

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KIBERA**  
**FAMILY APPEAL NO. E001 OF 2025**

**MAHMUD KARIUKI**

**KIBUE.....APPELLANT**

**VERSUS**

**SULEIMAN WAWERU QIBUE.....1<sup>ST</sup>**

**RESPONDENT**

**ZAINA WANGARI.....2<sup>ND</sup>**

**RESPONDENT**

**ZAHRA KIBUE.....3<sup>RD</sup>**

**RESPONDENT**

*(Being an appeal against the ruling delivered on 8<sup>th</sup> September 2025 by Hon. Muktar B. Salat (P.K) at Kibera Kadhi Court Succession Cause No. E004 of 2024 Mahmud Kariuki Kibue vs Suleiman Waweru & 2 Others)*

**JUDGEMENT.**

1. This judgment is made pursuant to an interlocutory appeal challenging the ruling of the Kadhi's Court delivered on 8<sup>th</sup> September 2025. The memorandum of appeal dated 18<sup>th</sup> September 2025 raises thirteen grounds, which coalized into one central issue: whether the learned Kadhi erred in law and fact in permitting the production and reliance on a forensic document examiner's report in circumstances that infringed the Appellant's right to a fair hearing.
2. The Appellant contends that the Sub-County Criminal Investigations Officer who produced the report was neither its author nor duly sworn, and was incapable of speaking to its methodology or findings. He further argued that the Kadhi failed

- to exercise discretion to summon the maker of the report for cross-examination, despite the report being pivotal to the dispute.
3. The appellant avers that the report was produced during a mention, without prior notice or service, at a stage when the matter remained at pre-trial. No witness statements had been filed, no documents exchanged, and no party had testified. In those circumstances, the Appellant maintains that the learned Kadhi misdirected himself by treating the application as one seeking to re-open concluded proceedings, when no substantive hearing had commenced. The Appellant further faults the reliance on Article 159(2)(b) of the Constitution to privilege expediency over the substantive guarantees under Article 50, and for shifting to the Appellant the burden of curing an irregular process occasioned by ambush.
  4. The Appellant accordingly seeks orders that the appeal be allowed; that the ruling of the Kadhi's Court delivered on 8<sup>th</sup> September 2025 be set aside; that the forensic document examiner's report dated 28<sup>th</sup> May 2025 be expunged from the record or, in the alternative, that its maker be summoned for examination and cross-examination; that the matter be remitted to the Kadhi's Court for further proceedings in compliance with the right to a fair hearing; and that costs of the appeal be provided for.
  5. The appeal was canvassed by way of written submissions. The Appellant contended that the learned Kadhi wrongly declined to exercise discretion to recall a witness whose evidence was central

to the dispute, thereby infringing the Appellant's right to a fair hearing.

6. It was submitted that the application was properly brought under section 146(4) of the Evidence Act and Order 18 rule 10 of the Civil Procedure Rules, both of which vest the court with wide discretion to recall a witness at any stage where the interests of justice so demand. The Appellant argued that the discretion to recall a witness must be exercised judiciously, with the court balancing expedition against substantive justice and considering whether any prejudice to the opposing party is irreparable or compensable by costs.
7. It was emphasised that the application did not seek to re-open a concluded case. The proceedings before the Kadhi's Court were still at the pre-trial stage. No party had testified and the substantive hearing had not commenced. The Appellant merely sought to meaningfully challenge expert evidence that had been irregularly introduced. That the forensic document examiner's report dated 28<sup>th</sup> May 2025 was said to be pivotal to the dispute, as it concerned the authenticity of an agreement allegedly executed by the deceased and which, if relied upon, would effectively disinherit the Appellant and other beneficiaries. Despite its centrality, the report was produced through a secondary witness who was neither its author nor an expert.
8. The Appellant submitted that denial of the opportunity to cross-examine the maker of the report violated Article 50(2)(k) of the Constitution. Reliance was placed on **Moses Ndichu Kariuki v Republic [2009] eKLR**, where the Court of Appeal held that the

right to cross-examine is the linchpin of a fair trial and that denial thereof occasions prejudice. Further reliance was placed on **Vincent Otieno Otieno v Republic [2019] eKLR**, in which the High Court affirmed that, unless serious prejudice is shown, courts should generally allow the recall of witnesses as part of the right to a fair hearing.

9. The Appellant also faulted the proceedings on the basis that the witness who produced the report was not sworn, contrary to the Oaths and Statutory Declarations Act, rendering the testimony and the report inadmissible. It was further submitted that the report was produced during a mention without prior disclosure, amounting to ambush and denying the Appellant adequate time to prepare, contrary to Article 50 of the Constitution.
10. In conclusion, the Appellant argued that the learned Kadhi misdirected himself on the law and the procedural posture of the case, elevated expediency over constitutional rights, and thereby occasioned a miscarriage of justice warranting the intervention of this Court.
11. In rebuttal, the Respondents submitted that the impugned ruling concerned a matter squarely within the discretion of the trial court, namely whether to permit the recall of a witness who had already testified and been cross-examined.
12. It was argued that the threshold for appellate interference with the exercise of judicial discretion is well settled. Reliance was placed on **Apungu Arthur Kibira v IEBC & 3 Others [2019] eKLR**, where the Supreme Court held that an appellate court may only interfere where the decision is shown to have been based on

whim or prejudice, founded on an error of law or principle, informed by irrelevant considerations or omission of relevant ones, or is plainly wrong. The Respondents further relied on **Mbogo & Another v Shah [1969] EA 93** as the locus classicus on the limited circumstances under which appellate interference is justified.

13. The Respondents submitted that the learned Kadhi properly applied the law to the facts. The witness was produced, cross-examined, and the Appellant was granted leave to tender rebuttal evidence. No arbitrariness, misdirection, or prejudice was demonstrated. Reference was made to section 146(4) of the Evidence Act and Order 18 rule 10 of the Civil Procedure Rules, both of which vest discretion, not obligation, upon the court to recall a witness. It was submitted that this discretion must be exercised judiciously and not to afford a party a second opportunity to refine its case.
14. The Respondents contended that the Appellant had a full and fair opportunity to test the impugned report. The report was availed in open court, examined in the presence of all parties, subjected to cross-examination, and followed by leave granted to the Appellant to engage an independent expert, whose report was subsequently filed. It was further submitted that the allegation of ambush was contradicted by the record. Counsel actively participated in cross-examination, raised concerns on the report, and neither objected to its production nor sought an adjournment on grounds of unreadiness. The Respondents relied on **Republic v Silas Magongo Onzere alias Fredrick Namema [2017]**

**eKLR** and **Republic v Mwalulu & 8 Others [2004] eKLR** for the proposition that the right to a fair trial entails a reasonable, not unlimited, opportunity to challenge evidence. It was argued that allowing the appeal would undermine finality, encourage piecemeal litigation, and offend the overriding objectives under sections 1A and 1B of the Civil Procedure Act, as well as Article 159(2)(b) and (d) of the Constitution.

15. In conclusion, the Respondents submitted that no prejudice had been demonstrated, the discretion was properly exercised, and the appeal was devoid of merit and amounted to an abuse of process. The Court was urged to dismiss the appeal with costs.

16. I have considered the appeal, the submissions in support and against, and the main issue for determination is whether the learned Kadhi properly exercised his judicial discretion in declining to recall a witness, or whether that discretion was misdirected, arbitrarily exercised, or exercised in a manner that violated the Appellant's right to a fair hearing, thereby warranting appellate interference.

17. The starting point is whether the learned Kadhi properly exercised his discretion in declining the Appellant's application to recall a witness or to summon the maker of the forensic document examiner's report. That discretion was not at large. It was required to be exercised within the confines of the law and with due regard to the procedural posture of the matter and the nature of the evidence in issue.

18. The proceedings before the Kadhi's Court were still at the pre-trial stage. No party had testified, the substantive hearing had not

commenced, and the impugned expert report lay at the core of the proceedings. The application was therefore not one to re-open concluded proceedings but one intended to ensure that a critical piece of evidence was properly tested before the matter progressed.

19. The law on the nature and limits of judicial discretion is settled. Chief Justice **John Marshall, in Osborn v Bank of the United States, 22 U.S. 738 [1824]**, stated as follows:

*“Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.”*

20. Similarly, the Supreme Court of India in **K. Prakash v B.R. Sampath Kumar, Civil Appeal No. 9047 of 2014**, citing **Rookey’s Case [77 ER 209]**, described discretion thus:

*“Discretion is a science, not to act arbitrarily according to men’s will and private affection... it is to be governed by rules of law and equity... in no case does it contradict or overturn the grounds or principles thereof.”*

21. These principles underscore that discretion must advance, not defeat, the right to a fair hearing. Where evidence is pivotal and

has not been properly tested, the law prescribes a course that safeguards procedural fairness.

22. The circumstances under which an appellate court may interfere with discretionary orders are well settled in **Mbogo & Another v Shah [1968] EA 93**, where it was held that interference is justified where the court has misdirected itself, acted on irrelevant considerations, or failed to consider relevant ones. The present case meets that threshold.
23. From the record, no prejudice was demonstrated to have been occasioned by the Respondents to warrant the decision of the court. Allowing the recall of the witness or the examination of the report's maker would not have delayed the trial, and the Respondents would have retained the right of re-examination. The learned Kadhi's failure to follow that course amounted to a misdirection.
24. The discretion to recall a witness is intended to advance substantive justice. Where the evidence in question is pivotal, and where the opposing party has not had a proper opportunity to test it, the interests of justice tilt in favour of recall. Denying that opportunity in the present circumstances curtailed the Appellant's right to a fair hearing under Article 50 of the Constitution.
25. In the premises, the dismissal of the Appellant's application was based on a misapprehension of both the law and the procedural posture of the case, and the discretion was not exercised judiciously.
26. Consequently, the appeal is allowed in the following terms:

- (i) The ruling of the Kadhi's Court delivered on 8<sup>th</sup> September 2025 is set aside.
- (ii) The matter shall be remitted to the Kadhi's Court with directions that the maker of the forensic document examiner's report dated 28<sup>th</sup> May 2025 be summoned to testify and be subjected to cross-examination, or, in the alternative, that the witness who produced the report be recalled, duly sworn, and examined afresh. The Respondents shall have the corresponding right of re-examination.
- (iii) Being a family matter, each party shall bear their own costs.

Orders accordingly.

**Judgement dated and delivered virtually this 16<sup>th</sup> day of December 2025**

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**D. KAVEDZA**  
**JUDGE**

**In the presence of:**

Parties Absent.

Karimi Court Assistant.