



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NO.402 OF 2000**

**IN THE MATTER OF THE ESTATE OF NGUGI B KAGUTHI (DECEASED)**

**ANN CHEPTOO.....APPLICANT**

**VERSUS**

**JOEL KAGUTHI NGUGI.....RESPONDENT**

**RULING**

1. This is a ruling on application dated **18<sup>th</sup> December 2014**. It seeks the following orders:

- a. That **Joel Ngugi Kaguthi** be ordered to release motor vehicle registration number KSD Peugeot Station Wagon to the applicant who is now bedridden due to diabetes.
- b. That the respondent be ordered to reinstate a fence between plot No. Nakuru Municipality Block 27/191 and Nakuru Municipality Block 27/192.
- c. Costs of the application to be provided.

2. Ground on the face of the application is that the court delivered its judgment on 31<sup>st</sup> May 2006 and the vehicle registration number KSD Peugeot Station Wagon was awarded to the applicant by the court; that the said vehicle was in possession of the respondent and so far it has not been produced or handed over to the applicant.

3. Further that the respondent has gone ahead to pull down houses that the applicant had put up in plot LR **Nakuru Municipality Block 27/191**.

4. That in the interest of justice, the respondent ought to put up the fence that he destroyed without the applicant's involvement or service of court documents in Nakuru CMCC No.612 of 2013.

5. The application is supported by affidavit sworn by the applicant. She averred that judgment was delivered by **Justice Kimaru** on 15<sup>th</sup> December 2014 and confirmation of grant was issued on 31<sup>st</sup> May 2006 and according to the confirmed grant, the applicant was allocated motor vehicle registration number KSD Peugeot Station Wagon but he has delayed in following up the matter because he became diabetic and both his legs have been amputated.

6. He prayed that the court to order the respondent to release the said vehicle.

7. In response, the respondent filed 2 further affidavit sworn on 2<sup>nd</sup> April 2017 and 9<sup>th</sup> May 2017. He averred that the application does not disclose any wrong doing on his part. He stated that there have been court orders in force which ordained all their actions and by orders issued by **Hon. Nthuku** on 14<sup>th</sup> March 2014 in respect to illegal structures erected on plot **No. Nakuru municipality Block 27/192** which orders have never been challenged, varied and or set aside; that the respondent merely complied with valid court orders devoid of any intrusive acts.

8. He averred that the applicant omitted to inform the court that her son **John Kiboi** three times sought to take the vehicle from where it was packed and out of their custody.

9. He averred that he personally took the applicant's son to parking lot at Scarlet Plaza on Kanu Street where the vehicle had been parked all

along and the vehicle keys were handed over to the said **John Kiboi**; he added that ordinarily the vehicle was not in use which he derives interest neither is any of his family. He states that they only retained the logbook alongside other family documents.

10. He further averred that the applicant's son went with his driver one **Martin** from Eldoret when he sought to have the vehicle and since then, he has not heard about the vehicle which belonged to their father.

11. He averred that loss or disappearance of the vehicle has not been reported to police; he stated that in compliance of the vehicle he gave out the vehicle 7 years ago because he had no interest in the same neither did he use it before and its whereabouts can best be found in the doorsteps of the applicant.

12. He averred that the remainder of the applicant's averments is speculative, imprecise and devoid of merit hence orders sought should not be allowed.

13. He concluded by stating that, should the orders sought be granted, he will be grossly be prejudiced at the instance of illegalities; that they will suffer immeasurable loss and damage and prayed for the application to be dismissed.

14. In response to the respondent's affidavit the applicant filed affidavit sworn by **John Kiboi Ngugi** a son to the applicant on 25<sup>th</sup> September 2017. He denied having ever met the respondent to enquire about the motor vehicle herein as respondent had already informed his mother's lawyers that it got burnt during post-election violence.

15. He averred that the respondent has been difficult in nature as it took several months for him to release title deeds to his mother which he finally did on 3<sup>rd</sup> July 2017.

16. Counsels herein proceeded by oral submissions. **Ms Nancy Njoroge** for the applicant submitted that efforts to have release of motor vehicle herein have not elicited positive conclusion. She referred to judgment by **Justice Kimaru** delivered on 31<sup>st</sup> May 2006. She submitted she finally got the title deeds and logbook through **Mr. Biko** Advocate but the respondent has in custody the vehicle and varied explanations that sell him out. That in affidavit he swore on 7<sup>th</sup> May 2017, he said he had called the son of applicant **John Kiboi** to take the vehicle and in the same affidavit he says he didn't take it. He says it was taken away by the son then says it got burnt during post-election tribal clashes. She submitted that given several explanations their view is that the vehicle is with the respondent.

17. **Mr. Biko** for the respondent submitted that his client complied with court order and the only question is possession. He relied on their affidavit; he submitted that the application is not seeking Anton pillar orders and the explanation has been given in good faith and left it to the court to make a determination on the issue. He argued that the registration number of the vehicle in applicant's affidavit is KSD which is not complete.

18. In a rejoinder **Ms. Nancy Njoroge** submitted that they have come to court under **Section 47 of the Succession Act** that gives this court orders to ensure that justice is done and up to now they have not been told their client has been given the vehicle. She said the logbook given to them indicate the logbook number as KSD 496; that they are referring to the same vehicle.

#### **ANALYSIS AND DETERMINATION**

19. There is no doubt that the vehicle referred to herein is registration number KSD 496. This is confirmed by logbook given to applicant's advocate by respondent's counsel and also referred to in the letter dated 2<sup>nd</sup> November 2008 from the respondent's advocates to the applicant's advocates.

20. It is not in dispute that the said vehicle was allocated to the applicant in confirmation of grant dated 31<sup>st</sup> May 2006. Its logbook is confirmed to have been given to applicant's Advocates. What is in issue is whether the respondent gave out possession of the vehicle to the applicant and/or who has custody of the vehicle and if it has not been given to the applicant why and finally what is the remedy.

21. I agree with counsel for the application that the respondent did not give candid explanation as to the whereabouts of the vehicle. From the averments he contradicts himself. At one point he says he showed the vehicle to the son of the applicant **John Kiboi Ngugi** and gave him the car keys. He adds that the said **Kiboi** went with the mechanic to collect the vehicle from the garage and further that it is the applicants who knows where the vehicle is.

22. On the other hand, he avers that the garage where he had taken the vehicle got burnt during post-election skirmishes. He however never availed any occurrence book extract to confirm that indeed the vehicle was burnt during post-election skirmishes or any other evidence to corroborate his allegations.

23. The respondent's contradictory versions concerning the vehicle casts doubt on his credibility and I am persuaded to believe that he has not been truthful to the court. It is my considered view that he never released or handed over the vehicle to the applicant neither was it burnt.

24. The applicant deserve to be compensated by the respondent the equivalent of the value of the car at the time it was allocated to her if the vehicle cannot be released to her for any reason by the respondent.

#### **25. FINAL ORDERS**

- 1. Motor vehicle registration number KSD 496 be released to the applicant.**

2. In the event that the respondent is not able to release the vehicle for any reason, he pays the applicant money equivalent to the value of the vehicle at the time the grant of letters of Administration was confirmed.

3. Costs of the application to the applicant.

Ruling dated, signed and delivered via email at Nakuru this 14<sup>th</sup> day of May, 2020.

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**RACHEL NGETICH**

**JUDGE**

**TO:**

Odhiambo and Odhiambo & Co. Advocates Counsel for Applicant

Nancy Njoroge & Co. Advocates Counsel for Respondent