



REPUBLIC OF KENYA



**MNA v HAG (Civil Appeal E171 of 2023) [2024] KEHC 3182 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3182 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E171 OF 2023  
EM MURIITHI, J  
MARCH 20, 2024**

**BETWEEN**

**MNA ..... APPELLANT**

**AND**

**HAG ..... RESPONDENT**

*(Being an appeal against the entire ruling, Judgment and decree of Hon. Senior Resident Kadhi Hon. Gavava A. Mohamed delivered on 22nd September 2023 and 22nd June 2023 respectively in the Kadhi Court of Kenya at Isiolo in Divorce Cause no. E013 of 2023)*

**RULING**

1. The appeal in this case arises from the judgment delivered on 22/6/2023 in Divorce case no. KCDC/E013 of 2023 by the Kadhi’s Court at Isiolo where the Court accepted jurisdiction over the matter of divorce and related children custody and maintenance between the appellant and the respondent, ruling as follows:

“Section 170 of the Constitution of Kenya provides: -

“170(5) the jurisdiction of a Kadhi’s 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”.

The matter which is before this court is of civil and both parties are Muslims. Consequently, this matter is rightly before this court.



Section 67 of the Rules and Practice in the Kadhis Court provides ....

The herein above provisions, this honourable court deems it appropriate to order as follows: -

1. That the marriage between the Petitioner and the Respondent is hereby dissolved.
2. That the Petitioner shall observe her Edah of three months without engaging in marriage proposal.
3. That the Respondent shall provide the Petitioner a post-divorce maintenance of Kshs. 30,000/= (i.e. Kshs. 10,000/= per month)
4. That the Petitioner shall be issued with a Divorce Certificate upon its application and after completion of her Edah.
5. That the Respondent shall give the Petitioner Kshs. 70,000 as her dowry within six (6) months upon the judgement herein.
6. That the Petitioner shall be given the physical custody of the minors.
7. That the Respondent shall be given the legal custody of the minors.
8. That the Respondent shall give the Petitioner before 5<sup>th</sup> of every month Kshs. 40,000/= per month as the maintenance of the minors.
9. That the Respondent shall cater for medication, school and Madrassa and their expenses and pay directly to the institution.
10. That the Petitioner shall cater for shelter (including water and electric power bills)
11. That the Respondent shall give the Petitioner a conciliatory gift of one female goat within three (3) months upon the judgement herein.”

2. Subsequently, upon an application for enforcement of the judgment, the Kadhi's Court made orders as follows:

“Owing to the premises hereinabove, this court proceed to make the following orders:

1. That the application of the Applicant is hereby allowed.
2. That the status quo the orders of the judgement dated 22<sup>nd</sup> day of June, 2023 remains intact.
3. That the Respondent shall pay the Applicant medication bills incur as per the invoice of the Hospital within three months upon the ruling herein.
4. That the Respondent shall pay the Applicant Kshs. 2,000/= as a madrassa fee by the end of this month of September, 2023.
5. That the respondent shall get reasonable access to his minors especially during the school and Madrassa holidays.



6. That the Respondent shall get reasonable access in visiting his minor at School and Madrassa.
  7. That the Respondent shall process and include the Applicant under his medical cover with immediate effect.
  8. That the Respondent shall not block or cut off communication with the Applicant and this is for the welfare and interests of the minors.
  9. That any assault with evidence, legal procedure shall be followed to the latter
  10. That noncompliance of any of the herein above orders, the court shall proceed to salary attachment for that matter.
  11. No orders as to costs."
3. Aggrieved by the decisions, the appellant filed an appeal against the two decisions and in a memorandum of Appeal dated 12/10/2023 set out the grounds of the appeal as follows:
- “ 1. That the learned Kadhi erred in law and in fact in holding that the appellant shall pay the respondent mediation bills incur as per invoice of the hospital within three months on the ruling herein without considering and placing sufficient weight on the testimony and without analyzing the entire evidence on record.
  2. That the learned Kadhi erred in law and in fact by failing to consider that the Respondent has a medical insurance cover i.e. Jubilee Insurance which she used to pay for the medical expenses incurred at hospital as such she did not pay directly from her pockets.
  3. That the learned Kadhi erred in law and in fact by failing to consider that the Respondent is already medically covered by Jubilee Insurance.
  4. That the learned Kadhi erred in law and in fact that the appellant shall provide Ksh.40,000/- (forty Thousand only) before the 5<sup>th</sup> of every month towards the maintenance of the minors without considering the evidence of the appellant and his current financial and employment status.
  5. That the learned Kadhi erred in law and fact in acting without jurisdiction in deciding upon custody and maintenance of the minors.
  6. That the learned Kadhi erred in law and fact in finding that only the Respondent is entitled to custody, care and control of the minors.
  7. That the learned Kadhi erred in law and in fact in finding that it is the sole responsibility of only the appellant to cater for children medical expenses, school fees and other related expenses without considering the financial and employment status of the Respondent too.
  8. That the learned Kadhi so misdirected himself on matters of law and fact as to occasion a miscarriage of justice against the appellant.
  9. That in the light of the foregoing the learned Kadhi failed to do justice before him in the case at hand.”



4. In the meantime, the appellant sought stay of the decisions of the court by Notice of Motion dated 15/2/2024 seeking reliefs orders as follows:
  1. This Application be certified urgent and the same be heard ex-parte instance.
  2. The Honorable Court be pleased to Order stay of execution pending hearing and Determination of this Application, the judgement and decree delivered on 22<sup>nd</sup> June, 2023 and ruling and orders issued on 22<sup>nd</sup> September, 2023 by Hon. Gavava A. Mohamed (SRK) in Isiolo Kadhis Court Divorce Cause No. E013 of 2023.
  3. The Honorable Court be pleased to Order stay of execution pending Hearing and Determination of this Appeal, the Judgement and Decree delivered on 22<sup>nd</sup> June, 2023 and ruling and orders issued on 22<sup>nd</sup> September, 2023 by Hon. Gavava A. Mohamed (SRK) in Isiolo Kadhis Court Divorce Cause No. E013 of 2023.
  4. Any other relief that the Honorable Courts deems fit to grant.
  5. The costs of this Application be provided for.”
5. The application was based on grounds set out in the application as follows:
  - i. That on 22<sup>nd</sup> June, 2023 the Honorable Senior Kadhi Hon. Gavava A. Mohamed delivered Judgement in Divorce Cause No. E013 of 2023 to the effect that among other orders issued, the Applicant/Appellant was to provide Kenya Shillings Forty Thousand. (Kshs. 40,000/=) every month towards the maintenance of his 4 children and Kenya Shillings Fifteen Thousand (Kshs. 15,000/=) every month for medical care amounts which Appellant/Applicant considers to be extremely high and exorbitant considering his current financial status.
  - ii. That subsequently the Honorable Senior Resident Kadhi delivered a Ruling on 22<sup>nd</sup> September, 2023 in the said suit ordering the Applicant/Appellant amount other orders to pay to the Respondent Kenya shillings Ninety Four Thousand Four Hundred and Twenty Five (Kshs. 94,425/=) the same being Medication bills incurred as per the Hospital bill presented within 3 months of which the said bills were settled by the Respondent’s insurer.
  - iii. That as Result of the said Orders and Decree the Respondent has obtained orders to attach to attach the Applicant/Appellant salary which is barely enough to sustain him and his family.
  - iv. That currently the Applicant/Appellant Employer is in the process of attaching the said salary to the extent of Kenya Shillings Eighty Five Thousand per Month (Kshs. 85,000/=) of which if the said salary is attached the Applicant/Appellant will be rendered destitute unable to meet his financial obligations.
  - v. That the Appellant/Applicant being aggrieved by said ruling and Judgement had already launched an appeal raising substantive and meritorious grounds of Appeal and if the Appellant/Applicant salary is attached the Appeal will be rendered nugatory.



- vi. That prior to the Respondent moving the Kadhis Court the Appellant/Applicant was providing to his children by paying School Fees having them included in his medical cover and further remitting to the Respondent monthly maintenance within his financial capability.
- vii. That this Application has been filed in time.
- viii. That the Applicant is ready and willing to abide by such terms as this court deems just and expedient in granting of the orders sought herein.
- ix. That the Respondent will not suffer any prejudice in the event the orders sought for in this application are granted and it is only fair and just that the orders sought herein are granted.
- x. That unless the application and orders sought are heard and granted in the first instance Applicant will suffer irreparable loss and prejudice.
- xi. That it is in the wider interest of justice that the orders sought be granted.”

6. The Respondent opposed the application by a relying affidavit sworn on 22<sup>nd</sup> February, 2024 setting out her case as follows:

- “2. I have read and understood the contents of the applicant’s application dated 15<sup>th</sup> February, 2024. I swear this affidavit in opposition of the application and response to issues raised in the Application.
- 3. The application is made in bad faith and the applicant seeks to ensure that the minors and I do not enjoy the fruits of the judgement herein.
- 4. Further the applicant is not being candid with this honorable court for he has only talked of two children while we have four. (Attached and marked HAG1 a-d are copies birth certificates and birth notification)
- 5. Judgment in this matter only confirmed and gave orders for the protection and provision of the minors herein.
- 6. The Applicant refused to clear the medical bill and I had to settle it on my own after he totally refused to clear it saying that he can only settle the bill through a court order thus I sought execution since this is an obligation he owes to the minors and especially since we are Muslims and our culture demands that the father has sole responsibility.
- 7. The Applicant is in the habit of abdicating his responsibilities because he still refused to settle the medical bill after I gave birth to our last born two months ago. (Attached and marked HAG2 are copies of medical bills)
- 8. The applicant has a primary duty to provide for his children and allowing this application amounts to leaving the minors without shelter, food, clothing and other basic needs.
- 9. The applicant is trying to escape his parental and constitutional responsibility and should not be allowed to do so. He is a man of means and capable of providing for the minors. (Attached and marked HAG 3 is a copy of his employment contract)



10. The applicant herein has always made my life as well as those of my children impossible thus the reason I sought the order of maintenance.
11. The application is against the best interest of the minors and should thus not be allowed as it will amount to the minors not having their father providing for them despite him having the means to do so.
12. From the application by the applicant, it is therefore crystal clear that the applicant is just seeking to delay the enjoyment of the rights of the minors and myself and the delay and infringement ought to be condemned and brought to an end. The court should not aid him in perpetuating his illegality.”

### **Principles for grant to stay of execution**

7. The Court has considered the principles for the grant of stay of execution under Order 42 Rule 6 of the Civil procedure Rules. There has not been any unreasonable delay. The court’s verdict as regards arguability of the appeal, substantial loss and provision of security is set out below.

### **Arguable case**

8. Upon reading the Memorandum of Appeal herein it cannot be said that the appeal is entirely frivolous as to disentitle the applicant to an order for stay. It is considered that there is an arguable case on the jurisdiction of the Kadhi’s Court over matters of custody and maintenance of children. However, an arguable case does not mean a case which must succeed. There might also be a question whether, on the evidence before the trial court, the order for the payment of maintenance in the amount ordered was proper. For this reason, the court finds that there are serious questions to be presented to the appellate court on appeal and there is, consequently, a proper basis for the grant of stay of execution of the Judgment of the Court appealed from.

### **Substantial loss**

9. The court agrees that the appellant shall be occasioned substantial loss if his salary is attached as permitted by the trial court for the payment of the decretal sum herein before the appeal that he has lodged is heard and determined. The respondent has not shown that she is ready, able and willing to refund the appellant should the appeal eventually be successful.

### **Security for due performance of judgment**

10. The primary orders sought to be appealed from relate to the provision of maintenance for minor children of the parties. Provision for the maintenance of the children is a live obligation of the parents, which co-extensive to the minor status of the children and it cannot be held in abeyance pending appeal to the detriment of the children so as to deny them proper upkeep and care within the means of their parents. What may be contested is the amount of provisions to be made by the parents, the appellant and the respondent in the case.
11. In this case, a maintenance order for Ksh.40,000/- was made against the appellant in respect of the four children of the parties. The appellant also takes issue with Kadhi’s Court order imposing sole responsibility on the appellant to cater for the children and at the oral argument before this court urged the court to direct an assessment by the Children Officer, Isiolo, as to the appropriate maintenance.
12. While a deposit of any monies in court, or joint interest earning account in counsel’s names, as security in this case is not suitable because it would still deny the minor children provision for maintenance,



the court considers a part-payment to the respondent mother of the sum of Ksh.40,000/- directed by the Kadhi's Court would properly go the continuing need for upkeep of the children which cannot wait for the determination of the appeal. The Court will, therefore, order as security herein, the part-payment of the monthly maintenance amount in the sum of Kenya Shilling Twenty (20,000/-) to be paid on or before 5<sup>th</sup> of every month as directed by the trial court.

### **Hearing of the Appeal**

13. The Civil Procedure Act s. 65 (1) (c) requires that an appeal be to the High Court

“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.”

14. Being mindful of the constitutional direction that matters involving children be expedited, the Court shall order for the expeditious filing of the record of appeal herein so as to facilitate early hearing and disposal of the appeal.

### **Orders**

15. Accordingly, for the reasons set out above, the court makes the following orders:

1. There shall be a stay of execution of the decisions of the trial court to the extent and on security in terms of the orders made hereinafter.
2. The order for the payment of Ksh.40,000/- per month as maintenance for the children is stayed on condition that the appellant shall make monthly payments to the Respondent the sum of Ksh.20,000/- for the maintenance of the four children of the parties.
3. The appellant shall continue to comply with the other orders of the trial court and particularly to pay school fees and take out medical insurance cover for the children pending the hearing and determination of the appeal.
4. In default of the conditions for the payment herein above, the order for stay shall lapse and be of no effect.

Order accordingly

**DATED AND DELIVERED THIS 20<sup>TH</sup> DAY OF MARCH, 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:-

Parties in person.

