

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CIVIL APPEAL NO. E002 OF 2026

BOKU BODHA.....
APPELLANT

VERSUS

HALIMA ANNO ABDI.....
RESPONDENT

RULING

1. The appellant herein filed his Notice of motion Application dated 6th January 2026, seeking to stay the ruling dated 15th December 2025 delivered by the Hon Kadhi in ***Marsabit Matrimonial suit No E016 of 2023*** pending hearing and determination of the appeal filed.
2. In response, the respondent filed a Notice of preliminary objection dated 20th January 2026, wherein she raised the following grounds of objection, namely that;
 - a) ***That this Honourable court's Appellate jurisdiction has been improperly invoked, the appellant having framed the present appeal as one arising from a ruling on review while in substance seeking to re-litigate, reopen and overturn the original judgment of the Kadhi's***

court on grounds previously raised in a withdrawn appeal, thereby rendering the appeal incompetent in law and an abuse of the court process.

- b) That the Appeal and the accompanying application are incompetent in law and constitute an abuse of the process, the appellant having previously filed and withdrawn Civil Appeal No 2 of 2024 against the judgment of the Kadhi's court dated 8th December 2023, and now seeking to reintroduce the same grounds through an appeal against a subsequent review ruling obtained after the withdrawal of the said Appeal.***
- c) That although framed as an appeal against the ruling on review, the appeal substantively, challenges the merits and jurisdiction underlying the original judgment of the Kadhis' court dated 8th December 2023, which judgment ceased to be applicable upon withdrawal of the earlier appeal.***
- d) That the appeal is further incompetent in law in that the prayers contained in the memorandum of appeal expressly seek a rehearing of the suit, a relief unknown in law in an appeal arising from a ruling on review, thereby converting the***

appeal into a collateral attack on a final judgment.

- e) ***That an appeal from a ruling on review is, in law, limited to the propriety of the exercise of review jurisdiction and cannot be used to re-litigate jurisdictional or substantive grounds that were available, raised and abandoned upon withdrawal of a prior appeal.***
- f) ***That permitting the appeal would amount to re-litigation by procedural mutation, offend the doctrine of finality of litigation and undermine the orderly administration of justice.***

3. The respondent thus urged this court to allow the preliminary objection raised and be pleased to strike out the appeal filed with costs.

DETERMINATION

4. The parameters for consideration in determining a preliminary objection are now well settled and in general it should raise only issues of law. The same were set out in the case of **Mukisa Biscuits Manufacturing Ltd -vs- West End Distributors (1969) EA 696** , Where at page 700 Law JA stated that:

“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argu

ed as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case, at page 701, ***Sir Charles Newbold, P. stated:***

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

5. The appellant has an undeniable right to appeal against the ruling of the Hon Kadhi's court dated 15th December 2025 and to have the said appeal heard on merit. To that extent it cannot be said that the appellant has wrongly invoked the jurisdiction of this court as it is an appeal expressly allowed by law.

6. Secondly, it is premature and speculative of the respondent to allege that the said appeal will cover other grounds and/or open an avenue for the appellant to re-litigate issues earlier determined by the Kadhi's court judgment dated 8th December 2023. Even if that were true, this court at the hearing stage will be able to sieve what is relevant and was considered under the review application and what is not. Finally, the issues raised in the preliminary objection are not issues of law and to that extent, I do find that the said preliminary objection has no merit and the same is dismissed with costs to the Appellant.

READ, SIGNED, and DELIVERED virtually at **MARSABIT** on this **22nd** day of **APRIL 2026**.

FRANCIS RAYOLA OLEL
JUDGE

Delivered on the virtual platform, Team this **22nd** day of **APRIL 2026**.

In the presence of: -

.....Appellant

..... Respondent

ORIGINAL