



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**ENVIRONMENT & LAND CASE NO. 373 OF 2014**

**HELDA ALOO OKOTH.....PLAINTIFF/APPLICANT**

**VERSUS**

**MATAYO OWAKO OYIERA.....DEFENDANT/RESPONDENT**

**RULING**

1. **HELDA ALOO OKOTH** (the applicant) has moved this court by way of a Notice of Motion dated 28/10/2013 brought under Section 1A, 1B, 3 and 3A of the Civil Procedure Act (Cap. 21) Laws of Kenya and Order 51 of the Civil Procedure Rules and all enabling provisions of the law. The application seeks orders as follows –

1) The authorised officer of this Honourable court do sign application for consent, mutation and transfer forms and execute all necessary documents to facilitate the implementation of the decree herein for and on behalf of **MATAYO OWAKO OYIERA**.

2) That there be leave to apply.

2. The application is supported by an affidavit of the applicant sworn on 28/10/2013. From the affidavit and grounds on the face of the Motion, the applicant was the successful plaintiff in this suit, where she was awarded one and a half acres from land parcel **MARACHI/ELUKHARI/81** which is registered in the respondent's name and who was the defendant in the suit. The applicant has deposed that the respondent/judgment debtor has become uncooperative and refused to execute forms and other documents to enable the applicant get the portion decreed in her favour. She has now come to this court for an order that an officer of this court be authorized to execute the necessary forms to give effect to the decree.

3. **MATAYO OWAKO OYIERA**, (the respondent) has opposed this application. He has filed both grounds of opposition and a Replying affidavit. The respondent contends that the applicant is seeking to execute a judgment given in 1992, more than 21 years contrary to law. The respondent maintains that the applicant has not shown any lawful reason upon which such an application can be brought to execute a judgment more than 21 years after its delivery.

4. It is the respondent's position that the application is frivolous, vexatious and an abuse of the court process. He prays that the application be dismissed with costs.

5. Parties filed written submissions which are on record and have reiterated their respective positions in those submissions.

6. I have considered the application, the affidavits by parties and submissions filed. The applicant has sought the assistance of the court to help her execute the judgment given in her favour on 22/12/1992. This, according to the applicant, is necessitated by the refusal by the respondent to execute relevant documents in her favour for purposes of sub-dividing and transferring one and half (1½) acres decreed by this court in her favour.

7. The respondent has vigorously opposed the application contending that execution of the judgment and decree of this court given on 22/12/1992 is now time barred in terms of Section 4 (4) of the Limitation of Actions Act (Cap.22) Laws of Kenya. The respondent holds a strong view that this application is unjustified in so far as execution of the judgment is concerned because, according to him, that judgment is now time barred or otherwise “stale”.

8. In response to this argument, counsel for the applicant has argued that the words of Section 4 (4) of the Act (Limitation of Actions Act (Cap.22) are “**permissive**” and therefore the judgment and decree is available for execution.

9. Section 4 (4) of the Act is in the following words –

***S.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 subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recovering 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 expiry of six years from the date on which the interest became due.”***

10. The applicant argues that the words of Section 4 (4) are permissive because they use the word “may”: which is not mandatory.

11. Looking at the words used in Section 4 (4) of the Act, the impression created is that those words are permissive.

12. However, that is not entirely correct. The words of Section 4 (4) are not permissive. They are mandatory as was held in the case of ***M’Rinkaya & Another –vs- M’mbijiwe [2007] 2 KLR*** where the Court of Appeal had occasion to deal with this issue. In that case, the respondent to that appeal had filed a suit against the appellants seeking their eviction from some parcel of land in Nkubu, Meru. The respondent alleged that the land belonged to him and that it had been unlawfully allocated to the appellants. The trial court allowed the suit and ordered the eviction of the appellants. The appellants’ appeal to the High Court was dismissed on 10/7/1979. They filed a second appeal to the Court of Appeal but that too was dismissed on 21/2/1984. Later the appellant filed a Notice of Motion in the High Court seeking a warrant for the eviction of the appellants from the land, but the application was abandoned.

13. In 2001, appellants brought a suit against the respondent basing it on the provisions of Section 4 (4) of the Limitation of Actions Act (Cap. 22). The appellant contended that the respondent never executed the 1979 judgment even after the final appeal was dismissed. They sought a declaration that execution of the judgment was statute barred. The respondent had argued that the words in Section 4 (4) of the Act were not mandatory. The High Court construed the provisions of Section 4(4) to be permissive and that they gave the court a discretion to allow execution of a judgment after the expiry of twelve years.

14. The appellant appealed to the Court of Appeal where it was held, that the use of the word “may not” in the Limitation of Actions Act did not give the court absolute discretion whether or not to allow the enforcement of a judgment after the expiry of limitation period prescribed for various causes of action.

15. The court went on to say that a judgment for possession of land should be enforced before the expiry of the twelve years limitation stipulated in Section 7 of the Act and that the judgment debtor acquired possessory title by adverse possession which he can enforce in appropriate proceedings.

16. From the holding in the above case, it is clear that a judgment must be executed within twelve years from the date of its delivery. The applicant has argued that the court file had been missing for sometime which made it difficult to execute the judgment. That may sound a reason but the law must be upheld. The applicant ought to have known that a judgment was available for execution within twelve years, and should have moved with speed to reconstruct the court file to necessitate execution. That having not been done, the applicant has herself to blame.

17. The applicant has also argued that non execution of the judgment and decree within twelve years is a technicality which should not be allowed to defeat the applicant's rights to a lawfully obtained judgment. The limitation period imposed by Section 4 (4) of the Act is not a mere technicality. It is a limitation prescribed by a Statute and is therefore not a Procedural technicality.

18. The policy behind this limitation, I think, was to bring litigation to an end so that parties know their obligations and perform those obligations without delay. Otherwise there would be perpetual and endless litigation.

19. Execution proceedings is an action taken for purposes of enforcing a judgment and therefore falls under Section 4 (4) of the Limitation of Actions Act. Execution herein in so far as it relates to a judgment that is more than twelve years old, is time barred making the application unsustainable.

20. The applicant also pleaded with the court to find that the respondent was to blame for the delay in executing the judgment within time. However, there are no materials placed before me to show that the respondent was requested to sign the documents and declined to do so. I am not also persuaded that the applicant can rely on the Provisions of **Section 39 (b)** of the Limitation of Actions Act and plead estoppels against the respondent, because she failed to execute the judgment when it was alive.

21. The applicant has further urged the court to apply the O<sub>2</sub> (Oxygen Principle), in **Section 1A** and **2A** of the Civil Procedure Act as the overriding principle in determining this application. Under **Section 1A** of the Act (Civil Procedure Act), the overriding objective of the Act and Rules made there under is to facilitate the just expeditious, proportionate and affordable resolution of disputes between parties. The applicant has invoked and relied on the decision of ***Kenya Commercial Bank Ltd. –vs- Kenya Planters Co-operative Union[2013] IEA 136*** where Nyamu, JA. dealt with the O<sub>2</sub> Principle holding that after the enactment of the O<sub>2</sub> Principle, the court is required by statute when exercising its powers under the Act and rules made pursuant to the Act, to give effect to the overriding objective; and that technicalities of procedure, non-compliant precedents or exercise of powers in a manner that would defeat the court's core business of acting justly should give way.

22. The learned Judge of Appeal was dealing with an application for extension of time to file an application out of time under the Rules of that Court. From the Ruling, the delay was for one day and the learned Judge of Appeal in construing the Rules, was of the view that a delay of one day was not inordinate and went on to apply the O<sub>2</sub> Principle in allowing the application before him.

23. However, in the application before me, I am dealing with execution of a judgment after twelve years from the date of its delivery. This is not a matter that falls under Sections 1A and 2A of the Civil procedure Act. As held in the case of ***Kariuki Network Ltd. & Another –vs- Daly & Figgis Advocates (Civil Application No. Nai. 293 of 2009)***, the application of the overriding Principle does not operate to uproot established Principles and Procedures but to embolden the court to be guided by a broader sense of justice and fairness.

24. The sense of Justice and fairness looks at both sides. The applicant has had a judgment in her favour for over twelve years but never executed it. That judgment for all intent and purposes, is now "Stale" and is not available for execution in terms of **Section 4 (4)** of the Limitation of Actions Act. To allow the applicant execute a judgment that is more than twelve years will be in violation of clear provisions of the law.

25. For the above reasons, the application dated 28/10/2013 is disallowed and is hereby dismissed with

costs.

*Dated and delivered at Kakamega this 23<sup>rd</sup> day of January, 2015*

**E. C. MWITA**

**J U D G E**