



**Waruhiu & 2 others v Gal Construction Limited (Environment & Land
Case 1430 of 2013) [2022] KEELC 3443 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3443 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1430 OF 2013**

**LN MBUGUA, J
MAY 12, 2022**

BETWEEN

**LOISE MUTHONI WARUHIU 1ST PLAINTIFF
SOLOMON WILSON KARANJA 2ND PLAINTIFF
NICK MUGWANDIA MURIUKI (SUING AS ONE OF THE EXECUTORS OF
THE ESTATE OF THE LATE SAMUEL NJOROGE WARUHI) 3RD PLAINTIFF**

AND

GAL CONSTRUCTION LIMITED DEFENDANT

JUDGMENT

1. This suit was instituted through originating summons dated November 22, 2013 by the plaintiffs who are the legal representatives of the estate of Samuel Njoroge Waruhiu (Deceased). They contend that deceased was the director of Sawa Flora Limited. That in 1992 Sawa Flora Limited (hereinafter referred to as the Company) contracted the Defendant to construct green houses at its flower farm on Mutoma Estate for a consideration of \$700,000 (Kshs 15,000,000) but a dispute arose on the value of work done by the Defendant.
2. Following this dispute, the defendant instituted proceedings HCCC Suit No 526 of 1994 against the company and the company appealed the decision in Civil Appeal Case No 110 of 1994. However, on July 17, 1994, the parties entered into a consent whereby the Company undertook to pay \$360,000 as the value of work done based on a valuation carried out by Harold H Webb and Partners. To guarantee this payment, the late Samuel Njoroge Waruhiu who was the Company's Director charged as security the properties; LR Githunguri/ Githiga/ 233, 869, 1408 and 1407 registered in his name. This charge was registered on October 11, 1994.
3. The company however defaulted its payment and the defendant instituted HC Misc. Application No 1257 of 1994 where judgement was entered against the Company which was ordered to pay Kshs



20,057,229. Subsequently, the Company went out of business having paid Kshs 17,000,000 with the last payment made on June 18, 1996. Following this turn of events, the defendant herein sued the Company's Directors for the balance in HCCC No. 2316 of 1997 but the suit was dismissed.

4. In 2013, during the process of winding up the company, advocates of the executors of the estate of the late Samuel Njoroge Waruhiu asked the defendant's advocates to prepare a discharge of the said properties but the advocates indicated that the defendant still had intentions of realizing the debt. The plaintiffs claim that their advocates made it clear that the decree was time barred and could no longer be enforced but the defendant's advocates were adamant that the decree had to be settled and refused to discharge the charge and surrender the charge documents and title deeds.
5. The plaintiffs stated that from 1996 when the last payment was made, the Defendant had not taken any steps to realize the charge and its claim over the properties had thus been extinguished vide section 19 of the *Limitation of Actions Act*. They added that the company and the deceased were distinct entities and it was unjust for the defendant to hold the late Samuel Njoroge liable for the debts of the company. It was also noted that the defendant having recovered the principal sum owed, was out to unjustly enrich itself by refusing to discharge the charged properties.
6. Based on the above averments, the plaintiffs seek a determination of the following points;
 - i. Whether the charge registered against the parcels of land known as LR Numbers Githunguri/ Githiga/ 233, Githunguri/ Githiga/ 869, Githunguri/ Githiga/ 1408 and Githunguri/ Githiga/ 1407 should be discharged.
 - ii
 - (A) Whether the defendant should produce the original charge documents and the title deeds to the parcels of land known as Land Registration Numbers LR Githunguri/Githiga/233, Githunguri/Githiga/869, Githunguri/Githiga/1408 and Githunguri/Githiga/1407.
 - (B) Alternative to question (ii A);

In the event the original title and charge are not available whether the plaintiff should proceed to obtain provisional titles and a discharge thereof;
 - iii. Whether the charges against the parcels known as LR Numbers Githunguri/ Githiga/ 233, Githunguri/ Githiga/ 869, Githunguri/ Githiga/ 1408 and Githunguri/ Githiga/ 1407 are valid and enforceable.
 - iii. Whether the period within which the defendant should have realized the security if at all has lapsed.
 - iv. Whether the defendant should bear costs of this suit.
7. Pursuant to directions given by the court on February 26, 2019, the suit was canvassed by way of affidavit evidence and written submissions.
8. In their submissions dated November 25, 2019, the plaintiffs set out the issue for determination as; Whether the Charge registered against the parcels of land known as LR Numbers Githunguri/



Githiga/ 233, Githunguri/ Githiga/ 869, Githunguri/ Githiga/ 1408 and Githunguri/ Githiga/ 1407 should be discharged.

9. It was submitted that the right to action was statute barred by section 19(1) of the *Limitation of Actions Act* noting that the decree was issued on November 24, 1995 had become obsolete vide section 4(4) *Limitation of Actions Act*. It was also submitted that the judgement debtor was wound up and thus the decree could not be enforced against a non-existent entity.
10. Reference was made to the Court of Appeal case of *Willis Onditi v Gateway Insurance Co Ltd* [2014] eKLR: "... Execution of judgements and/or decrees is governed by section 4(4) of the *Limitation of Actions Act*... The Judgement which the Appellant sought to execute was passed on August 26, 1996. The Judgement should therefore have been executed on or before August 27, 2008..."
11. It was further submitted that when the company went out of business, the Defendant sued its Directors for satisfaction of the Decree vide HCCC No. 2316 of 1997 but the suit was dismissed in 2005 for want of prosecution. They thereafter neither reviewed nor appealed the dismissal, sued the deceased as the guarantor nor realized the security. As such, it was unreasonable for the defendant to continue holding the deceased's titles and the executors of the estate of the deceased cannot be held liable for debts incurred by a defunct company.
12. Counsel also submitted that the defendant having failed to exercise its rights or remedies following the Company's failure to pay its debt had waived its rights against the deceased as a guarantor noting that it was inexplicable why the defendant was holding onto the deceased's title more than 20 years for money it was not interested in pursuing. As such, the defendant had waived its right to realize the security and should be estopped from maintaining the charge.
13. The defendant did not defend the suit, thus the matter proceeded as an undefended claim.

Analysis and determination

14. Having regard to all the material presented before this court, I find that the issue for determination is: Whether the charge registered against LR Nos Githunguri/ Githiga/ 233, Githunguri/ Githiga/ 869, Githunguri/ Githiga/ 1408 and Githunguri/ Githiga/ 1407 should be discharged.
15. Section 4(4) of the *Limitation of Actions Act* stipulates that:

"An action may not be brought upon a Judgment after the end of twelve years from the date on which the judgment was delivered,....."
16. Further, section 19(1) of the *Limitation of Actions Act* provides:

"An action may not be brought to recover a principal sum of money secured by a mortgage on land or movable property, or to recover proceeds of the sale of land, after the end of twelve years from the date when the right to receive the money accrued."
17. The decree in Hc Misc Application 1257 of 1994 in which the company was ordered to pay Kshs 20,057,229 was apparently given on April 28, 1995. Considering that the charge had been executed just few months earlier on 11.10.1994, then it is crystal clear that defendant had taken the court route to recover its money. The decree of April 28, 1995 is certainly time barred.
18. In any event, the plaintiffs had apparently paid a sum of Ksh 17 000 000 leaving a balance of 3 000 000 of which the defendant was back in court in HCCC No 2316 of 1997 which was dismissed for



want of prosecution on 1.2.2006. The plaintiffs have availed all these court records in their bundle of documents.

19. I find that following the dismissal of the suit HCCC NO.2316 of 1997 on 1.2.2006, the issue of debts owed to the defendant by Sawa Flora Limited became moot. In *Daniel Kaminja & 3 others (suing as Westland Environmental Caretaker Group) v County Government of Nairobi* [2019] eKLR, Mativo J stated that:

“A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact”

20. In light of the above finding, then this court ought to bring some kind of closure in relation to the dispute. The Court of Appeal in *Lti Kisii Safari Inns Ltd & 2 others V Deutsche Investitions- undenwicklungsgesellschaft* ('deg') & others [2011] eKLR held that;

“... It is not enough for a court of law to tell a victim of injustice that a wrong had been perpetrated against him without offering a remedy. It is a maxim of equity that Equity will not suffer a wrong to be without a remedy. The idea expressed in this maxim is that no wrong should be allowed to go unredressed if it is capable of being remedied by courts of justice.”

21. In the instant case, the defendant has held on to the titles of the deceased for the last 27-28 or so years (since October 1994). It is a high time that the estate of the deceased got back the said titles. In the circumstances, I grant final orders as follows;

1. I hereby direct that the Charge registered against the parcels of land known as LR Numbers Githunguri/ Githiga/ 233, Githunguri/ Githiga/ 869, Githunguri/ Githiga/ 1408 and Githunguri/ Githiga/ 1407 be and are hereby discharged forthwith.
2. The defendant is given 45 days within which to relinquish to the plaintiffs the titles (which are discharged) in relation to the parcels nos LR Numbers Githunguri/ Githiga/ 233, Githunguri/ Githiga/ 869, Githunguri/ Githiga/ 1408 and Githunguri/ Githiga/ 1407.
3. In the event the original title and charge are not availed to the plaintiffs as directed above, then the Plaintiff is at liberty to apply for provisional titles thereof in respect of the parcels nos. LR Numbers Githunguri/ Githiga/ 233, Githunguri/ Githiga/ 869, Githunguri/ Githiga/ 1408 and Githunguri/ Githiga/ 1407.
4. No order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Minyiri holding brief for Mrs. Show for the Plaintiff

Court Assistant: June Nafula

