



GJG v HG (Civil Appeal E122 of 2023) [2025] KEHC 2664 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2664 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E122 OF 2023
CJ KENDAGOR, J
FEBRUARY 27, 2025**

BETWEEN

GJG APPELLANT

AND

HG RESPONDENT

(Being an appeal against the Judgment of Hon. Gavana A. Mohamed, Senior Resident Kadhi delivered on 25th July, 2023 in Isiolo Kadhi Court Matrimonial Case. No. E013 OF 2022)

JUDGMENT

Introduction

1. The Appellant and the Respondent got married under the Islamic Law in 1991 and were thereafter blessed with 5 children. However, their marital relationship broke down and the Respondent petitioned the Court seeking orders on actual and legal custody, care and control, and maintenance of the children. She sought custody of the children and an order compelling the Appellant to take care of their maintenance and education.
2. The Appellant filed an Answer to Petition & Cross-Petition in which he stated that his marriage to the Respondent had irretrievably broken down and sought for dissolution of the same. The Respondent filed an Answer to Cross-Petition in which she denied that the marriage had broken down and opposed the Appellant's prayer for dissolution of marriage.
3. The Court delivered a judgment on 25th July, 2023 in which it declared the divorce between the [Respondent] and the [Appellant] as valid and ordered the Respondent be issued with a Divorce Certificate. It also ordered the Appellant to give the Respondent Kshs.30,000/= as the cost of post-divorce maintenance within three months upon the judgment.
4. Concerning the children, the Court gave the Respondent physical custody but held that this could be reviewed upon request. The Court gave the Appellant legal custody and reasonable access to the



children. It also held that the Appellant was to pay Kshs.60,000/= monthly for accommodation and maintenance of the children. Lastly, it ordered the Appellant to cater for the children's medication, school and madrasa.

5. The Appellant was dissatisfied with the judgment and appealed to this Court vide a Memorandum of Appeal dated 27th July, 2023. The Grounds of Appeal are as follows;
 1. That the Learned Kadhi erred in law and fact in entertaining and purporting to adjudicate a claim relating to custody and maintenance of children, which does not fall under the jurisdiction of his Court as the claim has no bearing whatsoever to Islamic Law and/or rights enforceable thereunder.
 2. That the Learned Kadhi erred in law and fact in presiding over a case involving children while not duly gazetted pursuant to Section 90 (2) of the Children's [Act No.29 of 2022](#).
 3. That the Learned Kadhi erred in law and fact in failing to take viva voce evidence from the Parties in this proceedings before delivering his erratic judgment.
 4. That the Learned Kadhi erred in law and fact in ordering the Appellant to be paying colossal amount of Kshs.60,000/= per month as accommodation and maintenance for the children albeit parental responsibility ought to be equally shared by the parents.
 5. That the Learned Kadhi erred in law and fact in failing to take cognizance that three out of the five (5) children of the parties hereof, are adults and can and ought to fend for themselves.
6. He asked the Court to allow the Appeal and set aside the judgment and decree given on 25th July, 2023. The Appeal was canvassed by way of written submissions.

Appellant's Written Submissions

7. The Appellant submitted that the judgment was delivered without taking viva voce evidence from the parties. It stated that the hearing of the matter before the Kadhi was adjourned on countless occasions on account of varying reasons including; negotiating consents, non-attendance of witnesses, and transfer of the Court among others. It argues that the Court directed parties, suo moto, to file submissions on custody and maintenance without proceeding to hearing and delivered a judgment based on the submissions. He also argued that the Kadhi Court did not have jurisdiction to hear and determine issues of child custody and maintenance.
8. In addition, the Appellant submitted that the Kadhi failed to consider the fact that 3 of the 5 children were actually adults as was captured in the Appellant's Written Submissions. Lastly, the Appellant argued that the Kadhi's apportionment of liability between the parties was unlawful because it did not observe the principle that parental responsibility should be shared equally between the parents. He argued that the judgment did not allocate the Respondent any portion of parental Responsibility.

The Respondent's Written Submissions

9. The Respondent submitted that the Kadhi Court has jurisdiction to hear and determine Children matters. She argued that child custody and maintenance are incidental to marriage and divorce and thus falls squarely within the jurisdiction of the Kadhi's Court. On this issue, she relied on the case of Civil Appeal No. E009 of 2024 Mohamed Abdo Ali Versus Sadia Ibrahim Edin and Zudg v SJKUR (2020) eKLR, where the Courts held that Kadhi's court has jurisdiction to issue orders on child maintenance and custody. It also argued that the Appeal ought to be dismissed for lack of merit.



Issues for Determination

10. Having considered the Grounds of Appeal and the submissions from both parties, I opine that there are two issues for Determination
 - a. Whether the Kadhi's Court has jurisdiction over Children matters.
 - b. Whether the Judgment was properly arrived at.

The Duty of the Court

11. Being a first appeal, the duty of this Court is to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. This principle was set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123 where the Court held:

“...this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”

Whether the Kadhi's Court has jurisdiction over Children matters

12. The Appellant submitted that the Honourable Kadhi did not have jurisdiction to hear and determine child custody and maintenance matters. This Court will first determine this issue.
13. The High Court in *MAA v SIE (Civil Appeal E009 of 2024)* [2024] KEHC 4894 (KLR), faced a similar question where the Appellant questioned the jurisdiction of the Kadhi's Court to deal with Children maintenance matters. The Court held:

“Custody and maintenance of children are incidental to marriage and divorce and therefore they fall squarely within the jurisdiction of the Kadhi's Court.”

14. This issue was exhaustively handled by the High Court in *ZUDG v SJKUR (2020)* eKLR, where the Court held that the Kadhi Court has jurisdiction over children matters:

“This court for now, aligns itself, so did the Kadhis who sat in this matter with the thought that the Children's Act did not oust the jurisdiction of the Kadhi or other subordinate courts in dealing with issues of children. Indeed, lately all magistrates are gazetted to handle children matters and in this court's considered view, by implication Kadhis too being in the category of magistrates should and ought to hear such matters and more so where the same are connected and incidental to the cause before the kadhi, so long as the said court applies the principles laid down by The Children's Act and in particular applies the best interest of the child's principle as enunciated by the said Act.”

15. Based on the above authorities, I do hold that the Kadhi Court had jurisdiction to hear and determine children issues on child custody and maintenance.



Whether the Judgment was properly arrived at

16. The third ground of appeal caught the attention of this Court. On this ground, the Appellant argued that the Learned Kadhi erred in law by failing to take viva voce evidence from the parties before delivering his judgment.
17. I have relooked the court record to determine the truthfulness of the above claim and ascertain the basis on which the Court arrived at the judgment. From the typed record and proceedings, it is clear that the matter was not heard and parties did not testify before the court. Although it had been set for hearing on several occasions, such hearings never took place due to several factors which resulted to adjournments. The matter went for pre-trial on 12th July, 2022 and was slated for hearing on 2nd August, 2022. However, on supposed hearing date, parties agreed to give ADR a chance and the matter was given a further mention date.
18. It was slated for hearing on 13th September, 2022 but it could not proceed on the said date because it later turned out to be on a public holiday. It was later slated for hearing on 13th December, 2022 but parties could not be heard as the Court was on transfer. It was later set for hearing on 22nd February, 2023 but the hearing could not proceed because the Respondent was bereaved. It was later slated for hearing on 16th May, 2023. The hearing did not proceed, but the Court directed the parties to file submission on the issue of child maintenance. The parties filed their submissions and the court delivered the impugned judgment on 25th July, 2023.
19. From the said record, it is clear that the parties did not testify before the Court. There is also no evidence that the parties agreed by consent to adopt their written statements and other documents without calling the witnesses.
20. I have also relooked at the impugned judgment to ascertain how the lower Court addressed the issue. He stated as follows; “There were unnecessary adjournments and it’s the court’s duty to manage cases by striving to give fair opportunity to parties to present and heard their cases. The Judiciary has zero policy on unnecessary adjournments to encourage timely determination of matters in compliance with Article 159 of *the Constitution* of Kenya 2010....The parties through their advocates filed their final submissions for the determination of the matter.”
21. This Court is being invited to determine whether the lower court was right in solely relying on the parties’ submissions, without their testimonies, to determine the matter.
22. In *Ngang’a & Another vs. Owiti & Another* [2008] 1KLR (EP) 749, the Court held that:

“As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystalize the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court’s focus is sought to be concentrated on the main aspects of the case that affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable.”



23. Similarly, in *Robert Ngande Kathathi v Francis Kivuva Kitonde* [2020] eKLR, the Court held as follows;

“It also relied on submissions of the parties to which no agreed documents were annexed. Submissions, with due respect, do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions. As was held by Mwera, J (as he then was) in *Erastus Wade Opande vs. Kenya Revenue Authority & Another* Kisumu HCCA No. 46 of 2007:

“Submissions simply concretize and focus on each side’s case to win the court’s decision that way. Submissions are not evidence on which a case is decided.”

24. This issue was more recently restated by the Court of Appeal in *Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau* [2016] eKLR, where the Court held as follows;

“First and foremost, there can be no quarrel with the statements in the above judgments that averments by the parties do not constitute evidence. Madan, JA (as he then was) made this abundantly clear in *CMC Aviation Ltd v. Crusair Ltd (No1)* [1987] KLR 103 when he stated:

“The pleadings contain the averments of the three parties concerned. Until they are proved or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded on them. Proof is the foundation of evidence.

As stated in the definition of “evidence” in section 3 of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or disproved. Averments are matters, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain unproven... The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.”

25. Based on the above authorities, this court finds no basis on which the Hon. Kadhi made the impugned judgment. I have relooked at the pleadings placed before the lower Court and ascertained that none of them constituted an express or implied admission of the issues in dispute. In addition, the parties did not expressly adopt their submissions as evidence. Further, the parties did not explicitly agree to adopt their respective witness statements and filed documents. I therefore find that, in these circumstances, the impugned judgment cannot stand.

26. I allow the appeal and order that the case between the Appellant and Respondent be heard by a different Kadhi.

Disposition

27. These are the final orders of the Court;

- a. The Appeal is allowed and the Judgment of the Trial court delivered on 25/07/2023 is hereby set aside.



- b. The case is referred back to the Kadhi Court for fresh hearing and determination by a different Kadhi.
- c. Each party shall bear their costs of the appeal.

28. It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS
ONLINE PLATFORM ON THIS 27TH DAY OF FEBRUARY, 2025.**

.....

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

No attendance by parties

