



REPUBLIC OF KENYA



KENYA LAW
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**SGG v NT (Civil Appeal E029 of 2025)
[2025] KEHC 15620 (KLR) (Family) (30 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15620 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ISIOLO
FAMILY
CIVIL APPEAL E029 OF 2025
SC CHIRCHIR, J
OCTOBER 30, 2025**

BETWEEN

SGG APPELLANT

AND

NT RESPONDENT

RULING

1. The Appellant's Notice of Motion dated 30.06.2025 seeks orders as follows:
 - a. (Spent)
 - b. (Spent)
 - c. That this Honourable Court be pleased to grant stay of execution of the Ruling and Decree of the Kadhi's Isiolo in Matrimonial Application no. E005 of 2025, and all other consequential orders therein pending the hearing and determination of the appeal filed therein.
 - d. That this Honourable Court be pleased to discharge the exparte orders issued by the Kadhi's Court at Isiolo on 4th February, 2025 restricting the Applicant from access his Equity Bank Account, pending the hearing and determination of the Appeal.
 - e. That the costs of this application be provided for.

The Applicant's case

2. The Application is supported by the Applicant's affidavit as well as the grounds on the face of the application. It is the Applicant's case that following an application filed by the respondent, under Certificate of Urgency before the Kadhi's court at Isiolo, in Matrimonial Cause Number E005 /2025 , the Hon. Kadhi issued orders barring access to his Equity bank Account. In his response to the



application, he filed a replying Affidavit as well as a preliminary objection challenging the jurisdiction of Kadhi's court to entertain the cause.

3. The Applicant's objection was based on grounds o that he was not a Muslim, and had not submitted to the jurisdiction of Kadhi's court. He further stated that both parties reside in Merti and consequently the matter ought to have been filed at Merti Kadhi's court and not Isiolo.
4. In its ruling, the Hon. Kadhi held that the Applicant was a Muslim, had contracted an Islamic marriage and was therefore subject to the jurisdiction of kadhi's court, and dismissed the preliminary objection. The Applicant states that the said finding had no evidential basis.
5. He further faults the trial Kadhi for concluding that the Applicant had subjected himself to the jurisdiction of Kadhi's court by the mere act of filing a replying Affidavit to the respondent's Application and while ignoring the fact that the Applicant had filed a preliminary objection concurrently, with the said affidavit. It is further stated that it was not tenable for the trial kadhi to arrive at the conclusion that he had no territorial jurisdiction yet proceeded to make an order transferring the case to Merti kadhi's court. The trial court has further been faulted for failing to lift the exparte orders barring access to the Applicant 's Bank Account even after concluding that he had no territorial jurisdiction over the matter.
6. The applicant finally states that he has filed an appeal against the trial court's Ruling and the grounds are arguable and with high chance of success. He therefore seeks for a stay of the said Ruling pending the hearing and determination of his Appeal.

The respondent's case

7. It is the Respondent's case that the applicant had subjected himself to the Kadhi's Court and therefore the Kadhi's court had jurisdiction. She states that the restriction of access to the Applicant's Account was justified for purposes of securing her rights and interests, and to protect the substratum of the suit, as lifting the access will render the suit nugatory .
8. The Respondent further states that the Applicant has not demonstrated that he has an arguable appeal; that the order of transfer to Merti Kadhi's court for want of jurisdiction by the trial Kadhi was consistent with legal principles and do not warrant stay; that the grant of stay will simply delay the resolution of the matter. It is finally stated that the applicant is a Muslim and had submitted himself to the jurisdiction of the Kadhi's court.
9. The application was argued by way of written submissions.

Applicant's submissions

10. On principles of Stay Pending Appeal, the Applicant submits, inter-alia ,that where jurisdiction is an issue, then preserving status quo is essential, lest the appeal be rendered academic.
11. On the question of jurisdiction, the Appellant submits that in terms of Article 170(5) of the [*Constitution*](#) and Section 5 of the Kadhi's Court Act, Jurisdiction is not solely determined by the subject matter, but also by the parties' professed faith. In this regard the Applicant has relied on ZMS - PAS (2013) eKLR plus 3 Others decisions all of which emphasized that profession of Islamic faith by both parties to a suit ,is a condition precedent to the Kadhi's court's assumption of jurisdiction. It is further submitted that the trial khadi's conclusion that the Applicant was a Muslim contradicted the evidence presented by the applicant, and that it amounted to imposing a faith to the Applicant contrary to the freedom of religion enshrined under Article 32 of Constitution .



12. While relying on the decision of the court in the case of Re-estate of Abdikadir Abdi Ibrahim (deceased) 2023 KEKC 24 the Applicant further contends that merely filing a replying affidavit did not amount to subjecting himself to the jurisdiction of the Kadhi's particularly where a party has explicitly denied professing the Muslim faith.
13. The Applicant further argues that further to the above, the Kadhi's court had no territorial jurisdiction over the matter, as the cause of action arose at Merti, and hence should have been filed at the kadhi's court in Merti. In this regard, the Applicant has relied on the case Republic vs Kadhi's Court, Garsen & 2 others Exparte Leli Chaka Katana(2013) eKLR, where it was held that Khadi's territorial limits must be strictly observed.
14. On the substantial loss, it is submitted that, the Applicant is a retired teacher who solely depends on his pension, and restriction of access to his Equity account had caused him severe financial hardship, embarrassment and inability to meet his daily needs. The Appellant further submits that whether an appeal will be rendered nugatory depends on the circumstances of each case; That where enforcement of orders involves financial restriction threatening the Applicant's livelihood, then stay should be granted to balance equities and prevent irreparable harm. The cases of Reliance Bank Ltd vs Norlake investments Ltd (2002) 1 E A 227 and R vs Kahdi's Court, Garsen & 2 others (Supra) have been relied on.
15. Further on the restriction of access to his Equity Bank Account, it is submitted that the same was issued without notice to the Applicant and hence a violation of the rules of natural justice; were issued without jurisdiction in any event, and the Applicant who relies solely on his pension has been subjected to financial hardship.
16. It is submitted that the Application has been brought with undue delay as the ruling was delivered on 16.6.2025 and the Present Application filed on 30.06.2025.
17. Finally on security, it is submitted that the Applicant is willing to abide by any orders on security that the court may issue. On costs, It is submitted that it should follow the event.

Respondent's Submissions

18. The respondent reiterates that, the Applicant is a Muslim; that the orders issued by the trial court was to preserve the substratum of the petition ;and that lifting the orders will render the petition before the Kadhi's court, a nullity.
19. It is further submitted that, in terms of Order 42 Rule 6(1) & (2) of the Civil Procedure Rules, the Applicant has not met any of the conditions set out therein. On the barring access to the Applicant's Equity Account, the respondent submits that the Applicant has other sources of income that can sustain him pending appeal. That claiming that the said monies are for sustenance is not sufficient case and neither is it evidence of substantial loss. In this regard the respondent has relied on the decision on the case of Kenya Shell Ltd -Vs_ Kibini (1986) KLR 410.
20. The respondent has further submitted that it has not been demonstrated that she will be unable to refund the money, if any amount has been paid to her.
21. On security, it is submitted that the security must be one which will satisfy the decree as was held in the case of Mwaura Karuga Limit Enterprises -VS- Kenya Bus Services Ltd & 4 Others & Gianfranco & Ano Vs African Merchant Assurance Co. Ltd (2019) eKLR. And that in this case, the Applicant has not submitted any security.



Analysis And Determination

22. Upon consideration of the parties pleadings, submissions, the grounds of Appeal and the Ruling of the Hon. Kadhi delivered on the 16.6.25.,I have identified the following two issues for consideration:-
 - a. Whether stay should be granted.
 - b. Whether the Khadi's court orders of 4.2.2025 should be lifted.
23. The principles for granting stay pending appeal are set out under Order 42 (Rule 6(2) of the Civil Procedure Rules. This section of the law provides as follows: “ No order for stay of execution shall be made under subrule (1) unless—(a)the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and(b)such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
24. It is also trite law that the applicant must demonstrate that the Appeal is arguable and with high chances of success.

Substantial loss

25. The Applicant has submitted that being denied access to his account, to which his pension is deposited, has caused him financial hardship and embarrassment. The Respondent on the other hand ,while admitting that the Applicant is retired teacher, states that the Applicant has other sources of income and that the lack of sustenance has not been proved.
26. What constitutes substantial loss varies according to the circumstances of each case. The Applicant has averred that it's financial embarrassment and lack of substance. The respondent has demanded proof of lack of sustenance. In regard to this demand one wonders what proof does the respondent have in mind? Failure to eat three or two meals a day, or buy extra shirt for want of money, for instance, has no proof, save the applicant's own word or confession. Demanding for proof of such wants is rather misplaced. Further this court takes judicial notice, as a matter of common notoriety , that lack of reliable income leads to deprivation of basic needs and financial embarrassment. The Applicant therefore need not submit any other proof save what he has stated in his affidavit.
27. The Respondent has also stated that the Applicant has other sources of income. This is an assertion coming from the respondent. consequently, the evidential burden of proof fell on her (see section 109 of the *Evidence Act*). The respondent's submission that the burden is on the Applicant is therefore misconceived. Further in this regard , I associate myself with the finding of the High Court in the case of Republic -Vs- Kadhis Court Garsen (Supra), that substantial loss includes economic hardship, particularly in matrimonial disputes affecting sustenance.
28. On the question of delay if any , I am satisfied that the application was filed without any delay, as the same was filed about two weeks following the delivery of the ruling.

security

29. I have considered the issue of provision of security by the Applicant against the circumstances of this case. The Applicant has submitted that he is willing to comply with any orders on security that this court may make. This is not a money decree and I have observed that save to stop the Applicant from accessing his Bank, to provide maintenance and pay school fees for his last born child, there was no order of payment of any specific amount of money to the respondent, either as a lump sum or periodically. Thus there is no basis upon which this court can determine the amount that should be



deposited as security. However the court can order for security on costs, but this is a family dispute where it is the practice of courts not to award costs unless costs are an absolute necessity in the given circumstances. For the aforesaid reasons, I decline to make any order on security.

Whether The Appeal Is Arguable

30. The appeal raises two issues: the question of jurisdiction , and the issuance of substantive exparte order, namely the blocking of access to the applicant's account.
31. It is trite law that jurisdiction cannot be assumed as it is only conferred by the Constitution or statute; that when a court has no jurisdiction it downs its tools. Jurisdiction is a key principle of law and once raised as an issue on appeal then it is an arguable issue. In this case, the jurisdiction was challenged on grounds that one of the parties was not a Muslim and had objected to the submission to the Kadhi's court. Considered against the provisions of Article 170(5) of the Constitution and Section 5 of the Kadhi's court this ground of appeal is arguable.
32. Am therefore satisfied that the Applicant has satisfied all the prerequisite conditions for granting of stay pending Appeal.

Whether the Kadhi's order of 4/2/25 should be discharged

33. The order stopping the applicant's access to his account at Equity Bank was made pursuant to the Respondent's Notice of Motion dated 03.02.2025. In the said Application, the respondent had sought maintenance for herself and her children.
34. In regard to the said Application and the ruling delivered in respect thereof, it suffices to make the following observations;
 - a. The orders were made exparte, at the first instance, when the application was brought under certificate of urgency. The order was substantive, and it was evident that it was going to cause prejudice to the Applicant. Consequently, such an order should not have been made without the Appellant being given a chance to be heard. It went against the rules of natural justice and violated Appellant's Constitutional right to fair trial.
 - b. In her Application, respondent had not given reasons for blocking access to the account .It was certainly not a remedy to the plea for maintenance. The trial court too did not give justification for barring access to the Account .
 - c. There was no evidence of any of the children being of a minor Age. In the Respondent's own petition she had indicated that the youngest child was 18 years. Save for the fact that the youngest child was still in school, and may have been a justification for continued maintenance, this should have been disclosed in the Application as a sign of good faith. Otherwise the plea for children's maintenance was misleading.
 - d. However, the fact that the youngest child was still in school was admitted to by the Applicant, and he did submit receipts showing that he has been paying school fees.
 - e. Finally, it was contradictory of the Hon. Kadhi to order for maintenance and at the same time bar access to the Applicant's Bank Account. How was the Appellant supposed to provide maintenance and pay school fees as the Hon. Kadhi so ordered yet he could not access the funds? And when considered against the fact the Respondent too was not given any access to the same funds then the money has ended up being of no use to either party.



35. The order barring access was therefore prejudicial, unwarranted and served no purpose at all to either party or the child that still required maintenance.
36. In conclusion, the application is merited, and I hereby order as follows:
- a) Pending hearing and determination of the appeal herein an order of stay is hereby issued against the Ruling of 16.6.2025 delivered at Isiolo Kadhi's Court in the Matrimonial Application Number E005/2025.
 - b). The order of the Isiolo Kadhi's Court issued on 4.2.25 in Matrimonial Application number E005/2025 barring the Applicant's access to his account at Equity Bank Isiolo Branch is hereby set aside, and it is hereby ordered that the Applicant is hereby allowed to have access and operate the said Bank Account.
 - c). The Applicant will continue to pay school fees for the youngest child if she is still in school, and provide for the necessary sustenance.
 - d). Each Party to meet their own costs.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 30TH DAY OF OCTOBER, 2025.

S. CHIRCHIR

JUDGE.

In the presence of :

Roba Katelo – court Assistant

Ms. Githinji for Mr. Mbabu for the Applicant .

NT – The Respondent.

