



REPUBLIC OF KENYA



**RMM v RWR (Matrimonial Cause E006 of 2022)  
[2023] KEHC 22619 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22619 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MATRIMONIAL CAUSE E006 OF 2022**

**G MUTAI, J**

**SEPTEMBER 22, 2023**

**BETWEEN**

**RMM ..... APPLICANT**

**AND**

**RWR ..... RESPONDENT**

**RULING**

1. The Applicant filed an application dated 11<sup>th</sup> May 2023 vide which he sought various maintenance orders pending the hearing and determination of the Originating Summons. This application has not been heard and determined to date.
2. The Respondent's counsel entered an appearance on 26<sup>th</sup> May 2022. The Respondent also filed a Notice of Preliminary objection of even date vide which two grounds were raised to wit that:-
  1. The instant application is res judicata; and
  2. The instant application and the main suit offend the provision of section 11 of the *Civil Procedure Act*, (chapter 21 of the Laws of Kenya).
  3. The said Preliminary Objection wasn't canvassed for the reasons apparent from my ruling of 31<sup>st</sup> May 2023 which I shall not rehash here. In the said ruling I reinstated the application dated 11<sup>th</sup> May 2022 which had been dismissed for non-attendance and ordered that the case be mentioned on 12<sup>th</sup> June 2023 for purposes of directions.
  4. On 12<sup>th</sup> June 2023 I gave directions in the presence of the counsel for the Applicant, and in the absence of the Respondent's counsel, that the Applicant's application dated 11<sup>th</sup> May 2022 be canvassed by way of written submissions and fixed a date for mention to confirm compliance, to wit, the 12<sup>th</sup> day of July 2023. On the latter day I varied my previous orders and directed that the Preliminary Objection would be canvassed first, by way of Written Submissions. When



the matter came up for mention on 28<sup>th</sup> July 2023, upon confirming that both parties had complied my directions, I fixed the matter for ruling on 22<sup>nd</sup> September 2023.

### Submissions of the Respondent

5. The Respondent had previously filed Written Submissions dated 25<sup>th</sup> July 2022. The Respondent submitted that the dispute before this Court had previously been before the Kadhi's Court as Kadhi Court Cause No. E38 of 2022; R W R versus R M M.

6. The Respondent referred the Court to sections 7 of the [Civil Procedure Act](#) which states as follows:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. —(1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

7. It was submitted that the Kadhi Court has the jurisdiction to hear and determine, not just divorce causes between Muslim couples, but also questions regarding division of matrimonial properties between them. The Respondent urged that during the course of hearing the divorce cause the Kadhi was seized of the matrimonial property dispute which he then determined. In light of that it was urged that I be pleased to find that this cause is res judicata and to uphold the preliminary objection.

8. The Respondent also urged that the originating Summons offends section 11 of the [Civil Procedure Act](#) which requires litigants to file cases in the lowest courts competent hear them. I was referred to the case of [AWA versus HPP](#) [2018]eKLR where Chitembwe, J in his judgment stated that:-

“in the end it is my finding that both the High Court and the Kadhi's Court have jurisdiction to determine the dispute. This matter is hereby transferred to the Marsabit Kadhi's Court for hearing and final determination. The Respondent is at liberty to apply to this Court and to have the matter referred to the Kadhi's Court in Moyale or Isiolo”.

9. The Respondent also referred to the judgment of the Court of Appeal in [RMM versus BAM](#) [2015]Eklr, a 5 bench panel of the Court of Appeal judges held that “if their marriage was purely



Muslim, and the property in issue was acquired during the currency of that marriage, the Kadhi's Court would be the most efficacious in handling and determining the dispute”.

10. I will not dwell on the 4<sup>th</sup> authority in the Respondent's bundle save to say that it is a decision of a Kadhi sitting in Isiolo. That Court, with due respect to it and also to the Respondent's counsel is not a Court of record.

### **Submissions of the Applicant**

11. The Applicant identified 2 issues coming up for determination as being whether the High Court has jurisdiction to hear and determine the matter and if the matter is *res judicata* having been heard and determined by the Kadhi's Court.
12. In respect of the issue the Applicant, relying on the authorities his counsel attached, submitted that the High Court has jurisdiction.
13. The Applicant submitted that the matter could not be determined by way of a preliminary objection. It was also urged that this matter was not *res judicata*. The Applicant thus prayed that the preliminary objection be dismissed.

### **Analysis of the law**

14. The Court of Appeal for Eastern Africa in the case of *Mukisa Biscuit Manufacturing Co Ltd versus West End Distributors* (1969)EA 696 stated (per Law JA) that:-

“... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”
15. In the same case Sir Charles Newbold wrote that:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is exercise of judicial discretion”.
16. To determine if I should allow the preliminary objection I must first make a finding whether the matter before the Kadhi's Court was based on issues which are directly and substantially in issue herein, between the same parties and that the Kadhi's Court was competent to try it. To do so I must consider the pleadings before the Court below.
17. In the suit before the Kadhi the plaintiff (now the Respondent) sought dissolution of the marriage to the Defendant (now the Applicant, costs of the suit, Iddah maintenance, and “any other relief that the Court may deem fit and just to grant”.
18. The Defendant (now the Applicant in this cause), in his Counterclaim, sought to have the Plaintiff, vide which the divorce was sought, dismissed with costs, failing which the Plaintiff be declared a disobedient wife and subjected to a full process of “Khulu” under Islamic Sharia law.
19. This Originating Summons on the other seeks to have what the Applicant describes as matrimonial property divided on 50:50, separation of the assets, transfer (of the assets), accounting of incomes, settlement of the properties and incomes and costs.



20. In his decision dated 28<sup>th</sup> April 2022 the Hon Habib Salim Vumbi, Principal Kadhi dissolved the marriage between the parties hereto, ordered the Plaintiff (now the Respondent) to observe Iddah for divorce, the Defendant (now the Applicant) to make a monthly payment of Kes.15,000.00 for 3 months, for the maintenance of the Plaintiff during Iddah period and that the divorce certificate would be issued to the Plaintiff upon completion of the Iddah period and upon payment of due Court fees.
21. The test applied by the Courts in determining whether a matter is *res judicata* is well settled. In the case of *Abok James Odera versus John Patrick Machira*, Civil Application No Nairobi 490 of 2001 the Court distilled the principles as being the following: -
1. There must be a previous suit in which the matter was in issue;
  2. The parties were the same or litigating under the same title;
  3. A court competent to try the matter heard the same; and
  4. The issue has been raised once again in a fresh suit.
22. The rationale for *res judicata* was discussed by the Court of Appeal in the *Independent Electrol and Boundaries Commission versus Maina Kiai & Others* [2017]eKLR where it was stated that:-
- “The rule of or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and afford parties closure and respite from the specter of being vexed haunted and hounded by issues....
23. The Court of Appeal went on to quote the Indian Supreme Court case of *Lal Chand versus Kadha Kishan*, AIR 1977 SC 789 where it was stated that :-
- “The principle of *res judicata* is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue. The practical effect of the *res judicata* doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit.”
24. I must point out at the outset that in writing this ruling I have had to interrogate the facts. What was under contestation in the Court below is apparently not agreed upon. That being the case, and bearing in mind the holding in *Mukisa Biscuit case (supra)* it does not appear to me that the Preliminary objection raised herein has merits. But even if I was wrong, a cursory look at the pleadings and the judgment of the Court below shows that issues falling for determination in the Kadhi Court, that is to say, the divorce and Iddah maintenance, are different from those before this Court. The Originating Summons seek division of matrimonial property. I am therefore unable to agree with the Respondent that this matter is *res judicata*.
25. Even if it were true that the matrimonial property dispute was heard by the Kadhi, something that cannot possibly be determined, without interrogating the record of the Court below, the matter would



still not be res judicata as the learned principal Kadhi did not make a determination on that point. In his judgment he stated:-

“in regard to the issue of the investment the Respondent was not that specific to enable this honourable (Court) make a sound determination. I therefore advise the Respondent to move the Court appropriately on the issue”.

It would appear to me that by coming to this Court the Applicant acceded to the advice of the learned Principal Kadhi and cannot be faulted.

26. Regarding the second limb of the Respondent’s objection the authorities cited by the Respondent all support the contention that this Court has jurisdiction. See *AWA versus HDD* [2018]eKLR and *RMM versus BAM* [2015]eKLR. I do not know why the Applicant can be faulted for filing his cause before a Court with requisite jurisdiction.
27. I must point out that the Kadhi Court does not have automatic jurisdiction under article 170(5) of the *Constitution*. The Constitution is clear that its jurisdiction is 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. A Muslim has the option of having his dispute determined by any other Court, not just the Kadhi’s Court. By filing this cause in this civil Court, it would appear to me that the Applicant has chosen not to submit to the religious law.
28. The foregoing notwithstanding *Civil Procedure Act* provides procedure applicable to Civil Proceedings. Procedure applicable in respect of Matrimonial proceedings is provided for in section 18 of the *Matrimonial Property Act*, No 49 of 2013. *Civil Procedure Act* would only apply if there was a lacuna. There is none in respect of litigation arising from matrimonial property contestations. The applicable rules have since been gazetted and are in operation. In my opinion therefore the second limb of the objection is misguided and made in ignorance of the applicable procedural rubric.

### **Disposition**

29. The preliminary objection must therefore fall. The same is hereby dismissed. Costs shall abide the outcome of the main cause.
30. This matter has been outstanding for over a year now. In the view of the Court further prosecution of interlocutory applications serve no useful purpose. Parties are implored upon to withdraw them so that the main cause can be heard.

Orders accordingly.

**DELIVERED AND DATED AT MOMBASA THE 22<sup>ND</sup> DAY OF SEPTEMBER 2023 VIA MICROSOFT TEAMS**

.....  
**GREGORY MUTAI**  
**JUDGE**

**In the presence of:-**

Ms. Wanjiku for the Applicant;

No appearance for the Respondent; and

Mr. Arthur Ranyondo – Court Assistant.

