



REPUBLIC OF KENYA



**Kang'ethe v Kang'ethe (Miscellaneous Civil Application E027 of 2024)  
[2025] KEHC 1438 (KLR) (19 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1438 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MISCELLANEOUS CIVIL APPLICATION E027 OF 2024  
E OMINDE, J  
FEBRUARY 19, 2025**

**BETWEEN**

**SIMON KANG'ETHE ..... APPLICANT**

**AND**

**NADHIFA SHARIF KANG'ETHE ..... RESPONDENT**

**RULING**

1. There are two applications pending before this court being a Notice of Motion dated 28/10/2024 and a Notice of Motion dated 08/11/2024. The Application dated 28/10/2024 seeks the following orders;
  - a. Spent
  - b. Spent
  - c. Spent
  - d. That this Honourable Court be pleased to stay further proceedings in the said Kadhi's Court at Eldoret Matrimonial Case No. E001 of 2023 Nadhifa Sharif Kang'ethe vs- Simon Kang'ethe until further orders.
  - e. That this Honourable Court be pleased to stay further proceedings in the said Kadhi's Court at Eldoret Matrimonial Case No. E001 of 2023 Nadhifa Sharif Kang'ethe vs- Simon Kang'ethe pending the hearing and determination of the Originating Notice of Motion herein.
  - f. That the costs of this application be provided for.
2. The application is premised on the grounds set out therein and the contents of the affidavit in support of the same.
3. The 2<sup>nd</sup> application, a Notice of Motion dated 08/11/2024 seeks the following orders;



- a. Spent
  - b. That the orders made by this court on 30<sup>th</sup> October 2024 be discharged and/or lifted and/or set aside forthwith.
  - c. That this Miscellaneous Application File No. E072 of 2024 be closed and/or be consolidated with Eldoret High Court Civil Appeal No. E071 of 2023 and be placed before Honourable Wananda who issued orders on 09/02/2024 therein to handle the matter.
  - d. That the Applicant/Respondent and his counsel be ordered to pay costs for this application.
4. The application is premised on the grounds set out on the face of it and the contents of the supporting affidavit.

### **Replying Affidavit**

5. The Respondent, Nadhifa Sharif Kang'ethe opposed the application dated 28<sup>th</sup> October 2024 vide a Replying Affidavit dated 8<sup>th</sup> November 2024. She deponed that there exists an appeal in this court filed by the applicant against the orders of the honourable Kadhi issued on 23/02/2023. Further, that the applicant filed an application for stay of that decision before this court which was determined vide a ruling delivered on 9<sup>th</sup> February 2024.
6. That in the said Ruling, the court directed the applicant to comply with the orders of the Kadhi pending appeal and the applicant has declined to comply with the said orders. She urged that the applicant has pending orders before this court in Civil Appeal No. E071 of 2023 and is therefore not deserving of the orders issued on 30<sup>th</sup> October 2024 as maintaining the orders will result in conflicting orders by judicial officers with concurrent jurisdiction.
7. The deponent averred that the applicant misled the court into issuing the orders of 30/10/2024 and further, that he is guilty of material non-disclosure of material facts to the court. This non-disclosure pertains to the existence of an appeal in this court challenging the orders of the Kadhi, the existence of the ruling dismissing the application of stay of the Kadhi's orders, non-compliance with the orders of this court and misleading this court into issuing orders to frustrate the Notice to Show Cause set for him to explain why he has declined to comply with court orders.
8. She stated that the applicant ought to have moved this court in the appeal as there is an existing appeal. The applicant is forum shopping and the application is an abuse of the court process. She urged that there is no appeal against Justice Wananda's orders and instead of complying with the ruling the applicant has filed another application before the Kadhi purporting to challenge the said decision. She prayed the court dismiss the application with costs.
9. When the matter came up for directions on 12<sup>th</sup> November 2024, the parties were directed to file very skeletal submissions on the application dated 8<sup>th</sup> November 2024 and particularly on the issue that the case the subject matter of the Application dated 28<sup>th</sup> October 2024 was already before the Hon Mr. Justice John Wananda who already delivered a Ruling on the issues raised in the said Application. On its part the Court undertook to avail to itself the Appeal file number E071 of 2023 for its perusal. by the Respondent dated

### **Applicants' Submissions**

10. The applicant filed submissions dated 30<sup>th</sup> November 2024 through the firm of Messrs Kamau Kuria & Company Advocates. Senior Counsel Dr. Kamau Kuria urged that Article 165 (6) and (7) of *the*



Constitution of Kenya bestows upon this court, supervisory jurisdiction over all subordinate courts, including the Kadhi's Court.

11. That this jurisdiction allows the High Court to ensure that justice is done in all subordinate courts and to intervene when necessary to prevent injustice or procedural irregularities. Counsel cited the case of *Director of Public Prosecutions v Perry Mansukh Kansasara & 8 others* (2020) eKLR in which the court accepted as correct the Malaysian High Court decision where it explained that the object of conferring on the High Court a kind of paternal or supervisory jurisdiction is in order to correct or prevent a miscarriage of justice. He urged that the actions of Hon. Kadhi in the present case have undermined the fair administration of justice, thus necessitating the intervention of this Court.
12. Counsel submitted that the jurisdiction is designed to give to the supervised court directions to enable it to do justice and is not an appellate jurisdiction as shown by the language used under article 165 (7) of the Constitution.
13. Further, it is the Applicants' case that Order 42 of the Civil Procedure Rules governs appeals from the subordinate courts being the Kadhi's court and the Chief Magistrate's Court. That the right to appeal to the High Court against a decision of the lower court is conferred by Section 79G of the Civil Procedure Act which provides that every appeal from a subordinate court shall be filed within a period of 30 days from the date of the judgement or order appealed against.
14. That the order which the Applicant appealed against is a 2023 order. The appeal was filed by the applicant on 1<sup>st</sup> May, 2023 within the 30 days' period. Counsel further stated that Order 42 rule 11 of the Civil Procedure Rules requires that the appeal be placed before a Judge within 30 days of filing for directions under section 79G of the Act, and that Rule 12 gives the court power to admit or not admit an appeal. That once the Appeal is admitted, under Rule 13. the Judge gives directions to facilitate the hearing of an admitted appeal.
15. That these directions concern the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of the record or part of the record thereof and any exhibits or other necessary documents. That Order 42 rule 13(4) provides that before the appeal goes for hearing, the judge shall satisfy himself/herself that the documents described in that Rule from the lower court are availed to the High Court.
16. Counsel pointed out that the function of the appellate court is therefore different from that of the Supervising Court as described by the Court of Appeal in the case of *Selle v Motorboat* (1968) EA 123. He urged that whatever jurisdiction is invoked is to enable the court with that jurisdiction to apply the law correctly.
17. Counsel submitted that the Respondent has misrepresented the facts to the court and is not able to distinguish an application for supervision under article 165 (6) and (7) from an appeal lodged by a party under section 79C of the Civil Procedure Act.
18. Counsel submitted that the Applicant's complaints are that the Kadhi is biased against him in the course of administering justice as shown by the facts as follows: That first, on 21<sup>st</sup> March, 2024 he certified the Applicant's Notice of Motion dated 14<sup>th</sup> March 2024 urgent but declined to hear it between 21<sup>st</sup> March, 2024 and 24<sup>th</sup> September 2024 when he set down for showing cause, a notice to show cause of the respondent which he signed on 10<sup>th</sup> July. 2024 but gave preferential treatment.
19. That secondly, that it took the intervention of the Chief Magistrate for the Kadhi to set down the Applicant's application dated 14<sup>th</sup> March, 2024 and 29<sup>th</sup> August, 2024 and when they came up



- for hearing on 25<sup>th</sup> October, 2024 because he elected to only give directions for the hearing of the Respondent's notice to show cause contrary to what he had posted in CTS.
20. That third, Counsel for the Respondent was in the Kadhi's chambers on 25<sup>th</sup> October, 2024 when the proceedings were supposed to be virtual and the Applicant's Counsel appeared virtually while the Respondent's Counsel appeared physically in the absence of the Applicant's Counsel.
  21. That Fourth, the Kadhi found the Applicant guilty of contempt of court without any hearing during the mention of the case on 25<sup>th</sup> October, 2024; Fifth, the Kadhi advised the Applicant and the Respondent in 2021 in his office at which he gave contradictory advice in support of the Respondent, through his interlocutory ruling and contrary to the law as stated by the Court of Appeal at Nairobi in Civil Appeal Number 144 of 1988: Githunguri versus Jiba Credit purported to finally determine that the Respondent is allegedly half owner of the properties acquired during coverture and because of that purported holding, the Respondent and her Counsel are not interested in anything else except the enforcement of the illegal determination.
  22. Counsel urged that Article 165 (6) and (7) is based on the maxim of law that justice must not only be done but must manifestly be seen to be done and where this is not the case, the court will intervene and give directions to ensure that the ends of justice are served. That in this case, the object of the Respondent and the Kadhi is to prevent justice from being done.
  23. Counsel cited the holding of the East African Court of Justice in Attorney General of the Republic of Kenya v. Anyang Nvongo & Others, Application No. 5 of 2006 (East African Court of Justice), where the court held that judicial impartiality is the bedrock of a democratic judicial system. Further, that the standards of fairness of judicial officers were described by the Privy Council in Maharai v AG 1977 1 AER 411.
  24. Counsel submitted that the applicant urges this Honourable Court to hold that the application for supervision under Article 165(6) and (7) of *the Constitution* is vastly different from an appeal filed in accordance with Section 79G of the *Civil Procedure Act* and Order 42 of the Civil Procedure Rules and further that with respect, the Counsel's claim that the originating motion has the same objective as the appeal is based on his misapprehension of the law and failure to read the pleadings before the court.

### **Respondents' Submissions**

25. The Respondent filed submissions dated 25<sup>th</sup> November 2024 wherein he reiterated the contents of the Replying Affidavit. Counsel submitted that the Respondent takes issues with the manner the Applicant moved this court in the instant Miscellaneous Application. The Applicant's sole intention was to mislead the court into issuing orders without disclosing the existence of Eldoret Civil Appeal No. E071 of 2023 in which this court had declined to stay the Kadhi's orders.
26. Counsel urged that the Applicant filed an appeal before this court challenging the Honourable Kadhi's orders together with an application in Eldoret Civil Appeal No. E071 of 2023 seeking stay of execution and/or implementation of the Kadhi's orders. The Court heard the application and determined it vide its ruling delivered on 9<sup>th</sup> February, 2024. The Court directed the Applicant to specifically comply with the orders of the Kadhi's Court pending appeal. The Appellant has declined to comply with the orders and as such is not deserving of audience before this court hence the respondents' application dated 8<sup>th</sup> November, 2024
27. Counsel reiterated that this application is intended to cause confusion, mislead this court into issuing orders calling for the Kadhi's file in Eldoret Matrimonial Cause No. E001 of 2023 through this miscellaneous application without disclosing to this court that there exists an appeal filed by the



Applicant vide Eldoret Civil Appeal No.E071 of 2023 in which this court affirmed the orders issued by the Kadhi on 23<sup>rd</sup> February, 2023 which orders the Applicant has not complied with necessitating the issuance of the Notice to Show Cause to compel compliance.

28. Counsel submitted that this court and Mr. Justice John Wananda's court are courts of concurrent jurisdiction and therefore the orders sought by the Applicant cannot legally issue in light of the valid orders of the Court which are on record and which the applicant has failed to comply with. He urged the court to dismiss the application dated 28<sup>th</sup> October, 2024 with costs.

### **Determination**

29. I have considered the submissions by both Counsel. I note from the submissions by Senior Counsel Dr. Kamau Kuria, it is not denied that there is an Appeal preferred by the applicant herein against a decision of the Kadhi's Court in the matter involving the very same parties in the two applications now before this court arising from arising from Eldoret Kadhi's Court Matrimonial Cause Number E001 of 2003 Nadhifa Shariff Kangethe v Simon Kangethe which Appeal has been brought by the Applicant herein seeking a stay of execution of the Kadhi's orders dated 12<sup>th</sup> April 2023 and 23<sup>rd</sup> April 2023.
30. I have noted further, that it is not denied by the applicant that the said Appeal is pending before the Hon Mr. Justice John Wananda. It is also not denied that the Hon Judge heard Application for Stay of execution therein dated 3<sup>rd</sup> May 2023 and rendered his Ruling on the Application on 9<sup>th</sup> February 2024.
31. In a nutshell, Counsel for the Applicant submits that this matter now before the Court is not similar to the one before the Hon Mr. Justice Wananda because in this particular Application, it is the Supervisory Jurisdiction of the Court as provided under Article 165(5) and (7) of *the Constitution* that has been invoked whereas in the matter before the Hon Mr. Justice Wananda, it is the Appellate Jurisdiction of the Court as provided under Section 79G of the *Civil Procedure Act* and Order 42 of the Civil Procedure Rules that has been invoked.
32. In addressing my mind to the submissions by both Counsel, the long and short of the issue of whether this matter ought to proceed before this court or before Hon Justice Wananda is as here below;
33. It matters not whether it is the Supervisory Jurisdiction or the Appellate Jurisdiction of this Court that has been or is sought to be invoked. The fact which is not at all denied is that there already is a matter involving the same parties now before this court matter that is actively before the Hon Judge Wananda who just like this Court has the mandate and the power to exercise whichever of the jurisdictions is sought to be invoked and that is if there be any real distinction between these two jurisdictions to warrant appearance before different Courts of concurrent jurisdiction as has been submitted by Counsel for the Applicant.
34. Over and above this, I have had occasion to peruse the Application in Eldoret Civil Appeal No. E071 of 2023. From my perusal of the same, I have noted that this Application now before this Court is an exact replica of the Application dated 3<sup>rd</sup> May 2023 down to the very last detail and including all the annexures appended to each of these Applications. This therefore means that an Application similar to the one dated 28<sup>th</sup> October 2024 has already been heard and determined by Mr. Justice Wananda who presides over a Court of a similar concurrent jurisdiction. It follows therefore that this Application is improperly before this Court.
35. Furthermore, even assuming it was the supervisory jurisdiction of this Court that is being invoked, which in my opinion is not the singular reason why this application is before this Court, the Hon Mr. Justice Wananda too has a similar jurisdiction to supervise the Kadhi's Court. It is also my considered opinion that the Hon Judge having already interacted with the matter to the extent of delivering a



Ruling would in actual fact be in a better position to appreciate the circumstances of the case more in the exercise of the supervisory jurisdiction that is being sought.

36. In this regard, I agree with the Counsel for the Respondent and find merit in his Application dated 8<sup>th</sup> November 2024 and I allow the same in its entirety as follows;
- a. That the interim orders made by this court on 30<sup>th</sup> October 2024 with respect to the Application dated 28<sup>th</sup> October 2024 be and are now hereby discharged, vacated and set aside.
  - b. That this Miscellaneous Application File No. E072 of 2024 be and is now hereby consolidated with Eldoret High Court Civil Appeal No. E071 of 2023 and the matter as consolidated is to be placed before the Hon Mr Justice John Wananda on 24<sup>th</sup> February 2025 for directions.
37. As a consequence of my finding as above, it is my further finding that the Application dated 28<sup>th</sup> October 2024 is mischievous, it is brought in bad faith and is a complete and total abuse of the Court process. The same is accordingly dismissed and notwithstanding the fact that this is a matrimonial cause, in light of my finding as to the nature of the Application, the Applicant is to bear the costs of this application. The costs of the Application dated 8<sup>th</sup> November 2024 shall be in the cause.

**READ DATED AND SIGNED AT ELDORET ON 19<sup>TH</sup> FEBRUARY 2025**

**E. OMINDE**

**JUDGE**

