



REPUBLIC OF KENYA



**KENYA LAW**  
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**Orre v Ali (Family Appeal E001 of 2024)  
[2025] KEHC 15112 (KLR) (Family) (27 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15112 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ISIOLO  
FAMILY  
FAMILY APPEAL E001 OF 2024  
SC CHIRCHIR, J  
OCTOBER 27, 2025**

**BETWEEN**

**ARBE ORRE ..... APPELLANT**

**AND**

**ABDULLAHI OSMAN ALI ..... RESPONDENT**

*(Being an Appeal from the Ruling of Hon. Gavava .A.M (SRK) delivered on 20th June 2024 in Isiolo Kadhi's court Divorce cause No. E011 of 2024)*

**JUDGMENT**

1. The Appellant herein filed Divorce Cause No. E002 of 2024 at Isiolo Chief Magistrate's Court seeking for dissolution of marriage. The Respondent filed a response to the petition, but at the same time, filed a fresh petition at Isiolo Kadhi's Court being Kadhi Divorce Cause Number E011/2024, seeking the same relief.
2. This prompted the Appellant to file a preliminary objection ( The objection) to the divorce cause at the Kadhi's Court, which objection is the subject matter of this Appeal.
3. The objection was based on the following grounds:
  - a). That the respondent has under Article 170(5) of *the Constitution* of Kenya, elected not to submit herself to hournable Kadhi's jurisdiction.
  - b). That the matter is sub-judice having been filed way after Isiolo Chief Magistrate's Court Divorce Cause Number E002/2024 was lodged on 27.2.2024, was served and responded to by the petitioner.



4. The Honourable Kadhi heard the objection and in a ruling delivered on 20<sup>th</sup> June, 2024 dismissed it . It is the said ruling that has given rise to this appeal.

### **Memorandum of Appeal**

5. In the memorandum of appeal dated 19.7.2024 the Appellant has presented the following grounds for consideration:
  - a). That the Honourable Court erred in law in failing to find that the matter was sub-judice.
  - b). The Honourable Court erred in assuming jurisdiction contrary to Article 175(5) of the Constitution of Kenya and the Kadhi's Court Act.
6. The appeal was heard by way of written submissions.

### **Appellant's submissions**

7. It is the Appellant's submission that in terms of Section 16 of Civil Procedure Act( CPA), the Khadi's Divorce cause No. E022/2024 was sub-judice; that there was already in existence a suit at the Chief Magistrate which had been filed earlier and was yet to be determined. The Appellant has relied on the Supreme Court decision in the case of Kenya National Commission on Human Right vrs AG and 16 others ( citation not provided) and Republic vs paul kihara kariuki, Attorney General & LSK (2020) eKLR to buttress her submissions on the concept and effect of sub-judice rule. The Appellant points out that the divorce cause at the chief magistrate court was filed on 27.02.2020 while the one at the Kadhi's court was filed on 8.2.2024 , and thus, in arriving at its finding the trial court was breaching section 6 of CPA.
8. On whether the khadi's court erred in assuming jurisdiction over the matter, the appellant submits that pursuant to Article 170(5) of Constitution and section 5 of Kadhi Court Act, it is evident that the jurisdiction of Kadhi's court is determined, not only by the subject matter of the claim ,but also by the faith of the litigant.
9. It is further submitted that the jurisdiction of the Kadhi's court is determined by 3 factors namely,- the subject matter of the claim or dispute, the Muslim faith and the party's submission to the jurisdiction of Kadhi's court. In this regard the decision in the case of Genevieve Bertrand vs Mohammed Atham Maawiya & Ano. (2014) e KLR was relied on. It is stated that the Appellant herein neither professed the Muslim Faith nor had submitted herself to the jurisdiction of the Kadhi's Court. It is the Appellant's further submission that neither a party's acquiescence nor Court's own motion can confer jurisdiction; that the issue of jurisdiction can be raised at any stage of the proceedings. To buttress her submissions on the question of jurisdiction and the fact that it can be raised any time, the Appellant has relied on the decision on the case of Isaac Alouch Polo Aluochier vs IEBC 9petition number 2. (e023) of 2022 and Jamal Salim vs Yusuf Abdullahi Abdi & Ano(2018) e KLR.
10. The respondent did not file any submissions.

### **Analysis and Determination**

11. This being a first appeal, the mandate of this Court is to review the evidence , carry out its own evaluation and arrive at its own findings.( see : Selle& Ano vs Associated Motor Boat CO. Ltd. ( 1968)E.A 123)
12. I have duly considered the grounds of appeal, the trial court proceedings, the Ruling and the appellant's submissions and have identified the following issues for determination:



- a. Whether the Kadhi's Divorce Cause Number E011 of 2024 was sub-judice.
  - b. Whether the Kadhi erred in assuming jurisdiction in the divorce cause.
13. The above issues were raised by way of preliminary objection. Before proceeding to determine them, it is imperative to ascertain whether the objection herein met the threshold of a preliminary objection.
  14. The concept and nature of a preliminary objection has been the subject of many past decisions of the superior courts . In this regard I can do no more than to refer to the famous decision in the case in Mukisa Biscuit manufacturing co. Ltd -vs- West -end distributors ltd (1969) EA.696 where the court held: “.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. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
  15. In the present case , the sub-judice rule is a principle of law and indeed, is anchored on section 6 of the *civil procedure Act*. Jurisdiction is also both a principle of law and in the present case , is raised on the basis of constitutional and statutory provisions, namely Article 170(5) of *the Constitution* of Kenya and Section 5 of the Kadhi's Court Act, respectively
  16. Thus both grounds of objection are on points of of law and hence they have met the threshold of a preliminary objection.

**Whether the Kadhi's Divorce Cause Number E011 of 2024 was sub-judice.**

17. The sub-judice rule is founded on Section 6 of CPA. The section provides as follows: “No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
18. The nature and the rationale was of the rule was expounded by the supreme court in the case of Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] KESC 54 (KLR), where the court explained it as follows:
 

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9<sup>th</sup> Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives”.
19. The facts in this case are straight -forward. The Appellant filed for dissolution of marriage at the Chief Magistrate’s Court under Divorce Cause No. E002 of 2024. The petition was filed on 27.2.2024. Later,



on 15.3.2024 the Respondent filed Kadhi Divorce Cause Number E011 2024. The subject matter of the two petitions are the same, namely the dissolution of Marriage between the two parties herein. It is stated by the Appellant that the former suit was yet to be determined. This fact has not been challenged and therefore I accept the appellant assertion in this regard.

20. I have perused the ruling of the Hon. Kadhi and I have observed the he did not make a determination on the issue, though the Appellant had raised it. In the final orders, he ordered that the plaint should be served. This implies that he was ready to go on with the matter.
21. Section 6 of CPA and caselaw, on the sub-judice rule, have no ambiguity. To the extent that a similar divorce cause involving the similar parties was live at the chief magistrate's court then Kadhi Divorce Cause Number E011/2024 was sub-judice. By purporting to proceed with its determination of the later suit, the trial court erred.

#### **Whether the Kadhi erred in assuming jurisdiction in the divorce cause.**

22. The Jurisdiction of the Kadhi's Court is set out under Article 170(5) of *the constitution* of Kenya and section 5 of the Kadhi's Court's Act. Article 170 (5) provides as follows: "The jurisdiction of a Kadhi's 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." The above provisions of *the Constitution* are reproduced under Section 5 of the Kadhi's court's Act.
23. The decision of the court of Appeal in the case of GENEVIEVE BERTRAND ( supra) draws further clarity on the above two provisions. The court held:- The jurisdiction of the Kadhi's Court is specifically defined under Article 170 (5) of *the Constitution* and Section 5 of the Kadhi's Act, as "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 Court". 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."
24. The salient facts in this case are that the parties contracted a Muslim marriage; the Appellant has since abandoned the Muslim faith, and hence both parties are not Muslims, and further, the Appellant has expressly stated that she does not wish to submit to the jurisdiction of Kadhi's court. In the case of CKC & and Ano Vs ANC ( 2019) eKLR, the Court of Appeal held inter alia:

"Professing the Islamic faith and voluntarily submitting to the jurisdiction of the Kadhi's court are absolute preconditions for application of Islamic law to the appellants. If it were otherwise, the words "in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts" in Article 170(5) of *the Constitution* would be utterly meaningless."

25. I Further associate myself with the views of the Justice Onguto in the case of Fazleabbas Mohammed Chandoo v A.I Hussein - Kadhi, Kadhi's Court & 4 others [2015] KEHC 1922 (KLR) where he held:

"For the jurisdiction also to exist, the parties to the dispute must submit themselves to the jurisdiction of the Kadhis' Court. The parties must not only profess the Muslim religion but must also submit to the jurisdiction of the Kadhis Court. The jurisdiction is consequently consensual. So that where one party decides not to recognize the fact that the Kadhis' Court can resolve the dispute and declines to participate in the proceedings, the Kadhis' Court



is immediately divested or robbed of jurisdiction. In such a case the dispute must then be referred to the High Court or the magistrates' court for resolution.

26. I did not find any contest on the fact that the Appellant had ceased being a Muslim. The fact she does not wish to subject herself to Kadhi's Court is also not contested. The Authorities I have referred to simply state that the submission to the jurisdiction of kadhi's court is voluntary . I will hasten to add that even for a professing Muslim , the submission is still voluntary.
27. It is my finding that in terms of Article 170(5) and Section 5 Court's Act, and in the circumstances of the facts presented, the Hon. Kadhi had no jurisdiction to entertain Divorce Cause No. E11 of 2024.
28. In conclusion , the ruling of the Kadhi delivered on 20<sup>th</sup> June 2024 is hereby set aside and substituted with orders as follows:
  - a). It is hereby declared that Isiolo Kadhi's court Divorce No. E 011 of 2024 is sub-judice
  - b). The Kadhi's Court had no jurisdiction to entertain divorce Cause number E011/2024
  - c). Consequently the preliminary objection dated 22.4.2024 is hereby upheld.
  - d). Kadhi Divorce Cause No. E011 of 2024 is hereby struck off.
  - e). Each party to meet their own costs in respect of the Lower Court Cause and this Appeal.

**DATED SIGNED AND DELIVERED AT ISIOLO THIS 27<sup>TH</sup> DAY OF OCTOBER , 2025.**

**S. CHIRCHIR**

**JUDGE.**

In the presence of :

Roba Katelo- court Assistant

Ms. Oigara for the Appellant.

