1. INTRODUCTION

Jurisdiction is defined as the official power to make decisions. For any court or body to take any steps towards determining any case before it, it must be satisfied that it has the requisite jurisdiction because as held in Owners of Motor Vessel “Lilian S” vs Caltex Oil (Kenya) Ltd, without jurisdiction a court has no power to make one more step as there would be no basis for doing so.¹

This paper examines the emerging jurisprudence on the jurisdiction of judicial and other dispute resolution forums in determining custody and maintenance cases involving children to parents who profess Muslim faith. These forums are the Children Court, Kadhis’ Courts and others such as the H.H. The Aga Khan Shia Imami Ismailia National Conciliation and Arbitration Board (Arbitration Board).

2. BACKGROUND

Article 3(1) of Convention on the Rights of the Child, Article 4(1) of the African Charter on the Rights and Welfare of the Child, and Article 53(2) of the Constitution of Kenya, all provide that in all actions concerning a child, the best interests of a child shall be the primary consideration.²

Article 14 of the Convention on the Rights of the Child and Article 9 of the African Charter on the Rights and Welfare of the Child provide for the right of the child to freedom of thought, conscience and religion and that the states must ensure this right is respected.³ Article 32(1) of the Constitution of Kenya makes similar provision that every person, children included, has a right conscience, religion, thought, belief and opinion.⁴ Religion plays a key role in defining a human being and these legal provisions demonstrate that when it comes to children, religion is at the center of their lives and must be protected and promoted by both natural and juristic persons.

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² Convention on the Rights of the Child, Article 3(1); African Charter on the Rights and Welfare of the Child, Article 4(1); Constitution of Kenya, Article 53 (2).
³ Convention on the Rights of the Child, Article 3(1); African Charter on the Rights and Welfare of the Child, Article 9.
⁴ Constitution of Kenya, Article 32(1).
In maintenance and custody matters of children born to parents professing Muslim faith, religion is again at the center. Religion is what defines the jurisdiction of an institution in handling the matters before it, particularly with regard to those who profess Muslim faith. The question as to whether Kadhis courts and other forums of dispute resolution have jurisdiction to handle children matters involving custody and maintenance has been a live issue in Kenyan courts. In some cases, it has been argued that children matters are incidental to marriage issues where the Kadhis courts have jurisdiction to deal. In other cases, it is argued that only Children’s court has jurisdiction to hear children matters and that Kadhis’ courts are not children court.

Determining which dispute resolution forum has jurisdiction over which matters is not an easy task especially to persons who don’t have knowledge in Kenyan law and how courts in Kenya operate. Inability to determine the most appropriate forum to file a case is an issue that can seriously hinder access to justice. It is an issue that can lead to wastage of precious judicial time, precious time for litigants, money and other resources, and to emotional drainage especially in matters concerning children. Sometimes, litigants who are not sure of where to file their cases are accused of forum shopping and crafty litigants use this as a way of ‘punishing’ the other party by filing suits in multiple courts which all seem to have jurisdiction. This is very common in matters involving children’s custody and maintenance, due to the peculiar circumstances under which those matters arise. For instance, in divorce proceedings, custody of children and their maintenance may arise. In other instances, the issues can arise as stand-alone issues where the parties are not married, or are married but are not seeking dissolution of the marriage.

Jurisdictional questions have arisen in matters of custody and maintenance of children to parents who profess Muslim faith, and this is demonstrated by the relatively high number of appeals to the High Court on this question filed in the last ten years. The Judges’ opinions are divided on whether or not Kadhis’ courts have jurisdiction to determine this issue. For instance, in *THJ vs SMO*\(^5\) and *Najma Ali Mohamed vs Swaleh Ruba\(e\)*\(^6\) the courts held that children matters are incidental to marriages and therefore Kadhis Courts have jurisdiction by virtue of Article 170(5) of the Constitution which gives Kadhis Courts the jurisdiction to deal with marriage matters. The courts in *ABMM vs SMY & Another*\(^7\), *SMH vs SAA*,\(^8\) *AAI vs HAD*,\(^9\) and *HMM v KJD*\(^10\) took the view that Kadhis Courts have no jurisdiction to deal with custody and maintenance of children and that the Children’s Court established under Section 73 of the Children’s Act has exclusive jurisdiction.

In determining a jurisdictional question, the views of the child involved, where the child is able to communicate, must be taken either directly or through an impartial representative as a party to the

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\(^5\) (2014)eKLR.
\(^6\) (2010)eKLR.
\(^7\) (2019)eKLR.
\(^8\) (2014)eKLR.
\(^9\) (2018)eKLR.
\(^10\) (2014)eKLR.
proceedings, as required by Article 4(2) of the African Charter on the Rights and Welfare of the Child and Article 12(2) of the Charter on the Rights of the Child. The child should be given an opportunity to say whether they are comfortable having the children’s court or Kadhis courts or other forums that are created pursuant to faith and religion determine cases involving them, where the child is able to express themselves. It is not enough to consult the disputing parties only and ignore the child.

3. JURISDICTION OF CHILDREN’S COURT, KADHIS’ COURTS & OTHER BODIES IN CUSTODY & MAINTENANCE OF CHILDREN MATTERS

i. Children’s court

The jurisdiction of the Children’s Court to handle custody and maintenance matters is not contested. The debate is whether the jurisdiction is exclusive. Section 73 of the Children Act provides that ‘there shall be courts to be known as Children’s Courts constituted’ for the purpose, among others, of conducting matters involving custody and maintenance of children.

The High Court and Kadhis court’s decisions show a difference of opinion on this issue. The opinions are inconsistent in themselves such that it is not easy to answer the question as to whether the Children’s Court has exclusive jurisdiction or other forums have jurisdiction so long as some conditions, such as gazettement of judicial officers to handle children’s matters, are met. For instance in AAI –vs HAD,11 the court while adopting the opinion of the Chief Kadhi said:

‘Part VII of the Act deals with custody and maintenance of children. Although the jurisdiction of the Children’s Courts is not exclusive, jurisdiction in matters involving children has not been conferred upon the Kadhis Courts nor is the Chief Justice empowered by the Children Act to appoint any Kadhi for the purpose of conducting proceedings under the Act. My finding therefore is that the Kadhi’s Court does not have jurisdiction to deal with matters concerning children and without jurisdiction, the Kadhi’s Court cannot entertain any proceedings before it concerning children. The upshot of this finding is that in granting orders of custody and maintenance of the children herein in Mombasa Kadhi Civil Cause No. 55 of 2013, the Hon. Principal Kadhi exceeded the jurisdiction conferred upon the Court by the Constitution and by statute.

...

Hon. Sheikh Al Muhdhar A. S. Hussein, Chief Kadhi was of the opinion that the Appeal should be allowed. The Hon. Chief Kadhi’s opinion is reproduced in part:

“The learned Kadhi erred in giving himself jurisdiction to entertain issues of children while there is an act of parliament children Act No. 8 of 2001 which deals with issues of Children regardless to

11 (2018)eKLR.
their faith. Jurisdiction is donated by the Law ... Any court decision without jurisdiction that decision shall render (sic) NULL and VOID however good it is.”

I concur with the opinion of the Hon. Chief Kadhi and my conclusion is that the Hon. Kadhi misdirected himself by assuming jurisdiction over the issue of custody and maintenance of the children herein."\(^\text{12}\)

In **HMM v KJD**,\(^\text{13}\) the court held that the children’s court has the exclusive jurisdiction to handle custody and maintenance matters because the Children Act was enacted for that special purpose.\(^\text{14}\) The court followed, with approval, the decision in **ZHZ vs SDS**\(^\text{15}\) where the court said:

‘The cited law [Constitution and Kadhi’s Court Act] makes it clear that the jurisdiction of the Kadhi’s Court is to matters of personal law e.g. marriage, divorce and inheritance. No mention is made of children’s matters like 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 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.’

In **Republic v Kadhis Court Nairobi & 2 others Ex- parte T L**,\(^\text{16}\) the court held that the children’s Act does not confer Jurisdiction upon Kadhi’s courts to hear and determine children matters either expressly or impliedly.\(^\text{17}\)

In **ABMM v SMY & another**\(^\text{18}\) the court held:

‘It is therefore apparent from the above Article 170(5) and section 5 of the Kadhi Courts Act, which provisions of the law are couched in mandatory terms that they set the limit on the areas upon which the Kadhi Court would have jurisdiction. The term ‘shall’ is used. However, it is notable that nowhere does it mention the aspects of custody and child maintenance

Therefore, in my view it is clear that the drafters of the above provisions of the law never intended the Kadhi’s Court to handle matters relating to custody and maintenance of the children nothing prevented them from expressively doing so.’

Some of the courts are of the opinion that the jurisdiction of the Children’s Court is not exclusive but that since the Chief Justice has not gazetted Kadhis as judicial officers who have power to deal

\[^{12}\text{Id., paragraphs 15,17 and 18.}\]
\[^{13}\text{(2014)eKLR}\]
\[^{14}\text{Id., page 3.}\]
\[^{15}\text{(2014)eKLR.}\]
\[^{16}\text{(2018)eKLR.}\]
\[^{17}\text{Id., paragraph 37.}\]
\[^{18}\text{(2019)eKLR paragraphs 19 and 21.}\]
with custody and maintenance cases under Section 73 of the Children’s Act like it happens with magistrates, then Kadhis lack jurisdiction.

For instance, in Republic v Kadhis Court Nairobi & 2 others Ex- parte T L,\(^{19}\) the court held that the Chief Justice has not gazetted any Kadhi to handle children’s matters and so Kadhis have no jurisdiction to do so.\(^ {20}\) In HMM v KJD the court held that the Children’s Act grants exclusive jurisdiction over all children matters including custody and/or maintenance only to Judicial Officers who are gazetted under the said Act and that a Kadhi is not a judicial officer gazetted to handle children matters.\(^ {21}\)

The Court of Appeal has departed from the position taken by the High Court above and seems to have settled the question of exclusivity of the jurisdiction of the Children’s Court. In **TSJ v SHSR**,\(^ {22}\) the court has held that there is no stipulation in Section 73 of the Children’s Act that the jurisdiction of the Children’s Court is exclusive.\(^ {23}\) Part VII of the Children Act provides that, “a court” may on application make orders regarding custody, care and control, maintenance of children but this does not stipulate that the jurisdiction of the Children’s Court is exclusive. Consequently, nothing prevents other courts or bodies such as the Arbitration Board to handle matters of custody and maintenance.

Agreeing with earlier decisions in Amin Mohamed Hassan v Zahra Mohamed Abdulkadir,\(^ {24}\) and Abdirahman Mohamed Abdi & Another vs Adan Yusuf\(^ {25}\) in determining that the Children’s Court is not exclusive, the High Court in ZUDG v SJKUR,\(^ {26}\) held 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.’\(^ {27}\)

The position of the law, therefore is that the Children’s Court does not have exclusive jurisdiction to determine custody and maintenance matters and that Kadhis Courts and other bodies also have jurisdiction.

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\(^{19}\) (2018)eKLR.
\(^{20}\) Id., paragraph 31.
\(^{21}\) (2014)eKLR page 4.
\(^{22}\) (2019)eKLR.
\(^{23}\) Id., paragraph 41.
\(^{24}\) (2009)eKLR.
\(^{25}\) (2013)eKLR.
\(^{26}\) [2020] eKLR.
\(^{27}\) Id., paragraph 10.
ii. Kadhis Courts

The jurisdiction of Kadhis Courts is provided for under Article 170(5) of the Constitution of Kenya which provides that ‘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 also speaks to the jurisdiction of the Kadhis Courts and provides:

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.

A reading of Article 170(5) of the Constitution and Section 5 of the Kadhis Court Act shows that three factors, namely, subject matter of the claim, religion and submission to Kadhis courts dictate whether that court has jurisdiction to deal with any matter. All the three factors must be present, and where any one of them is absent, the last part of Section 5 of the Kadhis Court Act applies. That is, other courts have jurisdiction to handle the matter. This means that the jurisdiction of the Kadhis court is also not exclusive.

There is no debate about the issue of religion and submission to the Kadhis court. The issues are clear. The question that arises is whether custody and maintenance matters for children to parents who profess muslim faith form part of the subject matters that Kadhis courts can handle. The subject matter is derived from personal status, marriage, divorce or inheritance. The opinion is divided. Some school of thought thinks that they are not and others think that custody and maintenance of children are matters incidental to marriage, divorce, and personal status which Kadhis courts can handle. This is perhaps due to lack of a definition to those parameters.

For instance, in H M M v K J D, the court held that custody and maintenance of children is not provided for under Article 170(5) of the Constitution and Section 5 of the Kadhis Courts and cannot be construed to fall under any of the ‘personal status’ parameter provided under that Article.

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28 Chapter 11 Laws of Kenya.
29 (2014)eKLR page 2.
and section of the law. Similar decision was made in ABMM vs SMY & another, 30 SMH vs SAA, 31 GSA vs ASA, 32 and ZHZ vs. SDS 33

In Amin Mohamed Hassan –vs- Zahara Mohammed Abdulkadir, 34 the court held that issues of custody and maintenance fall into the category of personal status. The court followed the definition in the Black’s Law dictionary which describes personal status as follows;

“A person’s legal condition whether personal or proprietary; The sum total of a person’s legal rights, duties, liabilities and other legal relations or any particular group of them separately considered.

The court in Republic v Kadhis Court Nairobi & 2 others Ex- parte TL 35 adopted and followed the definition of personal status given in Amin Mohamed Hassan case. Similarly, the judges in Najma Ali Ahmed vs Swaleh Rubea, 36 and Abdirahman Mohamed Abdi & Another vs Adan Yussuf 37 and the Kadhi in HSA v AAL 38 were all of the view that custody and maintenance matters are so intertwined with personal status, marriage and divorce issues that they cannot be separated and therefore well within the Kadhis court’s jurisdiction. In TSJ v SHSR 39 the Court of Appeal described issues of maintenance and custody as issues of personal nature 40 and the current position of the law, therefore, is that custody and maintenance fall within the subject of personal status.

There is no doubt that issues of custody and maintenance can arise, and they do arise, in divorce matters or even matters concerning marriage. It would not be in the interests of justice and best interest of a child to sev ere this matter and have the parents seek redress in another forum when they have already submitted to the jurisdiction of the Kadhis court. Demanding this would be an impediment to access to expeditious and effective justice. There is need for the courts to examine the parameters constituting the subject matter of a claim widely and purposively, rather than narrowly by just stating that the Constitution and the Kadhis Court Act do not mention the issue of custody and maintenance of children. There is no way the law can provide for every conceivable situation. Instead, through provisions such as Article 259(1) of the Constitution, the courts have

31 (2013)eKLR.
32 (2014)eKLR.
33 (2014)eKLR
34 (2009)eKLR
35 (2018)eKLR
36 (2010)eKLR.
38 (2020)eKLR.
39 (2019)eKLR
40 Id., paragraph 21.
powers to interpret the law in a manner than advances development of the law, contributes to good
governance and promotes the values and principles of law.

There are instances where the children involved have capacity to express their religious beliefs
and pursuant to Section 83(1)(g) of the Childrens Act, this expression must be taken into account
by any court, whether Kadhis or any other, when it is raised. For instance, a child who expressly
states their religious persuasion as Islamic and their parents have submitted to the jurisdiction of
the Kadhis courts should not have their case referred to any other court for the determination of
their custody or maintenance issue as this would unnecessarily limit their right to freedom of
religion under Article 32 (4) of the Constitution.

However, and for good order and to resolve the division in opinions demonstrated above, Section
73(d)(ii) of the Children Act should be amended to provide for gazettement of Kadhis to preside
over children matters. There is no reason to believe that Kadhis have no capacity to determine the
cases in accordance with the dictates of part VII of the Children’s Act.

iii. Other dispute resolution bodies

In any community, there are internal dispute resolution forums or bodies created to resolve disputes
even on matters of personal law. These forums and systems fall within the ambit of Alternative
Justice Systems recognized under Article 159 (2)(c) of the Constitution. Even before the
promulgation of the Constitution, some courts already recognized and protected these forums. For
instance, in N vs N41 the issue before the court was whether the HH The Aga Khan Shia Imami
Ismailia Provincial Council, Kisumu established under the Holy Constitution ordained by the Shia
Ismami Ismaili Muslim faith spiritual Leader His Highness The Aga Khan to handle matters of
personal law including, among others, maintenance and custody of children. The court held that it
had jurisdiction vested under statute and the Council also had jurisdiction because Ismailis
voluntarily submit to its jurisdiction in respect of the subjects relating to their personal law as
stated in their constitution. Madan J.A added:

“I am not aware of any statutory provision which prohibits a set (sect) within the general
society from setting up their own tribunal for the settlement of matrimonial or other
permitted disputes between its own members; a tribunal thus constituted has a duty to act
fairly and justly.

In an orderly society the High Court gives, as it ought to give, recognition to a tribunal
which is set up by the consent of members of a sect to administer their personal law. Such
non-statutory tribunals are useful adjuncts to courts of law which administer justice under

41 (1982)eKLR.
their inherent and statutory jurisdictions. They usefully reduce the burden of the courts of law in an ever-increasing complex society.”

Recently, the Court of Appeal in TSJ v SHSR\(^{42}\) followed the decision in N vs N and backed up by Article 159(2)(c) of the Constitution held that the H.H. The Aga Khan Shia Imami Ismailia National Conciliation and Arbitration Board, Nairobi had jurisdiction to handle custody and maintenance cases filed before it by parties who have submitted to its jurisdiction and further it cannot be said that the use of arbitration in the sphere of personal law disputes is either against the law or against public policy.\(^{43}\) The court further said that it cannot be said that matters of personal law are in the exclusive jurisdiction of courts. The court further held that that there is nothing in the Arbitration Act that would prevent disputes “of a personal nature” from being resolved under the framework of the Arbitration Act.\(^{44}\) In a nutshell, the Court of Appeal conclude that that nothing precludes a body such as the Arbitration Board from arbitrating over disputes relating to custody and maintenance of children where both parties submit to the authority of such a body by agreement by dint of their religious edict under their constitution.\(^{45}\)

Consequently, forums other than the courts have powers to determine issues of custody and maintenance so long as they are organised by a community or sect in accordance with their religious edict, they are empowered to do so by the constitutions and parties submit to their jurisdiction. However, these other bodies do not in any way oust the jurisdiction vested on the courts by legislation or Constitution.

Alternative justice forums should be promoted, protected and encouraged and the Court of Appeal has shown the way by the decisions above. As noted in the Alternative Justice Systems Baseline Policy, these forums reflect the lived realities of Kenyans where only 5% of the disputes are referred to law courts.\(^{46}\) The advantages of the forums include increased access to justice for many Kenyans, reduction of case backlog and decongestion of courts and doing justice differently and more effectively.\(^{47}\)

5. BEST PRACTICES

Some countries have settled the question as to whether custody and maintenance of children fall in the category of personal status. For instance, in the United Arabs Emirates state, the Federal Law No. (28) of 2005 on Personal Status provides that personal status includes custody,

\(^{42}\)(2019)eKLR.
\(^{43}\)Id., paragraph 34.
\(^{44}\)Id., paragraph 35.
\(^{45}\)Id., paragraph 38.
\(^{46}\)Alternative Justice Systems Baseline Policy, Executive Summary.
\(^{47}\)Id.
maintenance and guardianship of children. Personal Status Courts deal with personal status matters and apply Islamic law. Malaysia has the Syariah courts created under Section 40 of the Administration of Islamic Law(Federal Territories) Act 1993 with jurisdiction to handle personal status issues and some criminal offenses involving Muslims exclusively as per List II of the Ninth Schedule to the Federal Constitution of Malaysia, and Islamic Family Law (Federal Territories) Act 1984. Personal status issues include maintenance, adoption, legitimacy, and guardianship of children.

In the United Kingdom, there is a Muslim Arbitral Tribunal created pursuant to the Arbitration Act 1996. The Tribunal comprises of experts in Islamic law and has its own procedures known as Procedure Rules of Muslim Arbitration Tribunal which regulate and govern its operations. The Tribunal deals with Islamic divorce and family disputes which include custody and maintenance of children. It is a form of alternative dispute resolution mechanisms.

6. CONCLUSION

From the discussion above, issues of custody and maintenance of children are personal matters which fall within the subject of person status but division of opinion arises because there is no clear definition in the statutes or Constitution. Such matters can be properly dealt with by Kadhis Courts and other alternative justice forums so long as they have power to deal with those matters and parties submit to their jurisdiction. Where there is no submission to the jurisdiction, then other courts can determine the matters.

However, these multiple forums with concurrent jurisdictions are not always good for access to justice. They create confusion and lead to wastage of scarce resources. There is need for legislation or case law to specify how these concurrent jurisdictions can be exercised. The confusion inhibits promotion of the best interests of the child because it causes delays in determination of the cases.

Best practices show that it is important to define whether custody and maintenance cases fall within the person status category as it makes it easy to identify which forum has jurisdiction. The religious courts have been clothed with clear and sufficient jurisdiction to handle custody and maintenance cases by legislation. The practices also show that alternative dispute resolution mechanisms have been embraced and are assisting in accessing justice.

48 Articles 142, 143, 144, 149 and 150.
49 Id.
50 Federal Constitution of Maysia, Ninth Schedule.
51 Islamic Family Law (Federal Territories) Act, Sections 72-87.
53 Id.
54 Id.
7. RECOMMENDATIONS

i. Section 73(d)(ii) of the Children’s Act to be amended to provide for appointment of Kadhis as children courts just like it happens with magistrates.

ii. Provisions recognizing other forums for dispute resolution with respect to custody and maintenance matters and regulating the adoption and enforcement of their orders be inserted in the Children’s Act.

iii. Clear definition of what matters of ‘personal status’ entail be provided for, and specifically, that custody and maintenance of children fall within the subject of ‘personal status.

iv. Provisions guiding the exercise of the concurrent jurisdictions of courts be provided for under the Children’s Act since this is the universally accepted statute on children matters.