REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 1832 OF 1980

ESTHER NJERI MBURU (SUING AS ADMINISTRATOR OF

THE ESTATE OF THE LATE TITUS MUIRURI DOGE).....APPLICANT

VERSUS

DEL MONTE KENYA LIMITED

(FORMERLY KENYA CANNERS LIMITED)..... RESPONDENT

RULING

This is one of the oldest cases still pending determination in our courts. In fact, the applicant is the administrator of the late Titus Muiruri Donge who passed on before the execution of the decree following the judgment delivered on 28th October, 1988. Following the said judgment, an appeal to the Court of Appeal was dismissed and after many years of waiting, the applicant filed an application by way of Notice of Motion dated 23rd November, 2020 for the substantive orders that, pursuant to orders No. 1 and 3 of the decree aforesaid, the Deputy Registrar of this court do proceed to sign the transfer instruments in favour of the applicant in respect of a parcel of land comprising 8.7 hectares and known as LR No. 12157/7; and that the Registrar of Titles,, Nairobi, do issue a Certificate of Title in the name of the applicant in respect of the said parcel of land.

The application is supported by grounds set out on the face thereof and the supporting affidavit of Esther Njeri Mburu, the applicant herein. After service of the said application, the respondent did not file any reply thereto except that a Notice of Preliminary Objection was lodged by the respondent to the effect that before the hearing of the application dated 23rd November, 2020 the respondent shall raise a preliminary objection on the ground that the application is time barred under Section 4 (4) of the Limitation of Actions Act as the plaintiff, now applicant, failed or neglected to execute the decree issued on 6th December, 1989 for more than 30 years.

In between the filing of the application and the Notice of Preliminary Objection, there is evidence parties were involved in negotiating a settlement and a record thereof was pending. In fact, at some point the learned counsel for the applicant informed the court he had received a draft consent and raised a few issues, and was waiting for the respondent's counsel to address the same. For purposes of record, the Notice of Preliminary Objection was filed four months after the filing of the application. It was agreed that the preliminary objection would be argued first, and that is the basis of this ruling.

Section 4 (4) of the Limitation of Actions Act Cap 22 Laws of Kenya 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."**

The above provision appears in Part II of the Act which is subject to Part III and reads as follows,

> **"3. This Part is subject to Part III of this Act, which provides for the extension of the periods of limitation in the case of disability, acknowledgement, part payment, fraud, mistake and ignorance of material facts."**

Both parties have filed submissions to address the preliminary objection.

It is the respondent's case that the application by the applicant is time barred because it was brought more than 20 years after the judgment. Section 4 (4) of the Act therefore disentitles the applicant to the orders sought. In that regard the court does not need any proof of any fact save to look at the date of the judgment and the date of the application. Clearly according in to the respondent, it is over 32 years which is way above 12 years limit set by the Act. This is simply a question of law which should be answered in the affirmative.

On the other hand, the applicant states that there has been a fresh accrual of rights which brings the dispute subject to Part III of the Act. In saying so, the applicant has referred to correspondence by counsel for the respondent which appears to confer upon the applicant the right to the subject matter. In answer to that submission, the respondent has made a distinction between action for recovery of land and action brought upon a judgment.

The applicant directed some blame on the part of the her former counsel which qualifies to be a mistake in failing to file a formal application for execution, which the respondent states however, that its right to invoke Section 4 (4) aforesaid cannot be extinguished by such a mistake.

The other issue that has been raised is whether or not the respondent has the locus to raise the preliminary objection and its conduct in relation to the applicant.

The respondent has been a party to the proceedings all along and although the orders sought are directed to the Deputy Registrar, the subject matter was originally in its possession. The court process settled the matter of ownership of the parcel of land which the applicant seeks to enforce by way of execution in her favour. The orders to actualise the process were directed to the respondent. This therefore confers locus on the respondent. There is no dispute that the land now has been invaded by people who have no claim thereto whatsoever.

Although the respondent does not claim ownership or possession. I say so because had the preliminary objection been confined to the subject of limitation under Section 4 (4) of the Act aforesaid without anything else from either party, then no evidence would have been required to uphold that claim. However, it is agreed that Part II of the Act is subject to Part III of the Act which the applicant seeks to rely on.

The marginal note to Section 23 of the Act is instructive. It refers to fresh accrual of right of action on acknowledgement or part payment. Subsection 1 (b) (i) provides that

> **"Where…. the person in possession of the land acknowledges the title of the person to whom the right of action has accrued ……the right accrues on and not before the date of the acknowledgment."**

The judgment of the court has a direct reference to the land in dispute. In that case therefore, if the respondent has acknowledged the right of the applicant upon the said land then part III of the Act is operational.

In the correspondence referred to by the applicant there is the letter dated 29th May,2015 by the respondents advocate to the applicants advocate. This letter has not been disowned by the respondent's advocate. It reads in part as follows,

> **"We notice that the plot to be transferred to your client is now LR No. 12157 Thika North. We however do not have the sight of the deed plan. Was it ever obtained? Can you avail the copy?"**

This was followed by another letter dated 8th July, 2015 from the respondents advocate to the applicant's advocates. That letter reads in part as follows,

> **"What you continue to send are the survey maps covering the entire property of our client. We require a specific deed plan for LR No. 12157."**

The observations by the advocate for the respondent in the two letters were by then current and futuristic. They addressed property to be transferred. They observed that they required a specific deed plan for the cited piece of land not the entire property of their client. What this means is that, the piece of land to which the applicant was entitled was recognisable and acknowledged. Under such circumstances evidence was required and the filing of an affidavit by the applicant can therefore not be faulted.

There is then an email dated 16th February, 2021 from the respondents advocate to the applicants advocate forwarding draft consent for approval by the applicant. It is instructive that the said communication was made after the filing of the application dated 23rd November, 2020 and before the filing of the preliminary objection dated 15th March, 2021.

In that draft consent, two orders stand out.

> **"3. The portion of land shaded and marked red on exhibit f be transferred to Esther Njeri Mburu as administrator of the estate of the late Titus Muiruri Donge for the avoidance of doubt this is the portion of land referred to in order No. 1 of the decree.**
>
> **4. The deputy registrar of this court shall execute the relevant documents for the transfer of the portion of land to Esther Njeri Mburu as administrator of the estate of the late Titus Muiruri Donge."**

The advocates for the applicant addressed a letter to the advocates for the respondent on 12th March, 2021 accepting a number of draft orders

in the draft consent which included the above draft orders. Without going into any semantics, the respondent recognized **"this is the portion of land referred to in order No. 1 of the decree."** This was acknowledgement by the respondent in its true tenure and context. It needs no further clarity that these were admissions on the part of the respondent in favour of the applicant which therefore confirms the application of Part III of the Act. The application of Part III of the Act removes the objection from being a pure point of law and places the same in the category that requires proof. The extracts of the mail cited above and the affidavits filed meet that requirement.

In the case of **Oraro vs. Mbaja (2005)1 klr 145 Ojwang J** (as he then was) had this to say,

> **"I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo, that "where a Court needs to investigate facts, a matter cannot be raised as a preliminary point." This legal principle is beyond dispute, as there are divers weighty authorities carrying the message."**

The learned Judge reinforced the requirement of proof when the preliminary objection is not a pure point of law. Where a party is not a player in a mistake that adversely affects his or her position, such a mistake cannot be used against such a party. It is in that recognition therefore that, if a mistake is identified, like in this case on the part of counsel for the applicant, and where the applicant is not to blame, such a mistake cannot be visited upon the applicant. It follows that such a mistake also falls under part III of the Act.

I have read the cases cited by the respondent in support of the preliminary objection. With respect, those authorities are not of any help to the respondent. In the case of **Koinange Investment and Development Co. Limited vs. Ian Kahiu Ngethe & 3 others (2019) e KLR** the court was considering an intervening order for stay of execution and had nothing to do with accrual of right of action based on acknowledgment. In the case of **M'Ikiara M'Rinkanya & Another vs. Gilbert Kabeere M'Mbijiwe (2007) e KLR** the same was about late execution and nothing to do with acknowledgment.

There is then the question of prejudice. One must ask, what prejudice will the respondent suffer if the application dated 23rd November, 2020 is allowed? There is already a judgment in favour of the applicant. There is already acknowledgement by the respondent of that right. The respondent is not in actual but constructive possession, neither does it claim any right to that land. If anything, it is the applicant who shall continue to suffer prejudice because she is not in possession and the land is occupied by other people unlawfully.

The obvious conclusion is that no prejudice whatsoever shall befall the respondent. Malice may be imputed from the conduct of a party. In the instant case, the resistance displayed by the respondent despite unequivocal admission of the applicant's right to the land is tinctured with malice.

In view of the foregoing, I have no hesitation whatsoever in finding that the preliminary objection is misplaced and lacking in merit. The same is hereby dismissed with costs to the applicant. The application dated 23rd November, 2020 shall be heard on merit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY, 2021

A. MBOGHOLI MSAGHA

JUDGE

In the presence of:

Ms. Abuya h/b for Mr. Karungo for the Applicant

Mr. Tugee for respondent