



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 447 OF 2014**

**BETWEEN**

**SARAH NJAMBI WAWERU.....1<sup>ST</sup> PETITIONER**

**SAMUEL KIMANI WALLACE.....2<sup>ND</sup> PETITIONER**

**AND**

**THE ADMINISTRATOR OF THE ESTATE OF FRANCIS KAHENDE KIMANI**

**(namely HELLEN NYAMBURA KAHENDE JOSEPH NJOYA**

**MAK'OGONYA T.T. TIEGO).....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. This Petition was filed on 11<sup>th</sup> September 2014 and it is said to be premised on **Article 165** of the **Constitution** and **Sections 362** and **363** of the **Criminal Procedure Code Cap 75 Laws of Kenya**.

2. It relates to land parcel number Dagoretti/Kangemi/73 whose ownership has been in dispute between the 1<sup>st</sup> Petitioner and the late Francis Kahende represented by the Administrators of his estate, the present 1<sup>st</sup> Respondent.

3. In the Petition, it is the Petitioners' claim that there have been prior Court proceedings between the Parties relating to that land viz:

**i) SRMCC No.10814 of 1993** where the late Francis Kahende had sued the 1<sup>st</sup> Petitioner claiming a refund of Kshs.100,000/- for purchase of ½ acre out of title Dagoretti/Kangemi/73 aforesaid. He succeeded in his claim.

**ii) C.M's Court Criminal Case No.4255 of 1993** against both Petitioners upon a

complaint initiated by the late Francis Kahende who had claimed that the Petitioners had obtained Kshs.120,000/- on the false pretence that they were in a position to sell to him ½ acre out of land parcel No.Dagoretti/Kangemi/857. The 1<sup>st</sup> Petitioner was found guilty and was duly convicted of that charge.

**iii) Kiambu C.M's Court Civil Case No.370 of 1995** in which the late Francis Kahende had sued for specific performance of the contract for sale of the ½ acre out of Dagoretti/Kangmei/857. He succeeded in his claim.

4. At paragraph 9 of the Petition, the Petitioners have pleaded that this Court ought to call for all the above files ***“for revision and for appropriate orders for the ends of justice and that none of the decisions were based on cogent evidence as required by law.”***

5. The specific prayers in the Petition are in any event the following;

***“1) The late Francis Kahende Kimani having recovered Kshs.100,000/- in SRMC Civil Case No.10814 of 1993 Nairobi was not entitled to 1 ½ acres of land which he eventually obtained.***

***2) The transfer of the said lands totalling 1 ½ acres be reversed and possession of the same be reverted for the 1<sup>st</sup> Petitioner.***

***3) The Petitioners be awarded damages and costs of this Petition.”***

### **Petitioners Case**

6. The Petitioners case is contained in their Petition aforesaid, the Supporting Affidavit of Sarah Njambi Waweru, the 1<sup>st</sup> Petitioner, sworn on 10<sup>th</sup> September 2014, a Further Affidavit sworn on 1<sup>st</sup> October 2015 and their Written Submissions dated 26<sup>th</sup> March 2015.

7. It is their evidence that the 1<sup>st</sup> Petitioner was the registered proprietor of land parcel No.Dagoretti/Kangemi/73 which, in 1990, she sub-divided and created Nos. Dagoretti/Kangemi/857 and 885. By 1989 however, she had agreed to sell ¼ acre to the late Francis Kahende at Kshs.100,000/-. A Sale Agreement between the two of them was allegedly prepared by Kahende's lawyer but it provided that she was selling one acre to him. She thereafter declined to perform her part of the agreement for that reason.

8. Kahende then sued the 1<sup>st</sup> Petitioner in **Nairobi SRMCC No.10814 of 1993** claiming a refund of the Kshs.100,000/- he had paid her and after obtaining judgment, he attempted to auction parcel number 857 aforesaid. The 1<sup>st</sup> Petitioner in 1995, to save the land, paid the decretal sum in cash.

9. According to the Petitioners, the matter should have ended there but Kahende then filed a criminal complaint claiming that the Petitioners had falsely and unlawfully pretended to sell him ½ acre to be excised out of land parcel No.Dagoretti/Kangemi/857 and when they failed to transfer the land to him, he obtained the 1<sup>st</sup> Petitioner's conviction for obtaining money by false pretences.

10. At paragraph 13 of her Supporting Affidavit she then stated that after the conviction, Kahende filed yet another civil suit, being **Kiambu CMCC No.370 of 1995**, obtained judgment in his favour and later had ½ acre out of parcel No.857 aforesaid transferred to him.

11. The gist of their case before this Court is therefore that all the above proceedings were unlawful, based on lies and fraud propagated by Kahende and accepted by the Courts and they have thereby suffered great injustice in the loss of the ½ acre of land, money in litigation costs, mental anguish and humiliation. They seek the orders elsewhere reproduced above.

### **1<sup>st</sup> Respondent's Case**

12. Hellen Nyambura Kahende, by a Replying Affidavit sworn on 22<sup>nd</sup> May 2015 opposed the Petition on behalf of the 1<sup>st</sup> Respondent. Submissions were also later filed in that regard on 11<sup>th</sup> June 2015.

13. For the Estate of the late Francis Kahende, its case is that the Petitioners have deliberately concealed from this Court pertinent facts including the fact that although Kahende died on 24<sup>th</sup> December 2010, it took the Petitioners 4 years to institute the present proceedings which relate to events that occurred in his lifetime.

14. They also state that the purchase price of the land that the late Kahende paid for was Kshs.120,000/- and it was to be excised from Parcel No.73 aforesaid and the said excision was later registered as Parcel No.858. That the 1<sup>st</sup> Petitioner, after applying for Land Control Board Consent and obtaining it, refused to transfer the same hence the basis for her arrest, charge and conviction in **Criminal Case No.4255 of 1993**. No appeal from that decision was ever filed.

15. They add that **Kiambu CMCC No.320 of 1995** was then filed for orders of specific performance which were granted and an appeal in **Nairobi HCCA No.91 of 1990** was dismissed by Visram J (as he then was). No appeal from that decision was filed either.

16. According to the 1<sup>st</sup> Respondent, although the title to the land in issue was registered in the name of the late Kahende, on 19<sup>th</sup> August 1996, the 1<sup>st</sup> Petitioner filed a restriction against that title which was only removed by an order of Musyoka J issued on 19<sup>th</sup> September 2013 in **Succession Cause No.613 of 2011**. In the Matter of the Estate of the Late Francis Kahende.

17. That from the above facts, it is their conclusion that the Petitioners have approached this Court with soiled hands, in abuse of its processes and their Petition ought to be struck off.

### **2<sup>nd</sup> Respondent's Case**

18. On its part the 2<sup>nd</sup> Respondent in opposing the Petition filed the following Grounds of Opposition;

***“1) The Petition is otherwise incompetent, misconceived, misplaced and is an abuse of the process of this Honourable Court.***

***2) The Petition is bad in law, vexatious and a total sham.***

***3) The law is clear that where a party is aggrieved by the judgment of a Court he ought to Appeal or apply for Review of the judgment.***

***4) The Petition is frivolous and incurable defective as the Petitioners have not exhausted the available avenues of Review and Appeal.***

***5) The Petition is barred by the doctrine of laches.***

***6) The Petition is unmeritorious as the threshold for the grant of the orders sought has not been met.”***

### **Determination**

19. I have taken into account the submissions made and the authorities cited but in my view, there is good reason why a party should be held to its pleadings; so that a Respondent and the Court can know what issues are in contest and to be responded to. The same issues are what a Court must determine.

20. Elsewhere, above, I reproduced the Prayers in the Petition herein and they can be summarised as herebelow;

21. The first issue to address however is whether this matter was properly brought as a constitutional question to be addressed under **Article 165(3)(d)** of the **Constitution** which provides as follows:

*“165(3) Subject to clause (5), the High Court shall have—*

*(a) ...*

*(b) ...*

*(c) ...*

*(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—*

*(i) the question whether any law is inconsistent with or in contravention of this Constitution;*

*(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution”.*

22. I have not seen any pleading or submission on the above provision but I gather that the Petitioners have placed firm reliance on **Article 165(6)** and **(7)** of the **Constitution** which provide as follows:

*“(1) ...*

*(2) ...*

*(3) ...*

*(4) ...*

*(5) ...*

*(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.*

*(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”*

23. In what circumstances can the above provisions be invoked? The 2<sup>nd</sup> Respondent referred to the decision of Tuiyot J in **Busia H.C Criminal Case No.5 of 2014, Republic vs Douglas Barasa & Anor** where the Learned Judge stated thus:

*“where there is specific and alternative remedy then a party seeking supervisory redress must use that avenue unless it can be demonstrated that the alternative remedy is not efficacious. To invoke the use of Article 165(6) of the Constitution even where there is specific and effective statutory framework would be to diminish the importance of both the Constitutional and Statutory provisions.”*

24. Makau J in **Meru H. C. Petition No.14 of 2014** also stated as follows in that regard:

*“where a dispute resolution mechanism is provided for in a Statute, and where there is a clear procedure for the redress of any particular grievance by the Constitution or Statute that*

***provision ought to be strictly followed.”***

25. The above statements seem to echo the oft-quoted position taken by the Court of Appeal in **Speaker of the National Assembly vs Karume, Civil Application No.92 of 1992**.

26. I have no reason to disagree with the above findings and as regards revision in criminal cases under **Sections 362 and 363 of the Criminal Procedure Code**, the 1<sup>st</sup> Respondent referred to the decision of Ibrahim J (as he then was) in **Ephantus Gachanja & 3 Others vs Republic [2010] eKLR** where he stated thus:

***“The Court’s jurisdiction and powers of revision are strict and should be exercised only in appropriate cases. Revision process ought not to be used as a guise of or to supplant appeals. The two are separate and distinct procedures. I see no impropriety or illegality in these proceedings. For a trial Court to reach a possible erroneous or wrong decision in law does not automatically invoke the revisionary powers of this Court.”***

27. Again I find no reason to disagree with that finding and therefore in a nutshell:

- i) For supervisory jurisdiction to be exercised, it must be shown that the Petitioners have no other remedy available in law hence recourse to that special jurisdiction of the High Court and;
- ii) For revision in criminal matters to be invoked, it must not be such as to supplement or avoid an appeal.

28. In that regard, I recall that the Petitioners stated at paragraph 9 of the Petition:

***“The Petitioners plead with this Honourable Court to call for the three files for revision and for appropriate orders for the ends of Justice, for the reasons that none of the decisions were based on cogent evidence as required by law”.***

29. The three files are:

- i) Nbi SRMCC No.10814 of 1993;**
- ii) Nbi CM’s Court Criminal Case No.4255 of 1993; and**
- iii) Kiambu CMCC No.370 of 1995.**

30. Revision is provided for under **Section 362 and 363 of the Criminal Procedure Code** which provide as follows:

***“362 The High Court may call for and examine the record or any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.***

***363.(1)A subordinate court of the first class may call for and examine the record of any criminal proceedings of a subordinate court of a lower class than it and established within its local limits of jurisdiction, for the purpose of satisfying itself as to the legality, correctness or propriety of any finding, sentence or order recorded or passed, and as to the regularity of the proceedings.***

***(2)If a subordinate court acting under subsection (1) considers that a finding, sentence or order of the court of lower class is illegal or improper, or that the proceedings were irregular, is shall forward the record with its remarks thereon to the High Court.”***

31. Without saying more, only **Nbi CM’s Criminal Case No.4255 of 1993** can fit the very basic test

under the above Sections because Civil Cases are not amenable to the legal concept of revision.

32. However, all three are at the very basic amenable to the supervisory jurisdiction of this Court. There is no doubt however that in the criminal case, there is nothing to revise. I have read the proceedings (supplied by the Petitioners) and I see no impropriety in the manner the proceedings were conducted.

33. In fact, I notice that in that criminal case, the Petitioners were represented by an advocate, Mr. Gitonga, who raised no objection to any aspect of the trial. In sentencing the Petitioners on 30<sup>th</sup> June 1994, the learned trial Magistrate stated thus:

***“Owing to the nature of the case and the circumstances brought to court’s attention, accused person is remorseful for what she has put complainant through, she is aged and now is willing to have the property transferred/do what she ought to have done. Accused person is discharged under Section 35(1) with an additional stringent condition to have the documents that were to be executed by her so executed within 30 days from today.”***

34. Despite the above orders, twenty years later, a revision is now being sought allegedly because the evidence leading to the conviction was not “cogent”. That allegation, in my view, cannot be sustained at all and the Petitioners, not having appealed their conviction and sentence cannot now purport to seek a revision of the said decision.

35. Regarding **CMCC No.370 of 1995**, I have read the judgment of Visram J in **C.A 91 of 1996** where the Petitioners were the Appellants. The Learned Judge dismissed the Appeal after a thorough analysis of the facts and the law. How can this Court now be called upon, under **Article 165(6) and (7) of the Constitution** to do anything about that decision? This Court cannot supervise itself and cannot also sit an appeal on its own decisions. Again, the prayers by the Petitioners are incredible, to say the least.

36. As for **SRMCC No.10814 of 1993**, the Judgment in that Court was delivered against the 1<sup>st</sup> Petitioner on 23<sup>rd</sup> November 1994. The decree was later executed by the payment of monthly instalments of Kshs.15,000/- from 1<sup>st</sup> February 1995 until payment in full (those terms were recorded by consent). No appeal or even review of that decision was ever made. What other orders can this Court then give? I submit none.

37. Having so said, I agree with the Respondents that the delay in filing the present Petition is unacceptable, neither is the approach taken by the Petitioners in instituting it.

38. Without taking further precious judicial time, before me sit a Petition that falls in the rank of the frivolous, vexatious and an abuse of Court process and it is obvious why. The three prayers sought cannot be granted.

39. The Petition herein is hereby dismissed. As for costs, they follow the event and a Petition such as this one should only attract costs against the Petitioners to be paid to the 1<sup>st</sup> respondent only.

40. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF APRIL, 2016**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Muriuki – Court clerk

Mr. Khamati for Petitioner

Mr. Kamunya holding brief for Miss Wawira for 2<sup>nd</sup> Respondent

No appearance for 2<sup>nd</sup> Respondent

**Order**

Judgment duly read.

**ISAAC LENAOLA**

**JUDGE**