GMA v HA (Civil Appeal E003 of 2025)
[2025] KEHC 17743 (KLR) (Family) (1 December 2025) (Judgment)

Neutral citation: [2025] KEHC 17743 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

CIVIL APPEAL E003 OF 2025

CJ KENDAGOR, J

DECEMBER 1, 2025

BETWEEN

GMA ..... APPLICANT

AND

HA ..... RESPONDENT

(Being an Appeal from the Ruling of the Kadhis Claims Court at Nairobi, Hon. M.G. Randu (SRM) delivered on 11{{^th}} December, 2024)

JUDGMENT

1. The Respondent sued the Appellant at the Kadhi's Court seeking several orders against him. She claimed that they are married to each other since November, 2003 but their union has broken down. She sought official dissolution of the marriage, and maintenance, among other orders. The Appellant did not file his defense to the Petition and the matter went for formal proof hearing on 1st October, 2024, after which it was set for judgment on 30th October, 2024. He filed an application dated 4th October, 2024 seeking to arrest the judgment, to have the petition reheard, and be granted leave to file a response to the petition.

2. The Court delivered a ruling on 11th December, 2024, in which it allowed the Appellant's application. It arrested the judgment and directed that the Petition be reheard. The Court also directed the Appellant to pay the Respondent sum of Kshs.100,000/= in throw away costs within 30 days of the ruling.

3. The Appellant was dissatisfied with the ruling and appealed to this Court vide a Memorandum of Appeal dated 8th January, 2025. He listed the following grounds of appeal;

    1. The Learned Magistrate erred in law and fact in finding that the Respondent had failed to file his defense in time as provided for under the Kadhis Court (Procedure and Practice) Rules.

    2. The Learned Magistrate erred in law and fact in failing to consider and apply the principles and rules of service of hearing notices on the adversarial party prior to the hearing date.

    3. The Learned Magistrate erred in law and fact in awarding the Respondent throw away costs of Kshs.100,000/= which amount was not only manifestly excessive but lacked any justification or qualification.

    4. The Learned Magistrate erred in law and fact by abusing discretionary powers and consequently failing to act judicially in the circumstances of this case.

    5. The Learned Magistrate erred in law and fact by failing to consider the merits of the Appellant's submissions.

    6. The Learned Magistrate erred in law and fact in finding and holding that the Respondent's suit conduct was valid and proper without considering and placing sufficient weight on the evidence and submissions of the Appellant and without analyzing the entire evidence on record thereby arriving at an erroneous decision.

4. He asked the Court to allow the appeal and set aside the ruling and order made by the Honourable Kadhis Court, Hon. M. G. Randu, in KCDC/E238/2024 on 11th December, 2024 requiring him to pay the Respondent Kshs.100,000/= in throw away costs within 30 days from 11th December 2024.

5. The Appeal was canvassed by way of written submissions.

Appellant's written Submissions

6. The Appellant submitted that the lower Court was not justified in awarding throw away costs to the Respondent. He relied on Rule 26, 35 (2), and 43 of the Kadhis Courts (Procedure and Practice) Rules. He argued that the formal proof hearing was conducted prematurely and thus there was no basis for placing the blame on him. He stated that the formal proof happened on 1st October, 2024, when the period during which he was supposed to file his defense was yet to lapse. He stated that he had filed his Notice of Appointment on 18th September, 2024 and that he had 15 days from that day to file his response. He argued that the 15 days lapsed on 2nd October, 2024 yet the formal proof hearing happened on 1st October, 2024.

Respondent's written Submissions

7. The Respondent submitted that the award of throw away costs is an unfettered discretion of the Court and furthermore, the Appellant has not produced sufficient proof how the costs are in excess. She argued that the award of Kshs.100,000/= is a proper exercise of judicial discretion and reflects the inconvenience and financial prejudice she suffered. Lastly, she submitted that the Appellant is a man of means and very much capable of paying the said throw away costs. She asked this Court to retain the award of throw away costs as granted by the lower Court.

Issues for determination

8. Having considered the grounds of appeal and the submissions of the parties, I find that there are two issues for determination;

    a. Whether the formal proof hearing was premature.

    b. Whether the lower Court was justified in awarding the Respondent Kshs.100,000/= as throw away costs.

9. The role of this Court as the first appellate court is well-settled. It is trite law that the duty of the first appellate Court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. As the Court is re-evaluating the evidence, it is required to bear in mind that it had neither seen nor heard the witnesses. This principle was set out in Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123:

> "...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ..."

10. The said principle was restated in Okeno vs. Republic (1972) EA 32, where the East Africa Court of Appeal stated as follows;

> "An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

11. Based on these authorities, this Court is being required to undertake a wholesome review of the Appellant's Notice of Motion dated 4th October, 2024, and come up with its conclusion. In other words, the Court is being invited to relook at the merits of the said Notice of Motion to determine whether the lower Court was justified in determining the application the way it did.

12. As a way of background, I shall reproduce the contents of the said Notice of Motion to set the context. In the said application, the Appellant sought the following orders;

    1. Spent.

    2. Spent.

    3. That this Honourable Court be pleased to direct the Petition dated 23rd August 2024 be reheard and that the Respondent be granted leave to file a response to the Petition dated 23rd August 2024.

4. That the Respondent's Answer to Petition and cross petition, witness statement, list of documents, list of witnesses and annexures attached hereto be deemed duly filed upon payment of the requisite Court fees.

5. That costs of this application be provided.

13. The grounds of the application were enumerated on its face and supported by an affidavit sworn by the Appellant and dated 4th October, 2024 and a further affidavit dated 23rd October, 2024. He stated that his advocates filed and served their notice of appointment within time; being within 15 days from 3rd September, 2024. He also averred that his advocates thereafter had 15 days from 18th September, 2024 to file their response; ending 2nd October, 2024. He averred that he was not served with the hearing notice for the formal proof despite the fact that he had served the Respondent with a notice of appointment of his advocates on 18th September, 2024.

14. The Respondent responded to the application through a replying affidavit sworn by her and dated 18th October, 2024. She stated that she served the Appellant with the petition but the Appellant did not file a response within the stipulated time. She averred that the lower Court satisfied itself on the issue of service before fixing the matter for formal proof. She stated that, by dint of practice, she is not under any obligation in law to serve the Appellant when the Court is satisfied with service and the matter proceeded as an undefended cause.

Whether the formal proof hearing was premature

15. The first issue for determination is whether the formal proof hearing that took place on 1st October, 2024, was premature. In other words, this Court must ascertain whether the Appellant's window for filing his response had lapsed by the time the lower Court heard the formal proof on 1st October, 2024.

16. The law governing the conduct of matters before the Kadhis Court is the Kadhis' Courts (Procedure and Practice) Rules. The most relevant provisions for this instant case is Rule 26 and Rule 35 (2) which provides as follows:

26. Entering appearance

The respondent must enter appearance within 15 days of service of the summons to enter appearance.

35. Filing of pleadings

(2) A response shall be filed within fifteen days of filing a memorandum of entering appearance.

17. I have obtained the lower Court file to ascertain the procedural correctness of the proceedings at the lower Court. The record shows that the Appellant was served with summons on 3rd September, 2024. There is an affidavit of service on record sworn by one Bashir Mumbaha. The Appellant seems to admit this fact in his further affidavit dated 23rd October, 2024. The question now turns on whether the Appellant entered appearance within the 15 days stipulated by Rule 26 of the Kadhis' Courts (Procedure and Practice) Rules outlined earlier above.

18. The Appellant, in his further affidavit dated 23rd October, 2024 averred that he filed and served the notice of appointment of his advocates within time; being within 15 days from 3rd September, 2024. The Respondent denies this. I have relooked at the evidence on record at the lower Court to see whether he indeed filed and served the notice of appointment as he claimed.

19. I have seen a copy of the Notice of Appointment of Advocates for Yunis Mohamed & Associates Advocates. It is dated 18th September, 2024 but it was received by the Kadhi's Court on 22nd November, 2024 (The Court's stamp indicates that the Court received the Notice of Appointment on 22nd November, 2024).

20. I have also noticed that the Appellant contradicted himself on this issue. In his Supporting affidavit dated 4th October, 2024, he stated that he was unable to file its Notice of Appointment within time because the e-filling Platform had malfunctioning problems for the better part of September, 2024. However, he changed this position and stated different facts in his further affidavit dated 23rd October, 2024. In the latter affidavit, he averred that he filed and served the notice of appointment of his advocates within time; being within 15 days from 3rd September, 2024. I note that these are two different statements on one factual issue and this Court cannot reconcile the contradictions.

21. In my view, it is more likely than not that the Appellant did not file the Notice of Appointment of Advocates to the Court within 15 days of service of the Summons. This is based on his admission that he had challenges filing the same in the CTS as well as the evidence of a copy of the Notice of Appointment, which indicates that the lower Court received and stamped the said Notice of Appointment on 22nd November, 2024.

22. In addition, the Appellant did not provide evidence to show this Court that his challenges in accessing CTS prevented him from filing the Notice of Appointment within the 15 days. In the lower Court, he produced a copy of an email in which he told the ICT Support that he had challenges accessing his law firm account. He wrote this email to the ICT department on 27th September, 2024. In my analysis, the Appellant cannot blame the alleged ICT challenges to his current predicament because, by the time he wrote the email, the 15 days within which he was to file the Notice of Appointment/response had long lapsed.

23. In the end, I make a factual finding that the Appellant did not file the Notice of Appointment of his Advocates on 18th September as he alleges, and hence did not enter appearance/file response within the 15 days as stipulated by law. Based on the available evidence and in the absence of other evidence, I find that he filed the Notice of Appointment of his advocates on 22nd November, 2024 as evidenced by the stamped copy alluded to earlier.

24. Rule 47 (2) of the Kadhis' Courts (Procedure and Practice) Rules gives the Court the discretion to set a matter for formal proof where a response has not been filed within the prescribed period. It also provides that the Kadhis Court should direct the Petitioner to issue a hearing notice (for the formal proof) to the other party. The rule provides as follows;

> 47. First direction hearing
>
> (2) Where no response or objection is filed within the prescribed period, the Court may, on the application of the petitioner or on its own motion, direct that the matter proceed to formal proof and issue the appropriate notice.

25. The Appellant claimed that he was not served with a hearing notice for the formal proof. The Respondent admitted that she did not serve him with the hearing notice. She submitted that, by dint of practice, she was not under any legal obligation to serve the Appellant, arguing that the Court was satisfied with service and the matter proceeded as an undefended cause.

26. I do not agree with the Respondent's submissions that she was not under any legal obligation to serve the Appellant with the Hearing notice for the formal proof. It is a common practice in our Courts that where a court sets a matter for formal proof, it will also order for a hearing notice to issue.

27. I have relooked at the record of the lower Court to determine whether the Kadhis Court directed the Respondent to serve the Appellant with a hearing notice for the formal proof. It appears to me that the lower Court did not direct the Respondent to issue a hearing notice to the Appellant. I also noted that the formal proof hearing took place on 1st October, 2024, and that on that date, the lower Court did not inquire from the Respondent whether she had issued a hearing notice to the Appellant.

28. On that ground alone, I find that the formal proof hearing violated Rule 47 (2) of the Kadhis' Courts (Procedure and Practice) Rules, for want of a hearing notice. I therefore find that the same was premature.

29. Having found as such, the second issue for determination aborts. The question on whether the Court was justified in making the award for throw away costs is not open for interrogation because the formal proof hearing was conducted prematurely and in contravention of Rule 47 (2) of the Kadhis' Courts (Procedure and Practice) Rules for want of a hearing notice.

Disposition

30. The Appeal succeeds.

31. The lower Court's order issued on 11th December, 2024, directing the Appellant to pay the Respondent sum of Kshs.100,000/= in throw away costs within 30 days of the order is hereby set aside.

32. This being a family matter, I order that each party shall bear their own costs of this appeal.

33. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 1ST DAY OF DECEMBER, 2025.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Ms. Akinyi, Advocate holding brief for Yusuf, Advocate for Respondent

No appearance for Appellant