



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CONSTITUTIONAL PETITION NO. 2 OF 2020

ELIAS MWIRIGI ARIMI.....PETITIONER

VERSUS

THE HIGH COURT OF KENYA1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND

MOSES GITUMA IPWI1ST INTERESTED PARTY

BEATRICE NKATHA M'IMPWI2ND INTERESTED PARTY

LUCY KENDE IMPWI.....3RD INTERESTED PARTY

GRACE MWARI M'IMPWI4TH INTERESTED PARTY

CATHERINE MUKIRI DOMISIANO.....5TH INTERESTED PARTY

R U L I N G

1. By a petition dated 05/02/2020, the petitioner contended that he was the registered owner of **L.R. No. Abothuguchi/Kariene/2191** having purchased the same from the 1st Interested Party for value.

2. That however, by a judgment delivered on 19/12/2018 in ***Meru Succ. Cause No. 255 of 2010 “(the Cause)”***, the court cancelled the transfer of both **L.R. No. Abothuguchi/Kariene/2490 and 2491** to the 1st interested party and reverted the titles thereto back to the deceased. The same were consequently shared equally among the five (5) beneficiaries of the deceased in that Cause.

3. Consequently, the petitioner alleged that the said decision had breached his constitutional rights and in particular, his right to property. He therefore sought orders in the following terms: -

"a) A declaration be issued that the judgment in Meru H.Ct. Succ. C. No. 255 of 2010 and any decree emanating therefrom is unconstitutional, illegal, null and void to the extent that it denies the petitioner, ELIAS MWIRIGI ARIMI, the right to the property comprised in L. R No. Abothuguchi/Kariene/2491 without due process.

b) Any entries made in the register thereto pursuant to the said judgment and/or decree be cancelled forthwith to reinstate the petitioner as the registered owner thereof.

c) Any cautions, inhibitions and/or restrictions registered against L. R. No. Abothuguchi/Kariene/2491 pursuant hereto or to the said judgment sand decree be lifted forthwith.

d) Costs be provided for."

4. The 1st and 2nd respondent filed a notice of preliminary objection dated 20/04/2020. In the objection, they opposed the petition on ten (10)

grounds which may be summarized to four (4): **that the petition raises no reasonable constitutional issues or breaches; no action can be brought against the 1st respondent or judicial officers; the court lacks jurisdiction as the matter is res judicata; and that the petition lacks substratum for the petitioner ought to seek redress through appeal and or review.**

5. The parties filed their respective submissions which the Court has carefully considered. The respondents submitted that the 1st respondent is a court of admiralty in terms of **section 4 of the Judicature Act**. That it therefore lacks juristic personality. That judicial officers enjoy judicial immunity in exercise of their judicial functions by dint of **Article 160 (5) of the Constitution** and **section 6 of the Judicature Act**.

6. It was further submitted that the prayers sought showed that the petitioner was seeking the court to exercise its supervisory jurisdiction over a court of equal status. Besides, there was a pending appeal before the Court of Appeal. The cases of **Housing Finance Company of Kenya Ltd v Embakasi Youth Development Project Civil Case No. 1068 of 2001 (2004) 2 KLR**, **Maina Gitonga v Catherine Nyawira Maina & another [2015] eKLR** and **Peter Ng'ang'a Muiruri v Credit Bank Limited & 2 others [2008] Eklr** were relied on in support of those submissions.

7. On his part, the petitioner submitted that there was a constitutional issue to determine since there was a breach of his constitutional rights. That judges and other judicial officers are immune from prosecution by virtue of **Article 160(5) of the Constitution** and **section 6 of the Judicature Act** but this did not extend to the 1st respondent which is a legal entity capable of being sued.

8. That it was the 1st respondent who was being sued and not the judicial officer who presided over the Cause. That since the petitioner was not a party in the Cause, he was not bound by the rules of appeal and or review. That in the premises, the matter was not *res judicata* as alleged by the respondents.

9. Preliminary objections are raised purely on a point of law and not facts. See **Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd [1969] E.A. 696**, where Newbold P, observed: -

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop”.

10. The facts in this matter are agreed. The petitioner had purchased the subject property from the 1st interested party. It was in his name as at the time the Cause came up for hearing. He alleged that he was not involved in the Cause. The judgment is alleged to have infringed his right to property. Is that a constitutional breach which can be pursued by way of a constitutional petition?

11. I do not think so. Since the judgment was made in properly existing Cause, the proper course should have been to pursue and challenge those orders in the said Cause and not to lodge an independent Constitutional petition. It is presumed that a lawful judgment by a competent court cannot be said to be unconstitutional and amenable to the process of challenge through a Constitutional Petition as the petitioner has sought herein. There are legal channels that exist to challenge such decisions.

12. In my view, what the petitioner should have done was to apply and be enjoined in that Cause for the purpose of challenging that judgment. That is possible under **section 76 of the Law of Succession Act**, by applying for the revocation of the grant on the alleged ground that it extended to determine rights over his property without giving him a hearing. This is possible as the Court in that judgment observed that there was no evidence to show that the 1st interested party had sold the subject property. That is all the petitioner needs to produce to the court that made the judgment rather than seek to challenge it vide a separate Constitutional Petition as he has now sought to.

13. In this regard, I find that there is no constitutional issue capable of being determined by way of a separate Constitutional Petition.

14. The second issue is whether this Court has jurisdiction to entertain the matter. Jurisdiction is everything without which a court has no power to make one more step as it is required to down its tools. See **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR**.

15. It was the respondents' contention that this Court lacks jurisdiction as the matter is *res judicata*. That this Court cannot sit on appeal on a decision made by a Court of co-ordinate jurisdiction. On his part, the petitioner submitted that the matter is not *res judicata* and does not fall under **Section 7 of the Civil Procedure Act**.

16. The issue before the Family Court in the **Meru Succ. Cause No. 255 of 2010** was the ascertainment of the assets and beneficiaries of the deceased and the consequent distribution of the estate. The issue at heart therefore was, whether the subject properties belonged to the deceased. The Family Court having determined that issue, the same cannot be open to further determination by a Court of co-ordinate jurisdiction.

17. It was the petitioner's contention that he had suffered a legal grievance as a result of the judgment in the said Cause. In the effect, the petition in this matter is questioning the said judgment.

18. It is true that this Court has jurisdiction under **Article 165 (3) (b) of the Constitution** to determine a question as to whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. In prayer (a) of the petition, the petitioner seeks to declare the said judgment unconstitutional on the ground that it had denied him his right to property.

19. In my view, that would be invoking this Court's supervisory jurisdiction. That jurisdiction is not available where the actions sought to be

reviewed are those of a court with co-ordinate jurisdiction. That will infringe *Article 165 (6) of the Constitution* which provides: -

“(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.”

20. In **Kombo v Attorney –General [1995-1998] 1 EA 168**, the court observed: -

“As all complaints in the application seem to be criticisms on what was done by that court and, it seems that it is said that that court acted erroneously and that of necessity it is in the nature of an appeal which does not lie to a judge of co-ordinate jurisdiction as the election petition court. Speaking in this regard, I agree with the respondent that this is an attempt to circumvent the provisions of section 44(5) of the Constitution which provides against any appeal against all decisions of the election court. I agree that the election court had acted as a High Court in terms of section 44 (1) of the Constitution. The present court is sitting pursuant to the provisions of section 84 (1) of the Constitution. ... I also accept the contention that the High Court is a court of record in all its different constitutions and capacities be it the High Court sitting outside the provisions of section 84 or by virtue thereof or under Section 44 of the Constitution. That contention makes the submission that a High Court sitting pursuant to the provisions of section 84 thereof can override the same High Court exercising its Constitutional jurisdiction under section 44, untenable.” [Emphasis added]

21. In view of the foregoing, I am of the view that the present petition is in the nature of an appeal against the subject judgment which is untenable.

22. Counsel for the respondents contended that the High Court is not a juristic person capable of being sued. The petitioner on his part submitted that since he was not suing the High Court of Kenya at Meru but the High Court of Kenya, the latter was a legal entity.

23. The High Court is established under *Article 165 (1) of the Constitution* which provides that: -

“(1) There is established the High Court, which—

(a) shall consist of the number of judges prescribed by an Act of Parliament; and [Emphasis added]

(b) shall be organised and administered in the manner prescribed by an Act of Parliament.”

24. From the foregoing definition, the institution of the High Court is but a collection of such number of Judges as is provided for under the *High Court Organization and Administration Act, 2015*. Its decisions are those of the Judges who themselves have immunity under *Article 160(5) of the Constitution*.

25. In **Bellevue Development Company Ltd v Francis Gikonyo & 3 others [2020] Eklr**, the Supreme Court of Kenya held: -

“Besides freedom of thought, expression and action, the other cardinal factor encapsulated in this immunity is finality. It would be a travesty of justice if disgruntled litigants are permitted to sue Judges who rule against them thus prolonging litigation unnecessarily and personalizing matters that Judges ought not to have personal interest in. In the words of *Mativo J in Maina Gitonga v Catherine Nyawira Maina & Another* (supra) if we allow court decisions to be “drawn into question by frivolous and vexatious actions, there will never be an end of causes, ... controversies will be infinite.” ... Judicial immunity, we reiterate, is meant to provide protection to judicial officers from third parties’ interference, influence or obstruction. Judicial immunity is also necessary to protect the reputation and perception of the Judiciary, to maintain the trust of the public and ensure transparency and accountability. ... We agree and would only conclude by stating that the immunity accorded to a Judge is absolute in the meaning attributed to the expression by Article 160(5) of the Constitution and as analyzed in this Judgment.”

26. In view of the foregoing, no action can lie against the High Court of Kenya as it is not a juristic body. Further, it is constituted by personnel who enjoy partial immunity under the Constitution and are not amenable to proceedings for reason of decisions made in the course of their duty.

27. In the view of the foregoing, I find the preliminary objection to be meritorious. The petition is therefore scandalous and vexatious and is hereby struck out with costs.

DATED and DELIVERED at Meru this 9th day of July, 2020.

A. MABEYA

JUDGE