KENYA / JUDGMENT

MA v HAA [2026] KEHC 9628 (KLR)

[2026] KEHC 9628 (KLR)

COURT
High Court

BEFORE
H Namisi

CASE / FILE NUMBER
Civil Appeal E167 of 2025

Source: new.kenyalaw.org · Research copy typeset by Esheria. Not court-issued or certified.

MA v HAA (Civil Appeal E167 of 2025) [2026] KEHC 9628 (KLR) (Family) (3 July 2026) (Ruling)

Neutral citation:

[2026] KEHC 9628 (KLR)

Republic of Kenya

In the High Court at Nairobi (Milimani Law Courts)

Family

Civil Appeal E167 of 2025

H Namisi, J

July 3, 2026

Between

MA

Appellant

and

HAA

Respondent

Ruling

1.The matter before this Court is a Notice of Motion dated 30 September 2025, which seeks to invoke both the appellate and the supervisory jurisdictions of the High Court, as enshrined in Article 165(3)(b), (6), and (7) of The Constitution, alongside the procedural mechanisms provided under Sections 1A, 1B, and 3A of the Civil Procedure Act, and Order 42 Rule 6 of the Civil Procedure Rules, 2010.

2.The Applicant seeks to stay the execution and enforcement of an ex-parte Ruling and subsequent consequential Orders delivered on 8 September 2025 by the Kadhi's Court at Nairobi (Hon. Suqyan Hassan Omar, Ag. Chief Kadhi) in Matrimonial Cause No. KCMATC E007 of 2025. Furthermore, the Applicant seeks a stay of all proceedings in the subordinate court pending the hearing and determination of the intended appeal, and prays that this Court calls for and examines the trial court's record to assess the legality, propriety, and regularity of the proceedings pursuant to its supervisory mandate.

3.The application is vehemently opposed by the Respondent, Hassan Ahmed Abdulhafedh, through a Replying Affidavit deponed on 14 October 2025, and accompanying written submissions. The Respondent raises preliminary objections regarding the jurisdiction of this Court, positing that the Applicant is currently outside the territorial jurisdiction of Kenya in defiance of the very orders she seeks to stay. Consequently, the Respondent invokes the equitable doctrine that one who comes to equity must come with clean hands, urging the summary dismissal of the application.

Brief Background

4.The Applicant and the Respondent were married under Islamic law on 20 June 2006. The union was blessed with two children: a daughter born 3 May 2008, and a son born 29 March 2019. Over time, the marital relationship suffered a severe breakdown, characterized by mutual allegations of cruelty, infidelity, and abuse.

5.The Applicant alleges that the zenith of this deterioration occurred in July 2025, when she was subjected to mistreatment culminating in the Respondent forcibly expelling her and the minors from their matrimonial home at Lotus Flower Apartments on Riara Road, Nairobi. Documentary evidence on record indicates that the Applicant lodged a formal complaint at Muthangari Police Station on 1 July 2025, recorded under OB Number 28/01/07/2025.

6.Following this incident, on 18 July 2025, the Applicant departed from Kenya with the two minors, travelling to her country of origin, the Kingdom of Morocco. Her departure is corroborated by copies of passport exit stamps annexed to her Affidavits. Shortly thereafter, on 25 July 2025, the Applicant instituted formal divorce proceedings against the Respondent. She filed a Petition for Divorce for Discord before the Court of First Instance in Inezgane, Agadir, Morocco (Matter No. 1127/1626/2025). The Moroccan Court issued an Order of Service on 28 July 2025, summoning the Respondent to appear for a hearing scheduled for 10 September 2025.

7.In what appears to be a parallel legal trajectory, the Respondent instituted Matrimonial Cause No. KCMATC E007 of 2025 at the Nairobi Kadhi's Court on 7 August 2025. In his pleadings, the Respondent levelled severe allegations against the Applicant, including claims of serial adultery with multiple named individuals, substance abuse, child neglect, the installation of covert surveillance in the matrimonial home, and the illicit removal of the minors from the jurisdiction without his consent.

8.The procedural anomalies that form the absolute crux of the present Application began with the Respondent's attempt to effect service of the Kadhi's Court processes upon an Applicant who was already residing in North Africa. The Respondent's appointed process server, Mourice Mbengele, deponed in an Affidavit of Service that he attempted physical service at the Applicant's Nairobi apartment on 11 August 2025. Upon finding the door locked and receiving no response, he averred that he affixed the documents to the door.

9.Crucially, the process server further averred that he subsequently served the documents electronically. He claimed to have sent the pleadings and Hearing Notices via the Applicant's WhatsApp number (+254 799 41) on 11 August and 25 August 2025, and via an email address (ach*mina@gmail.com) on 14 August and 25 August 2025.

10.The Applicant vehemently contests the validity and factuality of this electronic service. She adduced correspondence with Safaricom PLC customer care, demonstrating that she had reported her Kenyan mobile number compromised shortly after leaving the country. The telecommunications provider confirmed the suspension of the line on 25 August 2025 due to suspected unauthorized access. Furthermore, she deponed that the email address utilized by the process server was fictitious and did not belong to her. Most fundamentally, however, she argued that because she was outside the jurisdiction, the law required the Respondent to obtain formal leave of the court to serve her extraterritorially, which was never done.

11.Satisfied by the process server's Affidavit that service had been properly effected via electronic means, the Kadhi's Court proceeded to hear the Respondent's application ex-parte on 4 September 2025. On 8 September 2025, the Hon. Kadhi delivered a Ruling issuing drastic, far-reaching, and highly coercive orders. The dispositive portion of the Ruling ordered:i.The mandatory and immediate return of the minors to the matrimonial home in Nairobi, failing which a warrant of arrest would be issued against the Applicant.ii.The grant of interim custody, care, and control of the minors to the Respondent pending the hearing and determination of the suit.iii.An injunction restraining the Director of Immigration Services from permitting the Applicant to remove the minors from the jurisdiction.iv.Directives to the Officer Commanding Station (OCS) Jomo Kenyatta International Airport and OCS Muthangari Police Station to enforce compliance.v.The issuance of summonses to the management of several third-party corporate entities, including J.W. Marriott Hotel, Alba Hotels (Social House), Edmor Suites, Ole-Sereni Hotel, Tribe Hotel, SteadMark Hotel, Trademark Hotel, and Emirates Airline. These corporate entities were compelled to produce all records, booking documents, and CCTV footage concerning the Applicant.

12.Upon learning of these adverse ex-parte orders, the Applicant instructed her Advocates to file an application before the Kadhi's Court on 19 September 2025, seeking to set aside the Ruling and the ensuing decrees. Documentary evidence produced before this Court, including system-generated receipts and screenshots from the Judiciary's Case Tracking System (CTS), confirms that the Application was successfully uploaded, and the requisite filing fees were paid on 22 September 2025.

13.However, during a mention before the Kadhi's Court on 25 September 2025, the trial court declined to entertain the Application. The trial court's recorded directions indicated that upon perusing the physical file and the CTS, no such Application was visible, save for a Notice of Appointment of Advocates. Consequently, the trial court granted the Respondent liberty to institute execution processes against the Applicant.

14.Concurrently, the sweeping nature of the Kadhi's Court's discovery orders against third-party hotels triggered collateral constitutional litigation. One of the individuals adversely mentioned in the Respondent's Kadhi Court Affidavits, Mohammed Naeem Essak, filed a Constitutional Petition (HCCHRPET/E067/2025) before the High Court at Kiambu on 7 October 2025. He challenged the Kadhi Court's jurisdiction to issue orders compelling hotels to release CCTV footage that would infringe upon the privacy rights of non-parties. On 8 October 2025, the Hon. Lady Justice Dorah Chepkwony issued conservatory orders staying the execution of Order No. 5 of the Kadhi's Court's Ruling, specifically halting the mandatory production of CCTV footage by the hotels.

15.Faced with the imminent threat of warrants of arrest, the potential forceful repatriation of the children, and the trial court's refusal to hear her Application, the Applicant approached this Court on 30 September 2025 via the instant Notice of Motion.

The Application

16.The Applicant’s case is that the Kadhi's Court proceedings are fundamentally vitiated by incurable procedural irregularities that amount to a gross violation of the constitutional right to a fair hearing under Article 50(1). The core argument is that the purported service of process on 11 and 14 August 2025 was a legal nullity. Because the Applicant had already left the jurisdiction of Kenya on 18 July 2025, the law—specifically Part IV, Rule 64 of the Kadhi's Courts (Procedure and Practice) Rules, 2020, and Order 5 Rule 21 of the Civil Procedure Rules—mandated that the Respondent seek and obtain explicit leave of the court prior to attempting extraterritorial service. No such leave was ever sought or granted.

17.The Applicant further asserts that the Kadhi's Court exceeded its circumscribed constitutional jurisdiction under Article 170(5) by issuing sweeping discovery orders against non-Muslim third-party corporate entities (hotels and airlines), thereby infringing upon her right to privacy under Article 31 of The Constitution and violating the Data Protection Act, 2019.

18.Regarding the threshold for a stay of execution under Order 42 Rule 6, the Applicant maintains that she will suffer immeasurable substantial loss if the stay is not granted. She argues that the execution of the ex parte orders would result in the unlawful curtailment of her personal liberty

through an unwarranted arrest, alongside the traumatic and forceful repatriation of the minors, which inherently contravenes their best interests. Finally, she implores this Court to invoke its supervisory jurisdiction under Article 165(6) and (7) to correct the trial court's blatant procedural impropriety in ignoring her duly filed application to set aside the ex parte orders.

19.The Respondent's defence is heavily anchored on a preliminary objection regarding the jurisdiction of the High Court. He argues that because the Applicant unlawfully removed the children from Kenya and remains in Morocco, she is actively defying the orders of the trial court. Relying on the strictures of Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited KLR 1, he contends that jurisdiction is everything and that this Court must down its tools because the subject matter (the minors) and the Applicant are outside its territorial jurisdiction.

20.Furthermore, the Respondent invokes the equitable maxim that "he who comes into equity must come with clean hands". He asserts that the Applicant approaches the Court with tainted hands, attempting to use the appellate process to rubber-stamp her disobedience of the Kadhi's Court orders and her unlawful interference with the children's education.

21.On the principles for a stay of execution, the Respondent argues that the Applicant has failed to meet the mandatory threshold of Order 42 Rule 6. Citing China City Construction Company Limited & another v Karisa KEHC 3323 (KLR) and Machira t/a Machira & Co Advocates v East African Standard 2 KLR 63, he asserts that the Applicant has not demonstrated specific, tangible substantial loss. Conversely, the Respondent contends that staying the orders would severely prejudice the minors, who are missing their academic programs, and that granting a stay would actively contravene the best interests of the children as provided under Article 53 of The Constitution and Section 32 of the Children Act. He maintains that service was lawfully effected via electronic means pursuant to Order 5 Rule 22B of the Civil Procedure Rules and Rule 173 of the Kadhi's Court Rules.

Analysis & Determination

22.Having exhaustively reviewed the pleadings, the competing Affidavits, the statutory provisions, and the rival submissions, the analysis indicates that the resolution of this application turns on the following principal issues:i.Whether the High Court is divested of its appellate and supervisory jurisdiction due to the physical absence of the Applicant and the minors from the territorial boundaries of Kenya, and whether the Applicant is barred from seeking relief by the equitable "clean hands" doctrine.ii.Whether the Kadhi's Court possessed the requisite jurisdiction to issue the ex parte orders of 8 September 2025, specifically concerning the legality of extraterritorial service of process without prior leave.iii.Whether the Applicant has satisfied the legal threshold for the grant of a Stay of Execution and a Stay of Proceedings pending appeal under Order 42 Rule 6 of the Civil Procedure Rules.iv.Whether the circumstances of this case warrant the invocation of the High Court's extraordinary supervisory jurisdiction under Article 165(6) and (7) of The Constitution to call for the record and correct jurisdictional overreach concerning non-party corporate entities.

Territorial Jurisdiction, Contempt, and the "Clean Hands" Doctrine

23.The Respondent's threshold argument operates on the premise that the High Court lacks jurisdiction to entertain this Application because the Applicant has removed the subject minors to Morocco, contrary to the trial court's orders. By relying heavily on the pronouncement by Nyarangi, JA in Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited KLR 1, the Respondent posits that jurisdiction is an absolute prerequisite, and without it, the Court must cease all proceedings.

24.This argument betrays a fundamental conflation of territorial jurisdiction and subject-matter/ supervisory jurisdiction. The jurisdiction of the High Court is constitutionally entrenched and immutable save by constitutional amendment. Article 165(3)(a) of The Constitution grants the High Court unlimited original jurisdiction in criminal and civil matters. More pertinently for the present Application, Article 165(6) explicitly vests the High Court with supervisory jurisdiction over all subordinate courts. Article 169(1)(b) establishes the Kadhi's Court as a subordinate court, thereby placing it squarely under the supervisory ambit of the High Court.

25.The assertion that a litigant's physical departure from Kenya extinguishes the constitutional appellate or supervisory jurisdiction of the High Court over a domestic subordinate court is legally untenable. Jurisdiction is not an ephemeral concept that evaporates when a party crosses an international border. The Respondent himself invoked the jurisdiction of the judicial system by filing the matrimonial cause in August 2025. He cannot approbate and reprobate; he cannot utilize the Kadhi's Court to obtain coercive ex parte orders and subsequently claim that the appellate tier of the exact same judicial system lacks the jurisdiction to review those very orders merely because the opposing party resides abroad. The Lilian S doctrine prohibits a court from acting without statutory or constitutional enablement; it does not mandate a superior court to surrender its constitutionally granted supervisory authority over an allegedly errant subordinate court.

26.The Respondent's supplementary argument asserts that the Applicant is in active contempt of the 8 September 2025 orders, thereby lacking clean hands. It is an ancient and well-established tenet of equity that a party who wilfully disobeys a valid court order cannot seek the indulgence of the court. A valid court order must be obeyed or complied with without exception. Furthermore, in custody disputes, fraudulent conduct to obtain or retain custody negates the trust reposed by the court, as noted in jurisprudence concerning the parens patriae jurisdiction.

27.However, the application of the contempt doctrine and the clean hands maxim is strictly predicated on the existence of a valid and lawful underlying order. A citizen cannot be held in contempt of an order that is fundamentally defective, void ab initio, or issued without jurisdiction. While court orders must be respected, the right to a fair hearing under Article 50 of the Constitution is non-derogable. If an order is obtained ex-parte through irregular service, it offends the absolute core of the rules of natural justice. A party against whom a void order is made is entitled to apply to an appellate or supervisory court to have it set aside ex debito justitiae.

28.This Court cannot shut its doors to a litigant claiming a gross violation of constitutional due process under the guise that the litigant has not complied with the very order they seek to nullify. To do so would be to elevate procedural compliance above constitutional supremacy. This Court is fully clothed with the requisite jurisdiction to hear and determine the present Application. The Respondent's preliminary objection is accordingly overruled.

The Legality of Ex-Parte Orders and Extraterritorial Service of Process

29.The validity of the ex parte orders issued by the Kadhi's Court on 8 September 2025 hinges entirely on whether the Applicant was lawfully served with the originating court processes. The right to a fair hearing, guaranteed as a fundamental right under Article 50(1) of The Constitution, strictly requires that a party be given adequate notice of the proceedings instituted against them and a reasonable opportunity to formulate and present a response. Any pleading filed and not served on the opposite party has no legal force and cannot be dealt with by the court.

30.The process server's Affidavit reveals that service was purportedly effected on 11 and 14 August 2025 by affixing the documents to an apartment door in Nairobi, and by sending them via WhatsApp and an email address. However, the Applicant has deponed, and furnished irrefutable documentary evidence in the form of official passport exit stamps, that she departed Kenya for Morocco on 18 July 2025. It is, therefore, an uncontroverted fact that at the time the Respondent instituted the suit on 7 August 2025, and at the time of the purported electronic service, the Applicant was outside the territorial jurisdiction of Kenya.

31.The law regarding the service of process outside the jurisdiction is exceptionally strict. This strictness reflects core principles of state sovereignty and international comity; a domestic court cannot assert coercive jurisdiction over an individual residing in a foreign sovereign state without adhering to stringent procedural safeguards.

32.Order 5 Rule 21 of the Civil Procedure Rules regulates service out of Kenya, stipulating that such service may only be allowed with the express leave of the court. Similarly, Rule 64 of the Kadhi's Courts (Procedure and Practice) Rules, 2020 explicitly states that the court may, where necessary, order service of a petition outside Kenya, and such an order giving leave must be sealed and forwarded through recognized channels.

33.Courts have consistently held that the failure to obtain leave prior to serving a party outside the jurisdiction is not a mere curable procedural technicality, but a fundamental jurisdictional defect that renders the proceedings a nullity. In the authoritative decision of Misnak International (UK) Limited v 4MB Mining Limited & 3 others eKLR, the Court of Appeal elucidated this principle with absolute clarity:“The High Court assumes jurisdiction over persons outside Kenya by giving leave, on application by a plaintiff to serve summons... outside the country.... Proper service as stipulated by the Civil Procedure Rules necessitates formal procedures, including seeking leave for service out of jurisdiction, which were not followed, thereby nullifying jurisdictional claims based purely on email notification."

34.This strict jurisdictional stance was reaffirmed in DNK v GS KEHC 547 (KLR), where the Court struck out an originating summons and vacated all interim orders precisely because the petitioner failed to obtain prior leave to serve a respondent residing in Austria.

35.In the instant matrimonial dispute, the record reflects that the Respondent made no application whatsoever for leave to serve the Applicant out of the jurisdiction. Instead, he relied exclusively on substituted service via electronic means under Order 5 Rule 22B of the Civil Procedure Rules and Rule 173 of the Kadhi's Court Rules. This constitutes a fatal misapprehension of the law. Substituted service is a method of affecting service when physical personal service cannot be achieved within the jurisdiction; however, it cannot be utilized as a backdoor mechanism to bypass the mandatory statutory requirement of seeking leave for service ex juris. Before a court can authorize substituted service upon a foreign resident, it must first weigh the reasons adduced by the plaintiff, determine whether a proper case has been made out, and formally grant leave for the summons to be served outside its territorial boundaries.

36.Because no leave was sought by the Respondent or granted by the Kadhi's Court, the purported service via WhatsApp and email on an Applicant residing in Morocco was fundamentally irregular, invalid, and incurably defective. Consequently, the Kadhi's Court failed entirely to acquire personal jurisdiction over the Applicant. Any proceedings conducted, and any orders issued, in the absolute absence of valid service are a nullity. The ex parte orders of 8 September 2025, including the drastic orders granting interim custody and threatening arrest, were therefore issued without jurisdiction and constitute a gross violation of the Applicant's constitutional right to a fair hearing.

Stay of Execution, Substantial Loss, and the Paramountcy of the Child's Best Interests

37.The Applicant seeks a stay of execution of 8 September 2025 orders, alongside a stay of all proceedings in the Kadhi's Court, pending the hearing and determination of her intended appeal. The foundational principles governing the grant of a stay of execution are set out in Order 42 Rule 6(2) of the Civil Procedure Rules. The court exercises discretionary power and must be satisfied that three conjunctive conditions are met:i.Substantial loss may result to the applicant unless the order is made.ii.The application has been made without unreasonable delay.iii.Such security as the court orders for the due performance of the decree has been given by the applicant.

38.In Butt v Rent Restriction Tribunal KLR 417, the Court of Appeal provided foundational guidance on the exercise of this discretion, stating that the court's power should be exercised in a manner that prevents an appeal, if successful, from being rendered nugatory.

39.While Order 42 Rule 6 does not explicitly mention the requirement of an arguable appeal, subsequent binding jurisprudence dictates that the intended appeal must not be frivolous (Kenya Shell Limited v Kibiru and Another KLR 410). The applicant must demonstrate that the appeal raises points of law or fact that require the appellate court's serious consideration. Given the

profound procedural irregularities regarding the extraterritorial service of process analysed in the preceding section, the Applicant has unequivocally demonstrated an arguable appeal with extraordinarily high chances of success. The failure to obtain leave for service ex juris goes to the very root of the trial court's jurisdiction.

40.The Respondent, citing the recent decision in China City Construction Company Limited & another v Karisa KEHC 3323 (KLR), argues that the Applicant has failed to quantify or demonstrate the specific, tangible loss she will suffer. Furthermore, relying on Machira t/a Machira & Co Advocates v East African Standard 2 KLR 63, the Respondent asserts the general principle that a successful litigant is ordinarily entitled to the fruits of their judgment, and that a stay should only be granted in exceptional circumstances where pecuniary restitution is impossible.

41.These arguments, while sound in commercial law, must be properly contextualized within the unique sphere of family litigation. In civil claims involving monetary decrees, loss is easily quantified in numerical terms, and restitution is straightforward. However, in family matters involving the physical custody of minor children and the personal liberty of a parent, the concept of substantial loss completely transcends mere pecuniary valuation. As correctly cited by the Applicant, the persuasive authority of Tropical Commodities Suppliers Ltd v International Credit Bank Ltd (In Liquidation) 2 EA 331 establishes that substantial loss is a qualitative concept. It represents any loss of real worth, whether great or small, rather than a quantifiable mathematical formula.

42.The immediate execution of the Kadhi's Court orders would result in the issuance of a warrant of arrest against the Applicant. The deprivation of personal liberty, especially when predicated upon a constitutionally defective ex parte process, is the ultimate manifestation of substantial loss. Furthermore, the orders compel the immediate, mandatory repatriation of the minors from Morocco to Kenya. Uprooting young children abruptly across international borders on the strength of an ex parte order obtained without affording their primary caregiver a hearing would inflict severe, irreparable psychological and emotional distress on the minors.

43.This brings me to the crucial intersection of substantial loss and the paramountcy of the children's welfare. Article 53(2) dictates, in absolute terms, that "A child's best interests are of paramount importance in every matter concerning the child". In AKC v TWM KEHC 4810 (KLR), the court reiterated that acting in the best interests of the child is the overriding principle in all custody determinations. Furthermore, in DOB v DMA eKLR, the court emphasized that stay applications must be viewed through the lens of how the minor will be affected.

44.The Respondent claims the Applicant is neglecting the children and engaging in illicit activities. The Applicant, conversely, claims she fled the jurisdiction due to abuse and cruelty. The veracity of these grave allegations cannot be deciphered from untested, un-cross-examined Affidavits in an ex parte hearing. It is decidedly not in the best interests of the children to be utilized as pawns, forcibly removed across continents under the threat of their mother's arrest, before a competent court has had the opportunity to conduct a rigorous, merit-based, inter-

partes evaluation of their welfare. Preserving the status quo pending the appeal prevents irreparable harm and ensures the children's stability is not jeopardized by voidable judicial orders.

45.The impugned orders were issued on 8 September 2025. The Applicant filed an application to set them aside in the trial court at the earliest opportunity on 19 September 2025. Upon the trial court's constructive rejection of that application on 25 September 2025, she filed the instant application before this Court on 30 September 2025. This timeline demonstrates immense diligence. The Application was unequivocally filed without unreasonable delay.

46.Regarding the provision of security for the due performance of the decree, it must be noted that this is not a monetary decree. The execution involves personal liberty and child custody. The requirement for financial security is therefore not strictly applicable to the nature of the reliefs sought and can be entirely dispensed with by the court in the interests of justice.

47.The analysis indicates that the Applicant has successfully discharged the heavy burden under Order 42 Rule 6 of the Civil Procedure Rules. A stay of execution and a stay of proceedings are eminently merited.

The High Court's Supervisory Jurisdiction (Article 165(6) and (7))

48.The Applicant additionally prays that this Court invokes its extraordinary supervisory jurisdiction to call for the record of the Kadhi’s Court and halt its proceedings entirely.

49.Article 165(6) grants the High Court supervisory jurisdiction over the subordinate courts and any person, body, or authority exercising a judicial or quasi-judicial function. Article 165(7) empowers the High Court to call for the record of any proceedings and make any order or give any direction it considers appropriate to ensure the fair administration of justice.

50.This supervisory jurisdiction is conceptually and functionally distinct from the Court's appellate jurisdiction. While an appeal generally deals with the substantive merits of a lower court's decision, supervisory jurisdiction is concerned with the decision-making process itself. It exists to ensure that lower courts act strictly within the bounds of their legal authority, scrupulously observe the rules of natural justice, and do not abuse their processes.

51.In the persuasive and highly detailed decision of Director of Public Prosecutions v Perry Mansukh Kansagara & 8 others eKLR (High Court Criminal Revision 4 of 2020), the Court articulated the precise parameters for supervisory intervention. The court noted that intervention is warranted in situations involving:i.Special or exceptional circumstances that cannot be addressed through statutory revisional or appellate powers without undue expense or delay.ii.Clear and irrefutable evidence of a gross violation of a person's constitutional rights.iii.A public interest element so substantial that the superior court would be deemed as abetting an injustice if it did not intervene to correct the situation.

52.Applying this rigorous standard, there are two glaring instances of procedural and jurisdictional impropriety in the Kadhi's Court proceedings that compel this Court to invoke its supervisory mandate:

53.The Applicant uploaded an application to set aside the ex parte orders onto the Judiciary's electronic Case Tracking System (CTS) on 22 September 2025, paying all requisite filing fees. Irrefutable documentary evidence, including system-generated receipts and time-stamped screenshots from the CTS platform, confirms this submission. Yet, during the mention on 25 September 2025, the trial court declared that no such application had been filed and inexplicably granted the Respondent liberty to proceed with execution.

54.A court of law has a fundamental constitutional duty to hear parties who approach it seeking relief. The administrative failure of a court or its registry to recognize a properly filed application, leading directly to the imminent deprivation of a litigant's liberty and the forced removal of children, is a gross procedural failure. It violates the right to fair administrative action under Article 47 and the absolute right to a fair hearing under Article 50. This refusal alone constitutes an exceptional circumstance warranting immediate supervisory intervention to halt the tainted proceedings.

55.Perhaps the most egregious legal error in the trial court's proceedings is found in Order No. 5 of the 8 September 2025 Ruling. The Kadhi's Court issued mandatory summonses compelling several third-party corporate entities—including J.W. Marriott Hotel, Alba Hotels, Emirates Airline, and others—to produce booking documents, travel records, and CCTV footage concerning the Applicant.

56.The jurisdiction of the Kadhi’s Court is not general; it is explicitly and narrowly circumscribed by Article 170(5) of The Constitution. The provision states that the jurisdiction of a Kadhi’s court shall be limited 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. These factors are conjunctive, not disjunctive. If the parties do not profess Islam, or do not submit to the jurisdiction, the Kadhi's Court is entirely stripped of its authority.

57.While the Kadhi's Court possesses the ancillary procedural power to summon witnesses and compel evidence under Rule 132 of the Kadhi's Court Rules, this administrative power cannot be utilized to exercise coercive, substantive jurisdiction over non-Muslim third-party corporate entities. A corporate entity, such as a multinational hotel chain or an airline, does not possess a religious affiliation, cannot profess Islam, and certainly did not submit to the Kadhi's jurisdiction in this matrimonial dispute.

58.By issuing these mandatory discovery orders against non-parties, the Kadhi's Court engaged in severe jurisdictional overreach. It attempted to compel these corporations to breach data protection laws (specifically Section 30 of the Data Protection Act, 2019) and infringe upon the constitutional right to privacy (Article 31) of individuals who were not parties to the underlying dispute.

59.The chaotic consequences of this jurisdictional overreach are already evident. One of the individuals adversely mentioned in the Respondent's Kadhi Court affidavits, Mohammed Naeem Essak, was forced to file a Constitutional Petition (HCCHRPET/E067/2025) before the High Court at Kiambu to protect his privacy. On 8 October 2025, the High Court at Kiambu issued conservatory orders staying the execution of the Kadhi's Court CCTV production orders insofar as they affected non-parties.

60.The existence of parallel High Court proceedings generated solely by the Kadhi's Court's overbroad, ultra vires discovery orders creates a fragmented and highly dysfunctional judicial landscape. It is the exact scenario envisioned by the framers of the Constitution when they bestowed the High Court with the supervisory mandate under Article 165(6)—to systematically rein in subordinate courts that exceed their strict jurisdictional parameters and to ensure the orderly and fair administration of justice across the Republic.

Disposition

61.Accordingly, this Court, striving to uphold the strict tenets of natural justice, the supremacy of the Constitution, the rule of law, and the best interests of the children, makes the following orders:i.The Notice of Motion Application dated 30 September 2025 is hereby allowed.ii.Pending the hearing and final determination of the appeal, an order of stay of execution be and is hereby granted, staying the operation, execution, and enforcement of the whole Ruling and all consequential orders delivered by the Kadhi’s Court at Nairobi on 8th September 2025 in Matrimonial Cause No. KCMATC E007 of 2025 (Hassan Ahmed Abdulhafedh v Mina Achendid).iii.An order is hereby issued staying all further proceedings in the Nairobi Kadhi’s Court in Matrimonial Cause No. KCMATC E007 of 2025 pending the final determination of the appeal.iv.In the exercise of this Court's extraordinary supervisory jurisdiction under Article 165(6) and (7) of the Constitution of Kenya, 2010, the Executive Officer of the Kadhi's Court at Nairobi is hereby directed to transmit the original trial court physical file, the electronic CTS records, and the certified typed proceedings in Matrimonial Cause No. KCMATC E007 of 2025 to the Registry of the High Court, Family Division, within 21 days of the date of this Ruling for further examination and directions.v.The costs of this Application shall abide the outcome of the main appeal.

DATED AND DELIVERED AT NAIROBI THIS 3 DAY OF JULY 2026HELENE R. NAMISIJUDGE OF THE HIGH COURTDelivered on virtual platform in the presence of:Court Assistant: Lucy Mwangi

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE	https://new.kenyalaw.org/akn/ke/judgment/kehc/2026/9628/eng@2026-07-03
CASE PAGE	https://chat.esheria.ai/case-law/kenya/ma-v-haa-Stayofexecution-high-court-2026--9edc75cb99ab850b4e92eb4d

Prepared on 29 October 2026 · Esheria