



**SS & another v HSG (Matrimonial Cause E007 of 2020)  
[2021] KEKC 19 (KLR) (11 January 2021) (Ruling)**

*SS & another v HSG [2021] eKLR*

Neutral citation: [2021] KEKC 19 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT ISIOLO  
MATRIMONIAL CAUSE E007 OF 2020  
AH ATHMAN, SPK  
JANUARY 11, 2021**

**BETWEEN**

**SS ..... 1<sup>ST</sup> PETITIONER**

**IHS ..... 2<sup>ND</sup> PETITIONER**

**AND**

**HSG ..... RESPONDENT**

**RULING**

1. The applicants in their Notice of Motion application dated December 9, 2020 pray for orders that the 1<sup>st</sup> applicant be granted custody of the children and the court be pleased to grant an injunction restraining the respondent from evicting the plaintiff and the children from the matrimonial home.

**Applicants’ case**

2. The applicant deponed that the respondent chased them from the matrimonial home compelling them to live in a rented house without support from the respondent, and that the children are suffering. They contend the respondent abandoned his parental and marital responsibilities.

**Respondent’s case**

3. The respondent did not file a reply to the application. He only filed a defense to the petition which essentially seeks the same orders. He opposes the application. In the interest of justice, I deem the defense and oral reply as reply to the application.
4. The respondent denied the applicants claims. He stated that he made every effort to be a good father despite mistreatment and lack of respect by the applicants. He further stated he asked them to leave the matrimonial home for the sake of his life and that of his ailing mother who lives with him. He



contended the children save two, are adults and should be able to fend for themselves; that he is retired and is unable to pay them the maintenance prayed for. He also said he has no where to live except in the matrimonial home and the plaintiff and her children neither respect him nor help him out in any way.

### **submissions**

5. It was submitted for the applicants that the respondent chased them from the matrimonial home in [Particulars Withheld] – Isiolo Town and despite intervention by neighbors and elders the respondent refused to let them back leaving them destitute after (27) years of marriage. They submitted they are vulnerable and unable to cater for accommodation, sustenance and education without the support of the respondent. The first applicant submitted that the respondent divorced her shortly after chasing her from the matrimonial home.
6. The second applicant submitted that the respondent assaulted his children and wife and chased them out of the matrimonial home, that he had not been eating at home and only came to sleep. She further stated that she needs the respondent to continue to finance her studies for a diploma in community health at the Meru technical college.
7. The applicants submitted they no longer pray for restraining order against eviction or to respondent to be ordered to allow them to live with him, apprehensive of mistreatment and continued problems, they instead pray for him to be compelled to support their accommodation, sustenance and education.
8. It was submitted for the respondent that he is recently retired as a driver with the Ministry of Health, County government of Isiolo, that all his married life to the first applicant he had been taking care of his family needs and education to the best of his ability. He submitted that the first applicant severally deserted the matrimonial home and living him with infants for months, that he persevered mistreatment by the first respondent for twenty years for the sake of the children. He submitted that the first applicant has spoil the children, now adults against him and he gets no assistance, service or respect from the first applicant or his children. He further submitted he is now ailing and living with his ailing mother and for his own safety and that of his mother requested the applicants to leave the matrimonial home. He admitted to have divorced the first applicant on November 28, 2020, the day he had asked them to leave the matrimonial home. He submitted further that the house in Tulu Roba is the only investment and accommodation for him and is neither able to allow them back nor support them financially.

### **Facts**

9. The First applicant was the wife of the respondent. The second applicant is their daughter. The couple were married under Islamic law in 1993. They are blessed with five children: G, I, Z, A and A. G and Z are adults. G lives alone doing menial jobs. I (22 years old) completed certificate course in community health and wishes to pursue a diploma in the same field. She is neither employed nor married. A is in Form four, A and Z are in Primary school. The first applicant has been a house wife for the [27] years the couple were married. The respondent just retired as a driver with Ministry of Health, County government of Isiolo. He is yet to receive his final dues. He developed a wooden house in part of the 50 x 100 plot at [Particulars Withheld] where he brought his ailing mother from Mombasa to live with her. The respondent lives with one child, A, a form four student. The first applicant lives with three, two minors and a dependent unmarried daughter.

### **Analysis**

10. It is not disputed that the respondent and first applicant had been married for [27] years. It is also not disputed that the respondent on November 28, 2020 divorced his wife and forced her 11.out of the



matrimonial home. The respondent argued he requested his wife and children to leave the matrimonial home. Two of the children are minors. It is clear the applicants did not agree to leave and have had difficulty getting accommodation, food and education. The issue of whether or not the first applicant and the children mistreated, did not respect the respondent as a husband and father is contested, as is the issue of whether the respondent assaulted and mistreated the respondent and children.

12. Although section 2 of the Children’s Act No 8 of 2001, defines a child as ‘any human being under the age of 18’, section 28 of the Act provide for extension of parental responsibility beyond the eighteenth birthday if the court is satisfied that special circumstances exist that necessitate such extension. The Act provide that all children are entitled to survival, parental care, education, religious education, health care, non-discrimination, protection from abuse and best interest of the child among others. Islamic law extends period of daughters right to parental responsibility by their parents till they are married.

13. .Islamic law rests the responsibility of children maintenance fully on their fathers based on children’s needs and the father’s financial ability. There is no standard quantum, but the court, in a dispute on the rate of maintenance shall try to balance between the two factors under Q.65.35 read together with Q.2.233. Fathers thus are obligated and can be forced by court to provide for their children both male and female till they become independent. Al Zuhaily in his Islamic jurisprudence and its evidences states at 10/7353:

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‘Men are compelled to provide for their parent’s and children’s sustenance if they are poor and his ability to so do.’

14. Ibn Abidin, in his Al Radd Al Mukhtar, states juristic consensus in compelling fathers to provide for their parents, children and wives whether or not they are able.

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‘From analysis of the madhahib, it is clear there is juristic consensus among Muslim scholars on men’s responsibility to provide for their fathers, mother, children and wives if they are able, if they are not and the mother is wealthy and the father is not, the mother may be ordered to provide but the same shall be a liability on the father.’ Al Durr al Mukhtar 2/ 925.

**Findings**

15. The respondent therefore has a legal responsibility under the law to protect and provide for his children including the adults, especially the daughters who are neither married nor employed. Further a divorced wife under Q.2.241 is entitled to edda maintenance and mata’ [conciliatory gift] after a marriage of such length.

16. The respondent erred in forcing his family out of the matrimonial home and leaving them destitute. It is irresponsible, inhumane and illegal. His financial situation notwithstanding, he must discharge his responsibility as a father.

17. Accordingly, the respondent is ordered to provide for his three children who are living with their mother, the first applicant as follows:

- i. Accommodation and sustenance Kes 10,000.00 per month
  - ii. Education
18. The first applicant is entitled to conciliatory gift mata' at least 15% the value of the Tulu Roba property. The respondent to pay her the same upon receipt of his final dues with his employer.
  19. The Parties marriage is confirmed annulled, first revocable divorce [within 90 days] with effect from November 28, 2020. Divorce certificate to issue.
  20. The ruling settles all the issues in the petition with finality. The matter is marked resolved and settled. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT ISIOLO ON THE JANUARY 11, 2021**

**HON. ABDULHALIM H. ATHMAN**

**SENIOR PRINCIPAL KADHI**

In the presence of

Mr. Guyo Adan, Court assistant

Applicants

Respondent

