



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU

CIVIL SUIT NO. 337 OF 1996

BETWEEN

GODFREY AJUANG OKUMU PLAINTIFF/APPELLANT

AND

NICHOLAS ODERA OPINYA DEFENDANT/RESPONDENT

JUDGMENT

1. This judgment is in respect of an appeal filed under **Order 49 rule 7(1)** of the *Civil Procedure Rules* from the decision of the Deputy Registrar (Hon. T. Obutu, PM) delivered on 29th March 2014 declining to order execution in respect of the Notice to Show Cause why execution should not proceed against the defendant dated 20th March 2014 issued under **Order 22** of the *Civil Procedure Rules*.

2. Before I deal with the substance of the appeal, a brief history of the matter will suffice. The plaintiff sued the defendant for refund of Kshs. 150,000/- on account of a land sale transaction that had become void for want of Land Control Board consent. Wambiliangah J., heard the matter and delivered judgment in favour of the plaintiff on 10th October 1999. In due course, following an application for execution by the plaintiff, as decree-holder, the court issued a Notice to Show Cause why execution should not proceed against the defendant dated 20th March 2014. At the hearing before the Deputy Registrar, the defendant objected to execution of the decree on the basis that the proceedings were barred by **section 4** of the *Limitation of Actions Act (Chapter 22 of the Laws of Kenya)*. The Deputy Registrar held, inter alia, that since 15 years had elapsed since the judgment was delivered on 10th October 1999, it could not be enforced by operation of **section 4(4)** of the *Limitation of Actions Act*.

3. The plaintiff now appeals against the decision of the Deputy Registrar. The plaintiff has raised several grounds of appeal. Apart from contesting the jurisdiction of the Deputy Registrar to deal with the objection, the substance of this appeal is that Deputy Registrar erred in law and in fact in holding that execution of the judgment was statute barred. The plaintiff also argued that in arriving at the decision, the Deputy Registrar failed to appreciate the mode of computation of time taking into account the history of the matter and that the plaintiff had made several applications seeking to execute the decree.

4. The defendant's position was that the plaintiff could not contest the Deputy Registrar's jurisdiction as he had submitted to it. Counsel for the respondent submitted that the Deputy Registrar appreciated the law and it was clear that the judgment having been issued on 1999, the time upon which it was enforceable and the judgment debt recoverable had expired.

5. Both parties made oral and written submissions which I have considered. I will first dispose of the issue of jurisdiction. The order appealed from was issued by the Deputy Registrar of this court. Under

Order 49 rule 7(1) of the *Civil Procedure Rules*, the Deputy Registrar has jurisdiction to hear and determine applications for decrees and orders made under **Order 22** of the *Civil Procedure Rules*. The order appealed from was for execution of the decree under **Order 22**. Under **Order 49 rule 7 (2)** of the *Civil Procedure Rules*, an appeal from a decision of the registrar under this Order is appealable to a judge in chambers. When hearing an application under **Order 22**, the Deputy Registrar has jurisdiction to entertain any argument incidental to and in opposition to the Notice to Show Cause and a party aggrieved by the decision is entitled to appeal to the Judge in Chambers against the decision (see also *Damar Odak v Moses Ochichi* KISII HCCC No. 158 of 2009 [2011]eKLR). I therefore find and hold that the Deputy Registrar had jurisdiction to determine whether the application for execution was time barred.

6. The resolution of this matter centres on the interpretation and application of **section 4(4)** of the *Limitation of Actions Act* provides as follows:

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. [Emphasis mine]

7. The plaintiff submitted that **section 4(4)** of the *Act* does not apply to this case as the word ‘*action*’ referred to is not defined in the *Act* does not apply to the application and proceedings that were before the Deputy Registrar. Counsel for the plaintiff contended that *action* refers to civil proceedings commenced in a manner prescribed by the rules of court. Thus under the *Civil Procedure Rules*, an *action* is one that would be commenced by filing a plaint in accordance **Order 3** of the *Rules*. In his view, the proceedings were not predicated or premised upon a judgment but rather commenced by a suit within the time permitted by the *Act* hence **section 4(4)** of thereof was inapplicable. In summary, the plaintiff submitted that execution proceedings pursuant to a judgment could not amount to commencement of civil proceedings as this was a continuation of proceedings under **Order 22** of the *Rules* and in respect of proceedings already commenced under the *Rules*.

8. The defendant took the position that ‘*action*’ had a broader interpretation and in that context included proceedings including execution proceedings. Counsel for the defendant referred to *Njuguna v Njau* [1981] 1 KLR 225 where the Court of Appeal held that:

[A]ction in the context of Section 4(4) of Cap 22 is not intended to bear a restricted meaning and therefore embraces all kinds of civil proceedings including execution proceedings.

9. Apart from *Njuguna v Njau* (Supra), the Court of Appeal has settled the meaning of ‘*action*’ and its application for purposes of the *Act*. In *M’ikiara M’Rinkanya and Another v Gilbert Kabeere M’Mbijiwe* NYR CA Civil Appeal No. 124 of 2003 [2007]eKLR, the Court of Appeal noted that:

The construction given to the corresponding section 4 (4) of the Act by the courts in this country is much wider. All post judgment proceedings including originating proceedings and interlocutory proceedings for execution of judgment are statute – barred after 12 years.

Likewise, in *Willis Onditi Odhiambo v Gateway Insurance Co. Ltd* KSM Civil Appeal No. 37 of 2013 [2014] eKLR, the Court of Appeal observed that:

In other words, the appellant wanted to execute the said decree against the respondent out of time. Execution of judgments and/or decrees is governed by section 4(4) of the Limitation of Actions Act which is in the following terms:

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.

The judgment which the appellant sought to execute was passed on 26th August, 1996. The judgment should therefore have been executed on or before 27th August, 2008.

10. Thus the question for court is whether the execution of the judgment in this case was within 12 years contemplated by the **Act**. In other words, was the plaintiff barred from lodging the notice to show cause after the lapse of 12 years. In **Hudson Moffat Mbue v Settlement Fund Trustees & 3 Others ELC NO. 5704 of 1992 (OS) (UR), Mutungi J.**, while considering the application of **section 4(4)** of the **Act** where an application for execution of judgment had been brought before the expiry of the 12 years had lapsed but was determined until after the period had expired observed thus:

What I understand the law to be is that once a judgment has been rendered, execution of that judgment must be commenced within the 12 year period otherwise you cannot obtain a judgment and fail to do anything about it and after 12 years have expired seek to execute the same. Section 4(4) of the Limitation of Actions Act will bar you from carrying on with such execution.

11. From the cases as cited above, it is apparent that the term *action* under **section 4(4)** of the **Act** includes execution proceedings. The argument by counsel for the plaintiff cannot therefore, stand. The purpose of time limitations is to ensure that proceedings, litigation, including execution proceedings do come to an end. A judgment creditor must exercise diligence in realizing the fruits of the judgment otherwise risks being barred by the **Act**.

12. In determining whether the plaintiff's claim is statute barred as argued by the defendant, this, the court must first determine the question of when time should start running in execution of a decree. From a reading of **section 4(4)** of the **Act**, it is apparent that time starts running from the date of the judgment. The Deputy Registrar's decision to decline to order execution of the decree was premised on the ground that the plaintiff had taken no action from the date of the judgment. This fact was contested by the plaintiff who faulted the court for not taking into account earlier attempts to execute the decree. The court must therefore determine the question whether any action by a decree holder to execute the decree falls within the meaning of an action and thus should count in determining when time should start running.

13. In this case, execution of the decree was deemed to have commenced with the plaintiff's application for execution on basis of which the Notice to Show Cause against execution was issued. It is now settled that under **section 4(4)**, an action includes execution proceedings. Action therefore, in this context would mean acts done in pursuing execution of the decree. Execution of a decree is a process which begins with the filing of an application for execution. The plaintiff pleaded that attempts had been made before, through several applications to execute the decree. I am of the view that a demonstrated action by the plaintiff to realise the decree before expiry of the limitation period would falls within the meaning of an action contemplated under the **Act** and should therefore be taken into account. A contrary determination would have the effect of allowing a party to benefit from a process he may defeat by frustrating a legitimate decree holder.

14. If the decree holder can demonstrate that execution has commenced, the computation of time ought to take this into account. I find support in the position in **George Waweru Njuguna v Stephen Gitau Kamuyu Nairobi ELC Civil Suit No. 1636 of 1996 [2015] eKLR** citing with approval the decision in **Hudson Moffat Mbue v Settlement Fund Trustees & 3 Others (supra)** that:

Where the execution process had been started, the court took the view that the process must be allowed to be completed even if completion comes after the statutory 12 year period. In the case I expressed myself thus on the issue:-

"I hold the position therefore that the expression "An action may not be brought upon a judgment after the end of twelve years from the date on which judgment was delivered ----" means that unless an application has been brought for enforcement of the judgment and has been completed and/or the same has not been concluded by the time the 12 year, period expires no fresh action for enforcement of the judgment can be brought after the expiry of 12

years from the date of the delivery of the judgment”.

15. I have considered the proceedings and it is clear that since the appellant has been kept on proceeding with execution and has taken various steps to prosecute the notice to show cause since 2004 upto the time the Deputy Registrar declined to order execution.

16. I allow the appellant's appeal and set aside the order of the Deputy Registrar dated 29th October 2015. The respondent shall bear the costs of this appeal. The matter shall proceed with execution in due course.

DATED and DELIVERED at KISUMU this 18th day of September 2017.

D.S. MAJANJA

JUDGE

Mr Odera instructed by Oraro and Company Advocates for the plaintiff.

Mr Ojuro instructed by Otieno, Yogo, Ojuro and Company Advocates for the defendant.