

**IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

Mohamed Gawse Mohamed Ameer,
No. 4, Abdul Carder Mawatha,
Kal-Eliya.
Respondent-Petitioner-Petitioner

CA CASE NO: CA/LA/6/2017

BOARD OF QUAZIS CASE NO: BQ/31/17/R/CMB

QUAZI COURT OF BADULLA CASE NO: KK5672,

K2172/5647, T1703

Vs.

Mohamed Zawahir Sithy Nawziya,
No. 90/B,
Aluthwatta Road,
Badalkumbura.

Applicant-Respondent-Respondent

Before: Mahinda Samayawardhena, J.

Counsel: Safana Gul Begum for the Petitioner.
Yoosuf Nazar for the Respondent.

Written Submissions: By the Petitioner on 30.10.2018
No written submissions were filed by
the Respondent.

Decided on: 04.12.2018

Samayawardhena, J.

The respondent-petitioner-petitioner (petitioner) filed this appeal with leave obtained from the former Bench against the order the Board of Quazis dated 22.07.2017 by which the Board of Quazis refused to issue notice on the petitioner-respondent-respondent (respondent) on the revision application filed by the petitioner before the Board of Quazis dated 01.06.2017. By that revision application, the petitioner sought to set aside the Kaikuli order of the Quazi dated 05.09.2015 (P1).

Notwithstanding the petitioner in the prayer to the petition (tendered before the Board of Quazis dated 01.06.2017) speaks about an order dated 05.09.2015 regarding Kaikuli, he has, in paragraph 2 of the petition, stated that it was not a compelling order (except in respect of the payment of Rs.25,000/= as a part of Kaikuli).

P1 is in Tamil language and the English translation provided to this Court fortifies the said position. The relevant portion in P1 reads as follows:

25,000/= money should be paid.

10 sovereigns of jewelry and 1 shop

Husband said to file a case regarding shop and obtain

Wife was told regarding this

The fact that there was no compelling order is further reinforced by P1A and P4 as well. P1A dated 06.02.2017 is a “Show Cause Notice” sent to the petitioner asking him to appear before the Quazi on 18.02.2017 with Kaikuli. The petitioner has refused to go. Then another “Show Cause Notice” marked P4 dated 05.04.2017 has been sent to the petitioner asking him to appear

before the Quazi on 06.05.2017 with his evidence (2017.03.25 දින දක්වා කයිකුලි 25,000/-, රන්පවුම් 10 ශී, කඩ කාමරය විකුණන ලද මුදල හිඟ මුදලක් වශයෙන් පවතින බවට කරුණු වාර්තා වී ඇත. එබැවින් 2017.05.06 දින ප.ව./පෙ.ව. 9.00 ට බදුල්ල දිස්ත්‍රික් ක්වාසි අධිකරණය කාර්යාලයට පෞද්ගලිකව මා ඉදිරියේ ඔබ සතුව ඇති සාක්ෂි සමග පෙනී සිටින ලෙසට මෙයින් දැනුම් දෙමි) and also kaikuli (ඔබට කිහිප වතාවක් දැනුම් දුන්නත් උසාවියට පැමිණ නැත. කයිකුලි හා රන්පවුම්, කඩ විකුණන ලද මුදල් ආදී සියළුම දේ රැගෙන 2017.05.06 දිනට උසාවියට පෙනී සිටින ලෙසට නියෝග කරමි.) It has further been stated in P4 that, if he fails to appear on the due date, the Enforcement Order would be issued to the Magistrate's Court to recover the money. The petitioner without going before the Quazi with his evidence or witnesses to convince why he is not bound to pay Kaikuli, has gone before the Board of Quazis asking the Board of Quazis to cancel the Kaikuli order.

In my view, without the petitioner first going before the Quazi in response to Show Cause Notice and telling his grievance before the Quazi, he cannot straightaway come before the Board of Quazis asking the Board of Quazis to cancel the Kaikuli order, which he himself says is not an order.

If there was a Kaikuli order already made, there is no necessity for the Quazi to send the Show Cause Notice P4 asking the petitioner to appear before the Quazi with the petitioner's evidence on 06.05.2017.

It is not clear on what basis the Show Cause Notice was sent. According to Rule 4 of the Fourth Schedule to the Muslim Marriage and Divorce Act, No.13 of 1951, as amended, such Show Cause Notice is sent after entering *ex parte* order nisi, but

before it being made absolute. In terms of Rule 10, no appeal lies even against such order absolute, but the dissatisfied party can go before the Quazi within reasonable time to purge default. However, the aforesaid Kaikuli order was not made *ex parte*, but apparently, *inter partes*.

As a general observation I must state that, dissatisfied parties go before the Board of Quazis whenever they receive a Show Cause Notice from the Quazi, and the Board of Quazis, without a murmur, entertains those applications or appeals, and try the matters on merits. That is a wrong procedure. That is what has happened in this case also. The party who receives the Show Cause Notice shall first go before the Quazi and tell what he or she has to say to the Quazi, and shall come before the Board of Quazis only if he or she is dissatisfied with the order of the Quazi. The Board of Quazis is an appellate body. The position is the same in respect of *ex parte* orders. The defaulter cannot come before the Board of Quazis without first making an application to the Quazi to purge default. If the Quazi refuses it, then only can the defaulter come before the Board of Quazis challenging that order. The only exception would be the rare instance of entertaining a revision application filed against an *ex parte* order made by the Quazi, which is palpably wrong, perverse and resulted in a manifest failure of justice.

According to section 97 of the Muslim Marriage and Divorce Act, Kaikuli, for the purpose of the Act does not include immovable properties.

The Quazi in both Show Cause Notices marked P1A and P4 has stated that if the petitioner fails to appear before the Quazi, the Enforcement Order would be issued to the Magistrate's Court to

recover the money as a fine. This has been acknowledged, if not approved, by the Board of Quazis in the impugned order. This is incorrect. In terms of section 64 of the Act, Enforcement Orders cannot be issued to the Magistrate's Court for the recovery of Kaikuli. In terms of section 65 of the Act, Kaikuli can be recovered only as a money decree through the Primary Court.

The Board of Quazis has not taken any of those matters into account when they made the impugned order dated 22.07.2017. The Board has gone on irrelevant matters to refuse Notice on the application.

Even though I am not in agreement with the reasoning of the Board, I agree with the conclusion of the Board that the petitioner's application shall be dismissed (on the ground that the petitioner cannot come before the Board of Quazis when a Show Cause Notice is served by the Quazi). Hence appeal is dismissed without costs.

Let the petitioner go before the Quazi and make a suitable application.

Judge of the Court of Appeal