



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**JUDICIAL REVIEW NO. 8 OF 2020**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS**

**AND**

**IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES CAP 21 LAWS OF KENYA**

**AND**

**IN THE MATTER OF ARTICLES 47, 201 (D) AND 221 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE PUBLIC FINANCE MANAGEMENT ACT**

**AND**

**IN THE MATTER OF GOVERNMENT PROCEEDINGS ACT**

**AND**

**IN THE MATTER OF COURT CONTEMPT ACT**

**AND**

**IN THE MATTER OF UNSATISFIED JUDGEMENT DEBTS AGAINST THE**

**ATTORNEY GENERAL AND ANOTHER IN THE SUM OF KSHS. 187,467.80/=**

**TOGETHER WITH INTERESTS ON THE DECRETAL SUM AT 12% PER ANNUM**

**ARISING FROM THE JUDGEMENT OF CHIEF MAGISTRATE'S COURT AT MIGORI**

**IN CIVIL SUIT NO. 1123 OF 1999 DELIVERED ON 9<sup>TH</sup> JULY, 2003 AND PURUSANT TO**

**CERTIFICATE OF ORDER AGAINST THE GOVERNMENT ISSUED ON 11<sup>TH</sup> OCTOBER, 2012**

REPUBLIC.....APPLICANT

-VERSUS-

NARKISHO OKELLO UTENDE.....1<sup>ST</sup> RESPONDENT

ELISHA ABADE UTENDE.....2<sup>ND</sup> RESPONDENT

DIDUS ODIRA.....3<sup>RD</sup> RESPONDENT

THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT

THE PRINCIPAL SECRETARY, STATE

DEPARTMENT OF INTERIOR, MINISTRY

OF INTERIOR & COORDINATION

OF NATIONAL GOVERNMENT.....5<sup>TH</sup> RESPONDENT

THE PRINCIPAL SECRETARY, MINISTRY OF

NATIONAL TREASURY.....6<sup>TH</sup> RESPONDENT

AND

PHILIP ONYANGO OMOLLO.....EX - PARTE APPLICANT

### RULING

This ruling is in respect to the 4<sup>th</sup> respondent's notice of preliminary objection which is based on grounds that: -

**The instant notice of motion is incompetent as it offends provisions of Cap 22 Laws of Kenya (Limitation of Actions Act) in that more than 12 years have lapsed since the applicant obtained judgement.**

**The judgement was entered on 9/7/2003 and the Judicial Review application filed on 7/7/2020 is far beyond the 12 years required by law.**

None of the parties filed submissions to the notice of preliminary objection. The submissions dated 2/12/2020 by the ex-parte applicant are in relation to the notice of motion application and they do not address the issues raised in the 4<sup>th</sup> respondent's notice of preliminary objection.

By a Notice of Motion Application dated 7/7/2020 filed on 18/7/2020 evenly, the ex-parte applicant through the firm of M/S Nyagesoa & Co. Advocates seeks the following orders: -

**i) That the Honourable Court be pleased to grant an order of judicial review in the nature of mandamus do issue against the respondents herein jointly and severally compelling the respondents jointly and severally to pay ex-parte applicant the judgement debt herein in the sum of Kshs. 187,467.80/= being the general damages, costs together with all accrued interest on the decretal sum of damages at Kshs. 12% per annum arising from the judgement of the Migori Chief Magistrate's Court in Civil Suit Number 1123 of 1999 Philip Onyango Omollo vs The Honourable Attorney General & 3 others delivered on 9/7/2003 and pursuant to the certificate of order against the government issued on 11/10/2012 and continues to attract interest at court rates.**

**ii) That the Honourable Court be pleased to set a timeline and/or duration within which the respondents do settle the decretal sum with interest accruing until date of payment.**

**iii) In default of compliance with the orders of Mandamus and failure to pay the judgement in the sum of Kshs. 187,467.80/= together with all accrued interests amounts at 12% per annum the orders Mandamus be deemed as sufficient notice under Section 30(1) of the Contempt of Court Act, 2016 to the persons holding offices of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents requiring them to show cause why contempt proceedings should not be commenced against the respondents.**

**iv) That in default of compliance with the orders of Mandamus and failure to pay the judgement debt in the sum of Kshs. 187,467.80/= together with all the accrued interests amounts at 12% per annum 30 days after service and failing to show sufficient cause for non-contempt proceedings against the persons holding the offices the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents for them to personally be summoned to court proceedings against the committed to civil jail for contempt.**

**v) The applicant be at liberty to apply to this honourable court for all necessary and/or consequently orders that this honourable court may deem fit to grant in the circumstances.**

**vi) The respondents be condemned to bear costs of this application.**

The application is based on grounds (a) - (q) appearing on the face thereof and is supported by the Supporting Affidavit of Philip Onyango

Omollo the ex-parte applicant, sworn on 7/7/2020.

According to the ex-parte applicant, he obtained judgment in his favour vide **Migori CMCC No. 1123 of 1999 Philip Onyango Omollo vs The Honourable Attorney General & 3 others** for an amount of Kshs. 187,467.80/= together with accruing interest at court rates.

Consequently, the ex-parte applicant's advocates extracted a certificate of order of costs against the 4<sup>th</sup> respondent issued on 11/10/2012 and the 4<sup>th</sup> respondent, was served with a notice of entry of judgment dated 17/7/2003. Despite that, the respondents have not made any efforts to make good the ex-parte applicant's claim against them hence he is not able to enjoy the fruits of his judgement.

I have considered the 4<sup>th</sup> respondent's notice of preliminary objection and the grounds thereof. It is not in dispute that a judgement was delivered in favour of the ex-parte applicant in **Migori Chief Magistrate's Court in Civil Suit Number 1123 of 1999 Philip Onyango Omollo vs The Honourable Attorney General & 3 others on 9/7/2003** for an amount of Kshs. 187,467.80/= together with accruing interest at court rates.

The 4<sup>th</sup> respondent's notice of preliminary objection is premised on the fact that the ex-parte applicant's application is time barred by dint of the provisions in Section 4(4) of the Statute of the Limitations Act. The 4<sup>th</sup> respondent contends that the instant suit is statute barred as more than 12 years have elapsed since the applicant obtained judgement.

**Mukisa Biscuits Manufacturing Co. Ltd Vs. West End Distributors (1969) E.A. 696** it was held:

**“...a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implications out of pleadings and which if argued as a preliminary point may dispose of the suit.”**

In **Mukisa case (supra)** Law JA further stated as follows: -

**“...examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound to a contract giving rise to this suit to refer the dispute to arbitration.”**

Therefore, the issue of limitation is a point of preliminary objection which when first addressed can determine whether or not a trial court has the requisite jurisdiction to hear and dispose of a suit.

Section 4(4) of the Statute of Limitations of Actions Act provides: -

**“(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.”**

In **Alexander Mbaka v Royford Muriuki Rauni & 7 others [2016] eKLR** the court held:-

**“...it is clear that once a decree, judgment or order of a court has passed the 12<sup>th</sup> year of its issuance, it cannot be enforced. It becomes stale, nothing, it expires, the rights declared therein dissipate. It becomes as if it never existed. The rights declared therein cease to exist! Simply put, the life of a decree, judgment or order which remains unexecuted is simply 12 years and nothing more.”**

From the court record, judgement was delivered on 9/7/2003. The ex-parte applicant was to act upon, bring any necessary proceedings to execute the judgement within a period of twelve (12) years that on or before 9/7/2015. The instant notice of motion application was filed on 18/7/2020; a timeline of five (5) years after expiry of the limitation period.

There is no reason given by the ex-parte applicant on the delay of filing the instant notice of motion application to execute the judgment rendered on 7/7/2003.

In **Owners of the Motor Vessel “Lilian s” vs Caltex Oil (K) Ltd (1989) KLR** Nyarangi J held:-

**“Where the court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a court has no power to make one more step. Where the court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”**

Having found that the instant application was filed outside the statute of limitation period, this court is devoid of jurisdiction and should down its tools. I uphold the preliminary objection. The ex-parte applicant's notice of motion application dated 7/7/2020 stands dismissed.

Costs to the 4<sup>th</sup> Respondent.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2021.

R. WENDOH

JUDGE

**Judgment delivered in the presence of**

Mr. Omwoyo holding brief Mr. Nyagesoa for the Ex-Parte Applicant.

No appearance for the Respondents.

**Nyauke** Court Assistant.