



**Mwango v Oisosa & 2 others (Civil Suit 396 of 1998)  
[2023] KEELC 17465 (KLR) (17 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17465 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
CIVIL SUIT 396 OF 1998**

**M SILA, J**

**MAY 17, 2023**

**BETWEEN**

**ESTHER KERANDI MWANGO ..... PLAINTIFF**

**AND**

**WILLIAM OISOSA ..... 1<sup>ST</sup> DEFENDANT**

**WILFRED OIRERE OISOSA ..... 2<sup>ND</sup> DEFENDANT**

**CHRISTOPHER MOSE OISOSA ..... 3<sup>RD</sup> DEFENDANT**

*(Application for execution lodged after 12 years of judgment but within 12 years of taxation of costs; respondent contending that the decree is stale given the provisions of Section 4 (4) of the Limitation of Actions Act; applicant arguing that she is still within time as decree could not be executed before taxation of costs pursuant to Section 94 Civil Procedure Act; court of opinion that since the decree was of the High Court, it could not be executed before taxation of costs unless leave to do so was granted; that Section 4(4) of the Limitation of Actions Act should be read so that time runs from the time the decree is capable of execution; objection to the execution dismissed)*

**RULING**

1. Through an application for execution filed on August 31, 2022, the applicant sought to have the defendants show cause why they should not be committed to civil jail for failing to pay general damages and interest as awarded to the applicant. The court obliged and issued the notice which is dated September 8, 2022. The notice is opposed by the judgment debtor who filed a preliminary objection. The objection is that the notice is time barred pursuant to Section 7 of the *Limitation of Actions Act*, Cap 22, Laws of Kenya. I directed that the preliminary objection be considered as a reply to the notice so that the two may be heard together. Both Mr Bosire, learned counsel for the judgment creditor, and Mr Godia, learned counsel for the judgment debtor, did file written submissions which I have taken into account before arriving at my decision.



2. The record shows that the judgment creditor/plaintiff, commenced this suit by way of a plaint which was filed on October 27, 1998. In the plaint, he sued William Oisosa, Wilfred Oirere Oisosa, and Christopher Mose Oisosa as defendants. She pleaded to be the owner of the land parcel Bassi/Boitangare/638. She averred that the defendants were owners of the land parcel Bassi/Boitangare/209 and contended that they had trespassed into her land. In the suit, the plaintiff asked for an eviction order, a permanent injunction, general damages for trespass, costs and interest.
3. The case was heard and judgment was delivered on November 27, 2009. Judgment was in favour of the plaintiff with the court declaring that the defendants had illegally occupied the plaintiff's land. The court issued the order of eviction and the order of permanent injunction. On general damages, the court awarded her a sum of Kshs 100,000/= together with interest and costs. The bill of costs was taxed on 8th October 2010 in the sum of Kshs 117,785/=. All this time the plaintiff was being represented by the law firm of M/s Koina Onyancha & Company Advocates. I have seen a letter dated April 18, 2012 lodged by the said firm asking that the court file be traced from the archives for purposes of execution by way of a notice to show cause as the decretal sum remained unpaid. There is a reply dated June 8, 2012 informing counsel that the court file is available and is open for perusal. There are letters on record asking for issuance of a notice to show cause, but I have no evidence of any issuance of any notice, until the subject application for issue of notice was lodged on August 31, 2022, and notice to show cause issued on September 8, 2022.
4. In his submissions, Mr Godia has referred to Section 4 (4) and 7 of the *Limitation of Actions Act*. He contends that the right to pursue the judgment sum is time barred. Counsel urged that judgment was delivered on November 27, 2009 and that the time for execution of the judgment lapsed on November 28, 2021. On costs and interest, counsel urged that more than six years have lapsed and thus the collection of these is barred by Section 4 (4) of the *Limitation of Actions Act*. I was referred to the case of *M'Ikiara M'Rinkanya & Another vs Gilbert Kabeere M'Mbijiwe* (2007) eKLR and *Moses Kipkurui Bor vs John Chirchir* (2019) eKLR.
5. On his part, Mr Bosire, learned counsel, for the applicant, submitted that costs were taxed on November 8, 2010 and the application for execution was filed on November 8, 2022 which is within the 12 years' period stipulated in Section 4 (4) of the *Limitation of Actions Act*. Counsel submitted that the decree could not be executed without first taxing the costs and referred to Section 94 of the *Civil Procedure Act* and Order 21 Rule 9 (2) of the *Civil Procedure Rules*.
6. I have considered the above submissions.
7. The relevant dates are of judgment, taxation, and when the application for execution was filed. Judgment was delivered on November 27, 2009, costs were taxed on 8 November 2010, and the application for execution was filed on August 31, 2022.
8. The relevant law in issue is Section 4(4) of the *Limitation of Actions Act*, which 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.
9. Although Mr Godia cited Section 7 of the *Limitation of Actions Act*, and submitted that Section 4 (4) should be read together with Section 7, I do not see the applicability of Section 7 which is drawn as follows:-



7. Actions to recover land
- An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.
10. What is before court is not an action for recovery of land but an execution of the monetary award in a judgment, thus Section 7 above cannot apply. What squarely applies is Section 4 (4) which I have outlined.
11. Section 4 (4) of the *Limitation of Actions Act*, does provide for a 12-year limitation period before an action can be brought on a judgment. The word ‘action’ has been interpreted in our jurisdiction to include the process of execution and this is well elaborated in the Court of Appeal decision in the case of *M’ikiara M’Rinkanya & Another vs Gilbert Kabeere M’Mbijiwe* (2007) eKLR.
12. The core issue that calls for determination by this court is whether Section 94 of the *Civil Procedure Act*, extended the time for execution, from the date of delivery of judgment to the time of taxation of costs. Section 94 of the said Act provides as follows:-
94. Execution of decree of High Court before costs ascertained
- Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.
13. From the above, it will indeed be seen that where a suit is before the High Court, the decree ought not to be executed without leave of the court until the costs are taxed, and as a natural consequence, the process of execution of the decree cannot proceed. None of the parties provided me with any authority interpreting Section 94 of the *Civil Procedure Act*, vis-à-vis Section 4 (4) of the *Limitation of Actions Act*. My search has also not revealed to me any authority on the same. It thus falls for this court to give its own interpretation of the two sections.
14. It is my opinion that given the provisions of Section 94 of the *Civil Procedure Act*, the time specified in Section 4 (4) of the *Limitation of Actions Act*, must be interpreted to mean that time runs from the time the decree is capable of execution. This to me, is the reasonable interpretation to give to Section 4 (4), otherwise even the time where execution of a judgment is stayed, for example pending appeal, would continue being computed, which cannot be the intention of Section 4 (4). I do not see how a party, who is faced by a legal stricture that bars him/her from proceeding with execution, ought to be prejudiced by the running of the time provided in Section 4 (4) of the *Limitation of Actions Act*. It must be considered that time can only run against the decree holder when the judgment is capable of execution, and judgments of the High Court, unless otherwise ordered, cannot be executed until the costs are taxed. In our case, costs were taxed on November 8, 2010 and it is from that period that the judgment became capable of execution. It is my view that the application for execution lodged on August 31, 2022 was therefore not shut out by Section 4 (4) of the *Limitation of Actions Act* and execution for the judgment sum can proceed.
15. There is however a part of the judgment relating to interest which has been caught up by time. It will be seen from Section 4 (4) of the *Limitation of Actions Act*, that there can be no execution for arrears of interest going beyond six years from when they became due. To me, the simple interpretation is that



the applicant can only benefit from interest within 6 years of the decree becoming capable of execution. Any interest beyond that period of time cannot be recoverable.

16. For the above reasons, subject only to the limitation of interest, I dismiss the preliminary objection with costs. The notice to show cause is properly filed and the respondents thus need to show cause why execution against them ought not to proceed.
17. Orders accordingly.

**DATED AND DELIVERED AT KISII THIS 17 DAY OF MAY 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

