail al Awtar, 6 pg 386 added that:

> " the right to choose (parent for custody) for a child who has attained the age of discernment and puberty is equal without discrimination to both boy and girl child."

17. The choice of the child though, must be tested to be in its best interests. Al Shaukany in Nail Al Awtar, 6 pg 386 stated:

    It needs to be reasonable and not detrimental to its welfare. Commenting on the scholar's opinions on the issue,

> " Ibn Qayyim stated that it is imperative before resorting to options of choice of lots in determining disputes on custody, that the child's best interest of the child is considered. Where one of the parents is best suited for custody of the child, he or she shall be granted same without resorting to lots or choice. He relied on verses of general application such as Q.66.6 'O you who have believed, protect yourselves and your families from a Fire whose fuel is people and stones…' He claimed the scholar's opinion who give priority to lots or choice of children is limited by this verse. He reported that Ibn Taymiyah said: 'two divorcees fought over custody of their child before a Kadhi, the Kadhi let the child choose either parent and he chose his father. The mother requested the Kadhi to ask the child the reason for his choice. When asked, the child said, ''my mother sends me to teachers who punish me but my father lets me play with other children'', the Kadhi then reviewed his decision and granted custody to the mother"

18. Under section 76 (3) of the *children's Act*, cap 141 Laws of Kenya, the court is required to consider the child's wishes according to her age and understanding. It provides:

> " where the court is considering whether or not to make an order with regard to a child, it shall have particular regard to the following:
>
> (a) the ascertainable feelings of the child concerned with reference to the child's age and understanding."

19. In this matter, the age, understanding and maturity of the child is the only material change in the circumstance on the issue of custody and visitation rights of the minor. The applicant failed to demonstrate it is the child's wishes. The parties should have requested the child to be called to inform court of her wish to settle the issue with finality. In the interests of justice, the same may be considered on application by either party.

20. The application lacks merit. It is hereby dismissed with costs.

    Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON 28TH JULY, 2022

HON ABDULHALIM H ATHMAN

SENIOR PRINCIPAL KADHI

In the presence of:

Ms Judith Ndori, Court assistant

Mr Fareed for the applicant

Mr Ndege for the respondent present virtually.