**Owaga v Koech (Civil Suit 399 of 1996) [2022] KEHC 17144 (KLR) (22 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 17144 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISII**

**CIVIL SUIT 399 OF 1996**

**REA OUGO, J**

**NOVEMBER 22, 2022**

**BETWEEN**

**WALTER ONYANGO OWAGA ..... PLAINTIFF**

**AND**

**SIMON PHILIP KIMUTAI KOECH ..... DEFENDANT**

**RULING**

1. In an application dated the December 1, 2021 the defendant/ applicant (the applicant) seeks the following orders;

    i. That there be stay of execution of the judgment delivered on September 3, 2003 together with all the consequential decrees and orders of the honorable court including the warrants of arrear and mediation proceedings herein pending the hearing and determination of the application.

    ii. That judgment delivered against the defendant /applicant be declared statute barred by dint of section 4(4) of the *Limitation of Actions Act* and same be quashed.

    iii. That the costs of the application be provided for.

2. The application is supported by the affidavit of the applicant Simon Philip Kimutai Koech. The application was opposed.

3. The respondent/ plaintiff (the respondent) filed suit against the defendant applicant in the year 1999 and judgment was delivered against the applicant on the September 3, 2003, general damages of Kshs 981.500/-. According to the applicant the respondent has failed to execute the said judgment. That he was served with a notice to Show cause as to why execution should not issue. The respondent on the November 20, 2015 was issued with warrants of attachment of moveable property by Minimax Auctioneers. The applicant avers that he was not served with any execution documents by the said auctioneers and that the document filed in court on April 11, 2016 as the certificate of attachment dated November 27, 2015 is misleading and false. That the none of the properties allegedly proclaimed

were proclaimed none was sold. That auctioneers did not go for his household and he was not even aware of the proclamation process. That he is aware that there were subsequent extensions and re-issue of the warrants of attachment and sale of moveable properties but now execution proceeded. That the judgment is barred by operation of the law as it has not been executed within the 12-year period that law of limitation requires. That the amount of Kshs 3,794,051/- being the decretal sum indicated in the notice to show cause dated August 19, 2001 and warrant of arrest dated October 26, 2021 is erroneous as that same contravenes the same law of *Limitation of Actions Act* as interest on judgment amounts accrue interests up to the sixth year and no interest is recoverable.

4. The application is opposed. The respondent filed a replying affidavit dated March 8, 2022. The respondent admits that judgment was entered in his favor in 2003. That the file was inactive due to the mistake of his former Advocate on record. That all three advocates who have been acting for him ceased to do so hence his notice to act in person. That he has perused the file and the court has always been oved and that the claim that no action has never taken on the file till only by September 30, 2015 is false. That the challenge to the mode of execution and the issue of *Limitation of Actions Act* raised by the applicant is based on technicalities and the same is contrary to the provisions of article 159 (2) (d) of the *Constitution* which provides that justice shall be administered without undue regard to technicalities. That the applicant is trying to get an order of stay of execution through the back door by pleading *Limitation of Actions Act*. That the applicant cannot rely on Petition No 1345 of 2005. That he will suffer irreparable loss if the applicant is granted the orders sought. That when he perused the file, he found that the matter had been referred to mediation which process the applicant did not object to. That the applicant has only moved to court after he was served with an application for notice to show cause why execution should not issue way back in 2015. That the application is an afterthought and that they should proceed to execution process as justice denied is justice delayed.

**Analysis And Determination**

5. I have considered the rival affidavits, the submissions the court record and the law. There is no dispute that the court entered judgment against applicant for a sum of Kshs 981500/-. The respondent did not take any action until September 28, 2015 when he filed an application for execution of decree for the sum of Kshs 3,065,508.00. This was about 12 years after the judgment was delivered. The NTSC was fixed for hearing on the October 19, 2015 and the court having confirmed that the applicant was served issued a warrant of arrest by then the amount had risen to Kshs 3,065,508.00. Thereafter things went quiet. The warrant was not affected. An application for NTSC was fixed again for the September 27, 2021 and on the said date the Deputy Registrar (DR) ordered that the applicant be served with the NTSC. On the November 14, 2021 the DR referred the matter to mediation.

6. The applicant relies on section 4(4) of the *Limitation of Actions Act* which provides as follows;

Section 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, 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".
>
> "So it would appear that the term "action" is wider than the term "suit" since the latter terms is included in the term action. Based on the interpretation, the respondent's notice of motion for the eviction of the appellant would qualify as "an action". We would also rely

on the authorities cited both before us and before the learned judge. Both *Lamb & Sons Ltd v Rider*[1948] 2 ALL ER 402 and *Lougher v Donovan*[1948] 2 ALL ER 11 dealt with similar provisions under the relevant English status. It was held in both cases that an action to enforce a judgment after the twelve-year period is statute barred.

The law is clearly stated in the above section no action may be brought upon a judgment after the end of 12 years. The judgment the respondent seeks to execute was delivered on the September 3, 2003. At the time the respondent sought to execute the judgment, on September 28, 2015, 12 years had passed. The respondent relies on article 159 (2) (d) arguing that the omission on his part is a mere technicality. This submission is misleading. article 159 is not applicable in my view in matters where the law is clear.

7. I find merit in the application and agree with the applicant that the judgment the respondent seeks to execute is statute barred by dint of section 4(4) of the *Limitation of Actions Act* and the same is quashed. and is not enforceable. No orders as to costs.

**DATED, SIGNED, AND DELIVERED AT KISII THIS 22ND DAY OF NOVEMBER 2022.**

**RE OUGO**

**JUDGE**

**In the presence of:**

Mr Kirui for the applicant/defendant.

Plaintiff in person.

Ms. Aphline Court Assistant.