



**Mbuga v Nyamache (Environment & Land Case 104 of 2021)  
[2022] KEELC 3505 (KLR) (20 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3505 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA  
ENVIRONMENT & LAND CASE 104 OF 2021**

**JM KAMAU, J**

**JULY 20, 2022**

**BETWEEN**

**KABETE MBUGA ..... PLAINTIFF**

**AND**

**NYAKANGI NYAMACHE ..... DEFENDANT**

**RULING**

1. The Plaintiff filed a suit on March 6, 1996 initially being Kisii High Court Civil Suit No. 84 of 1996 claiming that in 1968 the Plaintiff leased part of his ancestral land measuring 2 Acres to the Defendant for Kshs. 140/= a year and the latter paid him Kshs. 1,400/= for ten years up to 1978 when the Defendant stopped cultivating the land. This was on land parcel number North Mugirango/Boisanga/143. But in January 1996 the Defendant came back and forcefully demarcated the land claiming to have bought it and the demarcated portion of 1.3 Hectares was given L.R. No. North Mugirango/Boisanga/147 and registered in the name of the Defendant. The Plaintiff therefore filed this suit and prayed for judgement for: -
  - “(a) A declaration that land parcel No. North Mugirango/ Boisanga/ 147 registered in the name of the Defendant is held in trust for the Plaintiff.
  - (b) An order of specific performance directing the Defendant to transfer the said land parcel No. North Mugirango/Boisanga/147 to the Plaintiff.
  - (c) Alternatively, the Court do rectify the register to reflect the Plaintiff as the registered owner of land parcel No. North Mugirango/Boisanga/147.
  - (d) A permanent injunction restraining the Defendant, his agents and/or servants from further interfering with land parcel No. North Mugirango/Boisanga/147 until the final determination of this suit.



- (e) Costs of this suit.
- (f) Any other or further relief as the court may deem fit to grant.”

2. The Defendant filed a Defence and a Counter-claim where he denied the Plaintiff’s claim and averred that he is the proprietor of North Mugirango/Boisanga/147 on first registration by purchase being before land adjudication in 1968 and which he has been occupying since then. He therefore counter-claims for the eviction of the Plaintiff from the said land, delivery of vacant possession, Damages, Mesne profits and an injunction against trespass by the Plaintiff. He also sought interest on Damages and on Mesne profits. The Plaintiff responded to the counter-claim by filing a Defence to the same.

3. The Plaintiff’s claim was dismissed on November 15, 2000 and orders of injunction and eviction from L.R. No. North Mugirango/Boisanga/147 issued against the Plaintiff. The Defendant was also given Judgment for Kshs. 100,000/= against the Plaintiff as General Damages. An appeal was preferred. The appeal was then struck out on November 28, 2003 in the Court of Appeal sitting at Kisumu. An application for extension of time within which to lodge an appeal out of time under Rule 4 of the Court of Appeal Rules was equally dismissed with costs on November 25, 2004. A Notice to show cause why the Plaintiff should not be evicted from the suit premises then followed. This was by way of Notice of Motion dated 24/3/2022 in the following words: -

- “ 1. That this matter be certified as extremely urgent and be heard ex-parte in the first instance.
- 2. That pending the hearing of the same inter-partes on the .....day of 2022, there be a temporary stay of execution of the NTSC set for hearing on March 28, 2022 before the Deputy Registrar Nyamira.
- 3. That there be a Stay of Execution of the Orders made on December 22, 2021 and all other subsequent Orders until this Application by the Plaintiff/ Respondent is heard and determined.”

4. The same is supported by the Affidavit of George Joseph Mogaka sworn on 24/3/2022 where he deposes that the Application dated 6/7/2021 was heard and determined without affording him an opportunity to be heard. The court then ruled that the orders granting that Application be set aside. What now remains is whether the execution should be proceeded with or whether it should be deemed time barred. Specifically, the Plaintiff asks this court to order that there be a stay of execution of the orders made by this court for the eviction of the Plaintiff from the suit land i.e. North Mugirango/Boisanga/147 pending the Hearing of the said Application. In his submissions, the Applicant argues that the Decree dated December 21, 2000 is time barred while the Respondent feels otherwise.

5. Section 4 (4) of the [Limitation of Actions Act](#) states as follows:

“ 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.”



6. In ELCNo.5704 of 1992 (OS) *Hudson Moffat Mbue -vs- Settlement Fund Trustees & 3 others (unreported)* the court stated as follows:

“I hold the position therefore that the expression “An action may not be brought upon a judgment after the end of twelve years from the date on which judgment was delivered ----“ means that unless an application has been brought for enforcement of the judgment and has been completed and/or the same has not been concluded by the time the 12 year period expires no fresh action for enforcement of the judgment can be brought after the expiry of 12 years from the date of the delivery of the judgment”

7. The Decree Holder has only 12 years from the date of judgment to execute. The Hearing of the Application for Notice to show cause on 16/2/2005 was stood over generally for non-attendance. This suit came back to life on 31/1/2019 for another NTSC but however, Counsel for the Respondent informed the court that there was need for substitution of the Judgment Debtor. It is important to note that the above Application for substitution of the late Kabete Mbuga had already been allowed by the Court on 26/10/2004. As a matter of fact, there is no need for requesting substitution as was held in *Mueni Kiamba v Mbiti Kimeu Kimolo* [2017] eKLR. In that matter, at the execution stage the objection was raised that the Deceased Plaintiff had not been substituted. Referring to Order 24 Rule 10 of the CPR (which states that substitution is not necessary where any of the parties dies) the Court held as follows:

“I find there is wisdom in the above provision in that matters that have reached execution stage should be allowed to proceed without the need for substitution of deceased parties. This goes a long way in ensuring the overriding objective of the Civil Procedure Act and Rules namely the timely and expeditious determination of disputes between parties. Hence, it is my considered view that it was not mandatory to substitute the deceased decree holder at the execution stage and therefore the learned trial magistrate misapprehended the law when he ruled that the non-substitution of the decree holder was fatal to the suit...”

8. From the foregoing, my hands are tied and I hereby declare that the execution of the judgment is time barred. I do not see the effect of allowing the Application dated 24/3/2022. I must make a determination and therefore I make the following orders:

1. Execution of the Judgment and subsequent Decree in this suit is time barred under section 4 (4) of the Limitations of Actions Act and no further attempts can be made by the substituted Decree Holder.
2. The Notice to show cause slated for 28/3/2022 was void ab initio and that no further Notice(s) should be served upon the Judgment Debtor.
3. Consequently, the instant Application is dismissed with costs to be borne by the Applicant.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 20<sup>TH</sup> DAY OF JULY 2022.**

**MUGO KAMAU**

**JUDGE**

In the Presence of : -

Court Assistant - Sibota

Ms. Nyaenya for the Plaintiff/Respondent



Defendant – N/A

