



O S A v M S A (Civil Case 3 of 2015) [2015] KEKC 16 (KLR) (23 April 2015) (Ruling)

O S A v M S A [2015] eKLR

Neutral citation: [2015] KEKC 16 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT MOMBASA
CIVIL CASE 3 OF 2015
AH ATHMAN, PK
APRIL 23, 2015**

BETWEEN

OSA PLAINTIFF

AND

MSA DEFENDANT

RULING

1. The plaintiff filed this suit praying for actual custody of the child SOS aged [9] years and the defendant be given restricted access to the child. The defendant raised a preliminary objection to the plaint on the following grounds:
 1. That the Kadhi's court has no jurisdiction to hear and determine matters concerning children.
 2. That the subject matter of this suit is in Malindi and therefore the children's court in Malindi has jurisdiction to hear and determine this matter.
 3. That the defendant shall be prejudiced if she is compelled to submit to the jurisdiction of the Kadhi's court for the matter.
2. The plaintiff oppose the preliminary objection. He contends the court has requisite jurisdiction to handle children matters and that the court may return the plaint to the plaintiff to present it to the court where it should have been instituted or the High court could transfer it to the right court.

The issues for determination in this preliminary objection are:

1. Whether or not Kadhi's Court have jurisdiction to hear and determine matters concerning children
2. Place of suing - whether the suit was filed in the right court with territorial jurisdiction



3. Submission to the jurisdiction of the Kadhi's court
3. The preliminary objection was disposed by way of written submission. Mr J. K. Mwarandu represented the defendant while Mr Yunis Mgupu represented the plaintiff.

Place of Suing

4. The plaintiff resides in Mombasa while the defendant resides in Malindi. The plaintiff agrees the defendant is resident in Malindi. Section 12 of the *Civil Procedure Act*, cap 21 provides suit shall be instituted where cause of action situate. Section 15 of the *Act* provide suits shall be instituted where the defendant actually resides.

Subject to the limitations aforesaid, every suit shall 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

This suit should have been filed in Malindi.

Jurisdiction Of Kadhis Court To Hear And Detmermine Issues Of Custody And Maintenance Of Children.

5. The jurisdiction of the Kadhis court is derived from Article 170 [5] of the *Constitution of Kenya, 2010*;

The jurisdiction of a Kadhis' court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.

Section 5 of the *Kadhis Court Act*, Cap 11 replicates the same:

"A Kadhi's court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it".

6. The issue of custody and maintenance of children is incidental to divorce. Further while personal status in common law may not clearly include issues of children, under Islamic law it categorically falls under personal status.
7. In the *Black's Law Dictionary* , eighth edition, Bryan A. Garner law of status is defined as 'the category of law dealing with personal or non-proprietary rights, whether in rem or personam and is distinguished from the other two departments of civil law namely the law of obligation and the of property.
8. Professor Dr Wahba Al Zuhaily in his *Islamic Jurisprudence and its Evidences* defines 'personal status' as the laws that relate with person's relationship with his family from marriage to his death...



9. Doi in '*Shariah - Islamic Law*' and Zakiyuddin's ' Sharia Rules on Personal Status', indicate that:

personal status is conceptualized in a broader category of jurisprudential questions pertaining to status of the person in relation to rights, duties and liabilities he or she owes to family rights from the founding of a family to distribution of estate upon death.
10. Dr Ahmed Al Ghandur in his '*Personal status in Islamic Shariah*' [9182], Al Falah Publishers- Kuwait at pg 21 states:

'the term personal status started to be used in Islamic Shariah when Sheikh Mohamed Qadri Basha wrote his book titled 'Shariah laws on personal status' in the form of statutes comprising of rules on marriage, divorce and issues related thereto, inheritance, wills, gifts ...
11. Section 13, Egyptian Judicature Act of August 28, 1949 provides that personal status consist of:
 1. Issues relating to legal competence of individuals
 2. family issues such as marriage proposal, marriage, rights and obligations of spouses, dowry, matrimonial property.
 3. Divorce, dissolution of marriage, separation
 4. paternity, parenthood, relationships between parents and children, provision of maintenance and to relations and in laws.
 5. incapacity, administration, desertion, determination of death of a lost person
 6. issues pertaining to inheritance and wills and other issues relating to ones transactions taking effect after one's death.
 7. issues relating to correction of legal paternity, adoption

(*Personal status in Islamic Shariah*, Dr Ahmad Al Ghandur, 2nd edition, pp 21-22)
13. The issue of custody and maintenance of children is clearly a personal status issue under Islamic law.
14. The High court has dealt with the issue of whether or not Kadhis court can hear and determine issues of custody and maintenance of children. Judges have differed on this issue between those holding the Kadhis court has jurisdiction to deal with issues of children custody and maintenance and those who hold it does not.
15. On the one hand, Hon Judges Musyoka, Muchelule and Odera held that the Kadhi's court lack jurisdiction to hear and determine issues of custody and maintenance of children because it is not expressly provided for in the law and due to the enactment of the Children's Act, Cap 141.
16. Hon Musyoka J, in the case of *GSA v ASA* Nairobi High Court Civil appeal No 53 of 2013 [2014] eKLR states:

“From the wordings of Article 170(5) of the Constitution, it would appear that the Constitution has not granted jurisdiction to the Kadhis Court over matters touching on custody and maintenance of children. It is doubtful therefore whether the Kadhis Court can grant custody and maintenance orders over children.



17. Hon Muchelule J, in the case of [SMH v SAA](#) Kisumu High Court Misc application No 125 of 2013 [2013] eKLR, held :

“My understanding is that the Kadhis court is properly seized on the divorce matter, but may not deal with issues of custody and maintenance of children. The issues are not among those in respect of which the constitution and the Act have donated jurisdiction to the Kadhis Court. The issue can only be properly dealt with by a children’s court under the children act, No 8 of 2001”.

18. Hon M. Odero J, in the case of [ZHS v SDS](#), Mombasa High Court, Misc. Civil application No 45 of 2013 [2014] eKLR and [HMM v KJD](#), Mombasa High Court, Civil appeal No 15 of 2013 [2014] eKLR held:

‘The cited law [[Constitution](#) and [Kadhis Court Act](#)] makes it clear that the jurisdiction of the Kadhis court is to matters of personal law e.g. marriage, divorce and inheritance. No mention is made of children’s matters relating to custody, access and / or maintenance of children of a marriage. Matters relating to children are special and exclusive and this is why there exists a specific act to deal with such matters being the [Children’s Act, 2001](#). It is only in a children’s court and with reference to the Children Act that decisions respecting custody, access and / or maintenance of children can properly be made..’

19. On the other hand, Hon Judges Serгон, Hellen Omondi and Stella Mutuku held that the Kadhi’s court have jurisdiction to hear and determine issues of custody and maintenance because it is incidental to the issue of divorce, it is a component of personal status and the enactment of the [Children Act](#) did not oust the jurisdiction of the Kadhis Court and / or repeal any of the provisions of the Act.

20. The High Court at Mombasa (Serгон, J) in HCCA 120 of 20004, [Amin Mohamed Hassan v Zabra Mohamed Abdulkadir](#) [2009] eKLR held:

“even if the [Children’s Act](#) No 8 of 2001 was in existence, I don’t think the appellant would have succeeded for two reasons. First, the Children’s Act No 8 of 2001 didn’t expressly oust the jurisdiction of the Kadhi’s court nor did it repeal any of the provisions of the Kadhi’s Act.

A critical look at section 185 of the Children’s Act will reveal that courts other than the children’s court were given discretion to refer matters before them touching on children to the children’s court. The Act uses the word ‘may’ instead of ‘shall’. It is therefore not true that the Kadhi’s court has no jurisdiction... Secondly the preliminary objection came late in the proceedings..”

21. Hon Serгон, J, in the case of [Mohamed Omar v JB Mdivo](#), Mombasa High Court, Misc. Civil Application No 949 of 2005 [2007] eKLR ruled that

“I do not think the jurisdiction of the Kadhi’s court has been taken away by the enactment of the children’s court.. ”

22. Hon HA Omondi J, in the case of [Najma Ali Ahmed v Swaleh Rubea](#) , Malindi High Court Civil Appeal No 22 of 2007 [2010] eKLR held:

Part VII of the [Act](#) deals with custody and maintenance of the child and gives the children’s court provision to make orders of maintenance for the child. However it must be borne in mind that the child’s maintenance is incidental to the marriage and this thus falls under the jurisdiction of the Kadhi’s court which addresses matters of personal law on members of the



Muslim faith. Indeed the teachings of the Qur'an are so specific even as regards provision by fathers for their sons and there was no error by the Kadhi'.

23. Hon Stella Mutuku J, in the case of *Abdirahman Mohamed Abdi & another Vs Adan Yusuf*, Garissa High Court, Civil appeal No 13 of 2012 [2013] eKLR held:

My view therefore is that paternity and custody of the child in this case are incidental to the issues of marriage and divorce between the appellants and thus it fall under the jurisdiction of the Kadhis Court. [see Miscellaneous Civil application No 903 of 2005, Republic Vs Kadhi Sheikh Twalib & another, Ex parte, Maimuna Salim And Najma Ahmed v Swaleh Rubea [2010] eKLR].

24. These are two school of thoughts on interpretation of the law on the issue by the High Court, the literal and purposive [Lord Donning, *Discipline of Law*, pg 16]. Clearly the issue is not settled. I am more persuaded, which I hereby hold, by the decisions confirming Kadhi's court jurisdiction to hear and determine issues of custody and maintenance of children; the *Kadhis Court Act* not having been repealed by the enactment of the *Children Act*, cap 141, the said issues being incidental to divorce proceedings before Kadhis Court and being a component of personal status. Further the direct consequence of finding the Kadhis Court lacks jurisdiction to hear custody and maintenance of children is multiple litigation, which apart from being costly also delays justice. This offends Article 159 (2) (b) and sec. 1 A, of the *Civil Procedure Act*, Cap 21.

Submission To The Jurisdiction Of The Kadhi's Court.

25. Mr Mwarandu submitted for the defendant that she 'will be highly prejudiced if she is compelled to submit herself to the jurisdiction of the Kadhi's court for the matter which concerns the rights of a child'.
26. Article 170[5] of the *Constitution* provides the Kadhis Court will exercise its jurisdiction where both parties profess the Muslim faith and submit to the jurisdiction of the Kadhis Court. Hon Odero J, in *Mariam S Swaleh & 4 others v The Chief Kadhi & 3 others*, Judicial Review No 9 of 2013 [2013] eKLR held :

"..what this means is that there must be consensus between the parties that a matter of inheritance be determined in the Kadhis court. The fact that one is a Muslim does not obligate such a person to have a matter concerning inheritance determined in the Kadhi's court. In this case whilst the applicant appears to desire that distribution be done in accordance with Islamic law, the respondents in sworn affidavits have clearly expressed a desire not to subscribe to the jurisdiction of the Kadhi's court. This is a choice which they are entitled to make.."

27. The Kadhi's Court is the only court that parties have to submit to its jurisdiction, which may be used as the first line of defence and consequently lead to its weakening. I do not believe this was the intention of the constitution but I must observe the decision of the High Court in the matter.
28. I am however compelled by the dictates of Qur'an to remind the parties, the serious consequences of such seemingly innocent and harmless averment. Muslims have no choice on whether or not they should be judged according to Qur'an and Sunnah. Where Shariah law or part thereto is not applied in a country, they have an excuse, but where it is operational, they should not have any choice. To choose



to be judged by other laws where Shariah law or part thereto is operational, is a weakness in one's faith. This is based on Qur'an: Nur: 24: 47 - 51 and Ahzab: 33: 37.

'But they [hypocrites] say, 'we have believed in Allah and in the Messenger and we obey' then a party of them turns away after that and they are not believers. And when they are called to [the words of] Allah and His Messenger to judge between them, at once a party of them turns aside in refusal. But if the right is theirs, they come to him in prompt obedience. Is there disease in their hearts? or have they doubted or do they fear that Allah will be unjust to them or His messenger? rather, it is they who are wrong. The only statement of the [true] believers when they are called to Allah and His messenger to judge between them is that they say, ' we hear and we obey', and those are the successful.

Qur'an: Nur : 24: 47 - 51.

'and it is not for a believing man and a believing woman, when Allah and His messenger have decided a matter, that they should [thereafter] have any choice about their affair and whoever disobeys Allah and His messenger has certainly strayed into clear error.

Qur'an: Al Ahzab: 33: 37.

Conclusion

29. The preliminary objection is allowed in part. The Kadhis Court have jurisdiction to hear and determine issues of custody and maintenance of children where both parties profess the Muslim faith. However this court lacks territorial jurisdiction to hear this matter and the defendant has chosen to not submit to this court's jurisdiction. Accordingly, the plaintiff has leave to file the plaint at the Children's Court at Malindi.
30. Each party to bear its own costs.

DATED AND DELIVERED IN OPEN COURT AT MOMBASA ON 23RD APRIL, 2015.

ABDULHALIM H. ATHMAN

PRINCIPAL KADHI

In the presence of

Mr Yunis Mgupu for plaintiff

Mr Mwarandu for defendant.

