

Research Article

Reform from Within: Efforts by Kadhis' Courts in Kenya to Empower Muslim Women's Access to Matrimonial Property and Divorce Settlements Rights

Abdulkadir Hashim

University of Nairobi

Abstract.

When the relationship ends through divorce or separation, Muslim married women risk losing their share of the matrimonial property and other marital rights after divorce. As a result, Muslim widowed women lose the rights to ownership, control, and access to properties they enjoyed during their marriage life. The application of Muslim personal law (MPL) in the Kadhis' courts in Kenya, similar to other jurisdictions, is highly dependent on social customs that to a great extent hinders women's access to their rights after divorce. Previously, Muslim women appearing before the Kadhis' courts in Kenya would persevere their marital sufferings and submit to patriarchal norms of male priority, authority, and power. Current religious underpinnings of MPL in the Kadhis' courts in Kenya demonstrate a continuing change in Muslim religious courts toward expanding Muslim women's access to justice. Neo-Kadhis are influenced by contemporary Muslim legal opinions and conventional legal trends and constitutional instruments such as the Constitution of Kenya 2010 that provides for gender equality, including equality in ownership of property, and prohibits the state from making laws that arbitrarily deprive a person of property or the enjoyment of the rights/interests over property on any discriminatory grounds. The Neo-kadhis are pioneering the reform process that adopts a progressive approach in responding to emerging legal issues related to women litigants' rights to matrimonial property rights and divorce settlements rights in the form of Mata'a (consolatory gift) as opposed to the prevalent Islamic traditional approach in Muslim religious courts. Influenced by conventional court decisions, recent cases decided by the Neo-Kadhis in Kenya consider wives' day-to-day household activities and monetary contributions in assessing matrimonial property rights after divorce. This paper examines the dynamics of the progressive approach adopted by the Neo-Kadhis in Kenya toward enhancing women's access to justice rights and gender relations in Muslim religious courts in Kenya and beyond.

Keywords: Access to matrimonial rights, divorce settlement rights, Kadhi's courts, Muslim women, Islamic family law, Kenya

Corresponding Author:
Abdulkadir Hashim; email:
hashim@uonbi.ac.ke

Published 11 January 2024

Publishing services provided by
Knowledge E

© Abdulkadir Hashim. This article is distributed under the terms of the [Creative Commons Attribution License](#), which permits unrestricted use and redistribution provided that the original author and source are credited.

Selection and Peer-review under the responsibility of the RIICSHAW Conference Committee.

OPEN ACCESS

1. Introduction

In the era of Society 5.0, characterized by competition and contestation in gender related matters, various contemporary issues arise in various aspects of marriage life, inter alia, share in the matrimonial property and other marital rights after divorce. Muslim divorced women in our contemporary era risk the opportunity of losing their entitlement to rights of ownership, control, and access to matrimonial properties they enjoyed during the marriage life. Marriage and is highly dependent on social customs that hinder to a great extent women access to their rights after divorce.

Divorce and separations cases, which are on the rise in Muslim communities, have a significant impact in the social and economic lives of Muslims in the societies. In the past few decades, Muslim women appearing before the Kadhis' courts in Kenya would persevere their marital sufferings and submit to patriarchal norms of male priority, authority, and power. The era of Society 5.0 has brought changes to family dynamics and with the growing level of education and enlightenment of Muslim women, there is paradigm shift in the increase of Muslim women litigants appearing at the Kadhi's courts in Kenya seeking their rights to divorce and matrimonial rights.

Current religious underpinnings of Muslim Personal Law (MPL) in the Kadhis' courts in Kenya demonstrate a continuing change in Muslim religious courts towards expanding Muslim women's access to justice. Access to justice for Muslim women has been spearheaded by Neo-Kadhis who are influenced by contemporary Muslim legal opinions and conventional legal trends and constitutional instruments such as the Constitution of Kenya 2010 that provides for gender equality, including equality in ownership of property and prohibits the state from making laws that arbitrarily deprive a person of property or the enjoyment of the rights /interests over property on any discriminatory grounds.

Recent cases decided by the Neo-Kadhis at the Kadhi's courts in Kenya take into account wives' household day-to-day activities and monetary contributions in assessing matrimonial property rights after divorce. The Neo-kadhis are pioneering the reform process that adopts a progressive approach in responding to emerging legal issues related to women litigants' rights to matrimonial property rights and divorce settlements rights in the form of Mata'a (consolatory gift) as opposed to the prevalent Islamic traditional approach in Muslim religious courts.

Most of the research undertaken on marriage and divorce related issues does not echo the challenges facing Muslim women after divorce that results into injustice. This paper is unique in that it explores predicaments facing Muslim women in accessing

their marital rights after divorce and demonstrates efforts undertaken the Neo-Kadhis in Kenya to enhance access to justice.

The paper highlights the dynamics of the progressive approach adopted by the Neo-Kadhis in Kenya in the era of Society 5.0 towards enhancing Muslim women access to justice and gender relations in Muslim religious courts in Kenya and beyond. The paper further offers new perspectives in understanding contestations between Muslim male and female litigants appearing before religious courts in the current era and seeks to contribute to the development of relevant and adaptive laws in accordance with the changing times.

2. Methods

This paper is mainly based on desk/document review of court cases upheld by the Kadhi's courts in Kenya. The Constitution of Kenya 2010 gives powers to the High Court of Kenya to preside over cases appealed from the Kadhi's courts. The paper critically looks courts cases determined at the Kadhis' courts in Kenya and cases which have been appealed from the Kadhi's courts to the High Courts of Kenya. Most of the cases cited are available online except few cases which are indicated as unreported. The paper further uses other relevant statutes such as the Children's Act of 2022 related to cases decided by the Kadhi's courts. References are made to relevant verses from the Holy Quran and authentic Hadiths. Other sources used include, *inter alia*, commentaries of the Holy Quran and Hadith and classical books on Muslim jurisprudence. The paper also makes reference to works of contemporary Muslim jurists who advocate for progressive approach in handling matters related to gender issues in Islam. Some of the sources used also include scientific journals.

3. Results and Discussion

3.1. Empowering Muslim women's access to justice

A notable feature in the Kadhi's courts in Kenya is the rising appearance of Muslim women litigants seeking legal recourse and redress. Previously, Muslim women would persevere their marital sufferings and submit to peer pressure which are highly dependent on social customs that hinder to a great extent women access to their rights after divorce. A significant section of present-day Muslim women has achieved basic education and legal awareness which give them the courage to to take their disputes

to the Kadhi's courts. Compared to earlier trend of reluctance by Muslim women to file cases at the Kadhi's courts despite their sufferings, there is a paradigm shift in breaking the cultural taboo that denied aggrieved Muslim women litigants seeking access to justice.

Married couples happily their wedding but when the marital ties end through divorce, or separation, Muslim married women risk the chance of losing entitlement of their share in the matrimonial property and other marital rights after divorce. Muslim divorced women are thrown out of their matrimonial homes home without giving due regard to the principle laid in the Quran "And do not forget liberality between yourselves".[1] As a result of these unjust and inhuman manner, Muslim widowed women loose rights of ownership, control, and access to properties they enjoyed during their marriage life. The custom is that men divorce their wives for minor reasons without paying attention to severity of the solemn oath they have taken when entering into the marriage. Verse 4: 21 of the Quran provides "And how could you take it away [what you have given] after you have given yourselves to one another, and she has received a most solemn pledge from you?" and the Hadith of Prophet Muhammad (PBUH) said "Women are the sisters of men" [2] (*an-nisaa shaqaiq al-rijal*) of which the meaning implies equality of participation of women in matrimonial issues.

3.2. Background on Kadhi's courts in Kenya

Kadhis and their courts in Kenya have occupied a peculiar position compared to other religious and customary courts in East African since the pre-independent period to the present. Accommodation of Kadhis' courts since independence in Kenya in the mainstream judicial system reveals the recognition of religious courts in a modern conventional plural legal setting. Kadhi's courts in Kenya are subordinate courts with the jurisdiction to adjudicate on matters related to personal status, marriage, divorce and inheritance between Muslim parties who submit to the jurisdiction of the Kadhi's courts.

Article 170 (5) of the Constitution of Kenya 2010 states:

"The jurisdiction of a Kadhis' courts 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 Constitution of Kenya 2010 incorporates a Bill of Rights that has opened venues for women litigants. Article 20(2) of the Constitution of Kenya 2010 states:

“Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom”.

However, Article 24(4) of the Constitution of Kenya 2010 exempts the application of provisions on equality to Muslims. The Article states:

“The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis’ courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance”.

Further, Article 32 (4) of the Constitution of Kenya 2010 provides that:

“A person shall not be compelled to act, or engage in any act, that is contrary to the person’s belief or religion”.

Article 32(4) of the Constitution of Kenya 2010 donates to persons professing Islam a constitutional right to resolve their disputes according to principles of their religion. Article 32(4) is based on the premise no person shall be compelled to any law that is contrary to the person’s belief or religion. These exemption clauses have paved the way for diverse differing opinions by High Courts judges which have in turn led to various interpretations on the powers and jurisdiction of Kadhis’ courts on matters related to Muslim personal law.

3.3. Custody of Children Between Islamic Law Principles And Conventional Law Doctrines

3.3.1. The Islamic law position on custody of children

According to Islamic law principles the mother of the child has the right of custody and care of a boy up to 7 year and a girl up to the of puberty (*sin al-tamyiiz*) so long as she is not disqualified to such custody. The person most entitled to have the custody of the child is the mother, that is if she fulfils the condition necessary for the person to have custody over a child. However, a mother loses the right to custody when she marries another person. In such a case, the child’s custody devolves to the next most eligible person.

Although there is no verse of the Holy Qurʾān on the custody of the minors, Muslim jurists have referred to the verse of *Riʾāʾa* (fosterage) which states that the mother should breastfeed their infants for two complete years. It is inferred through the deduction of the text that in the years of infancy the right of upbringing and fostering the child remains with the mother.

Abu Hurayra (May Almighty Allah be pleased with him) reported that a woman came to the Prophet (PBUH) and said: "... my husband wants to take my son and he has helped me and fetched for me water from the well of Abi 'Inabah. The Prophet (PBUH) said to the child; this is your father and this is your mother, get hold of the hand of any of them as you wish. The child held his mother's hand and she went with him". [3]

The mother has priority on *ḥaḍanah* (custody) and *Riḍā'ah* (fosterage), while the father has priority on *wilāyah* (guardianship). In this regard, Al-Imam Ibn Qayyim (*May the mercy of Allah be upon him*) states:

"There are two types of legal authorities over minors: one type the father has priority over the mother and those in her side and this is guardianship on property and marriage, and the other, the mother has priority over the father and this is custody and breastfeeding ...". [4]

Hence, preference on custody of children is given to the mother's side whereas guardianship is given to the father. In all schools of both the Sunnis and Shī'as, the father is recognized as guardian which term in the context is equivalent to natural guardian and the mother in all schools of Muslim law is not recognized as a guardian, natural or otherwise, even after the death of the father.

The father's right of guardianship exists even when the mother, or any other female, is entitled to the custody of the minor. The father has the right to control the education and religion of minor children, and their upbringing and their movement. So long as the father is alive, he is the sole and supreme guardian of his minor children.

The mother's right of custody is not an absolute right but instead it is based on the best interest of the child and she cannot surrender her right to any person. The underlying principles in deciding custody of the child remain that the child in his tender age must not be deprived of the warmth, affection and full-time attention that he needs in his growing years from his mother.

The mother's right of custody is recognized in the sense that it can be enforced against the father or any other person, but it is a right to which obligations, are attached. The mother's right of custody is solely recognized in the interest of children, and, in no sense, it is an absolute right; she cannot exercise it as she wishes. Mother's right of custody is, in fact, a right of rearing up of children. If she is not found suitable to bring up the child, or her custody is not conducive to the physical, moral and intellectual welfare of the child, she can be deprived of it.

In all the schools of Muslim law, the mother has the right to the custody of her daughter until she attains puberty in preference to the husband. However, the right to custody may be taken away from the mother in two cases; firstly, in the case of a disobedient

wife on the ground that she is likely to cause more harm to the child by turning him away from Islam and raising him in an environment contrary to Islamic teachings and manners. Secondly in the case of a woman who is married to someone who is not among the agnate relatives of the child as per the Hadith of the Prophet (Peace and mercy of Allāh be upon Him) said “You have a prior right to him as long as you do not marry”. [5]

The other aspect to consider in granting custody of the child is the principle that the welfare or the best interest of the child is paramount. The welfare and interests of the child is paramount and custody of children shall be given to a parent taking into consideration legal, social, and medical conditions of the child and according to the circumstances of the parent. [6]

Muslim jurists are of the view that when it is detrimental for the child to live with his mother due to her remarriage, profession or religion then the custody will transfer to the father. In *Nayl al Autar* it is stated that

“It is essential to look in to the interest of the children before they are given the option to choose between the parents for their custody. If it becomes clear about any one of them that he /she will be more beneficial to the children from the point of view of their education and training then there is no need for *qur'ā* (lot) or the choice of the children). [7]

Muslim jurists have differed on the entitlement of custody for both parents:

- 3.1.1.a Hanafi School the child boy attains puberty at the age of seven and the girl the age nine in which case their custody shall pass to the father.
- 3.1.1.b Maliki School held that mothers shall keep custody of their sons until the age of puberty while the daughters shall stay with their mother until their marriage.
- 3.1.1.c Shāfi'i school held that mothers shall keep custody of both boys and girls until the child attains the age of discretion (*tamyiz*) around seven or eight years after which the child will be given the option to choose between either of the parents.

3.3.2. Custody of children in the conventional courts in Kenya

Similar to other Commonwealth jurisdictions, conventional courts in Kenya apply the Common law principles. In the case *Nana binti Mzee v. Mohamed Hassan* [8] the Court of Appeal of Kenya held that English law applied to determination of custody of a Muslim child. Similarly in the case of *Fazlan Bibi v. Tehran Bibi and Mohamed Din Kashmiri* [9] the Court held that:

“As to the guardianship of the infant child of the first marriage, Muslim law lays down clearly that the right of a mother to the guardianship of a boy under 7 years of age is lost by reason of her remarriage, and I was asked to apply that law ... Sitting as a court of equity, I have jurisdiction to make orders ... but the jurisdiction is exercisable according to English and not Muslim law”

Similar to this contention, was the case of *Abdulreman Bazmi v. Sughra Sultana* [10] the Court of Appeal held:

“The (Guardianship of Infants) Ordinance applies with full force to Muslim, not less than to other infants and under section 17, the welfare of the child is paramount and not the right under Muslim law of either parent is a paramount consideration in deciding questions of custody”

In the case of *Zuleikha Mohammed Naaman v. Gharib Suleiman Gharib* [11] the appellant, being the mother, applied for custody and maintenance for herself and the children. The father denied the mother’s right to custody alleging that she had been unfaithful. The Chief Kadhi gave custody to the mother because of the interest and welfare of the children with reasonable access to the father. The father appealed to the High Court of Kenya that gave joint custody to both parties and physical custody to the mother, with reasonable access to the father. The father applied for the review of this order stating that the children have reached the age of seven which according to Shariah marks the start of proper moulding of the character of the child, hence he was best qualified for their custody. The Judge reviewing the case gave the custody of the two children to the father on the ground that the religious welfare of the children would be best addressed if they were placed in the father’s custody though the mother was given unfettered access.

The mother appealed to the Court Appeal of Kenya that Appeal held that section 17 of the Guardianship of Infants Act (Chapter 144) provides”

“... where the question of custody of an infant is to be decided, the court “shall regard the welfare of the infant as the first and paramount consideration...”.

The Judge contended that this section takes precedence over the personal law of the parties and therefore it applies to all children in Kenya including Muslim children. He further maintained that the so-called religious welfare on which the Judge at the High Court placed so much emphasis was irrelevant and that by equating religious upbringing with the welfare of the children there can be no doubt that the learned Judge misapprehended the law and allowed the appeal giving the mother custody, care and control of the children and allowed the father to access any one weekend each month.

In the case of *GSA vs. ASA* Nairobi High Court Civil Appeal No. 53 of 2013 [12] the Kadhi granted custody to the mother of four children between the age of four and one on the ground that the children are of tender age and that if this responsibility is entrusted to the father, he will place them under the care of his other wife, who is likely to abuse and mistreat them. The father appealed to the High Court of Kenya on the ground that the lower court violated the principle of the best interest of the child in granting custody to the mother. The Judge at the High Court set aside the orders of the Kadhis and granted custody of the children to the father basing his opinion on Section 4(2) of the Children Act provides that:

“...in all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.

3.3.3. The practice of the Kadhi's Court on custody of children

The Neo-kadhis are pioneering the reform process that adopt a progressive approach in responding to emerging legal issues related to women litigants' rights to matrimonial property rights and divorce settlements rights in the form of *Mata'a* (consolatory gift) as opposed to the prevalent Islamic traditional approach in Muslim religious courts. Influenced by conventional courts decisions, recent cases decided by the Neo-Kadhis in Kenya take into account wives' household day-to-day activities and monetary contributions in assessing matrimonial property rights after divorce.

In the case of *FAA v IAM* [13] the Kadhi granted custody of three children aged 7,4 and 2 years to the mother and held:

“Section 76(3) of The Children's Act directs the court to consider and protect children's physical, emotional and educational needs and comfort and would shun any disruption likely to affect their wellbeing ... The general principle regarding custody of minor children is that unless there exist peculiar and special circumstances, the mother has priority”

The Kadhi concluded and held:

“In the circumstances, totality of evidence and considering the children are of tender age, the actual custody of the children is vested and granted to his mother, the petitioner herein. The defendant to get unlimited access”.

In the case of *DAJ v HMA* [14] the Kadhi held:

“In Islamic law and with due regard to the ability and capability of the parties, the mother has more right to custody of her children regardless of sex until the age of

understanding recognized at seven or so provided she has not remarried or otherwise ... The reason for this was that, in early years, the mother is more suitable for raising the young child (regardless of sex) with love, mercy, attention and motherly care than the father.”

Contrary to the above decisions, in the case of M. Kaur. D. v. N. K.H [15] the husband applied to the Kadhi's court for custody of two minor children on grounds of the mother's immoral acts which are detrimental to the minors' best welfare, interest and cultural and religious wellbeing. The Kadhi granted interim custody of the minors to the father and unlimited access to the minors to the mother.

3.3.4. Adopting the progressive Maqasidi approach

Children are gifts from the Almighty Allah and are a trust in the custody of the parents and persons responsible to take care of them. Verse 42:49 provides “He bestows the gift of female offspring on whomever He wills, and the gift of male offspring on whomever He wills”. Verse 16:72 stipulates “And Allah has given you mates of your own kinds and has given you, through your mates, children and children's children, and has provided for your sustenance out of the good things of life”. The Prophet (PBUH) said “He is not one of us who does not show mercy to our youngsters.” He also says: “He who does not show mercy will be shown no mercy (on the Day of Judgement)”. [16]

Children's rights should be implemented within the greater values (*Maqasid al-Sharia*) that include life (*Nafs*) and lineage/progeny (*Nasl/Irdh*). Children's basic rights of life, education, health, accommodation and maintenance are shared responsibilities of parents who are duty bound to promote and protect welfare of their children. Children's right to life is paramount and takes priority among the greater values (*Maqasid al-Sharia*) of life (*Nafs*) and lineage/progeny (*Nasl/Irdh*) which seek to promote and protect children's lives and welfare .

3.4. Division of matrimonial property after divorce

3.4.1. The Islamic law position on the division of matrimonial property after divorce

Muslim scholars have dealt with the issue of wife's contribution towards the matrimonial property in a superficial manner. Imam Abu Hanifa, Malik and Shafi'i have stated that marriage is contracted for marital relationship and not domestic services. More recent

scholars have stated that it is the duty of the wife to cater for home according to the financial means of her husband and his social status. They have based their opinion upon the practice of the wife's of the Prophet and his Companions. Imam Muhammad Abu Zahra [17] maintains that among the husband's rights upon his wife is her obligation to take care of the household according to the means of her husband and depending on the background from which the wife comes.

Shafi'i School of jurisprudence held that when the husband-and-wife dispute over the household assets, the contribution of each party in acquiring the assets would be the determining factor.[18] It was also held that where there is a mixed property among the spouses and no evidence is tendered nor a spousal agreement that differentiates ownership of property and its mode of division, there is need to resort to an equitable principle where both parties are equally awarded half share of the assets.[19] It was further held that the share of a wife to a matrimonial asset is in recognition of her role in managing the household and taking care of the family. [20]

The proponents of giving a share of matrimonial property to a divorced Muslim wife rely on verses of the Quran that prohibit oppression among spouses.[21] The proponents compare division of matrimonial property with partnership (*Sharikah*) where properties of spouses are merged and in the event of divorce each spouse is entitled to a proportionate share of his or her contribution.

According to some jurists, the wife is under no legal obligation to do the routine housework, although she may do so on her own choice. The wife is not bound, to render services such as cooking, cleaning the house, ironing clothes, cleaning house utensils, unless she does so on her own choice. [22]

Whatever fortune she may possess, the wife is not bound to contribute anything towards the household items and expenses. She is not even bound to contribute to her own personal needs, when the satisfaction of these needs forms part of the husband's duty of maintenance. [23]

If the wife chooses to do house hold work, the husband is bound to supply his wife with tools of grinding and baking and the utensils of drinking and cooking, ironing and all household items needed. [24] The wife can, however, with her own free will, choose to share part of the economic burden. Khadijah helped the Prophet (PBUH) and Asma, the daughter of Abu Bakr, helped her poor husband Zubayr.

On the other hand, opponents of giving a divorced Muslim wife a share of matrimonial property held such a move may infringe on the rights of other legal heirs that result into the wife taking more than her entitlement in the matrimonial property which in turn amounts to eating others property unlawfully.[25] Opponents also argued that that there

is no clear legal authority on the division of matrimonial property among Muslim parties after divorce. Some Muslim jurists have opined that wife's taking care of her husband's mental and emotional well-being is not part of her matrimonial obligation and does not amount to a contribution in the distribution of the matrimonial property.

For instance, Imam Taqi al-Din Ahmad Ibn Taymiyyah (d.728 A.H.) held that it is obligatory upon a wife to serve her husband according to the custom of her peers.[26] Imam Muhammad Abu Zahra quoted the evidence of wives of Prophet Muhammad (peace be upon him) and wives of the companions who undertook matrimonial duties in serving their husbands. Imam Abu Zahra concluded that it is obligatory for a wife to undertake matrimonial duties towards her husband according to her peers.[27]

Imam Ibn Al Qayyim noted that "It cannot be assumed based purely on what is held in hand or having authority over a name by having the name on a land title and the likes becoming the rights of only a single person if the property is acquired during the duration of the marriage, in fact its existence is of no consequence. In relation to this, an allusion can be made to the appliances in the house and other properties for example a house, a piece of land and the likes that are acquired during the time when both are still husband and wife unless there is proof to show that the properties were divided or the rights of each one separately".[28]

In his commentary of Q:2:228, Sayed Sabiq in *Fiqh al-Sunnah* stated:

"The basis set by Islam in arranging and managing the life of a husband and wife is a basis that is appropriate with the natural tendency and habit of mankind whereby the men concentrate more on work and efforts outside the home, while the women are more suited to handle work at home for example managing the household, nurturing the children, preparing every facility to make the atmosphere in the house calm and peaceful. Therefore, it is the task of the men to find a job suitable for them, as it is the task of the women and with this the household will operate well in and out of the home without compromising any party". [29]

3.4.2. Division of matrimonial property in the conventional courts in Kenya

Contribution by either the husband and wife towards the acquisition of matrimonial property can be both monetary and non-monetary contribution. Words such as 'joint efforts' and 'works towards the acquiring of the properties' need to be constructed as embracing the domestic efforts or work undertaken by either of the spouses.

The reasoning for this principle of economic partnership was also based on that in certain cases a wife may have sacrificed her own career in order to bring up the children and provide domestic services for the whole family and therefore may not have earned any money with which to acquire tangible assets. It would be unfair indeed if such wife were to be divorced after many years of marriage without any provisions for her future. [30]

Contribution towards the acquisition of matrimonial property is defined under Section 2 of the Matrimonial Property Act, 2013 in the following terms:

“In this Act, unless the context otherwise requires— “contribution” means monetary and non-monetary contribution and includes— a) domestic work and management of the matrimonial home; (b) child care; (c) companionship; (d) management of family business or property; and (e) farm work”.

Section 7 of the Matrimonial Property Act further clarifies contribution in matrimonial property that:

“Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”

In the case of *AWM v JGK* [31] the High Court of Kenya held:

“The share of each party to a marriage is pegged on the contribution made by each party. That is the law as it is and as applied in various decisions ...

Although this provision grants equal rights to parties to a marriage as stipulated, this does not mean that a party to a marriage is entitled to equal share of the property acquired during marriage unless his or her contribution is ascertained to have been equal to that of the other spouse. However, the article guides the courts in determining the rights of parties to a marriage in respect to subdivision of matrimonial property. The above High Court relied on the view of the Court of Appeal in *PNN v ZWN* [32] where the Court of Appeal held:

“Thus it is that the Constitution, thankfully, does not say equal rights ‘including half of the property.’ And it is no accident that when Parliament enacted the Matrimonial Property Act, 2013, it knew better that to simply declare that property shall be shared on a 50-50 basis. Rather it set out in elaborate manner the principle that division of matrimonial property between spouses shall be based on their respective contribution to acquisition.”.

The basis of division of the matrimonial property in Common law, is the recognition of the division of labour between husband and wife, without which the accumulation of

the wealth is not possible. The entire property acquired during the subsistence of the marriage by either spouse, under Common law, constitutes matrimonial property and should be divided equally. Lord Denning in *Fribance V. Fribance* [33], decided:

“... the title of the family assets does not depend on the mere chance of which way round it was. It does not depend on how they happened to allocate their earning and their expenditure. The whole of their resources are expended for their benefit - either in food, clothes, living expenses for which there was nothing to see or in the house or furniture which are family, belong to them jointly. It belongs to them in equal shares”.

As stated earlier, the Constitution of Kenya 2010 provides for exemption clauses excluding Muslim law from its provisions. For instance, in the Chapter of the Bill of Rights under a section of limitations of rights and fundamental freedoms, Article 24(4) states:

“The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis’ courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance”.

The Marriage Act of 2014, which is an Act applicable to all citizens of Kenya, provides the entitlement of equal rights of spouses during marriage and at the dissolution of such marriage. Section 3 (2) of the Marriage Act 2014 states:

“Parties to a marriage have equal rights and obligations at the time of the marriage, during the marriage and at the dissolution of the marriage”. Section 3(2) of the Marriage Act 2014 is a replica of Article 45 (3) The Constitution of Kenya 2010.

However, the Marriage Act qualifies Section 3(2) by exempting Muslims from the provision on equal rights and obligations. Section 3(4) reads:

“Subject to subsection the parties to an Islamic marriage shall only have the rights granted under Islamic law”.

Furthermore, Section 3 of the Matrimonial Property Act 2013 states:

“A person who professes the Islamic faith may be governed by Islamic Law in all matters relating to matrimonial property.”

Section 4 of the Matrimonial Property Act 2013 provides for the equal status of spouses in relation to matrimonial property irrespective of the application of the person’s religious law. The Section states:

“Despite any other law, a married woman has the same rights as a married man — (a) to acquire, administer, hold, control, use and dispose of property whether movable or immovable; (b) to enter into a contract; and (c) to sue and be sued in her own name”.

Kenya being a former British colony relies on Common law as one of its sources of law. Division of matrimonial property after divorce is another interesting area that Common law principles are applicable to all the Kenyan citizens, Muslim litigants included. For instance, the Married Women's Property Act, 1882 of the United Kingdom is applicable to Muslims.

In the case of *Fathiya Essa v. Mohamed Alibhai Essa* [34] the parties had contracted an Islamic marriage in 1972 and dissolved it in 1988. The appellant contended that properties acquired during the subsistence of their marriage to be declared as jointly owned by herself and the respondent. It was held that the Married Women's Property Act 1882 of the United Kingdom is an Act of general application and applies equally to Muslims as it does to non-Muslims in Kenya. The Court therefore gave the wife a share in the matrimonial property owned by her former husband. [35]

Applicability of the Married Women's Property Act 1882 to Muslim litigants was challenged in *R.M.M v B.A.M* in which the Trial High Court Judge Odero held:

"For these reasons I find that the Married Women's Property Act 1882 which of necessity envisages a monogamous union is not applicable in this case. The Plaintiff ought to have sought relief in the Kadhi's court under Cap 156" [36]

The aggrieved party being dissatisfied with the High Court lodged an appeal before the Court of Appeal. The main issue in the appeal was the question of how property which has been acquired during the subsistence of a valid marriage should be dealt with following the dissolution of the marriage. The Appellant argued that the Kadhi's court did not have jurisdiction over the property since both parties did not profess the Muslim religion at the time of their marriage and therefore only the Married Women's Property Act 1882 could be invoked. Hence, the High Court erred by invoking Muslim law to apply to a non-Muslim relationship.

The Court of Appeal held that:

"If their marriage was purely Muslim, and the property in issue was acquired during the currency of that marriage, the Kadhi's Court would be the most efficacious in handling and determining the dispute... But the dispute is not that clear cut, and therein lies the problem." [37]

The Court of Appeal declined to overrule *Essa v. Essa* and held that the Trial Judge at the High Court was in error in finding that the Married Women's Property Act 1882 was not applicable in the case.

Before the enactment of the Matrimonial Property Act 2013 and the Marriage Act 2014, the applicable law to cases related to matrimonial property for all litigants in

Kenya was the Married Women's Property Act of 1882 in the United Kingdom. In the case of *Essa v. Essa* (1996), the Court of Appeal in Kenya was called upon to adjudicate on the distribution of the matrimonial property acquired the subsistence of the marriage which involved Muslim parties who contracted an Islamic marriage. Justice Omolo of the Court of Appeal held that the Married Women's Property Act of 1882 was an act of general application, and applied equally to Muslims and non-Muslims in Kenya. [38]

In the case of *EMK v SSS*[39], the High Court Judge held:

"... that Islamic law recognizes both financial and non-financial contribution of spouses in matrimonial property ... The Qur'an recognizes that each spouse is entitled to their property. Surah An Nisa: 4:32 provides as follows 'For men is a share of what they have earned, and for women is a share of what they have earned.' It is clear from this provision of the Qur'an that earning is a key factor in determining each spouse's entitlement to matrimonial property. Said differently, division of matrimonial property, must be based on each spouse's contribution... from the forgoing, it is evident that nonmonetary contribution by spouses must be taken into account in the division of matrimonial property acquired or improved during coverture, notwithstanding that property is in the name of one spouse"

In the case of *AWA v HDD* [40] the High Court of Kenya held that:

"Even under Islamic Law the Contribution of each spouse has to be determined depending on the circumstances of the case ... To say that section 3 of the Act does not confer jurisdiction to the Kadhi's Court is tantamount to clawing back the underlying principle of applying Islamic Law to matrimonial property to the Muslim faithful"

3.4.3. The practice in the Kadhi's Courts on the division of matrimonial property after divorce

In the case of *HSB v. HMA*[41] the parties were marriage in 1977 and divorced in 1999. The Defendant (wife) prayed for the suit property be awarded to her and the issues of the marriage to the exclusion of the Plaintiff (husband) on the ground that she taken care of the husband's mental and emotional well-being prior, during and after the purchase of the suit property. The Kadhi gave a share of one-eighth of the matrimonial property to the wife based on her taking care of her husband's mental and emotional well-being during and after the purchase of the property.

The Kadhi held *"It is now generally accepted that where most Moslem women are not employed or in salaried employment contribution does not necessarily mean cash payment. It is sufficient if as a result of division of labor, the spouses perform*

different functions all which enhance the good of the family including the acquisition of matrimonial property”.

In the case *HSJ v SAA* [42] where the wife who was the petitioner made considerable direct and indirect contributions towards the development of the parcel of land, the Kadhi held:

“... Matrimonial property is founded on established Islamic legal traditions on protection of individual wealth generally. Q.2.188 provide: ‘And do not consume one another’s wealth unjustly or send it [in bribery] to the rulers in order that [they might aid] you [to] consume a portion of the wealth of the people in sin, while you know [it is unlawful]’. And that Islam specifically prohibits dealing with another’s property without his consent as reported by Ibn Abbas (May Allah be blessed with him) narrated that the prophet Muhammad (May Allah’ peace and blessings be upon him) said: ‘the wealth of Muslim is not legal (to others) except with his free will and consent’. [43]

In the case of *FM v AW* [44] the Kadhi held:

“Division of matrimonial property right is safeguarded by vesting in each spouse ownership according to their respective contribution be it monetary or non-monetary. It is for this reason that I shall strive to give effect to any monetary or non-monetary contribution that F would have proved in development of their matrimonial house/home and/or role played in marriage to guarantee her a share and or send-off.”

The Kadhi further held:

“What one deserves must be arrived at by considering his/her respective contribution whether monetary or non-monetary. The bigger the contribution, the bigger the entitlement. Where there is evidence that a non-monetary or monetary contribution entitled a spouse to half of the property then, the courts should give it effect. But to hold a 50:50 sharing could imperil the marriage institution. It would give opportunity to one to contract a marriage, sit back without making any monetary or non-monetary contribution, distress the union and wait to reap the marital property. This will oppress the spouse that makes the bigger contribution”.

A number of married Muslim women in our contemporary societies work and support the matrimonial home either directly or indirectly.

In the case of *Amina Hassan Ahmed v. Yussuf Adan Abdulla* [45] the Kadhi granted fifty percent (50%) share of the matrimonial property to the wife.

3.4.4. Adopting the progressive Maqasidi approach

Dissolution of marriage should be guided by the greater values of Sharia (*Maqasid al-Sharia*) which demand honouring and protection of life (*Nafs*), lineage/progeny (*Nasl/Irdh*) and property/wealth (*Maal*) of the spouses and children of the marriage.

In cases of divorce, the Quran calls for spouses to be pious and righteous and recall the good that prevailed during the marriage. Verse 2:238 encourages forgiving and foregoing rights due in marriage “And to forego and give is nearer to Taqwa (piety, righteousness). And do not forget grace (*fadhl*) between yourselves. verily, God sees all that you do.

Contribution towards property can be direct or indirect. Any spouse who makes such contribution can acquire beneficial interest in the property, equal to the contribution made. In the event of a divorce, a spouse who has evidence to support his/her contribution towards to the acquisition of the matrimonial property during the marriage, whether direct or indirect, should apply to the court for his/her entitlement to a share of the matrimonial property.

The challenge facing the division of matrimonial property acquired during the subsistence of marriage between Muslim spouse after divorce is due lack of a definitive legal position of Muslim classical jurists on the extent of division of matrimonial property to Muslim parties after divorce. This is coupled with the lack a clear definition by courts in Kenyan on the extent of indirect contribution wife’s to the acquisition of a matrimonial property.

Upon divorce or dissolution of marriage by the Court, Kadhi’s court has the jurisdiction to determine the matrimonial property and equitably divide the same between parties. The court in carrying out this power ought to consider the extent of direct and indirect contributions made by each party and the substantial improvements made by one party of a non-matrimonial acquired by the other either through direct or indirect contribution.

3.5. Practise in the Kadhi's court on granting *Matā* (Conciliatory gift)

Wives are entitled to a matrimonial gift known as *Matā* upon divorce, to console her and lessen the harm as a result of the divorce. The value of the gift should be commensurate with the husband’s financial ability and the duration of the marriage.

It is reported by al-Bayhaqi that when *ʿAsan ibn ʿAlī* (*May Allāh be pleased with them*) divorced his wife, he sent to her ten thousand as her *Matā* together with her

remaining *Mahr*. When the wife received them, she said “A small gift from a disserted love one”. [46]

On Chapter 33 verse 28 of the Qurʾān “O Prophet (Muhammad)! Say to your wives: If you desire the life of this world, and its glitter, Then come! I will make a provision for you and set you free in a handsome manner (divorce).” Imām Al-ʿAbārī stated that the verse implied an order to Prophet Muhammad (peace of *Allāh* be upon Him) to provide a gift to his wives in the case of separation through divorce. [47]

Shaykh Muhammad Ali Al-Sayyis in his commentary of rulings at volume 1 page 168 supports Saeed Ibn Jubair’s opinion (*May Allah be pleased with him*) that Q:2:241 provides for *Matāʾ* compensation to all women.

“For divorced women Maintenance [should be provided] on a reasonable [scale]. This is a duty on the righteous.” [48]

The recent practice in the Kadhi’s court in Kenya is that depending on the merit of the case, divorced women are granted *Matāʾ* (Conciliatory gift) in addition to other reliefs sought.

4. Conclusion

An interesting aspect in the current practice at the Kadhis’ courts is the emergence of matters related to division of matrimonial property between divorced Muslim spouses, cases of custody of children, and granting *Matāʾ* (Conciliatory gift). This paper has examined the dynamics of the progressive approach adopted by the Neo-Kadhis in Kenya towards enhancing women access to justice rights and gender relations in Muslim religious courts in Kenya.

Contemporary emerging issues touching Muslim personal law can no longer be dismissed but rather need to be approached and responded to with a comprehensive juristic vision highlighting the ultimate objectives of Islamic law (*maqāsid al-Sharīʿa*). There is a need to formulate new approaches in developing a confident and constructive Muslim jurisprudence that will respond to emerging challenges.

Neo-Kadhis in Kenya have adopted progressive juristic views and recent judgments reflect embracing Common law doctrines related to paternity and sharing of matrimonial property geared towards bridging the gap between Islamic law and Common Law. Such conflicts may be negotiated in a pragmatic approach with a view of harmonising the two dual systems of law.

This paper underscores the need to have a progressive comparative jurisprudential approach that propagates for the flexibility and adaptability of Islamic law that will in turn assist in responding to emerging legal issues facing Muslim litigants in the Kenyan courts and beyond. The paper further advocates for harmonization of Islamic law with Common law principles without necessarily sacrificing the intended objectives and values of the two legal systems.

Other emerging issues such matters to related to the Common law concept of presumption of marriage, marital issues emerging from marriage and divorce particularly when the spouses involved are of different faiths need to be addressed with the *Maqasidi* spirit.

The noble initiative undertaken to harmonise *Shari'ah* and Civil Law in various disciplines should be encouraged and supported. Muslim scholars like Jamaludin Al Afghani, Muhammad 'Abdu, Rashid Ridha and the like have faced challenges of their time and proposed harmonious solutions to them. Rashid Ridha has declared that:

“There is nothing in our religion that is incompatible with modern civilized nations except some few questions...and I am ready to sanction everything that the experience of the Europeans before us shows to be needed for the progress of the state in the terms of true Islam ... I must not confine myself to a school of Law – only to the Qur'an and the authentic Tradition” [49] .

References

- [1] Quran 2:237
- [2] International Islamic Committee for Women & Child (IICWC). The Islamic Charter on Family, Translated by Heather Shaw, 2007 C.E. – 1428 A.H. <http://www.iicwc.org/lagna/iicwc/iicwc.php?id=872>, p.149
- [3] Narrated by Ahmad and authenticated by al-Tirmidhi.
- [4] Ibn al Qayyim, Zaad al Maad 5/ 438
- [5] Ibn al Qayyim, Zaad al Maad 5/ 438
- [6] International Islamic Committee for Women & Child (IICWC). The Islamic Charter on Family, Translated by Heather Shaw, 2007 C.E. – 1428 A.H. <http://www.iicwc.org/lagna/iicwc/iicwc.php?id=872>, p.91.
- [7] Al Imam al-Shawkani, Nayl al Awtar, Al Imam al-Shawkani.
- [8] 1944 EACA 4
- [9] 1919/1921 8 EALR 200

- [10] 1060 EA 801 see also Yasmin v. Mohamed EA 370
- [11] Civil Appeal 123 of 1997 at Mombasa (unreported)
- [12] eKLR <http://www.kenyalaw.org> accessed on 17 September 2016
- [13] FAA v IAM eKLR
- [14] DAJ v HMA eKLR
- [15] M.K.D v. N.I.K.H, Kadhi Court, Nairobi (unreported).
- [16] Al-Azhar University in cooperation with the United Nations Children's Fund (UNICEF), Children in Islam. Their Care, Upbringing and Protection. Al-Azhar University; 2005. p. 1.
- [17] Ridha, Huquq an Nisaa fi Al-Islam. Beirut: Al-Maktab al-Islami; 1984. p. 167.
- [18] Imam Shafi'i, Kiatb al-Umm.
- [19] Sayyid Abdulrahman ibn Muhammad, Bughyat al Mustarshidīn, p.159.
- [20] Uthman ibn Shattaa al Bakriy, l'anatu al-Talibin, Hashiya (marginal notes) on the text Fathul Mu'iin, by Al-Maliybaariy.
- [21] For instance, Quran Chapter 65 verse 6.
- [22] Shukri A. Muslim Law of Marriage and Divorce. Gorgias Press; 2009. p. 81.
- [23] Shukri A. Muslim Law of Marriage and Divorce. Gorgias Press; 2009. p. 82.
- [24] Shukri A. Muslim Law of Marriage and Divorce. Gorgias Press; 2009. p. 80.
- [25] For instance, Quran Chapter 2 verse 188
- [26] Taqi al-Din Ahmad Ibn Taymiyyah Majmu al Fatawa, Vol. 33 page 58 -59.
- [27] Abu Zahra M. Al-Ahwal al-Shakhsiyyah. Cairo: Dar al-Fikr al-Arabi; 1957. p. 167.
- [28] Al Qayyim I. al-Turuq al-Hukmiyyah Fi al-Siyasah-al-Shariyyah, Cairo: Matba'ah Al-Madani, 1961, p. 24.
- [29] Sabiq S, al-Sunnah F. 2/ p.174, Printed in 1981 Darul Fikr, Beirut, Lebanon
- [30] Rwezaura BA. The Court of Appeal of Tanzania and the Development of the Law of Domestic Relations. East Africa Law Review. 1989 Dec;16(2):148.
- [31] AWM v JGK eKLR
- [32] PNN v ZWN eKLR
- [33] EWCA Civ J1129-2
- [34] Civil Appeal 101 of 1995 at Nairobi (unreported).
- [35] This is a similar view that was adopted by the Court of Appeal of Tanzania in the case of Bi Hawa Mohamed v. Ally Sefu in which the Court of Appeal held that a spouse's domestic services, rendered during the subsistence of the marriage, amounted to an "effort" and are a "contribution" within the provisions of Section 114 of the Tanzanian Law of Marriage Act.

- [36] R.M.M v B.A.M <http://www.kenyalaw.org>, Civil Appeal NO. 267 OF 2011, Waki, G.B.M. Kariuki, Mwilu, M'inoti&Murgor, JJ.A
- [37] R.M.M v B.A.M <http://www.kenyalaw.org>, Civil Appeal NO. 267 OF 2011, Waki, G.B.M. Kariuki, Mwilu, M'inoti&Murgor, JJ.A
- [38] *Essa v. Essa* (1996) EA 53.
- [39] OS No 3 of 2015 (Mombasa), *EMK v SSS*, [unreported].
- [40] *AWA v HDD* eKLR
- [41] *Hussein Sheikh Bashir v. Hassida Mohamed Ali*, Kadhi's Court at Kibera, Nairobi, 2014(unreported).
- [42] *HSJ v SAA* eKLR
- [43] *Al Albany in his Irwa'ul Ghalil* at page 1459.
- [44] *FM v AW* eKLR
- [45] *Amina Hassan Ahmed v. Yussuf Adan Abdulla*, Civil Case No. 143 Of 2014, Kadhi Court, Upperhil, (unreported).
- [46] *Abu Zahra M. Al-Ahwal al-Shakhsiyyah*. Cairo: Dar al-Fikr al-Arabi; 1957. p. 167.
- [47] *Tafsir Al-Ḥabārī*, *Surat al-Azhāb*, Chapter 33 verse 28
- [48] *Al-Sayyis MA. Tafsir Ayat Al- Ahkam*. Cairo: Al-Maktabah al-Asriya; 2002.
- [49] *Ridha MR. Huquq an Nisaa fi Al-Islam*. Beirut: Al-Maktab al-Islami; 1984. p. 167.