



**Hassan v Mahmoud (Family Miscellaneous Application
E045 of 2025) [2026] KEHC 428 (KLR) (20 January 2026) (Ruling)**

Neutral citation: [2026] KEHC 428 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY MISCELLANEOUS APPLICATION E045 OF 2025**

**G MUTAI, J
JANUARY 20, 2026**

BETWEEN

ZAINAB ALI HASSAN APPLICANT

AND

HASSAN MAHMOUD RESPONDENT

RULING

1. The application before the court is dated 4th September 2025. Vide the said application, the applicant seeks the following orders:-
 - a. Spent;
 - b. That pending the hearing and determination of this application, this honourable court be pleased to issue an order for extension of time to file a memorandum of appeal against the ruling delivered in Mombasa Kadhi's Court Misc Civil Application No E966 of 2024; Zainab Ali Hassan v Ali Hassan Mahmoud;
 - c. That pending the hearing and determination of this application interpartes, this honourable court be pleased to grant an interim order staying the execution of the decreed/order issued on 6th March 2025 pursuant to the ruling stated in prayer 2 above;
 - d. That pending the hearing and determination of this application interpartes, this honourable court be pleased to grant an interim order staying proceedings in the Kadhi's Court at Mombasa in Kadhi's Court Misc Civil Application No E966 of 2024; Zainab Ali Hassan v Ali Hassan Mahmoud.
 - e. That pending the hearing and determination of the appeal, this honourable court be pleased to grant an interim order staying the execution of the decree or order issued on 6th March 2025;



- f. That pending the hearing and determination of the appeal, this honourable court be pleased to stay the proceedings in Kadhi’s Court Misc Civil Application No E966 of 2024; Zainab Ali Hassan v Ali Hassan Mahmoud; and
- g. That the costs of this application be provided for.
2. The applicant was aggrieved by the decision delivered by the Hon Kadhi on 27th February 2025, in which the court below dismissed the application filed by the applicant seeking to have the court issue a consent for her to marry a person of her choice, as her guardian (“wali” in Arabic) had refused to do so. The applicant contends that the refusal wasn’t based on any applicable law, relied on unsubstantial facts, and lacked evidence. It is further contended that the court below ordered that the applicant’s intended bridegroom be kept away, at least 500 meters from the applicant, notwithstanding the fact that the said orders had not been prayed for, and neither did the Kadhi have the power or jurisdiction to issue any such order.
3. The applicant averred that she was unable to file the appeal on time due to circumstances beyond her control, as the respondent forced her to seek refuge.
4. The application is supported by the annexed affidavit of Zainab Ali Hassan, sworn on 4th September 2025.
5. The application is opposed. The respondent filed a replying affidavit sworn on 17th September 2025, as well as grounds of opposition, also dated 17th September 2025. The respondent in the affidavit in support of the application averred that the applicant herein, as a pro se litigant, filed an application for review dated 28th April 2025, which specifically sought at paragraph 3 thereof that “this honourable court be pleased to review the ruling and orders made on 27th February 2025”. The same was dismissed with no orders as to costs on 19th May 2025.
6. The application was canvassed by way of written submissions. The submissions of the applicant’s counsel, Mr Said Mgupu, are dated 20th September 2025. It was urged on the basis of a number of cases, including *Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] KESC 12 (KLR), *Visram Ravji Halai v Thornton & Turpin 1963 Ltd*; Civil Application No 15 of 1990, *RWW v EKW* [2019] KEHC 6523 (KLR), and *Arun C Sharma v Ashana Raikundalia t/a A. Raikundalia & Co Advocates & 2 others* [2014] KEHC 2430 (KLR), that all the conditions necessary for the grant of the orders sought had been met. Counsel prayed that the application be allowed as prayed.
7. The respondent, on the other hand, urged that the conditions that an applicant must satisfy before a stay is issued by the court had not been met. It was contended that having filed an application for review and appeal against the impugned decision was not an available remedy.
8. I have considered the application and the responses thereto. Before determining whether the test under Order 42 Rule 6(2) of the Civil Procedure Rules has been met, I must first decide whether it is possible to appeal a decision that one had previously attempted to review and for which the review application was unsuccessful.
9. Section 80 of the *Civil Procedure Act* states that: -
- “ Any person who considers himself aggrieved: -
- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or



- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

10. Order 45 Rule 1(1) of the Civil Procedure Rules states that: -

- “(1) Any person considering himself aggrieved—
 - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

11. It would seem to me that it isn't possible to appeal a decision one had previously sought to review. The rules give parties the right to elect which of these two grievance redressal mechanisms to apply, and once they choose one or the other, the choice is final and binding. This view has the support of several authorities. I shall refer to one such authority below.

12. In the persuasive case of Serephen Nyasani Menge v Rispah Onsase [2018] KEELC 654 (KLR), Mutungi, J, stated that: -

- “ 14. In my view, a proper reading of Section 80 of the Act and Order 45 Rules 1 and 2 makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order. In the present case, the applicant exhausted the process of review up to appeal and now wishes to go back to the same order she sought review of and failed, and to try her luck with an appeal. The applicant wants to have a second bite of the cherry. She cannot be permitted to do so. Her instant application constitutes an abuse of the process of the court, and the same must surely fail. The applicant had her day in court when she chose to seek a review of the order that she now wishes to appeal against. Litigation somehow must come to an end, and for the applicant, the end came when she applied for review and appealed the decision made on the review application. Litigation cannot be conducted on the basis of trial and error. That is why there are provisions of the law and the procedure to be adhered to. The applicant invoked the provisions of the law and the procedure thereto, and the court rendered itself on the basis of the law and the evidence.”

13. I agree with the above decision. In the circumstances, it is my view that the application filed herein is without merit, an abuse of the process of the court, and is for dismissal.

14. Having found as above, there is no need for me to consider whether the conditions for the grant of stay of execution pending appeal have been met. That question is moot.



15. The orders that commend themselves to me, therefore, are: -
- a. The application dated 4th September 2025 is hereby dismissed.
 - b. Each party shall bear his/her own costs; and
 - c. The court file is hereby closed.

16. It is so ordered.

DATED AND SIGNED IN MOMBASA, THIS 20TH DAY OF JANUARY 2026. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Ms Amina, for the Respondent;

No appearance for the Applicant; and

Ms Bancy - Court Assistant.

