Kamau v Munyungu (Suing as the legal representative of the Estate of the Late William Munyungu Chege) (Environment and Land Appeal 18 of 2021) [2023] KEELC 17010 (KLR) (24 April 2023) (Judgment)

Neutral citation: [2023] KEELC 17010 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND APPEAL 18 OF 2021

FM NJOROGE, J

APRIL 24, 2023

BETWEEN

ISAAC KIMANI KAMAU ..... APPELLANT

AND

EUNICE WANGUI MUNYUNGU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE WILLIAM MUNYUNGU CHEGE) ..... RESPONDENT

(Being an appeal from the Ruling of the Hon. E.G Nderitu (CM) delivered on 03/08/2021 in MOLO CMCC No. 77 of 1993)

JUDGMENT

1. By a memorandum of appeal dated August 17, 2021, the appellant being aggrieved and dissatisfied by the decision of Hon EG Nderitu CM delivered on August 3, 2021 in Molo CMCC No 77 of 1993 appeals to this court on the grounds:

    a. That the Learned Chief Magistrate erred in law in finding for the Respondent and allowing her application dated March 22, 2021, which Application sought for leave to execute a decree issued on June 16, 2000 i.e. over 21 years old.

    b. That the Learned Chief Magistrate in allowing the Respondent's Application for leave to execute an otiose decree for eviction flatly ignored the mandatory provisions of sections 152 (G)(1) (a)(d) to (i) of the *Land Act*.

    c. That the learned Chief Magistrate (with due respect) failed and refused to be bound by the precedents of the Superior Courts such as:

1. Court of Appeal Nyeri, Civil Appeal No 124 Of 2003, *M'ikiara M'rinkanya & Another v Gilbert Kabeere M'mbijiwe* [2007].

2. Court of Appeal at Eldoret, Civil Appeal No 230 Of 2001, *Malakwen Arap Maswal Vs Paul Kosgei* [2004] eKLR.

3. Nakuru HC, Civil Case No 223 of 2000, *John Muhanda Muya & Another v Stanley Kungu*.

d. That the Learned Chief Magistrate made fundamental errors on law in deciding in favour of the Respondents on an application that was seeking execution of a Judgement that was delivered on 16th June 2000, a period of twenty-one (21) years more than the statutory twelve (12) years in utter disregard of the provisions of Section 4(4) of the *Limitation of Actions Act*, Chapter 22, Laws of Kenya.

e. That the learned Chief Magistrate totally and completely misdirected herself and misapprehended the applicability of Section 4(4) of the *Limitation of Actions Act* read together with Section 7 of the *Limitation of Actions Act*, and the contents thereof touching on execution of a decree that is more than twelve (12) years.

f. That the learned Chief Magistrate erred in law totally and facts in flagrantly ignoring the Respondent herein, who was the Applicant in the lower court in the Application dated March 22, 2021 by simply ignoring the provisions of Order 22 Rule 18 (1)(a) of the *Civil Procedure Rules*.

g. That the learned Chief Magistrate erred in law totally and facts in not placing reliance on the entirety of the suit from the inception, but only focused on the application for execution while making her decision which was not only time barred but also a classical instance of abuse of the court process.

h. That the learned Chief Magistrate erred in allowing the now Respondent's application dated March 22, 2021, with no order as to costs, and overruled The Appellant's Notice of Preliminary Objection without assigning any reasons of doing so.

2. The appellant therefore prays that the court sets aside the ruling and the order of the Chief Magistrate delivered on August 3, 2021 and substitute the same with an order allowing the appellant's Notice of Preliminary Objection and strike out the respondent's Notice of Motion dated March 22, 2021 with costs.

3. The background to the application giving rise to the impugned ruling and order is as follows: on 9/7/1993 the respondent filed the plaint in the Chief Magistrate's court in CMCC No 77 of 1993 seeking general damages for trespass, an eviction order, mesne profits and costs of the suit. The basis of the respondent's case was that he was the lawful owner of a portion of land known as plot No 21 situated within Tayari Farm Molo. He averred that sometime in the year 1990, the appellant trespassed onto his portion of land and committed acts of waste. The appellant filed his statement of defence on August 30, 1993 where he denied the averments of the respondent. Judgement was delivered on June 16, 2000 where the court issued eviction orders against the defendant together with costs of the suit. The Appellant filed an appeal against the said judgement in High Court Civil Appeal No 71 of 2000 which was dismissed on April 28, 2010.

4. The respondent filed the application dated March 22, 2021 and sought an order to enable Ongumwe Auctioneers, Kericho evict the appellant from plot No 21 Tayari Farm Molo as per the judgment of the

court delivered on June 16, 2000. In response to the said application, the appellant filed a preliminary objection dated 5/04/2021 on the grounds that judgement was delivered on June 16, 2000 and a period of over twenty years had lapsed. Further grounds on the preliminary objection were that the provisions of Section 4(4) of the *Limitation of Actions Act* and Order 22 Rule 18 (1) (a) of the *Civil Procedure Rules* forbid the execution of any decree unless a party seeking to execute such a decree complies with the mandatory provision of the procedure set out therein. The learned magistrate in his ruling delivered on August 3, 2021 allowed the respondent's application and ordered that the appellant be evicted from Plot No 21 Tayari Farm Molo as per the judgement delivered on 16/06/2000. Being aggrieved with the said ruling, the appellant filed the present appeal.

Submissions

5. The appellant adopted his submissions running from pages 21 and 43 of the record of appeal while the respondent filed his submissions dated January 26, 2023 on January 30, 2023. However, the appellant in his submissions substantially submitted on stay pending appeal more that the issues that arise in the present appeal.

6. The respondent on the other hand submitted that the appellant had already been evicted from the suit property and setting aside of the said orders would not serve any useful purpose and identified the following issues for determination:

    a. Whether the execution of the decree was time barred under the provisions of Section 4(4) *Limitation of Actions Act*.

    b. Whether the execution of the decree was forbidden under the provisions of Order 22 Rule 18(1)(a) of *Civil Procedure Rules* 2010.

7. On the first issue, the respondent submitted that the trial court properly dealt with the said issue; that there was a stay of execution of the decree and so time stopped running from the date of the said stay. The respondent noted that the trial court relied on the case of *Koinange Investment & Development Co Ltd vs Ian Kahiu & 3 Others* [2015] eKLR in determining the said issue.

8. On the second issue, the respondent submitted that the trial court properly considered the provisions of Order 22 Rule 18(1)(a) of the *Civil Procedure Rules*. The respondent also submitted that the appellant was not willing to comply with the judgement of the court and yet she had participated in the proceedings. The respondent relied on Article 159(2) of the *Constitution* of Kenya and sought that the appeal be dismissed with costs.

Analysis and Determination

9. After considering the appeal and the submissions, the only issue that arises for determination is whether the learned trial magistrate erred in law in holding that the respondent had a valid decree capable of execution.

10. The appellant argued that Section 4(4) of the *Limitation of Actions Act* bars a party from executing a judgment after the lapse of twelve years. The judgment in the matter having been delivered on June 16, 2000, the appellant argued that a period of twenty-one years had lapsed and the respondent could not therefore be allowed to execute the same.

11. The respondent on the other hand argued that the appellant had appealed the said judgment and stay of execution orders issued before the appeal was dismissed on April 28, 2010 and therefore he was within time as twelve years had not lapsed from the date of dismissal of the appellant's appeal.

12. The learned trial magistrate observed as follows in the ruling delivered on 3/08/2021:

> "...it is thus clear that a judgment a copy of which the decree is provided was delivered in favour of the plaintiff on June 16, 2000. The defendant appealed to the High Court against the judgement vide HCC Appeal No 71/2000 before the High Court in Nakuru. It is undisputed that a stay of execution of the judgment herein was granted pending the hearing and determination of the appeal. The appeal was finally heard and determined on the April 28, 2010...Now while it is indeed true that the judgment now being executed was granted in the plaintiffs favor 21 years ago, it cannot be said to be barred under the provisions of Section 4(4) of the *Limitation of Act* in the aforesaid circumstances. The stay of execution orders granted in HCCA No 71/2000 staying execution until the appeal is heard and determined had the effect of suspending the effluxion of time as long as the appeal was still pending. Time therefore for purposes of Section 4(4) of execution of the limitation of Section Act remained in abeyance remand until the April 28, 2010 when the appeal was determined."

13. Section 4(4) of the *Limitation of Actions Act* provides as follows:

> "(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, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due."

14. It is not disputed that judgment in this matter was delivered on June 16, 2000. Annexed to the application dated March 22, 2021, that was subject to the ruling delivered on August 3, 2021 from which the present appeal emanates from, is a memorandum of appeal filed in HCCA No 71 of 2000 dated June 28, 2000. This was the appeal filed from the judgement delivered on June 16, 2000. The respondent also annexed a copy of the judgment delivered on April 28, 2010 in HCCA No 71 of 2000. As was noted by the trial magistrate, the issue of whether there was stay of execution of judgement was not contested by the appellant herein.

15. The Court of Appeal in the case of *M'Ikiara M'Rinkanya & Another v Gilbert Kabeere M'mbijiwe* [2007] eKLR held as follows:

> "Lastly, it is logical from the scheme of the Act, that a judgment for possession of land, in particular should be enforced before the expiration of 12 years because section 7 of the Act bars the bringing of action for recovery of land after the end of 12 years from the date in which the right of action accrued. By the definition in section 2 (2) (3) of the *Limitation Act*:
>
> "Reference in this Act to a right of action to recover land include reference to a right to enter into possession of the land and reference to the bringing of an action in respect of such right of action include reference to making of such an entry".

According to that definition the institution of proceedings to recover possession of land including proceedings to obtain a warrant for possession is statute – barred after the expiration of 12 years."

16. The court in the case of *Koinange Investments and Development Company Limited v Ian Kahiu Ngethe & 3 others* [2015] eKLR cited by the trial magistrate held as follows:

> " 31. From the above, it is clear that Mutungi J temporarily suspended the execution of the court order issued on February 5, 2004. The said court order was to give effect to the process of sub- division, specifically that the Deputy Registrar could execute any documentation with regard to the sub-division and subsequent transfer of the suit property.
>
> 32. I therefore agree with the Defendants submission that in view of the order for stay of execution, it would have been improper for the Defendants to carry out any form of execution of the decree. A decree or order becomes enforceable from its date. Therefore, time on the judgement delivered on October 14, 2002 started running as from the date of its delivery.
>
> 33. However, the filing of appeal number 108/2003 would not affect the enforceability of the judgement/decree. However, this court, through the orders of Mutungi J. stayed the judgment decree's operation. I am therefore of the view that the judgment has not lapsed due to the effluxion of time as argued by the Plaintiff. The orders of Mutungi J had the net effect of suspending the completion of the ongoing execution of the judgment in any terms, as long as an appeal was being determined in the Court of Appeal."

17. I am therefore inclined to agree with the findings of the learned trial magistrate that stay of execution orders that had been issued in HCCA No 71 of 2000 stopped the time from running but after delivery of the judgement in that appeal on April 28, 2010, the time begun to ran. The application for execution dated March 22, 2021 was therefore made within the time period of twelve years. Further even if the period of time that lapsed after the judgment and before the obtainance of the stay of execution order was taken into consideration being 3 months and 9 days, it would not make the delay in execution attain the threshold of 12 years.

18. The appellant contends that the respondent did not follow the process of execution set out under Order 22 Rule 18(1) of the *Civil Procedure Rules* while the respondent submitted that the appellant was always aware of the intended execution and compliance with the said provision was superfluous.

19. The learned trial magistrate stated as follows in the ruling:

> "...the proviso to the above provision is also clear, that the court can do away with the requirement to show cause if for reasons to be recorded it considers such notice unreasonably delaying or unjust. This is one of those cases where there is no point of issuing a notice to show cause. The defendant/respondent is not being ambushed with execution. For close to two years, this matter has come up severally for an application to substitute the deceased plaintiff with the applicant herein. The purpose why the applicant was being substituted was clear and indeed was one of the issues ruled on in a ruling delivered on February 23, 2021."

20. Order 22 Rule 18(1) provides as follows:

18. (1) Where an application for execution is made—

(a) more than one year after the date of the decree;

(b) against the legal representative of a party to the decree; or

(c) for attachment of salary or allowance of any person under rule 43, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him: Provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is caused solely by reason of the judgment debtor having changed his employment since a previous order for attachment.

21. The court in the case of *Invesco Assurance Co v MW (Minor suing thro' next friend and mother (HW)* [2016] eKLR held as follows:

> "On the matter of the decree having been over one-year-old, it is trite that a Notice to Show Cause ought to be issued to the judgment debtor before execution pursuant to Order 22 Rule 17 & 18 of the *Civil Procedure Rules*.
>
> It is not in dispute that the Notice to Show cause was not issued. The appellant submits that failure to have the Notice to Show Cause issued made the warrants of attachment illegal and therefore the trial magistrate erred in law in failing to declare the execution process illegal.
>
> Rule 18 gives the court discretion to refuse execution when no notice to show cause is issued. My understanding of the rule is that the court may also exercise its discretion and allow execution where notice to show cause is not given."

22. In her now impugned ruling the learned trial magistrate observed that the matter has come up severally for an application to substitute the deceased plaintiff with the respondent and that the purpose why the applicant was being substituted was clear and indeed was one of the issues ruled on in a ruling delivered on February 23, 2021. I have examined the application giving rise to that ruling. It is clearly stated that the purpose of the application was to substitute the deceased original plaintiff in the lower court suit with the present respondent for the purpose of execution. A part of the ruling read as follows:

> "The application is premised on the grounds that ... the plaintiff passed on April 21, 2016; that the applicant herein sought letters of administration and now wish (sic) to be substituted in place of the deceased so as to execute the judgment for the benefit of the deceased (sic) estate."

23. It is clear all through the two applications and rulings that judgment had been obtained and that all that remained was execution thereof. It is my view that the learned trial magistrate properly and consciously exercised her discretion in the ruling dated 3/8/2021 dispensing with the issuance of the notice to show cause as required under Order 22 Rule 18re(2) of the *Civil Procedure Rules*. Consequently, the appellant's instant appeal lacks merit and it is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 24TH DAY OF APRIL 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU