



**(Deceased) (Suing as Legal Representative of Mbogori Muratha (Deceased))
v Ikunya (Sued as A Legal Representative of Ikunyua Kanake) (Environment
& Land Case 9 of 2020) [2022] KEELC 46 (KLR) (10 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 46 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

ENVIRONMENT & LAND CASE 9 OF 2020

CK YANO, J

MAY 10, 2022

IN THE MATTER OF THE DECREE ISSUED IN MERU HCCC NO.158 OF 1986

BETWEEN

MBOGORI MURATHA.....JUDGEMENT CREDITOR (NOW DECEASED)

AND

IKUNYUA KANAKE...JUDGEMENT DEBTOR

AND

**IN THE MATTER OF AN APPLICATION FOR EXECUTION OF
THE SAID DECREE ISSUED IN MERU HCCC NO.158 OF 1986**

BETWEEN

**JOTHAM MBUBA MBOGORI (SUIING AS LEGAL REPRESENTATIVE OF
MBOGORI MURATHA (DECEASED PLAINTIFF**

SUIING AS LEGAL REPRESENTATIVE OF MBOGORI MURATHA (DECEASED)

AND

MOSES MUTHEE IKUNYA DEFENDANT

SUED AS A LEGAL REPRESENTATIVE OF IKUNYUA KANAKE

JUDGMENT

1. The Applicant filed an originating summons dated August 18, 2020 under Order 37 Rule 1 of the [Civil Procedure Rules](#) and Article 159 of [the Constitution](#) seeking a determination of the following questions: -



- a. Is the Respondent/Defendant in the instant suit, the Judgement Debtor in Meru HCCC NO.158 OF 1986?
 - b. Is the Applicant's/plaintiff's deceased father the Judgement Creditor in Meru HCCC No.158 of 1986?
 - c. Was the Decree in Meru HCCC No.158 of 1986 to the effect that the Respondent/Defendant was to sub-divide L.R Magumoni/Mukuni/40 and then transfer a portion of land measuring 3.00 Acres or thereabout to the Applicant's/plaintiff's deceased father?
 - d. Did the Respondent/Defendant ever appealed (sic) against the Decree issued in Meru HCCC No. 158 of 1986, during the lifetime of the Applicant's/Plaintiff's deceased father?
 - e. Did the Respondent/Defendant ever satisfied (sic) the Decree issued in High Court Civil Case} HCCC No.158 of 1986 and in favour of the Applicant's/plaintiff's deceased father and during the Applicant's/plaintiff's deceased father's lifetime?
 - f. Was the Applicant's/plaintiff's deceased father during his lifetime residing with his family on the former L.R Magumoni/Mukuuni/40 and on a portion of land measuring 3.00 Acres or thereabout?
 - g. Was the Applicant's/plaintiff's deceased father buried on the former LR Magumoni/Mukuuni/40 and on a portion after sub-division described today as L.R Magumoni/Muukuni/1040 and 3735?
 - h. Has the Applicant/plaintiff acquired the necessary Letters of Administration before instituting the instant proceedings against the Respondent/Defendant?
 - i. Is the Applicant/plaintiff in occupation of the said 3.00 Acres from the Original LR Magumoni/Mukuuni/40 and which are described today as L.R Magumoni/Mukuuni/1040 and 3735?
 - j. Is the Respondent/Defendant liable in Law to satisfy the Decree issued in Meru HCC No.158 of 1986 in favour of the Applicant/plaintiff and as a Legal Representative of the deceased Decree Holder in Meru HCCC No.158 of 1986?
 - k. Was any Demand Notice issued upon the Respondent/Defendant by the Applicant's/plaintiff's Advocates before instituting the Instant proceedings as required in Law?
 - l. Has the Respondent/Defendant ever attempted to satisfy the Decree issued in Meru HCCC NO.158 of 1986, but later declined to attend the land Control Board to transfer the suit Lands to the Applicant/plaintiff?
 - m. Is the Respondent/Defendant liable to sign and/or execute all the necessary documents to facilitate transfer of LR. Magumoni/Mukuuni/1040 and 37 35 to the Applicant/plaintiff, and in satisfaction of the Decree issued in Meru HCCC No.158 of 1986, and in default this Honourable court Deputy Registrar be empowered to sign and/or execute all the necessary documents in favour of the Applicants/plaintiff?
 - n. Who is liable to meet the costs of the suit?
2. The application is supported by the Affidavit of Jotham Mbuba Mbogorithe Applicant herein dated 18th August, 2020 and a further affidavit dated 3rd November, 2020.



3. It is deponed by the Applicant that the Respondent/Defendant in the instant Originating Summons was the Judgement Debtor in Meru HCCC NO.158 of 1986, and Applicant's late father was the Judgement Creditor/Decree Holder in the said suit.

That the Decree in Meru HCCC No.158 of 1986 was to the effect that the Respondent/Defendant was to Sub- divide L.R Magumoni/Mukuuni/40 and thereafter transfer a portion of Land measuring 3.00 Acres or thereabout to the Applicant's deceased father.

4. It is further deponed that the original file of *Meru HCCC No. 158 of 1986* was destroyed before the Applicant's late father could apply for execution of the judgment delivered in his favour in the year 1987. The Applicant has annexed a copy of a letter dated 14th September, 1987 requesting for Judgment, copy of the Register and copy of letter dated 10th February, 2020 confirming the destruction of the file in Meru HCCC 158 of 1986.
5. The Applicant has deponed that his father died on 19th June, 2000 before enjoying the fruits of his judgment in Meru HCCC 158 of 1986. A copy of the Death Certificate has been annexed. The Applicant has further deponed that his late father who was the Judgment creditor in Meru HCCC No. 158 of 1986 was buried on the original LR. Magumoni/Mukuuni/40 and which actual site today can be identified on Land Parcels No. Magumoni/Mukuuni/1040 and 3735. The Applicant states that after the demise of his father, the Applicant continued cultivating on LR Magumoni/Mukuuni/1040 and 3735, all measuring 3.00 Acres or thereabout.
6. The Applicant has deponed that on 21st July, 2020, he was duly issued with the Limited Grant of Letters of Administration in respect of the estate of his deceased father solely for purpose of enforcing the decree issued in Meru High Court Civil Suit No. 158 of 1986. A copy of the said Limited Grant of Letters of Administration Ad litem issued in the Chief Magistrate's court at Chuka in Misc. Succession Cause No. 16 of 2020 has been annexed.
7. It is deponed by the Applicant that the Respondent had agreed to transfer LR. No. Magumoni/Mukuuni/1040 so as to settle the claim of the Applicant's late father partly, but refused to attend the Land Control Board. Copies of the Application to the Land Control Board, Respondent's National Identity Card and KRA PIN and photograph have been annexed. It is the Applicant's contention that the Respondent has no legal justification to decline to transfer the suit lands to the Applicant, adding that the Respondent does not reside on either of the two parcels LR. Magumoni/Mukuuni/1040 and LR Magumoni/Mukuuni/3735.
8. The Respondent filed a replying affidavit dated 21st October, 2020, further affidavit dated 20th November, 2020 and Replying Affidavit dated 22nd November, 2021. It is deponed by the Respondent that he has only heard of the alleged Meru HCCC No. 158 of 1986 for the first time when he was served with certain documents in mid 2020 and had never been served with summons to enter appearance or any other documents at the material time when the case is alleged to have been filed or at all. He averred that the late Mbogori Murathi was his close friend and that in about 1976, he allowed him to cultivate on part of the Respondent's land free of charge, a practice he said was common and is still common in that area. The Respondent further averred that the deceased was also allowed by several other people to cultivate their pieces of land from time to time because he had a large family and with limited land. He stated that the late Mbogori Murathi and his family only cultivated the said parcels of land but never resided thereon, but from time to time had temporary shelters on it to aid in the farming. The Respondent averred that he was polygamous and that part of his family lived on the subject land while he worked and lived with some other family in Taita Taveta. He averred that he permanently returned to and has since 1989 resided in Magumoni and that he had no dispute with the deceased.



9. The Respondent deponed that the late Mbogori Murathi and his family gradually ceased cultivating the said land after the Respondent gifted it to his son Moses Muthee Ikunyua in mid 1990s and who settled on it in 2010, adding that the late Mbogori Murathi ceased cultivating the land and removed all his structures by 2012. The Respondent stated that he had no knowledge of the Application for control of Land Control Board and denied refusing to attend any land control board since he never applied for one. He termed the documents exhibited by the Applicant as forgeries. The Respondent has exhibited copies of several letters as well as Forensic Examination Report.
10. Relying on legal advice, the Respondent contends that the Applicant's application is non-suited as a cause of action under Order 37 of the *Civil Procedure Rules* and prayed to have the originating summons herein struck out and/or dismissed with costs.
11. On September 2, 2021, by consent of the parties herein, the Notice of Motion dated 23rd June, 2021, was allowed and the Respondent Ikunyua Kanake who passed away on January 1, 2021 was substituted with Moses Muthee Ikunyua as the Legal Representative of his estate. Further, on 1st December, 2021, the parties by consent agreed to have the application herein canvassed by way of written submissions. The Applicant filed his submissions dated January 14, 2022 on January 17, 2022 while the Respondent filed his submissions dated February 14, 2022 on February 15, 2022.
12. The Applicant submitted that it is not contested that there existed Meru High Court Civil Case HCCC No. 156 of 1986 in which Judgment was entered in favour of the Applicant's deceased father. That the said Judgment was not appealed against by the Respondent's deceased father nor was the same satisfied by the deceased during his lifetime. It was further submitted that the deceased Defendant voluntarily surrendered documents for purposes of booking Land Control Board consent. It is the Applicant's submissions that the instant suit is much alive and not statutory barred as alleged by the Respondent and further that in spirit of *the constitution* under Article 159(2)(d), this Honourable court ought to dispense justice without undue regard to procedural technicalities. The Applicant further submitted that the court ought not rely on document examiner report attached to the Respondent's replying affidavit. That the same is not admissible in law since the document examiner never filed any affidavit nor was he availed by the Respondent to testify in court.
13. The Applicant contends that he has proved his case to the required standard and urged the court to grant the orders sought in the originating summons herein.
14. On his part, the Respondent submitted that the parties by consent agreed with the blessings of the court that the matter be canvassed by way of affidavits and submissions and therefore the Applicant cannot be heard submitting that any part of the Respondent's evidence be excluded from consideration. The Respondent submitted that in the absence of Judgment and decree in Meru HCCC No. 156 of 1986, there is nothing that may be executed as there are no variable orders. The Respondent further submitted that at the expiry of 12 years, any Judgment would not be enforceable by virtue of section 4(4) of the *Limitation of Actions Act*. It is the Respondent's submissions that the Applicant is grossly guilty of laches and the application by way of an originating summons is non-suited, and not merited. The Respondent urged the court to find that the Applicant has not even proven that he has or is in possession of the suit land and has failed to prove his case on a balance of probabilities. The Respondent urged the court to dismiss the suit with costs.

Determination

15. Taking into consideration the rival submissions and the pleadings adduced by the respective parties, I find that the issues for determination herein are whether the suit is statutory barred by virtue of section



4(4) of the Law of *Limitation of Actions Act* Cap 22 Laws of Kenya, and depending on this court's finding on the above, whether the orders prayed for by the Applicant should be granted as sought.

16. The Applicant has in his submissions invited the court to grant him orders to execute the decree issued in Meru HCCC No. 158 of 1986. The Applicant is claiming to be entitled to 3.00 Acres from LR. NO. Magumoni/Mukuuni/1040 and 3735 by virtue of a decree issued in MERU HCCC NO. 158 OF 1986 in favour of his deceased father who is said to have been the Judgment creditor in the said suit while the Respondent was the Judgment Debtor. The said judgment and decree is said to have been issued in the year 1987 while the Applicant has deponed that his father died on 19th June, 2000 before executing the said decree, and therefore before enjoying the fruits of the said judgment. Original file in Meru HCCC No. 158 of 1996 is said to have been destroyed. It is not clear as to why the Applicants deceased father did not execute the decree in the said case before the file was destroyed and before his demise on 19th June, 2000. It is also not stated why the suit herein has been filed at Chuka and not Meru court where the alleged judgment was delivered. Additionally; the court further noted that there was no copy of judgment and decree in Meru HCCC No. 158 of 1986 that have been exhibited in this suit.
17. The above aside, I now turn to the main issues for determination framed by the court. There is no doubt that the main prayer sought by the Applicant herein is the execution of the Judgment and decree in Meru HCCC No. 158 of 1986 allegedly delivered in the year 1987. Section 4(4) of the *Limitation of Actions Act* Cap 22 Laws of Kenya provides:-

“4(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 a 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, in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

18. In the case of *Koinange Investments and Development Company Limited –v- Ian Kabiu Ngethe & 3 Others* [2015] eKLR it was stated:

“From the reading of the above provision, it is apparent that section 4(4) of the *Limitation of Actions Act* is unclear as to what the term “an action” refers to. The question then becomes whether the same refers to the institution of a fresh action or to any sort of action taken in executing judgment or to both? In the Defendants’ submissions while citing the case of *Lowsley –v- Forbes (t/a L.E. Designs Limited)* (1999) 1 A.C. 329, the true construction of the term action in the aforementioned clause meant a fresh action and did not include proceedings by way of execution of a judgment in the same action. The Plaintiff however reiterated that this was not the case and in fact section 4(4) also applies to execution of proceedings.”



19. In the case of *Willis Ouditi Odhiambo –vs- Gateway Insurance Co. Ltd* (2014) eKLR, the Court of Appeal was clear that section 4(4) of the *Limitation of Actions Act* covers execution of judgment, and stated as follows:

“In other words the appellant wanted to execute the said decree against the Respondent out of time. Execution of judgment and/or decrees is governed by section 4(4) of the *Limitation of Actions Act* which is in the following terms:-

“4(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.”

The Judgment which the appellant sought to execute was passed on 26th August, 1996. The Judgment should therefore have been executed on or before 27th August, 2008.”

20. The matter that gave rise to the above appeal was a fresh suit brought to enforce a Judgment in an earlier suit. The Court of Appeal was emphatic that section 4(4) of the *Limitation of Actions Act* governs execution of Judgments and decrees. The instant matter before this court is not different.
21. From the pleadings herein, the Judgment in Mer HCCC No. 158 of 1986 which the Applicant has sought to execute is said to have been passed in the year 1987. The Judgment should therefore have been executed in or before the year 1999. This suit was filed on 18th August, 2020. I am therefore of the view that the Judgment has lapsed due to the effluxion of time pursuant to the provisions of section 4(4) of the *Limitation of Actions Act*. The suit was therefore brought after the lapse of 12 years and without leave of court. The originating summons is therefore without merit on that front.
22. From the foregoing, the court holds that the Applicant’s suit is without merit and is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 10TH DAY MAY, 2022

IN THE PRESENCE OF:

C/A: Martha

Muriithi h/b for Njeru Ithiga for Plaintiff/Applicant

Mugo h/b for Mugambi for Defendant

C. K. YANO,

JUDGE.

