



REPUBLIC OF KENYA



**SAA v HMM (Divorce Cause 30 of 2018) [2022] KEKC 164 (KLR) (14 September 2022) (Ruling)**

Neutral citation: [2022] KEKC 164 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT ISIOLO  
DIVORCE CAUSE 30 OF 2018  
IA HUSSEIN, PK  
SEPTEMBER 14, 2022**

**BETWEEN**

**SAA ..... APPLICANT**

**AND**

**HMM ..... RESPONDENT**

**RULING**

1. This is an application for reviewing the orders of this court issued on July 18, 2018. Principally, the applicant is seeking the review of the custody order and control of the minors. The application is brought under section 1A, 1B, 3A, of the *Civil Procedure Act*.
2. The grounds of the application are set out in the notice of motion as follows:
  1. That the children who are under the custody of their mother, the respondent, are in secondary school and are declining in their academic performance due to poor conditions and lack of proper guidance putting their future at stake.
  2. That the respondent is married and her attention to the children is divided she cannot properly care for the children.The grounds of the application are supported by the affidavit of Salat Adan Abdi, the applicant sworn on May 31, 2022.
3. The application was objected to by the plaintiff/respondent vide her replying affidavit dated June 21, 2022. The petitioner/respondent maintained that the applicant is belatedly seeking to overturn and defeat the ends of justice by filing this unmerited application and that she is not married to another man and that the condition of one of the minors needs special care and that any attempt to review the custodial order will prejudice the interest of the minor. On the premises, she asks the court to dismiss the application since the applicant has failed to show what prejudice he will suffer should the custody of the minors is not disturbed.



4. I have given due consideration to the submissions by the parties and the issue that falls the determination is:
  1. Whether there are grounds for the court to grant an order for review/vary.
5. It is a trite law that just like the right to appeal, an order for review/vary is a creature of statute, which must be provided for expressly. In considering an application for review, the court exercises its discretion judicially as was held in the case of *Catherine Njuguni Kanya & 2 others v Commercial Bank of Africa Limited* [2015] eKLR.
6. Article 53(2) of the *Constitution* on the child's best interest is of paramount importance in every matter concerning the child. It is not in dispute that the circumstances of the parents and that of the children change as they grow and attain the age of majority, the stringent rules for review of orders and judgment under the *Civil Procedure Rules* do not strictly bind the children's matters before Kadhis' courts and that order 162(1) of the *Kadhis' Courts Rules 2020* gives the Kadhi's Court lawful and wide discretion to make and vary orders in the best interest of the child. The order states as follows;
  - "(1) 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 to the status of children and/or any financial provisions for the spouse or children.
  - (2) 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 a change of material circumstances."
7. Reliance must be placed on rule 79(d) of the *Kadhis' Courts Rules 2020* where the rule underscored the power of a court to review the judgment. From the above provisions, no doubt, the trial court has the power to vary or make further orders in the proceedings relating to children.
8. At present, the applicant is seeking custody of the minors based two-fold; the respondent's remarriage and the education of the minors. A mother's remarriage may affect the maternal priority in the case of custody of the child. This principle is literally deduced from the prophetic sayings, which state;

"[y]ou have more right to look after him, so long as you don't remarry."
9. The law presumes that the quality of maternal bond and care may reduce due to the mother's commitment to a new husband. However, the above saying does not indicate that merely by remarriage by the mother would the love and affection for her children through the first husband and, that she will automatically lose the right to custody upon her remarriage through some of the schools (S, M and H) interpret this saying literally as having a mandatory effect. While others (H B and I H) dissented on the basis that the Prophet himself married a woman (Ummu Salamah) who had a child with her previous husband in her custody. In *Abdalla Iddi Waititu v Rashada Hussein*, the court stated that;

"the fact that the defendant had married for the second time will not absolve right to custody unless PW1 evidence discloses any incident showing the defendant not bestowing any interest in the welfare of the minor."
10. Applying the above test in the instant case, nothing has been presented before the court as regards the respondent's remarriage. It was crucial for the applicant's case to prove that the respondent's remarriage and that her remarriage has compromised the best interest of the minors, which was not the case. Further, no evidence has been adduced to establish a nexus between the child's educational decline and the respondent's remarriage.



11. The pristine rule that the onus of proof is on the claimant, ‘Albayyinat al mudai’ , should not be taken as a fossilized doctrine as though it admits no process of intelligent reasoning. Considering the special needs of the minors, the roles of both parents should be complimentary and the best arrangement would be to allow the minors to spend some time with the father or mother because the father needs to know them as much as they need to know him and giving an allowance for each parent to visit the minors during the time they are living with mother or father.
12. Consequently, I find that this is not a proper case in which this court can exercise its authority to vary its decision regarding the custody of minors in its entirety. Further, considering that child change as they grow and attain the age of majority the effect of the above findings will be as follows.
  - a. The respondent shall continue having physical custody of the minors.
  - b. The applicant shall continue enjoying unlimited access to the minors during their stay with their mother.
  - c. The applicant shall have custody of the minors during the school holiday.
  - d. The respondent shall enjoy unlimited access to the minors during their stay with their father.
  - e. No order as to costs.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 14<sup>TH</sup> DAY OF SEPTEMBER 2022.**

**AJ ISHAQ HUSSEIN**

**PRINCIPAL KADHI**

