



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL CASE NO. 156 OF 2012

(FORMERLY HCCC 297 OF 1993 MERU)

MARY NJERIPLAINTIFF/RESPONDENT

VERSUS

MOHAMED ALI..... DEFENDANT/APPLICANT

RULING

This is the Notice of Motion dated 14th September 2012 and filed on 24th September 2012 by the Defendant/Applicant for the following orders:-

- 1. This Honourable Court be pleased to restrain the plaintiff from executing judgment of 9th March, 1994, its consequential order and or decree for being statutory time barred pending hearing and determination of this application.***
- 2. The decree of this Honourable Court issued on 5th April, 2012 be declared null and void and of no legal effect and the plaintiff be restrained from executing the same against the defendant.***
- 3. The costs of this application be provided for.***

The main ground is that the Plaintiff/Respondent is time barred by statute to execute a decree that emanates from a Judgment issued on 8th March 1994. The application is supported by his sworn affidavit of 14/9/2012. In it he says he was never served with Notice of entry of this judgment.

The Plaintiff/Respondent opposed the application through her replying affidavit sworn on 9th October 2012. She states that she co-owns the property EMBU/MUNICIPALITY/498 with the Defendant/Respondent. And that there is a decree in respect of the Applicant and Respondent and this property (MNM1a&b). There is an issue of payment of rent by their respective tenants. Initially the rents were deposited in one account and there appeared to be no problem between the 2 parties. Now there is a problem.

Ms. Abib & Associate Advocates for the Defendant/Applicant filed written submissions. They stress that the Plaintiff/Respondent's action is time bared by reason of Section 4(4) of the Limitation of Actions Act. And further that no notice of entry of judgment has ever been served on the Defendant/Applicant her husband.

Ms. Ndorongo for the Plaintiff/Respondent submitted that these two parties are husband and wife. This

problem started in mid January 2011 when the Defendant/Applicant instructed the Plaintiff/Respondent's tenants not to pay their rent in the common account. She further submits that the levy of distress for rent is in respect of the Plaintiff/Respondent's tenants and not against the applicant.

I have read through the record herein. This record confirms that the matter proceeded exparte before the High Court Meru and judgment entered for the Plaintiff/Respondent on 8/3/1994 to the effect that the plot in issue be sub-divided in two equal portions with the Plaintiff being the proprietor of the front portion and the Defendant being the proprietor of the rear equal portion. If this has been done is not clear. It has now come out through this application that the Defendant/Applicant and Plaintiff/Respondent are husband and wife. From the time of the judgment to 2011 there appears to have been no problem over the plot. The complaint is that the Plaintiff/Respondent has embarked on a process of executing the decree because as the Notice was served on the tenant/tenants a copy of the decree was annexed. There should be a distinction between what was before the Court in 1993/94 and what is before this Court now otherwise the parties may find themselves transgressing into areas not meant for this Court.

- i. The issue before the Court which is contained in the decree of 8/3/1994 was the sub-division of the plot into two equal portions.
- ii. This decree did not address the issue of tenants.
- iii. The issue before me now is about tenants paying and/or not paying rents whether to the defendant/applicant or plaintiff/respondent. That is a matter to be addressed at another forum and not this one.
- iv. The tenants and rents cannot be said to be an execution of the decree of 8/3/1994.
- v. The plaintiff/respondent erred in serving the tenants with a copy of the decree. Each party here knows who his/her tenant is and they should address their issue with them as such.
- vi. Had the plaintiff/respondent been enforcing the decree of 8/3/1994 this Court would have granted the orders being sought but what the plaintiff/respondent is doing is between her and her tenants. It has nothing to do with the Defendant/Applicant as far as the execution of this decree is concerned.
- vii. And if the defendant/applicant is aggrieved by the judgment of 8/3/1994 he should seek advice on what to do about it.
- viii. I find the present application to be misplaced and I dismiss it.
- ix. No orders as to costs.

DIRECTIONS DELIVERED, DATED AND SIGNED AT EMBU THIS 4TH DAY OF APRIL 2014.

H.I. ONG'UDI

JUDGE

In the presence of:-

Defendant/Applicant

Njue CC