



HAH v HAJ (Divorce Cause Case16 of 2020) [2021] KEKC 9 (KLR) (23 September 2021) (Ruling)

HAH v HAJ [2021] eKLR

Neutral citation: [2021] KEKC 9 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT ISIOLO
DIVORCE CAUSE CASE16 OF 2020
AH ATHMAN, SPK
SEPTEMBER 23, 2021**

BETWEEN

HAH PETITIONER

AND

HAJ RESPONDENT

RULING

1. The main case in this matter filed on September 8, 2020, was heard and determined on the merits. Judgment was entered on October 12, 2020. The applicant had divorced the petitioner / respondent. She had prayed for child custody and maintenance. The court confirmed the divorce and awarded custody to the petitioner and child maintenance at Kes 6,500.00, school fees and edda maintenance of Kes 21,000.00. On April 29, 2021, the applicant moved to the Chief Magistrate’s Court at Isiolo in Children’s Case No E004 of 2021 for orders inter alia custody of the minor. In a ruling on a preliminary objection in that case on June 29, 2021, the Chief Magistrate upheld the preliminary objection and dismissed the respondent’s children case. The Honourable Chief Magistrate advised ‘at this point in time the jurisdiction of this court and that of the Kadhi are parallel so the option to him is to go back to that court for the orders to be revised / varied or proceed to the superior court’. He chose to come back to the Kadhi’s court.
2. Through Notice of motion application dated July 5, 2021 the respondent / applicant prays for orders that:
 - i. This Honourable Court be pleased to stay execution of the judgment delivered on October 12, 2020 and any consequent orders thereon pending hearing and determination of this application
 - ii. The Honourable Court be pleased to review and vary its judgment delivered on October 12, 2020.



3. The respondent opposed the application through her replying affidavit dated August 4, 2021.
4. The applicant deposed that the duration granted to him for access of the child is not sufficient as the child needed more time to get parental love, affection, care and protection from both her parents. He averred that the respondent abdicated her role on child care; that the child has been ill and instead of having her treated at a licensed medical facility, the respondent has been taking the child to traditional healers. He further deposed that he has married another wife, has other responsibilities, is servicing a loan and therefore need a review of the maintenance order of Kes 6,500.00 per month, especially as, (according to him) the respondent is not properly utilising the upkeep he sends her.
5. In a further affidavit dated August 9, 2021, the applicant deposed that he has been in full compliance of the court orders given by this court and had been dutifully paying the maintenance amount.
6. In opposition to the application, the respondent deposed that the applicant has wilfully disobeyed this Court's orders, that the application does not meet the threshold for review and the court is functus officio on the matter. She averred further that the applicant has been forum shopping and denied the child has not been neglected. She stated she never denied him access of the child.
7. The applicant was represented the Mr. Jarso from firm of Wario Minishi & Company advocates while the respondent was represented by Mr Ashaba from the firm of Mutuma Gichuru & Associates advocates. The application was disposed of by of written submissions.

Submissions

8. Mr Wario for the applicant submitted that there is considerable change in circumstance in the issue and the same is brought in the interests of the child and qualifies as sufficient ground for review. He further submitted that the child is still young and need of parental love, affection and care from both parents. He further submitted further that the child maintenance order given is beyond his means and is contrary to Islamic law. He relied on Q.2.233 and Q.65.7
9. Mr Ashaba for the respondent submitted that since he got married, the applicant has not been providing any child maintenance and has not complied with the order on edda maintenance. He submitted that the applicant failed to demonstrate how the funds he had sent had been misused, or his claims that the child was taken to a traditional healer. He submitted that the court should not condone contemnors. He relied on *Econet Wireles Kenya Ltd vs Minister for information and Communication of Kenya & Another [2005] eKLR* and *Kanchaben Ramnikal Shah -vs- Shamit Shantilal Shah & 6 others [2010] eKLR*.
10. The respondent further submitted that the review being sought touches on the substratum of the judgment and not an apparent error on the face of the record. He submitted the reasons given do not qualify to grant of review. He relied on the cases of *Ajit Kumar Rath -vs- State of Orisa & other*, 9 Supreme Court Cases, *Tokesi Mambili & Others vs Simion Litsanga 204 eKLR*. He finally submitted that a court after passing judgment becomes functus officio and cannot revisit the judgment on merits or purport to exercise a judicial power over the same matter save as provided by law. He relied on the cases of *Jersey Evening Post Limited v Al Thani [2002] JLR 542*, *Raila Odinga & 2 others -vs- Independent Electoral & Boundaries Commission & 3 others* and *Meningya Salim Murgani vs Kenya Revenue Authority [2014] eKLR*.



Analysis and Finding

11. I have carefully read to the parties' dispositions and submissions by learned counsels. The issues for determination in this application is whether or not the applicant is entitled to review of the maintenance order and period of access to the child.
12. Order 45, Civil Procedure Rules, Cap 21 Laws of Kenya provides three grounds for review of the court's orders. These are:
 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.
13. The same is replicated in rule number 79 (1) of the Kadhi's Court (practice and Procedure) rules_2020 (KCR) which adds another ground, that is 'if the ruling or order requires clarification'. Parties are therefore entitled to apply for review if they can successfully demonstrate the four grounds; demonstration of important new evidence that was not within their knowledge or ability at trial, a clear error on the face of record or an issue needing clarification. An error would normally be self-evident and would not require elaborate submissions to discern. A wrong application of law or wrong finding does not qualify as a ground for review although it may qualify as a ground for appeal. In the case of Pancras T. Swai v Kenya Breweries ltd [2014] eKLR, the court of appeal NAI, the court held:

'...the appellant's right to seek review, though unfettered, could not be successfully maintained on the basis that the decision of the court was wrong either on account of wrong application of the law or due to failure to apply the law at all....'an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal.'
14. That said, though, the KCR_2020, the applicable rules of procedure in the Kadhi's court, envisages unlimited review of children custody and maintenance matters in the best interests of children. The applicant has to demonstrate the review sought is not merely for his convenience but is predicated on the best interests of children and upon credible proof of material change of circumstances. Rule 162 (1) of the rules provide:

'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 with the status of children and / or any financial provisions for the spouse or children.
15. Rule 162 (2) provide:

'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 change of material circumstances.
16. Considering the importance of children welfare and the need to protect them from neglect and abuse, in its wisdom, the rules removed procedural technicalities in the realisation of their rights.
17. It is my considered view based on the reading of the rules, that review in issues of custody and divorce is allowed as an exception to the general rule of the doctrine of *functus officio*. However, the onus is on the applicant to provide proof to meet the required threshold.



18. In the instant application, the record is clear, the issue of access to the child in the judgment was adopted from the parties' agreement at pre-trial. The applicant does not live in Isiolo. He is still living in Marsabit where he works as a teacher. The only change of circumstances is that he is married. The change of circumstance contemplated by the rules are those that directly affect the child. I have also looked at the applicant's payslip (which he had declined to produce at trial to help court assess his income). This is new evidence but same was clearly within knowledge and ability to produce at trial. The contrary has not be demonstrated at all. In any case it confirms the maintenance order is well within his financial ability to support the child from his income of Kes 25,000.00. But for servicing of three commercial loans, he would be earning a net monthly salary of Kes 45,596.00.
19. The issue of child neglect would qualify as a sufficient ground for review of custody. There is, however, no conclusive evidence on the issue. The medical report showed only the child has symptoms of 'anaemia, hotness of body, blood infections and malnutrition'. The doctor's opinion is that the condition is preventable if child is taken care of properly.
- The child could have been unwell on the day she had been taken for check-up. We have been shown and have seen her pictures before, during and after the medical examination. She has since regained her weight. The parents have been coming with the child to court during the hearing sessions. The court had the opportunity to observe the physical health of the child. She is not in danger of medical neglect. There is no credible, sufficient evidence to sustain the claim of child neglect.
20. Even under the new *Kadhi's Court (procedure & practice) rules (2020)*, the application failed to meet the required legal threshold for review. The application fails. It be and is hereby dismissed.

This being a family matter, each party to meet its own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ISIOLO ON 23RD SEPTEMBER, 2021

HON. ABDULHALIM H. ATHMAN

SENIOR PRINCIPAL KADHI

In the presence of:

Mr. Guyo Adan, Court assistant

Mr. Wario Jarso for the applicant

Mr. Ashaba for the respondent

