



NO.96

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**MISC. CIVIL APPLICATION NO. 198 OF 2012**

ANDREW ROBI WAMBURA.....APPLICANT

**VERSUS**

MOGESI MARWA ALIAS ITARORO.....1<sup>ST</sup> RESPONDENT

MARWA CHRISTOPHER ITARORO.....2<sup>ND</sup> RESPONDENT

**RULING**

1. The application before me has been brought by way of Notice of Motion dated 12<sup>th</sup> June, 2012. The same is supported by the Affidavit of the Applicant sworn on 13<sup>th</sup> June, 2012. The application has been brought under sections 3, 3A, 63 (e) and 95 of the Civil Procedure Act, Cap. 21 Laws of Kenya and Order 50 rule 6 of the Civil Procedure Rules. The application seeks the following prayers;
  - i. **An order for the extension of time within which the decree issued on 17<sup>th</sup> August, 1998 in Kisii HCCC No. 82 of 1996 may be executed;**
  - ii. **An order for the extension of time within which to file an application for leave to execute the decree issued in Kisii HCCC No. 82 of 1996 on 17<sup>th</sup> August, 1998;**
  - iii. **An order that the application to execute the decree issued on 17<sup>th</sup> August, 1998 in Kisii HCCC No. 82 of 1996 be deemed to have been filed within the time so extended;**
  - iv. **An order that the court do give any other remedy and/or relief and/or order and/or further directions as it may deem fit and just to grant in the circumstances.**
2. The circumstances giving rise to this application as far as I can gather from the material before me are as follows, the applicant had filed a civil suit before this court on 5<sup>th</sup> March, 1996 against the respondents namely, **Kisii HCCC No. 82 of 1996** (hereinafter referred to only as “**HCCC No. 82 of 1996**”) seeking among others, specific performance of the agreement for sale the applicant had entered into with the 1<sup>st</sup> respondent and one, Wairema Marwa Chacha, who was then deceased and whose estate was represented by the 2<sup>nd</sup> respondent with respect to a portion measuring 3 acres of all that parcel of land comprised in **L.R No. Bugumbe/Mabera/137**(hereinafter referred to as “**the suit property**”), a permanent injunction restraining the respondents from transferring and/or interfering with the suit property and a declaration that the respondents held the suit property in trust for the applicant. HCCC No. 82 of 1996 was by consent of the parties referred to arbitration on 4<sup>th</sup> March, 1997 to be conducted by the D.O. Mabera Division assisted by four (4) elders (“**the arbitrators**”). The arbitrators submitted their award to court on 20<sup>th</sup> May, 1998.

The said award was in favour of the applicant. The said award was after the necessary formalities made a judgment of the court and a decree was issued in accordance therewith on 17<sup>th</sup> August, 1998. I cannot make much sense of the award or the decree that flowed therefrom. It is clear however that whatever claim the applicant had against the respondents was allowed by the arbitrators. On 13<sup>th</sup> December, 2006, the applicant made an application for the execution of the said decree of 17<sup>th</sup> December, 1998. For reasons that are not clear from the record before me, the said application was withdrawn by consent on 17<sup>th</sup> July, 2007. The applicant has explained in his affidavit in support of the present application that the said application was withdrawn to allow parties to attempt to reach an out of court settlement. This explanation is not convincing because the applicant did not have to withdraw the said application for an out of court settlement negotiations to take place. The matter seems not to have been settled if the applicant is to be believed and 3 years later, the applicant lodged another application for execution. The application was filed on 25<sup>th</sup> August, 2010 by way of Notice of Motion dated 24<sup>th</sup> August, 2010. The application was heard by Justice D. Musinga who dismissed the same on 16<sup>th</sup> September, 2011 on the ground that the application was time barred the same having been filed out of time contrary to the provisions of section 4 (4) of the Limitation of Actions Act, Cap. 22, Laws of Kenya. The decree the applicant sought to execute was made on 17<sup>th</sup> August, 1998. The application for execution was therefore made outside the 12 years limitation period allowed under the said provisions of the Limitation of Actions Act for execution of judgments.

3. The present application is therefore intended to enlarge the 12 years limitation period fixed for execution of judgments so that the applicant may lodge another application for execution of the decree of the court dated 17<sup>th</sup> August, 1998. In his affidavit in support of the application, the applicant gave the history of the dispute between the applicant and the respondents that I have already highlighted above. He also explained the reason why he delayed in filing the application for execution timeously which he attributed to attempts that were made to settle the matter out of court that never materialized and the loss of the court file.
4. The application was opposed by the 2<sup>nd</sup> respondent. The court was informed that the 1<sup>st</sup> respondent is deceased. Through his replying affidavit sworn on 4<sup>th</sup> February, 2013, the 2<sup>nd</sup> respondent opposed the applicant's application on two main grounds. The first ground of opposition related to the correctness of the decree that the applicant sought to enforce against the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent contended that whereas the award by the arbitrators in favour of the applicant which was adopted as a judgment of the court related to land parcel known as L.R. No. Bugumbe/ Mabera/ 42, the applicant was seeking execution against the parcel of land known as L.R. No. Bugumbe/ Mabera/ 137 (the suit property). To that extent, the applicant argued that the orders sought herein cannot issue. The second ground of opposition put forward by the 2<sup>nd</sup> respondent to the application was that the applicant's application for execution was heard on merit and dismissed by the court and as such the present application is res judicata.
5. The 2<sup>nd</sup> respondent contended therefore that the present application is incompetent bad in law and should be dismissed. On 4<sup>th</sup> February, 2013, the parties agreed to argue the application by way of written submissions. The applicant filed his submissions on 12<sup>th</sup> March, 2013 while the 2<sup>nd</sup> respondent filed his submissions on 12<sup>th</sup> April, 2013. I have considered the applicant's application, the affidavit filed in support thereof, the applicant's advocates' submissions and the authorities cited by them. I have also considered the 2<sup>nd</sup> respondent's affidavit in reply to the application, the 2<sup>nd</sup> respondent's advocates' submissions and the authorities cited by them. The parties raised several issues in their affidavits and submissions. On my part however, I have identified only two issues that call for determination in this application. The first issue is whether this court has the jurisdiction to extend the time limited under section 4 (4) of The Limitation of Actions Act, Cap. 22 Laws of Kenya, within which judgments may be executed. If the finding on this first issue is in the affirmative, the second issue would be whether the applicant has given sufficient reasons that warrant the extension of time sought. On the first issue, I am unable to find

for the applicant. The Limitation of Actions Act, Cap. 22, Laws of Kenya provides time frame within which actions may be instituted with respect to various causes of action, the instances in which the time limited therein may be extended and the procedure for moving the court for that purpose. The only instance in which the limitation period provided for under the Limitation of Actions Act may be extended by the court is provided under section 27 of the said Act. That is, in cases of ignorance of material facts in actions for negligence, nuisance or breach of duty. The procedure for moving the court is provided for in section 28 of the said Act. The Act has not given the court the power to extend time in any other instance. The limitation period that the applicant wants extended relates to the time limited under section 4 (4) of the said Act within which actions may be taken on judgments. The court has not been given power under the Limitation of Actions Act to extend time in this instance. The applicant has moved the court under section 95 of the Civil Procedure Act and Order 50 rule 6 of the Civil Procedure Rules. With due respect to the submission made by the applicant's advocates and the case law cited, neither section 95 of the Civil Procedure Act nor Order 50 rule 6 of the Civil Procedure Rules confer jurisdiction on the court to extend the time limited under the Limitation of Actions Act. Section 95 and Order 50 rule 6 aforesaid gives the court power to enlarge time limited by the Civil Procedure Act and the rules made thereunder and by the court and no more. In the absence of any express words in these provisions of the Civil Procedure Act and rules, the court cannot extend the power donated by the same to enlarge time limited by other statutes. The cases cited by the applicant in his submission all relate to enlargement of time limited by the court. The applicant did not cite any authority in which the court in reliance on the provisions of section 95 of the Civil Procedure Act or Order 50 rule 6 of the Civil Procedure Rules extended the limitation period set out under the Limitation of Actions Act. Due to the foregoing, it is my finding that the court has no jurisdiction to grant prayers 1, 2 and 3 in the applicant's application. I must add that I did not understand prayers 2 and 3 in the applicant's application. They did not make sense to me as there was no basis, upon which they were being sought. I found them superfluous. Having reached the conclusion that the court has no jurisdiction to grant the extension of time sought by the applicant, I don't need to consider the issue as to whether the applicant has made out a case that warrants such extension. In his application, the applicant also beseeched the court to grant any other or further remedy or relief and to give any other of further direction as the justice of the case may require. I have given careful thought to this prayer. Although I sympathize with the predicament in which the applicant finds himself, I find my hands tied by the law. In this application in which the main prayer sought was extension of time, I am unable to grant any other remedy or relief to the applicant after reaching the conclusion that I have no jurisdiction to grant the said principal prayer. I believe however that all is not lost for the applicant. If he has been in occupation of the suit property since 1988 as he claims and the prayers he had sought in HCCC No. 82 of 1996 which included a declaration that the respondents held the suit property in trust for him were granted, I don't see any threat to his continued occupation of the suit property. I don't think that his failure to execute the said decree took away the declaration of trust that was made in his favour against the respondents.

6. For the reasons I have given herein above, the applicant's application brought by way of Notice of Motion dated 12<sup>th</sup> June, 2012 fails wholly. The same is dismissed with costs to the 2<sup>nd</sup> respondent.

**Dated, signed and delivered at Kisii this 12<sup>th</sup> day of July, 2013.**

**S. OKONG'O,**

**JUDGE**

**In the presence of:-**

Mr. Mokuu holding brief for Nyagesoa for the Applicant

No appearance for the Respondent

Mobisa Court Clerk.

**S. OKONG'O,**

**JUDGE.**

**E&LC.MISC.APP.NO.198 OF 2012**