



REPUBLIC OF KENYA



**AA v SAS (Family Appeal E030 of 2025)
[2025] KEHC 17259 (KLR) (18 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 17259 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E030 OF 2025**

**G MUTAI, J
NOVEMBER 18, 2025**

BETWEEN

AA APPELLANT

AND

SAS RESPONDENT

RULING

1. The court below delivered a ruling on 5th May 2025, vide which it reviewed or varied its earlier orders of 20th March 2025. The court issued orders regarding the minors' custody. The matter before the Kadhi was a divorce cause between the parties hereto. In the said cause, the respondent herein was a petitioner while the appellant/applicant was the respondent.
2. Being aggrieved, the appellant/applicant filed a memorandum of appeal dated 5th May 2025, vide which he prayed that the appeal be allowed, that the court's ruling of 5th May 2025 in Mombasa Kadhi's Court Divorce Cause No E301 of 2024 be set aside, and that the costs be awarded to him.
3. The appellant/applicant also filed a notice of motion application dated 5th May 2025, vide which he sought to have the execution of the impugned ruling stayed pending the hearing and determination of the appeal.
4. The applicant's application was opposed. The respondent's counsel filed her deposition, sworn on 12th May 2025, and at the same time filed grounds of opposition dated 12th May 2025. The said grounds of opposition, which really are a preliminary objection on a point of law, are the subject of this ruling. The preliminary objection is based on three grounds, to wit that: -
 - a. The honourable court lacks jurisdiction to entertain the motion by virtue of the doctrine set out in sections 6 and 7 of the *Civil Procedure Act*;
 - b. The motion as drawn is an abuse of the process of the court;



and

- c. The appeal is incompetent, invalid, and fatally defective.
5. The respondent urged that the notice of motion dated 5th May 2025 be struck out and or dismissed with costs.
6. The preliminary objection was canvassed by way of written submissions. The submissions of the respondent, in favour of the objection, are dated 19th May 2025, while those of the applicant are dated 27th May 2025.
7. I have considered the parties' respective submissions. In my view, the issue for determination is whether the matter before me is res judicata and or res subjudice, and whether the application is an abuse of the process of the court.
8. It is trite law that two appeals before this court emanates from proceedings in the Kadhi's Court between the parties hereto, that is to say, High Court Family Appeal No E069 of 2024; Abdulrahaman Abdalla v Salma Ahmed Said, which arose out of the judgment of the Kadhi's Court delivered on 22nd August 2024, and this appeal which arose out of the decision we have already referred to. Does that make this matter res judicata or res subjudice? I will first look at the statutory provisions.
9. Section 6 of the *Civil Procedure Act* states that: -

“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.”
10. Section 7 of the *Civil Procedure Act* states that:-

“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.”
11. In the case of John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR), the Supreme Court held that: -

“59. For res judicata to be invoked in a civil matter, the following elements must be demonstrated:

 - a) There is a former judgment or order which was final;
 - b) The judgment or order was on merit;
 - c) The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
 - d) There must be between the first and the second action identical parties, subject matter, and cause of action.



(See Uhuru Highway Developers Limited v Central Bank of Kenya & others [1999] eKLR and See the decision of the Court of Appeal in Nicholas Njeru v Attorney General & 8 others Civil Appeal 110 of 2011 (2013) eKLR)”

12. Applying the dictum in the above-cited case to this matter, I note that whereas most of the above reference elements are present, this appeal and that in E069 of 2024 arise from different decisions of the court below. In my view, an aggrieved litigant is entitled, subject to what the rules say, to contest the decision of the trial court by appealing to a higher court. This is so because the courts are not infallible.
13. This is, in fact, what happened in this case. That said, having multiple appeals arising from a single matter is not ideal. It would be better if all the issues were addressed in a single appeal, so that the court hearing the appeal can deliver a single decision regarding all the pending matters. That, in my view, would result in optimal use of what I consider to be a very scarce resource: judicial time.
14. The upshot of the foregoing is that the preliminary objection is without merit. The same is dismissed with no orders as to costs.
15. It is so ordered.

DATED AND SIGNED THIS 18TH DAY OF NOVEMBER 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Bundi, for the Appellant/Applicant;

Mr Asige, for the Respondent; and

Arthur – Court Assistant.

