



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 74 OF 2018

**DAVID KIRIMI CHARLES (Sued as Legal Rep of
ABRAHAM KAILEMIA IKIGU – Deceased).....APPELLANT**

VERSUS

**MUNTU KIRUMANIA MUNGANIA (Suing as Legal Rep. of DORIS
KINANU KIRIMANIA – Deceased).....RESPONDENT**

(An appeal from the Ruling and Order of Hon. L. Ambasi CM.

Made on 19th June, 2018 in Meru CMCC No. 2624 of 2010)

J U D G M E N T

1. The appellant was sued by the respondent in the above noted suit before the Meru Chief Magistrate's Court for damages arising out of an accident that occurred on 24th December, 2008. In that accident, Doris Kinanu Kirimania perished and his father claimed damages for her estate. Judgment was entered against the appellant on 20th January, 2012 for Kshs.1,022,350/-.
2. Since that time, the appellant has been in these courts resisting the execution of that judgment. He 1st filed an objection proceeding which was dismissed on 15th March, 2014. He appealed against that decision in the **Meru Civil Appeal No. 234 of 2013** which was dismissed by Gikonyo J on 16th November, 2017.
3. He was thereafter committed to civil jail in execution of the said decree. On 7th June, 2018, he took out a Motion on Notice before the trial court seeking the stay of execution pending the hearing and determination of the **Meru Constitutional Petition No. 16 of 2018 DAVID KIRIMI CHARLES (Suing as the Legal Representative of ABRAHAM KAILEMIA IKIGU –Deceased) vs. MUNTU KIRIMANIA (Deceased) (hereinafter “the Constitutional matter”)**.
4. By a ruling delivered on 19th June, 2018, the trial Court (Hon. L. Ambasi CM) dismissed the said application. It is against that ruling that the appellant has appealed to this court setting out 17 grounds of appeal. The appeal was argued by way of written submissions which the court has had the opportunity to consider.
5. In his submissions, **Mr. Ondieki** Learned Counsel for the appellant summarized the grounds of appeal to seven and I propose to consider the appeal along the same lines.
6. The first ground was that the trial court misapprehended the law to the prejudice of the appellant. That under ***Order 22 Rule 25 of the Civil Procedure Rules***, the trial court should have stayed the execution of the decree pending the determination of the constitutional matter. The case of **Kamaliza Security Guards v. Zakhem Construction (K) Ltd [2001] eKLR** and the ***RSC Order 47 r 1(1)*** were cited in support thereof.
7. ***Order 22 Rule 25*** provides:-

“Where a suit is pending in any court against the holder of a decree of such court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided”.

8. The said provision is only permissive. The use of the term “may” suggests that, the court has the discretion to either stay the suit or not. If it determines that it should stay the suit before it, it has the discretion to either impose security or not. It seems that it would be more persuasive to a court if the party applying for an order of stay to offer security. However, the failure by an applicant to offer security does not by itself hinder the court’s discretion to grant the stay sought.

9. In the present case, the appellant did not offer any security. The trial court seems to have considered that to be fatal. That was a misdirection. There was no requirement for the appellant to offer any security. It was for the trial court to impose the security that it would have considered to be adequate and appropriate in the circumstances, if it was of the opinion that it should order a stay.

10. To my mind therefore, the question is whether in misdirecting itself as such, the court erred. The case before the trial court was execution of a money decree. She considered that there had been no challenge whatsoever against the ex-parte judgment that was being executed. The so called “other pending suit against the decree holder by the judgment/debtor” was but a Constitutional petition challenging the constitutionality of the suit before the trial court.

11. Firstly, the so called Constitutional Petition that was pending before this court was not exhibited before the trial court. Secondly, even if it was exhibited, it is very unlikely that a lawful decree is challengeable by way of a Constitutional proceeding. It is trite that where there are settled procedures of challenging or securing reliefs under the law, the constitutional route is not the way to go. It is likely to amount to abuse of court process.

12. Be that as it may, and without hamstringing the court that will ultimately determine the appellant’s Constitutional petition, while the appellant was perfectly entitled to pursue the constitutional route, he should have established the specific rights that were violated, breached or threatened by the execution of the lawful decree before the trial court. In this regard, the trial court cannot be faulted for declining to grant the stay as sought on the ground of pending Constitutional petition.

13. The second and third grounds were that the trial court erred by applying the most draconian method of executing a judgment and that committing a person to civil jail should be used sparingly. The cases of **Lang’o Odhiambo v. Wilson Ndolo Ayah & 3 Others [2015] eKLR** and **Solomon Murithi Gitandu & Anor v. Jared Maingi Mburu [2017] eKLR** were cited in support of those submissions.

14. My view is that, the said cases were correct in the interpretation of the limitations inherent in the law in the use of committal to civil jail as a means of executing civil process. The limitation is evident in ***Order 38 of the Civil Procedure Rules***. Before resulting to committal as a means of execution, the court must to be satisfied that, the judgment/debtor is absconding from the jurisdiction or has dishonestly dealt with his property, or that he has had means to settle the decree or a substantial part thereof but has failed to or finally, or the decree is in respect of an amount he was bound in a fiduciary capacity to account.

15. The first step is a notice to a judgment debtor to show cause why he should not be committed to civil jail. That is an opportunity given to a judgment/debtor, such as the appellant was given, to show that he falls under the provision of ***Order 38 of the Civil Procedure Rules*** that, he is unable to settle the decree because of impecuniosity. Although appellant was given this opportunity, he failed to show that he is unable to settle the decree because of impecuniosity.

16. To the contrary, there is evidence on record that the appellant inherited a lot of immoveable and moveable properties from the estate of **Abraham Kailemia Ikiugu** as well as **Charity Nyawira Kailemia**. The lower court suit being one against him as a trustee of the estate of the late **Abraham Kailemia Ikiugu**, the appellant perfectly fell in the category of those who could be committed to civil jail in execution of a decree under ***Order 38 of the Civil Procedure Rules***. It as in respect of properties that he was bound to account. Those grounds fall by the wayside.

17. The next grounds were that, the trial court erred in failing to appreciate that the appellant was wrongly sued, in holding that it was mandatory that security be offered under ***Order 22 Rule 25*** and in finding that the judgment remained unchallenged. The case of **Lang’o Odhiambo v. Wilson Ndolo Ayah & 3 Others (Supra)** was cited in support of the contentions.

18. I have already held that the finding that there was no security offered was not fatal. The issue of whether or not the appellant was wrongly sued could not be an issue for the trial court to consider at that stage. It was common ground that the appellant has never applied to set aside the judgment or appeal against it. To my mind, the said judgment could not be said to have been challenged by the institution of the alleged constitutional petition. I have never known and I am not about to hold that facing a legal process as per law provided, which is without any abuse of process, can be termed a breach of a constitutional right or safeguard challengeable by way of a constitutional petition.

19. In the present case, what the appellant was facing was a legal process by way of execution by committal to civil jail. While it is not in the purview of this court or the trial court to consider what rights and freedoms had been violated or threatened to be violated, it was incumbent upon the appellant to disclose how a lawful legal process could be an infringement or threatened infringement of constitutional rights capable of forestalling a lawful legal process before the trial court. All he was needed to do was to show that he was impecunious, since committal cannot issue against an impecunious person. Those ground also fail.

20. In this regard, I find no fault in the way the trial court dealt with the matter.

21. I have considered the entire matter and record. It is not in dispute that at no time the appellant has ever challenged the respondent’s case before the trial court. A careful consideration of the record will disclose that:-

- a) an accident occurred and one **Doris Kinanu Kirimania** died as a result thereof;
- b) a suit was filed and judgment entered in favor of the estate of the deceased;

- c) a declaratory suit was filed against the appellant and judgment obtained which has for nearly 9 years has remained unchallenged;
- d) that the appellant is not only a legal representative of the estate of the late **Abraham Kailemia Ikigu**, but that he inherited substantial properties vide the Certificate of Confirmation of grant issued on 7th October, 2014;
- e) that the said **Abraham Kailemia Ikiugu** was the driver of the vehicle that caused the death of the deceased the subject of the suit in the subordinate court. That as such driver, it was alleged and proved that it was his negligence that had led to the accident that caused the death of the deceased;
- f) that the appellant was also the administrator of the estate of the late **Charity Nyawira Kailemi vide Meru HC Succession Cause No. 229 of 2009** wherein he had also inherited various properties including, but not limited to, death benefits, gratuity, monies in various accounts as well as substantial shares in various companies as per the Certificate of Confirmation dated 16th November, 2010.

22. To my mind, there was ample evidence before the trial court that, not only was the appellant avoiding to pay and settle the decretal amount, but that he had the ability to settle the decree but he was buying time. To my mind, if there was a proper case where a judgment debtor should be committed to civil jail and severally so, this was it.

23. It would seem that the appellant is playing musical chairs with both the courts and the respondent with the hope that with the passage of time, the decree will be rendered stale. Indeed, it is now 8 years since the judgment was passed in the primary suit and the 3rd respondent is yet to realize the fruits of that judgment. The decree has only a life of less than 3 years before it becomes stale.

24. Is the appellant to be allowed to continue with the 'dance' of musical chairs? I do not think so. It is time that he is told, and firmly so, that once legal rights inure by way of a judgment, they are enforceable as per law provided.

25. Accordingly, I find that the appeal is without merit and the same is hereby dismissed with costs. The Court had suspended the appellant's jail term pending the hearing and determination of this appeal. The appeal being unsuccessful, let the appellant be apprehended forthwith and continue to serve his term in jail as per the law provided.

It is so decreed.

DATED and **DELIVERED** at Meru this 20th day of June, 2019.

A. MABEYA

JUDGE