



**In re Estate of Late Kassim Abdalla Hussien (Succession Cause  
36 of 2019) [2025] KEKC 24 (KLR) (19 May 2025) (Ruling)**

Neutral citation: [2025] KEKC 24 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT MOYALE  
SUCCESSION CAUSE 36 OF 2019**

**A GALGALO, PK**

**MAY 19, 2025**

**IN THE MATTER OF THE ESTATE OF LATE KASSIM ABDALLA HUSSEIN**

**BETWEEN**

**FATUMA DIMA HIRBO ..... APPLICANT**

**AND**

**ABDALLA SHARRIF HUSSEIN ..... RESPONDENT**

**RULING**

1. The Court has considered the Notice of Motion dated 16th April 2025 brought by the Applicant, Fatuma Dima Hirbo, under certificate of urgency, invoking Article 159 of the *Constitution*, Rule 88 of the *Kadhi's Court (Procedure and Practice) Rules*, Order 22 of the *Civil Procedure Rules*, and Sections 1A and 1B of the *Civil Procedure Act*.
2. The Applicant seeks various reliefs aimed at executing the judgment of the High Court of Kenya at Marsabit in Civil Appeal No. E006 of 2022, including transfer of funds, deposit of rent proceeds, recovery of personal and legal documents, and certain household items.
3. Upon filing, the application was certified urgent, and directions were given for service upon the Respondent to afford him an opportunity to respond.
4. The Court further notes that the matter was listed for hearing on 24th April 2025, but could not proceed due to a preliminary objection on jurisdiction raised by the Respondent and his subsequent filing of a cross-application dated 30th April 2025. In that application, the Respondent seeks, among other orders:
  - a. Recusal of Hon. Adan Galgalo, the Principal Kadhi, from further handling the matter,
  - b. Transfer of the matter to another Kadhi or court,



- c. Declaration that the current application offends procedural rules and is incompetent.
5. Both parties filed written submissions. The applicant submitted that the preliminary objection falls on all grounds focusing on form rather than substance of the application. He cited Article 159(2)(d) of the *Constitution of Kenya* which provides that in exercising judicial authority, the courts and tribunals shall be guided by the principles, among which that justice shall be administered without undue regard to procedural technicalities. He also cited section 1A of *Civil Procedure Act*, Rule 88 and 167 of the *Kadhi's Courts (Procedure and Practice) Rules* Legal Notice 203 of 2020. She submits that failure to strictly apply, the form or format or the forms proposed to be used does not render the application null and void and the court in the interest of substantial justice can implement justice in the manner applied.
  6. On the view that Kadhi's court cannot enforce judgment and orders of high court due to lack of jurisdiction, the applicant opposes it and relied on Section 28 of the *Civil Procedure Act*, and 29 of the *Civil Procedure Rules* 2010.
  7. According to the applicant, Kadhi sat as an assessor on appeal is simply executing a judgment, he has provided his opinion and there is no statute that bars from executing the decision which he has not made. Because the Kadhi is not sitting on appeal or review of High Court orders or judgment. Lastly, she submits that no grounds advanced in the preliminary objection has been substantiated hence it must be dismissed with cost to the applicant.
  8. On the other hand, the respondent submits opposing the application on grounds that the Kadhi's Court does not have jurisdiction to enforce orders emanating from the high court. He cited authorities from superior courts including, *Samuel Kamau Macharia & Others v Kenya Commercial Bank Ltd & Others* [2012], Misc. App. No. 8 of 2021; *Peter Mungai v. Joseph Ngaba Kuria and 2 others, Lilian S v. Caltex Oil Kenya* [1989] eKLR, *Phoenix of E.A. Assurance Company Ltd v M. Thiga t/a News Paper service* [2019] eKLR, *Orange Democratic Movement v Yussuf Ali Mohamed & Others* [2018] eKLR, and *Julia Muthoni Gitthinji v. African Banking Corporation Ltd* [2020] eKLR.
  9. He also cited Article 170(5) of the *Constitution of Kenya* 2010, Rule 88 and 90 of the *Kadhi's Court (Procedure and Practice) Rules*, Section 7 of the *Civil Procedure Act*, Order 22 of the *Civil Procedure Rules* 2010, Rule 33 of the *High Court (Organization and Administration) Rules*.
  10. Finally, he concludes that this court is not clothed with power to enforce the high court without direction emanates from high to assist to execute its orders. He therefore prays for the application to be dismissed with cost to the respondent.
  11. I have considered the submissions and grounds set out by both sides, the provisions of the laws and the authorities cited. The sole issue manifest for determination of this matter is whether the Kadhi's has mandate to entertain the instant application for execution of High Court judgment and subsequent orders in the Civil Appeal E006 of 2025 at Marsabit.
  12. The said matter is a succession cause no. 36 of 2022 determined in this court by Hon A. D. Wako, Principal Kadhi. Where it went on appeal by the respondent to Marsabit High Court, and I happened to be one of the assessors at appeal.
  13. I must deal with the issue of whether I have jurisdiction over this application seeking enforcement of the appellate court's orders issued on 6<sup>th</sup> March 2025. Nothing the court will do without jurisdiction, because jurisdiction is everything, the court must have jurisdiction before saying anything over a case



before it. In *Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited* [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

14. Jurisdiction of the Kadhi's Court, Under Article 170 of the *Constitution*, the Kadhi's Court is a subordinate court with jurisdiction limited to matters of personal status, marriage, divorce, and inheritance where both parties are Muslims and consent to its jurisdiction. Likewise, section 5 of the *Kadhi's Court Act* Cap 11 replicates the same.
15. However, with regard to the execution of High Court orders, the law is settled. Rule 88 of the *Kadhi's Court (Procedure and Practice) Rules* 2020 legal Notice No. 203 of 2020, provides on execution of any order shall be made to the court and be supported by an affidavit setting out a statement of non-payment or non-compliance and exhibiting an affidavit of service of the order. The court may make such orders as the circumstances may deem just.
16. The court referred by in the *Kadhi's Court (Procedure and Practice) Rules* 2020 herein is the Kadhi's Court as defined in section 90 and 92 of the same *Rules*, that a judgment creditor may present to the court application for an order for execution in Form KC 13 and the Kadhi, if there appears no reason why execution should not issue, shall sign and seal the order in duplicate. Where the Court is satisfied that the judgment-debtor has satisfied the judgment, the Court may, on the application of the judgment-debtor, record in the file that the judgment has been satisfied. In the light of these rules the court referred to herein is Kadhi's Court.
17. By the *Civil Procedure Act* at section 29, which provides the court as to which application for execution is made, is the “court which passed a decree”, in relation to the execution of decree, except where the context otherwise requires, include-
  - (a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the court of first instance; and
  - (b) where the court of first instance has ceased to exist or to have jurisdiction to execute it, the court which, if the suit wherein the decree was passed were instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit. In view of the above provisions, the court of first instance where the instant matter emanated from is the Kadhi's court.
18. The matter in question is a succession cause which this court has jurisdiction over it, as per parties are professing Islamic faith and had submitted to the jurisdiction of Kadhi's court on first time when the matter was on trial at the beginning. The orders or decree of the high court upheld most of the decisions of this court and was in favour of the applicant. The respondent who is objecting to Kadhi's court jurisdiction to execute high court's orders is determined by the High Court as not beneficiary of the estate and likewise is being removed from joint administratorship by the high court.



19. Order 22 of the [Civil Procedure Rules](#) 2010 mainly provides modes of execution of decrees and orders. Rule 24 of the same order (Order 22) of [CPR](#) 2010, further allows that the decree may be transferred from the court which passed the decree to another court for its execution. This states;

“Any order of the court by which a decree is passed, or of such appellate court as aforesaid, in relation to the execution of such decree, shall be binding upon the court to which the decree is sent for execution”.

20. Also, Order 22 rule 6 of the [CPR](#) 2010, it further explains how a decree sent to another be applied for execution. The rules states as -

“Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A: Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days’ notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution”.

21. The provision which provides for transfer of the decree or order is also rule 4 of Order 22 of [CPR](#) 2010, which explains procedure on how such decree shall be executed. It states;

“The court sending a decree for execution by another court shall send—

- (a) a copy of the decree;
- (b) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unexecuted; and
- (c) a copy of any order for the execution of the decree, or, if no such order has been made, a certificate to that effect.”

22. Rule 5 of Order 22 of the same, states;

“The court to which a decree is so sent shall cause such copies and certificates to be filed, without any further proof of the decree or order for execution, or of the copies thereof, unless the court, for any special reasons to be recorded under the hand of the judge, requires such proof”.

23. The subject of this application is a decision from the High Court at Marsabit; although, the appeal was because of the judgment from the Kadhi’s court at Moyale. To my view the court which passed the decree brought here for execution was and is the High Court but not the Kadhi’s Court. In the light of the above fact and provisions therein, as in [Civil Procedure Act](#) and [Rules](#), notably the [Kadhis’ Courts \(Procedure and Practice\) Rules](#), 2020, it is the High Court which has jurisdiction to execute its judgment or orders unless otherwise expressly stated in the judgment or Orders thereof to direct the



Kadhi's Court at Moyale to execute its decree, the Kadhi cannot assume to execute High Court orders or decree. This as per provision of laws at Section 31(2) of [CPA](#), which states,

“The court which passed a decree may of its own motion send it for execution to any court of inferior but competent jurisdiction”.

Thus, where a decree emanates from the High Court, it must either be executed by the High Court or be transmitted to a subordinate court with jurisdiction, for this case the Kadhi's court, if accompanied by proper registration and transmission of the decree for execution can execute the high court order.

24. Further, practical challenges—such as the absence or unavailability of a High Court judge or registrar—cannot confer jurisdiction where none exists. Also, the urgency or welfare of children does not change jurisdiction. While the intention is noble and urgent (paying school fees), jurisdiction is a matter of law, not convenience. The Kadhi cannot act without a High Court order authorizing him to execute or supervise compliance.
25. Therefore, this Court finds that it lacks jurisdiction to execute the High Court's judgment in Civil Appeal No. E006 of 2022 in the absence of an express directive or formal transmission under the applicable rules.
26. In the case of [Auma v Khaduli](#) (Civil Appeal E061 of 2024) [2024] KEHC 11934 (KLR), R.E Aburili J. in his finding at paragraph 44 states:

“This in my view was an error of law as the trial court being a subordinate court lacks the jurisdiction to enforce the taxation orders emanating from the High Court which has a procedure laid out for execution of its orders spearheaded by the Deputy Registrar of the Court. The trial court further lacked jurisdiction to enforce as against the appellant, settlement of costs which were never assessed in the first instance as the only bill of costs filed was withdrawn on the same day as stated above in 2012”.

27. The Respondent also applied for the recusal of Hon. Adan Galgalo, alleging bias due to his role as an assessor in the appeal. While every litigant has a right to an impartial hearing, the threshold for recusal is a real likelihood of bias, not mere participation in prior proceedings.
28. That said, given the Court's finding on jurisdiction, this issue is now moot, as this Court cannot proceed with enforcement in any event.
29. This Court declines jurisdiction to entertain the Applicant's Notice of Motion dated 16th April 2025 on the ground that it seeks to execute High Court orders, which this Court cannot lawfully enforce without:
  - a. An express direction from the High Court, or
  - b. Formal transmission and registration of the decree as per Order 22 Rule 6 of the [Civil Procedure Rules](#).
30. The Applicant is advised to seek appropriate execution orders directly from the High Court or pursue formal transmission of the decree to an appropriate court.
31. In light of this ruling, all other pending applications, including the Respondent's Notice of Motion dated 30th April 2025, are rendered moot.
32. Each party shall bear their own costs.  
Orders accordingly.



**DATED AND DELIVERED AT MOYALE ON THIS 19<sup>TH</sup> DAY OF MAY 2025.**

**HON. ADAN GALGALO**

**PRINCIPAL KADHIKADHI'S COURT – MOYALE**

In the open Court and in the absence of:-

Mr John Behailu for the Applicant

Mr Yussuf for the Respondent

