



Balala & another v Balala & another; Al-Beity (Interested Party) (Civil Appeal E058 of 2024) [2025] KEHC 10554 (KLR) (9 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10554 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E058 OF 2024**

G MUTAI, J

JULY 9, 2025

BETWEEN

SALAAH SALIM BALALA 1ST APPELLANT

ABDALLAH SALIM BALALA 2ND APPELLANT

AND

MOHAMED SALIM BALALA 1ST RESPONDENT

TAUFIQ SALIM BALALA 2ND RESPONDENT

AND

FATMA ALI AL-BEITY INTERESTED PARTY

RULING

1. Before this court is a Notice of Preliminary Objection dated 25th November 2025 raised by the advocates for the respondents. The same is based on the following grounds: -
 - a. The present appeal is a nullity at inception, as a notice of appeal has not been filed contrary to rule 86 of the *Kadhis' Courts (Procedure and Practice) Rules, 2020*;
 - b. The *Kadhis' Courts (Procedure and Practice) Rules, 2020* prohibits appeals on interim orders granted by the Kadhi's Court for purposes of preserving any property in issue as provided for under rule 112 (6) of *Kadhis' Courts (Procedure and Practice) Rules, 2020*.
 - c. The appeal is incompetent as no leave has been sought despite the fact that the application which led to the ruling dated 3rd September 2024, was brought under Order 31 of the *Civil Procedure Rules*, whose appeals do not lie as of right as per Order 43 Rule 1 of the *Civil Procedure Rules*;



- d. The respondent was served on 25th November 2024, despite the fact that the Memorandum of Appeal is dated 15th September 2024, clear on timelines of service of the same and Order 42 Rule 12 being clear on timelines of service of the same.
 - e. In conclusion, until these fundamental issues are heard and determined, this honourable court should refrain from issuing any orders.
2. The appellants opposed the preliminary objection. The preliminary objection was canvassed through written submissions. I will outline a summary of the aforementioned submissions below.
 3. I note at the outset that the appellants, as I understand from what is available in the court record, filed written submissions in respect of the appeal, and not the preliminary objection. That notwithstanding, I will consider the said submissions to the extent that they are relevant.
 4. The respondents, through their advocates, Balala & Abed Advocates, filed written submissions dated 17th January 2025.
 5. Ms Ndegwa, learned counsel for the respondents, in her written submissions, stated that the appeal is incompetent as no notice of appeal has been lodged as required under rule 86(2) of the *Kadhis' Courts (Procedure and Practice) Rules, 2020*. Ms Ndegwa urged that the appellants seek to appeal orders of the Kadhi's Court granted to preserve the property of the deceased, even though the same is not allowed under Rule 112(6) of the *Kadhis' Courts (Procedure and Practice) Rules, 2020*. She further urged that no leave had been sought as required under Order 43 Rule 1 (2) of the *Civil Procedure Rules*. Counsel prayed that the court reject the appeal summarily, as it has yet to be admitted, and there are no sufficient grounds for interfering with the orders of the Kadhi's Court. She contended that the matter is still pending before this court for the appointment of administrators.
 6. When the matter came up for highlighting of the submissions, Ms Ndegwa submitted that the appeal does not lie as of right. She further submitted that there was no service of the memorandum of appeal. Counsel urged the court to dismiss the appeal with costs.
 7. In response, Ms Katsiya, for the 1st appellant, submitted that the ruling being appealed against does not fall under Rule 112 of the *Kadhis' Courts (Procedure and Practice) Rules, 2020*, as it includes other matters. She submitted that the appeal was rightly before the court. She referred the court to section 50 of the *Law of Succession Act* and urged the court to uphold the right to appeal.
 8. Counsel further submitted that the matters sought to be set aside are discretionary decisions, and this court has the right to determine whether the discretion was properly exercised. She urged the court to find that any rules that impede access to justice are unconstitutional.
 9. She submitted that the respondents did not suffer any prejudice and urged the court to dismiss the preliminary objection.
 10. Mr Aziz, for the 2nd appellant, submitted that Rule 112 of the *Kadhis' Courts (Procedure and Practice) Rules, 2020*, deals with preservation of the estate, and in this case, the Kadhi was dealing with distribution. Mr Aziz submitted that the High Court derives its powers from the *Constitution* and thus has the discretion to ensure that the court below does not misuse its powers. He urged the court to dismiss the preliminary objection.
 11. Ms Ndegwa submitted that the orders issued by the Kadhi to the rent concerned rent collections. The same was meant to preserve the estate.



12. Does a valid preliminary objection exist? Have the respondents demonstrated that the appeal should be struck out? To answer these questions, I must first map out the scope of preliminary objections.
13. The Court of Appeal for Eastern Africa, in the celebrated case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd* (1969) EA 696, held as follows: -
- “A Preliminary Objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings and which, if argued as a Preliminary point, may dispose of the suit...
- It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
14. In the case of *Oraro v Mbaja* (2005) KLR 141, Ojwang J (as he then was), elaborated further on what a preliminary objection is and stated that: -
- “A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point. Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”
15. The appellants' preliminary objection is founded on the contention that the respondents contravened Rules 86 and 112(6) of the *Kadhis' Courts (Procedure and Practice) Rules, 2020* by appealing against interim orders of the Kadhi's Court without seeking leave.
16. It is necessary that I set out the said Rules here.
17. Rule 86 of the *Kadhis' Courts (Procedure and Practice) Rules, 2020* states that: -
1. An appeal against the decision of the Kadhi's court shall be made to the High Court, and against the decision of the High Court to the Court of Appeal;
 2. An appeal shall be made by giving a notice of appeal;
 3. An appellant may appeal against the whole or any part of a decision;
4. The notice of appeal shall be filed within thirty days from the day on which the decision was pronounced, and shall state whether the whole or part only, and what part, of the decision is appealed against.
18. Rule 112 of the said *Rules* states that: -
1. The Court may grant an interim order on such terms as it deems fair and just and may give directions as to further proceedings;
 2. An application for an interim order shall be made in Form KC 19 and supported by an affidavit;
 3. The Court may, on the application of any party, make interim orders for the purpose of—



- a. preserving any property in issue;
 - b. safeguarding the rights of any party pending trial;
 - c. facilitating the trial or hearing of the proceedings; or
 - d. the amendment of any proceedings or correction of any error, on such terms as may be just.
4. An application for interim orders may be made orally, but any party affected thereby shall be given the opportunity to be heard thereon.
 5. Where on the hearing of the application, made before the trial of a cause or matter, for an interim order it appears to the Court that the matter in dispute can be better dealt with earlier than when considering the whole suit, the Court may upon being satisfied of the merits thereof make an order accordingly and may also make such order as respects the period before trial as the justice of the case requires.
 6. There shall be no appeal against any interim order made under this rule.
19. Order 43, Rule 1 of the *Civil Procedure Rules* states that: -
1. An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act—
 - a. Order 1 (parties to suits);
 - b. Order 2 (pleadings generally);
 - c. Order 3 (frame and institution of suit);
 - d. Order 4, rule 9 (return of plaint);
 - e. Order 7, rule 12 (exclusion of counterclaim);
 - f. Order 8 (amendment of pleadings);
 - g. Order 10, rule 11 (setting aside judgment in default of appearance);
 - h. Order 12, rule 7 (setting aside judgment or dismissal for non-attendance);
 - i. Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);
 - j. Order 19 (affidavits);
 - k. Order 22, rules 25, 57, 61(3) and 73 (orders in execution);
 - l. Order 23, rule 7 (trial of claim of third person in attachment of debts);
 - m. Order 24, rules 5, 6 and 7 (legal representatives);
 - n. Order 25, rule 5 (compromise of a suit);
 - o. Order 26, rules 1 and 5(2) (security for costs);
 - p. Order 27, rules 3 and 10 (payment into court and tender);
 - q. Order 28, rule 4 (orders in proceedings against the Government);
 - r. Order 34 (interpleader);



- s. Order 36, rules 5, 7 and 10 (summary procedure);
 - t. Order 39, rules 2, 4 and 6 (furnishing security);
 - u. Order 40, rules 1, 2, 3,7 and 11 (temporary injunctions);
 - v. Order 41, rules 1 and 4 (receivers);
 - w. Order 42, rules 3, 14, 21, 23 and 35 (appeals);
 - x. Order 45, rule 3 (application for review);
 - y. Order 50, rule 6 (enlargement of time);
 - z. Order 52, rules 4, 5, 6 and 7 (advocates);
 - aa. Order 53 (judicial review orders).
2. An appeal shall lie with the leave of the court from any other order made under these Rules.
 3. An application for leave to appeal under section 75 of the Act shall, in the first instance, be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.
 4. Save where otherwise expressly provided in this rule, “order” includes both an order granting the relief applied for and an order refusing such relief.
20. Were the orders appealed against “interim orders”? The ruling emanated from the decision of the court below in respect of the application dated 4th June 2024, vide which the following orders had been sought: -
1. Spent;
 2. Spent;
 3. That the honourable court do set aside the proceedings of the court of the 29th January 2024;
 4. That the interested party provide an account of all proceeds of rent collected on behalf of the estate of the deceased from 2010 to 1st June 2024;
 5. That the objectors be granted leave to file a reply to the application dated 13th December 2023; and
 6. That costs be in the cause.
21. With utmost respect to the respondents, I disagree with the contention that the orders sought were “interim orders.” Rather, they were interlocutory orders addressing procedural matters and protecting the subject matter of the suit. While interim orders and interlocutory orders are made during the pendency of the case, they are not synonyms and should not be confused. Setting aside of proceedings, granting of leave and provision of accounts, though made during the pendency of a suit, are interlocutory orders, not interim orders. In my view, these matters are not subject to the limitation imposed by Rule 112 of the *Kadhis' Courts (Procedure and Practice) Rules, 2020*. Had that been the intention of the Rules Committee of the Court, they would have said so explicitly.
22. It is also my view that the preliminary objection on grounds a, b, and c does not raise a pure point of law. The same requires the facts to be ascertained, and also for this court to exercise its judicial discretion. Therefore, grounds a, b, and c of the preliminary objection must fail.



23. Was leave necessary before the lodgement of the appeal? My view is that Rule 86(1) of the *Rules* is couched in permissive terms. A party may appeal to this Court against the decision of the Kadhi Court without seeking leave. I must point out that the *Civil Procedure Rules* are not automatically applicable to the Kadhi matters and are applicable where there is a lacuna, and “so far as relevant to proceedings under these Rules and so far as they are not inconsistent with Muslim law.”
24. There is no lacuna in the Rules as clear provisions exist on the lodgement of an appeal in the *Kadhis' Courts (Procedure and Practice) Rules, 2020*.
25. That being the case, I disagree with the proposition that leave was necessary. My understanding of Muslim law is that it is concerned with substantive justice, rather than procedural technicalities. The objection on the said ground must thus fail.
26. The respondents have argued that the appellant breached Order 42, Rule 12 of the *Civil Procedure Rules*, as he did not adhere to the set timelines.
27. Section 79B of the *Civil Procedure Act* states that: -
“Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against, he may, notwithstanding Section 79C, reject the appeal summarily.”
28. Order 42, Rule 11 of the *Civil Procedure Rules* states that: -
“A judge of the High Court shall, within thirty days of the filing of an appeal under section 79B of the Act, peruse the appeal and give directions in accordance with the provisions of section 79B of the Act.”
29. Order 42, Rule 12 of the *Civil Procedure Rules* states that:-
“Where the judge admits the appeal under section 79B of the Act, the registrar shall notify the appellant, who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar.”
30. The court, in the case of *Richard Ngetich & another v Francis Vozena Kidiga* [2014] KEHC 74 (KLR), stated that:-
“Under Order 42 rule 11, upon filing of the appeal, the appellant is obligated to within thirty days, cause the matter to be listed before a judge for directions under Section 79B of the Act. Section 79B, requires that before an appeal from a subordinate to the High Court is heard, a judge of the High Court to it, and if he considers that there is no sufficient ground for interfering with the decree, part of the decree or order appealed against, notwithstanding Section 79C, gives the judge the discretion to reject the appeal summarily.
After the refusal of a judge to reject the appeal under Section 79B of the Act, when the Registrar is required to notify the appellant of the admission of the appeal. After the appellant is notified by the Registrar about the admission of the appeal, he/she is obligated to serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar. See Order 42 rule 12.



Under rule 13 thereunder, the appellant is obligated, within twenty-one days after the date of service, after giving notice to the parties, to cause the appeal to be listed for giving of directions by a judge in chambers. It is clear from the aforementioned provisions of the law that the appellant bears the obligation to list the application for directions before a judge. The law requires him to do so within thirty days from the date of filing of the appeal.

The Purpose of the directions under order 42 rule 11 is to give the judge an opportunity for purposes of perusing the appeal and determining whether to admit it or reject it summarily. Under rule 12 of order 42, it is only after the judge has declined to summarily reject the appeal when the appellant can lawfully serve the memorandum of appeal on the respondents.

In my view where the appellant files an appeal and fails to cause it to be listed for admission within the time stipulated under order 42 rule 11, he cannot be heard to say that the appeal is properly on record. I say this because, it is after directions are issued under Order 42 rule 11 when an appeal can lawfully be served on other parties.

In the circumstances of this case, the appellant filed a memorandum of appeal on 29th June 2012. The law required him to cause it to be listed for directions within thirty days from the date it was filed (that is by 29th July, 2012. It's my considered. This means that the time within which the appellant was supposed to list the appeal for hearing has expired; he cannot list it for admission unless he first seeks for enlargement of time under Order 50 rule 6 of the Civil Procedure Rules. This is the ideal situation under the rules.

However I recognise that in practice, it is quite the opposite, once memorandum of appeal is filed and the proceedings are typed, it is the court registry on its own motion which takes the file to the Judge for admission or otherwise. This has been fortified by many past decisions of various Judges, and I think it would be unfair to penalise the appellant for the scenario obtaining. I would, under the circumstances, invoke the provisions of section 1A of the Civil Procedure Act regarding the overriding objectives of the rules, which is intended to facilitate the just and proportionate resolution of civil disputes; and decline to dismiss the application on the basis that it is not just or proportionate to do so.”

31. From the court record, the memorandum of appeal dated 15th September 2024 was filed on 24th September 2024. The Record of Appeal was filed on 25th November 2024 and served upon the respondents, and as a result, the respondents' advocates filed a notice of address dated 25th November 2024 on 26th November 2024.
32. The first time this matter came up at the registry was on 25th September 2024 and was fixed for mention on 7th October 2024. On 7th October 2024, the appellants were granted leave to file the Record of Appeal and the matter was fixed for mention on 14th November 2024. When the matter came up on 14th November 2024, Mr Aziz, counsel for the appellants, requested an additional seven days. Ms Julu, counsel for the respondents, did not object to the same, and the matter was fixed for mention on 26th November 2024. When the matter came up on 26th November 2024, Mr Aziz informed the court that they had filed and served the record of appeal and were ready to take directions. Ms Ndegwa, for the respondents, then informed the court that they had a preliminary objection herein and were also seeking directions. The honourable court directed that the preliminary objection be heard first.
33. The above narration speaks for itself. From my reading of the case law above and the court record, it is my view that the appellants did not contravene and or breach Order 42, Rule 12 of the Civil Procedure Rules.



34. It is clear from the foregoing that I have not found merit in the preliminary objection raised by the respondents. The same is dismissed. Given the nature of the matter, I order that the parties bear their costs.

35. It is so ordered.

DATED AND SIGNED IN MOMBASA THIS 9TH DAY OF JULY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Ms Ndegwa, for the Respondents;

Mr Aziz, for the 2nd Appellant;

Ms Katisya, for the 1st Appellant; and

Arthur - Court Assistant.

