



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL APPEAL NO. 234 OF 2013**

*Arising from the Ruling of Hon NASIMIYU, RM in MERU*

*CMCC NO. 262A of 2010 delivered on 15<sup>th</sup> March 2013*

**(CORAM: F. GIKONYO J)**

**DAVID K. CHARLES.....APPELLANT**

**Versus**

**PATRICK KITHORE KIRIMANIA.....RESPONDENT**

**JUDGMENT**

[1] Being aggrieved by the Ruling of Hon NASIMIYU, RM in MERU CMCC NO. 262A of 2010 delivered on 15<sup>th</sup> March 2013 the Appellant preferred this appeal. He filed a Memorandum of Appeal dated 6<sup>th</sup> April 2013 and listed the following grounds of appeal:

- 1. The learned trial magistrate erred in law and in fact in that she failed to consider the property attached by the Respondent for sale belonged to legal representative personally and did not form part of the deceased estate which the legal representative was acting for.*
- 2. The learned trial magistrate erred in law and in fact in ignoring and failing to consider or sufficiently consider the Appellant's case and the evidence and the evident that was adduced.*
- 3. The leaned trial magistrate erred in law and infact by misinterpreting the law to dismiss the Appellant's objection.*
- 4. The learned trial magistrate erred in law in fact in bring in the issues of the administration of the Estate which no party had challenged as shown on the record in court.*
- 5. The decision of the trial magistrate is against the weight of evidence and the law applicable.*
- 6. The learned trial magistrate erred in law and in fact in that she brought in extraneous matter into her decision by concluding that the Estate had not been accounted for contrary to the evidence before her.*

[2] On 23<sup>rd</sup> May 2017, the Appellant filed an Amended Memorandum of Appeal raising the following grounds of appeal:-

- 1. The learned magistrate erred in law and fact by not evaluating the entire evidence placed before the court.**
- 2. The learned trial magistrate did not consider the magnitude of the issues involved in the fatal accident in which a whole family members perished.**
- 3. The learned trial magistrate did not give validation of the letters of administration given to the father of the insured (now deceased) and went ahead to condemn the administrator of the deceased brother Mr. Abraham KailemiaIkigu.**
- 4. The learned trial magistrate allowed the properties of the administrator to be auctioned when he as only playing the role of an administrator which could even be done by a public trustee of the Attorney General's office and whose properties cannot be possibly attached personally.**
- 5. The learned trial magistrate never considered that because a legally married wife and her husband perished in one accident there could possibly no two persons apply for separate letters of administration.**
- 6. The learned magistrate allowed an illegal process to continue by ex parte proceedings leading to an illegal attachment of an administrators properties of one brother of Abraham, Kirimi who was not the insured nor the owner of the motor vehicle registration No. KAU 339B that was involved in the fatal accident.**
- 7. The learned trial magistrate erred in condemning the appellant failing to taken into account that the above mentioned motor vehicle (now exhibited) at Embu entrance from the Rupingani Bridge was comprehensively insured by REAL INSURANCE Company and there was no third notice of the running down proceedings.**
- 8. The appellant's motor vehicle and other movables have been attached but by the grace of God they had sold KBJ 634Z but the rest of properties risk is still rife.**
- 9. The learned trial magistrate failed to properly interpret Sections 39 (2) of the civil Procedure Act Chapter 21 Laws of Kenya and Sections 37 to Sections 39 of the aforementioned act on issues of the responsibility of legal representatives.**
- 10. The learned trial magistrate erred in law and fact by not considering that the appellant has not even at the time of filing this appeal benefited even from possession from the estate of his sister in law (Charity K. Nyawira) which is anything her father in-law Joseph MuriukiMigwi whose daughter was a legally married woman and her comprehensive insurance polices were in her name and in a Nyeri Succession matter the policies were bequetted to the the father (Joseph Muriuki Migwwi).**
- 11. The legality of the issue of legal representative of two estates of one family is put to question and calls for a judicial interpretation.**

### **Preliminary issue**

[3] But a quarrel on the Amended Memorandum of Appeal was fastened by the Respondent in his submissions; that the Amended Memorandum of Appeal was filed without the leave of the court and introduces extraneous matters. This is a point preliminary significance and I should deal with it straight away. I will deal with it in two parts; amendment without leave and introduction of extraneous matters. Under Order 42 Rule 3(1) of the Civil Procedure Rules, the Appellant may amend his memorandum of appeal without leave at any time before the court gives directions under rule 13 of that order. See Rule 3

thereof which provides as follows:-

**3. (1) The appellant may amend his memorandum of appeal without leave at any time before the court gives directions under rule 13.**

**(2) After the time limited by subrule (1) the court may, on application, permit the appellant to amend his memorandum of appeal.**

The Amended Memorandum of Appeal was filed on 23<sup>rd</sup> May 2017. Direction under Order 42 Rule 13 of the Civil Procedure Rules were given on 20<sup>th</sup> June 2017 by Mabeya J. From the technical of the law, the Appellant may not have required leave to file amend his Memorandum of Appeal. On the other limb; does the amendment introduce extraneous matters? The original appeal was on the ruling delivered on 15<sup>th</sup> March 2013 upon objection proceedings filed by the Appellant under Order 22 rule 51 of the Civil Procedure Rules. But the amended memorandum of appeal introduces grounds which are fit for an appeal against the substantive judgment delivered on 20<sup>th</sup> January 2012. That kind of impleading an appeal within an appeal is not only obnoxious but also contrary to the law as it defeats the requirement that appeal should be filed within 30 days of the decision, and the purpose of amendment which I need not overemphasize is to enable the court to determine the real question or issue in controversy in a proceeding. The approach adopted herein muddles up everything and renders resolution of the issue in controversy obscure. I will therefore only determine the main issues in controversy in respect of the ruling delivered on 15<sup>th</sup> March 2013 as are discernible from the appeal.

### **Directions**

[4] On 20<sup>th</sup> June 2017, the court directed *inter alia* that this appeal be canvassed by way of written submissions. Parties were directed to file submissions on the appeal within a period specified in the order. The Respondent filed submissions on the appeal; they are dated 19<sup>th</sup> July, 2017. The Appellant filed submissions on 3<sup>rd</sup> July 2017 and 17<sup>th</sup> July 2017. But those submissions seem to address the Notice of Motion dated 2<sup>nd</sup> June 2017- however they argue the main points in controversy in the appeal and which I will address.

### **Analysis of evidence and arguments**

[5] From the Amended Memorandum of Appeal, the major quarrel is that the trial magistrate allowed personal properties of the Appellant to be attached and sold in execution of a decree against him as an administrator of the estate of the deceased. The impugned ruling of the trial court dated 15<sup>th</sup> March 2013 relates to objection proceedings that had been filed by the Appellant under Order 22 rule 51 and 52 of the Civil Procedure Rules. The objection proceedings were prosecuted through *viva voce* evidence adduced by the Appellant. Looking at the evidence adduced, the log books to motor vehicles registration numbers KBA 392H and KBJ 634Z were registered in the names of other persons whom the Appellant claimed to be the owners thereof. Under section 8 of the Traffic Act, the person in whose name the vehicle is registered is the *prima facie* owner of the vehicle. The section therefore, merely provides for a rebuttable presumption of ownership of the vehicle. On this proposition of the law see the case of **NANCY AYEMBA NGAIRA vs. ABDI ALI Civil Appeal 107 of 2008[2010] eKLR, where Ojwang, J** (as he then was) that:

***“There is no doubt that the registration certificate obtained from the Registrar of motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the Traffic Act is fully cognizant of the fact that a different person, or different other persons, may be the de facto owners of the motor vehicle – and so the Act has an opening for any evidence in proof of such differing ownership to be given. And in judicial practice, concepts have arisen to describe such alternative forms of ownership: actual ownership; beneficial ownership; and possessory ownership. A person who enjoys any of such other categories of ownership may for practical purposes, be much more relevant than the person whose name***

***appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership. Indeed, the evidence adduced in the form of the Police Abstract, showed on a balance of probabilities, that 1<sup>st</sup> defendant was one of the owners of the matatu in question.”***

[6] The evidence adduced show that both motor vehicles were insured in the name of the Appellant and his names appeared on both vehicles. In law, only persons with insurable interest may insure a property. In so far as property is concerned, insurable interest refers to a legal interest of a person in the protection of a property and such interest could be proof of ownership of a motor vehicle despite the fact that the insured is not the registered owner of the motor vehicle. In this case, although the Appellant claimed to be merely manager of the vehicles, the evidence available show he is the owner of the said vehicles with insurable interest thereto. Therefore, the presumption of ownership of the motor vehicles in question under section 8 of the Traffic Act was accordingly rebutted and the trial magistrate was right in rejecting the argument by the Appellant that he was merely managing the vehicles for the registered owners. In light of the evidence on record, I find that the Appellant is the owner of motor vehicles registration numbers KBA 392H and KBJ 634Z.

[7] Having stated the above, one question still lingers in this appeal, that is:-

***Whether execution of a decree passed against a party as the legal representative of a deceased person may be executed by the attachment and sale of the property of the legal representative of the deceased person.***

This very question arose in an earlier application in this matter and the court stated the following:-

***I must admit that, although this application is essentially seeking stay of execution pending appeal, it is, however, based on somewhat rare and quite technical ground; execution against legal representative of the deceased. Therefore, this question requires a discussion on the process and procedure of execution of decree against the legal representative of the deceased. Accordingly, sections 37 to 39 of the Civil Procedure Act are of utmost importance. But, I will recite section 38 and 39 in extenso below:***

### ***37. Legal representative***

***(1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representative of such deceased, or against any person who has intermeddled with the estate of such deceased.***

***(2) Where the decree is executed against such legal representative, or against any person as aforesaid, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability the court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.***

### ***39. Enforcement of decree against legal representative***

***(1) Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.***

***(2) Where no such property remains in the possession of the judgment-debtor, and he fails to satisfy the court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the court in the***

*same manner as if the decree had been against him personally.*

***Attachment of property of deceased held by legal representative***

***[5] The law, the way I understand it is that execution against a legal representative of the deceased person is permitted. Except, however, liability thereto will be to the extent of the property of the deceased which has come to the hands of the legal representative and has not been duly disposed of. Therefore, where the entire estate property has gone to the legal representative, as is the case, here, execution shall be directed at any or all of the property of the deceased that has come to him.***

***Execution against personal legal representative personally***

***[6] The law also allows execution against any person who has intermeddled with the property of the estate. But, in a case of intermeddling with the estate of the deceased or where no property has been left in the hands of the legal representative or where there is need to ascertain the link between the property of the legal representative and the estate property, the court is called upon to carry out an inquiry. I borrow this from the clear text of the law above as well as from the words...only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; which bear defined legal connotation. Thus, the law requires and empowers the court executing the decree, on its own motion or on application of the decree-holder to carry out an inquiry...for the purpose of ascertaining such liability... to compel such legal representative to produce such accounts as it thinks fit. This inquiry takes after the procedure provided for Notice to Show Cause and it will certainly be an important consideration to establish whether the legal representative has dishonestly transferred, concealed, charged or removed any part of the estate property, or committed any other act of bad faith in relation to the estate property. Thus, where no such property of the estate remains in the possession of the legal representative- the judgment-debtor in the suit- the inquiry is even more intense, and if he fails to satisfy the court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the court in the same manner as if the decree had been against him personally. See section 39(2) of the Civil Procedure Act which provides that:-***

***Where no such property remains in the possession of the judgment-debtor, and he fails to satisfy the court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the court in the same manner as if the decree had been against him personally***

***Accordingly, depending on the result of the inquiry I have alluded to above, the law allows execution of such decree against the legal representative as if it was against him personally. This means, in such circumstances, his own properties may be attached in satisfaction of the decree.***

[8] Doubtless, the Appellant is the administrator of the estate of the deceased, one Abraham KailemaIkigu and the sole beneficiary thereof. He was sued as the defendant but in representative capacity, in the suit appealed from. He is also the judgment-debtor in that case. Therefore he is subject to section 38 and 39 of the Civil Procedure Act. Notably, the inquiry in section 37 and 39 of the Civil Procedure Act need not take a particular form of pleading although I stated that it takes after the procedure for a notice to show cause; meaning that, whatever procedure adopted, should avail the person an opportunity to explain why his property should not be attached or sold in execution of the decree therefrom. Therefore, the Objection proceedings provided a perfect atmosphere for and was such inquiry. And it is laudable that the trial magistrate determined the objection proceedings through *viva voce* evidence. And as a result of that inquiry, liability for purposes of executing the decree against the personal representative of the deceased was accordingly established. The Appellant did not inform the court of the due application of the property of the deceased for which he was the administrator and had

come into his possession as the sole beneficiary of the estate of the deceased. See the confirmed grant. As such, the decree may be executed against the motor vehicles that were insured and owned by the Appellant. It bears repeating that, in the circumstances of this case, the decree herein could be executed against the administrator in the same manner as if the decree had been against him personally. See section 39(2) of the Civil Procedure Act which provides that:-

***Where no such property remains in the possession of the judgment-debtor, and he fails to satisfy the court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the court in the same manner as if the decree had been against him personally***

[9] Accordingly, I find no fault in the decision by the trial magistrate in her ruling of 15<sup>th</sup> March 2013 in respect of the Objection proceedings herein. The trial magistrate was fully alive to the above provisions of the law and clearly stated in the ruling that:

***“The 2<sup>nd</sup> Objector has not explained to this court why the decree in this suit remains unsatisfied to date and has not provided any accounts to the court on how he has applied the estate of the deceased.***

***I find that the conduct of the 2<sup>nd</sup> objector/judgment debtor is calculated at obstructing and delaying the process of execution herein.***

***Order 39 Rule 1 of the Civil Procedure Rules provides, that a decree may be executed against the legal representative of an estate to the extent of the property of the deceased in respect of which he has failed to satisfy the court that he has duly applied that property, in the same manner as if the decree had been issued against him personally”.***

[10] In the upshot, this Appeal fails and is dismissed with costs to the Respondent. It is so ordered.

**Dated, signed and delivered in open court at Meru this 16<sup>th</sup> day of November 2017**

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**F. GIKONYO**

**JUDGE**

In the presence of:

Mr. Mokuia advocate for Respondents

Mr. P.K. Njoroge advocate for Appellant – absent

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**F. GIKONYO**

**JUDGE**