



**Assira v Okote & another (Environment and Land Miscellaneous Application  
42 of 2019) [2022] KEELC 13528 (KLR) (12 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13528 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 42 OF 2019  
DO OHUNGO, J  
OCTOBER 12, 2022**

**BETWEEN**

**MELCHIZEDEK ASSIRA ..... APPLICANT**

**AND**

**JACKSON SHIKWATA OKOTE ..... 1<sup>ST</sup> RESPONDENT**

**FRANCIS INDAKWA OKOTE ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By Notice of Motion dated 31<sup>st</sup> July 2019, the applicant seeks the following orders:
  1. That the executive officer and/or the Deputy Registrar of this Honourable court be and is hereby empowered to sign/execute transfer documents for land parcel No. S/ Wanga/ Ekeru/2226 being a subdivision of parcel of land No. S/Wanga/Ekeru/167.
  2. That the costs hereof be provided for.
2. The application is supported by an affidavit sworn by the applicant. He deposed that the Court of Appeal at Kisumu ruled that he be registered as the proprietor of a portion of land measuring 6 acres which he occupies on the parcel of land known as South Wanga/Ekeru/167 and that the respondents are not keen on executing transfer documents. He annexed a copy of judgment of the Court of Appeal at Kisumu in Civil Appeal No. 20 of 19192, dated 8<sup>th</sup> July 1992. That the respondents went ahead and subdivided the suit property into various portions including parcel of land known as S/Wanga/ Ekeru/2226 which he occupies and utilises. He added that he effected service upon the respondents on 25<sup>th</sup> February 2019, but they blatantly refused to sign.
3. In response, the respondents filed a notice of preliminary objection dated 3<sup>rd</sup> November 2021, in the following terms:



1. The claim does not meet the standards of section 4(4), section 7 of the Limitations of Actions Act as well as order 21 rule 7(1) of the civil procedure rules.
2. That the claim against the 1<sup>st</sup> and 2<sup>nd</sup> respondents is therefore fatally defective and the same should be struck out.
4. The application was canvassed by way of written submissions. The applicant submitted that it is not in doubt that he had a judgment related to the suit property in his favour and that Section 4 (4) of the *Limitation of Actions Act* is not crafted in mandatory terms. He therefore urged the court to allow the application.
5. In their rejoinder, the respondents relied on *Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd* (1969) EA 696. They further argued that the applicant obtained the judgment in his favour on 8<sup>th</sup> July 1992 but slept on it thereby rendering the application time barred pursuant to Section 4(4) of the *Limitation of Actions Act*. Arguing that a judgment cannot be executed after 12 years, the respondents relied on the cases of *Danson Muriithi Ayub v Evanson Mithamo Muroko* [2015] eKLR and *Gathoni v Kenya Co-operative Creameries Ltd* [1982] eKLR. They therefore urged the court to dismiss the application with costs.
6. I have considered the application, the affidavits, the notice of preliminary objection and the submissions. The issues that arise for determination are whether the application is statute barred and whether the orders sought should issue.
7. The principles applicable to a preliminary objection are settled. In *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696, the locus classicus on preliminary objections in this region, Law JA stated:

So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

8. Thus, a valid preliminary objection should, if successful, dispose of the suit. Applying the above principles to the matter at hand, there is no dispute judgement was delivered on 8<sup>th</sup> July 1992 in Kisumu Civil Appeal No. 20 of 1992 in favour of the applicant herein by R. O. Kwach JA (with Cockar JA and Hancox CJ consenting) in the following terms:

I.... enter judgment in favour of the appellant on the counter-claim and make an order under section 38 of the *Limitation of Actions Act* that the appellant be registered as the proprietor of the portion he occupies (6 acres) on parcel no. South Wanga/ Ekeru/167 together with costs.....

9. Section 4 (4) of the *Limitation of Actions Act* provides:

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 debt may be recovered after the expiration of six years from the date on which the interest became due.



10. The judgement that the applicant now seeks to enforce was delivered on 8<sup>th</sup> July 1992 while the present application was filed on 31<sup>st</sup> July 2019. A period of slightly over 27 years lapsed between delivery of the judgment and the filing of the application.

11. In the case of *M'ikiara M'rinkanya & Another v Gilbert Kabeere M'Mbijiwe* [2007] eKLR, the Court of Appeal held:

From the above analysis, it is clear that a judgment for possession of land should be enforced before the expiry of the 12 years limitation period stipulated in section 7 of the Act. If the judgment is not enforced within the stipulated period, the rights of the decree holder are extinguished as stipulated in section 17 of the Act and the judgment debtor acquires possessory title by adverse possession which he can enforce in appropriate proceedings. So, quite apart from the authority of *Lougher v Donovan*, which we consider as still good law in this country, and the previous decisions of this Court, there is a statutory bar in section 7 of the Act for recovery of land including the recovery of possession of land after expiration of 12 years. It follows, therefore, that, to hold that execution proceedings to recover land are excluded from the definition of "action" in section 4 (4) of the Act would be inconsistent with the law of adverse possession.

12. It follows therefore that the court lacks jurisdiction to consider the present application since it is statute barred. A suit filed in a court without jurisdiction is dead on arrival and cannot be remedied. See *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR.

13. In the result, Notice of Motion dated 31<sup>st</sup> July 2019 is struck out with costs to the respondents.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 12<sup>TH</sup> DAY OF OCTOBER 2022.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

No appearance for the applicant

No appearance for the respondents

Court Assistant: E. Juma

