



REPUBLIC OF KENYA



Taib v Said (Civil Suit 88 of 1996) [2022] KEHC 12598 (KLR) (23 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12598 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 88 OF 1996
DO CHEPKWONY, J
AUGUST 23, 2022**

BETWEEN

MOHAMED ALI TAIB PLAINTIFF

AND

SALIM AGIL SAID DEFENDANT

RULING

1. On 9th March, 2021, this court in a ruling of even date directed the parties to address the court on the issue of whether the claim now being asserted by the Plaintiff is time barred or not. This follows the court having noted that the matter was settled by a consent Judgment in the year 1996 and thereafter a Notice to Show Cause issued in the year 2000. The Plaintiff took no action until 21st December, 2020 when he moved the court vide a notice to show cause of even date, seeking the defendant to be committed in civil jail in execution of a decree for Kshs.22,495,622.05. The court was also observant that since the year 1996 when the decree and/or Judgment was issued in this matter until the year 2020 when the Plaintiff later took up the execution, at least twenty (20) years had passed thereby exceeding the time limit within which a Judgment can lawfully be executed.
2. The matter was then mentioned on 10th June, 2021, 28th September, 2021, and 14th October, 2021 respectively. The court indulged the parties on all those dates so that they could file their written submissions. On 14th October, 2021 when the matter was mentioned before the Honourable Lady Justice Olga Sewe, Mr. Odipo counsel holding brief for Mr. Taib for the Plaintiff indicated that the Plaintiff had filed his submissions and was ready to take a hearing date. Since the Respondent was not present and had not filed any submissions, the matter was adjourned to 25th November, 2021. When the court reconvened on 25th November, 2021, Mr. Ajigo appeared on behalf of the Respondent while the Applicant and/or his advocate did not show up.
3. It turned out that the submissions allegedly filed by the Applicant were not in the court file and since the date was given in the presence of the Applicant's counsel, the court proceeded to fix a ruling date. The applicant was also directed to place his submissions in the court filed before the ruling date.



4. However, at the time of writing these submissions, the Applicant's submissions were yet to be placed in the court file and proceeded with the two sets of submissions filed by the Respondent.

Respondent's Submissions

5. The germane of the Respondent's submissions is that once a Judgment has been rendered, execution of the Judgment must be commenced within twelve years period otherwise after the twelve (12) years, any execution will be time barred under Section 4 (4) of the Limitation of Action Act. In that regard, it is submitted that the Notice to Show Cause the Applicant wants to enforce is with respect to a Judgment delivered on 30th April, 1996. That it is now 25 years after the said Judgment was rendered hence the execution being undertaken is time barred. Besides that, the Applicant was not barred from effecting service upon the Respondent even while he was in Tanzania. Therefore, since the Applicant chose to do nothing for over 12 years, he is caught up with time and cannot undertake any execution. These submissions were supported by excerpts from inter alia the case of; *Nancy Wambui Gatheru -vs- Peter Wanjere Ngugi* Nairobi No. 36 of 1993, *M'Ikiara M'Rinkanya & Another -vs- Gilbert Kabeere M'Mbijiwe* [2007]eKLR, *National Westminster Bank PLC -vs- Powney, Hudson Moffat Mbue -vs- Settlement Fund Trustees & 3 Others*.

Analysis and Determination

6. I have considered the submissions by the Respondent and the question that must be answered is whether or not the execution of the Judgment and/or decree issued in this matter is time barred by virtue of Section 4(4) of the *Limitation of Actions Act*.
7. It would appear from the material presented before the court that the Judgment/Decree in this matter was entered way back on 30th April, 1996 and the Plaintiff/Applicant seeks to execute it by way of Notice to Show Cause dated 7th December, 2020. Before proceeding with the notice to show cause, this court on its own motion asked the parties to file submissions with respect to the validity of execution on a judgment which has remained unexecuted for over 12 years. This court was also of the view that the Judgment and the decree in this matter was by the year 2009 time barred by dint of Section 4(4) of the *Limitation of Actions Act* but before making such a pronouncement, the rule of natural justice places an obligation upon the court to ensure that parties are first given the opportunity to be heard.
8. Despite being availed that opportunity, the Plaintiff/Applicant has failed to file any submissions to address the issue. The Respondent on the other hand has throughout his submissions maintained that the Judgment and decree in this case are statutorily time barred for the

Plaintiff to call for any execution.

9. In that regard, the provision in Section 4(4) of *Limitation of Actions Act* is reiterated 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.” [emphasis mine].



10. The above Section governs the time within which execution of a Judgment can be carried out. To buttress this, reliance is placed on the Court of Appeal case of *Willis Onditi Odhiambo –vs- Gateway Insurance Co. Ltd* (2014) eKLR, where the Court in the same vibe had this to say;

“In other words the appellant wanted to execute the

said decree against the respondent out of time. Execution of judgments and/or decrees is governed by section 4(4) of the *Limitation of Actions Act* which is in the following terms-

“4(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”.

The Judgment which the appellant sought to execute was passed on 26th August, 1996. The judgment should therefore have been executed on or before 27th August, 2008”.

11. Similarly, I have taken note of the *Hudson Moffat Mbue -vs- Settlement Fund Trustees* case (supra), cited by the Respondent where the court was emphatic that Section 4(4) of the *Limitation of Actions Act* bars one from carrying on with execution when for a period of twelve (12) years, the Judgment Creditor failed to undertake any execution.
12. The foregoing thus lays a precedent that the execution of Judgments and Decrees is governed under Section 4(4) of the *Limitation of Actions Act* and precludes any execution after the statutory twelve (12) year period.
13. There is therefore no justification to depart from the same position, considering the fact that the decree in this matter was issued on 30th April, 1996 which is now over 12 years ago, hence the time within which execution could be undertaken has since lapsed from the date of delivery of the subject Judgment and Decree.
14. In the circumstances, the Notice to Show Cause dated 7th December, 2020 which was pending determination is hereby set aside and dismissed for being time barred.
15. Each party to bear its own costs.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATES AND SIGNED AT NAIROBI THIS 23RD DAY OF AUGUST, 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Muli counsel holding brief for Mr. Taib counsel for Plaintiff

Mr. Buseka counsel for Respondent

Court Assistant - Sakina

