



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**HIGH COURT CIVIL CASE NO. 569 OF 1998**

**(FORMERLY ELC NO. 102 OF 2018)**

**WILSON NJIRI GIKONYO.....PLAINTIFF**

**-VERSUS-**

**SIMON KIMAMO.....1<sup>ST</sup> DEFENDANT**

**GABRIEL KARANJA KIRIKA.....2<sup>ND</sup> DEFENDANT**

**PETER GIKONYO KINYUA.....3<sup>RD</sup> DEFENDANT**

**PETER NJUGUNA MBUGUA.....4<sup>TH</sup> DEFENDANT**

**JOSEPH M. ONDIEKI.....5<sup>TH</sup> DEFENDANT**

**JOSEPH NJIHIA.....6<sup>TH</sup> DEFENDANT**

**SAMUEL MURAGURI.....7<sup>TH</sup> DEFENDANT**

**GRACE WANJIKU.....8<sup>TH</sup> DEFENDANT**

**RULING**

1. The Plaintiff filed this suit against the Defendants in 1998 seeking *inter alia* a declaration that he - the Plaintiff - was the absolute proprietor of all Title No. Dundori/ Miroreni Block 2/94 (former name) currently Title Nos. 1030, 1038, 1043, 1071, 1073, 1095, 1096, 1094 and 1037. He also sought general damages for trespass, mesne profits, a permanent injunction restraining the Defendants from entering, trespassing, erecting illegal structures and/or in any way interfering with the Plaintiff's quiet possession together with costs and interest at court rates.

2. The Plaintiff was successful in the case. In a Judgment dated 30/07/2003, this Court (**Lesiit J**), found in favour of the Plaintiff and entered Judgment as follows:

*I enter Judgment for the Plaintiff against each of the Defendants in terms of Prayers (a) and (d) of the Plaint and in terms of Prayer (b) at 20,000/- against each Defendant. The Plaintiff also gets the costs of the suit and interest at court rates.*

3. The Court (**Koome J.**) subsequently corrected the Judgment in a ruling dated 10/03/2006, to indicate the correct description of the suit premises.

4. The Plaintiff died on 04/03/2013 long after judgment had been entered. On 18/03/2015, Letters of administration were issued to his widow Mary Wanjiku Njiiri (hereinafter "the Applicant"). The Applicant has brought the Application dated 06/11/2017 seeking the following orders:

1. Spent

2. Spent

3. *THAT this Honourable Court be pleased to order that Mary Wanjiku Njiiri be substituted for the Plaintiff herein, the late Wilson Njiiri Gikonyo*

4. Spent

5. *THAT this Honourable Court be pleased to appoint M/S Javan Auctioneers to remove the Legal Representatives of Gabriel Karanja Kirika, Peter Gikonyo Kinyua, Peter Njuguna Mbugua, Samule Muraguri and Grace Wanjiku, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants herein respectively, from possession of portions of the suit property herein.*

6. *THAT the legal representative of Gabriel Karanja Kirika, Peter Gikonyo Kinyua, Peter Njuguna Mbugua, Samule Muraguri and Grace Wanjiku, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants herein respectively, account to the Decree Holder rent received from their respective tenants since 30<sup>th</sup> July, 2003.*

7. *THAT the costs of this Application be in the cause*

5. At the time of filing this Application, the Applicant was represented by Kamau Kuria & Company Advocates. The Application is supported by the grounds on the face of it and the Affidavit of Mary Wanjiku dated 06/11/2017. The Applicant deposes that being the widow of the Plaintiff, she is entitled to a life interest in his estate, to sell the Deceased's immovable property under Section 37 of the Law of Succession Act and that the suit properties form part of the estate which she is entitled to sell during her lifetime.

6. The Applicant however says that it has been 11 years since a decree was issued in her late husband's favour yet the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants have continued to disobey the same by letting the suit properties, thereby depriving her of the use of the said properties.

7. She believes that the 2<sup>nd</sup> Defendant's widow who is his personal representative and who now resides on the property, together with the 3<sup>rd</sup>, 4<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants ought to account for their use of the properties in terms of rent and mesne profits since 2003.

8. The Applicant also deposes that since the Plaintiff died after Judgment, the suit could not abate, and it is necessary that she be enjoined as the Plaintiff, to carry on with execution since she is the administrator. She believes that the Defendants will not be prejudiced if the application is granted and that it is in the interest of justice that the same be allowed.

9. She also states that despite a Consent between her current advocates and the advocates of her late husband for the release of the file with her late husband's advocates, the said firm of advocates has refused to release the file to Kamau Kuria & Co. Advocates, causing the delay in execution.

10. In response to the Notice of Motion dated 06/11/2017, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendants, through their counsel, Karanja Mbugua & Co. Advocates, filed a Preliminary Objection dated 17/06/2019. The Preliminary Objection is raised on the following points of Law:

1. *THAT Judgment in this case was pronounced on 30<sup>th</sup> July 2003, and the application dated 6<sup>th</sup> November 2017 seeking to execute the said Judgment was filed in Court on 6<sup>th</sup> November 2017, a period of over 12 years after Judgment was delivered. The Decree Holder is therefore barred from executing a Judgment for recovery of land under Section 4(4) of the Limitation of Actions Act Chapter 22 Laws of Kenya.*

2. *THAT in the alternative and without prejudice to ground 1 above, the Decree Holder is barred under Order 22 Rule 18(1) of the Civil Procedure Rules from seeking to execute a decree which is more than one year old before taking out a Notice to Show Cause against the Judgment debtors(s). The motion dated 6<sup>th</sup> November 2019 is therefore premature, incompetent and bad in law.*

11. The Applicant's then filed three additional affidavits: two dated 17/07/2019 and 19/09/2019. The first is sworn jointly by the Applicant and her son, David Gikonyo Njiiri, the second is sworn solely by the Applicant and the third sworn by David Njiiri Gikonyo. The Affidavits allude to errors and mistakes in the Court's proceedings and orders made on 21/05/2019 and 17/06/2019. They accuse the Defendants and the Defendants' advocate Mr. Karanja Mbugua of introducing errors on the record on the said dates to the effect that they were not on record when they were in fact on record, since no Notice of Change of Advocates has been filed. They believe this was intended at delaying the hearing of the matter.

12. The Applicant contends that the reason for their inability to pursue the matter is that the same was being handled by the Plaintiff, who is now deceased. It is also the Applicant's deposition that after the Judgment and Decree being issued in 2003, the Plaintiff sought rectification of the Judgment and Decree and obtained the same in 2006. After then, the Applicant says there was a breakdown in communication between the Deceased Plaintiff and his advocates between mid-2009 and 2012 which lead to the proceedings becoming dormant. This breakdown in communication, continued even after her husband's death in 2013 and any efforts to reach the advocate on record, Mirugi Kariuki Advocates were frustrated. This continued in 2016 even when they sought clarification through their then advocates, Kamau Kuria & Co. Advocates, but eventually led to the consent of 05/06/2017 on the issue of fees owed to the Plaintiff's former advocates.

13. The Applicant says that it was after 2013 when her family found out about the Judgment of 2003 and some correspondence addressed to the Deceased Plaintiff on the status of the matter. They located the file in the strong room in 2016 within the Traffic Registry after strenuous efforts, something they found astounding. It was only after they traced that they were able to peruse the file and ascertain its status.

14. The affidavits also indicate that after receiving the corrected Judgement, the Plaintiff moved the Court on 16/06/2006 and on 04/08/2006 when the Plaintiff took out a Notice to Show Cause. A ruling on the Notice to Show Cause was delivered on 28/05/2007. The Learned Deputy Registrar was categorical: “*In my view, the decree issued herein on 24/05/2006 speaks for itself... and the judgment debtors ought to comply.*”

15. This ruling was then followed by a delay in execution caused, in part, by taxation proceedings. The application for execution was only filed in court on 17/09/2008. Thereafter there were several Notices to Show Cause to the Defendants and even warrants issued against some of the Defendants after the year 2008 and preceding the Plaintiff’s death.

16. The Applicant also claims that on 15/04/2019 she was served with letters purporting to commence illegal mediation process, which essentially forced an outcome on her. It was after she declined these proceedings that the defendants filed an objection.

17. Before the determination of the Application dated 06/11/2017 and the Preliminary Objection, the Applicant also filed an application dated 31/10/2019 seeking the following orders:

1. Spent

2. *THAT the Grant ad Litem dated 12<sup>th</sup> April, 2013 in Nakuru High Court Succession Cause No. 88 of 2013 be adopted as part of the record in this court files upon which David Gikonyo Njiiri be added as a Co-plaintiff.*

3. Spent

4. *THAT this Honourable Court be pleased to review by rectifying and harmonising its orders & proceedings of 21<sup>st</sup> May 2019, 17<sup>th</sup> June 2019 and 23<sup>rd</sup> September, 2019.*

5. *THAT this Honourable Trial Court be pleased to dismiss or expunge from this Court File the Defendants Notice of Preliminary Objection dated 17<sup>th</sup> June 2019 and punish the Counsel for the defendants for contempt whereupon it issues restitution of execution proceedings forthwith ab initio, with effect from 17<sup>th</sup> June 2019*

6. *THAT the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 7<sup>th</sup> & 8<sup>th</sup> defendants and the said mediator Leah W. Macharia including Covenant Mediators & Counselling Centre be jointly & severally punished for contempt for payment of Kshs. 200,000 per each contemnor and that this Honourable Court be pleased to grant punitive orders and damages payable by the 4<sup>th</sup> & 7<sup>th</sup> defendants herein, Leah W. Macharia and Covenant Mediators & Counselling Centre in the quantum of Kshs. 3 million in compensation for mental anguish.*

7. *That the Nakuru County Police Commander enjoin the Court Bailiff and any other auctioneers the Applicant/ Plaintiff may appoint in executing eviction orders against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 7<sup>th</sup> & 8<sup>th</sup> Defendants jointly and severally.*

8. *THAT this Honourable Court be pleased to order that the Applicant/ Plaintiff be issued with certified copies of the rulings of 28<sup>th</sup> May 2007 and 25<sup>th</sup> July, 2008.*

9. *THAT costs with effect from 25<sup>th</sup> July 2008 and interests at court rates thereon be provided for and condemned against the Defendants at the Higher Scale.*

18. The Applicant then filed another affidavit dated 04/08/2021 sworn by herself and David Gikonyo Njiiri. The additional depositions are to the effect that there has already been a settlement between the Plaintiff and the 1<sup>st</sup> and 5<sup>th</sup> Defendants, and that Applicant had previously commenced execution proceedings.

19. On 30/06/2021, I directed that both Applications on record will be determined simultaneously with the Preliminary Objection filed by the counsel for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendants. I directed that all parties who wished to file any further responses or affidavits to the Applications to do so within twenty-one days. I further directed that the parties file submissions to the two Applications and Preliminary Objection. On 06/10/2021, both the Applicants and the Respondents confirmed that they had filed all that they wished to for the determination of the two Applications and Preliminary Objection.

20. The Applicant filed two sets of submissions. The first dated 04/09/2019, filed by the Applicant’s then advocates on record. They rely on the definition and scope of Preliminary Objections given in ***Mukisa Biscuits v West End [1996] EA 696*** and ***John Mundia Njoroge & 9 others v Cecilia Muthoni Njoroge & another [2016] eKLR.***

21. It is the Applicant’s submission that being the Plaintiff’s widow and administrator of his estate, she is entitled to continue with execution under the provisions of Order 22 Rule 29(1) of the Civil Procedure Rules. It is also her submission that the Decree extracted from the Judgment delivered on 30/07/2003 could not be executed as drawn in view of the wrong description of the suit property and could only wait until its review on 10/03/2006. The Applicant cites the case of ***Systems Reliability Limited & Another v Yaya Towers Limited [2018] eKLR.***

22. The Applicant does not deny the effect of Section 4(4) of the Limitation of Actions Act but submits that following the review of Judgment, the time started to run on 10/03/2006, putting the present application within the required 12 years. The Applicant argues that the authorities cited by the Respondent can therefore be distinguished from the present case.

23. The Applicant also relies on Order 22 Rule 18(2) of the Civil Procedure Rules, which, she submits, allows the Court to issue execution

orders without issuing the Notice to Show Cause, if the Court is of the opinion that the same will cause unreasonable delay or defeat the ends of justice. The Applicant relies on the case of **Dubai Bank Kenya Ltd v Cons Africa Limited [2012] eKLR** and invites the Court to invoke the provisions of Order 22 Rule 18(2) of the Civil Procedure Rules.

24. The Applicant prays for costs. According to her, the Respondents' Preliminary Objection is meant to delay the execution of the Judgment and relies on the cases of **Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai & 4 Others [2014] eKLR** and **Republic v Communication Authority of Kenya & another Ex-Parte Legal Advice Centre Aka Kituo Cha Sheria [2015] eKLR**

25. The Applicant also filed submissions dated 06/08/2021 and 10/08/2021 respectively. The Applicants seem to change the narrative in their submissions, to recant part of their earlier affidavits and submissions. The effect being that the Plaintiff had done execution to its final stages, and they are not seeking to execute the Decree for the first time.

26. The Applicant has additionally relied on **National Enterprises Corporation v Mukisa Foods C.A Civil Appeal No. 42 of 1997** and **Tiberio Okeny and Another v Attorney General & 2 Others C.A Civil Appeal No. 51 of 2001**, **Philip Keipto Chemwolo** and **Another v Augustine Kubende [1986] KLR 495** and **Banco Arabe Espanol v Bank of Uganda [1999]2 EA 22**

27. The Respondents equally filed two sets of submissions. Their first submissions are dated 25/06/2019 while their second submissions are dated 14/10/2021. The Respondents maintain that the date of Decree was 30/07/2003 when the Judgment was first issued and not the date when the Judgment was corrected. They argue that the Court does not have the Jurisdiction to enlarge time or grant leave to a Decree Holder to execute a decree which is more than 12 years old.

28. They also argue that the Applicant has not given sufficient reason why the Judgment was never executed for 10 years while the Plaintiff was still alive or by the Applicant 4 years after the Plaintiff died. They have extensively relied on the cases of **M'rinkanya & Nother v Gilbert Kabere M'mbijiwe [2007] eKLR** and **John Mwaniki Mwaura v John Ndongyo Njuguna [2018] eKLR**. The other cases cited by the Respondents are **Mohamed v Sarda [1970] EA 358** and **Njuguna v Njau [1980] eKLR**.

29. They say that even if the Applicant was to rely on the corrected Judgment, they would still be out of time. They therefore argue that the required time of 12 years for execution of a decree has lapsed. Secondly, they argue that the doctrine of adverse possession has taken effect since the Respondents have had silent and continued possession of the suit properties. They rely on Section 4(4) of the Limitation of Actions Act and the case of **ELC No. 5704 (OS) Hudson Moffat Mbue v The Settlement Fund Trustee & 2 others [UR]**

30. The Respondents also rely on Section 7 of the Limitation of Actions Act and the case of **M'rinkanya & Nother v Gilbert Kabere M'mbijiwe [2007] eKLR** in support of the argument that they have been in open and continuous possession of the suit properties before the judgment of 2003 and continued doing so after the Decree. The Respondents have cited various authorities on actions for recovery of Land including **Malakwen Arap Maswai v Paul Kosgei [2004] eKLR**.

31. The Respondents submit that they have since established title over the property through the operation of adverse possession. They cite the case of **Celina Muthoni Kithinji v Safiya Binti Swaleh & 8 Others [2018] eKLR**. They pray that the Application dated 06/11/2017 be dismissed and their Preliminary Objection be allowed.

32. From the two applications and the Preliminary Objections, the following issues arise for determination:

- a. Whether Mary Wanjiku Njiiri and David Njiiri should be admitted as Plaintiffs in the matter.
- b. Whether Section 4(4) of the Limitation of Actions Act bars the Plaintiff from execution.
- c. Whether the Respondents are entitled to the Suit Premises by operation of the doctrine of adverse possession.

33. The Parties disagreed on whether the issue of the Applicant being admitted as a Plaintiff in place of the Deceased was spent. The Applicant, in her later submissions argued that the prayer is yet to be granted since she remains an Applicant and is yet to be substituted as the Plaintiff in the case.

34. One of the powers granted to an administrator of the estate of a Deceased Person under Section 82 of the Law of Succession Act is to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative. The Grant issued on 18/03/2015 made the Applicant Mary Wanjiku Njiiri who is the widow of the Deceased, the Administrator of the Estate. By virtue of Section 82 (a) of the Law of Succession Act, she is entitled to pursue any suits commenced by the Plaintiff during his life time. As for the David Gikonyo Njiiri, he was granted a Limited Grant of Letters of Administration Ad Litem on 12/04/2013, in respect of the present suit. It is a Grant for Special purpose, whose purpose is to allow the recipient to pursue legal proceedings on behalf of the Deceased Party. There is little controversy, therefore, that both Mary Wanjiku Njiiri and David Gikonyo Njiiri are entitled to pursue the legal claims of the original (deceased) Plaintiff in this case.

35. In determining the second issue, the fundamental question is when time start running for execution of the Decree. Section 4(4) of the Limitation of Actions Act provides that time starts to run after the delivery of judgment. Parties have disagreed on whether the time should start running from 30/07/2003 when the original judgment was given by Lesiit J. (as she then was) or 10/03/2006 when the judgment was corrected by Koome J. (as she then was).

36. In my view, the correct date is 10/03/2006 when the correction was done. The Plaintiff had approached the Court for correction precisely because the judgment was incapable of execution with the errors and without the clarification offered in the ruling of 10/03/2006. As I hold below, anyway, even if one took the earlier date (30/07/2003) as the operative date, the developments in the Court file would operate in

favour of the Applicants.

37. From the record, there are various instances when the Plaintiff sought execution of the Decree from the time the ruling correcting the Judgment was delivered. Notably, is the ruling of 28/05/2007 which relates to a Notice to show Cause filed against the Judgment Debtors, who are the Respondents in this case. In the Ruling, the Deputy Registrar indicated that the Judgment of the Court had been clear and that it needed no interpretation or explanation for execution to take place. This essentially means that the Plaintiff had began execution at some point.

38. From the foregoing, the ultimate question is therefore, whether having previously commenced execution, the Applicant is barred by the Statute of Limitation on time. I am persuaded by the case of *Godfrey Ajuang Okumu v Nicholas Odera Opinya [2017] eKLR*, where the Court found that a demonstrated action by the Plaintiff to realise the decree before expiry of the limitation period fell within the meaning of an action contemplated under the Limitation of actions Act and should therefore be considered in computing time

39. Should previous attempts at execution in this case be considered in the computation of time? The answer is in the affirmative. Moreover, it would be unjust to allow the Respondents to benefit from the provisions of Section 4(4) of the Limitation of Actions Act, when there have been apparent intervening circumstances frustrating the process of execution including *inter alia*, the Court file being misplaced due to no fault of the Applicants.

40. I will finally deal with the question of whether the doctrine of adverse possession militates in favour of the Respondents in the present case. It does not.

41. The ingredients were recently discussed by the Court of Appeal in *Mtana Lewa v- Kahindi Ngala Mwangandi (2005)eKLR* where it was held that:

***Adverse Possession is essentially a situation where a person takes Possession of land, asserts rights over it and the person having title to it omits or neglects to take a action against such person in assertion of his title for a certain period, in Kenya 12 years.***

42. To establish a claim of adverse possession, a Claimant is required to show that possession of the disputed property was: (1) hostile and under claim of right; (2) actual and un-interrupted; (3) open and notorious; (4) exclusive; and (5) continuous for the required period of 12 years.

43. In the present case, the Respondents were well aware of a judgment against them and they cannot possibly establish that they occupied the premises under claim of right. Additionally, they faced various attempts to execute the judgment – including the Notices to Show Cause, one of which was adjudicated in favour of the Applicant/Plaintiff. It is, therefore, impossible for them to establish all the elements of adverse possession. Their claim for adverse possession fails.

44. What about the fact that before execution there was a requirement to bring a Notice to Show Cause as a condition precedent? The answer is supplied in Order 22 Rule 18(2) of the Civil Procedure Rules:

*Nothing in sub-rule (1) shall be deemed to preclude the Court from issuing any process of execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.*

45. In the present case, as the history rehashed above shows, the original judgment was delivered sometime in 2003. The Applicants have demonstrated attempts to enforce the judgment since then. The Respondents are aware about the judgment and about these efforts. They are also aware about the present Application for execution of the judgment. It would be the ultimate apotheosis of technical fetish over substantive justice to refuse to grant orders of execution because a particular form intituled “Notice to Show Cause” should have first been served on the Respondents. The Respondents are well aware about the present proceedings to enforce the judgment. They have, in essence, attempted to show reasons why the judgment should not be executed. They have failed. These are good reasons to proceed with the execution without requiring the merely technical process of serving another Notice to Show Cause.

46. In the end, therefore, the two Applications under consideration are meritorious as the Preliminary Objection is not. The Preliminary Objection is dismissed.

47. Accordingly, I make the following orders:

**I. The Plaintiff be substituted with Mary Wanjiku and David Njiiri Gikonyo as Plaintiffs in the matter.**

**II. The Plaintiffs to proceed with execution as per the decree extracted and dated 24/06/2006.**

**III. That the Nakuru County Police Commander to assist the licenced auctioneers appointed by the Applicants/ Plaintiff to execute eviction orders against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 7<sup>th</sup> & 8<sup>th</sup> Defendants and/or their Legal Representatives at the expiry of thirty (30) days from the date hereof.**

**IV. The legal representatives of Gabriel Karanja Kirika, Peter Gikonyo Kinyua, Peter Njuguna Mbugua, Samuel Muraguri and Grace Wanjiku, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants herein respectively, account to the Applicants for all the rents received from their respective tenants since 10<sup>th</sup> March, 2006.**

**V. The Respondents to bear the cost of both Applications and the Preliminary Objection.**

**VI. The rest of the prayers not specifically granted are deemed to have been declined.**

48. Orders accordingly

**DATED AND DELIVERED AT NAKURU THIS 25TH DAY OF NOVEMBER 2021**

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**JOEL NGUGI**

**JUDGE**

**NOTE:** This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.