



**Serem v National Bank of Kenya (Civil Case 53 of 1996)
[2022] KEHC 12677 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12677 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE 53 OF 1996
HK CHEMITEI, J
JULY 28, 2022**

BETWEEN

RICHARD KIPLANGAT SEREM APPLICANT

AND

NATIONAL BANK OF KENYA RESPONDENT

RULING

1. In his Notice of Motion dated 10th March 2022 the applicant prays for the following orders;
 - a. That the judgement dated 5th February 2003 and all consequential orders are time barred under the *Limitation of Action Act*.
 - b. The court reviews the order of arrest dated 5th February 2022 since the court had no jurisdiction to issue because of *Limitation of Action Act*.
 - c. The court be pleased to order the respondent to release the original title deed for Kericho / Koiyet /142 to the applicant since it was not charged.
2. The applicant as well prayed for costs for the application. The same is based on the grounds thereof and the applicant's affidavit sworn on the same date.
3. The said affidavit gives a chronology of the events in this long and winding matter which in my view is clear and simple. The applicant took a loan facility with the respondent and he was unable to service. The respondent filed this suit to recover the same. Judgement was entered against him after the court found the defence spurious.
4. The respondent thereafter instituted execution proceedings and in not less than three applications the applicant attempted to stop the same to no avail. Eventually he was committed to civil jail where he spent three months which later culminated into a consent dated 1st July 2010 where he was released conditionally.



5. It appears from the replying affidavit of Judah Kimutai that the applicant since paying the sum of Kshs. 100,000 as one of the conditions of being released has not made any payments. This led to the respondent attempt execution again vide the notice to show cause dated 11th January 2022 which has led to the applicant filing this application.
6. The thrust of the application is inched on the Limitation of Action Act. He deposes that by virtue of the said act the judgement of this court dated 5th November 2003 cannot be executed. He also prays that the title deed which is in the custody of the respondent was not charged and the same ought to be returned to him.
7. On the issue of limitation Judah Kimutai in his replying affidavit disputed this fact. He said that the applicant has frustrated the execution of the judgement and thus it cannot be argued that the same has lapsed as suggested by the applicant. In other words, limitation statute cannot favour the applicant in this sense.
8. Parties were directed to dispose the application by way of written submissions which they did comply.
9. The applicant reiterated the issue raised in the supporting affidavit to the application. He formulated the issues around the provisions of Section 4 of Cap 22 and submitted that in line with the said law, the judgement was unenforceable and this court should declare so. He also relied on the case of Malakwen Arap Maswai v. Paul Kosgei 2004 eKLR.
10. On the question of his title deed which is held by the respondent, he submitted that there was no reason why the respondent should have it in his custody yet the same had not been charged. That the applicant in any case did not charge the same as he did not take any facility with the respondent.
11. In its submissions the respondent vehemently opposed the application on the grounds that time could not have run for the simple reason that where there was stay of execution of a decree time does not run. The respondent relied on the case of Hudson Moffatt Mbue v. SFT & Three Others eKLR ELC no. 5704 of 2992(0S).
12. On the issue of the title deed the respondent submitted that the same does not hold as there was a prohibitory order registered against the title. That this was an issue which ought not to be within the purview of this court at the moment.
13. The respondent prayed for the application to be dismissed.

Analysis and Determination.

14. As set out earlier, the issue of the indebtedness by the applicant to the respondent is not in question. As a matter of fact, he spent three months in civil jail which culminated into a consent although it appears the applicant failed to honour it. The debt is therefore still subsisting and interest of course accruing.
15. Does the Limitation of Action Act really aid the applicant from his liabilities as he urges this court? Section 4(4) states 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.”



16. In light of the myriads of applications made by the applicant to stop execution against him can he benefit from the above portion of the law.? I do not think so. Looking at the proceedings herein, it appears that the first execution process commenced on 23rd February 2004 which was less than one year after judgement was entered.
17. Thereafter there was another attempt which led into another application in which the court ruled in favour of the respondent on 18th February 2005. Subsequently the applicant was committed to civil jail in which he served for three months but was released vide the consent dated 1st July 2010.
18. There were thereafter objection proceedings in which the court again ruled in favour of the respondent on 19th January 2017.
19. In essence, there is a clear line of execution proceedings which the applicant has not denied. The net effect was for the realisation of the judgement dated 5th November 2003.
20. In my view therefore, limitation does not run where execution exercise is ongoing. Within the 12 years' period provided by the law the respondent has continued to attempt execution against the applicant. I do not think parliament anticipated that time would run when execution process was on like in this case. It only applies where one gets a favourable decree, sits on it for twelve years and wake up thereafter to enforce.
21. This is so unless the applicant shows a good cause and probably seeks the consent of the court. The word "may" in the above section is illustrative. It is not a blank cheque. One must satisfy the court why it was unable to execute the judgement before the expiry of the said 12 years.
22. Further the applicant in the cause of the period made some payments as acknowledged by the respondent. It therefore meant that he interrupted the period which may have been for argument sake in his favour.
23. This matter is distinguishable from the Malakwen case (*supra*) since in that case the execution was attempted way after expiry of 12 years and even more. Clearly in the matter at hand, the applicant cannot benefit for the reasons stated above.
24. There is however the issue surrounding the title no. Kericho/Koiyet/142. There is no evidence on record that the same was charged or secured a loan facility in favour of the respondent. The argument that the same is being held by the respondent has not been controverted.
25. It is true that a prohibition has been placed against the register. That prohibition was not at least sanctioned by this court or at all. I think most probably it was a pre-emptive action taken by the respondent. If that is the case, then there is no reason for the respondent to hold in its custody the applicant legal document without any supporting reasons which in this case is a charge.
26. However, since this court is not privy on how it ended up in the respondent's custody, it will not be prudent to engage itself on it. This was not one of the prayers in the suit or a counterclaim for that matter. Suffice to set the record straight that there is no order directing the respondent to caution the said title pending the determination of this suit or at all.
27. The court as well declines the invitation by the applicant to stay any execution against him for the reasons given above. Let him challenge the execution in the usual manner but for now this court declines to grant any stay or to set aside any execution exercise.
28. For the above reasons, this court does not find any merit in this application and it is hereby dismissed with costs to the respondent.



DATED SIGNED AND DELIVERED VIA VIDEO LINK THIS 28TH DAY OF JULY 2022.

H K CHEMITEI

JUDGE

