Charles (Suing as the Legal Representative of Abraham Kailemia Ikigu (Deceased) v Kirimania (Sued as the Legal Representative of the Estate of the Late Doris Kinanu Kirimania (Deceased)) (Civil Appeal 154 of 2019 & 86 of 2020 (Consolidated)) [2025] KECA 950 (KLR) (4 April 2025) (Judgment)

Neutral citation: [2025] KECA 950 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 154 OF 2019 & 86 OF 2020 (CONSOLIDATED)

JW LESSIT, A ALI-ARONI & GV ODUNGA, JJA

APRIL 4, 2025

BETWEEN

DAVID KIRIMI CHARLES ..... APPELLANT

SUING AS THE LEGAL REPRESENTATIVE OF ABRAHAM KAILEMIA IKIGU (DECEASED

AND

MUNTU KIRIMANIA ..... RESPONDENT

SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE DORIS KINANU KIRIMANIA (DECEASED)

(Being appeals from the judgments and decrees of the High Court, Meru (Gikonyo, J and Mabeya, J) delivered on 6th May, 2019 and 4th June 2020inConstitutional Petition No. 16 of 2018 and Civil Appeal No. 7 of 2020 respectively)

JUDGMENT

1. The background of the dispute herein was that on 24th December 2008, Doris Kinanu Kirimani (the deceased) was travelling as a lawful passenger in motor vehicle registration no. KAU 338B which was being driven by Abraham Kailemia Ikiugu, also deceased. As a result of an accident along Meru-Nairobi highway,MLD Civil Appeal 154 of 2019 Page 1 of 34 the deceased lost her life. A grant of letters of administration in respect of the estate of Abraham Kailemia Ikiugu was issued to the appellant and was confirmed. The appellant inherited all the properties of Abraham Kailemia Ikiugu which included 5 plots in Mavoko, 3 plots at Athi River, a house in Embakasi, 2 plots in Nairobi and a plot in Embakasi. He further inherited all the proceeds in 4 bank accounts and death gratuity from Sadolin Paints Ltd.

2. As a result of the accident, the respondent sued the appellant for damages in Meru CMCC No. 262A of 2010. The appellant entered appearance and filed a defence. When the matter was fixed for hearing on 1st December 2011, the appellant who had been served, did not appear and the matter proceeded ex parte and judgement was entered in favour of the respondent in the sum of Kshs 1,022,350.

3. Upon the entry of judgement, execution commenced. However, the appellant lodged objection proceedings against the execution being levied on motor vehicle registration nos. KBJ 634Z and KAB 392H. That objection was dismissed on 15th March 2013,and the appellant appealed against the dismissal vide Meru High Court Civil Appeal No. 234 of 2023 – David K Charles v Patrick Kithore Kirimania. The appeal similarly was dismissed on 16th November 2017. When execution was commenced by way of committal of the appellant to jail, the appellant appealed against the order of committal vide HCCA No. 74 of 2018, but the appeal was dismissed on 20th June 2019. The appellant lodged an appeal against that order vide Nyeri Court of Appeal Civil Appeal No. 260 of 2019.

4. The appellant also lodged Meru Constitutional Petition No.16 of 2018 (the petition) seeking to challenge the efficacy of the proceedings before the trial court. It is the decision in this petition that is the subject of Civil Appeal No. 154 of 2019. In the petition, the appellant sought: a declaration that his proprietary rights were infringed; a declaration that he was erroneously sued in Meru CMCC No. 262A of 2010; an order quashing the judgement and order in Meru CMCC No. 262A of 2010; a declaration that motor vehicle registration No. KBJ 634Z was sold off by the respondent, and the respondent should surrender the said motor vehicle as it was or its cash equivalent; and damages for suffering and illegal deprivation of his rights.

5. It was contended that at the time of the institution of the case before the Chief Magistrate's Court in CMCC No. 262A of 2010, the said motor vehicle belonged to Charity Nyawira Kailemia (deceased) and did not belong to Abraham Kailemia (deceased); that at that time Christine Nyawira was represented by her own legal representative although there was a dispute as to who was the valid legal representative; that the judgement entered against the estate of Christine Nyawira was not only invalid but was entered without being heard; that the execution proceedings were improperly conducted and the motor vehicle was sold off at a throw away cost of Kshs 300,000 when its market value at the time was Kshs 1,200,000; that the respondent had applied for warrants of arrest to commit the petitioner to civil jail; that he was justified in bringing the petition as opposed to an appeal as he intended to adduce new evidence although he had no issue with the merits of the decision of the lower court; that he was also concerned about the time lapse, the nature of the remedies he was seeking and the efficiency and avoidance of multiplicity of suits.

6. According to the appellant, while he had no issue with the determination made by the trial court, his complaint was that the case was determined on the basis of misleading information; that motor vehicle reg. no. KAU 339B belonged to the appellant. In his intention to adduce new evidence, the appellant relied on section 78 of the *Civil Procedure Act*, Order 42 rule 27 of the Civil Procedure Rules, the cases of Governors Balloon Safaris Limited v Zacharia W. Baraza T/A Siuma Auctineers [2016] eKLR and Mzee Wanja & 93 Others v A. K. Saikwa [1982-88] 1 KAR 462. According to the appellant, due to the lapse of time, which he reckoned to be six years, it was unreasonable for him to seek leave of the court to file the appeal.

7. The respondent's case, on the other hand, was that the petition did not meet the threshold for filing similar cases and that the issues raised by the appellant were civil in nature, whose remedies were available in civil proceedings. According to the respondent, the appellant ought to have preferred an appeal against the judgement in Meru CMCC No. 262A of 2010. Hence, the petition was bad in law. The respondent was of the view that if the appellant alleged violation of his personal rights, he ought to

have filed the petition in his own name and not as an administrator of the estate of Abraham Kailemia Ikiugu. The respondent also alluded to yet another appeal against an interlocutory injunction that was dismissed in HCCA No. 74 of 2018.

8. In his judgement, the learned Judge held that by conceding that the trial magistrate came to a justifiable determination based on the evidence adduced before it, was 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; that the central issue in controversy before the trial court as well as before the appellate court was ownership of motor vehicle registration no. KAU 339B; that upon careful consideration of the evidence adduced, both courts held that the vehicle belonged to the deceased, Abraham Kailemia; that the appellant filed his defence as well as objection proceedings but in all these forums, he neither submitted the evidence nor a copy of the records to show that the motor vehicle was registered in the name of Charity Nyawira Kailemia in the year 2005; that he also did not adduce evidence showing that the insurance policy for the year 2008, when the accident occurred, was issued to Charity Nyawira on 3rd March 2008; and that the appellate system in Order 27 of the Civil Procedure Rules provides for adduction of evidence which the appellant did not resort to.

9. The learned Judge found: that the High Court had already rendered itself on the appeal and that even if he were to take the petition to be seeking for the review of the judgement, there were no grounds to warrant review because the evidence in question was in possession of or readily obtainable by the appellant from the registration authority; that the appellant's remedy lay in the appellate hierarchy established in *the Constitution* and not in a petition for declaration of rights or violation thereto; that the petition was a back door attempt to re-litigate the appellant's case; that by filing the petition on the ground of his apprehension that seeking extension of time might not be allowed, the appellant was abusing the court process; and that the process and remedies provided in *the Constitution* and the rules made thereunder are meant to aid legitimate agitation and declaration of rights and or their violations thereto and are not meant to be used to circumvent either legal process provided in law or to curtail legitimate expectation of judgement-holders from benefitting from the due process of the law in execution of those judgements.

10. In dismissing the petition, the learned Judge relied on the cases of Hosea Sitienei v University of Eldoret & 2 Others [2016] KLR and Francis James Khasira v Public Service Commission & 2 Others[2016] eKLR.

11. That decision was issued on 6th May 2019. On 26th July 2019, the appellant filed a Notice of Motion seeking to set aside the judgement of 20th January 2012 on the grounds that he was not served, had been wrongly sued and that the judgement was oppressive and against the rules of natural justice. That application was dismissed by the learned trial magistrate. It was against that decision that the appellant appealed to the High Court in Meru High Court Civil Appeal No. 7 of 2020. The decision in that appeal is the subject of Civil Appeal No. 86 of 2019.

12. In his judgement dismissing the appeal, the learned Judge held: that although there is no time limit for seeking to set aside an ex parte judgement, the relief being an exercise of discretion, the court is entitled to consider the conduct of the appellant generally and inquire into the reason for the delay since under Article 159 of *the Constitution*, justice should not be delayed; that the trial court considered that the appellant had stayed for 8 years without challenging or applying to set aside the judgement; that the trial court, in those circumstances, did not exercise its discretion wrongly; that the appellant was not candid in his depositions before the trial court hence the finding by the trial court that it was not necessary that the deponent of the affidavit of service be summoned for cross-examination was correct; that the appellant having been appointed the legal representatives of the estates of Ibrahim Kailemia Ikiugu and Charity Nyawira Kailemia, the respondent was perfectly entitled to sue the negligent driver

and hence the suit against the appellant who was his personal representative was in order; that having sued the driver, it was upon the appellant to join the owner of the vehicle by way of third party proceedings and he failed to do so because he also doubled as the administrator of the estate of Charity Nyawira Kailemia, the owner of the vehicle hence the ground that the owner was not sued failed; that the trial court could not be faulted for finding that the appellant had taken 8 years to challenge the judgement that was entered in 2012; that even if the trial court had considered the other issues, which the High Court did, the only irresistible conclusion would have been to dismiss the application; that the appellant could have raised all the constitutional issues it was raising before the High Court in the petition; and that the appellant filed multiple proceedings with a view to frustrating the lawful judgement entered against him.

13. In the appeal arising from the petition, the appellant has raised a whopping 25 grounds of appeal, with some grounds comprising of sub-grounds. In our view, the grounds may be reduced to the issues: that the learned Judge erred in failing to appreciate that the petition raised novel and serious constitutional issued that required adjudication; that the learned Judge failed to appreciate that there was violation of the appellant's constitutional rights; that the learned Judge failed to take into account matter which he ought to have considered; that the learned Judge did not carry himself as an independent arbiter but was partisan in canvassing the respondent's case; that the learned Judge misdirected himself on the facts before him; that the learned Judge erred by allowing personal execution against the appellant and in failing to find that the appellant was wrongly sued; that the learned Judge erred in allowing the personal properties of the appellant to be attached to meet the liabilities of the estate of the owner of motor vehicle reg. no. KAU 339B; that the learned Judge erred in failing to find that the ex parte judgement dated 20th January 2012 was improperly entered; that the learned Judge erred in not considering new and emerging evidence; that the learned Judge erred in finding that the remedies lay in the appellate system and in finding that the petition was an abuse of the court process; that the learned Judge erred in failing to appreciate that international treatises and good practice within the meaning of Article 2(5) & (6) of *the Constitution*; and that the learned Judge erred in law by failing to analyse the entire facts and draw own conclusions.

14. As regards Civil Appeal No. 86 of 2019, which was an appeal against the decision dismissing the appeal against the learned magistrate's decision on the application for setting aside the ex parte judgement, it was based on the grounds that the learned judge erred in law and fact: by inter alia failing to appreciate that the appellant was wrongly sued in the primary suit as the respondent did not have a cause of action against him; by failing to appreciate that the judgment was a product of ex-parte proceedings and the respondent had taken advantage of the absence of the appellant in court to mislead the court into a conclusion that the appellant was the owner of motor vehicle registration no. KAU 339B; by failing to appreciate that the affidavit of Charles Mokua Advocate, and the process server deposed a lot of falsehood and the advocate refused to be cross- examined on the facts deponed to in the affidavit of service; by failing to appreciate that the appellant had a legitimate expectation to apply for setting aside of the ex-parte judgment; and by holding wrongly that under section 7 of the *Civil Procedure Act*, all constitutional issues in relation to the primary suit were res judicata.

15. We heard the appeal on 16th December 2024 when learned counsel, Mr Ondieki appeared for the appellant while learned counsel, Mr Mokua, appeared for the respondent. Learned counsel largely relied on their written submissions.

16. On behalf of the appellant, it was submitted in respect of Civil Appeal No. 154 of 2019: that he was condemned without being accorded a chance to present his case contrary Article 25(c) and Article 50(1) of *the Constitution* which contemplates that if there is any dispute, each party should be given a chance to articulate their case before an independent and impartial court of law; that the omission

led to violation of other constitutional provisions like equal protection and equal benefit of the law under Article 27(1) of *the Constitution* and the violation of human dignity protected under Article 28 of *the Constitution*; that the actions by the trial court also violated Article 29 of *the Constitution* which protects the security of the person; that the fact that the appellant was detained for one month was tantamount to cruel, inhumane and degrading treatment because he had not been accorded a fair hearing; that the actions by the trial court also violated the right to fair administrative action that is fair, expeditious, efficient, lawful, reasonable and procedurally fair; that since the respondents knew that their actions were likely to affect the appellant adversely it was prudent for them to give reasons why they never pursued the estate of Charity Nyawira Kailemia and instead of the appellant who was the administrator of the estate of Abraham Kailemia Ikigu; that failing to do this, prejudiced the appellant and undermined constitutional protections that could have safeguarded him; that the actions by the respondents violated the appellants right of access to justice under Article 48 of *the Constitution*; and that it was wrong for the High Court to decide serious constitutional questions on account of technicalities.

17. It was further submitted: that the court violated Article 2(5) & (6) of *the Constitution* which domesticates Article 11 of the United Nations International Convention on Civil and Political Rights which prohibits the state and other stake holders from imprisoning a party on account of an outstanding civil debt; that it was a disservice to *the Constitution* for the court to decide the issues in a pedantic manner forgetting that under Article 259(1) it was obligated to interpret the law in a manner that promotes the purpose, values and principles of *the constitution*; that the court was also obligated to interpret the law in a manner that advances the rule of law, human rights and the fundamental rights in the Bill of Rights and permits the development of the law and contributes to good governance; that the High Court never addressed its mind to the conflicting facts on the ownership of Motor. Vehicle registration No. KAU 339 B and the implications it had on the petition; that the High Court was also wrong to draw an inference that Motor Vehicle registration. Nos. KBA 392 H and KBJ 634 Z were both insured in the appellant's name, and they were both in matatu business through Inana Seven Seaters Sacco; the appellant was merely an administrator of the estate of Abraham Kailemia Ikiugu, who was not the registered owner of Motor registration No.Vehicle KAU 339B, so, it was a gross misdirection for the superior court to fail to appreciate this basic fact; that the High Court failed to appreciate the fact that this was an ex parte judgment that was issued without according the appellant any audience and the appellant had raised a critical issue of service; and that the appellant has never been accorded any hearing and it was wrong to find that his remedy was in the appeal.

18. It was the appellant's submissions: that there was no abuse of the court process whether in the pleadings or by submissions because under Article 22 of *the Constitution*, the appellant was justified to file claim alleging that his rights and fundamental freedoms were being violated, threatened, denied or infringed, because the appellant had been imprisoned for over a month and five days for a case that he knew nothing about; that there are letters of administration obtained in Nyeri Civil Case No. 892 of 2009 in favour of one Joseph Muriuki Migwi who took out letters of administration for Charity Nyawira Kailemia, and this was the right person to be sued on behalf of the estate of Charity Nyawira Kailemia, thus the Respondent pursued the wrong party; that the appellant was wrongly detained in Meru prison for 35 days and his Matatu Motor Vehicle registration No. KBJ 634Z was wrongly attached and auctioned, and the Appellant lost his liberty and business opportunities because of this case, yet he was wrongly sued since there was no nexus between him and Motor Vehicle Reg. KAU 339 B.

19. In support of the appeal, the appellant relied on Civil Appeal No. 240 of 2011 - Hon. Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi and Another, Constitutional Petition E002 of 2021 - Catherine Chepkemoi Mukenya v Hon. Evanson Pkemei Lomaduny and Another and Supreme Court in Petition No. 41 of 2017 - Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi. The appellant

submitted that he raised legal and constitutional questions that ought to be adjudicated by the Court. He urged the Court to set aside the High Court decision and hold that the rights of fair hearing and fair trial under Articles 10, 25(c), 50(1), 159(2) (a) and (e) were violated.

20. The Respondent's position was that the learned Judge rightly found the petition to be an abuse of the process, incompetent and inappropriate.

21. As regards appeal No. 86 of 2019, no submissions were filed by the appellant specific to the appeal. On the other hand, the respondent's submissions were: that this being a second appeal, the appeal ought to have been limited to points of law; that the appellant has dwelt upon issues of facts/evidence most of which is new evidence; and that the appeal was without merit and an abuse of court processes and should be dismissed with costs.

22. We have considered the submissions made by the parties. Since Civil Appeal No. 154 of 2019 is a first appeal, we are not just mandated but enjoined to re-evaluate the evidence adduced before the trial court and arrive at our independent judgment on whether or not to allow the appeal. In so doing, we are expected to subject the whole of the evidence to fresh and exhaustive scrutiny and draw our own conclusions thereon, bearing in mind that we did not have the opportunity of seeing and hearing the witnesses first-hand. See Selle & Another v Associated Motor Boat Co. Ltd. & others[1968] EA 123.

23. While we appreciate that we may, in appropriate cases, reverse or affirm the findings of the trial court in Peters v Sunday Post Limited [1958] EA 424, the predecessor to this Court, stated that:

> " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide."

24. With respect to findings of fact by the trial court, this Court's position as stated by Hancox, JA (as he then was), in Mohammed Mahmoud Jabane v Highstone Butty Tongoi Olenja [1986] KLR 661; [1986-1989] EA 183 is that:

> " The appellate Court only interferes with the trial Court's findings of fact if it is shown that he took into account facts or factors which he should have not taken into account, or that he failed to take into account matters of which he should have taken into account, that he misapprehended the effect of the evidence or that he demonstrably acted on wrong principles in reaching the findings he did."

25. Although the appellant raised a plethora of grounds of appeal, the decision by the learned Judge was based on the fact that the appellant was abusing the process of the court. This is clear from the learned Judge's conclusion that:

> " The entire petition is just but a backdoor attempt to re-litigate his case. From his own admissions, he is fearing that laches 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...I should say that the process and remedies provided in *the Constitution* and rules made thereunder are meant to aid legitimate agitation and declaration of right 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 judgement-holders from benefitting from the due process of the law in the execution of those judgements. The petitioner cannot be allowed to re-package his claim into a constitutional petition."

26. It is not in doubt that the High Court has the inherent power under section 3A of the *Civil Procedure Act* :

> "...power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

27. The "oxygen" principles in sections 1A and 1B of the *Civil Procedure Act*, which are replicated in sections 1A and 1B of the *Appellate Jurisdiction Act*, have similarly been recognised by this Court as invokable in order to achieve the same results. Accordingly, in the case of Hunker Trading Company Limited v Elf Oil Kenya Limited [2010] eKLR, this Court pronounced itself as hereunder:

> " The 'O2 principle' poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In our view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day."

28. Abuse of legal process was deprecated in the case of Mitchell and Others v Director of Public Prosecutions and Another [1987] LRC (const) 128 where it was held that:

> " ....in civilized society legal process is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly, it can be used improperly, and so abused. An instance of this is where it is diverted from its proper purpose, and is used with some ulterior motive, for some collateral one or to gain some collateral advantage, which the law does not recognize as legitimate use of that process. But the circumstance in which abuse of process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes extrinsic evidence only. But if and when it is shown it happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instance. Others attract the res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop proceedings, or put an end to it. This inherent power has been used time and again to put a summary end to a process which seeks to raise and have determined an issue which has been decided against the party issuing it in earlier proceedings between the parties."

29. This Court in Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 Others [2009] KLR 229 cited the South African Court of Appeal Case of Beinosi v Wiyley 1973 SA 721 [SCA] at page 734F-G in which Mohomad CJ, set out the applicable legal principle regarding abuse of process of the court as follows: -

> " What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of "abuse of process. It can be said in general terms, however, that an abuse

of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective."

30. The Court, in Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 Others (supra) also cited the decision of the Court of Appeal in Abuja, Nigeria in the case of Attahiro v Bagudo 1998 3 NWLL pt 545 page 656, which stated that the term abuse of court process has the same meaning as abuse of judicial process and that the employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. Also quoted in the said decision was the decision of Karibu-Whytie JSC in the Nigerian case of Sarak v Kotoye [1992] 9 NWLR 9pt 264) 156 at 188-189(e) in which the concept of abuse of judicial process was described as:

> "...imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice ..."

31. The Court in Sarak v Kotoye (supra) went on to give the understated circumstances as examples or illustrations of the abuse of the judicial process:

> "(a) Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
>
> b. Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
>
> c. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.
>
> d. (sic) meaning not clear.
>
> e. Where there is no loti of law supporting a Court process or where it is premised on frivolity or recklessness."

32. In this case, the appellant entered appearance and filed a defence before the Magistrates' Court in Meru CMCC No. 262A of 2010. On the hearing date, he did not attend court, and the hearing proceeded in his absence. One would have expected that he would apply to have the judgement set aside if he had a good reason for non-attendance. Instead of doing so, he kept quiet, and when execution was commenced, he instead instituted objection proceedings claiming that the attachment was being levied against the properties of Charity Nyawira Kailemia who was not a party to the suit. It turns out that the said Charity Nyawira Kailemia was the sole owner of the vehicle that was involved in the accident and that the appellant was similarly the administrator of her estate. Upon the dismissal of the objection proceedings, he filed an appeal to the High Court in Meru High Court Civil Appeal No. 234 of 2023, which was dismissed. When execution was commenced by way of committal of the appellant to jail, he appealed against the order of committal vide HCCA No. 74 of 2018, but the appeal was similarly dismissed. Against that decision, he filed an appeal vide Nyeri Court of Appeal Civil

Appeal No. 260 of 2019. Instead of pursuing that appeal, he returned to the High Court with Petition No. 154 of 2019, in which he stated that he had no issue with the decisions of the trial magistrate or the appeal that emanated from that decision but was seeking leave to adduce fresh evidence. In doing so, he stated that he did not appeal because he was grossly out of time and was doubtful whether

he would be granted leave to appeal out of time. What the applicant was, in effect, seeking was leave to adduce fresh evidence through a constitutional petition. He was well aware that he could achieve the same relief in an appeal, but being apprehensive of the likely outcome of seeking leave to appeal out of time, he instead resorted to filing a constitutional petition. He was, in effect, using the avenue of a constitutional petition to circumvent the appellate route. In other words, the appellant filed the constitutional petition in order to achieve what he was unable , through his own default, to achieve by an appeal. We agree with the position taken by the Constitutional Court of South Africa in Similarly in Minister of Home Affairs v Bickle & Others [1985] L.R.C. Cost.755, Georges, CJ held as follows:

> "It is an established practice that where a matter can be disposed off without recourse to *the Constitution*, *the Constitution* should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so (Wahid Munwar Khan v The State AIR [1956] Hyd.22)...Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights."

33. We cannot see how the learned Judge in the petition was expected to arrive at a different decision other than the one he did. A party who files a constitutional petition in order to achieve a relief that he could have sought in an appeal, but for his own lethargy, can only be said to be abusing the court process. The appellant's end game was to have the ex parte judgement set aside. Instead of seeking to do so, he set out to challenge the execution by way of objection proceedings. Upon hitting a wall, he resorted to a petition. We are now aware that after the dismissal of the petition, the appellant went back to the magistrate's court to seek to set aside the ex parte judgement, the relief which he ought to have sought the previous 8 years.

    When told that he was too late to seek the orders, the appellant was, once again, before the High Court seeking to upset that decision. The dismissal of that attempt is the subject of Civil Appeal No. 86 of 2020, to which we shall return to shortly.

34. It is clear that the appellant set out not only to frustrate the respondent but to keep the courts busy with his applications. We agree with the learned Judge that the appellant was guilty of gross abuse of the court process. We cannot agree more with the sentiments of the learned Judge in Meru HCCA No. 74 of 2018 that:

> "It would seem that the appellant is playing musical chairs with both the courts and the respondent with the hope that with the passage of time, the decree will be rendered stale. Indeed, it is now 8 years since the judgement was passed in the primary suit and the 3rd respondent is yet to realise the fruits of that judgement. The decree has only a life of less than 3 years before it becomes stale. Is the appellant to be allowed to continue with the 'dance' of musical chairs? I do not think so. It is time that he is told, and firmly so, that once legal rights inure by way of a judgement, they are enforceable as per law provided."

35. These wise words were uttered by the learned Judge on 20th June 2019. If the learned Judge thought that the appellant would heed them, he was mistaken. The appellant was not done with the "dance of musical chairs". He went back to where it all started in the Magistrate's Court and sought to scuttle the root of the litigation by seeking to set aside the judgement. Upon the dismissal of his application, he appealed to the High Court in Meru HCCA No. 7 of 2020, whose dismissal is the subject of Civil Appeal No. 86 of 2020, which we now proceed to address.

36. As stated hereinabove, the said appeal was dismissed by Mabeya, J on 4th June 2020. In dismissing the appeal, the learned Judge found that that the trial court did not err in considering the delay in making the application, a delay spanning 8 years; that the appellant was not candid in his depositions before the trial court when he contended that he was not the administrator of the estate of Charity Nyawira Kailemia yet he had been appointed the legal representatives of the estates of both Ibrahim Kailemia Ikiugu and Charity Nyawira Kailemia; that the contention that the owner of the vehicle that caused the accident was not sued was baseless since he was the legal representative of the estate of the owner of that vehicle and did not deem it fit to join himself in the suit as a third party; and that the constitutional issues raised ought to have been raised in the petition.

37. As rightly appreciated by the learned Judge, the learned magistrate was exercising a discretion. In those circumstances, as held by this Court in Price & Another v Hilder [1986] KLR 95, it would have been wrong for the learned Judge to interfere with the exercise of the trial court's discretion merely because the learned Judge's decision would have been different. He could only interfere if the principles laid down by Madan JA (as he then was) in United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] E.A were satisfied. In that case it was held that:

> " The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account;
>
> fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

14. The learned Judge considered the decision of the learned magistrate and went further to pronounce himself, as he was entitled to do on a first appeal, on the issues that the learned magistrate had not dealt with. Before us is a second appeal. Pursuant to section 72 of the *Civil Procedure Act*, our mandate is limited to points of law. As was appreciated by this Court in Kenya Breweries Ltd v Godfrey Odoyo [2010] eKLR:

> " In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. In the case of Stephen Muriungi and another v Republic [1982-88] 1 KAR 360, Chesoni Acting JA (as he then was) said at page 366:
>
> 'We would agree with the view expressed in the English case of Martin vs Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.'"

38. We have considered the issues raised before us, and we are not persuaded that the decision reached by the learned Judge was perverse. In the petition, the appellant stated that, based on the evidence

presented before the trial court, he had no issue with the decisions of the trial court or the appellate court. That being the position, on what basis did he expect the trial court to set aside its decision, which the appellant appreciated was legally sound? Having failed in his attempt to adduce fresh evidence via constitutional petition, the appellant's application to set aside the judgement was still-born. The learned Judge was alive to the remit of his jurisdiction and cannot be faulted. The circumstances under which an appellate court interferes with the exercise of discretion are stringent. Such circumstances become even more stringent where a second appeal is preferred against the decision of the first appellate court, confirming the exercise of discretion by the trial court. In this case, the threshold for upsetting the decision of the first appellate court, declining to interfere with the exercise of discretion by the trial court, has not been met.

39. Having considered the consolidated appeals, we find the sentiments of this Court in J M Mwakio v Kenya Commercial Bank Ltd. Civil Appeal No. 156 of 1997 very apt. In that case, it was stated that:

> "The appellant is a familiar figure in the Law Courts. He does not hesitate to institute litigation on any aspect of perceived breach of his rights. Whereas litigants are perfectly free to bring any number of suits they may so desire, they must understand that in doing so, they are bound to stick to the rules governing the conduct of litigation in courts... no consequence that flows out of the enforcement of law can be said to cause injustice. Moreover, it is a cardinal principle in the administration of justice that it is in the interest of all persons that there should be an end to litigation...The appellant must be told in no uncertain terms that no matter how many applications and suits he may institute in the courts seeking to recover the suit property, such attempts by him would be futile and a waste of resources since the dispute relating to the suit property has been heard and finally determined by competent courts. This appeal is indeed vexatious and amounts to an abuse of the process of the court and it is dismissed with costs...."

40. We find no merit in both appeals and, following the beaten path, dismiss them with costs.

41. Judgement accordingly.

DATED AND DELIVERED AT NYERI THIS 4TH DAY OF APRIL, 2025.

J. LESIIT

.....

JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR