



REPUBLIC OF KENYA



**KENYA LAW**  
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**AKH v AOI (Civil Appeal E036 of 2024)  
[2025] KEHC 9494 (KLR) (Family) (3 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9494 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY  
CIVIL APPEAL E036 OF 2024**

**HK CHEMITEI, J**

**JULY 3, 2025**

**BETWEEN**

**AKH ..... APPELLANT**

**AND**

**AOI ..... RESPONDENT**

***(BEING AN APPEAL FROM THE RULING AND ORDER OF  
HON. SUQYAN H. OMAR DATED AND DELIVERED ON THE  
15TH MARCH 2024 IN DIVORCE CAUSE NO. E094 OF 2023)***

**JUDGMENT**

1. This judgement relates to the memorandum of appeal dated 12<sup>th</sup> April, 2024 filed by the Applicant, Abdirahman Kulmiye Hirsi; appealing against the Ruling delivered on 15<sup>th</sup> March, 2024 by the Deputy Chief Kadhi Hon. Suqyan Hassan Omar.
2. It is based on the Grounds That The Learned Kadhi:
  1. Erred in law and in fact by neglecting to consider that the Respondent's chamber summons fell under the doctrine of res judicata undermining the fundamental principal of law that there must be finality to legal proceedings.
  2. Erred in law and in fact in granting divorce in the absence of a divorce petition and failing to consider the brazen and wanton disregard of procedure in instituting divorce proceedings in Kenya.
  3. Erred in law and in fact in failing to consider the Applicant's suit offends mandatory provisions of the Kadhi's Court Act as read together with Rules 20 and 151 of the Kadhi's Courts



(Procedure and Practice) Rules noting that the Applicant is attempting to institute divorce proceedings under the instant application contrary to the aforesaid provisions.

4. Misdirected himself in reviewing and or reconsidering his judgment delivered on 5<sup>th</sup> January, 2024 without notice to the Applicant as to the grounds of the review.
  5. His unilateral review and/or reconsideration of the judgment entered on 5<sup>th</sup> January, 2024, without affording the Appellant an opportunity to contest the grounds thereof, represents a gross miscarriage of justice. Such actions undermine the principles of fairness and transparency upon which the legal system is predicated.
  6. Misdirected himself in failing to consider the law and facts in holding that the prayer for Khulu was not an issue in Petition Number E094 of 2024 and thereafter proceed to review and/or reconsider an issue that was not determined in the said suit.
  7. By depriving the Appellant of the opportunity to challenge the court's review and/or reconsideration of his judgment delivered on 5<sup>th</sup> January, 2024, the learned Kadhi violated the fundamental right to procedural fairness. This denial of natural justice strikes at the very core of the Appellant's rights and impugns the integrity of the judicial process.
  8. Erred in law and in fact in failing to consider the legal and factual complexities surrounding the prayer for Khulu, and his subsequent review and/or reconsideration thereof, constitutes a serious error of judgment.
  9. Misdirected himself in interpreting the law regarding divorce by way of Khulu thereby demonstrating a clear misapprehension of legal principles relating to Khullu. His erroneous interpretation not only impairs the efficacy of legal proceedings but also cast doubt upon the competence and impartiality of the judiciary.
  10. Erred in law and in fact in denying the Appellant a refund of the gifts given to the Respondent as a consideration to marry the Appellant.
  11. Misunderstood and misapplied the law.
  12. Misdirected himself on matters both law and fact hence occasioning a miscarriage of justice against the Appellant.
3. The Appellant prays for orders that:-
- a. The ruling and order delivered on 15<sup>th</sup> March, 2024 by the Hon. Suqyan H. Omar be set aside in its entirety.
  - b. The cost of this appeal be borne by the Respondent.
  - c. Any other order that the court may deem fit to grant.
4. The appellant has filed written submissions placing reliance on the following:-
- a. *Siri Ram Kawa vs M. J. E. Morgan*, CA 71/ 1960 (1961) EA 462 where it was stated that, "The law with regard to res judicata is that it is not the case it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re – open that litigation merely by saying... It is therefore not permissible for parties to evade the application of res judicata by simply conjuring up parties or issue with a view to giving the case a different complexion from the one that was given in the former suit."



- b. Uhuru Highway Development Ltd vs Central Bank of Kenya, Exchange Bank Ltd (in voluntary liquidation) and Kamlesh Masukhlal Pattni where the court stated as follows:- “That is to say, there must be an end to applications of similar nature, that is no further, under principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be mandated by new applications filed after the original was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that Section 89 of Civil Procedure Act caters for.”
  - c) Republic vs Attorney General; and Another Ex parte James Alfred Kovoso where it was stated as follows: “Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts or tribunals of competent jurisdiction cannot enjoy the fruits of their judgments due to road blocks placed on their paths by actions or inactions of others.”
  - d. Raila Odinga vs I. E. B. C. & Others [2013] eKLR where it was held that, “Article 159 (2) (d) of the Constitution was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court.”
  - e. Adetoun Oladeji (NIG) Ltd vs Nigeria Breweries PLC S. C. 91/2002 where it was held as follows: “... It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to issue and must be disregarded.”
  - f. James Kanyiiita Nderitu & another v Marios Philotas Ghias & another [2016] eKLR where it was stated as follows: “It is trite law that the laws of procedure are grounded on a principle of natural justice which requires that parties should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not preclude from participating in them.”
5. The Respondents have filed written submissions dated 22<sup>nd</sup> November, 2024, placing reliance on the following:-
- a. *AWB vs SED (Civil Case No. 25 of 2019)* where it was stated as follows: “Khulu or Khula – It is a procedure through which a woman can divorce her husband in Islam, by returning the dowry or something else she received from her husband. The most famous case is that of Thabit Bin Qals whose two wives sought divorce from him. One of them Jamillah Bint Abi Salud disliked his features. She said to the prophet, “Nothing can bring him together with me, he is the blackest, the most short statured, and the ugliest. I don’t blame him, for his morals, or religion, but I am afraid Islam will lose its hold upon me if I am compelled to live with him, after hearing her complaints the prophet said to her; will you give him back the orchard he gave you. She replied yes and more if he wants. The prophet asked her not to give more and ordered Thabit to accept the orchard and divorce her. (cited by Siddigi M. M. 1993).”
  - b. Civil Appeal No. E084 of 2021 between The Speaker of The National Assembly of The Republic of Kenya, The National Assembly and The Senate of the Republic of Kenya and 12 Others where the court stated: “... for res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered no in disjunctive, but conjunctive terms: (a) The suit or issue was directly and substantially in



issue in the former suit. (b) That former suit was between the same parties or parties under whom they or any of them claim. (c) Those parties were litigating under the same title. (d) The issue was heard and finally determined in the former suit. (e) The court that formerly held and determined the issue was competent to try the subsequent sui of the suit in which the issue was raised.”

- c. *Gitau v Kenya Methodist University (Kemu)* (Petition 5 of 2020) [2021] KEHC 322 (KLR) (8 December 2021) (Ruling) where the court quoted with authority the determination in *The House of Lords in Henry JB Kendall & Others v Peter Hamilton* where it was stated as follows: “Procedure is but the machinery of the law after all, the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct, and even extinguish, legal rights, and is thus made to govern where it ought to sub serve.”
- d. *Malika v registrar of Lands* (Judicial Review E178 of 2023) [2024] KEHC 374 (KLR) (Judicial Review) (26 January, 2024) (Ruling) where the court quoted with authority, the case of *Philip Chemeno & another vs Augustine Kubende* where it was held as follows: “Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits... The court as is often said exists for the purpose of deciding the rights of parties and not for the purpose of imposing discipline.”
- e. Civil Appeal No. 28 of 2018: *NK vs AL* where the court quoted, with authority, the case of *Khurshid Bibi vs Muhammad Amin P.L.D 1967 Supreme Court 97* where it was held as follows:- “Verse 2: 229 of the Holy Quran implies that the wife has to pay compensation to the husband in order to obtain dissolution of marriage by Khula. This conclusion clearly emerges from its words “what she gives up to be free,” or “by what she ransoms herself,” ... It is a further check on the wife’s exercise of the right of Khula that, as a general rule, she cannot retain the benefits i.e. the consideration of the marriage, the same as the husband cannot take back whatever he has given to the wife in consideration of the marriage, if he divorces her, which is a corresponding restraint on his right. Therefore, it is necessary for the court to ascertain in a case of Khula what benefits have been conferred on the wife by the husband as a consideration of the marriage, and it is in the discretion of the court to fix the amount of compensation...”
- f. *Pindoria Construction Ltd vs Ironmongers Sanitaryware* Civil Appeal No. 16 of 1976 where it was held as follows:

“It is common ground that it is a matter for discretion whether or not to st aside a judgment under rule 8 of Order 9B of the Civil Procedure Rules. It is also well settled that the court of appeal will not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice...”

### **Analysis And Determination**

6. I have carefully considered the memorandum of appeal and the rival submissions and address them as follows.
7. The substantive question is whether the application before the Kadhi dated 26<sup>th</sup> January 2024 was res judicata.



8. The principle of res judicata was well articulated in *John Florence Maritime Services Limited & Another V Cabinet Secretary For Transport And Infrastructure & 3 Others* [2021] EKLK where the court stated:

“81. We reaffirm our position as in the *Muiri Coffee* case that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of res judicata prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

(82) If we were to find that the doctrine does not apply to constitutional litigation, the doctrine may very well lose much of its legitimacy and validity. We say this in light of the fact that constitutional tenets permeate all litigation starting with the application of Article 159 of *the Constitution* in both civil and criminal litigation, and its application now embedded in all procedural statutes. Further Article 50 on right to fair hearing and Article 48 on access to justice are fundamental rights which every litigant is entitled to. Such a holding may very well lead to parties, that whenever they need to circumscribe the doctrine of res judicata, they only need to invoke some constitutional provision or other.

(86) We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:

- a) There is a former Judgment or order which was final;
- b) The Judgment or order was on merit;
- c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d. There must be between the first and the second action identical parties, subject matter and cause of action.”

9. Having cited the above authority, I think it is fair to look at both prayers in the main suit at the trial court as well as the impugned application.

10. At the trial court the prayers among others included:-

- “(a) Official dissolution of the marriage between the Petitioner and the Respondent on account of faskh.
- (b) Issuance of divorce certificate forthwith.
- (c) Official dissolution of the marriage herein by way of khula in the alternative of (a) above.”

11. The court in its judgement ordered that:-

- “(a) the prayer on the dissolution of the marriage is hereby dismissed.”



12. The application on the other hand dated 26<sup>th</sup> January 2024 prayed for orders that:-
  - (a) the honorable court be pleased to dissolve the marriage herein on account of khula.
13. The court rendered its impugned ruling on 15<sup>th</sup> March 2024 where it stated among others that:-
  - (a) the marriage is dissolved by way of khula.
14. What runs across the substantive prayers in the suit and the application is dissolution of the marriage either by way of faskh or khula. The trial court found that the marriage could not be dissolved under the two processes and it therefore dismissed the same.
15. The application of 26<sup>th</sup> January 2024 was in my view a very ingenious way by the Respondent to bring back the prayers in the substantive suit. The honourable Kadhi had been requested to apply either of the two in dissolving or not the marriage. He had both options on the table. He chose neither of them.
16. Further the entire suit proceeded by way of full trial where evidence was taken from the parties and a whole judgement delivered. How then could the marriage be dissolved through a ruling instead of a substantive application?
17. The question of whether the same was a review under the provisions of Rule 79 of the Kadhis rules which is akin to Order 45 of the civil procedure rules is not true. The Respondent simply prayed for dissolution of the marriage through khula. This was not a new and an important issue discovered as it was already an issue or an option at the trial court.
18. Rule 79 of the Kadhis rules states as hereunder:-

Reconsideration of a matter

  - (1) A person who is aggrieved by a judgment, ruling or an order from which an appeal is allowed but from which no appeal is preferred, may within reasonable time, apply for a reconsideration of the judgment, ruling or order—(a) if there is discovery of new evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the judgment, ruling or order was made;(b) on account of some mistake or error apparent on the face of the record;(c) if the judgment, ruling or order requires clarification; or(d)for any other sufficient reason. (2) An application for review of a decree or order of the Court under paragraphs (b), (c) or (d), shall be made to the Kadhi who passed the decree or made the order sought to be reviewed or to any other Kadhi if that Kadhi is not attached to the Court station.(3) A party seeking the review of a judgment, ruling or order of the Court shall apply to the Court by way of an application and shall attach a copy of the judgment, ruling or order to be reviewed.(4) The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.
19. Based on the above, the proper way was to file an appeal and argue that the trial court had failed to consider the issue of khula espoused in the pleadings. Otherwise, the trial court regurgitated the same issues which it had dealt with during the substantive trial. There was nothing new to allow it tamper with its earlier decision.
20. For this reason, I agree with the appellant that the said application was res judicata and the court ought to have exercised its discretion and refused to entertain the respondent by allowing the preliminary objection and directing that she files an appeal to the appellate court.
21. On this ground alone I do not see the reason to consider the other grounds raised by the appellant though meritorious as well.



22. The appeal is hereby allowed, the trial court's ruling set aside.

23. Costs shall be in the cause.

**DATED SIGNED AND DELIVERED AT NAIROBI VIDE VIDEO LINK THIS 3<sup>RD</sup> DAY OF JULY 2025.**

**H K CHEMITEI**

**JUDGE**

