



IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 2 of 1982

1. Land & Environmental Law Division
2. Civil Practice & Procedure Limitation of Action S 4(4)
Cap 22 Laws of Kenya
3. Subject of Main: Suit
 - i) Land Dagoretti/Mutuini/221
 - ii) Land claim by way of adverse possession.
 - iii) Suit Originally filed in Resident Magistrate's Court
(4509/78) (27.12.78)
 - iv) Suit later transferred to the High Court
(W. Guilemard of 21.7.1980)
 - v) On 24.5.1983 matters referred to arbitration (Nyaragi J.)
 - vi) Award read out 13.1.1986 R. Kuloba J.
 - vii) Defendant filed application to review and set aside arbitration award of 13.1.1986
 - viii) The Application dated 13.1.1986 dismissed O'Connor J; ordered that the Land Parcel Dagoretti/Mutuini/221 be sub divided into 2 equal portion between the 2 parties Grace Wambui and Kamau Mbuthia the defendant.
 - ix) Registrar authorized to execute transfer forms authorizing the transfer of land as per decree Mango J. 11.6.1990
 - x) Orders of Mango J. defective/error on the face of the record. Amendments made 2.12.2004
 - xi) Defendant appoints new advocates by application of 30.11.2004. Leave granted Ransley J. (2.12.2004)
 - xii) Amendment of Mango J's orders granted Ransley J. (2.12.2004)
 - xiii) Application of 4.2.2005 seeking orders under Section 4 (4) Limitation of Actions Acts Cap. P. 22 for Declaration

that Judgment not being executed after 12 years period has no effect.

xv) Reply affidavit filed out of time struck out.

4. Main application – dated 4 February, 2005.

i) Plaintiff/Respondent - absent

ii) Hearing of application under Order IXb r 3 (a) Civil Procedure Rules.

5. Held – Application dismissed

6. Case Law - Njuguna v Njau (1981) KLR 225

7. Advocates

E.T. Gaturu for E.T. Gaturu & Co. Advocates for the plaintiff

Mureithi for C. Mureithi & Co. Advocates for the defendant

MBUTHIA MUTHAMI.....1ST PLAINTIFF

GRACE WAMBUI MUTHAMI.....2ND PLAINTIFF

VERSUS

KAMAU MBUTHIA..... DEFENDANT

RULING

I. Background of the Application dated 4 February, 2005

Seeking for execution proceedings be dismissed under Section 4 (4) of the Limitation of Action Act.

1. This is a finalized suit that involves Land being LR.Dagoretti/Matuini/221. The claim was by way of Adverse Possession. (The suit was originally filed in the Rm’s Court 4509/78 on 27 July 78) (It was later transferred to the High Court of Kenya W. Guilemard J. on 21 July 1980). At the High Court of Kenya the suit was transferred to the elders by way of Arbitration Nyaragi J. on 24.5.1983. The award was subsequently read out on 13 January 1986 R. Kuloba J. The Defendant filed an application to review and set aside the arbitration award of 13 January 1986. This application was dismissed O’Connor J. who ordered that – the Land parcel Dagoretti/Mutuini/221 be subdivided into 2 equal portions between the 2nd plaintiff Grace Wambui and Kamau Mbutia the Defendant.

2. On 11 June 1990 Mango J. gave orders upon application by the plaintiff to authorize the registrar to execute the transfer forms and transfer the land as per the decree.

3. Unfortunately from 1990 to 2004 the said orders could not be effected because the orders that Mango J. (now deceased) gave was defective. Instead of the land parcel reading LR Dagoretti/Mutuini/221 it read Dagoretti/Mutuini/21. Ransley J. corrected this mistake in 2004. Before he gave the orders, the defendant introduced a new advocate to act for him after judgment had been filed. The application of 30 November 2004 was granted for leave to allow the advocate come on record on 2 December 2004. On the same day leave to amend by the application of the plaintiff the errors on Mango J’s orders was granted.

4. The next step in this suit was to effect the said execution.

5. The new advocate for the defendant filed an application dated 4th February, 2005 whereby the defendant sought orders to declare that the execution of the decree having taken 12 years to execute is now of no effect. The execution ought to be dismissed. The advocate relied on Orders 4(4) of the Limitation of Actions Act and on the case law of Njuguna v Njau (1981) KLR 225.

6. The Replying affidavit to this application by the Plaintiff was struck out on grounds of having been filed out of time. It was further noted that on the day the application was called out for hearing the plaintiff and her advocate were absent. The hearing proceeded under Order IXb r 3 (a) Civil Procedure Rules.

II. Application 4 February, 2005

7. The arguments put forward by the defendant/applicant is that the decree ought to be dismissed simply because the execution took over 12 years to effect and upto date it has not been effected. There is therefore the Limitation of Actions that comes to play.

8. In the case law of Njuguna v Njau (1981) KLR 228 which I was referred to the High Court dismissed execution proceedings that was being effected within 10 years. On appeal to the Court of Appeal, it was argued that Section 4(4) of the Limitation of Actions Act in referring to “actions” also means execution. That this has to be done within 12 years. That 12 years was not yet up.

III. Findings

9. In the case law of Njuguna v Njau (supra) it was argued that it was unreasonable to hold that execution proceedings on land was and did expire due to Limitation of Actions. When in effect the fact that parties have been on the land for the same period as would constitute adverse possession did in itself not make sense.

10. In this case before me, the plaintiff has been on the land for over 12 years. If perchance the execution proceedings is not permitted she would still claim again under adverse possession.

11. Equity would therefore not permit the argument that the execution proceedings having not been done within 12 years it be not allowed.

12. In reality, time for this case, of the 12 years begins to run from

2 December 2004 when Ransley J. gave his orders correcting the error on Mango’s J. orders of 1990. It is not the plaintiff’s fault that for 14 years the courts failed in its duties to hear the application and correct a simple error.

13. The time for execution proceedings begins as of 2.12.2004 because that is the time all the papers are ready and in order to effect the execution whilst earlier the plaintiff was hindered from doing so.

III. Conclusion

14. This application of 4th February, 2005 is misconceived. It is hereby dismissed. As to costs, the Plaintiff was absent during the hearing of this application. The same is hereby not awarded to the Defendant/Respondent.

Dated this 22nd day of May, 2007 at Nairobi.

M.A. Ang’awa

JUDGE

E.T.N. Gaturu for E.T. Gaturu Advocates for the plaintiff

Mureithi for C. Mureithi & Co. Advocates for the defendant