



**Cheptoo v Chepkurui (Environment and Land Appeal 26 of 2020)
[2023] KEELC 17657 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17657 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL 26 OF 2020**

EO OBAGA, J

MAY 25, 2023

BETWEEN

STEPHEN K CHEPTOO PLAINTIFF

AND

CHERONO CHEPKURUI DEFENDANT

*(Being an appeal against the Ruling and order of the Senior Principal
Magistrate Hon. P. C. Biwott delivered on 15th October, 2020 in Kabarnet
E & L Court Case No. 1 of 2017 formerly Land case No. 4 of 1985)*

JUDGMENT

Introduction:

1. The appellant filed an appeal against the respondent in which he raised the following grounds: -
 1. That the learned magistrate erred in law and fact in failing to find that the plaintiff's claim for cost was time barred and in contravention of section 4(4) of the *Limitations of Action Act* Cap 22 of the Laws of Kenya.
 2. That the learned magistrate erred in law and fact in failing to find and/or hold that the order issued on March 21, 1990 purportedly awarding costs to the respondent was vacated on March 23, 1990 hence the order the respondent is seeking against the appellant does not exist.
 3. That further, the learned magistrate erred in law and fact in failing to find that an application by the Respondent to review the orders of March 23, 1990 vacating the order of March 21, 1990 was dismissed on November 24, 1992 hence the respondent application for execution dated July 9, 2020 is an abuse of the court process.



4. That the learned magistrate erred in law and fact by finding that the appellant preliminary objection dated August 6, 2020 was a mere technicality when it was based on sound principles of law and a statutory Act to wit section 4(4) of the [Limitation of Actions Act](#) Cap 22.
5. That the learned magistrate erred in both law and fact in failing to uphold the principle of stare decisis in respect of the Court of Appeal decision in Nyeri Court of Appeal Civil Appeal No 124 of 2003 [M'Ikiara M'Rinkanya Sabastian Nyamu v Gilbert Kabeere M'Mbijiwe](#) on Limitation of execution of Court orders and judgments as espoused under section 4(4) of the [Limitation of Actions Act](#) submitted by the appellant in support of his preliminary objection.
6. That the learned magistrate erred in both law and fact in finding that the respondent had been awarded costs when there were orders to the contrary that the order of costs was vacated.
7. That the learned magistrate erred in both law and fact in finding that the court file disappeared and therefore the respondent could not execute the decree yet there was no order for execution and further, the respondent had the option of reconstructing the court file.

Background

2. In 1985, the respondent filed a suit against the Appellant at Kabarnet Resident Magistrates' Court vide Land Case No 4 of 1982 (Now E&L Case No 1 of 2017) in which he claimed that during the demarcation process, the appellant had registered his land in his name.
3. When the case came up for hearing before the court, the trial magistrate referred the case to the panel of elders. The panel of elders heard the case and decided that the appellant's land had to be subdivided into two portions. The appellant's land was subdivided into Baringo/Kapropita/630 and 631 which were registered in the name of the appellant and the respondent respectively. The respondent sold his portion and moved away.
4. Sometimes in 1990 the respondent applied for costs which were awarded to him in the sum of Kshs 32,878 or in the alternative, the appellant was to give his land to the respondent. The order for costs together with the alternative of land appears to have been made on March 21, 1990 ex-parte as the appellant had been taken to court under warrant of arrest.
5. The appellant appears to have moved to court on March 23, 1990 whereby the orders of March 21, 1990 were vacated. The respondent moved back to court on July 4, 1990 seeking to have the orders of March 23, 1990 reviewed. This application was dismissed vide ruling delivered on November 24, 1992.
6. The appellant moved to court on March 3, 2015 and sought to have a prohibitory order which had been registered against his title at the instant of the court removed but the court in a ruling delivered on April 17, 2018 declined to lift the same arguing that the appellant had not paid the costs to the respondent.
7. The appellant applied for review of the court's ruling of April 17, 2018 vide application dated January 9, 2020. Before this application could be heard, the respondent filed an application dated July 9, 2020 in which he sought to execute for costs which had been awarded on March 21, 1990. In response to this application, the appellant filed a notice of preliminary objection on the following grounds: -
 - a. That the purported order allegedly made on March 21, 1990 which is sought to be executed is time barred and in contravention of Section 4(4) of the [Limitation of Actions Act](#).
 - b. That the order issued on March 21, 1990 was vacated by an order dated March 23, 1990 and the application for review to vacate the order of March 23, 1990 was dismissed with costs



on November 24, 1992, hence the order sought by the plaintiff to be executed against the defendant does not exist and can never be executed.

- c. That the plaintiff's application is therefore frivolous, vexatious and an abuse of the court process and ought to be dismissed with costs.
8. In a ruling delivered on October 15, 2020, the trial magistrate dismissed the preliminary objection arguing that the issue of limitation was a mere technicality and that as the court file had been missing from the registry for long, there was need to do justice by having the respondent's application for execution fully heard. This is what prompted the filing of this appeal.

Submissions;

9. The parties were directed to file written submissions. The appellant filed his submissions on March 16, 2023. The respondent filed his submissions on April 3, 2023.

Appellant's submissions

10. The appellant submitted that the respondent's application for execution dated July 9, 2020 is res judicata. He cited the case of *In Re-Estate of Kiura Kathari alias Kiura Njamin (Deceased)* (2021) eKLR where it was held as follows:-

“For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied that is; the suit or issue was directly and substantially in issue in the former suit; that former suit was between the same parties or parties under whom they or any of them claim; those parties were litigating under the same title; the issue was heard and finally determined in the former suit; and the court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised. See *Accredo AG & 3 others v Steffano Uccelli & another* (2019) eKLR”

11. The appellant also submitted that the respondent's application for execution was time barred by virtue of section 4(4) of the *Limitation of Actions Act* which provided as follows:-

“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.

12. In support of the contention that the application for execution for costs was time barred, the appellant relied on the case of *M'Ikiara M'Rinkanya & another -v- Gilbert Kabeere M'Mbijiwe* (2007) eKLR where the Court of Appeal held as follows: -

“From the above analysis, it is clear that a judgement for possession of land should be enforced before the expiry of the 12 years limitation period stipulated in section 7 of the Act. If the judgement is not enforced within the stipulated period, the rights of the decree holder are extinguished as stipulated in section 17 of the Act and the judgement debtor acquires possessory title by adverse possession which he can enforce in appropriate proceedings. So, quite apart from the authority of *Lougher v Donovan*, which we consider as still good law in this country, and the previous decisions of this court, there is a statutory bar in section 7 of the Act for recovery of land including the recovery of possession of land after expiration



of 12 years. It follows, therefore, that to hold that execution proceedings to recover land are excluded from the definition of “action” in section 4(4) of the Act would be inconsistent with the law of adverse possession.”

13. The appellant further submitted that the trial magistrate failed to follow case law from superior court. In support of this, he relied on the case of *M’ikiara M’Rinkanya* (Supra) and *Jasbir Singh Rai & 3 others –v- Tarlochan Sing Rai & 4 others* (2013) eKLR where it was held as follows: -

“Adherence to precedent should be the rule and not the exception... the labour of judges would be increased almost to breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.”

Respondent’s submissions

14. The respondent submitted that the appellant’s appeal is a waste of judicial time and that the appellant is seeking to rely on technicalities without regard to the fact that the court file had disappeared from the court registry for a long time and therefore the respondent could not execute for the costs in time.
15. The respondent further submitted that costs follow the event and that as costs were awarded, they should be paid by the appellant. He relied on the case of Republic –v- Rosemary Wairimu Munene, *Exparte Applicant –v- Ibururu Dairy Farmers Co-Operative Society Limited*, Judicial Review Application No 6 of 2014 where Justice Mativo (as he then was) while referring to section 27 of the *Civil Procedure Act* stated as follows: -

“The issue of costs is the discretion of the Court as provided under the above section. The basic rule on attribution of costs is that costs follow the event... it is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

Analysis and determination

16. I have carefully considered the record of appeal, the submissions by the parties vis a vis the grounds of appeal raised. As a first appellate court my duty is to re-evaluate the evidence and reach my own conclusion. This duty was stated by the Court of Appeal in the case of *China Zhongxing construction company Ltd –v- Ann Akuru Sophia* (2020) eKLR where the Court of Appeal cited the *East African Court of Appeal in Peters –v- Sunday Post Limited* (1956) EA 424 where Sir Kenneth O’ Connor states as follows: -

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in *Watt v Thomas* (1), [1947] AC 484.”



17. The court of appeal in *China Zhingxing Construction Company* (supra) further stated as follows;

“The appropriate standard of review established in these cases can be stated in three complementary principles:

- a. First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantages of seeing and hearing the witnesses testify before her; and
- c. It is not open to the first appellate court to review the finding of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

18. In re-evaluating the evidence in this matter, the following issues stand out for determination: -

- a. Whether there was a decree or order of costs capable of execution?
- b. Assuming there was a decree and/or order of costs, was the same time barred?
- c. Whether the trial court failed to adhere to the doctrine of stare decisis.
- d. Whether the respondent’s application for execution dated July 9, 2020 is res judicata.

a. Whether there was a decree or order of costs capable of execution?

19. I have gone through the proceedings in the lower court file. There was a bill of costs which was filed on January 28, 1990 by the respondent. There is nothing on record to show whether this bill was ever assessed. The appellant was brought to court under warrant of arrest on February 20, 1990 when he was ordered to pay the respondent a sum of Kshs 32,878 or in the alternative give vacant possession of his land being Baringo/Kapropita/630 to the Respondent.
20. The record further shows that on March 21, 1990 an order was extracted incorporating what transpired on February 20, 1990 but was purported to be given on March 21, 1990. It would also appear that on March 23, 1990, the appellant appeared before court where the orders of March 21, 1990 were vacated. What is interesting is that there is no record of the proceedings of either March 21, 1990 or March 23, 1990.
21. When the respondent moved to court through notice of motion dated July 4, 1990 seeking to review the orders of March 23, 1990, the application was dismissed as there was no record of proceedings of March 21, 1990 and March 23, 1990. The ruling dismissing the respondents application for review was delivered on November 24, 1992.
22. On June 8, 1990, the appellant had appeared before court where he had been summoned to show cause why he should not be committed to civil jail. When the appellant was given opportunity to respond to why he should not be committed to civil jail, he stated that the order for payment of costs had been struck out. At this juncture, the respondent’s counsel sought for time to seek instructions from his client.
23. It is after the advocate for the respondent sought instructions from his client that the application for review was filed. This application was dismissed for reasons given in paragraph 21 herein above. There was therefore no order of costs which was capable of execution. The Respondent may have been



emboldened in his pursuit for non-existent costs by a ruling which was delivered on April 17, 2018 which declined the appellant's application for removal of a restriction against the appellant's title on grounds that the appellant had not paid costs.

b. Assuming there was a decree and/or order of costs, was the same time barred?

24. The respondent filed an application dated July 9, 2020 seeking to execute for costs which were allegedly awarded on 21/3/1990. This application was being made after three decades. Section 4(4) of the Limitation of Actions Act as well as the case of M'Ikiara M'Rinkanya & another (Supra), no execution can be allowed after expiry of 12 years from the time the decree was issued.
25. There is an argument on the part of the respondent that he was unable to execute for costs as the court file was missing. I have gone through the entire lower court file. There is no single letter alluding to the missing file. Prior to March 21, 1990, the respondent had attempted to execute for costs through notice to show cause and arrest of the appellant. All through the file was available and the respondent was able to file any application he wished including the one for execution which he made after 30 years. I therefore find that even if there was a valid decree and/ or order for costs, the same was statute barred.

c) – Whether the trial court failed to adhere to the doctrine of stare decisis;

26. I have gone through the proceedings which culminated in the impugned ruling. There was no decision from a superior court which was brought to the attention of the trial magistrate which he refused to follow. Though judicial officers are supposed to appraise themselves on decisions of superior courts on topical issues, it is the duty of Advocates to assist the judicial officers by availing such decisions to the judicial officers. In the instant case, there is no basis of blaming the trial magistrate for not adhering to the doctrine of stare decisis when no decision of superior court was brought to the attention of the magistrate.

d) Whether the Respondent's application for execution dated July 9, 2020 is res judicata;

27. The issue of res judicata was never in the grounds of preliminary objection which was raised against the Respondents notice of motion of July 9, 2020. This issue of res judicata cannot therefore be raised on appeal without the leave of the court.

Disposition;

28. It is clear from the above analysis that there was no order for costs given on March 21, 1990 which was capable of execution. In any case the order which was purportedly given on March 21, 1990 is not backed by any proceedings. It was based on proceedings of February 20, 1990 and the said order has handwritten writings on right top corner that it was not approved. It is also not known how the order of March 21, 1990 was vacated by one of March 23, 1990 whose proceedings are not in the file.
29. The trial magistrate should not have ignored the appellant's plea that there was no order for costs to be pursued. By the respondent filing notice of motion dated July 9, 2020 purporting to pursue nonexistent costs, he was abusing the process of the court. I therefore find that the trial magistrate was wrong in dismissing the appellant's preliminary objection on ground of limitation and abuse of the process of court. I proceed to set aside the ruling of October 15, 2020 and in place thereof make an order dismissing the respondents application dated July 9, 2020 with costs. The respondent shall bear the costs of this appeal.

DATED, SIGNED and DELIVERED at ELDORET on this 25th day of MAY, 2023.

E. O. OBAGA



JUDGE

In the virtual presence of;

Mr. Chebii for Appellant.

Court Assistant –Laban

E. O. OBAGA

JUDGE

25th MAY, 2023

