

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**MISCELLANEOUS CIVIL APPLICATION NO. E003 OF 2026**

**ABUBAKAR ZAID ALI.....**  
**APPLICANT**

**VERSUS**

**RASHID ZAID ALI.....**  
**RESPONDENT**

**RULING**

1. The Applicant’s notice of motion dated 5<sup>th</sup> February, 2026 is expressed to be brought under *Sections 3, 3A, 18 and 63(e)* of the *Civil Procedure Act Cap 21 Laws of Kenya* and *Order 51 Rule 1* of the *Civil Procedure Rules* and seeks the following orders:

**a. [Spent].**

**b. THAT pending the hearing and determination of this application, there be a stay of proceedings in Nyando Succession Cause No. E297 of 2019, In the matter of the Estate of Miriam Saye.**

**c. THAT the Honourable Court may be pleased to make an order for the transfer of Nyando Succession Cause No. E297 of 2019, In the matter of the Estate of Miriam Saye (deceased) to the Kadhis Court in Kisumu for hearing and determination.**

**d. THAT costs of this application be provided for by the Respondent.**

2. The grounds upon which the application is premised are in precis that the parties to the matter are subject to Islamic law and therefore their personal affairs, including inheritance, ought to be governed and determined in accordance with Islamic law. The further grounds are that the estate of the deceased comprises property that had previously been dealt with by the Kadhi's Court in a separate succession cause under Islamic law and that it is therefore in the interest of justice that the application be allowed.
3. In his affidavit in support of the motion sworn on 5<sup>th</sup> February, 2026, the Applicant deposes that he is a stepson of the late **Mariam Awada Zaid** and a brother to the Respondent, both being sons of the late **Zaid Ali Suleiman** who passed away on 14<sup>th</sup> September, 1997. He avers that their late father was married to two wives, namely **Mariam Alambo** (deceased) and **Mariam Awada Zaid** (deceased), and that the family was blessed with eighteen children.
4. The Applicant further deposes that the deceased and the entire family profess the Islamic faith, which governs their personal affairs, including matters of inheritance.

5. The Applicant avers that on or about 20<sup>th</sup> of October, 2025, he discovered that the Respondent had secretly instituted succession proceedings in respect of the estate of the deceased before the court, and deliberately failed to file the same before the Kadhi's Court despite all parties being Muslims.
6. The Applicant states that upon obtaining the succession documents from court, he discovered that the Respondent failed to disclose that land parcel number Kisumu/W.Songhor/62/228 did not form part of the deceased's estate but instead belonged to their late father, **Zaid Ali Suleiman**.
7. The Applicant further deposes that the Respondent also failed to disclose the existence of *Succession Cause No. 1 of 2012* in the Kadhi's Court at Kisumu, in which a judgment had already been rendered distributing the said property among the beneficiaries of their father's estate and which judgment has not been set aside.
8. The Applicant states that he has since filed an application seeking revocation of the grant and setting aside of the confirmation thereof.
9. The Applicant's position is that since all the parties subscribe to the Islamic faith, it is prudent and just that the matter be

transferred to the Kadhi's Court at Kisumu for hearing and determination in accordance with Islamic law.

10. The Applicant further contends that the filing of the succession cause in Nyando Law Courts was motivated by ulterior motives as the Respondent was fully aware that the matter ought to have been filed in the Kadhi's Court.
11. The application is opposed and to that end the Respondent filed a replying affidavit that he swore on 10<sup>th</sup> February, 2026.
12. The Respondent deposes that the Applicant is his step-brother, whose biological mother is **Mariam Alambo Zaid**, a co-wife to his late mother, **Mariam Saye**. He denies the existence of any person known as "**Miriam Awada Zaid**" in their lineage and contends that the Applicant has conflated identities. He clarifies that the subject of *Nyando PMCC No. E297 of 2019* is the estate of his late mother, **Mariam Saye**.
13. The Respondent avers that the Applicant is a stranger to the estate of **Mariam Saye** and puts him to strict proof regarding the identity of "**Miriam Awada Zaid.**" He further states, on advice of counsel, that under the law of succession, a step-son does not rank in priority where the deceased left biological children.
14. The Respondent asserts further that land parcel number Kisumu/Songhor/62/228 belonged exclusively to **Mariam Saye**

and that the Applicant has failed to produce any evidence linking the property to their late father, **Zaid Ali Suleiman**. He further contends that the 2012 Kadhi's Court judgment relied upon by the Applicant was erroneous, as it purported to distribute property that did not belong to the deceased in that cause, and in any event only determined shares rather than ownership or title.

15. The Respondent deposes that the succession proceedings in *Nyando PMCC No. E297 of 2019* have already been concluded, a Certificate of Confirmation of Grant having been issued and a new title deed processed in the names of the lawful beneficiaries as joint owners.
16. He states that the Applicant filed an objection in October 2025, which is currently active and scheduled for mention on 20<sup>th</sup> February, 2026. He avers that the present application was filed shortly after seeking leave to file an additional affidavit in the Nyando Court matter and is a forum shopping attempt intended to delay the scheduled proceedings.
17. The Respondent contends that the application offends the principle of *sub judice*, as the issues raised herein are identical to those raised in the pending objection before the Nyando Court. He asserts that seeking transfer amounts to an abuse of the court process and an attempt to litigate the same issues in different forums.

18. The Respondent further deposes that the prayer for stay of proceedings is a delaying tactic intended to frustrate the beneficiaries and that he does not consent to the transfer of the matter to the Kadhi's Court, electing to maintain the jurisdiction of the civil courts.
19. The Respondent states, on advice of counsel, that under *Article 170(5) of the Constitution* the Kadhi's Court only has jurisdiction where all parties profess the Muslim faith and submit to it, and that absent such consent the matter must remain in the civil courts. He further avers that the Kadhi's Court lacks jurisdiction to issue or revoke grants of letters of administration or probate, such powers being reserved to the High Court and Magistrates' Courts, and that the Applicant is improperly attempting to use the Kadhi's Court to sit on appeal over a Magistrate's Court decision.
20. The Respondent maintains that the Applicant is conflating the estate of their late father, **Zaid Ali Suleiman**, with that of **Mariam Saye**, which are distinct legal entities, and reiterates that the property in question belonged solely to **Mariam Saye**.
21. Finally, the Respondent avers that the Applicant has failed to demonstrate sufficient cause or irreparable loss to warrant a stay and that in the interest of justice and finality of

litigation, *Nyando PMCC No. E297 of 2019* should proceed as scheduled. He therefore prays that the application be dismissed with costs.

22. The application proceeded by way of oral submissions by the two Counsel for the rival sides.

23. Having carefully considered the application, the affidavits both in support and in opposition thereto, together with the rival submissions and the applicable law, this Court is of the considered view that the following issues arise for determination.

24. The first issue for determination is whether the Applicant has established sufficient grounds to warrant an order staying the proceedings in *Nyando PMCC No. E297 of 2019* pending the hearing and determination of this application.

25. The second issue is whether this Court should proceed to order the transfer of *Nyando PMCC No. E297 of 2019*, being a succession cause relating to the estate of **Mariam Saye**, to the Kadhi's Court at Kisumu.

26. The third issue is whether the present application offends the doctrine of *sub judice* in light of the Respondent's contention that the matters raised herein are substantially similar to those pending determination in the objection proceedings already filed before the Nyando Court.

27. The fourth issue is whether, in light of the factual dispute regarding the identity of the deceased, the ownership of land parcel number Kisumu/Songhor/62/228, and the effect of the 2012 Kadhi's Court judgment, the orders sought are merited at this interlocutory stage.
28. Finally, the Court must determine whether the Applicant has satisfied the legal threshold for the exercise of this Court's discretionary powers under *Sections 3, 3A, 18 and 63(e)* of the *Civil Procedure Act* and *Order 51 Rule 1* of the *Civil Procedure Rules* and whether the interests of justice favour the grant or refusal of the orders sought, including the issue of costs.
29. The first issue for determination is whether the Applicant has established sufficient grounds to warrant a stay of proceedings in *Nyando PMCC No. E297 of 2019* pending the determination of the present application.
30. In this regard, the Court must consider whether the threshold for grant of stay of proceedings has been met, including whether the Applicant has demonstrated prejudice, risk of injustice or exceptional circumstances to justify halting ongoing proceedings.
31. In the present matter, I deliberately scheduled this ruling to be rendered before the Nyando succession proceedings can take place, meaning that the determination of the current

motion will effectively resolve the legal questions relevant to any interlocutory stay.

32. Consequently, any prayer for a stay of proceedings becomes moot, as the Nyando Court will proceed, if so, only after the resolution of this application, and no immediate risk of prejudice exists.
33. Accordingly, the first issue is determined against the Applicant.
34. The second issue for determination is whether this Court should proceed and order for the transfer of *Nyando PMCC No. E297 of 2019*, a succession matter concerning the estate of **Mariam Saye**, to the Kadhi's Court at Kisumu.
35. This issue necessarily calls for an examination of the scope of jurisdiction conferred upon the Kadhi's Courts under *Article 170(5)* of the *Constitution*, particularly whether such jurisdiction is contingent upon the consent of all parties.
36. *Article 170(5)* of the *Constitution* clearly limits the jurisdiction of Kadhi's Courts to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.

37. Thus, the constitutional test for Kadhi's Court jurisdiction comprises three elements:

- a. The subject matter must relate to personal status, marriage, divorce or inheritance under Muslim law.
- b. All parties must profess the Muslim faith.
- c. All parties must submit to the jurisdiction of the Kadhi's Court.

38. In ***Genevieve Bertrand v Mohamed Athman Maawiya & another [2014] eKLR***, the Court of Appeal interpreted *Article 170(5)* to confirm that the jurisdiction of the Kadhi's Court depends on parties' voluntary submission to its authority.

39. The court emphasized that jurisdiction is not automatic merely because the parties are Muslim, rather, the litigants must manifest acceptance of the forum.

40. In ***Rajab v Hamisi (Family Appeal E030 of 2024) [2025] KEHC 7269***, it was emphasized that the jurisdiction of the Kadhi's Court is contingent on the parties' submission, a requirement that cannot be compelled by one party's unilateral act.

41. Kadhi's Courts derive their jurisdiction from the *Constitution* and from *Section 5* of the *Kadhi's Court Act*, which mirrors *Article 170(5)*. In the instant case, the Applicant has not demonstrated that all interested parties, including the Respondent and other beneficiaries, if any, have submitted to the jurisdiction of the Kadhi's Court as constitutionally required. As a matter of fact, the Respondent is emphatic, in my understanding, in paragraphs 21, 22 and 23 of his affidavit, that he does not submit to the jurisdiction of the Kadhis Court.

42. The constitutional and statutory framework therefore compels the conclusion that although this Court generally has powers to transfer matters, on being satisfied that such order is warranted, from one subordinate court to another, it would be preposterous for the order of transfer to issue in a case where the Respondent has clearly stated that he will not submit to the jurisdiction of the Kadhi's Court, with the result that the said court will lack jurisdiction.

43. For these reasons, the second issue is determined against the Applicant.

44. The third issue for determination is whether the orders sought in this application, specifically, the stay of proceedings and the transfer of *Nyando PMCC No. E297 of 2019* to the Kadhi's Court, are rendered *sub judice* by the ongoing proceedings in the Nyando Court.

45. This issue entails an inquiry into whether the issues in the current motion are directly and substantially in issue in the pending proceedings and whether entertaining this application would amount to parallel litigation over the same subject matter.
46. Upon careful consideration, the Court observes that the orders sought in this application do not directly challenge or seek to re-litigate any substantive issues already pending before the Nyando Court. The prayers are purely procedural and interlocutory, transfer the matter to the Kadhi's Court for determination according to Islamic law.
47. Unlike a situation where an Applicant attempts to argue the merits of the estate or ownership of property in multiple forums, here the prayer is directed solely at changing the forum. The Applicant is not seeking to overturn any existing Nyando Court decision, nor to decide the rights of the parties independently. The request is procedural, relating to where and how the matters should be heard.
48. In line with the reasoning in ***Juma Dida & Another v Republic [2012] eKLR***, *sub judice* concerns arise only where the application seeks to determine issues already before another competent court, leading to potential conflicting judgments. Since this application does not seek determination

of the substantive rights or shares in the estate, it is not barred by the doctrine of *sub judice*.

49. Furthermore, the principle that procedural applications, such as those for stay or transfer, can be entertained even when substantive proceedings are ongoing is supported by the Court's general discretion under *Order 51 Rule 1 of the Civil Procedure Rules* and *Sections 3 and 18 of the Civil Procedure Act*. The Court may intervene to ensure that matters are heard in the proper forum, without prejudice to the pending substantive proceedings.

50. Accordingly, this Court finds that the orders sought in this application, the substantive one being transfer of *Nyando PMCC No. E297 of 2019* to the Kadhi's Court, are not *sub judice*. The prayers are procedural and do not amount to re-litigating the matters already before the Nyando Court.

51. The fourth issue for determination is whether, in light of the factual disputes regarding the identity of the deceased, the ownership of land parcel Kisumu/Songhor/62/228 and the effect of the 2012 Kadhi's Court judgment, the orders sought are merited at this interlocutory stage.

52. This includes consideration of whether the Applicant has sufficiently demonstrated that the property in question forms part of a different estate and whether such a determination

can properly be made within the framework of the present application.

53. Upon careful consideration, the Court finds that these substantive questions, including the proper identification of the deceased, the ownership of the disputed property and the implications of the prior Kadhi's Court judgment, cannot and should not be determined within the framework of this application for transfer or stay.

54. The present motion is strictly procedural, seeking to change the forum and does not provide an appropriate platform for adjudicating complex factual or legal disputes regarding property ownership or succession rights. Such matters are properly addressed in the substantive succession proceedings in the competent court, whether Nyando or, if it was to be transferred, the Kadhi's Court, after all relevant evidence has been adduced and full hearings conducted.

55. Call said, considering the persuasion that I have reached above, this Court finds that the orders sought for stay and transfer of *Nyando PMCC No. E297 of 2019* to the Kadhi's Court in Kisumu are not sufficiently engaged in the Applicant's favor.

56. In the premises, I reach the finding that the Applicant has not established a basis for the grant of the orders sought. The application dated 5<sup>th</sup> February, 2026 is therefore dismissed.

57. This being a family matter, I make a reservation on the issue of costs.

58. This file is hereby closed.

DELIVERED, DATED & SIGNED this 20<sup>th</sup> day of February, 2026.

**JOE M. OMIDO.**  
**JUDGE**

FOR APPLICANT: **Mr. P.D. Onyango.**

FOR RESPONDENT: No appearance.

COURT ASSISTANTS: **Mr. Ngoge & Mr. Juma.**