

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MARSABIT**  
**APPELLATE DIVISION**  
**CIVIL APPEAL NO. E014 OF 2025**

**DAKI HALAKE BORU.....**  
**APPLICANT**

**VERSUS**

**DOYO SORA ARERO.....**  
**RESPONDENT**

**R U L I N G**

**A. Introduction**

1. The application before this court for determination is the Notice of Motion application dated 29<sup>th</sup> December 2025 brought pursuant to provisions of **Section 1A, 1B, 3, 3A, & 79G of the Civil Procedure Act, Order 42 Rule 6(2), Order 51 Rule 1 of the Civil Procedure Rules, and** all other enabling provisions of law. The applicant prays for orders that;

- a) ***Spent***
- b) ***Spent.***
- c) ***That pending the hearing and determination of the substantive appeal, this Honourable court be pleased to issue an order of stay of execution, of the judgment, ruling, and***

***custody orders delivered by the Honourbale Kadhi in the said cause.***

***d) That pending the hearing and determination of the appeal, the custody care and control of the minor children aged twelve (12), ten (10) and eight (8) years be preserved under the care of the Appellant/Applicant, or such other arrangements as this Honourbale court may deem fit in the best interest of the children.***

***e) That this honourable court be pleased to issue such conservatory, protective or preservation orders as maybe necessary to safeguard the emotional, psychological, educational and moral welfare of the minor children pending appeal.***

***f) That the costs of this application be in the appeal.***

2. This application is supported by the grounds on the face of the said application the Supporting affidavit of the applicant, dated 29<sup>th</sup> December 2025 and is opposed by respondent through his replying affidavit dated 18<sup>th</sup> February 2025.

3. The Appellant averred that pursuant to leave granted by this court on 16<sup>th</sup> December 2025, in **Marsabit HCC Misc Civil Application No E006 of 2025**, she filed this appeal and strongly urged the court to note that the Kadhi's decision to place the custody of her three sons in the hands of the respondent was unfair as they were still minors, who required constant parental supervision, guidance, emotional reassurance, discipline and protection, which the respondent could not provide. No negative attribute had been reached to find that she was unfit to take care of her children and therefore it was in the interest of justice to grant the orders sought pending determination of the Appeal filed.
4. The Respondent opposed this application through his Replying Affidavit dated 18<sup>th</sup> February 2026, where he reemphasized that the Hon Kadhi's had exercised his discretion in a proper manner after considering the evidence placed before him by both parties. Apart from the children's age, the learned Kadhi had also considered other equally important factors such as distance to school and Madarasa, his role in bringing up the said children, the Appellants lack of stable and independent resident and conduct in bringing up the said children, which at times was not up to measure. Finally, he pointed out that the appellant had been granted reasonable access to the said children and therefore could not be heard to allege that she had been unfairly excluded in their upbringing.

5. The respondent thus urged the court to find that the Application filed had no merit and be pleased to dismiss the same.

## **B. Analysis & Determination**

6. I have carefully considered the Application, and the affidavits filed in support and in opposition thereto. The only issue which arises for determination is whether the judgment of the Honorable Kadhi dated 13<sup>th</sup> November 2024 delivered in ***Moyale Kadhi's Court Divorce Cause No. KCDC/E054/2024*** should be stayed pending hearing and determination of this Appeal.
7. Before filing this application, the applicant had filed **Marsabit HCC Misc Civil Application No E006 of 2025**, where she had sought for leave to file her appeal out of time and also for stay of execution of the said judgment pending hearing and determination of the intended Appeal. Vide a ruling dated 14<sup>th</sup> December 2025, her prayer for leave to Appeal out of time was granted but the limb for stay pending appeal was expressly declined. For good measure given that it was a children's matter, the court further directed that the appeal filed be disposed off within 120 days.
8. Instead of perusing determination the substantive Appeal, the Appellant has once again sought for orders of stay of

execution, which matter is *res judicata* as it offends provisions of **Section 7 of the Civil Procedure Act, 2010** which provides as hereunder:

***“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”***

9. The rationale of the doctrine of *res judicata*, was discussed in the Court of Appeal In decision of **Independent Electoral & Boundaries Commission -vs- Maina Kiai & 5 Others (2017) eKLR.** where it was held that;

***“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and***

*resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”*

10. In the **Maina Kiai** case (supra), the Court quoted with approval the Indian Supreme Court in the case of **Lal Chand vs. Radha Kishan, AIR 1977 SC 789** where it was stated;

*“The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue. The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it - not even by consent of the parties - because*

*it is the court itself that is debarred by a jurisdictional injunct, from entertaining such suit.”*

**C. Disposition**

- 11. The upshot is that the application dated 29<sup>th</sup> December 2025 lacks merit as it raises similar issues already determined by this court.
- 12. The said application is thus dismissed with costs to the respondent.
- 13. It is so ordered.

**READ, SIGNED and DELIVERED** virtually at **MARSABIT** on this **7<sup>th</sup>** day of **MAY, 2026**.

**FRANCIS RAYOLA OLEL**  
**JUDGE**

**Delivered** on the **virtual platform, Teams** this **7<sup>th</sup>** day of **MAY, 2026**.

**In the presence of;**

Present .....for Appellant

Present .....for Respondent

Mr. Jarso.....Court Assistant

ORIGINAL