



HAA v AHM (Divorce Cause 198 of 2019) [2022] KEKC 155 (KLR) (13 October 2022) (Ruling)

Neutral citation: [2022] KEKC 155 (KLR)

REPUBLIC OF KENYA
IN THE KADHI'S COURT AT UPPER HILL (NAIROBI MILIMANI LAW COURTS)
DIVORCE CAUSE 198 OF 2019
AH ATHMAN, SPK
OCTOBER 13, 2022

BETWEEN

HAA PETITIONER

AND

AHM RESPONDENT

RULING

1. The background of the matter briefly. The parties herein married in 2011 and divorced in 2013 are blessed with one child born in 2012. The petitioner filed for legal custody of the minor. The respondent opposed the petition and in addition applied for child maintenance. The matter was settled through consent adopted by court on October 3, 2019. The terms of the agreement *inter alia* are:
 1. The physical custody to the minors is granted to the defendant
 2. The plaintiff is granted access to the minor on Sundays and holidays, to be modified from time to time.
 3. The defendant to receive KES 15,000.00 per month towards the child's maintenance
 4. The plaintiff shall to cater for school / Madrasa fees and all related expenses
 5. The plaintiff shall provide medical expenses for the minor
 6. The plaintiff shall provide necessary documents for the minor
 7. Matter is marked as settled
2. Apparently, the petitioner failed to comply with the consent order regarding child maintenance. The respondent filed Notice to show cause why execution should not issue. The application was successful and warrant of arrest was issued upon the petitioner. It was only lifted when respondent agreed to settle the decretal amount of KES 15,000.00 per month plus KES 20,000.00 per month in settlement



- of arrears. The exact amount of arrears is disputed and the matter was listed for mention on November 1, 2022 to confirm the same.
3. The respondent had been living in Syokimau where the child schooled at The Daniels school, Syokimua. She later got married and moved to South B. She proposes the child goes to Al Huda Academy, South B, a private school, while the petitioner wants the child to learn at Kongoni primary school, a public school in South C. The parties could not agree on this issue hence the application.
 4. The petitioner's Notice of Motion application dated 19th September, 2022 under certificate of urgency is seeking orders:
 - i. That the application be certified urgent (spent)
 - ii. That the Honourable court be pleased to grant leave to transfer the minor A.H from St. Daniel School to Kongoni Primary school.
 - iii. That the Honourable court be pleased to grant an order to compel the respondent to submit the minor for grade assessment to effect the transfer.
 5. The respondent opposed the application through her replying affidavit dated September 28, 2022.
 6. The applicant deposed that the he has already paid the child's school fees at The Daniels School including 2nd term school fees but the respondent moved to South B in the middle of the term. He deposed further that he is unable to pay the fees at Al Huda Academy due to his business not doing well and extra expenses for treating his first wife who has been diagnosed with brain meningiom (brain growth). He averred he had to also transfer his other child from a private school to a full time Madrasa (Islamic school) due to his current financial situation. He contends Kongoni primary school's academic performance is excellent.
 7. The respondent on her part deposed that upon her relocation to South B, she had a discussion where they reached agreement with the applicant for the child to transfer to Al Huda Academy but the applicant upon being called to facilitate the transfer referred the matter to his advocate. She stated that she instructed her advocate to follow up the issue who was not able to convince him to facilitate the transfer. She stated further that issue of the transfer of the child is due mainly to her relocating to South B where the school situate. She argued the school is within walking distance and is of the same standard as his previous school. She further stated the applicant is misleading the court by saying his wife has cancer, which she confirmed from her that she only has small non-cancerous growth. The respondent further stated applicant's other child goes to an even more expensive school.
 8. Prof. Nandwa for the applicant submitted that the applicant is not financially able to pay school fees for Al Huda Academy and is currently paying KES 35,000.00 per month in compliance with court order on maintenance and arrears on child maintenance, that his business is down and incurring a lot of expenses to treat his wife but the respondent does not appreciate his predicament. He denied the applicant had reached any agreement for the child to go to Al Huda. He argued that the applicant was compelled to transfer his other child to a Madrasa program as a result of his financial situation.
 9. Ms. Nyagah for the respondent submitted the applicant is discriminating against the child, renegeing on his agreement for him to study at Al Huda. She argued the difference in the school fees between The Daniel School and Al Huda is only KES 3,000.00 and he shall actually be saving on transport.
 10. The issue for determination in this application is whether or not the prayers sought can be granted.
 11. It is prudent to clarify that this matter was heard and determined by Hon. A.I. Hussein, Principal Kadhi, now stationed at Isiolo Kadhi's court. It is important to recognize that I have no appellate



jurisdiction. I cannot purport to sit on appeal of my brother's decision. This is a ruling on a post judgment application. I must be careful to be guided by the decision on record and the best interests of the child.

12. Article 28 of the *UNCRC*, section 7 of the *Children's Act*, Cap 141 Laws of Kenya provides every child has a right to free basic education. Article 114 of the *Islamic Charter on Family*, ICF emphasize the same stating every child is entitled to a comprehensive and balanced education. Strictly under Islamic law, the responsibility of a child's education is upon his or her father based on a careful but fair balance between the twin factors of needs of children and the financial ability of the husband as espoused under Q.65.35 as read together with Q.2.233. Fair treatment is a noble requirement to Muslims in all their endeavours. This attribute is emphasised upon husbands between their wives and parents among their children. In hadith reported by Al Albany in 'Ghayat al Maram', page 272 and 'al silsilat al sahiha' page 1240 on the authority of Nu'man al Bashir, prophet Muhammad (may Allah's peace and blessings be upon him) stated: 'treat your children with fairness' (he repeated it three times). In another version also reported by Al Albany on the authority of Nu'man ibn Bashir in 'Sahih al Jami' at page 1042 the prophet (may Allah's peace and blessings be upon him) said: 'be fair among your children in gifts as you would like them to be fair to you in loyalty and kindness.'
13. In this case, the applicant in his supporting affidavit, suggests the court entered judgment (unless he meant 'consent judgment) that he pays child maintenance and pay school and Madrasa fees. However, Ms. Nyagah correctly posited the matter was settled by consent. I carefully perused the record, both on the physical and e-record on the CTS portal. I found no judgment only the consent adopted and signed by parties and the trial Kadhi. In this regard the terms of the consent judgment put the responsibility of the child's school and Madrasa fees upon the applicant. Consent judgment is binding, un-appealable and un-reviewable except on grounds that vitiate a contract. It is not disputed that the applicant had been paying the child's school fees at The Daniel School.
14. The applicant has demonstrated his financial challenges but failed to demonstrate fair treatment between his two children, he has enrolled one at a special school and the other in a public school. His suggestion that he transferred the other child due to the financial difficulties is not convincing. He has filed his monthly expenditures but failed to file any evidence of his income. He is still apparently paying more for his other child's child school fees than he is ready to pay for his child with the respondent. The applicant ought to treat both his children fairly. The respondent has legitimate expectation for their child to learn in a good school near their residence. It will also, I agree, be more convenient to the child. However, for want of appellant of jurisdiction I am not able to fiddle with a consent judgment.
15. Recognizing the respondent's desire and right for the child's quality education near where they live, it is not for the court to compel her to send the child to another school. Equally, the applicant cannot be compelled to provide more than his ability and / or as per their agreement. Upon examination of the fees structure for Al Huda, it is noted the KES 33,000.00 is only for tuition there are other expenses that increase the total learning costs at the private school.
16. The application partially fails. The child may proceed to be enrolled at Al Huda Academy. The applicant to contribute paying what he would have been paying for the child at The Daniel school (KES 30,000.00 per term) and the balance be paid by the respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON 13TH OCTOBER, 2022.

HON. ABDULHALIM H. ATHMAN

SENIOR PRINCIPAL KADHI



In the presence of

Mr. Suleiman A. Mohamed, Court assistant

Prof. Nandwa for the applicant

Ms. Nyagah for the respondent

