



**Republic v Swaleh, Senior Resident Kadhi, Mombasa & another; NRK & another
(Interested Parties); LMM (Exparte Applicant) (Judicial Review Application
E032 of 2023) [2025] KEHC 5208 (KLR) (10 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 5208 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION E032 OF 2023**

OA SEWE, J

MARCH 10, 2025

**IN THE MATTER OF ARTICLES 165(6) AND
170(5) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL
REVIEW ORDERS OF PROHIBITION AND CERTIORARI**

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

REPUBLIC APPLICANT

AND

**OMAR K SWALEH, SENIOR RESIDENT KADHI, MOMBASA 1ST
RESPONDENT**

YAK 2ND RESPONDENT

AND

NRK INTERESTED PARTY

SHH INTERESTED PARTY

AND

LMM EXPARTE APPLICANT



JUDGMENT

1. The Notice of Motion dated 2nd November 2023 was filed by the ex parte applicant, LMM (hereinafter, “the applicant”) in accordance with the leave granted to her on the 5th October 2023. She prayed for the following orders:
 - (a) That an order of Prohibition be issued barring the 1st respondent from proceeding in any manner whatsoever in Mombasa Kadhi’s Divorce Cause No. 93 of 2019.
 - (b) That an order of Certiorari be issued directing that the proceedings in Mombasa Kadhi’s Divorce Cause No. 93 of 2019 be forthwith removed to this Court for the purpose of quashing.
 - (c) That an Order of Certiorari be issued directing that the decision of the 1st respondent, Hon. Omar K. Saleh, delivered on 13th July 2023 in Mombasa Kadhi’s Divorce Cause No. 93 of 2019 be forthwith removed to this Court for purposes of quashing of the said decision.
 - (d) That the costs of the application be provided for.
2. The application was premised on the facts set out in the Statutory Statement dated 2nd November 2023, namely, that on the 13th July 2023, the 1st respondent delivered his ruling in Mombasa Kadhi’s Divorce Cause No. 93 of 2019 (the Divorce Cause) and yet the applicant was a Christian at the time. She averred that she was a Christian before she was forced to convert to Islam in order to get married to the 2nd respondent; and that she afterwards reverted back to Christianity and was therefore a Christian by the time the 1st respondent assumed jurisdiction over the Divorce Cause. Accordingly, the applicant averred that, by dint of Article 170(5) of the Constitution and Section 5 of the Kadhi’s Courts Act, the jurisdiction of the Kadhi’s Court was ousted, since it cannot hear or determine divorce petitions in which one of the parties does not profess the Islamic faith without that party having subjected themselves to the jurisdiction of the said court.
3. The applicant also relied on her Verifying Affidavit sworn on 2nd November 2023 in which she averred that, sometime in the year 2002, she met the 2nd respondent and entered into a romantic relationship with him. She further stated that, as a result of the said relationship, she got pregnant and was forced by circumstances to change her faith in order to get married to the 2nd respondent who had indicated to her that he was not going to take care of the baby if they were not married in accordance with his faith; and that they could not get married unless she changed her religion. In those circumstances, she converted to Islam because she was apprehensive that the 2nd respondent would otherwise neglect her and her unborn baby.
4. The applicant further averred that, soon after marrying the 2nd respondent, she reverted to her Christian religion and that the 2nd respondent was well aware that she never, in fact, practiced the Islamic faith. She pointed out that on 2nd October 2019 when the 2nd respondent instituted the divorce proceedings, he was fully aware that she had already reverted to Christianity. She therefore contended that, being a Christian, and having not subjected herself to the jurisdiction of the Kadhi’s Court, the 1st respondent had no power to hear or determine the subject Divorce Cause.
5. The applicant annexed to her affidavit copies of her Identity Card, Baptismal Card as well as the Judgment and Ruling delivered in Mombasa Kadhi’s Divorce Cause No. 93 of 2019 dated 2nd August 2021 and 13th July 2023, respectively. On the basis thereof, she prayed that her application be allowed and the orders prayed for by her granted with costs.



6. It is inexplicable, from the record, why the applicant found it necessary to file another application dated 6th May 2024 which is, in every way, a replica of her application dated 2nd November 2023. I will therefore confine myself to the 1st application dated 2nd November 2023.
7. The 2nd respondent opposed the said application vide his Replying Affidavit sworn on 15th July 2024. He confirmed that he got married to the applicant on 18th October 2002 under Islamic law; and that the applicant was indeed a Christian before their marriage. He however averred that the applicant voluntarily converted to Islam before their marriage and they thereafter cohabited together and lived a relatively happy life until 2007 when he got a job in Dubai. The 2nd respondent further stated that thereafter, their relationship deteriorated as a result of which he ended the same by pronouncing talaka on 1st April 2019 in accordance with the Muslim law. He annexed a copy of the talaka as his Annexure YAK 1.
8. The 2nd respondent further averred that it was in the same year that he instituted Divorce Cause No. 93 of 2019 at the Mombasa Kadhi's Court. He mentioned that it was necessary to file the suit because they had a dispute with the applicant over some 2 houses and a plot which he had sent money to the applicant to purchase on behalf of the family while he was working in Dubai. He also averred that the applicant was duly represented by a competent Advocate and that she responded and fully participated in the petition including consequential applications filed after judgment.
9. At paragraphs 9, 10 and 11 of his Replying Affidavit, the 2nd respondent averred that at no point did the applicant mention, during the proceedings aforementioned, that she had reverted to Christianity. He deposed that, as a matter of fact, the applicant identified herself as a Muslim and even demanded "mahr" which he explained to be dowry payable to a divorced lady in accordance with the Islamic law. Hence, according to the 2nd respondent, it is a fallacy for the applicant to claim that he knew about her re-conversion to Christianity, granted that he was out of the country most of the time and no such re-conversion was brought to his attention by the applicant. He averred that the claim is nothing but a ploy by the applicant to defeat the ends of justice after the 1st respondent rightfully decided the divorce cause.
10. Lastly, the 2nd respondent averred that the applicant has made all manner of attempts by herself and through third parties to frustrate him from enjoying the fruits of the judgment delivered by the 1st respondent and pointed out that she even sold one of the subject houses to a third party in blatant disregard of the clear decree of the Kadhi's Court. In his view, the applicant does not deserve the orders sought by her in this suit. He accordingly prayed for the dismissal of her application with costs. The 2nd respondent annexed several documents to his Replying Affidavit, including the pleadings filed by the applicant in the Divorce Cause.
11. In his Further Affidavit sworn on 5th August 2024, the 2nd respondent averred that after being served with the applicant's Supporting Affidavit and its annexures, he made an inquiry as to the authenticity of the Baptismal Certificate relied on by the applicant and got to learn that it was a forgery. He produced a letter from the Church mentioned in the Baptismal Certificate as Annexure YAK 2 to his Further Affidavit and pointed out that the matter was reported to Nyalı Police Station for investigations vide OB No. 29/21/07/2024.
12. The applicant filed closing submissions dated 9th October 2024, which appear to have been inadvertently referred to as the applicant's "Further Written Submissions on Notice of Motion dated 3rd October 2023". I say so because the application dated 3rd October 2023 was not a Notice of Motion but a Chamber Summons for leave to file a substantive judicial review application. The application was



allowed on 5th October 2023. In the circumstances, the submissions are hereby treated as submissions in respect of the substantive application dated 2nd November 2023.

13. In her submissions, the applicant proposed one issue for determination, namely, whether the orders of Prohibition and Certiorari can issue. She reiterated her contention that she was a Christian by religion; and that, at the instance of the 2nd respondent the 1st respondent issued a decree of divorce in Mombasa Kadhi's Divorce Cause No. 93 of 2019. The applicant therefore made reference to Article 170(5) of the Constitution and Section 5 of the Kadhi's Act, Chapter 11 of the Laws of Kenya and urged the Court to find that the 1st respondent had no jurisdiction to entertain the Divorce Case. She relied on *E.A. Assurance Company Limited v S.M. Thiga t/a Newspaper Service* [2019] eKLR and *C K C & another (suing through the mother and next friend J W N v A N C* [2019] eKLR for the proposition that where a court takes it upon itself to exercise jurisdiction which it does not possess its decision amounts to nothing.
14. On the basis of the foregoing, the applicant submitted that she is deserving of the judicial review orders of Certiorari and Prohibition. She also made reference to the cases of *Republic v University of Nairobi, Ex Parte Maxwell Magawi Odhiambo* [2019] eKLR and *Republic v Kenya National Examination Council, Ex Parte Gathenji & others*, Civil Appeal No. 266 of 1996 to buttress her submissions. Accordingly, the applicant prayed that her application be allowed and the orders sought granted.
15. On his part, the 2nd respondent submitted, vide his written submissions dated 26th September 2024, that the application dated 2nd November 2023 is a sham and an abuse of the process of the Court. He reiterated the factual basis of his case as set out in his affidavits and on the basis thereof, proposed for consideration the question whether the Kadhi's Court had the jurisdiction to hear and determine the Divorce Cause No. 93 of 2019 in which the applicant alleges to have reverted to Christianity at the time the suit was filed.
16. On the authority of *Pastoli v Kabale District Local Government & others* [2008], *Republic v Public Procurement Administrative Review Board and 2 others, Ex Parte Santam Services (E.A.) Limited* [2013] eKLR and *Seventh Day Adventist Church Limited v Permanent Secretary Ministry of Nairobi Metropolitan Development and another*, Judicial Review Case No. 112 of 2021, the 2nd respondent restated the applicable principles and underscored the principle that judicial review is concerned, not with the merit of the decision, but the decision-making process.
17. The 2nd respondent denied the allegation that the applicant re-converted to Christianity. He submitted that since the marriage between him and the applicant was celebrated in accordance with the dictates of Islamic religion, the 1st respondent had the requisite jurisdiction to handle and determine the Divorce Case, more so because the applicant submitted herself to the jurisdiction of the Kadhi's Court and fully participated in the proceedings. The 2nd respondent also urged the Court to take into account the averments set out in his Further Affidavit and the document annexed thereto and find that the allegation of re-conversion is contrived and the document in support forged.
18. Lastly, the 2nd respondent made reference to *Kenya National Examination Council v Republic, Ex Parte Geoffrey Gathinji Njoroge & 9 others*, Civil Appeal No. 26 of 1996, to augment his submission that an order of Prohibition cannot issue in situations where the complaint is that a wrong decision was made. He pointed out that in this instance, the Kadhi's Court has already pronounced itself on the Divorce Cause and that it is an afterthought for the applicant to seek judicial review three years after the delivery of the impugned judgment. Therefore, the respondent prayed for the dismissal of this suit with costs.



19. I have carefully considered the application, the averments in the affidavits filed in respect thereof as well as the written submissions filed by the parties. This is a matter in which the court has been called upon to exercise its supervisory jurisdiction as provided under Articles 165(6) and (7) of the Constitution which provides:
- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
20. The above provisions unequivocally confer on this Court supervisory jurisdiction over subordinate courts and tribunals, including the Kadhis' Courts. Moreover, the Constitution, under Articles 23 and 47, gives this court the power to grant Judicial Review orders on claims that their constitutional rights have been violated. Hence, in the case of *Saisi & 7 others v Director of Public Prosecutions & 2 others* (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment), the Supreme Court held:
- 73 ...The Fair Administrative Actions Act provides the parameters of judicial review to be the power of the court to review any administrative or quasi-judicial act, omission or decision of any person, body or authority that affects the legal rights or interests of an aggrieved person. The judicial review court examines various aspects of an act, omission or decision including whether the body or authority whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required...
 74. It is our considered opinion that the framers of the Constitution when codifying judicial review to a constitutional right, the intention was to elevate the right to fair administrative action as a constitutional imperative not just for state bodies, but for any person, body or authority. It was a clarion call to ensure that the constitutional right to fair administrative actions permeated every aspect of the lives of Kenyans, from their engagements with educational facilities such as universities, to employer-employee relationships, to engaging with public bodies in whatever capacity, or any body, person or authority that exercises quasi- judicial functions. We further take the view, that this approach is consistent with realizing the right of access to justice because justice can be obtained in other places besides a courtroom.
21. When exercising its judicial review jurisdiction, the Court does not focus on the merits of the challenged decision. Instead, the judicial review process examines the legality, reasonableness, or procedural propriety of decisions made by subordinate courts, tribunals, individuals, bodies, or authorities performing judicial or quasi-judicial functions.
22. Accordingly, in *Municipal Council of Mombasa v Republic & another* [2002] eKLR, the Court of Appeal held:
- ... The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter



by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review...”

23. In the case of *Pastoli v Kabale District Local Government Council and Others* [2008] 2 EA 300 it was held:

In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

24. The applicant herein did not challenge the merits of the decision of the 1st respondent. To the contrary, the contention of the applicant is that the decision dated 13th July 2023 by the 1st respondent is ultra vires in that it was made without jurisdiction and should therefore be quashed. Consequently, the single issue for determination is whether the 1st respondent had jurisdiction to entertain and determine Kadhi’s Court Divorce Cause No. 93 of 2019.

25. The importance of jurisdiction was aptly explained in *Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR, by the Court of Appeal as follows:

...Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...”

26. Similarly, in *Kalpana H Rawal & 2 Others v Judicial Service Commission & 2 Others* the Supreme Court of Kenya quoted with approval the decision of the Supreme Court of Nigeria in Case No. 11 of 2012: *Ocheja Emmanuel Dangana v Hon. Atai Aidoko Aliusman & 4 Others* thus:

...It is settled that jurisdiction is the lifeblood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity – dead – and of no legal effect



whatsoever, that is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost...”

27. Further, in the Supreme Court case *Macharia & another v Kenya Commercial Bank Limited & 2 others* (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012) (Ruling), the court held:

68. A Court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. Where the *Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law...”

28. The jurisdiction of the Kadhi’s court is provided for under Article 170(5) of the Constitution which states that:

(5) The jurisdiction of a Kadhi’s 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 Kadhis’ courts.

29. Additionally, Section 5 of the *Kadhis’ Courts Act*, provides:

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.”

30. It is plain, then, that the jurisdiction of the Kadhis’ Court is limited to the determination of questions of Muslim law on personal status, marriage, divorce and inheritance. The law also requires that the parties who approach the court profess the Muslim faith and submit to the jurisdiction of that court. Accordingly, parties who profess the Muslim faith who do not submit themselves to the jurisdiction of the Kadhis’ court are at liberty to approach the High Court or any other subordinate court for a determination of their dispute.



31. In this regard, the Court of Appeal, in the case of Genevieve Bertrand v Mohamed Athman Maawiya & Mohamed Atiq (Civil Application 24 of 2013) [2014] KECA 687 (KLR) (20 March 2014) (Judgment), held:

23. In the case of the Kadhi's Court, it is a creature of the Constitution (section 66 of the retired Constitution and article 169 of the current Constitution). The jurisdiction of the Kadhi's Court is specifically defined under Article 170 (5) of the Constitution and section 5 of the Kadhi's [Court] Act, as "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 Court".

Thus the jurisdiction of the Kadhi's Court is determined by the existence of three factors. That is the subject matter of the claim or dispute, the party's Muslim faith, and the party's submission to the jurisdiction of the Kadhis Court.

32. In this case, it is common ground that the applicant was formerly a Christian who had converted and embraced the Muslim religion at the time she got married to the 2nd respondent. It is not in dispute that their marriage was conducted under Muslim law and, for all intents and purposes, was a marriage under Part VII of the Marriage Act whose divorce proceedings were amenable to determination in accordance with Section 71 of the Marriage Act. This is notwithstanding that the applicant may have re-converted to Christianity.

33. I find succor in the case of R M M v M a.k.a. J K M (Civil Appeal 3 of 2017) [2019] KEHC 7104 (KLR) (23 May 2019) (Judgment), where the court held:

Change of religion does not of itself convert a marriage to the new religion. The parties must take steps to ensure the law is complied with. Converting a marriage from one type to another is a legal process. It cannot be equated to change of religion where a word of mouth is sufficient evidence of conversion..."

34. Further to the foregoing, there is no indication that applicant objected to the jurisdiction of the Kadhis' court for purposes of Article 170(5) of the Constitution. To the contrary, the documents presented herein by the 2nd respondent show that she fully participated in the impugned proceedings up until judgment was entered on 2nd August 2021. She further participated in the post-judgment proceedings including the subsequent application that yielded the ruling dated 2nd November 2023. The change of tack came almost two years after the delivery of the impugned decision.

35. Consequently, it is my finding that the 1st respondent had the jurisdiction to hear and determine Kadhi's Divorce Cause No. 93 of 2019 and therefore that the applicant's Notice of Motion dated 2nd November 2023 lacks merit. The same is hereby dismissed with an order for each party to bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 10TH DAY OF MARCH 2025.

OLGA SEWE

JUDGE

