



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO. 180 OF 2003

(FORMERLY HCCC NO. 180 OF 2003)

SAMUEL MUGABE MENYURI.....PLAINTIFF

VERSUS

SELINA NYABOKE MAKORI.....1ST DEFENDANT

JOSEPH MISATI.....2ND DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff filed suit against the Defendants claiming that the Defendants had trespassed onto his land parcel known as L.R No. NORTH MUGIRANGO/BOISANGA/3128. He prayed for a permanent injunction to restrain the Defendants from interfering with his land.

2. Upon being served with the Plaint and Summons to enter appearance, the Defendants filed a Defence denying the Plaintiff's claim and alleging that the Plaintiff had acquired the land by means of fraud. The Plaintiff subsequently applied to have the Defence struck out and expunged from the record and the application was allowed on 26th October 2004. The suit was then set down for hearing by way of formal proof and on 27th May 2005 judgment was entered for the Plaintiff as prayed in the Plaint. A decree was duly issued by the court on 17th July 2005.

3. By an application dated 18th July 2006, the Plaintiff applied for execution by way of a Notice to Show Cause why the Defendants should not be committed to civil jail for failing to satisfy the decree. The 1st Defendant was committed to civil jail pursuant to the said Notice to Show Cause. She then filed an application dated 15th September, 2006 seeking to set aside the *ex-parte* judgment. When the application came up for hearing on 24th July, 2007 the parties recorded a consent in the following terms:

“By consent the Defendants” application dated 15th September, 2006 be allowed on the following grounds:

- 1. That the judgment of 27/5/2005 be set aside.*
- 2. That the ex parte proceedings leading to the judgment be expunged from the record.*
- 3. That the order of 26.10.2004 be set aside.*
- 4. That the Defendant's Memo of Appearance and Defence of 5/3/2002 and 21/1/2004 respectively be filed within the next 14 days.*
- 5. The Plaintiff do reply to the Defence if need be within 14 days.*
- 6. The Defendants do pay the Plaintiff thrown away costs assessed at Kshs. 10,000 within the next 7 days, in default the judgment do stand and the Plaintiff be at liberty to execute”*

The court then lifted the bond that had been issued to the 1st Defendant.

4. It would appear that there was no activity on the file after the consent order was made on 24th July 2007, until 14 years later on the 29th September, 2021 when the Plaintiff filed a Notice of Motion seeking the following orders:

a) Spent

b) That upon certifying the application as urgent, the Honourable Court be pleased to grant leave to the firm of C.O Nyamwange & Co Advocates to come on record for the Plaintiff/Applicant Decree Holder in this matter, same having gone up to judgment in terms of the attached Draft Notice of Appointment.

c) That this Honourable Court be pleased to grant liberty and/or permission for execution, implementation and/or enforcement of the eviction order granted by this Honourable court on the 4th September, 2006 against the Defendants from land parcel number NORTH MUGIRANGO/BOISANGA/3128 belonging to and registered in the name of the Plaintiff/Applicant Decree Holder in this matter.

d) The eviction order herein be executed by Muriri Auctioneers of P.O Box 1324, Kisii.

e) The Honourable Court be pleased to order and/or direct the O.C.S Ekerenyo Police Station to provide reasonable security to facilitate the execution, enforcement and/or implementation of the eviction order issued on 4th September, 2006.

f) Costs of this application be borne by the Defendants/Respondents/Judgment debtors.

g) Such further and/or other orders be made as the Court may deem fit and expedient.

5. The application is based on the Plaintiff's Supporting Affidavit sworn on the 20th September, 2021 in which he depones that on 27th May 2005, this Honourable Court rendered its judgment ordering the Defendants to vacate and/or be evicted from the suit property which is registered in the name of the Plaintiff, but the Defendants had failed and/or refused to move out of his land thereby depriving him of his interest in the suit property. He therefore prayed that the Defendants be evicted from the suit property.

6. The application was opposed by the Defendants through the Replying Affidavit of Selina Nyaboke Makori, the 1st Defendant herein sworn on the 30th November 2021. In the said affidavit, she deponed that the application is a non-starter, an abuse of the court process and unmeritorious. She further deponed that the application is time-barred as per the provisions of the section 4(4) of the Limitation of Actions Act. It was her deposition that the 2nd Defendant had since died and therefore execution could not issue against him. She deponed that there was inordinate delay in executing the judgment which delay had not been explained by the Plaintiff.

7. In addition to the Replying Affidavit, the 1st Defendant filed a Notice of Preliminary Objection dated 30th November, 2021 on the ground that the application dated 20th September, 2021 contravenes the provisions of section 4(4) of the Limitation of Actions Act.

8. The Court directed that the Preliminary Objection be heard first and that the same be canvassed by way of written submissions. Both parties complied by filing their submissions which I have considered. This ruling is therefore in respect of the Preliminary Objection.

ISSUES FOR DETERMINATION

9. The singular issue for determination is whether the application dated 20th September, 2021 seeking to execute the decree arising from the judgment delivered on 27.5.2005 is time barred in terms of the provisions section 4(4) of the Limitation of Actions Act.

ANALYSIS AND DETERMINATION

10. Section 4(4) of the Limitation of Actions Act provides that:

Section 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 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".

11. In the case of **Willis Onditi Odhiambo v Gateway Insurance Company Limited (2014) eKLR**, where the extension was sought to enforce a judgment in a suit founded on tort in which the Plaintiff was awarded damages for personal injuries, the Court of Appeal held that the declaratory suit filed after a period of more than 12 years was filed out of time.

12. Furthermore, in the case of **Solongo v Gladys Nanjekho (Being the administrator of the estate of Antonina Makokha (Deceased) & Another (2021) eKLR**, the court relied on the Court of Appeal decision in **M'Ikiara M' Rinkanya & Another v Gilbert Kabeere M'Mbijiwe (2007) eKLR** where the Court held as follows:

"If the Judgment is not enforced within the stipulated period, the rights of the decree holder are extinguished as stipulated in section 17 of the Act and the judgment debtor acquires possessory title by adverse possession which he can enforce in appropriate proceedings. So quite apart from the authority of Lougher v Donovan, which we consider as still good law in this country and the previous decision of this Court, there is statutory bar in section 7 of the Act for recovery of land including the recovery of possession of land after the expiration of 12 years. It follows therefore, that, to hold that execution proceeding to recover land are excluded from the definition of 'action' in section 4(4) of the Act would be inconsistent with the law of adverse possession"

13. In addition to the above reasoning, Section 44 of the Limitation of Actions Act is intended to bar stale decrees which have not been

executed for more than 12 years. In the instant case, judgment was entered for the Plaintiff way back in 2005 and the same ought to have been executed by 2017. The application seeking to have the said judgment executed is therefore time-barred.

14. Another limb of the Respondent's argument is that the 2nd Defendant/Respondent passed away and therefore execution cannot issue against him as the suit against him has abated. However, this argument is not legally sound as Order 24 Rule 10 of the Civil Procedure Rules provides that substitution does not apply to proceedings in execution of an order. See the case of **Mueni Kiamba v Mbithi Kimeu (2017) eKLR**.

15. Similarly, the submission by counsel for the Plaintiff/Applicant that section 4(4) of the Limitation of Actions Act only apply to money decrees is without basis.

16. In view of the foregoing, it is my finding that the Preliminary Objection has merit and I uphold it. Consequently, the application dated 20.9.2021 is struck out with costs to the 1st Defendant/ Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 26TH DAY OF APRIL, 2022.

J.M ONYANGO

JUDGE