



**SS & IHS v HSG (Matrimonial Case E007 of 2020)
[2021] KEKC 18 (KLR) (15 February 2021) (Ruling)**

SS & another v HSG [2021] eKLR

Neutral citation: [2021] KEKC 18 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT ISIOLO
MATRIMONIAL CASE E007 OF 2020
AH ATHMAN, SPK
FEBRUARY 15, 2021**

BETWEEN

SS 1ST PETITIONER

IHS 2ND PETITIONER

AND

HSG RESPONDENT

RULING

1. In this notice of motion application dated February 1, 2021 the respondent / applicant prays for orders for review of the maintenance order given on January 11, 2021 on the grounds that, being a retired civil servant, he is not in a financial position to pay the maintenance awarded by the court. He prays that he gets, custody of the two minor children.
2. The respondent opposes the application. She made an oral reply on account of lack of funds, which had not been opposed by the applicant. Both parties made their submissions under oath.

Facts

3. The applicant divorced the respondent after 27 years of marriage. He is allegedly retired from the civil service. He chased his wife and children from the matrimonial home. They were compelled to live in a rented one-bedroom house but have not been able to pay rent yet. The applicant is not supporting them either. The court ordered him to pay Kes 10,000.00 maintenance and fund their education and pay the respondent 15% the value of the Tulu Roba house as conciliatory gift to the respondent upon receiving his final benefits. It is these orders the applicant wishes to be reviewed.



Submissions

4. The applicant submitted that the respondent is using the minor children as a shield to get money from him and that she is not able to take care of the children. In the event his prayer is not granted he prays the maintenance ordered be reviewed downwards to Kes 5,000.00 per month as he is currently retired and not in employment and therefore not able to pay the amount directed. He argued the daughter is now an adult and should fund her own education. He submitted, she has been married without his consent.
5. The respondent submitted the children will not be safe with the applicant and their views should be taken in account on the issue of custody. She further submitted the amount ordered is inadequate to sustain the family and they rely on neighbours help. She submitted the applicant is still employed as a driver, that she saw him with the government vehicle as recently as the day before. She stated the eldest daughter is not married and nobody has helped with her fees, that she is disappointed she cannot pursue her course. She submitted it was the applicant who suggested she gets married because he will not fund her education. The two minor children aged 9 and 15 years informed the court of their views on the issue of custody.

Analysis and Finding

6. I have carefully read and listened to the parties' arguments and submissions and the issues for determination is whether or not the applicant is entitled to review of the maintenance order.
7. Order 45, *Civil Procedure Rules*, cap 21 Laws of Kenya provides for review of the court's orders on three grounds:
 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.
8. The applicant has failed to demonstrate discovery of ne new evidence or error apparent on the face of the record. I have strained to find any other sufficient reasons and could find one. Article 3(1) of the *United Nations Convention on the Rights of the Child*, section 53 of the *Constitution of Kenya* (2010), section 4 of the *Children's Act*, cap 141 laws of Kenya and article 120 of the *Islamic Charter on Family* all provide:

‘the best interests of the child shall be a primary consideration in all actions concerning children’
9. On the issue of custody, it is very clear to me, the applicant is acting with negligence on his own progeny contrary to law. He is living in a house and fend for himself. He looks very well nourished and comfortable. Yet he chased his wife (and then divorced her) and the children, is refusing to fund their accommodation, sustenance and education. The two minor children aged 9 and 15 years have reached age of discernment under Islamic law, article 103 *Islamic Charter on Family, ICF*, their views have to be considered. Children the right to expression and opinion under article 13, *UNCRC* and article 32 and 33 of the *Constitution of Kenya* (2010). The children chose to remain with their mother.
10. 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 in accordance with art. 28 of *UNCRC*. Article 114 of the *Islamic Charter on Family, ICF* emphasize the same stating every child is entitled to a comprehensive balanced



education. Every parent has an obligation to ensure his children attain the best education and training according to his means. That responsibility does not end upon a child becoming an adult when he turns 18 years, but until he is able to fend for himself for a boy and a girl until she is married. Art 107 of the *ICF* provides:

‘Every child is entitled to a standard of living that befits his physical, mental, religious and social growth; a boy until he becomes able to earn a living, if a girl, until she gets married or earns enough to support herself.

11. Children must be protected from all forms of harm, abuse and neglect under article 116 of the *ICF*.
12. The applicant has not only failed to demonstrate any ground for grant of a review under the law but he has acted and continues to act in manner negatively impacting on the welfare, security and education of his children while he is comfortable in his [particulars withheld] home. The court is obligated to protect the rights of the children under the provisions of the *United Nations Convention On The Rights Of The Child*, the *Constitution of Kenya*, the *Children’s Act* and *Islamic Charter on Family*. The application fails and he is directed to forthwith comply with orders of this court, including settling balance of three month rent and further to provide education of his two adult children in secondary school and college.
13. No orders as to costs.
Orders accordingly.

DATED, SIGNED AND DELIVERED AT ISIOLO ON 15TH FEBRUARY, 2021

HON. ABDULHALIM H. ATHMAN

SENIOR PRINCIPAL KADHI

In the presence of:

Mr. Adano Roba, Court assistant

Respondent / applicant

Petitioner / Respondent

