



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CONSTITUTIONAL PETITION NO.16 OF 2018

IN THE MATTER OF ARTICLE 22 (1) OF THE CONSTITUTION OF KENYA 2010 AND

IN THE MATTER OF THE ALLEDGED CONTRAVENTION OF ARTICLE 40 OF THE CONSTITUTION OF KENYA

DAVID KIRIMI CHARLES (Suing as the Legal

Representative of the estate of

ABRAHAM KAILEMIA IKIGU (deceased).....PETITIONER

-VS-

MUNTU KIRIMANIA MUNGANIA (Sued as the

legal representative of the estate of

DORIS KINANU KIRIMANIA (DECEASED).....RESPONDENT

### JUDGMENT

#### Introduction

1. The petition is founded on **Article 40 of the Constitution**; the right to property. The controversy involves ownership of motor vehicle Registration No. KAU 339B. Also in issue is the institution of proceedings against the estate of Abraham Kailemia Ikigu in **Meru CMCC Suit No. 262A of 2010 Muntu Kirimania Mungania (suing as the legal Representative of the estate of Doris Kinanau Kirimania (deceased) versus David Kirimi Charles (sued as the legal representative of Abraham Kailemia Ikigu (Deceased))**.

2. The aforesaid suit was filed following a fatal road accident that occurred on 24<sup>th</sup> December 2008 along Meru- Nairobi road involving Motor vehicle Registration No. KAU 339B. The aforesaid accident claimed the lives of all the persons on board the motor vehicle including Abraham Kailemia Ikigu, Charity Nyawira Kailemia, Doris Kinanau Kirima and two other passengers.

3. The Court in **Meru CMCC Suit No. 262A of 2010** delivered its judgement on 20<sup>th</sup> January 2012 and awarded the Plaintiff therein a sum of Kshs. 1,022,350 plus cost and interest in the suit. The plaintiff commenced execution against the Defendant. Being aggrieved by the execution proceedings the Petitioner herein filed an objection to the execution proceedings. The objection proceedings were heard and dismissed by the trial Magistrate. The petitioner then preferred an appeal against the Ruling of the trial Magistrate in **Meru Civil Appeal No. 234 of 2013 David .K. Charles vrs Patrick Kithore Kirimania**: the appeal was equally dismissed by this Court. The appellate court found that both motor vehicles i.e. KBA 392H and KBJ 634Z were insured in the name of the petitioner herein and only a person with insurable interest can insure a property. The court also made a finding that the Petitioner was the owner of motor vehicles and held that the decree therein could be executed against the administrator in the same manner as if the decree had been executed against him personally.

4. The petitioner now seeks for a number of declarations, namely:

- (1) That his proprietary rights have been infringed;
- (2) That he was erroneously sued in Meru CMCC No. 262 A of 2010.
- (3) Quashing the judgement and Order in Meru CMCC No. 262 A of 2010.

(4) That the motor vehicle KBJ 634Z was sold off by the Respondent and that the Respondent should surrender the motor vehicle KBJ 634Z as it was on 31<sup>st</sup> August 2015 or its cash equivalent.

(5) Damages for suffering and illegal deprivation of his rights.

5. On 27<sup>th</sup> September 2018 this Honourable Court directed the parties to file Submissions on the competence of the petition.

### **Petitioners Submissions**

6. The petitioner submitted that at the time of the institution of the Case **in Meru Cmcc No. 262 A OF 2010** the motor vehicle the subject matter of the case belonged to Charity Nyawira Kailemia (deceased) and did not belong to Abraham Kailemia Ikigu (deceased). That at the time Christine Nyawira Kailemia was equally represented by her own legal representative although there was a dispute as to who is the valid legal representative in Nyeri High Court.

7. The petitioner avers that the judgement entered against the estate of the deceased was not only invalid but was entered without being heard. He also disputed the execution proceedings and averred that the motor vehicle was sold off at a throw away cost of Kshs. 300,000/= whereas its market value at the time was Kshs 1,200,000/=. The petitioner also avers that the Respondent has applied for warrant of arrest to commit the petitioner to civil jail unless he pays the remainder of the decretal amount being Kshs 1,889,475/=.

8. He submitted that he is justified to present this petition instead of an appeal on the premises that; *(a) He wants to adduce new evidence b) He has no issue with the merit of the decision of the lower court c) Time lapse d) the nature of the remedies he is seeking e) For efficiency and to avoid multiplicity of suits.*

9. On adducing new evidence he relied on the provisions of Section 78 of the Civil Procedure Act and Order 42 Rule 27 of the Civil Procedure Rules. He also relied on the cited authorities of; **Governors Ballon Safaris Limited v Zacharia W. Baraza t/a Siama Auctioneers [2016] eKLR & Mzee Wanja & 93 Others v A.K. Saikwa (1982-88) 1 KAR 462**. He averred that he had no issue with the determination of the trial court but the same was determined on the basis of it being misled by the Respondent to believing that the motor vehicle KAU 339B belonged to the petitioner. He also submitted that it is now six (6) years since the determination of the trial Court and it would be unreasonable for a litigant to seek leave of the court after the lapse of such a considerable time.

### **Respondents Case**

10. The Respondent herein filed grounds of opposition. The major argument was that the petition does not meet the threshold of filing similar cases. They also urged that the issues raised by the petitioner are civil in nature whose remedies are available in civil proceedings. In addition, they posit that the petitioner ought to have preferred an appeal against the judgement in Meru Cmcc No. 262A of 2010. Therefore, the petition is bad in law; if the petitioner alleges violation of his personal rights he ought to have filed the petition in his own names and not as a legal representative of the estate of Abraham Kailemia Ikigu. In its submissions the Respondent also alluded to yet another Appeal against an interlocutory injunction that was dismissed i.e. HCCA No. 74 of 2018.

### **Analysis and Determination**

11. I have deliberately highlighted the core of the parties' claims herein even if I am to determine the competence or otherwise of this petition.

### **Merits of the decision of the trial Court**

12. The petitioner herein avers that he is not concerned with the merit of the decision of the trial Court as well as the appellate court. According to him, the trial court came to a justifiable determination on the basis of the evidence adduced before it. This kind of argument is self defeatist and a depiction of an indolent suitor who litigates his case in instalments and at his own whims regardless of the law, rules of evidence and the rights of the other parties in the suit. The perfect question is: whose duty is it to adduce evidence in support of his case?

### **Adducing new evidence**

13. Before I answer the foregoing question, I note that the petitioner has filed this petition as an avenue for adducing new evidence. The central issue in controversy in the trial court as well as the appellate court was ownership of motor vehicle KAU 339B. Upon careful consideration of the evidence adduced, both courts held that it belonged to the deceased i.e. Abraham Kailemia. Notably, the petitioner filed his statement of defence. He also filed appeals on objection proceedings. But, in all these forums he neither submitted the evidence nor copy of record attached to this petition to show that the motor vehicle was registered in the name of Charity Nyawira Kailemia in the year 2005. He did not also adduce evidence to show that the insurance policy for the year 2008, when the accident occurred, was also issued to Charity Nyawira on 3<sup>rd</sup> March 2008. The appellate system in order 42 Rule 27 of the Civil Procedure Rules also provides for adducing of further evidence. He did not apply to adduce further evidence.

14. It does not end there. This court has already rendered itself in the appeal. Even if I were to take this petition to be seeking for review of judgment, there would be no grounds to warrant any review because the evidence in question was in possession of or readily obtainable by the petitioner from the registration authority. Therefore, such was not evidence which, upon due diligence, he could not have produced during the trial or appeal; it is not a discovery of new evidence envisaged in law. The petitioner's remedy lie in the appellate hierarchy established in the Constitution but not in a petition for declaration of rights or violation thereto. The entire petition is just but a back door attempt to re-litigate his case. From his own admissions, he is fearing that lashes will catch up with him. And so he decided not to apply for extension of time to file appeal but rather filed a petition under the Constitution. This is an epitome of a careless litigant who is abusing court

process. He is trying to run away from his obligation to explain the delay in filing appeal as required in law. See *Nicholas Kiptoo Korir Arap Salat v Independent Electoral & Boundaries Commission & 7 others*, [2014] eKLR.

15. I should state that the process and remedies provided in the Constitution and rules made thereunder are meant to aid legitimate agitation and declaration of rights and or their violations thereto. It is not to be used to circumvent other legal processes provided in law; or to curtail legitimate expectation of judgment-holders from benefitting from the due process of the law in execution of those judgments. The petitioner cannot be allowed to re-package his claim into a constitutional petition. Some of the instances where such unfortunate proceedings were stopped by court include; *Hoseah Sitinei v University of Eldoret & 2 others* [2016] eKLR and *Francis James Khasira v Public Service Commission & 2 others* [2016] eKLR. I am content to cite the decision in the latter case that:

**38. Justice Aganyanya (as he then was) heard this case in High Court case No. 965/1996 conclusively whether on merit or not. It is at that point that the Claimant should have taken up the matter either on review or appeal if he was not satisfied. Coming up with the same case 15 years later is in my view an abuse of the Court process because this matter was concluded and this Court cannot reopen it at this point.**

**39. Assuming even that the matter had not been concluded – it is still time barred as the Claimant filed it without seeking leave of Court to do so.**

**40. It is my finding that this entire claim is an abuse of the Court process it is *re judicata* and time barred. I find the Preliminary Objection has merit and I allow it and dismiss the entire claim accordingly with costs to the Respondents.**

16. I therefore find this petition to be an abuse of process, incompetent and inappropriate. I dismiss it with no orders as to costs.

**Dated, signed, and delivered in open court this 6<sup>th</sup> day of May 2019**

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**F. GIKONYO**

**JUDGE**

**In presence of**

Gogo for Ondieki for petitioner

M/s Nelima for Mokuu for respondent

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**F. GIKONYO**

**JUDGE**