



**Kiarie & 2 others v Kungu & another (Environment & Land Case 359 of 1981) [2023] KEELC 18469 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 18469 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 359 OF 1981  
LC KOMINGOI, J  
MARCH 16, 2023**

**BETWEEN**

**GATUNGU KIARIE ..... 1<sup>ST</sup> PLAINTIFF**

**FELISTER NYAKIO KUMA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF KAMAU KIRIU) ..... 2<sup>ND</sup> PLAINTIFF**

**KAMAU MACHARIA ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**JOSEPH KUNGU ..... 1<sup>ST</sup> DEFENDANT**

**ALICE WAGIKUYU NGOROGE (AS THE ADMINISTRATORS OF THE ESTATE OF JOSEPH NJOROGE KUNGU) ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This is the notice of motion dated November 13, 2020 brought under order 46 rule 18 and 20 of the [Civil Procedure Rule](#) Section 3A of the [Civil Procedure Act](#).
2. It seeks orders:-
  1. That this honourable court be pleased to enter judgment in terms of the Arbitral Award dated October 3, 1988 thereby declaring Land Parcel NO Loc4/Nguthuru/429, Loc4/Nguthuru/667, Loc4/Nguthuru/355 and Loc4/Gakui/95 as family lands from the name of Joseph Njoroge Kungu be cancelled.
  2. That the suit properties Land Parcel Nos Land Parcel No Loc4/Nguthuru/429, Loc4/Nguthuru/667, Loc4/Nguthuru/355 and Loc4/Gakuru/95 either rejiggered in the names of Njoroge kungu or Joseph Njoroge Kungu be shared out as per the Arbitral Award and the estate of the defendant



Joseph Njoroge Kungu be allocated 1.5 acres and the remainder be shared out amongst the children of three (3) brothers i.e Kungu, Kuma and Gatungu Kiarie in equal shares.

3. That the Deputy Registrar of this honourable court do sign the necessary subdivision documents, Land Board Application Forms and transfer documents to facilitate the implementation of the Arbitral Award.
4. That the cost of this application and the suit be borne by the defendant.
3. The grounds are on the face of the application and are set out in paragraphs (a) to (c).
4. The application is supported by the affidavit sworn by Felister Nyakio Kuma, Administrator of the Estate of the 2<sup>nd</sup> Plaintiff, sworn on the November 13, 2020.
5. The application is opposed. There are grounds of objection dated June 21, 2020 filed by the Defendant. It is the Defendant's case that the award sought to be enforced is time bared.
6. On the April 26, 2022, the court with the consent of the parties directed that the notice of motion be canvassed by way of written submissions.
7. The Plaintiffs'/Applicants' submissions are dated June 17, 2022. It is submitted that the Arbitral Award dated October 3, 1988 was read to the parties on December 15, 1988 by the Deputy Registrar but that the Defendant filed a Notice of Appeal, which notice was struck out on September 16, 1996. The Defendant did apply for extension of time to file a notice of appeal out of time but the application was dismissed on October 3, 1997.
8. It is the Plaintiffs' case that the Arbitral Award is still in force as the same has never been set aside. They have relied on the case of *Boleyn Magic Wall Panel Ltd vs Nesco Services Ltd Machakos HCCC 16 of 2017*.
9. It is further submitted that the Defendants' objection does not fall within the provisions of Section 37 of the *Limitation of Actions Act* and order 46 rule 16 of the Civil Procedure Rules. That what is before court is an application for adoption of an arbitral award made in the same matter and the issue of limitation period should not apply.
10. They pray that the application be allowed.
11. The Defendant's/Respondent's submissions are dated July 22, 2022. It is submitted that the Defendant's appeal was dismissed on September 16, 1996. The Defendant died on January 5, 2000. During this period nothing prevented the Plaintiffs from executing the award but they never did.
12. It is further submitted that the Plaintiffs became aware of the Defendant's death on January 5, 2000 and became aware that the widows of the Defendant had been appointed as the Administrators by May 18, 2001. It took the Plaintiffs' counsel seven years to apply for reinstatement of the Defendants abated. By a ruling dated November 10, 2010 Nambuye J allowed the Plaintiffs to apply for substitution but they did not do so.
13. It is submitted that the Application herein has been brought 32 years after the reading of the award on December 15, 1988. Reliance is placed on Section 4(1)(c) of the *Limitation of Actions Act* and Order 46 rule 18 (1) (c) of the Civil Procedure Rules. It is also submitted that the Application is time barred and the court has no jurisdiction to entertain it. The delay in enforcing the Award has not been explained. They did nothing from October 3, 1997 and the Plaintiffs have themselves to blame for failure and/or



delay in bringing this application. He has put forward the case of *Stanley Kinoti & 15 Others vs Simon Gitobu Ithiria & Another [2019] e KLR*.

14. It is also submitted that the *Limitation of Actions Act* also applies to actions whose time lines for doing such acts are provided for in the Act whether it is an action in a fresh suit or in an old suit.
15. They pray that the Application be found to be time barred and ought to be dismissed with costs to the defendant.
16. I have considered the notice of motion and the affidavit in support. I have also considered the grounds of objection, the written submissions and the authorities cited. The issues for determination are:-
  - i. Whether the execution of the Award is time barred by the *Limitation of Actions Act*.
  - ii. Who should bear costs of this application?
17. It is the Defendant's/Respondent's contention that the Award dated October 3, 1988 cannot be enforced as it is time barred. Section 4 of the *Limitation of Actions Act* provides that:-
  1. The following actions may not be brought after the end of six years from the date of which the cause of action accrued-
    - a. Actions founded on contract;
    - b. Actions to enforce a recognizance;
    - c. Actions to enforce an award;
    - d. Actions to recover a sum recoverable by virtue of a written law other than a penalty or forfeiture;
    - e. Actions including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law
  2. ....
  3. ....
  4. An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered.'
18. Order 46 rule 18 of the Civil Procedure Rules provides that:-

' 18(1) the court shall on request by any party with due notice to other parties enter judgment according to the award:-

  - (a).
  - (b).
  - (c) When an application under rules 14, 15 and 16 has been heard and refused and no leave to appeal against the refusal has been granted within 14 days of refusal'
19. I agree with the Defendant's submissions that this application is time barred. The explanation given by the Plaintiffs/Applicants for the delay is wanting.



20. I also agree with the Defendant's submissions that the Limitation of Actions Act applies to actions whose timelines for doing such acts are provided for in the Act.
21. I find that the Plaintiffs have been indolent. The application herein is time barred and it is dismissed with costs to the Defendant/Respondent

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 16<sup>TH</sup> DAY OF MARCH 2023.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

No appearance for the Plaintiffs

No appearance for the Defendants

Mutisya- Court Assistant

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