



REPUBLIC OF KENYA



**AA v AM (Divorce Cause E049 of 2022) [2022] KEKC 150 (KLR) (31 August 2022) (Ruling)**

Neutral citation: [2022] KEKC 150 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHI'S COURT AT UPPER HILL (NAIROBI MILIMANI LAW COURTS)  
DIVORCE CAUSE E049 OF 2022  
AH ATHMAN, SPK  
AUGUST 31, 2022**

**BETWEEN**

**AA ..... PETITIONER**

**AND**

**AM ..... RESPONDENT**

**RULING**

1. The respondent notice of preliminary objection dated June 3, 2022 raise the following points of law for determination by the court:
  - i. That this honourable court lacks jurisdiction to hear and determine issues of children custody, maintenance, health care and education expenses.
  - ii. The suit offends article 170 (5) of the *Constitution* of Kenya, 2010
  - iii. The suit offends section 73 of the *Children's Act*, cap 141 Laws of Kenya
  - iv. The claim for children custody and maintenance ought to be filed before the children's court.
  - v. The claim for children custody and maintenance ought to be dismissed with costs for want of jurisdiction.
2. The preliminary objection was disposed by way of written submission. The petitioner failed to file submissions to the preliminary objection. However, the petitioner argued the court had jurisdiction to hear and determine the matter as the children are a result of a marriage of the done under Islamic law.
3. Ms Kyalo for the respondent submitted that article 170 (5) of the *Constitution* of Kenya, 2010 and section 5 of the *Kadhi's Court Act*, cap 11 Laws of Kenya outlined the jurisdiction of the Kadhi's Court which does not include children issues. She submitted further that under section 73 of the *Children's Act*, the children's court has exclusive jurisdiction on children matters. She relied on the cases of *ABMM v SMY & another* [2019] eKLR and *MNO v SJM* [2021] eKLR.



4. The cases of *Owners of the Motor vessel 'Lilian S' v Caltex oil (K) Ltd* EA [1989] 7 eKLR, *Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 others* application No 2 of 2011 [2012] eKLR and *the interim Independent Electoral Commission* [2011], eKLR, settled the principle of primacy of jurisdiction in cases before courts of law and that same is only conferred by the *Constitution* or statute.
5. 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'.
6. 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 1<sup>st</sup> March, 2002 and the promulgation of the new constitution, 2010.
7. 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.
8. 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.
9. 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...
10. 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 ...



11. 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.'
12. 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'.
13. 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 2004, [Amin Mohamed Hassan v Zahra 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.
14. We are persuaded by the purposive interpretation in HCCA 120 of 2004, [Amin Mohamed Hassan v Zahra 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.
15. 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 gazetteement 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."

16. 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.'

17. 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 Jobo & another v Sulciman 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*.'

18. 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.'

19. 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.

20. We differentiate between prayers for lack of submission to the jurisdiction of the court and lack of jurisdiction. The two are distinct and not identical. The respondent did not deny submission to the jurisdiction of the court in his reply to the petition and counterclaim. He specifically stated at para 15 of his reply that ‘this honourable court has jurisdiction to hear and determine this cause.’ Lack of submission to the jurisdiction of the court was also not an issue listed in the respondent’s notice of preliminary objection. It came at the tail end of his written submission. It is trite law that parties are bound by their pleadings and new issues cannot be brought and argued at the submission stage. It is not capable of being granted.
21. It is noted that the respondent counterclaimed for divorce. He pronounced the divorce in court on June 2, 2022. The same was confirmed and may be registered.
22. The preliminary objection fails. It is hereby dismissed. Costs be in the cause.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON 31ST AUGUST, 2022.**

**HON. ABDULHALIM H. ATHMAN**

**SENIOR PRINCIPAL KADHI**

**In the presence of**

**Mr. Mudhir A. Sheikh, Court Assistant**

**Ms. D.M. Kyalo for respondent**

**Petitioner**

