



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO 66 OF 1999**

**NATIONAL BANK OF KENYA LIMITED.....PLAINTIFF**

**VERSUS**

**SAMUEL KIBOWEN TOWETT.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Defendant's Notice of Motion dated 20<sup>th</sup> May 2014 and filed on even date was brought under the provisions of Sections 1A, 1B, 3A & 63 (e) of the Civil Procedure Act, Order 51 Rule 1, 2 & 3 of the Civil Procedure Rules as well as Section 4 of the Limitation of Actions Act Cap 22 (Laws of Kenya). Prayers Nos (1) and (2) were spent. It sought the following remaining orders:-

**1) Spent.**

**2) Spent.**

**3) THAT the court proceedings of 31<sup>st</sup> July 2012, the orders made thereon inclusive of the warrants of arrest and any other subsequent proceedings in this suit premised on the proceedings and orders of 31<sup>st</sup> July 2012 be set aside and expunged from the court record.**

**4) THAT a declaration be and is hereby issued that the judgement and or decree herein is stale, statute barred and cannot be executed against the defendant.**

**5) THAT a declaration be and is hereby issued that the interest accruing over the judgement and or decree herein is stale, statute barred and cannot be recovered from the defendant.**

**6) THAT the execution proceedings as commenced by the plaintiff vide the Notice to Show Cause culmination of which is the warrants of arrest herein be and is hereby declared illegal, null and void.**

**7) THAT the plaintiff be and is hereby permanently barred from executing and or in any**

**other way seeking to enforce the judgement and decree herein against the defendant.**

**8) THAT the costs of this application be borne by the plaintiff.**

### **THE DEFENDANT'S CASE**

2. The Defendant's application was supported by his own affidavit that was sworn on 20<sup>th</sup> May 2014. He also filed a Supplementary Affidavit on 8<sup>th</sup> August 2014 and a Further Affidavit on 6<sup>th</sup> October 2014. The Defendant's Written Submissions were dated 8<sup>th</sup> August 2014 and filed on even date. His Further Submissions were dated 2<sup>nd</sup> October 2014 and filed on 10<sup>th</sup> October 2014. It also filed a List of authorities on 23<sup>rd</sup> May 2014.

3. The Defendant averred that the warrants of arrest were issued on the strength of an Affidavit of Service of one, Haggai O. Akelo that was sworn and filed on 25<sup>th</sup> July 2014 purporting that he had been served with a Notice to Show Cause in respect of this matter on 14<sup>th</sup> July 2012 whilst at Nakuru. His position was that he was in Nairobi and not in Nakuru on the said date.

4. He argued that, by deliberately not serving him with the Notices to Show Cause, the Plaintiff took an unfair advantage of him and moved the court to issue warrants of arrest against him unheard and against the cardinal Rules of natural justice. It is on this basis that the Defendant urged the Court to set aside the proceedings of 3<sup>1st</sup> July 2012 and any such orders granted thereon.

5. It was further his further case that the judgment and or decree herein having been secured on 24<sup>th</sup> September 1999 had now been rendered statute barred by virtue of the provisions of the Section 4(4) Limitations of Actions Act. He added that the interest being levied and accruing on the judgment debt was also statute barred.

6. It was contention that the execution proceedings as commenced and pursued against him by the Plaintiff were a illegal, null and void *ab initio* and therefore urged the court to grant his application as prayed.

### **THE PLAINTIFF'S CASE**

7. In response to the Application, on 23<sup>rd</sup> July 2014, the Plaintiff filed its Replying affidavit sworn on its behalf by Samuel Wanjohi Mundia on even date. Robert Paul Onyango, an Advocate of the High Court also swore a Further Affidavit on 25<sup>th</sup> September 2014. The Plaintiff's submissions dated 26<sup>th</sup> September 2014 were filed on 29<sup>th</sup> September 2014.

8. The Plaintiff averred that a warrant of arrest against the Defendant was executed on 12<sup>th</sup> May 2014 at 10.am in Nakuru. The Defendant was presented before Court in Nakuru on the same day but was denied bond to await his transfer to the High Court of Kenya, Milimani Commercial Court. The Defendant was categorical that the Defendant was served with Notice to show cause on 14<sup>th</sup> July 2012 and that since the Defendant had escaped from lawful custody of the court, he was undeserving of the audience of the court.

9. The Plaintiff admitted that the Decree in this matter was issued way back on 24<sup>th</sup> September 1999. It was however his averment that the Defendant had over the years frustrated its efforts to recover the decretal sum by hiding from bailiff's and process servers. It contended that the law on limitation applied when a decree holder sleeps on a decree for 12 years or is guilty of laxity, which was not the case in this instance.

### **LEGAL ANALYSIS**

10. After a careful analysis of the pleadings and the submissions on record, the court found that the Plaintiff had failed to show any proof of service of the Notice to Show Cause culminating in the

proceedings of 31<sup>st</sup> July 2012. Notably, once a party raises the issue of failure of service, the burden of proof shifts to the other party to prove that service was indeed effected.

11. The Plaintiff did not also substantiate the serious allegations it has made against the Defendant that he had escaped from lawful custody or went into hiding.

12. From the evidence that was presented before this court, there was no evidence that the Defendant had over the years frustrated the Plaintiff's for recovery of the decretal sum as it had contended. The Defendant submitted that his permanent abode, where he had always resided since the commencement of this suit, was known to the Plaintiff. It did appear that the Plaintiff had not demonstrated any efforts that it made to trace him or even an attempt to serve him the notices even through substituted service.

13. It was not in dispute that the decree herein was obtained on 24<sup>th</sup> September 1999 and ought to have been executed on or before 23<sup>rd</sup> September 2011. The Plaintiff did not give satisfactory reasons to explain why it did not execute the decree within the set time limit of twelve (12) years. Under section 1A of the Civil Procedure Act Cap 21 (Laws of Kenya), this court is enjoined to facilitate just, expeditious, proportionate and affordable resolution of dispute between parties. Further, this court is enjoined under Section 1B of the said Act to facilitate the efficient disposal of its business and the efficient use of the available judicial and administrative resources.

14. Section 4(4) of the Limitation of Actions Act provides as follows:-

**“An action may not be brought upon a judgement after the end of twelve years from the date of which judgement was delivered”.**

15. Notably, the proceedings of 31<sup>st</sup> July 2012 and other subsequent proceedings herein were conducted when the time for execution of the Judgment had already lapsed. It therefore follows that any proceedings after 23<sup>rd</sup> September 2011 could not stand as the Decree herein was already time barred.

16. It was the court's view that the purpose of Section 4 (4) of the Limitation of Actions Act was to ensure that there was expeditious disposal of disputes between parties and the efficient disposal of its business. The limitation period of twelve (12) years in enforcing a judgment should be enforced to the letter.

## **DISPOSITION**

17. In the circumstances foregoing, the upshot of this court's ruling was that the Defendant's Notice of Motion dated and filed on 20<sup>th</sup> May 2014 is hereby allowed in terms of Prayers Nos (3) and (8). Prayers Nos (4) – (7) could not be granted in an interlocutory application. The same were declaratory in nature and were best brought as reliefs in a main suit which was not the case herein.

18. It is so ordered.

**DATED and DELIVERED at NAIROBI this 26<sup>th</sup> day of March 2015**

**J. KAMAU**

**JUDGE**