



REPUBLIC OF KENYA



**Kazungu v Ratili (Civil Appeal E034 of 2025) [2025] KEHC 10264 (KLR) (11 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10264 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL E034 OF 2025**

**M THANDE, J**

**JULY 11, 2025**

**BETWEEN**

**STEPHEN KAZUNGU ..... APPELLANT**

**AND**

**BAKARI JUMA RATILI ..... RESPONDENT**

**RULING**

1. Before me for consideration is an Application dated 29.4.25 in which the Applicant seeks the following orders:
  1. Spent
  2. That this Honourable Court be pleased to issue an order of exhumation of the body of the Late Samuel Charo Kirao from Takaungu Muslim Cemetery for it to be taken back to the Kilifi County Referral Hospital Mortuary for preservation, pending hearing and determination of this application.
  3. That this Honourable Court be pleased to issue an order of exhumation of the body of the Late Samuel Charo Kirao from Takaungu Muslim Cemetery for it to be taken back to the Kilifi County Referral Hospital Mortuary for preservation, pending hearing and determination of the appeal filed herein.
  4. That in the alternative and by the very nature of the proceedings herein, the Honourable Court does proceed to determine the issues herein as framed and/or captured in the trial court and make its own decision by granting the Appellant permission to bury the body of his deceased son, the late Samuel Charo Kirao.
  5. That the Kilifi County Referral Hospital and the OCS of Kilifi Police Station and Kijipwa Police Station be ordered to comply with the orders made and/or issued herein.
  6. That costs of this application be borne by the Respondent in any event.



2. In his affidavit in support of the Application sworn on even date, the Applicant stated that his son Samuel Charo Kirao (the deceased) who had been mentally disturbed since 2020, was killed by way of mob justice on 1.4.25 at Takaungu. The deceased was taken to Coast General Teaching and Referral Hospital mortuary and on 17.4.25, the body was released to the Applicant who took it to Kilifi County Referral Hospital Mortuary for preservation and a burial permit issued to him.
3. The Applicant further stated that the family began burial arrangements and incurred costs exceeding Kshs. 184,240/=. However, on 25.4.25 at 5.30pm, the day before he collected the deceased's body for burial, he was served with a Court Order from the Kadhi's court restraining him from collecting and burying the body. The Applicant asserted that the said court order did not indicate whether the matter was pending hearing or ruling but the Respondent and/or his agent announced at the nearby mosque that the matter would be heard on 28.4.25, prompting him to attend court on the said date. However, to his surprise he found that the matter was pending ruling, having allegedly been heard on 25.4.25 without his knowledge or participation, though sued in the matter. The Applicant then filed a notice of a preliminary objection on a point of law and an urgent application to stay the proceedings and review and/or variation and/or setting aside of the ruling. The Applicant further stated that the Hon. Kadhi refused to handle the application for stay and instead issued orders that the deceased's body be collected from the mortuary by the Respondent for burial under Islamic law.
4. The Applicant further stated that the Respondent in bad faith hurriedly removed the deceased's body from the mortuary at around 10.00 P.M on 28.4.25 and buried him at around 11.00 P.M at Takaungu Muslim Cemetery without his and his family's knowledge or involvement. This was against the orders in the ruling that the deceased's family members attend the burial and by extension against the Islamic law as no burial happens at night. The Applicant seeks orders for the exhumation of the deceased's body for preservation at Kilifi County Referral Hospital pending hearing and determination of the appeal.
5. The Applicant asserts that the deceased was not a Muslim and thus he ought to be buried under Christian rites in his home at Takaungu where a grave had been dug. Further that being African-Christians, it is a taboo and/or abomination to dig a grave for the burial of a relative, only for the burial to take place elsewhere far away from home, a tradition that attracts curses, leading to more deaths in the family.
6. The Applicant urged that the orders sought be granted as no prejudice will be suffered by any party except him who stands to suffer irreparable loss and damage, if his application is dismissed.
7. In his replying affidavit sworn on 9.5.25, the Respondent stated that he converted the deceased to Islam and denied that the deceased was of unsound mind. He averred that following the demise of the deceased, he convened a meeting with the Applicant and other relatives and some members of the Mosque to resolve the issue of the deceased's faith. He stated that at the meeting, the Applicant confirmed that the deceased had converted to Islam in 2023 but that he would not allow his son to be buried under Islamic rights. The Respondent thus moved to the Kadhi's court to uphold Islamic teaching and dignity of the deceased. The first order was issued on 22.4.25 and was duly served. On 25.4.25, the second order was issued after the Applicant failed to attend court for the hearing. The Kilifi County Hospital Funeral Home declined to release the body of the deceased to the Applicant in compliance with the court order. Further that when the Hon. Kadhi delivered the ruling on 28.4.25, the Applicant was present in court. Additionally, that every court order was served upon the Applicant and that he had every opportunity to participate in the proceedings.
8. The Respondent further stated that the orders of the court were clear that the deceased was to be released to Muslims in Takaungu. He asserted that as a Muslim, the deceased was required to be buried



promptly in accordance with Islamic rites and denies that the burial was done in secrecy. He averred that the Applicant declined his invitation to attend the deceased's cleansing and burial. The Respondent further stated that the Appeal will be rendered nugatory if the prayers sought in the Application are granted. He urged that the Application be dismissed with costs.

9. The Applicant has in supplementary affidavit sworn on 12.5.25 denied the Respondent's allegations. In particular, he denied attending the meeting on 16.4.25 and dismissed the minutes exhibited as cooked. He denied being served and insists that there was secrecy in the proceedings before the Kadhi's court and burial arrangements.
10. The record shows that in the application dated 17.4.25 before the Kadhi's court, the Respondent sought a halt to the burial of the deceased and an order stopping the family of the deceased and burial committee from proceeding with burial arrangements, pending hearing and determination of the application. In the certificate of urgency, the Respondent expressed apprehension that the family of the deceased intended to bury him under Christian law.
11. By the order dated 22.4.25, the Hon. Kadhi gave an order of temporary injunction preventing the Applicant and the burial committee from burying the deceased. He further ordered that the remains of the deceased held at Coast General Hospital were not to be released pending hearing and determination of the application. The Officer Commanding Station (OCS) Takaungu Police station was to enforce the order. On 28.4.25, the Hon. Kadhi made the orders that the deceased had converted to Islam and died a Muslim and that he be buried in accordance with the Islamic faith. Further that the remains of the deceased be released to the Muslims of Takaungu and that the family members be allowed to attend the funeral. The OCS, Kijipwa was to liaise with the OCS, Takaungu to enforce the said orders.
12. As I consider the Application before me, the one question that quickly stands out is whether the Hon. Kadhi had jurisdiction to entertain the matter before him that gave rise to the Appeal and Application before this Court.
13. It is trite law that a Court's jurisdiction is conferred and not inferred. A Court therefore may only exercise such jurisdiction as has been conferred upon it by *the Constitution*, statute or both. In Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR the Supreme Court succinctly stated as follows:

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.

14. The jurisdiction of Kadhi Courts flows from *the Constitution* of Kenya, 2010 and from the Kadhi's Court Act. Article 170(5) of *the Constitution* provides:

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 Kadhis' Court Act is couched along similar terms.

15. There are 3 factors that are necessary to establish the jurisdiction of the Kadhi's court. The first is the subject matter, the second is profession of Islamic faith by all parties and the third is submission by



all parties, to the jurisdiction of the court. This was the holding by the Court of Appeal in *Genevieve Bertrand v Mohamed Athman Maawiya & another* [2014] eKLR which stated:

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 Kadhi's Court.

16. The issue before the Kadhi's court was the burial of the deceased who is alleged to have converted from Christianity to Islam. The Respondent sought orders barring the family of the deceased who were not Muslims, from burying the deceased under Christian rites. By dint of Article 170(5) of *the Constitution*, the Hon. Kadhi did not have jurisdiction to entertain the matter.

17. The law is that a court cannot exercise jurisdiction it does not possess. The locus classicus on jurisdiction is the case of *Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd* [1989] KLR 1., where Nyarangi, JA. stated:

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.

18. Upon noting that the Applicant and his family, the parties against whom the orders were sought, were not Muslims, the Hon. Kadhi ought to have downed his tools for want of jurisdiction. The Hon. Kadhi however chose to proceed without jurisdiction clearly arrogating to himself jurisdiction exceeding that which is conferred upon the Kadhi's court by law.

19. In *Attorney General & another v Nafula & 5 others; Attorney General (Interested Party) (Civil Application E121 & E120 of 2021)* (Consolidated) [2021] KECA 647 (KLR) (27 April 2021) (Ruling), the Court of Appeal had this to say about a court proceeding with a matter without jurisdiction:

Other than speaking to the arguability of the appeal, that mode of proceeding, facially without jurisdiction, renders the conservatory orders amenable to questions of legality and propriety. It casts doubts on the validity of the orders and hoists the prospects of invalidity on account of being null and void ab initio. The question then becomes whether it is in keeping with the tenets of the rule of law and respect for jurisdictional boundaries, as well as separation of powers, to let stand conservatory orders issued under such circumstances. And the answer to us seems patently in the negative.

20. Article 2(1) of *the Constitution* provides that *the Constitution* is the supreme law of the Republic and binds all persons and all State organs at both levels of government. The Hon. Kadhi is enjoined to exercise the jurisdiction conferred upon him by *the Constitution* and statute. The decision of the Hon. Kadhi which was made without jurisdiction raises, as the Court of Appeal stated in the cited case, questions of legality and propriety. The decision casts doubt on the validity of the orders and hoists the prospects of invalidity on account of being null and void ab initio. Accordingly, my finding and I so hold, is that the proceedings before the Hon. Kadhi and orders given therein being in violation of Articles 2(1) and 170(5) of *the Constitution*, are null and void ab initio. To allow the same to stand would militate against the tenets of the rule of law and jurisdictional boundaries.



21. In *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169 Lord Denning delivering the decision of the Privy Council stated:

If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

22. Having found as I have, that the proceedings and orders of the Hon. Kadhi are nullity and void ab initio, it follows then that every act done pursuant thereto is also void and a nullity. This includes the release of the remains of the deceased to the Muslims in Takaungu and the subsequent burial thereof, under Islamic law. It is therefore unnecessary for the Court to delve into the circumstances surrounding the burial of the deceased.

23. On whether the orders sought for exhumation should be granted, this Court sought the opinion of the Hon. Chief Kadhi on the issue of exhumation under Islamic law. This is what he stated:

Allah has honoured human beings, dead and alive. The dead must be treated with respect and honour just as the living. Graves under Islamic Law becomes Wakf endowments for the dead, it is not allowed to desecrate, walk on or build on them. Abdu Daud and other narrators report that the Messenger of Allah breaking the bones of a dead person is like breaking those of a living person. Al Naqrawy, a Maliki scholar stated that the grave becomes a Wakf endowment for the dead person.

It is not permissible to exhume a deceased Muslim and relocate his or her body to another grave unless it is extremely necessary either in the deceased's or public interest, Al Nawawy states in *Al Majmu* 5/273 "Scholars are agreed that exhumation of a deceased is not permissible except for a legally acceptable reason". Shafi' said in *Al Minhaj* p 62 "exhumation of a deceased in order to rebury him in another (grave), unless it is extremely necessary, is haram forbidden; for example, if he was buried without having washed, or was buried in a stolen piece of land or shrouded in a stolen shroud or buried not facing Qibla Mecca. The encyclopedia of Islamic Jurisprudence 32/40 records consensus among Muslim jurists on the impermissibility of exhumation for purpose of transferring the body of a Muslim to be buried in another grave.

If two persons were buried in one grave, or it is necessary for the government to construct a road or rail to pass through a grave, these would constitute some of the permissible grounds to exhume a body provided that the remains have not changed or have completely decomposed (including the bones). If the body has changed, or there is an alternative route to construct the road, it is better that the body is not exhumed. This is based on hadith reported by Bukhari on the authority of Jaber ibn Abdallah, he said "I was not happy that my father was buried with another (in one grave), until I exhumed him and buried him in a grave alone."

A body of a Muslim may also be exhumed and relocated if it is in its own interest for example flash floods may remove or affect the grave yard, it is buried on or close to pathway where people often trample on it.

24. The Court is duly guided by the opinion of the Hon. Chief Kadhi. It can be discerned from the opinion that while it is not permissible to exhume a deceased Muslim and relocate his or her body to another



grave, an order of exhumation may be made where it is extremely necessary in the deceased's or public interest. Further, Al Nawawy states in Al Majmu" 5/273 "Scholars are agreed that exhumation of a deceased is not permissible except for a legally acceptable reason".

25. My view is that in the circumstances herein, nothing can be of greater public interest than this court discharging its constitutional mandate of ensuring that decisions made by the courts beneath it, are in keeping with the tenets of the rule of law and respect for jurisdictional boundaries. Similarly, the burial of a deceased person pursuant to an order that is null and void is a legally acceptable reason for an order for exhumation.
26. It has been argued by the Respondent that the Appeal herein will be rendered nugatory if the orders sought are granted. The circumstances herein are such that the orders of the Hon. Kadhi which are void and a nullity, cannot be allowed to stand and the Court need not await the hearing of the Appeal to make such finding. In any event, it is the Appellant and not the Respondent who would be prejudiced if his appeal were to be rendered nugatory.
27. Having found as I have, that the Kadhi's court lacked jurisdiction to entertain the matter before him and that the orders issued are a nullity, the question of the deceased's burial remains unresolved. This can only be determined by a court of competent jurisdiction. Additionally, the question whether the deceased had converted to Islam or not will be determined in proceedings before such court.
28. In the end, I do allow the Application on the following terms:
  - i. The proceedings before the Kadhi Court Case No. are hereby nullified and the orders issued on 28.4.25 are hereby set aside.
  - ii. The remains of the deceased Samuel Charo Kirao shall, within 14 days of this order, be exhumed from Takaungu Muslim Cemetery and taken to Kilifi County Referral Hospital Mortuary for preservation, pending determination of the burial dispute by a court of competent jurisdiction.
  - iii. The Medical Superintendent of Kilifi County Referral Hospital shall comply with this order and the Officers Commanding Kilifi and Kijipwa Police Stations shall ensure compliance with the said order.
  - iv. The Applicant shall have costs.

**DATED SIGNED AND DELIVERED IN MALINDI THIS 11<sup>TH</sup> DAY OF JULY 2025**

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**M. THANDE**

**JUDGE**

