



**KM v RSK (Family Miscellaneous Application E030 of 2024)  
[2025] KEHC 3054 (KLR) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3054 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
FAMILY MISCELLANEOUS APPLICATION E030 OF 2024**

**G MUTAI, J  
MARCH 6, 2025**

**BETWEEN**

**KM ..... APPLICANT**

**AND**

**RSK ..... RESPONDENT**

**RULING**

1. The application before the court is a chamber summons dated 24<sup>th</sup> August 2024, vide which the applicant seeks the following orders: -
  - a. Spent;
  - b. Spent;
  - c. The court be pleased to stay the warrants of arrest and orders of committal to civil jail, issued by the Kadhi’s Court on 18<sup>th</sup> July 2024 and 21<sup>st</sup> August 2024, respectively and the applicant be discharged from prison pending the hearing of this application;
  - d. The honourable court be pleased to call for the subordinate court file in Mombasa Kadhi’s Court Divorce Cause No. E 294 of 2023 for the purpose of satisfying itself as to the correctness, legality and propriety of the findings of the Honourable Kadhi;
  - e. The honourable court be pleased to regularize the record of the subordinate court by revising the judgment of the honourable Kadhi dated 24<sup>th</sup> January 2024 to ensure its correctness, legality and propriety; and
  - f. Costs of this application be provided for.
2. The application was brought on the grounds that on 21st August, the applicant was committed to civil jail, arrested, and detained at Shimo La Tewa maximum prison to serve civil imprisonment. The



- committal was made after the Kadhi's Court issued warrants for his arrest on 18<sup>th</sup> July 2024 in execution of its judgment delivered on 24<sup>th</sup> January 2024.
3. It is apparent from the grounds that the applicant was aggrieved by the judgment in so far as it, in the applicant's view, delved into matters it lacked jurisdiction to determine and made pronouncements on matters /claims that were not based on evidence. The applicant averred that he couldn't file the application earlier as he lacked resources.
  4. After hearing the counsel for the applicant *ex parte*, the Presiding Judge issued temporary orders on 6<sup>th</sup> September 2024, *vide* which the applicant was released from prison.
  5. The application was opposed. The respondent filed a replying affidavit sworn on 4<sup>th</sup> November 2024 *vide* which she stated that the remedy available to the applicant was to either file an appeal or seek the review of the judgment, or order committing him to civil jail, something that he failed to do.
  6. The respondent averred that the matter before the court below was a divorce cause, which was within the jurisdiction of the Kadhi's Court under Article 170 (5) of the *Constitution*. Committal to civil jail was a lawful mode of execution of the judgment, and despite being served with a notice to show cause, the applicant never appeared.
  7. The respondent averred that the applicant was served with a notice to show cause on 21<sup>st</sup> June 2024, requiring him to attend court on 8<sup>th</sup> July 2024 and that he did not appear. It was for his failure to appear that the court on 18<sup>th</sup> July 2024 issued the warrants for his arrest. He was given an opportunity to show cause, but he failed to do so. She urged that the applicant had an advocate in the court below and attached a mention notice issued to the firm of George Egunza & Associates advocates as evidence of the said assertion.
  8. She urged that rather than filing this application, the applicant should have appealed against the impugned decisions. Therefore, she urged that the application be dismissed as it was frivolous and meant to waste the court's time.
  9. The application was canvassed through written submissions. I shall briefly restate the contents of the said submissions below.
  10. The applicant's submissions are dated 31<sup>st</sup> January 2025. In the submissions, the applicant's counsel urged that this court quash what he termed the illegal orders in the judgment of the Kadhi's Court delivered on 24<sup>th</sup> January 2024.
  11. The applicant identified issues coming up for determination as being: -
    - a. Whether the Kadhi's court had jurisdiction to issue the orders granted; and
    - b. Whether this court has jurisdiction to issue the orders sought.
  12. On the first issue, the applicant admitted that the Honourable Kadhi had jurisdiction to determine questions on divorce and provision of eddat maintenance but denied that he could order payment of a dowry balance or debt arising from a contract or make a determination on the custody of children.
  13. Relying on the *GMD v SAM* [2020] eKLR it was urged that the Hon Kadhi had no jurisdiction to determine children matters.
  14. He also urged that recovery of a debt of Kshs 184,970/- should have been pursued through the "normal court" (presumably the Small Claims Court). Reliance was placed on the case of *Owners of the Motor Vessel Lilian "S" v Caltex Oil (Kenya) Limited* [1989] eKLR for the proposition that a court without jurisdiction ought to down its tools.



15. A similar view was also taken regarding the recovery of the dowry balance of Kshs 20,000/-. It was urged that this arose from a “social” contract between the two former spouses. Upon breach, the aggrieved party ought to have gone to the civil court for redress.
16. On supervisory jurisdiction, the applicant urged that this court has supervisory jurisdiction over the subordinate court to revise orders and decisions arising from their decisions. The said jurisdiction was conferred by Articles 165 (6) and (7) of the Constitution. Counsel relied on the decision of the court in Sphikas & another v Kaluma & 2 others; Director, Criminal Investigations Department & 2 others (Interested Parties) [2023] KEHC 864 (KLR) and the case of Reuben Mwangi Nguri v Republic [2021]eKLR and urged that the application be allowed.
17. The written submissions of the respondent are dated 20<sup>th</sup> November 2024. The respondent identified one issue to wit, whether the applicant is entitled to the orders sought. Through her counsel, Ms Angeline Omollo, the respondent submitted that the orders sought shouldn't be issued as no case had been made.
18. Ms Omollo urged that being dissatisfied with the lower court's decision, the applicant should have filed an appeal since Order 42 Rule 1 of the Civil Procedure Rules provides for the right to appeal.
19. Counsel urged that the court did not exceed its jurisdiction. She submitted that the jurisdiction of the Kadhi's Court is limited to determining issues relating to personal status, marriage, divorce and inheritance, where all the parties profess the Muslim religion and submit to the jurisdiction of Kadhi's Court. Counsel stated that the payment of dowry and the loan of Kshs 184,970/- were all matters within the jurisdiction of Kadhi's Court.
20. She urged that the supervisory jurisdiction of the High Court could only be exercised where it had been demonstrated that the court acted without jurisdiction. In this case, nothing of the sort had happened. She further urged that the committal of the applicant to civil jail was not unconstitutional. In support of her contention, counsel relied on the case Hussein Marshallo Guracha v Marshallo Guracha & another [2021] KEHC 5424 (KLR)
21. It was therefore submitted that the application be dismissed.
22. I have considered the application, the affidavit in support and the annexures and the replying affidavit and its annexures. I have also considered the party's submissions. I must now determine if the orders sought ought to be issued.
23. In my view, the issues in this matter are: -
  - a. Whether the Kadhi's Court has jurisdiction to hear the dispute; and
  - b. If this court should issue, the orders sought.
24. What, then, is the jurisdiction of the Kadhi's Court? The jurisdiction of the said court is stated in Article 170 (5) of the Constitution and Section 5 of the Kadhi's Court Act as being: -  
Article 170(5) of the Constitution provides as follows: -
 

“(5) The jurisdiction of a Kadhis' court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.”



Section 5 of the *Kadhi's Court Act* states that:-

“ A Kadhi's court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.”

25. From the foregoing provisions, the Kadhi's Courts, therefore, hear cases: -
- i. determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance;
  - ii. Between parties who are Muslims; and
  - iii. Who have submitted to the jurisdiction of the court.
26. There is no doubt that the parties herein are Muslims. They submitted to the jurisdiction of the court below and had their divorce cause heard and determined by it. The court below delivered the impugned judgment. Did the court delve into matters beyond its ken?
27. I have reviewed the court's decision. It appears that the dissolution of marriage was within the lawful jurisdiction of the Kadhi's Court. I cannot fault the said court for its decision on payments of eddat maintenance and dowry. These are payments made under Islamic law and are personal status matters.
28. What of debt recovery? In my view, this was a borderline issue. The respondent urges that the loan was made within the domestic context to enable the applicant to improve himself. This explanation appears to me as being plausible. In making its determination, the Court below must have seen the recovery of such loans as being ancillary to the determination of personal status matters or as so intertwined with it as to be inextricable. That being so, I cannot find with certainty at this point that the Kadhi lacked jurisdiction to determine it.
29. I do not agree that committal to civil jail of a judgment debtor is unconstitutional. There have been a number of decisions in which the High Court has held that the said remedy is constitutional. I will cite two below.
30. In *Beatrice Wanjiku & another v Attorney General & another* (2012)eKLR, Majanja J., while holding that section 38 of the *Civil Procedure Act* was consistent with the *Constitution*, stated that:-
- “ 44. An analysis of the provisions of s.38 of the CPA and rules 22 of the Rules and their application demonstrate the following:
- a) The process of arrest and detention is not arbitrary. The debtor is given an opportunity to show cause before an order is made by a judicial officer.
  - b) The Judgment-Creditor can only be committed to civil jail once it is demonstrated that he or she has refused or neglected to pay, is about to abscond or is intent on obstructing or delaying execution of the decree.
  - c) The burden of proof rests on the judgment-creditor to show prove the elements that are necessary for the arrest and committal of the judgment-debtor.



- d) That arrest and committal is the last resort after other modes of execution have failed.
- e) There is a right of appeal against the decision of ordering arrest and committal.”

31. A similar determination was made by the Court in the case of *Jedida Chepkoech Mutai (Suing as The Legal Representative of the Estate of Julius Kipkorir Mutai (Deceased) v Cheronno Beatrice* (2018)eKLR where it was stated that:-

‘As I understand it, the general position in law is that the arrest contemplated under section 38 and 40 of the *Civil Procedure Act* is not unconstitutional. All that is required in proceeding under the two provisions is that there has to be strict adherence to the law. In *Jane Wangui Gachoka v Kenya Commercial Bank Limited* [2013] eKLR, the petitioner asked the court to declare sections 38(d) and 40 of the *Civil Procedure Act* and Order XX1 Rules 32,33 of the Rules which allowed for commitment to civil jail for non-payment of a debt as archaic and unconstitutional. In declining to make the declaratory orders sought by the petitioner, the court stated as follows:

“[33] The deprivation of liberty sanctioned by sections 38 and 40 of the *Civil Procedure Act* is permissible and is not in violation of either the *Constitution* or *ICCPR*. The caveat, however, which has been emphasized in all the cases set out above is that before a person can be committed to civil jail for non-payment of a debt, there must be strict adherence to the procedures laid down in the *Civil Procedure Act* and Rules, which provide the due process safeguards essential to making limitation of the right to liberty permitted in this case acceptable in a free and democratic society.”

- 32. Does the Kadhi Court have jurisdiction to hear children's matters? I decline to delve into this matter as there are appeals on this issue pending before this Court. As will become evident, it is not necessary for me to make a determination on this point now.
- 33. Did the applicant follow the right procedure? I agree that the applicant ought to have filed an appeal. The remedy was available to him. The explanation given for the failure to file the appeal was implausible and deceptive. The applicant had counsel in the lower court and may not be as indigent as Mr Yose suggested.
- 34. Since the applicant has a remedy at law, invoking supervisory jurisdiction is, in my view, improper. Courts have held that the said remedy should be used sparingly and only in the clearest of cases.
- 35. In the case of In *Republic v Chief Magistrate's Court at Milimani Law Courts; Director of Public Prosecutions & 2 others (Interested Parties); Ex-parte Applicant: Pravin Galot* [2020] eKLR the court stated as follows:

“59. There is a clear distinction between supervisory jurisdiction, judicial review jurisdiction and appellate jurisdiction. Supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts. Through supervisory jurisdiction, superior courts aim to keep subordinate courts within their prescribed sphere, and prevent usurpation. In order to exercise such control, the power is conferred on superior courts to



issue the necessary and appropriate writs. (see, *Gallagher v Gallagher* 212 So. 2d 281,283(La. Ct.App.1968)).

60. This power of superintendence conferred by Article 165 (6) of the *Constitution*, as pointed out by Harries, C.J. in *Dalmia Jain Airways Ltd. v Sukumar Mukherjee* AIR 1951 Cal.193 is to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors. This power involves a duty on the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power does not vest the High Court with any unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the Court or Tribunal. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principle of law or justice, where grave injustice would be done unless the High Court interferes. As the Supreme Court of India stated unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under Article 165 (6) of the *Constitution* to interfere” (see *D.N. Banerji v P.R Mukherji* 1953 S.C 58).”

36. In the case of *National Social Security Fund v Sokomania Ltd & Chief Magistrate’s Court Milimani* [2021] KEELC 1639 (KLR) the Court stated as follows:-

“The above cases that were cited by the 1<sup>st</sup> Respondent give some guidance on the exercise of the court’s supervisory powers under Article 165(6) of the *Constitution*. I am in agreement with the 1<sup>st</sup> Respondent that the supervisory power should be exercised sparingly and only in exceptional circumstances. It is also clear that the power should not be exercised where there is an appropriate alternative remedy.”

37. The applicant had the option of appealing against the Kadhi’s decision and ought to have done so. No plausible explanation has been given for the failure. I do not agree that the circumstances of this matter warrant the exercise of supervisory jurisdiction.
38. In my view, this application has no merit and is for dismissal. I dismiss the same. Consequently, the subsisting orders are hereby discharged.
39. I make no orders regarding costs as this is a dispute between former spouses.
40. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 6<sup>TH</sup> DAY OF MARCH 2025. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of: -

Mr Yose, for the Applicant;

Ms Apiyo, for the Respondent; and

Arthur – Court Assistant.

