CRITICAL OVERVIEW ON THE ROLE OF KADHI COURTS IN SOLVING FAMILY DISPUTES IN UGANDA

BY

MUGALA SWABURAH

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Declaration

I, MUGALA SWABURAH do hereby declare that the work presented in this dissertation arises out of my own research; I certify that it has never been submitted or examined in any university as an academic requirement for any award.

Sign Date

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MUGALA SWABURAH

Approval

This dissertation has been submitted with the approval of Dr. Masgnus Chima as the university supervisor.

Signed 

22-01-2019

Date of Approval

Dr Chima M.

..... (Supervisor)

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Dedication

This research is dedicated to the Almighty Allah, my dear beloved parents. I also dedicate this work to the people who have been so close to me and also not forgetting all my classmates whom we have endeavored to accomplish this journey together.

Thank you All!

Acknowledgement

First and foremost I am most grateful to my parents for their contribution towards my curricular achievements. Thank you very much for all your blessings and efforts rendered.

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Abbreviations

A.D: Stands for the Latin phrase *anno domini,* which means "in the year of our Lord

ACRCWC: African Charter on the Right and Welfare of the Child.

AEDT: Africa Education Trust.

IBEA: Imperial British East Africa Company.

IICWC: International Islamic Committee for Women and Child.

IIIT: International Islamic Institute of Islamic Thought.

IRII: Islamic Research Institute, Islamabad.

JSC: Judicial Service Commission.

JTF: Judiciary Transformation Framework.

KRA: Key Result Area.

MUHURI: Muslims for Human Rights.

P.B.U.H: Peace be Upon Him.

UNCRC: United Nations Convention on the Rights of the Child.

UNIFEM: United Nations Development Fund for Women

WAMY: World Assembly of Muslim Youth.

Tables of Cases

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CHAPTER ONE

INTRODUCTION TO THE STUDY

1.0 Introduction

This chapter presents the introduction of the study, the background of the study, the statement of the problem, the purpose of the study, research objectives, research questions, scope of the study, significance of the study, methodology and literature review and organization layout.

1.1 Background to the Study

The concept of Khadi Courts is strongly believed that Assyrians and Sumerians from Iraq, where earliest civilization of the world arose found their way to the East African coast[1]. They sailed across the oceans for opportunities and trade and subsequently discovered route to the Eastern Africa. Historical and archaeological evidence support this finding Black magic practiced along the coast of Eastern Africa is said to be identical to that practiced in Iraq[2].

Historians have recorded long existence of trade relationship between the Arabs and the inhabitants of the East African coast. The Kingdom of Aksum, the present Ethiopia and Eritrea had trade contact with Arabian traders including the Quresh of Makkah among others[3]. This was long before the advent of Islam. Therefore, the contact of Islam with the region of Eastern Africa was rather a continuation of a long standing relationship between the two regions. Some writers argue that Islam reached parts of Eastern Africa during the

[1] Ahmed Binsumeit A. Badawy, Penetration of Islam in Eastern Africa, in Proceeding of the Islamic Civilization in Eastern Africa, Kampala, Uganda, 15-17 December 2003, P. 17
[2] Ibid
[3] Akyol, Mustafa, Islam without Extremes; A Muslim Case for Liberty, New York: NY Norton, 2011

life time of the founder of Islam, Mohammad, may Allah's peace and mercy be upon him in 610 AD[4].

When the early Muslims suffered persecution in the hands of the Meccan pagans who were opposing the new religion of Islam, their leader allowed them to immigrate to Abyssinia (current Ethiopia) to seek refuge. This was in Rajab, the 7th month of the Islamic calendar, of the 5th year of the Prophethood[5]. Ethiopia was then ruled by a just christen ruler which religion shares so many similarities with Islam. The ruler welcomed the Muslims refugees and granted them asylum. It is believed that it was during that time that Islam had influence on the local people to the extent that even the ruler of Abysiniain the name of Najjash reverted to Islam and during his death the prophet of Islam performed for him funeral prayer in absentia[6].

Around 1330, Abu Abdullahi ibn Batuta, a Morocan traveller visited several cities along the Coast of East Africa including Mogadisho, Kilwa and Mombasa and commented that the legal practices in those cities were based on the Shariah[7]. In his findings he noted that in Mogadishu the Kadhi passed judgments on matters connected with the rules of shariah while other matters were determined by the governors and the ministers. Matters requiring opinion of the sultan were referred to him and he responds instantly on a note and thus such matters were settled based on his opinion[8]. He described residents of Mombasa and Kilwa as religious, trustworthy, righteous and generous and that they were followers of Shafii Madhab[9].

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[4] Ibid
[5] Al-Mubarak al-Furi, Ar-Rahiq al-Makhtum in Maktabah al-Shamela, Page. 44
[6] Ibid
[7] Ibn Batutah, Rihlatu Ibnu Batutah, Al-Makatabatul Shaamella, (Edn. Academiyah Al-Mamlakah Al-Maghribiyyah, Vol. 2, pp 116-120
[8] Ibid
[9] Ibid, Shafii Madhab: This is one of The School of Thought on Islamic Law Within Sunni Muslims named after its founder Abu Abdullahi Mohamed Ibn Idriss Al-Shafii Pp. 120-122.

From the foregoing we can conclude that long before the modern era Islamic legal system was already operational in the coastal region of Kenya. The colonial era began with the arrival of Portuguese in 1498.[10] About 200 years later, in 1698, the Omanis helped in liberating East African coast from Portuguese and subsequently established their own government in the region.[11] The judicial system under the Omani regime was based on shariah, particularly Ibadi and Shafii School of Thoughts[12]. Under this regime the courts were manned by Kadhis. The Chief Kadhi's court had jurisdiction throughout the coastal region while Kadhi's court's had jurisdiction only within districts.

During the 2nd half of 19th century, the European States began the scramble for and partition of Africa which culminated into Berlin Conference of 1884 in which they divided Africa among themselves[13]. Eastern Africa fell under three European powers including Italy, British and Germany. Horn and Somalia fell under Italy, Kenya and Uganda under British rule while Tanganyika (what is now called mainland Tanzania) was under German rule. It is worth noting that the areas that fell under British and German powers were land locked and this necessitated the two powers to negotiate with the administration of Zanzibar to utilize the coast of Indian Ocean. After years of negotiation an agreement was reached in which the sultan conceded ten miles strip to be controlled by the European powers provided they recognized inter alia the existing legal system which was based on Shari'ah law[14].

The Kadhis courts used to exercise quite a wide range of jurisdiction within the territorial jurisdiction of the Sultanate of Zanzibar where it applied general and specific rules of Islamic law. This trend continued even after the Sultan's concesion of the ten-mile strip to

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[10] Supra
[11] Karim, "History of Mombasa", in Mombasa info.com, last seen 15th April 2015. www.historyofmombasa.com
[12] Supra
[13] Ibid
[14] Supra

the British as protectorate. *In Jibana's case,*[15] *Hamilton, J, observed "It has been argued on the bases of proposition that Mohammadan law applies to the sales of land within the sultan's dominions and that as the British Government is administering those dominions on behalf of the Sultan... this court would recognize a title which would have been recognized by the Sultan's court before the Agreement.... I have no fault to find with either of these propositions".*

Further the Kadhi's courts had jurisdiction over crmininal cases equivalent to the power of the subordinate court of second classover the natives. *"A court of Liwali or Kathi shall have in criminal proceedings with respect to natives the same powers as a court of the second class."*[16] *"Magistrates holding subordinate Courts of first, second and third class shall have full jurisdiction over natives".* It is important to note that in addition to other sentences prescribed by law the powers of these courts extends to the sentence of whipping[17].

However, the promulgation of "The Courts' Ordinance 1931" reduced the powers of the Kadhis courts to matters of personal status, marriage divorce and inheritance. Marriage, divorce and inheritance are known and create no ambiguity. But what should constitute "*personal status*"need to be demystified. As far as I am concern, there is no jurisprudence in Kenya which ever clarified the meaning of the phrase "personal status". However, in other jurisdictions with similar judicial system as Kenya, "*personal status*" covers quite a range of family laws. The 1959 of the Law of Personal Status of Iraq covers in nine chapters rules governing marriages, divorces, children and their rights which include maintenance, custody and the rights of the children with special need. General provisions

[15] Said bin Shariff v Shariff Mohamed Shatry, 19 KLR. Pt. 1, 9.As referred to by J N D Anderson in Islamic Law in Africa, (1938), p. 101.
[16] S. 36 of The Special official Gazette of the East Africa and Uganda Protectorate 1907, Vol. IX-No. 187a
[17] Ibid

for the descendants and ascendants and the relatives, will and inheritance are also covered[18].

Tunisia and Sudan's law of personal status are also similar to that of Iraq. Tunisian law contains marriage, divorce, *eda*[19] (waiting period), children's and their rights including care for abandon or street children, inheritance, will and gift. Based on the foregoing broad understanding, the jurisdiction of the Kadhis court concerning children was never questioned and that the kadhis despite absence of express provision of the law in this regard have been entertaining issues related to the children. Also since the Kadhis courts mainly deal with family matters and that the family comprises the spouse and the children, the court never hesitated in adjudicating all civil cases concerning the family[20].

The jurisdiction of the Khadi courts over these matters is conferred under Article 129(1) (d) of the Constitution[21]. It provides that the judicial power of Uganda shall be exercised by the courts of judicature, which shall comprise the Supreme Court, the Court of Appeal, the High Court and such subordinate courts as may be established by Parliament, including Khadis courts for marriage, divorce, inheritance of property and guardianship.

Khadi Courts are minor courts as recognized by the constitution of Uganda under Article 129, as one of the subordinate Courts of judicature exercising judicial power to deal with matters of marriage, divorce, inheritance of property and guardianship. Khadi Courts in Uganda first operated without legislation until 2009 when their legalization was passed as an Act of Parliament. Cases were handled at mosques of Uganda Muslim Supreme Council (UMSC)) offices at Districts, where offices existed. However, the mediation the mediation

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[18] Supra

[19] *Eda*: This Is The Legally Defined Period During Which Women Shall Abstain from Contracting Marriage. It Occurs at the Instance of the Termination of the Previous Marriage either by way of Divorce, Death or Otherwise.

[20] Ibid

[21] Constitution of the Republic of Uganda, 1995

of these courts was not linked to any of the national laws but the Islamic teaching, basically based on the Holy Quran and Hadiths[22].

The GBV Programme Specialist, Mr. Edwin Kayuki, said the project will be implemented in the districts of Bugiiri, Mayuge, Jinja, Iganga and Kamuli. Those particular districts were chosen because of the presence of Faith-based structures supported by IRCU, the existence of community structures, the high GBV burden in Busoga region, and the existence of synergies from other reputable organizations delivering GBV related interventions in the region[23]. The activities carried out in the courts require capacities of the Sheiks and Imams in using the human rights approach in adjudicating cases of GBV, produce a manual of human rights framework and procedures for the Khadi Courts, strengthen institutionalization of GBV in the Muslim calendar and enhancing Khadi Courts to provide better premarital and marital counselling. Through the implementation of this programme, the Inter-Religious Council of Uganda intends to achieve improved litigation procedures and processes in regard to national and international laws to adjudicators of Khadi Courts through information dissemination. IRCU also intends to achieve enhanced capacity of Imams and Sheikhs in presiding over the Khadi courts to prevent, respond to, and minimize effects of GBV among the Muslim community[24].

After the enactment of ***"The Children's Act[25]"***, the jurisdiction of the Kadhis court on matters regarding children has been under question. The Children's Act has provisions for the establishment of Family and Children's Courts.[26] According to section 48 of the Act, the Children's court deals with civil matters such as parental responsibility, custody and maintenance, orders for the protection of children and children in need of care and

[22] IRCU, Khadi Courts in Busoga Region to be Empowered to Resolve Gender Based Violence Matters, 2015
[23] Ibid
[24] Supra
[25] Section 5, Cap 59
[26] Section 13

protection among others. The court also hears criminal matters against children and other offences under the Act except murder and where the child is charged along with adult.

1.2 Statement of the Problem

Article 129(1)(d) of the Constitution[27] provides that the judicial power of Uganda shall be exercised by the courts of judicature, which shall comprise the Supreme Court, the Court of Appeal, the High Court and subordinate courts. The Constitution adds that these courts may, by law, establish Khadi Courts[28] to handle marriage as well as cases of divorce, inheritance of property and guardianship. The Khadi courts are run according to the Sharia law, but supervised by the High Court. Those who are not satisfied with their judgments are at liberty to appeal in the High Court of Uganda[29]. Despite the various institutional bodies and policy on existence of Khadi Courts in uganda, there exists lack of clarity on whether the Kadhis courts in Uganda have jurisdiction and the will to handle family related disputes including divorce, Gender Based Violence and other family disputes. This uncertainty has created doubt among the clients and other stakeholders on the jurisdiction of the court. There are instances where the jurisdiction of the Kadhis court in handling family disputes were challenged in the High Court. It is thought that the problem of uncertainty of the jurisdiction of the Kadhis court over family disputes is brought about by misinterpretation or misunderstanding of the legal and institutional framework governing Khadi Courts in Uganda. Due to the gap, some lawyers, clients and judges have conceived that the family disputes be removed from the jurisdiction of Kadhis court. This research therefore aims at establishing how these courts will perform their duties by solving family disputes in Uganda.

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[27] Ibid
[28] Section 129, Article 1 (d)
[29] Section 139, Article 2

1.3 General Objective

The general objective of the study is to assess the role and relevance of Khadi Courts in Solving Family Disputes in Uganda.

1.4 Specific Objectives

I. To critic the relevance and effects of the Kadhi Courts in Uganda.

II. To examine the legal and institutional framework governing Khadi Courts in solving family disputes in Uganda.

III. To examine the various challenges hindering the implementation and operationalizing of Kadhi Courts in Uganda.

1.5 Research Questions

I. What is the relevance and effects of the Kadhi Courts in Uganda?

II. What is the legal and institutional framework governing Khadi Courts in solving family disputes in Uganda?

III. What are the various challenges hindering the implementation and operationalizing of Kadhi Courts in Uganda?

1.6 Scope

Content scope

The study aims on investigating the role, relevance, challenges and strong hold of Khadi Courts in Uganda in solving family disputes, it further discusses the legal and institutional framework governing Khadi Courts in Uganda and the challenges hindering the implementation and operationalizing of Kadhi Courts in Uganda.

Time scope

The study was carried out in a period of one year, it was started in mid last year (2018), the researcher gathered information for the study in a period of 2 months from March to May and the research is expected to be finished in June 2019. This is because the researcher has to finalize the research as a requirement to the school.

Geographical scope

The study was carried out in Uganda with emphasis to the Muslim law in the country and how the courts have managed to solve family disputes across the country.

1.7 Significance of the study

The study will be of relevance to the Legislative council of the Republic of Uganda in establishing the legal and institutional framework governing family disputes in Islam with guidance of Khadi Courts in Uganda.

The study will also be of importance to the Government of Uganda, and the community at large in the need for revision of family laws in relation to separation, sharing of inheritance, among others.

The study will help the academia by providing more relevant findings in regard to the provision and relevance of Khadi Courts in Uganda.

1.8 Methodology

The research will be majorly qualitative hence it will establish the findings of the research in the various chapters that follow. The research will be carried out using secondary data from various publications concerning Khadi Courts role within Africa, Globally and East Africa in general. The secondary information will be sought from the library of the university and the legislative council of Uganda, this will include sources like journals, text

books, acts and the parliament so that the researcher is equipped with enough data before compiling the thesis.

1.9 Literature review

Abdalla[30] reported on the establishment of the kadhis' courts in the Tanzania mainland that was done in Dar es Salaam and Zanzibar by the parliament of Tanzania through its subcommittee (Task Force) from 1998 to 2000. This research report, which was completed on July 15, 2000 was to be tabled in the National Assembly for the discussion. His research found that it was due to pressure from Augustino Lyatonga Mrema, Temeke Constitunency Member of Parliament and opposition party chairperson of NCCR-Mageuzi, and retired Colonel Yussuf B. Ramia, Bagamoyo Constituency Member of Parliament, that the government undertook this study. They raised the matter in the National Assembly in 1998, claiming to represent the long- time grievance of the Muslims over the demand for kadhis' courts. Accoroding to this report, the first official request for the establishment of kadhis' courts was made by the late Mufti Sheikh Hemed bin Juma Hemed during the annual meeting of the Muslim Council of Tanzania (BAKWATA) held at Muzumbe in Morogoro Region in 1985. This request was rejected by the government under the administration of President Alhajj Al Hassan Mwinyi[31]. Unlike these findings, the current study found that the Ugandan government is willing and collaborating with the religious leaders to establish Kadhi Courts in Uganda for the purpose of solving family disputes.

Abdulrauf[32] in relation to the questions and objectives of my study, this research report wrestles with the issues of whether the Muslims want kadhis' courts, the reasons for wanting them, and the solution to their demand for kadhi's courts. Other isssues raised

[30] Abdalla, B. (Historical legacy and contemporary challenges). Islam in Eastern Africa. Addis Ababa (2000)
[31] Ibid
[32] Abdulrauf, S. (History of ibn Hisham). Ibn Hisham. Al-Maktabah al-shamel

from this report that are relevant to my study include the meaning of the term kadhi; the appointment, qualifications, role of kadhi; the importance of kadhis' courts, along with their structure; the chief kadhi, his appointment as well as his role; kadhis' courts and women's rights, kadhis' courts and human rights; the Tanzanian Constitution of 1977 and Islamic law. The Task Force found that the claim for kadhis' courts was real and all Muslim groups interviwed were supportive of these institutions. Kadhis' courts are part of worship so that their absence denies the Muslims their right to worship. Furthermore, the existing civil courts have many weaknesses including lack of knowledge of Islamic law among the magistrates and judges. Moreover, Islamic law is undermined by the current civil courts and some of the provisions of the law are oppressive to Muslims. Unlike civil laws, Islamic law is absolute law and cannot be challenged by any authority. Similaraly, Isalmic law is always fair and kept updated. Some magistrates and judges use abusive languangu about Islam during their ruling. Kadhis' courts are also required because of some foreign influences in the current courts that are contrary to Islamic law. Some of these influences include the doctrine of precedent and *stare decisios,* judicial rulings based on foreign judicial systems (India and UK) and the work of orientalist scholars; the use of books of the law in civil courts that are in the English language and written by authors from India (where the majority of Muslims are Shiites). According to this report the establishment of kadhis' courts would promote unity among Tanzanians. The report goes on to say that for a Muslim to take a case related to personal matters to civil courts is a rebellion against God.

Ahmed[33], this report shows that Zanzibar and Kenya cannot be used as justification for the establishment of kadhis' courts in the Tanzania mainland because of the different contexts. The change of the existing personal laws on the mainland, for example, can

[33] Ahmed, H. I. (n.d.). The Kadhi's Courts- setting the Records Straight. Retrieved April 15, 2015, from Commonlii.org: www.commonlii.org/ke/KECKRC/2002/11.html

cause problems to some Muslims who are comfortable with such laws. Furthermore, unlike in Zanzibar, a pluralistic culture is more dominant than Islam in Tanzania mainland. Similary, Muslims are a majority in Zanzibar, while the population of Christians in the Tanzania mainland is bigger than that of the Muslims[34]. Despite the time and money from taxpayers invested in this project for two years, the committee concluded with ambiguous suggestions as follows: if kadhis' courts were to be established significant amendments for the following laws must take place: a wider interpretation of section 19 of the Tanzanian Constitution of 1977, so that the rigt to religion should not be restricted; the Judicature and Application of Laws of 1961, besides recognizing the Islamic law, should state that these personal laws are to be regulated by the respective religious communities; the law of marriage of 1971 should be amended so that marriage and divorce among Muslims are tackled directly by kadhis' courts; section 112 of the Constitution should be amended, Muslims should be part of the Judicial Service Commission who will serve in kadhis' courts; the current Unified Judicial System is to be retained.

Ndogo[35] this study differs with the parliamentary research report concerning the scope of geographical location, time frame, sampling, methods employed for the data collection, questions and objectives, motives, and approaches on how to address the matter. In regards to the scope of geographical location and time, the Task Force did its research on the matter in Dar es Salaam (the Tanzania mainland) and Zanzibar (the Isles), while the data collection for this study was done in Dar es Salaam and Kigoma (the Tanzania mainland), so that the findings of this study represent the voice of a majority of the Tanzanianswho are affected by the pressure for kadhis'courts. In contrast to the time frame of the Parliamentary Committee finding (which treated 1960 to 2000), this study

[34] Ibid

[35] Tanzania Parliament, *Taarifa ya Kamati Ndogo ya Bunge ya Uanzishwaji wa Mahakama/ Taasisi ya Kadhi Tanzania Bara*' (Research Report on the Establishment of the Kadhis' Courts in the Tanzania Mainland).This research was conducted in Dar es Salaam and Zanzibar from 1998 to2000, and was completed on July 13, 2000.

assesses the current situation of the demand for kadhis' courts, so that some of the findings of the Committee do not reflect the current situation of the Muslim demand for kadhis courts. The current divisions and conflicts between Muslims themselves, Muslims and the government, Muslims and Christians, Christians and the government, for example, are not reflected in the government research report.

Badawi[36] Gender, religion, age and political balance were taken into a consideration for data collection for this study. Tanzanians from diverse backgrounds were given the opportunity to share their views regarding the matter. In constrast, the majority of the people who were interviewed by the Task Force were Muslims and government officials. Only one Roman Catholic priest, Peter Smith (page 78 of the the 2000 government document on kadhis' courts), was interviewed. Religious and gender imbalance is evident in this report. My argument is that the exclusion of other key stakeholders on this serious national issue caused deterioration the situation by creating serious divisions and conflicts among the Tanzanians. Furthermore, this unhealthy move implies that this matter was a concern between the government and Muslims, which is not the case.

Herry[37] In her book Islamic Law, Gender, and Social Change in Post-Abolition Zanzibar Elke E. Stockreiter uses Islamic courts' records in Arabic to re-examine the operation of Islamic courts, gender, and social relations in Zanzibar town under British rule (1890-1963). Some of the issues raised by Srockreiter that are related to my study include the existence of kadhis' courts during the pre-colonial period, during the colonial era, and after the revolution of Zanzibar; the appointments, qualifications, and role of kadhis, the operations of the kadhis'courts; their procedure, language, and the scope of their jurisdiction; kadhis' courts, gender, and other marginalized groups. In her

[36] Badawi, A. b. Proceeding of the Islamic civilization in Eastern Africa, Uganda. penetration of Islam in Eastern Africa. Kampala, Uganda: Istambul (2006).
[37] Herry Mgombele, "The Challenge of Imposition of Islamic Laws in the Pluralistic Society and the Awareness of Christian Council of Tanzania," (2012).

discussion on these issues, Stockreiter argues that the British colonial government's views over *shari'a* led to judicial reforms that restricted the scope of kadhis' courts to family and personal status matters. According to the British colonial government, the Islamic legal system was against human diginity, justice, human rights, civilization, and and modernization. Despite judicial reforms, the British colonial government regarded Zanzibar as an Arab state, so that Islamic law was maintantained as the fundamental law.

1.10 Organization of the Study

The first chapter presents the introduction to the study, the introduction includes the background of the study, statement of the problem, general and specific objectives, research questions, scope of the study, significance of the study, methodology and literature of the study and the organization of the study. The second chapter includes the relevance of the Khadi Courts in Uganda. The third chapter investigates the legal framework governing Khadi Courts in solving family disputes in Uganda. The fourth chapter investigates the challenges in implementation and operationalizing of Khadi Courts in Uganda. The fifth chapter will conclude and recommend to the various stakeholders in the research.

CHAPTER TWO

RELEVANCE AND EFFECTS OF KADHI COURTS IN UGANDA

2.0 Introduction

This chapter focused on the relevance and effects of Kadhi Courts in Uganda, the relevance and effects are based on scholars views on Kadhi's court, but many of them focused on the history, evolution, administration and general jurisdiction of the Kadhis court as envisaged in the constitution and statutes.

2.1 Role of Kadhi Courts in Africa

Hassan Mwakimako, in his article "Conflicts and Tensions in the Appointment of Chief Kadhi in Colonial Kenya 1898-1960"[38] *which was published in "Muslim Family Law in Sub-Saharan Africa" (2010)* exclusively focused on the colonial politics of appointing Shaikh Al- Islam and Chief Kadhis in Kenya and how the administration endeavoured to control and curtail the powers and jurisdiction of the Kadhis Courts especially that of the Chief Kadhi. Since during this time the Chief Kadhis Courts had appellate jurisdiction that had limited appeals, at some point the colonial authorities thought of abolishing this critical office. He enumerated and gave accounts the Chief Kadhis from Shaikh Al- Islam Shariff Abdulrahman bin Ahmad Saggaf (1844-1922) a Siyu born scholar, Shaykh Mohammad bin Omar Bakore Ca. 1932, Shaykh Suleman bin Ali bin Khamis bin Sayyid al-Mazrui (1867-1937), Shaykh Al-Amin bin Ali bin Nafi al-Mazrui, Sayyid Ahmed Ali bin Ahmed Badawy[39].

[38] Hassan Mwakimako, "Conflicts and Tensions in the appointment of Chief Kadhi in colonial Kenya 1898-1960" published in "Muslim Family Law in Sub- Saharan Africa Colonial Legacies and Post-Colonial Challenges; International Institute for the Study of Islam in the Modern World (ISIM) and Amsterdam University Press (AUP), 2010) pp. 109-130.

[39] Ibid

The Islamic Charter on Family (2007): this Charter was published by International Islamic Committee for Women and Child (IICWC) and World Assembly of Muslim Youth (WAMY)[39]

The charter is a product of deliberations in series of symposiums where prominent Muslim scholars participated and made their contributions. It was in response to the organizers believed that there was western ideological invasion lead by United Nations on Muslim Society.

Proceeding of the International Symposium on Islamic Civilization in Eastern Africa (2006):[40] this work comprises collection of scholar's presentations at the symposium which took place 15-17 December, 2003 in Kampala; Uganda. Reknown Muslim scholars like the late Prof. Ali Mazrui participated in this symposium. The book covers extensive areas of Islamic civilization in Eastern Africa. It include penetration of Islam; Islam and trade; Kiswahili and Islamic literature; Islamic education and intellectual development; visual issues in Islamic civilization; European colonial powers and Islam, and Islam and contemporary period. The book highlighted presence of kadhis courts which had jurisdiction on civil, criminal and administrative justice[41].

History and spread of Islam through traders from Middle East and Asia and how they established settlements and governance especially along the coastal area. This new settlers came along with their culture and Islam and greatly influenced the indigenous Africans with whom they came into contact. The book discusses partly Islamic judicial system in this region which was initially the only judicial system in cities like Mombasa, Kilwa, Zanzibar, Lamu etc.

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[40] The Islamic Charter on Family, International Islamic Committee for Women and Child (IICWC) and World Assembly of Muslim Youth (WAMY), 2007

[41] Proceeding of the International Symposium on Islamic Civilization in Eastern Africa, Kampala, Uganda 15-17 December, 2003. Istanbul 2006

2.2 Relevance of Kadhi Courts in solving family disputes in Uganda

Uganda achieved independence in 1962. In 1972, a Muslim Supreme Council was established in an effort to unite various Muslim communities. The council's constitution provided for a Chief Kadhi, a College of Sheikhs, and district Kadhis to be nominated by the Chief Kadhi, but did not outline specific duties for these positions. The 1995 Ugandan Constitution declares that Uganda has no state religion and permits free practice of religion[42].

The Constitution allows parliament to establish any subordinate courts it sees fit; article 129 states that this includes "Kadhis courts for marriage, divorce, inheritance of property and guardianship as may be prescribed by parliament. In 2008, a Muslim Personal Law Bill proposed the creation of kadhis courts. The bill was very controversial, however, and Christian leaders petitioned the government to remove the constitutional provision allowing the establishment of kadhis courts.

Since 1998, attempts have been made to pass a Uganda Domestic Relations Bill, which would regulate many aspects of marriage relevant to Islamic law. For example, the bill gave men and women equal rights to divorce, made mahr optional, and required the first wife's permission for subsequent polygymous marriages. Muslim leaders in Uganda opposed the bill on grounds that it conflicted with Islamic law. The bill never passed.

In Iganga, Kadhi courts have been in existence for over 5 years. According to Sheikh Sinani Munanika (2017), Khadi courts have been hearing cases including divorce petitions, land disputes and resolving disputes in the distribution of the wealth of deceased family heads. However, the court hasn't been handling any criminal cases since they involve seeking proof and evidence from various witnesses. Majority of the cases heard where

[42] Jeppie et al., Muslim Family Law in Sub Saharan Africa: Colonial Legacies and Post-Colonial Challenges. Amsterdam University Press, 2010. Edited book of essays originally prepared for a conference in 2000; several essays on Kenya and Tanzania cited in this article.

earlier on filed in high court but withdrawn by the petitioners and transferred to the Kadhi's court.

2.3 Relevance of Kadhi's Courts in Protecting Children

As part of the subordinate court system, Kadhis courts are empowered to determine issues of Muslim law relating to personal status, marriage, divorce and inheritance for persons of Muslim faith. In its operation this court applies Shari'ah. However, appeal from the decision of the court lies to the High Court[43]. This is based on Article 129 (1) (d) of the constitution[44] which establishes subordinate courts to provide service to the people fairly, equitably and expeditiously. It is a holistic working policy paper but unless it addresses our concern in this study some quarters of Ugandan population will still remain to face limited access to justice.

When considering the rights of the children, Shari'ah seeks to create formidable foundation for the child long before the child comes into being. According to the rules and policy of the Shari'ah there will be no child of a single parent, unless such situation occurred by natural cause of death. That is why in Islam sexual relationship outside marriage is strongly abhorred. In order to safeguard this policy Islam establishes and protects the institution of marriage[45]. Family is formed and protected within the marriage institution where the rights of all family members including children are taken care of. In order to build the future of the yet unborn child, Islam ordains people who are planning to marry to make proper choice. It goes a further step of suggesting certain qualities which should be considered when planning to marry. Of all qualities religion and good mannerism are highly emphasized.

[43] Article 129 of the Constitution of the Republic of Uganda
[44] Ibid
[45] Article 18

Taking away jurisdiction of the Kadhis courts to hear and determine cases concerning children would amounts to miscarriage of justice. Family disputes are interconnected to each other. They are in form of a chain, hence cannot be separated from each other. Wife may file a suit against her husband who has neglected his duty towards the family. Imagine if she has children with him and she wants the court to compel him to provide maintenance for the family. Should she be subjected to move Kadhis court for her own rights and the children's court for the rights of the children? And in case she wants a divorce, custody of the child and maintenance?

What about a succession case where the parties are mixtures of adults and minors? Would they move different courts for the same estate?

Surely these scenarios, if allowed would involve double cost, delay and time consuming, confusion and end up in conflicting rulings from the different courts. The end result would be occasion of injustice from the institution which is custodian of justice. Therefore, the Kadhi's courts as a special court is better placed to impart justice according to the Shari'ah and it is competent to do so more than any other court.

2.5 Conclusion

This chapter has dealt with the review of the role and relevance of Kadhi's Court in settling family disputes in Uganda. The examination of the literature shows that attempts have been made to write on the Kadhis court generally but falls short of handling the topic of the research. Therefore, there is gap which hopefully this research will address. Shari'ah provides similar rights of the child as in international, regional and domestic conventions and legislation. Therefore, if that is the position then it is always fairer to handle all family related cases under one roof.

CHAPTER THREE

LEGAL AND INSTITUTIONAL FRAMEWORK OF KADHI COURTS IN UGANDA

3.0 Introduction

This chapter investigates the legal framework governing Kadhi Courts in Uganda, it is further aimed at assessing the contribution of the institutional framework right from the international to the national standards.

3.1 The Constitution of Uganda 1995 on Kadhi Courts

Though existing, Kadhi courts are not legally operational. The establishment of Kadhi courts under of the 1995 constitution[46] has not been regularised due to the absence of a supporting legislation. To date, Kadhi courts operate informally and are headed by the Director of Shariah at the UMSC. Below the directorate at the UMSC, area Imams of district and village Mosques adjudicate over cases that may be brought to them[47]. In some parts of Eastern Uganda such as Iganga and Jinja, several cases related to family disputes have been decided in Kadhi Courts. In Iganga alone, over 34 cases were referred to the court to help reach an understanding. Some of the cases heard included divorce petitions, land disputes and resolving disputes in the distribution of the wealth of deceased family heads. The court is chaired by Sheikh Sinani Muwanika, the Kadhi Iganga Muslim district who was assisted by a panel of three assessors. While opening the court session in October (2014), Sheikh Sinani Muwanika explained that Kadhi courts operate under the teachings of the holy Koran[48].

[46] Constitution of the Republic of Uganda, 1995
[47] UMSC Teaching on Islam Law in Uganda (2015)
[48] https://ugandaradionetwork.com/story/iganga-kadhis-court-to-hear-34-cases

Closest to the situation of Shariah courts within a formal justice setting is that portrayed by Kenya. Not only is Kenya geographically contiguous to Uganda but it is also a common wealth country with similar development indicators. Therefore, it is a good country for comparison and picking lessons. Like Uganda, the constitution of Kenya provides for the jurisdiction of Kadhi courts. These are courts where Islamic law or Sharia is applied for 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 said courts. The Constitution provides for the office of the Chief Kadhi and such number of other Kadhi's. A Kadhi is strictly speaking a judicial officer, judge or magistrate presiding over an Islamic Court but he is not necessarily a spiritual leader or imam.

3.2 Law of Succession Act, Cap 162

This Act is the main law that covers both substantive and procedural provisions pertaining to the management and administration of the estate of deceased persons in Uganda[49]. It seeks "to amend, define and consolidate the intestate and testamentary succession and administration of estates of deceased persons; and for purposes connected therewith and incidental thereto". It was passed in 1906 but brought into effect on 15th February, 1906.

According to Musyoka the constitution established Kadhis Courts and mandated it to decide matters arising out of Islamic law where such matters are related to Muslim personal law[50]. In case of dispute and controversies, the Act donates powers to the High Court which may be represented by Magistrate Court as appointed by the Chief Justice, to resolve issues under this Act. The Act also empowers Courts of law to especially determine all issues

[49] William Musyoka (2006), Law of Succession (LawAfrica), p. 3
[50] Ibid

relating to the estates of the deceased[51]. "For the avoidance of doubt it is hereby declared that the kadhis' courts shall continue to have and exercise jurisdiction in relation to the estate of a Muslim for the determination of questions relating to inheritance in accordance with Muslim law and of any other question arising under this Act in relation to such estates". This Act is quite relevant because inheritance affects adults and minors alike. Therefore by donating powers to the Kadhis Courts to adjudicate issues arising from the estate of Muslim deceased generally, it has empowered the Court to determine for children or against children.

3.3 Marriage Bill 2017

This Bill is meant to amend and consolidate various marriage and divorce related laws in Uganda which existed for a long time. There are various Acts of parliament dealing with marriages of different populations based on their faith and customary allegiance. They include Christian Marriages, Islamic Marriages, Hindu Marriages, Civil Marriages, Customary Marriages etc and their registrations. The Bill considers registration, solemnization and break down of marriage in Uganda[52].

If passed, the Bill will also empower Kadhis Courts among other institutions to adjudicate matrimonial disputes of Muslims and issue decrees accordingly. "Where a Kadhi, sheikh, imam or person authorised by the Registrar grants a decree for the dissolution of a marriage celebrated under Part VII, the Kadhi, sheikh, imam, Mukhi or authorised person shall deliver a copy of the decree to the Registrar". The Bill therefore aims to follow the Constitution of the Republic of Uganda hence providing for the existence of the subordinate courts which include Khadi Courts that provide that the laws governing marriages and divorces shall be Islamic Law.

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[51] Section 38 and 45
[52] The Marriage Bill 2017 of Uganda

The dissolution of marriage celebrated under the bill therefore requires that property be shared among the two partners. If passed still, out of the repealed old Acts relevant to the Kadhis Courts are Cap 156, The Mohammedan Marriage, Divorce and Succession Act. However, do not affect the powers of the court in anyway. The Bill shifts the issues of marriage and divorce to itself and gives powers to the Kadhis courts to handle them. In addition the Bill gives the court powers to handle cases related to children though as seen above the procedure will be govern by children's act.

This development can be looked from two sides; positive or negative. Creation of other institutions to help resolve matrimonial dispute among Muslims may be seen as an added advantage because it widens avenues by bringing service of justice closer to people, hence enhances access to justice. On the other side in the absence of proper check on the qualification and training procuring judicial services of these additional institutions may undermine the quality of service.

Also the Bill purports to shift the allegiance of the Kadhis to the Registrar of Marriages and Divorces because in this area of matrimonial proceedings it is the appointing authority. This is tantamount to a conflict in that the Kadhis are appointees and employees of the Judicial Service Commission (JSC) and not that of the Registrar of Marriages and Divorces. The provision of the constitution is clear in this regard. Kadhis Courts is among the subordinate courts and Kadhis are appointed and managed by the Judicial Service Commission.

3.4 The Children's Act, Cap 59

This Act is a detailed piece of legislation making provisions "for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; to make provision for the administration of children's institutions; to give effect to the

principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and for connected purposes"[53].

The Act creates Children's Court[54] "There shall be courts to be known as Children's Courts constituted in accordance with the provisions of this section...".And it empowers the Chief Justice to appoint a magistrate to preside over children's court. ..." "The Chief Justice may, by notice in the Gazette, appoint a magistrate to preside over cases involving children in respect of any area of the country"[55].

The creation of children's court and the appointment of magistrate to preside over the court do not, however, preclude other courts and their presiding judicial officers from handling children related cases. This is clear from the provisions of the children's Act itself. It has express provisions which empower other courts to handle children cases just like the children court. "...where in the course of any proceedings in any court other than a Children's Court it appears to the court that the person charged or to whom the proceedings relate, is under eighteen years of age, nothing in this section shall prevent the court, if it thinks fit, from proceeding with the hearing and determination of the case"[56].

3.5 Institutional mandate of the Uganda Muslim Supreme Council (UMSC)

There are several good practices located within muslim adjudication systems, both at institutional as well as individual level. At institutional level, mosque leaders work with formal institutions to enhance justice services. For instance, at Kibuli Mosque, when unable to resolve a matter in relation to distribution of property, contesting parties are referred to an advocate to organize valuation of the property before distribution. Another example identified from the UMSC is that when a divorce is dissolved, the decree is filed with the

[53] Children's Act, Cap 59 as amended in 2016
[54] Section 13
[55] Ibid
[56] Section 18

Uganda Registration Services Bureau (URSB) to ensure that no illegal claims arise thereafter[57].

Similarly, most Imams work with the police and refer cases that cannot be resolved, especially those with a criminal aspect such as domestic violence. This factor is very important because it indicates that muslim adjudication systems do not work in isolation of the formal justice system. One of the good practices being practiced in the three study areas in which MCJL operates is the use of trained paralegals to sensitize members of the community on rights and duties within the family and especially in relation to marriage.

Some of the users consulted affirmed that such sessions have enabled them to understand responsibilities of men and women in the family. In fact, one respondent stated that it is due to consistent messaging on rights of women that some members of the muslim community have been discouraged from marrying off their teenage daughters on grounds of being too young[58].

At individual level, there are several examples where Imams take initiatives to enhance access to justice for users especially women. For instance in Mirembe in Butambala, the Imam of Magatto Qur'an School, Sheikh Ali Sowedi Sseguya informed the research team that he often goes to the homes of his followers on request to intervene in their disputes, especially where women are hesitant to come out publicly about an existing conflict with their spouses, also to guarantee privacy or even where the women cannot afford transport costs to the mosque[59].

[57] Muslim Centre for Justice and Law (MCJL), Gender Responsiveness of the Muslim Adjudication System in Uganda (2016)
[58] Ibid
[59] Supra

3.5 Rules of Interpretation

In law interpretation of law is governed by certain rules which judges should observe while interpreting laws. It is not my wish at this juncture to delve so much in those rules of interpretation of statutes. Referral of few rules and examples from the superior courts of the land would surfice.

There are four rules of interpretation. Literal rule, golden rule, purposive rule and mischief rule.[160] In literal rule the focus is on the plain language which should be given ordinary meaning of the word. The golden rule seeks to consider the statute together and gives meaning of any part of it according to the objective and context of the statute as a whole. Closely related to the golden rule is the purposive rule which considers interpretation of legislative words by examining the general purpose of the statute in the social, economic or political context. Lastly, the mischief rule as the word itself suggests seeks to guide the judges to consider history prior to the legislation under review, its failure, remedy and reason of the remedy intended to achieve by the new legislation.[161] However, the best practice is that the above rules are used depending on the nature of the legislation. None of them stands on its own and independent of another rule. They should be examined together.

"When the court is called for an interpretation they do it not like a dictionary but in the context of the statute."[162]

In *Kibocha v Republic* the presiding learned judges were considering whether seemingly two conflicting provisions of the Evidence Act, ss. 25A and 111, one of them repealed the other. The judges ruled that in the absence of express provision to that effect then each section should be given operational effect.

"A statute or a section or part of a section of a statute cannot be said to have been repealed by implication. Express words must be used".[163]

Similar sentiment was observed by learned judges in *Republic v Public Procurement Administrative* Review Board and another *ex parte SelexSistemiintegrat*. The court was considering whether s. 100(4) of Public Procurement and Disposal Act No. 3 of 2005 oust or restrict the

160 James Holland & Julian Webb, Learning Legal Rules, 7th Edn, P. 253.

161 Ibid, pp. 253-263.

162 Ibid, p. 252.

jurisdiction of the High Court. The Court observed ***"ouster or restrictive clause on the jurisdiction of the court would only be effective if clear statutory words were used..."***[164]

The gist of the above mentioned findings of the learned judges are that repealing law or section must be explicit and clear and that no law or part of law shall be repealed by implication. Therefore, in this regard there is no any direct and clear provision in the children's Act which took away jurisdiction of the kadhi's court in relation to the children.

3.6 Other jurisdiction

There are other jurisdictions which have well defined laws on personal status. In Arab speaking countries personal status law is known as Qanun al Ahwaal Al-Shakhsiyyah[165] while personal status is translated as Al- Ahwaal Al-shakhsiyyah.[166]

In East Africa only Kenya and Tanzania (Zanzibar) have Kadhi's Courts and their laws are almost similar. The constitution of Zanzibar empowers the parliament to establish courts subordinate to the High Court of Zanzibar.[167] Section 6 (1) of The Kadhis Court Act, 1985 of Zanzibar provides:

"A Kadhis Court shall have and exercise jurisdiction in the determination question of Muslim law relating to personal status, marriage, divorce or inheritance in proceeding in which all the parties profess the Muslim religion."[168]

However, according to a State Counsel in the office of the Attorney General of Zanzibar, the court,s jurisdiction extends to the guardianship, custody of the children, Waqf (Endowment), gifts, maintenance where the claim does not exceed five hundred thousand shillings etc.[169]

In Gambia the jurisdiction of the Kadhis Court is similar to that of Kenya in that it's limited to personal status, marriage, divorce or inheritance where all parties are Muslims.[170]

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[164] Republic v Public Procurement Administrative Review Board and another ex parte SelexSistemiIntegrat, (2008) KLR, p. 731.

[165] Dr. Ibrahim I Al- Wahab, Law Dictionary,English-Arabic (3nd Edn: 1988), p. 172.

[166] Ibid, p. 232.

[167] Art. 100 of the Constitution of Zanzibar (?R.E. 2006).

[168] S. 6(1) of the Kadhis Courts Act No. 3 of 1985 of Zanzibar (Rev.2006).

[169] E-mail correspondence dated 15th July 2015.

There is no Kadhis Courts in Uganda. However, the Constitution provides a legislation to establish Kadhi's Court with the jurisdiction of handling Muslims cases of personal status, marriage, divorce, inheritance and guardianship.[171]

In Malaysia Kadhis Courts are called Shari'ah Courts.[172] They are available at both subordinate and appellate levels.[173] The jurisdiction of the shari'ah courts under Islamic Family Law (Federal Territories) Act 1984 covers marriage[174], divorce[175], maintenance of wife, children and others[176], guardianship which include management of the person and property affairs of the minors[177], question of legitimacy of a child[178] among others.

In the following pages we will briefly discuss few selected countries in relation to personal status law. These countries are selected because they have more elaborate laws on the subject of this research.

3.6.1 Iraq

In Iraq the family law is named as personal status law.[179] The following are the brief outlined of this law.

It comprises of 94 articles which is divided into general provisions, nine chapters which is further segmented into smaller sections. The general provisions deals with the scope of the application of this law and gives guidance to the courts in the event there is lacuna in this law.

Chapter 1 deals with the marriage which is further arranged into sub sections. Betrothal, pillars and conditions for marriage, validity of marriage, and registration of marriage contract are covered under this chapter.

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171 Art. 129, The Constitution of Uganda, 1995.

173 Ibid.

174 Ibid; ss.7-44.

175 Ibid; ss.45-58.

176 Ibid; ss. 59-80.

177 Ibid; ss. 81-105.

178 Ibid; ss. 110-119.

179 Law No.(188) of the year 1959 as translated into English by the American Bar Association Iraq Legal Development Project.

Chapter 2 devotes on other aspects of marriage. Section 1 deals with the marriages which are prohibited either permanently or temporarily and marriage to women belonging to the people of the book (*kitabiyah*). Chapter 3 deals with matrimonial rights and their stipulations. Dowry and wife's alimony are covered here.

Chapter 4 treats dissolution of marriage. Various forms of dissolution of marriages are addressed here. They include divorce, legal separation and voluntary separation (*khul'u*). The waiting period (*eddah*) and the laws involved are also covered under this chapter.

Matters involving children is covered in chapter 6. Kinship, breastfeeding and custody are elaborated here.

Chapter 7 discusses maintenance for descendents, ascendants and relatives. It lays principle that everybody is provided for from his or her own property and wealth except wife who shall always be provided from the property of the husband. If the child does not have property of his own his father shall provide for him. Parents shall provide for their daughter until she gets married and boys until they attain the age at which their peers are ordinarily earning, unless he is a student. An adult child who is incapable of earning livelihood is considered as minor and thus his maintenance shall be provided for by the parent.

Chapter 8 deals with bequeathing. Will, appointment of an executor and cessation of custody are examined under this chapter. Laws governing Will, types of Will, valid, voidable and void Will and the role of the executor are highlighted here. Of interest article 74 provides that if any child, male or female dies before the parent and survived by a child, upon the demise of the deceased parents, he will be treated as alive and his share shall be handed down to his children according to the shari'ah.[180]

Chapter 9 deals with Legacy and the laws of inheritance. It runs from article 86 to 94.

From the above overview of the Iraq "Personal Law" it's clear that it covers marriage, divorce, children and their affairs, inheritance, Wills and bequeaths. This is how personal status is understood and practiced in Iraq and it's my conviction that our (Kenya) personal status also have similar scope as Iraqi's as discussed above. I do not see any reason why personal status in our context should be limited to the marriage, divorce and inheritance.

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180 Ibid, Art. 74.

3.6.2 Egypt

Egypt's family law is called personal status laws. John Miles[181] in his investigation on the development of customary and Islamic law in Egypt discusses various operational courts and their jurisdiction in the country. These courts are mixed courts, the Consular courts, the national courts and importantly courts of personal status. Owing to the competing social and political interests each of these courts is modeled in such a way that it serves the interest of particular population. Courts of personal status serve personal status interest of various religious groups. There are shari'a courts for Muslims and Milli Courts for non-Muslim population.

This view of describing family law as personal status law seems to be common to the writers on the family law in Egypt. "From Jihan to Susanne, twenty years of personal status law in Egypt" is a title of an article examining general overview of Egyptian personal status law paying special attention to marriage and divorce.[182]

In Egypt there are many family laws titled the law of personal status governing specific aspect of the family.[183] I will enumerate few of these laws.

1. The law of maintenance and personal status (Law No. 25/1920);
2. Law No. 56/1923 regulating the minimum marriage age.
3. Law of Personal Status (Law No. 25/1929) regulating dissolution of marriage and family disputes.
4. Law of inheritance (Law No. 77/1943).
5. The Law of Bequest (Law No. 71/1946).
6. Law No. 1 of 2000.

Overview of those laws reveals details of what the personal status comprise in their context. Marriage, divorce, children and their rights including legitimacy, paternity test[184] and their physical custody, maintenance, care and welfare among others are adequately covered.[185]

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[181] John Miles, Customary and Islamic Law and its Development in Africa in Law for Development Review (Africa Dev. Bank) Pp. 13-14.

[182] Nathalie Bernard-Maugiron/BaudouinDupret, Twenty Years of Personal Status Law in Egypt in Recht van de Islam 19(2002), pp.1-19.

[183] John Miles, Customary and Islamic Law and its Development in Africa in Law for Development Review (Africa Dev. Bank), P.14.

As earlier mentioned in the introductory chapter the Egyptian Court of Cassation has settled the definition of personal status in 1934 when it stated that:

"Personal Status is the sum total of the physical or family descriptions of a known person which distinguishes him from the others and give legal effect under the law in his social life such as being male or female, married widowed or divorced, a parent or legitimate child, being of full legal capacity or defective capacity due to minority, imbecility or insanity, being of absolute or limited legal capacity.[186]

3.6.3 Nigeria

Nigeria has different layers of law consisting of English Common Law, local customary law and Islamic Law.[187] The constitution of the Federal Republic of Nigeria, 1999 establishes shari'a courts with appellate jurisdiction based at Abuja.[188] It further donates powers to willing states to establish such courts.[189]

The constitution defines jurisdictions of the shari'a courts as covering *"civil proceedings involving questions of Islamic personal law"*[190] and any other question provided the parties have agreed the court has jurisdiction.[191]

What would constitute Islamic personal law is further described as including the following:[192]

1. Matters relating to marriage concluded in accordance with Islamic Personal Law;
2. Questions of Islamic personal law regarding gift, Will or succession where the endower, donor, testator or deceased person is a Muslim; and

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184 Art. 15 of the Law of Personal Status No. 25 of 1929 as amended by Law No. 100 of 1985.

185 Ibid, Art. 20.

186 UNIFEM and MUHURI: Civil Procedure, Quick Reference Guide for the Kadhis (unpublished): P. 69.

187 Ibid, P. 7.

188188 Art. 260 of the Constitution of the Federal Republic of Nigeria, 1999.

189 Ibid. Art. 275(1).

190 Ibid, Art. 262.

191 Ibid, Art. 262(2)(e).

192 John Miles, Customary and Islamic Law and its Development in Africa in Law for Development Review (Africa Dev. Bank) P. 7.

3. Any question regarding an infant, prodigal, or person of unsound mind who is Muslim; or
4. The guardianship of a Muslim who is physically or mentally infirmed.

It is clear from the foregoing that in Nigeria the shariah courts which is same as kadhis court in our case has jurisdiction over civil proceedings involving question of Islamic personal law. And Islamic personal law in their context is well described as marriage and issues connected thereto, gifts and wills affairs of the estate deceased Muslim, persons of limited legal capacity as in infants and persons of unsound mind and as well as affairs of a physically handicapped Muslim.

3.6.4 Israel

The English law which was the law of Palestine before the establishment of the state of Israel defines personal status law as:

"for the purpose of these provisions matters of personal status mean suits regarding marriage or divorce, alimony, maintenance, guardianship, legitimation and adoption of minors, inhibition from dealing with property of persons who are legally incompetent, successions, wills and legacies, and the administration of the property of absent persons".

When the State of Israel was established it took over all legal affairs including the management of personal status. The religious courts were authorized to deal with such matters of personal status.[193]

The status in Israel is clearer. As in our case their law talks of "personal status" and for clarity personal status is defined to cover marriage, divorce, alimony, maintenance, guardianship of infant and minors and question of their legitimacy and adoption. Others are inhibition order dealing with the property of legally incompetent persons, succession, Wills and legacies and as well as administration of the property of absent persons. Those are what constitute the legal phrase of "personal status" in Israel and judicially managed by the religious courts.

3.6.5 Ethiopia

Ethiopian judicial system is similar to that of Kenya in that it has established and adopted dual legal systems. This is based on the constitution which among other rights establishes and protects rights to equality[194], freedom of religion, conscience and thought[195], rights relating to marriage and

193 (Solomon Zeitlin. Personal Status in Israel in "The Jewish Quarterly Review, Vol. 49, No. 2(Oct. 1958), P. 122).

the family[196] and an independent judiciary[197]. The Highest judicial power of the Federal Government vests in the Federal Supreme Court. The parliament may establish Federal High Courts and Courts of First Instance. Besides Federal Courts, States shall have courts of similar hierarchy with the federal Courts.

Of important to us the constitution mandates People's Representatives (Federal Parliament) and as well as the States Parliament to establish or recognize religious and customary courts of law. This is done pursuant to article 34 (5) of the Constitution and I quote: "***this Constitution shall not preclude the right of parties to voluntarily submit their dispute for adjudication in accordance with religious or customary laws. Particulars shall be determined by law***".

Proclamation No. 188/1999 titled "Federal Shari'a Court" established a three tier Shariah Courts; Federal Supreme Court of Shari'a, the Federal High Court of Shari'a and First Instance Court of Shari'a.[198] These courts are manned by chief kadi, his deputy and kadis. They have registrars and other personnel for its operation. The jurisdiction is limited in the words of John Miles to "personal and family matters".[199] They are as follows:-

1. Any question regarding marriage, maintenance, guardianship of minors and family relationships; provided that the marriage to which the question relates was concluded, or the parties have consented to be adjudicated in accordance with Islamic law.
2. Any question regarding Waqf (endowment), gift/hiba, succession or will: provided that the endower or donor is a Muslim or the deceased was a Muslim at the time of his death.
3. Any question regarding payment of costs incurred in any suit relating to the aforementioned matters.

The Ethiopian judicial system is typically like Kenya. It has a dual court system consisting of religious courts and the mainstream secular courts. Like Kenyan kadhis courts the shari'ah courts in Ethiopia is manned by kadis or Kadhis. The jurisdiction of this court extends to children and

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195 Ibid, Art. 27.

196 Ibid, Art. 34

197 Ibid, Art. 78.

198 Art. 3 of Proclamation 188/1999.

199 John Miles, Customary and Islamic Law and its Development in Africa in Law for Development Review (Africa Dev. Bank) p. 44

their welfare, endowment and gifts among others. That is how personal status is understood in Ethiopia.

3.7 Work of the Scholars

Many contemporary Scholars have extensively written volume of books and articles in this regard.

I will make reference to few of them and briefly analyze their contributions.

3.7.1. Dr.Mohamed Abu Zahra[200]

This scholar among many of his scholastic works is the book title "**Al-Ahwal Al-Shakhsiyyah**". The book is in Arabic and the title may be translated as Family Law or Personal Status Law. The 3rd edition which I am using is a 500 pages one volume book and was published in 1957.

The author introduced the book as meant for the student of sharia[201] and took a comparative approach in discussing relevant family laws and sharia.[202] The book is divided into four parts as follows[203]:

Part I: deals with the inception of marriage contract, prerequisite condition and preceding introduction to a valid marriage and conditions needed for its establishment, validity and continuity.

Part II: this part extensively discusses the rights and duties of spouse. Dowry, provision of maintenance, obedience, mutual respect and management of the family affairs are well addressed here.

Part III: this part examines various ways of terminating marriage, procedures involved and applicable rules and laws of various forms of dissolution of marriage. The effect of the termination of the marriage on established marital rights and management.

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200 Muhammad Abu Zahra, Al-Ahwaal Al- Shakhsiyyah (1957).

201 Muhammad Abu Zahra, Al-Ahwaal Al- Shakhsiyyah (1957), P. 5

202 Ibid, p. 7

203 ibid

Part IV: this part deals with the rights of children and it's whose duty to undertake. Under this part the author discusses legitimacy of a child and rules for paternity test and how to handle related cases; the right of an abandoned child; right of the child to breastfeeding; custody and guardianship of the child and his other interests and who has the duty or right thereof and their sequences and priority. Provision of maintenance for the child and other relatives are also treated.

This part is of paramount importance to our study in that the learned scholar considered in his work children are part of personal status law.

It is interesting to note that the book did not cover succession. However, this does not mean that succession does not fall under the personal status law. Because the author did not claim that his book is exhaustive of all personal status laws.

3.7.2 *The Islamic Charter on Family*[204]

The charter is a product of deliberations in series of symposiums where prominent Muslim scholars participated and made their contributions. It was in response to the organizer's believe that there was western ideological invasion lead by united nations on Muslim Society.

This Charter consisting of 164 articles is based on tenets of shariah and was meant to protect and guide Muslims family life. According to the authors the invasion on Islamic family is in various United Nation Conventions which purport to be international yet based exclusively on western values whose intention was to destroy Muslim family system and morals. In particular they singled out "*Programmes for Action Document*" which was the result of the "***International Conference for Population and Growth***", which was held in Cairo between 5th to 15th September 1994. It is widely believed the conventions, was in essence, a declaration of war against the Islamic family as established by Islam.

It covers family aspects in Islam and calls for practice and application by all Muslim states and others which recognize Islamic law in their respective legal systems. chapter I which is arranged into V sections deals with principles, values and general concept of family in islam. Chapter II discusses general duty of the Muslim community to form and protect the family. In chapter III the charter discusses in details rules governing formation of marriage, management and regulation of marital life, rights and duties of the spouses, relationships between parents and their child, rights of the parents over the children, and finally rules governing termination of marriage.

Of particular interest, the Charter spells out in chapter IV the rights and duties of a child in Islam which should be established and protected under Islamic law. Personal status rights of the child include rights to lineage (art.104), breastfeeding (art.105), custody (art. 106) and financial support (art. 107) among others.

And finally chapter V considers Islamic rules on the welfare of the larger Muslim family. Here the discussion is on Islamic rules on social welfare responsibility. Doctrine of takaful, maintaining uterine ties, inheritance, Will and bequest and waqf/ endowment is discussed here.

3.7.3 The Family Structure in Islam[205]

In this book the author discusses the family in Islam which includes children and their rights and duties. Before going into the question of family in Islam, he introduces the book by tracing back the family from the Arabian pre-Islamic rein and demonstrates the reforms which Islam introduced in the family sector. He then moves on to the definition and description of family as brought by Islam. The laws, rules, rights and duties related to marriage, divorce, children, their rights and duties, and the law of succession in Islam are discussed in this book.

The book is quite relevant in that in the view of the author family law covers marriage and issues of the marriage (children) and financial and property rights which would accrue to the members of the family by operation of law (succession).

3.8 Conclusion

This chapter has traced the meaning of Personal status from different sources. Various dictionaries, statues, decisions of the courts, and work of the scholars were consulted. Other jurisdictions with similar judicial system as Kenya were also referred to.

The study shows that personal status or personal status law or personal law or family law are one and the same and used synonymously.

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[205]Hammudah'AbdalAti', The Family structure in Islam (American Trust Publication:1977).

Many authors have used either of the terms in a manner which one would believe that its one and the same. John Miles is one of such scholars who used personal status law in a manner suggesting that its family law. Throughout his article titled "Customary and Islamic Law and its Development in Africa" he categorically used the term personal status law under which he discusses the entire family law. While discussing challenges posed by the influence and impact of Islamic law in Africa, the author says: "the contest, however, in countries on the continent that have a Moslem majority in their population, is between the Executive seeking to maintain a secular state, and the Islamic establishment seeking to make Islamic law of direct effect in every aspect of the law (rather than limited to direct effect in the laws of personal status).[206]

While examining Ethiopia he made reference to family law and I quote "as stated above, the main area where Customary and Islamic Law has influence is in *Family Law*. This is recognized in the Ethiopian Civil Code relating to *Family Law*".[207]

Therefor it's the finding of this chapter that personal status covers quite a range of family related issues including children and their affairs.

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[206] John Miles, Customary and Islamic Law and its Development in Africa in Law for Development Review (Africa Dev. Bank) P. 5.

[207] Ibid, p.42.

CHAPTER FOUR

CHALLENGES IN IMPLEMENTING AND OPERATIONALIZING KHADI COURTS IN UGANDA

4.0 Introduction

There is no Kadhi Courts in Uganda. However, the Constitution for the establishment of subordinate courts that include Kadhi Court with the jurisdiction of handling cases of personal status, marriage, divorce, inheritance and guardianship. These courts also face challenges and among those are discussed in this chapter.

4.1 Structural Set up

All muslim dispute resolution mechanisms in Uganda fall under the Uganda Muslim Council (UMSC) which heads all mosques in the country. The Kadhi Court is situated at the UMSC headquarters at Old Kampala in Kampala. This court is established under the constitution of UMSC and is one of the organs of UMSC falling under the Directorate of Sharia. It is headed by a director. The directorate is composed of the director, a deputy director and three registrars one of whom is tasked with handling the administration and registration of cases reported. The role of the registrar is to summon both parties and register the complaints received[60].

[60] Muslim Centre for Justice and Law (MCJL), Gender Responsiveness of the Muslim Adjudication System in Uganda (2016)

The court handles mostly cases of a domestic nature as laid out under Article 129 (d) of the constitution[61] to include marital disputes, inheritance, guardianship, guidance and counseling. Other non-domestic cases such as theft are mediated or referred. Mediation is employed first before a decision is made and both disputing parties are included as much as possible in amicable settlement and resolving of disputes. However, it should be noted that the decision of the UMSC Shariah Court is not final, the unsatisfied party can appeal to a higher court. Beneath the Council's Shariah Court at headquarters, it is expected that all districts should have their own smaller shariah courts which should handle matters arising from individual mosques.

At the same time, most district mosques have executive committees comprising of village muslim elders who assist the mosque heads, the Imams, in dispute resolution. However, due to several factors especially limited financial resources, these district courts are not operational. However, the presence of the shariah court at UMSC and Kadhi courts generally has created controversy over whether they are competent court whose rulings or orders can be enforced in Uganda. There are claims over lack of jurisdiction and force while others argue that they are competent courts envisaged under Section 2 of the Marriage and Divorce of Mohammedan Act and under Article 129(1)(d) read together with Article 274 of the Constitution[62].

The status of the informal Sharia court at UMSC has been considered by Hon. Justice B. Kainamura in Sumaya Nabawanuka v. Med Makumbi (High Court Family Division

[61] Constitution of the Republic of Uganda, 1995
[62] Ibid

Divorce Cause No. 39 0f 2011) in which the petitioner (Sumaya) filed a petition seeking for a decree nisi dissolving her marriage with her husband, the respondent. The marriage was contracted in accordance with muslim law.

She wanted custody of the child; maintenance of the child, alimony; share of the matrimonial property and costs. The respondent filed his reply refuting the allegations in the petition and by way of a preliminary objection applying that the petition be dismissed because it was re-judicata since the matter before court had been finally determined by the Shariah Court of the Muslim Supreme Council. He argued that a shariah court is a court of competent jurisdiction as provided for Under Article 129 (1) (d) of the Constitution 1995. He further contended that the shariah Court of the Muslim Supreme Council is such court that is envisaged under the Marriage and Divorce of Mohammedans Act. He urged further that the petition was incompetent in as far as it sought reliefs under the Divorce Act Cap 249 even though the marriage between the parties was celebrated under Mohammedan law[63].

4.2 Accessibility

Forms of Muslim Dispute Resolution Mechanisms operate at different levels of the muslim administration system with the highest being the Shariah Court at UMSC. There are as many Kadhis courts operating informally within the country as there are mosques. Except for minimal municipal standards for building, there are no strict formal

[63] Muslim Centre for Justice and Law (MCJL), Gender Responsiveness of the Muslim Adjudication System in Uganda (2016)

requirements prior to erecting a mosque[64]. As such, anyone can build a mosque and as a result, there are many mosques in muslim stronghold areas across the country, both public and privately owned. The multiplicity of mosques translates into physical accessibility to justice mechanisms because mosque leaders or Imams also take on the role Kadhis or judges.

Furthermore, except for the UMSC Shariah Court which charges a case opening fee of 50,000 shillings (approximately USD 15), dispute resolution services in most Kadhi courts are free. In general therefore, muslim justice mechanisms are fairly accessible, both physically as well as economically.

4.3 Competence and Quality Assurance

Because most mosques in Uganda are privately established, there is minimal control and oversight over their work by the UMSC. Beyond the issuance of a certificate of practice, there is no technical or financial assistance received by the mosques from UMSC with regard to aspects such as dispute resolution[65]. In some limited instances, leadership of mosques including mosque chairpersons and deputies undertake monitoring of the welfare of the mosque, but this is mainly limited to physical upkeep and sanitation with no input into the handling of disputes because they are not religious leaders.

The majority of Imams across the country have not received any specific training and mostly rely on their knowledge of the Qur'an to resolve disputes. Additionally, because

[64] Ibid
[65] UNICEF 2005; Forum on Marriage and the rights of women and girls (2001)

of the internal wrangles within muslim leadership in Uganda, some mosques fall outside of the control of UMSC, to other factions which have even less administrative capacity to provide over sight and quality assurance[66].

Thus, most lack simple items such as stationery for case documentation purposes which affects their competence to perform effectively. Related to the aspect of competence is the undue reliance on legal technicalities which do not often serve the purpose of justice or protection of vulnerable parties especially women. As shared by MCJL, most Islamic marriages are not formally registered.

4.4 Standard of Performance

Due to the limitations in funding, most Kadhi courts experience low standards of performance. For one, documentation is almost non- existent, cases are rarely recorded and therefore enforcement of decisions becomes difficult, or appeals therefrom. Secondly, confidentiality is not always guaranteed because of the limited space within mosques to hold private meetings. In fact, it was revealed during the study that some Imams invite conflicting parties into their homes to guarantee some form of privacy[67].

Even the UMSC Shariah Court though faring better than others in terms of having facilities for documentation, lacks private rooms in which to hold confidential meetings. In terms of personnel dedicated to dispute resolution, cases may be handled by normally 1-2 adjudicators, including the Imam and the Ameerat (female muslim leader)

[66] Ibid
[67] Mathur, Greene and Malhotra 2003; United Nations Commission on Population and Development 2002

but most often it is just one person[68]. Due to the above mentioned factors, dispute resolution work is under-prioritized especially where it requires resources in dispensation of justice, such as where there is need to travel to the locus or where a victim requires medical support in cases of physical violence[69].

4.5 Conclusion

Kadhi courts operate within the precincts set by several statutes, including the Kadhi's Courts Act, the Mohammedan Marriage and Divorce Registration Act and the Mohammedan Marriage, Divorce and Succession Act. Therefore, unlike Uganda, Kenya has a specific legislation guiding the operation of Kadhi courts as well as complimentary legislation on aspects such as divorce and succession which are missing in Uganda. Additionally, the said laws have codified Qur'anic provisions into statutory law, making them easily applicable in formal courts, whether or not the presiding officer is a person of the muslim faith. In the Ugandan case, this is lacking and it implies that interpretation of Islamic law on aspects such as marriage and succession are the reserve only of muslim scholars. This in itself is limiting because it confines application of this law to a selected part of the population. Additionally, because fewer persons have an adequate understanding of Islamic law, this is subject to abuse to misinterpretation which cannot be easily challenged especially in the context of poorer court users like women.

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[68] Ibid
[69] Supra

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusion

Because the Ugandan population is made up of a significant number of muslims, the Islamic adjudication system appeals to, and is used by a fair number of citizens. It is clear therefore, that muslim adjudication mechanisms including the existing forms of Kadhi courts are regarded as pertinent in enhancing justice for women. This study have investigated jurisdiction of the Kadhis Courts in matters relating to the children in Uganda. The relevant laws in Uganda donate to the Kadhis Courts powers to adjudicate matters of Islamic law pertaining to personal status, marriage, divorce and inheritance where all parties are Muslims.

Among these four items, marriage, divorce and inheritance are clear though not in detail. However, what constitute personal status in Ugandan legal context remained ambiguous. During my research I did not come across any domestic law be it statute or case law where personal status is defined.

As a result of this ambiguity even superior courts have given conflicting decisions on the matter. In order to bridge this gap I was compelled to resort to other jurisdictions with similar judicial system as Uganda. I have also had chance to consult some academic work of the scholars on the subject and as well as legal dictionaries. It is my humble finding that from the work consulted the phrase personal status have quite a

wider meaning as discussed in chapter three. For brevity it includes marriage, divorce, inheritance, affairs of the children, *Waqf* (endowment) etc.

It is also important to note that from this research there is nothing in the Children's Act No 8 of 2001 that would suggest stripping Kadhi's Courts from jurisdiction to handle children cases. To the contrary it is my finding that international and regional conventions and the children's Act strengthen the jurisdiction of the Kadhi's Court in this regard.

Among many rights guaranteed to the child under the above laws is the right to religion which in the words of the Convention on the Right of the Child states parties to it shall respect child's rights to religion and the child shall have freedom to manifest his it without limitation whatsoever except as prescribed in the law.[350]

5.2 Recommendations:

In light of the above, Uganda needs to enact a law regulating operation of its own Kadhi courts, combining both substantive Qur'anic provisions on aspects outlined under the constitution such as marriage and child maintenance, as well as procedural issues such as structure and numbers of Kadhi courts countrywide. In order to strengthen the operation of these courts, the law should further elaborate on aspects such as:

i. Specifications of personnel manning the courts;
ii. Permission for women to be appointed as assistants to the Kadhi (a position limited only to men) to help in those instances where women litigants in the

court find it difficult to explain to the male Kadhi the delicate and intimate details of some of their domestic problems;

iii. Establishment of courts with representation of all muslim sects across the country, both Sunni and Shia. Consideration ought to be given to the appointment of Kadhis of both sects so as to cater for the interests of all Ugandan muslims.

iv. Codification of Islamic family law in Uganda: this will help Kadhis to save their time in researching in the wider corpus of Islamic law and as well as the judges on appeal the lawyers, academicians and other stakeholders to have first hand information on Islamic family law.

v. As an interim solution and before the enactment of a detailed Muslim Family law it is prudent for The Chief justice of Uganda to exercise his power under the children's Act to appoint the Kadhis to handle children cases.

vi. Creation of awareness among the Kadhis, judges, lawyers legal academicians and other stakeholders on the role and mandate of Kadhis courts in children cases and why is it important to have the Kadhis courts to handle cases of the children of Muslim communities in Uganda. This can be done through training, seminars, meeting and discussions on the matter.

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