



REPUBLIC OF KENYA

IN THE KADHIS COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO. 106 OF 2018

SAK.....PETITIONER/RESPONDENT

V E R S U S

DA.....RESPONDEMT/APPLICANT

JUDGEMENT

1. This is a Ruling on the preliminary objection raised by the applicant's counsel in opposition to the entire suit vide notice of preliminary objection dated 4th May, 2018 and filed on the same date in this court.

2. The preliminary objection is based on the ground that this court lacks jurisdiction to hear and determine this matter since the marriage between the parties herein which is the subject matter of the proceedings was solemnized in Eldoret and the parties have also been resident of Eldoret as such, the applicant prays for the transfer of the suit to Eldoret Kadhis Court.

3. The respondent opposed the preliminary objection as being misconceived in arriving at her conclusion, the respondent stated that she and her witnesses are currently residing in Nairobi and that the respondent has been threatening to kill her if she sets her foot in Eldoret. She further stated that for the interest of justice this court is properly seized with jurisdiction to determine this matter.

4. I have given consideration to the oral submissions by learned counsel and the respondent. I have also considered the material and various authorities placed before me. In considering the issues raised before this court, it is important to set out the law with regard to territorial jurisdiction of Kadhis Courts.

5. The applicable law that confers territorial jurisdiction to Kadhis Court Article 170(4) of Constitution. Section 4 (2) of the Kadhis Courts Act and section 15 of the Civil Procedure Act. Article 170(4) of the Constitution provides that:

“(4) The Chief Kadhi and the other Kadhis, or the Chief Kadhi and such of the other Kadhis (not being fewer than three in number) as may be prescribed under an Act of Parliament, shall each be empowered to hold a Kadhis court having jurisdiction within Kenya.

6. Section 4(2) of the Kadhis Courts Act provides that:

(2) The Kadhis Courts shall have jurisdiction as follows:-

(a) three Kadhis courts shall each have jurisdiction within Kwale District, Mombasa District, Kilifi District and Lamu District.

(b) one Kadhis court shall have jurisdiction within:-

(i) Nyanza Province

(ii) Western Province and

(iii)

(c) One court shall have jurisdiction within Wajir District and Mandara District;

(d) One court shall have jurisdiction within the Nairobi Area and the Central and Eastern Provinces except Marsabit

District and Isiolo District.

(e) One court shall have jurisdiction in Garissa District and Tana River District.

(f) One court shall have jurisdiction in Marsabit District and Isiolo District.

(3) Each of the Kadhis Courts shall be a court subordinate to the High Court and Shall be duly constituted when held by the Chief Kadhi or Kadhi.

(4) A Kadhis Court may be held at any place within the area of jurisdiction of the Court.

Further, Section 15 of the Civil Procedure Act confers territorial jurisdiction

To Subordinate courts, it provides that:-

15. Subject to the limitations aforesaid, every suit be instituted in a court Within the local limits of whose jurisdiction-

(a) the defendant or each of the defendants (where there are more than

one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or

(b) any of the defendants (where there are more than one) at the time of

Commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution or

(c) the cause of action, wholly or in part, arises”

With the above in mind the from reading of Article 170(4) of the Constitution granted Kadhis Courts a Jurisdiction all through Kenya confining the power of Court beyond 10 miles of Coastal strips and beyond the territorial jurisdiction defined by Section 4(2) of the Kadhis Courts Act pursuant to Section 66(3) of the repealed Constitution. Whereas Section 15 of the Civil Procedure Act limits the jurisdiction of the courts based on geographical location of courts.

The aforementioned provisions of the laws seem to conflict and confusing to both the litigants and their legal representatives. Reverting back onto the question whether this Court has territorial jurisdiction and if not whether I can transfer this suit to Eldoret, it is worth to note that unlike Magistrates Courts jurisdiction of Kadhis Courts is provided for by the Constitution thus the Kadhis Courts Act only confirms that what is in the Constitution and/or when amended confers power to Kadhis Court subject to Article 170(5) of the Constitution see Art. 170(3).

In other words, Civil Procedure Act does not confer upon Kadhis Courts Jurisdiction, therefore as much as the two Acts seem to conflict 170(4) of the Constitution the rules of Supremacy of the Constitution provides that the Constitution takes supremacy.

Further, in Mohamed Sitaban V George Mwangi Karoki CA No. 12 of 2002. Ringera J Stated that:

“...Section 15 of the Civil Procedure Act applied only to court lower than the Resident Magistrates’ Court”. It is worth noting that the pecuniary jurisdiction of Kadhis Courts exceeds the pecuniary jurisdiction of the Resident Magistrates’ Courts by far. Accordingly, the provision of Section 15 notwithstanding the supremacy of Article 170(4) and the redundancy of Section 4(3) of the Kadhis Courts Act, the said provision does not limit the jurisdiction of Kadhis Courts within its locality and as such this court has jurisdiction within Kenya.

In conclusion I find that the preliminary objection raised by Counsel for the applicant be and is hereby dismissed. The costs will abide the outcome of the main suit.

Dated and delivered at Nairobi this 3rd day of September, 2018.

HON. A.I. HUSSEIN

Senior Resident Kadhi

In the presence of:

Mr. Mohamed for the Applicant/defendant

Ms. Hanan for the Respondent/Plaintiff