



**Kenya Power & Lighting Company Ltd v Sunkuli (Acting Secretary General)
& 2 others; Kollato Auctioneers (Interested Party) (Civil Suit 14 of 2004)
[2023] KEHC 26186 (KLR) (Commercial and Tax) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26186 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 14 OF 2004
JWW MONG'ARE, J
NOVEMBER 30, 2023**

BETWEEN

KENYA POWER & LIGHTING COMPANY LTD PLAINTIFF

AND

**JULIUS OLE SUNKULI (ACTING SECRETARY GENERAL) . 1ST RESPONDENT
MOHAMMED YUSUF HAJI (NATIONAL TREASURER) 2ND RESPONDENT
BONAYA GODANA (DEPUTY SECRETARY) OF KENYA AFRICAN
NATIONAL UNION 3RD RESPONDENT**

AND

KOLLATO AUCTIONEERS INTERESTED PARTY

RULING

1. The 1st, 2nd and 3rd Defendants filed an amended Notice of Motion dated 15th June 2022, brought under Sections 3, 3A, 34, 38, and 80 of the Civil Procedure Act, Order 9 Rule 9A CPR and Section 4(4) of the Limitation of Action Act, seeking the following orders:-
 1. Spent
 2. Spent
 3. Spent



4. That this Honourable Court be pleased to invalidate and set aside the sale by public auction parcel of land owned by KANU, Nakuru branch being Nakuru Municipality Block 9/31 conducted on the 13th of June, 2022.
 5. Spent
 6. That the judgment and decree delivered on 7.8.2009 by his Lordship Justice J.B. Havelock cannot be executed since the same is time barred pursuant to the provisions of Section 4(4) of the *Limitation of Actions Act* Cap 22 of the Laws of Kenya.
 7. That in the alternative this court be pleased to stay and set aside any interest charged on the principal amount after 6 years from 7.8.2009 with consequential orders.
2. The application is supported by the grounds set on its face and the supporting and supplementary affidavits sworn by Nick Salat on 15th June 2022 and 13th July 2022 respectively. In a nutshell, the grounds are that the decree dated 7th August 2009 as well as interest on the decretal sum are time-barred under Section 4(4) of the *Limitation of Actions Act*; and that the purported sale of the property known as Nakuru Municipality Block 9/31 (the property) (registered in the name of Kenya African National Union, Nakuru branch) to a third party by public auction on 13th June 2022 was illegal and un-procedural for non-compliance with the law.
 3. In response, the plaintiff filed a replying affidavit sworn by its legal officer, Irene Walala on 28th June 2022. On 7th August 2009, the Court entered judgment against the Defendants, for Kshs.212,816,986.80/-. The plaintiff filed an application for execution dated 16th November 2010 for notice to show cause why attachment and sale should not be issued against the property. On 16th January 2012, a prohibition order issued on 19th December 2011 was registered against the property.
 4. The deponent elaborated on the protracted litigation history of this matter, where the Defendants and Objectors files numerous applications in opposing the execution. The Defendants' application to set aside the judgment was dismissed. They then sought stay of execution pending appeal. Although stay was issued, it was dismissed as the Defendants failed to comply with the condition to furnish security.
 5. On 25th November 2013, the parties' advocates settled on the terms and conditions of sale of the property and the sale was fixed for 14th August 2014. The registered trustees of the Defendants' Nakuru branch lodged an objection dated 28th July 2014 on grounds that the property is owned by the Defendants' Nakuru branch, a separate and distinct entity from the Defendants. The objection was dismissed on 12th February 2015. The Objectors filed an application for review which they withdrew and sought stay pending appeal.
 6. Eventually, the Objectors filed an appeal and a judgment delivered on 17th November 2016, to the effect that Kenya African National Union was now a body corporate and all property of branches was vested in the body corporate. The Objectors sought and were granted 90 days' stay of execution pending appeal and another 60 days' on account of delay in typing of proceedings. However, they did not comply with the timelines and the Deputy Registrar fixed the sale of the property on 28th March 2018, later postponed to 8th June 2018.
 7. The Objectors filed Civil Appeal No. 149 of 2018 together with an application seeking to stop the sale which was dismissed by a ruling of 26th October 2018. The Objectors then filed Supreme Court Petition No. 44 of 2018 which was struck out as it had not been certified as a matter of general importance.



8. The Objectors again sought and obtained stay pending the determination of its application for preservation of status quo pending determination of its application for a moratorium to suspend the subject decree in ELC No. 39 of 2019. However, on 9th June, 2020, the Court stood over the matter due to failure to prosecute, and in essence gave the plaintiff the leeway to proceed with the sale.
9. Although there was delay in fixing a new date for sale of the property due to misplacement of the court file and procedural issues, eventually, the sale was scheduled to take place on 31st March 2021. The date was set on 25th November 2020. The Defendants attempted but failed to get injunctions to stop the sale in Nakuru CMCC ELC No. 64 of 2021 and in ELC No. 39 of 2019. This led to the fixing of the sale for 13th June 2022. Solai Auctioneers served the notice of sale on the Defendants on 10th May 2022 and the sale was advertised in the Standard Newspaper on 31st May 2022. The auction commenced on 13th June 2022 and bids were received but the sale was postponed due to a request for more time to settle the balance of the purchase price. On 16th June 2022, the plaintiff's advocates were served with the present application with an order preserving the status quo pending its hearing and determination.
10. The plaintiffs pray that the defendant's application dated 6th June 2022 be dismissed with costs to the plaintiff.
11. The application was canvassed by way of written submissions. The Defendants filed written submissions dated 13th July 2022 while the plaintiff filed written submissions dated 5th August 2022.

Analysis and Determination

12. I have considered the pleadings filed by the parties in this matter and their written submissions. The issues that arise for determination is whether the execution of the judgment issued on 7th August 2009 is time barred and whether the plaintiff's claim for interest is time barred.
13. The Defendants submitted that the execution is time barred under section 4 (4) of the *Limitation of Actions Act*. They cited the decision in the case of *Willis Onditi Odhiambo v Gateway Insurance* [2014] eKLR, and *Rachel Mwikali Mwandia v Ken Wameu Kasinga* (2013) eKLR, where the Court held that an action to recover interest is time barred after six years from the date on which interest became due.
14. On the other hand, the plaintiff argued that the Court is bound by Court of Appeal decisions to the effect that "action judgment" includes execution proceedings. The plaintiff also relied on *Rachael Mwikali Mwandia v Ken Maweu Kainga* [2013] eKLR and *Danson Muriithi Ayub v Evanson Mithamo Muroko* [2015] eKLR to argue that since the application for execution was filed within the 12 year window, it is entitled to continue with the execution until it is completed, especially where the proceedings have been prolonged solely by the Defendants.
15. In addition, the plaintiff also cited the case *Koinange Investment and Development Company Limited v Ian Kabiu Ngethe & 3 others (Being sued as the personal representatives of the Estate of Robert Nelson Ngethe (Deceased))* [2019] eKLR to buttress the proposition that the limitation period is suspended during any period when the execution of the judgment has been stayed.
16. Section 4(4) of the *Limitation of Actions Act*, provides that:

“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."

17. In *Hudson Moffat Mbue v Settlement Fund Trustees & 3 Others*, ELC No. 5704 of 1992 (OS) cited with approval in *Orion East Africa Limited v Tetu Coffee Growers Co-operative Society Limited (In Liquidation)* [2017] eKLR, the Court expounded on the effect of this provision, as follows:-

"...the expression "An action may not be brought upon a judgment after the end of twelve years from the date on which judgment was delivered ..." means that unless an application has been brought for enforcement of the judgment and has been completed and/or the same has not been concluded by the time the 12 year period expires, no fresh action for enforcement of the judgment can be brought after the expiry of 12 years from the date of the delivery of the judgment."

18. In this matter, the judgment was entered on 7th August, 2009. The plaintiff filed an application for execution on 24th November, 2010. The sale by public auction slated for 13th June 2022 was premised on that application for execution. I find that the application for execution was filed within the 12 year limitation period. Therefore, it is not subject to section 4(4) of the *Limitation of Actions Act*.

19. Regarding the plaintiff's claim for interest, section 4 (4) of the *Act* provides that:-

".....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."

Accordingly, I find that the plaintiff's claim for interest is time barred.

20. All in all, I find that the defendant's application dated 15th June 2022 partially succeeds and I order that:-

1. Any interest charged on the principal amount after 6 years from 7.8.2009 is set aside.
2. Each party to bear their own costs of this application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF NOVEMBER, 2023.

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Ms. Aloga holding brief for Ondieki for the Plaintiff/Respondent.

No appearance for the Defendant.

Amos - Court Assistant

