REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL SUIT 380 OF 2011

JOHN GATHOGO NDEGWA …….…… PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED …… DEFENDANT

RULING

By a plaint filed on 2nd September, 2011 the plaintiff stated that he is the registered proprietor of properties known as **Nyeri/Mweiga 125** and **Euaso Nyiro/Ilpejeta Block 1/568,** (hereinafter referred to as "**the suit properties**). The suit properties were charged to the defendant to secure loan facilities that were granted between 1984 and 1989. In paragraphs 5, 6 and 7 the plaintiff stated that:

"5. Due to the default of the plaintiff in paying the outstanding debt due, the defendant elected to institute a suit at the High Court in Nyeri being HCCC No. 77 of 1994 B and judgment entered against the plaintiff on 18th August 1994.

6. The plaintiff avers that the decree in favour of the defendant in the aforesaid suit is now time barred by virtue of the Provisions of Section 4 and 7 of the Limitation of Actions Act Cap 22 Laws of Kenya.

7. The defendant on 30th May 2011 instructed Elan Traders (Auctioneers) to issue forty five (45) days notification of sale of the plaintiff's property known as NYERI/MWEIGA/125. The plaintiff was served with the notice on 4th July 2011."

The plaintiff seeks a declaration that the defendant's decree in HCCC No. 77 of 1994 B is time barred by virtue of the provisions of **Section 4 (4)** of the **Limitation of Actions Act Cap 22 Laws of Kenya**. He also seeks a declaration that the defendant's statutory power of sale with respect to t he suit properties has been extinguished by virtue of **Sections 4 and 7** of the **Limitation of Actions Act.** The plaintiff further seeks an order of injunction to restrain the defendant from selling, disposing of or transferring the suit properties.

The plaintiff filed an application seeking an interlocutory order of injunction to restrain the defendant from selling the suit properties pending the hearing and determination of this suit.

The defendant entered appearance and filed a Notice of Preliminary Objection stating:

"1. That it is an undisputed fact that the defendant had filed a suit being Nyeri HCCC 77 of 1994 B against the plaintiff and a decree was issued.

2. That it is undisputed fact that the plaintiff suit herein arises out of the same claim by the defendant in Nyeri 77 of 1994 B.

3. That by virtue of the previous (sic) section 34 (1) and section 34 (2) of the Civil Procedure Act (sic) the suit herein is expressly barred and is incurably defective and all questions arising between parties ought and must be tried and determined in Nyeri HCCC 77 of 1994 B.

4. That for reasons aforesaid the suit herein cannot stand and must be struck out with costs."

This ruling is in respect of this preliminary objection that was argued on 30th April, 2012.

Mr. Bundotich for the defendant submitted that the 'plaintiff's suit is expressly barred by the provisions of **Sections 34 (1)** and **(2)** of the **Civil Procedure Act** which state as follows:

"34 (1) All questions arising between the parties to the suit in which a decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees."

Counsel submitted that the question as to whether the defendant can sell the suit properties by virtue of the decree in Nyeri HCCC 77 of 1994 B (hereinafter referred to as "**the Nyeri case**"), should be determined in that case and not in any other suit. He sought to rely on **MULLA, CODE OF CIVIL PROCEDURE, 17th edition, Volume 1 Pages 694 -723** and **WELLMA INSURANCE BROKERS LIMITED VS. MUHORONI SUGAR COMPANY LIMITED (IN RECEIVERSHIP) HCCC NO. 655 OF 1998.**

In response, **Mr. Mburugu** for the plaintiff submitted that the preliminary objection had been brought in bad faith and was intended to delay the course of justice. He urged the court to consider the overriding object of the Civil Procedure Act and the rules made thereunder as stipulated under **Section 1A** and **1B** of the **Civil Procedure Act.** He said that the suit was filed on September 2011 and interim orders had already been granted. Further, it had been agreed by consent that the entire proceedings file in respect of the Nyeri case be brought to this court.

Counsel further submitted that the decree in the Nyeri case has never been executed. The defendant had obtained a decree against the plaintiff but later abandoned the suit. Mr. Mburugu said that the plaintiff should not be allowed to exercise her statutory power of sale and urged the court to dismiss the preliminary objection and determine the application on its merits. In his view, the provisions of **Section 34 (1) and (2)** of the **Civil Procedure Act** are not relevant here.

Although the defendant is yet to file its statement of defence there is no dispute that the defendant was the plaintiff in HCCC No. 77 of 1994 B at Nyeri where a decree in the sum of **Kshs.780,006.10** was entered against the plaintiff herein. It is not clear why the defendant (the decree holder in the Nyeri case) did not execute the decree. The decree was issued on 28th November, 1994. **Section 4 (4)** of the **Limitation of Actions Act** states 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, 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, and no arrears of interest in respect of a judgment may be recovered after the expiration of six years from the date on which the interest became due."

The plaintiff herein is seeking a declaration that the decree in the Nyeri case is time barred and the defendant cannot purport to execute the same after expiry of nearly eighteen years.

Whereas that may be so, the provisions of **Sections 34 (1)** and **(2)** of the **Civil Procedure Act** bar the plaintiff from filing a separate suit seeking to resolve any question arising from the decree that was passed in the Nyeri case. Any such question must be determined by the court that is executing the decree.

On 7th September, 2011 the parties agreed by consent that the file in respect of the Nyeri case be remitted to this court. It is not clear whether that has been done. But irrespective of whether the Nyeri file has been sent to this court or not, I agree with the defendant that it is an abuse of the court process for the plaintiff herein to file this suit contrary to the express provisions of **Section 34 (1)** and **(2)** of the **Civil Procedure Act.** If the plaintiff verily believes that the decree issued in the Nyeri case is time barred and cannot be executed,an application to that effect ought to have been filed in the Nyeri case. Consequently, I uphold the preliminary objection and strike out the plaintiff's case. The plaintiff shall bear one half of the costs of the suit (on the lower scale) since the defendant had not filed any defence.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MAY, 2012.

D. MUSINGA,
JUDGE

In the presence of:
Muriithi – Court Clerk
Mr. Gachuhi for Mr. Mburugu for the Plaintiff
Mr. Odhiambo for Mr. Bundotich for the Defendant