



**MHD v MSO & another (Civil Appeal E020 of 2024)
[2025] KEHC 11615 (KLR) (1 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 11615 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CIVIL APPEAL E020 OF 2024
JN ONYIEGO, J
AUGUST 1, 2025**

BETWEEN

MHD APPELLANT

AND

MSO 1ST RESPONDENT

ASO 2ND RESPONDENT

(Being an appeal from the judgement and decree of Hon. Fabad Ismail delivered on 19.11.2024 in KCMTR No. EE015 of 2024 at PK's Court at Garissa)

JUDGMENT

1. The appellant moved the trial Kadhi's court via a plaint dated 02.04.2024 seeking for orders that:
 - i. The Honourable Kadhi to intervene in this matter.
 - ii. The 1st defendant to take up his responsibilities as a husband and father.
 - iii. Costs of the suit
 - iv. Any other relief(s) the court deems necessary to issue.
2. Brief facts of the appellant's(plaintiff's) case before the trial court were that she was previously married to one AMS the second respondent (2nd defendant) although erroneously referred to as the 1st defendant in the plaint dated 2-4-2024. That the 1st defendant who is the 1st respondent in this appeal but erroneously referred to as the 2nd defendant in the said plaint is the appellant's father in-law hence the father to the 2nd respondent (2nd defendant).
3. That their marriage which was consummated the year 2010 was blessed with four children all of whom are staying with her as her husband relocated to USA some time in 2016 thus abandoning them. She



averred that the 2nd respondent was irresponsible and uncaring as he had failed to meet any of his family obligations.

4. It was her case that after her husband left for USA, her father in-law (1st respondent) started harassing her and her children claiming that she had divorced with the 2nd respondent hence was not supposed to stay in the house erected on plot No.GSA/xxx located within bulla Iskadeq. She averred that it was her husband who moved her into the said house as their matrimonial home.
5. She deposed that her father in-law had ordered her to move out on grounds that the house belonged to his other son known as HHA. She blamed her father in-law for her misfortunes in her marriage. She sought protection from the court by recognizing her as the rightful owner and occupant of the said house.
6. The 1st respondent entered appearance and then filed a defence dated 08.04.2024 denying the allegations by the appellant. He urged that at no particular point did he interfere with the marriage of the appellant after her divorce in the year 2018. That the appellant did not live in a rental house as she owns a house at Bulla Mzuri while the house at Bulla Iskadeq is owned by HHA, his biological child. He alleged that the appellant broke into the suit house and threatened him together with his son HHA. He thus urged the court to dismiss the appellant's suit.
7. The court granted an opportunity for the matter to be referred for mediation in vain as parties failed to agree. Consequently, the matter proceeded for hearing as follows:
8. PW2, BKS in his testimony confirmed that there existed a marriage relationship the parties but they consequently divorced. That he was among the elders who received the dowry of Kes. 100,000/- meant for the appellant. He confirmed that Sheikh Mohamed Shafi was the one who conducted the marriage ceremony between the two parties but later, the 1st respondent visited and told him that the appellant had taken possession of the suit house in Plot No. GSA/xxx forcefully. He further stated that the 1st respondent informed him that the suit plot was for rental as he was not the owner of the same. Additionally, that the appellant informed him that she lived in the suit property with full knowledge of the 1st respondent who was the owner of the plot.
9. RW3, ASM testified that the petitioner and him were married under the Islamic law. That they divorced each other and that his father gave Kes. 100,000 for dowry to the petitioner. He stated that he witnessed the transfer of the disputed plot from Gulleid Ali Hassan to HMA. He maintained that the 1st respondent was the owner of the suit plot.
10. RW4, Dek Kowdan Mohamud testified that he was amongst the witnesses who witnessed the purchase of the land as per the documents in the record.
11. The trial court upon considering the facts and the law as presented before it delivered its judgment on 19.19.2024 thus making orders that:
 - i. The disputed Plot No. GSA/xxx is owned by HMA.
 - ii. The plaintiff to vacate the said plot No. GSA/xxx within 21 days.
 - iii. That the disputed divorce between the parties is confirmed and declared as a valid divorce.
 - iv. The 2nd respondent upon vacation of the said disputed Plot No. GSA/xxx shall provide Kes. 80,000 /- effective from December 2024.
 - v. The petitioner is restricted to interfere or violate the ownership rights of Mr. HMA over the said Plot No. GSA/xxx.



- vi. The 1st respondent is granted access or residing or gain over the disputed Plot no. GSA/xxx.
 - vii. Dissolution of marriages is hereby granted to the petitioner.
12. The appellant being dissatisfied with the judgment and decree of the trial court filed a memorandum of appeal dated 03.02.2025 on grounds as follows:
- i. That the learned trial Kadhi erred in law and fact by declaring that the plot No. GSA/xxx is owned by HMA.
 - ii. That the learned trial Kadhi erred in law and in fact by failing to appreciate the nature of the matter before him as belonging to children and matrimonial property.
 - iii. That the learned trial Kadhi erred in law and in facts by strictly following sharia law.
 - iv. That the learned trial Kadhi erred in law and in fact by failing to take cognisance of the fact that there existed a children's case before another competent court.
13. The appellant sought for the following prayers:
- a. That the appeal be allowed.
 - b. That the judgment and/or decree issued by the Kadhi's court be set aside.
 - c. Costs of the appeal and the lower court be borne by the respondents.
 - d. Any other relief.
14. The Court heard the appeal with the aid of two assessors pursuant to section 65 (1) (c) of the *Civil Procedure Act*, which provides for appeals to the High Court from an original decree of a Kadhi's Court as follows:
- “c) from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.”
15. The court directed that the appeal be canvassed by way of written submissions.
16. The appellant via her submissions dated 28.03.2025 identified the following issues for determination:
- i. Whether the learned Kadhi erred both in law and fact by finding that the appellant did not contribute in acquiring the suit house.
 - ii. Whether the learned Kadhi erred in law and fact by ordering the appellant to give the respondent vacant possession of the house.
 - iii. Whether the Kadhi's court failed to consider the best interest of the children who are still minors and under the care of their mother?
 - iv. Whether the supporting affidavit of the first respondent as filed was defective and thus ought to be struck out?
17. On the first issue, the appellant submitted that she contributed both monetarily and non-monetarily towards the acquisition of the suit house in Plot No. GSA/xxx. That she contributed by way of providing family needs, child care and managing the household. She relied on the cases of PNN vs ZWN [2017] eKLR and the Supreme court's decision in J.O.O. vs M.B.O. where the court emphasised that while spouses have equal rights, the division of property must be based on the contribution made



by each party. She relied on section 2 of the [Matrimonial Property Act](#) in urging that contributions are not limited to monetary contribution only but also include non - monetary contribution.

18. On the second issue, this court was urged that the 2nd respondent was not a credible witness for the reason that previously, he argued that the property was owned by his father but registered in the name of his son who is the primary owner. In the same breadth, he also claimed that he did not know the name of the owner whom he claimed to be his brother thus the contradiction according to the appellant was key. She contended that the 2nd respondent built the suit house as their family home before going to the USA and therefore, the 1st respondent has no vested rights in regard to the said suit house and Plot No. GSA/xxx. She also opined that noting that the 2nd respondent could not avail the alleged claimed legal owner to testify to the same, it was clear that the respondents were keen to dispossess her the suit house.
19. On the third issue, the appellant submitted that the trial Kadhi failed to properly consider the best interests of the children noting that by sending them away from the suit house, the same would have a significant impact in their growth. That if the appellant is evicted from the suit house, then the children's well-being is likely to be compromised as their father currently is away from the country and the appellant is the primary care giver.
20. On whether the supporting affidavit was defective, it was urged that the same did not meet the necessary legal requirements for affidavits sworn outside the commonwealth. That the affidavit sworn in non-commonwealth countries must meet specific requirements. To that end, reliance was placed on the case of Alim Alhamed Ali and another vs Emag Ag Nairobi (Milimani) HCCC No. 1806 of 2000 where it was stated that:

Affidavits taken in countries other than commonwealth countries require proof by affidavit or otherwise that they have been taken by a notary public, with the stamp and seal or the official position of the person taking the affidavit, as opposed to affidavits taken in commonwealth countries. Otherwise, such affidavits are defective and should be struck out.'
21. It was urged that the said affidavit shows that it was commissioned in Nairobi and yet the 2nd respondent lives in Kansas, U.S.A. In the end, the appellant urged this court to intervene to prevent the impending injustice as pronounced in the determination by the trial Kadhi.
22. The respondents also filed submissions dated 21.05.2025 arguing in regards to the following issues:
 - i. Whether this appeal is properly before the court.
 - ii. Whether the appellant has any right to plot No. GSA/xxx.
 - iii. Whether the Kadhi erred in failing to consider existing children proceedings between the appellant and the 2nd respondent.
23. In reference to the first issue, counsel urged that the appellant filed a memorandum of appeal on 03.02.2025 against the judgment of the trial Kadhi delivered on 19.11.2024. That the appeal was filed 75 days after the impugned judgment contrary to the provisions of section 79G of the [Civil Procedure Act](#) which provides that every appeal from the subordinate court to the High Court shall be filed within 30 days. That this court may admit an appeal out of time where the appellant satisfies the court that there existed good reasons. However, in this case, the appeal was filed 75 days after the delivery of the judgment and no reasons were advanced as to the delay and therefore, the appeal is defective.
24. On the second issue, this court was urged that the house and Plot No. GSA/xxx in Bulla Iskadeq, were neither owned or leased by the appellant nor the 1st respondent. That the property belongs to one



HMA as per the documentary evidence adduced before the trial court. Counsel submitted that the second limb as to the meaning of matrimonial home refers to the fact that the alleged property had been occupied by the spouses as their family home. That in this case, the appellant was clear that she occupied the suit house after the 1st respondent had moved to the USA and as such, the same cannot encompass a matrimonial home.

25. It was argued that the appellant did not demonstrate that the suit house belonged to her. That to the contrary, she forcefully evicted the 1st respondent from the suit house, a house previously given to him by his son HMA.
26. On the issue that the trial Kadhi erred in failing to consider the existing children proceedings between the appellant and the 2nd respondent, counsel urged that the appellant initiated the proceedings in the Kadhi's court via a plaint dated 02.04.2024 and at the same time, a children's suit vide plaint dated 22.07.2024. That there was no indication in the proceedings before the Kadhi that the children's suit existed. It was urged that had the appellant informed the Kadhi of the existence of the children's matter, then the Kadhi would have not made a maintenance order in the suit before him. To that end, this court was urged to dismiss the appeal herein with costs.
27. Having reviewed the evidence adduced before the trial court, the respective pleadings filed herein, submissions, authorities cited, the opinions of the assessors and the applicable laws, it is clear that there are issues of procedural impropriety manifesting themselves in the trial court's proceedings. Without delving into the substantive issues of this suit, of interest to me is the manner in which the 'hearing' was conducted. The manner of recording or taking evidence is wanting. One cannot follow as to who is testifying and for who.
28. There is no indication why the 2nd respondent who did not enter appearance nor file any defence ended up testifying as 2nd respondent on 19-9-2024. There is no indication as to why the appellant's evidence was not taken yet she was in court throughout. It is not indicated whether she had opted not to testify or adopted her statement. It is also not stated why the 1st respondent did not testify yet he was in court.
29. The flow of evidence is mixed up. One cannot connect which witness is testifying for who. The witnesses who testified are recorded as 2nd respondent, Rw3, pw2 and Rw4. Besides, it is not indicated whether any witness was ever cross examined or such opportunity was given.
30. The right to be heard or given fair hearing is inalienable and absolute. It cannot be taken away unilaterally. [See article 50 of the [constitution](#) and the Court of Appeal decision in the case of CMC Holdings Ltd vs James Mumo Nzioki Civil Appeal No. 329 of 2001 [2004] eKLR. It is high time our brother kadhis were taken for proper induction in recording court proceedings.
31. With the said background in mind, it is apparent that the procedure for hearing suits and examination of witnesses as provided for in the Kadhi's court rules of procedure and Order 18 of the Civil Procedure Rules (2010), Cap 21 Laws of Kenya was not complied with. The said order is very comprehensive on how a trial should proceed in court including the recording and production of evidence. Of importance to this court is Order 18 Rules 1 and 2 which provides as follows:
 1. The plaintiff shall have the right to begin unless the court otherwise orders.
 2. Unless the court otherwise orders—
 - (1) On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.



- (2) The other party shall then state his case and produce his evidence, and may then address the court generally on the case. The party beginning may then reply.
- (3) After the party beginning has produced his evidence then, if the other party has not produced and announces that he does not propose to produce evidence, the party beginning shall have the right to address the court generally on the case; the other party shall then have the right to address the court in reply, but if in the course of his address he cites a case or cases the party beginning shall have the right to address the court at the conclusion of the address of the other party for the purpose of observing on the case or cases cited.

32. In view of the above provisions, can the procedure adopted by the trial court in the case herein be said to have complied with the procedure as laid down in the Civil Procedure Act or the Kadhi's courts rules of procedure? I hold otherwise for the reason that such substantial deviation from a well laid down procedure is not acceptable. [See the case of James Njoro Kibutiri vs Eliud Njau Kibutiri 1 KAR 60 [1983] KLR 62;]
33. In view of the foregoing, noting that the procedure of recording and production of evidence was not proper, it is my finding that the Honourable Kadhi fell into error and the whole trial was rendered a nullity or mistrial on account of procedural impropriety. From the record of evidence, it will be improper for me to purport to do justice for both parties given the anomalies cited.
34. As a consequence of the above, the court makes orders that the matter be remitted for a retrial before another Kadhi other than Hon. Fahad Ismail. Matter to be mentioned on 21-08-2025 before Kadhi Dida Wako (PK) for further directions and the same to be heard on priority basis.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 1ST DAY OF AUGUST 2025

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J. N. ONYIEGO

JUDGE

