REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL SUIT NO. 311 OF 1978

FRANCIS KENYATTA JOHN.....1ST PLAINTIFF/APPLICANT

ELIZABETH WAMAITHA KITHAKA.....2ND PLAINTIFF/APPLICANT

JONA KARIUKI MBIRURI.....3RD PLAINTIFF/APPLICANT

NEPHAT NJUE.....4TH PLAINTIFF/APPLICANT

-VERSUS-

HURUN NJAGI IKINDU.....DEFENDANT/RESPONDENT

RULING

This ruling is in respect of two motions respectively dated 11 July, 2019 and 12 July 2019. The earlier motion was filed by the 3rd applicant while the latest one was jointly filed by the 1st,2nd and 4th applicants. They more or less seek similar orders, the primary one of which is the execution of the decree made by this court on 10 September 1990.

In the affidavit sworn by the 3rd applicant in support of his motion, he has stated that he is the son of Mbiruri Njage who was initially the 3rd plaintiff in this suit. According to the court decree, his father was entitled to 7 acres of land excised out of Title No. Kagaari/Weru/469 which was initially registered in the name of Ikindu Njagi, the original defendant. As a matter of fact, Ikindu Njagi had, in execution of the decree subdivided the land into four parcels one of which is Title No. Kagaari/Weru/4051 which was to be transferred to his father but, unfortunately, the defendant died before the transfer. Subsequently, the applicant's father also died before his share of the land could be transferred in his name. As the duly appointed representative of his deceased father the applicant wants this parcel of land transferred to him.

The 1st, 2nd and 4th applicants' narrative is more or less in similar terms; they all want their shares of land transferred to their respective names; in particular, the 1st applicant seeks to be registered as the owner of Parcel No. Kagaari/Weru/4054; the second applicant wants to have Parcel No. Kagaari/Weru/4052; the 3rd applicant wants Parcel No. Kagaari/Weru/4051 registered in his name; and, the 4th applicant seeks to haveParcel No. Kagaari/Weru/4053 as his own parcel.;

Except for the 4th applicant, the rest of the parties in this suit have been substituted in place of their deceased relatives whom they now represent. The first applicant, for instance, is the son of M'matu Njagi who was the 1st plaintiff in this suit.The 2nd applicant is the widow to Kithaka Njagi who was the 2nd plaintiff. The 3rd applicant is, as noted, the son of Mbiruri Njage who was the 3rd plaintiff. The respondent is the son to Ikindu Njagi, the original defendant.

A brief background of the present dispute is this: The 4th applicant and the rest of the original parties were brothers; in 1978 four of them filed a suit against their brother, Ikendu Njagi, seeking a declaration that Parcel No.Kagaari/Weru/469 was registered in his name for himself and in trust for them. Their plea was granted in an arbitration award that was subsequently adopted by this Honourable court as its judgment.

In the decree made by this honourable court on 22nd October 1990, Parcel No. Kagaari/Weru/469 was subdivided into five parcels of varied acreages each of which was allocated to the five brothers. In particular, Matu Njage, the 1st plaintiff, was given 14 acres; Kithaka Njage, the 2nd plaintiff was given 16 acres; Mbururi Njage, the 3rd plaintiff, was given 7 acres; Nephat Karigi Njage was given 7 acres; and, the defendant, Ikendu Njage, was given 7 acres. It is this decree that the applicants are seeking to enforce against the defendant.

In order to appreciate the applicant’s applications and, in particular, whether they are necessary and of any help to their cause, it is necessary that I reproduce the decree as framed; it was couched as follows:

REPUBLIC OF KENYA

“IN THE HIGH COURT OF KENYA AT NYERI

CIVIL SUIT NO. 311 OF 1978

MATU NJAGE

GITHAKA NJAGE

MBIRURI NJAGE and

DENNIS KARIITHI NJAGE.....PLAINTIFFS

VERSUS

IKENDU NJAGE.....DEFENDANT

22ND OCTOBER, 1990

DECREE

Claim for: -

i) An order that the defendant holds the parcel of land KAGAARI/WERU/469 in trust for the plaintiffs in the proportions recommended by the clan elders;

ii) An order requiring the defendant to subdivide the said parcel of land as follows:

Plaintiff No. 1. 14 acres

Plaintiff No. 2. 16 acres

Plaintiff No 3. 7 acres

Plaintiff No. 4. 7 acres

AND cause portions to be registered in the respective names;

iii) An order that the defendant do sign all necessary documents and in default the executive officer of this court to sign them;

iv) An order that the defendant do deliver the certificate of title of the said plot to the court and in default the production of the said certificate be dispensed with;

v) All necessary directions for subdivision of the said parcel of land in the proportions as aforesaid. (sic);

vi) costs of the suit with interest at Court rate;

vii) Any further alternative relief.

THE APPLICATION *by the Applicant/plaintiffs coming for hearing in the presence of the counsel for the Applicants/plaintiffs and the counsel for the Respondent/defendant* ***AND UPON READING*** *the affidavit in support thereof sworn by the plaintiff number 1 on 22nd day of September, 1988* ***AND UPON HEARING*** *the counsel for the Applicants/plaintiffs and the counsel for the respondents/ defendant* ***IT IS ORDERED***

1. That judgement be and is hereby entered for the applicants/plaintiffs in terms of the award of the arbitrators namely the parcel of land in dispute Kagari/Weru/469 be subdivided into the following proportions:

Matu Njage (Plaintiff No. 1) 14 acres

Kithaka Njage (Plaintiff No. 2) 16 acres.

Mbururi Njage (Plaintiff No. 3) 7 acres

Nephath Karigi Njage (Plaintiff No. 4) 7acres

Ikendu Njage (Defendant) 7 acres.

2. That the defendant do (sic) sign all necessary documents for subdivision land control board consent mutation transfers etc and in

default the executive officer of this court be and is hereby authorised to sign them.

3. That the defendant do produce the certificate of title of the parcel of land number Kagaari/Weru/469 and in the default the necessity for its production for subdivision transfer etc be and is hereby dispensed with;

4. The land registrar do(sic) register the subdivision of the parcel of land in the proportions aforesaid;

5. That there be liberty to apply.

6. That the defendant do(sic) pay to the plaintiffs the costs of the suit including costs of this application to be taxed and certified by the taxing master of this court together with the interest thereon at the rate of 14% per annum from the date hereof until the date of payment in full.

GIVEN *under my hand and the seal of this court at Nyeri this 22nd day of October, 1990.*

ISSUED *this 10th day of September 1990*

BY THE COURT

SIGNED

DEPUTY REGISTRAR

HIGH COURT OF KENYA NYERI*"*

As at the date of filing their applications, the decree was almost three decades old and for that very reason, it is obviously time-barred if section 4(4) of the Limitations of Actions Act, cap. 22, is anything to go by. According to this provision of law, no action can be taken on a judgment that is as old as twelve years; it reads as follows:

> **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.**

It follows that, on the face of it, the plaintiffs' motions would be misconceived because they constitute what, for all intents and purposes, are 'actions that are being brought upon a judgment, twelve years after its delivery.

But considering that the section is not couched in mandatory terms, it is arguable that there is a window for exercise of discretion by the court for enlargement of time; if there is that possibility, I suppose the court will only be called upon to exercise its discretion if the applicant has, in the first instance, moved it, in an appropriate manner, for extension of time. It is at that time that the court will consider whether, in the light of the language adopted in section 4(4), it has the discretion to extend time and if so, whether there is sufficient material before it to exercise its discretion in favour of the applicant and extend time for the applicant to take whatever action he intends to take on the decree. That certainly is not the case here; what is before court are applications seeking to enforce a decree that is old enough to have been archived in days of yore and in a suit that has been taken over by the first generation of the original parties all of whom, except one are, unsurprisingly, deceased. So I will not venture into matters that I have not been called upon to determine.

I have already held that the applicants' applications are what would constitute "an action" as contemplated in section 4(4) of the Limitation of Actions Act but a question is bound to arise, and legitimately so, whether indeed they fit that description. It would be a legitimate question because the Act is express that it is only "an action" that may not be taken on a judgment that is twelve years or older; it follows that the word "action" assumes a central role in determination of the question whether a particular conduct such as filing the sort of motions that have been filed by the applicants is the kind of conduct that has been prohibited by this provision of the law.

The Limitation of Actions Act does not define the word 'action' but in its technical sense, it is defined in section 3 of the Interpretation and General Provisions Act, cap. 2 to mean "*any civil proceedings in a court and includes any suit as defined in section 2 of the Civil Procedure Act (Cap. 21).*"

The applicants' motions are undoubtedly, civil proceedings and therefore they constitute actions that are being taken on an aged judgment or a judgment that is otherwise twelve years old. Section 2 of the Interpretation and General Provisions Act would therefore put this question to rest; that the applicants' applications are time-barred and thus, misconceived.

This would have been the ideal point to end this matter but there is one more question that certainly deserves some attention; it is whether the applicants were bound to take any "civil proceeding in a court" otherwise understood as "an action" against the respondent for them to enjoy the fruits of their judgment.

In my humble view, no such action was necessary. My assessment of the decree which the applicants purportedly sought to enforce is that, it

was, in many ways, all-encompassing or self-contained, so to speak, at least to such an extent that no further court action was required from the decree holders against the defendant for them to enjoy the fruits of their judgment. At any rate, they did not need the cooperation of the defendant to execute it such that it was not going to be necessary for them to come back to court to force his hand, one way or the other. The decree is express that the executive officer was always empowered to do all that the defendant would have done if, for one reason or the other, he could not do what he was supposed to do to facilitate the transfer of the various parcels of land to the plaintiffs.

And when I look at the record, I gather from it that indeed the executive officer assumed his role as directed by the court because there is evidence that he signed at least one form for transfer of land and an application for consent of the Land Control Board for transfer of Parcel No.Kagaari/Weru/4053 which is one of the five parcels that were to be transferred to the plaintiffs. What is not clear is whether he signed similar forms in respect of the rest of the parcels; if he did not, I suppose nothing stops him from signing the necessary forms for transfer of the respective parcels of land to their intended beneficiaries even at this belated stage.

Having considered the technical meaning attached to the word “action” it is fairly obvious that it does not include such administrative tasks by the executive officer or the deputy registrar of signing such documents as applications for consent to transfer or subdivision of land or applications for transfer land or even the presentation by the applicants themselves of such documents for registration at the lands office or any other office, for that matter, to facilitate transfer of land from one person to the other. These actions are, in my humble view, no more than mere formalities necessary in enforcing the court decree but which would not fit the definition of 'action' as known in law.

All the applicants were required to do was to collect the relevant forms duly signed by the executive officer or such other officer of the court currently mandated to execute such forms for presentation to the Registrar of Lands for his action; that door is still wide open to them. They will, of course, also present the necessary documents to the Lands Office showing that they are now the representatives of the original plaintiffs who are represented on the decree as the decree holders but who, as noted, are deceased except, of course, the 4th applicant.

That being the case, I find the applicants' motions respectively dated 11 July 2019 and 12 July 2019 superfluous and unnecessary. They are dismissed. Since the respondent never filed any response to any of them, I make no order as to costs. It is so ordered.

Signed, dated and delivered this 22nd day of May, 2020.

Ngaah Jairus

JUDGE