



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 243 OF 1999

IN THE MATTER OF THE ESTATE OF KIPKOSGEI ARAP MAINA ALIAS KIPKOSGEI TERER (DECEASED).

SABINA JEBORE INGOTE.....1ST PLAINTIFF/APPLICANT

DAVID MOSONIK.....2ND PLAINTIFF/APPLICANT

TABARNO KOSGEI.....3RD PLAINTIFF/APPLICANT

VERSUS

CHERUIYOT ARAP KOSGEI.....DEFENDANT/RESPONDENT

RULING

1. The applicant filed this application dated 16th March 2017 on the grounds that:-

- i. The respondent herein in contravention of the distribution order issued by the court vide a ruling dated 4th July, 2005 has threatened to sell and/or lease out to third parties the applicant's portion to their detriment.
- ii. There is a likelihood of the respondent receiving money for the portions meant for the applicants by concealment of material facts hence rendering the issuance of the appropriate orders necessary.
- iii. There is need to set down for hearing and final determination the application dated 24/9/2014 on priority basis in the best interest of justice.
- iv. The applicants herein continue to suffer prejudice by the respondent forcefully retaining their portions in total contravention of the distribution order in force.

2. The application was based on the grounds that the Honourable court delivered a ruling dated 4/7/2005 in which the estate of the deceased was herein distributed amongst the rightful beneficiaries which ruling further ordered that the respondents herein be evicted from the portion he was not entitled to.

3. The respondent moved the court for a stay of execution of the said order pending appeal vide an application dated 22/11/2012 which application together with the appeal was dismissed.

4. There is need for the application dated 24/9/2014 to be set down for hearing and appropriate orders issued in the best interest of justice.

5. The respondent being aware of the dismissal of the appeal is threatening to sell and/or lease out the portions meant for the applicants to third parties in contravention of the distribution orders in force.

6. Lastly, that the applicants herein stand to suffer great loss and damage in the event that the orders sought herein are not granted as prayed.

7. In response, the respondent filed a notice of preliminary objection on the grounds:-

- i. That the application is a nullity as it has not been signed as required by order 51 rule 13 of the Civil Procedure Rules, 2010.

ii. That the application is a nullity having been made when the 3rd plaintiff had already died in 2005 and is yet to be substituted by the personal representatives duly appointed under section 82 of the Law of Succession Act.

iii. The motion offends section 4(4) of the Limitation of Action Act, cap 22 laws of Kenya as the order sought to be executed was made by Justice George Dulu on 4th July, 2005 while the application seeking to execute was made on 24/9/2014 which is more than 12 years later.

8. The application was canvassed by way of written submissions. The said application was rescheduled for hearing after 7 days from 7th November, 2013 but the respondent has neither complied nor set down his application for hearing and has instead chosen to sit on the stay orders at the detriment of the applicants herein.

9. Order 24 rule 2 of the *Civil Procedure Rules* provides that where there are more than one plaintiff or defendants, and any of them dies and where the cause of action survives against the surviving plaintiffs or defendants, the court shall cause an entry to be made on the record and the case shall proceed at the instance of the surviving plaintiffs or against surviving defendant or defendants.

10. At the time of the court adjudicating on this matter, all the plaintiffs were alive. What the application seeks is only to enforce the orders of 4/7/2005.

11. Lastly, that it is true that the court made a ruling on 4/7/2005 but the applicants could not execute the order as the plaintiff filed an appeal against the said ruling pending the determination of the appeal.

12. The period for taking action on judgments has been reduced from 12 years to six years as it has been recognized, among other things, that fresh actions on judgments are nowadays very rare.

13. The time for executing judgment without leave of the court has been extended to six years and thereafter the extension of the period for execution depends on the discretion of the court.

14. Lastly, it is logical from the scheme of the Act, that a judgment for possession of land, in particular should be enforced before the expiration of 12 years because Section 7 of the Act bars the bringing of action for recovery of land after the end of 12 years from the date in which the cause of action accrued.

15. By the definition in Section 2 (2) (3) of the *Limitation Act*:

“Reference in this Act to a right of action to recover land include reference to a right to enter into possession of the land and reference to the bringing of an action in respect of such right of action include reference to making of such an entry”.

16. According to that definition the institution of proceedings to recover possession of land including proceedings to obtain a warrant for possession is statute – barred after the expiration of 12 years.

17. In *MEGARRY & WADE: The LAW OF REAL PROPERTY* 6th Ed., the authors state in paragraph 21 – 54 page 1325:

“Conversely, if enforcement does not take place within six years, the true owner may begin new proceedings for possession provided that at the time of the commencement, his right of action has not been barred by 12 years adverse possession”.

18. This view is re-inforced by Dillon LJ in *B.P. Properties Ltd v Buckler* [1987] 2 EG LR 168 at page 171 (as quoted from *National Westminster Bank v Powney* page 356 paragraph F – H).

*“The true position, in my judgment, under the Act of 1939 was that after a judgment for possession had been obtained in an action for recovery of land begun in due time, the successful plaintiff had 12 years from the date of judgment to enforce the judgment before any question of limitation could arise. The result may follow from the view expressed by Scott LJ in *Lougher v Donovan* [1948] 2 All ER 11 that an application to issue or extend a warrant for possession under judgment for possession is itself an “action brought upon a judgment for which there was a prescribed period of 12 years under section 2 (4) of the Act of 1939. Alternatively, it may be based on the view expressed by the editors of the County Court Practice in their notes to the present Ord. 26 rule 5 that, although the right to sue on a judgment has always been regarded as a matter quite distinct from the right to issue execution under it which is essentially a matter of procedure (*W. J. Lamb & Sons v Rider* [1948] 2 KB 331), nevertheless leave to issue a warrant of execution will not be granted, nor will warrant issued be renewed, at a time when the limitation period appropriate to an action on the judgment has expired”.*

19. From the above analysis, it is clear that a judgment for possession of land should be enforced before the expiry of the 12 years limitation period stipulated in Section 7 of the Act.

20. If the judgment is not enforced within the stipulated period, the rights of the decree holder are extinguished as stipulated in Section 17 of the Act and the judgment debtor acquires possessory title by adverse possession which he can enforce in appropriate proceedings.

21. There is a statutory bar in Section 7 of the Act for recovery of land including the recovery of possession of land after expiration of 12 years.

22. The proceedings to have the application for eviction set down is not time barred since after the ruling of 4/7/2005 the matter has been active in court.

23. The appeal between Cheruiyot Arap Koskei and Sabina Jebore Ingore, David Mosonik and Tabarno Koskei was dismissed on 29th October, 2014.

24. The issues raised in the preliminary objection are merely procedural issues about the signing of the application.

25. As regards to substitution of the deceased plaintiff Order 24 rules 2 provides that where the plaintiffs or defendants are more than one, in the event that one dies, the case shall proceed at the instance of surviving plaintiffs against surviving defendant or defendants.

26. The execution of the decree for possession of the land is not statute – barred. The upshot of the foregoing is that the ruling made in 2005 did not lapse as 12 years have not lapsed since the last process of execution on 29th October, 2014. The application is therefore merited and is allowed as prayed. Costs be in the cause.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET via EMAIL TO THE ADVOCATES this 30th day of April, 2020.