



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 64 of 1986

JAMES KURIA MAINA & 2 OTHERS.....PLAINTIFF/APPLICANT

Versus

KAIGUA MBOGO.....DECEASED DEFENDANT

WILSON GITAU KAIGUA.....1ST RESPONDENT

STANLEY MUIGAI KAIGUA.....2ND RESPONDENT

JOSEPH MBOGO KAIGUA.....3RD RESPONDENT

JOHN KIHONGE KAIGUA.....4TH RESPONDENT

MARY WAMBUI KAIGUA.....5TH RESPONDENT

RULING

This matter was fixed for the hearing of a Chamber Summons filed by the Plaintiff in this matter. That application seeks the following prayers:

“1. THAT the Honourable Court be pleased to order Mary Wambui Kaigua, Joseph Mbogo, Stanley Muigai and Wilson Gitau to deliver up vacant possession of the property known as Title No. LOC 16/MBUGITI/1011 to JAMES KURIA MAINA (as Trustee for Samuel Mbogo Kaigua and Godfrey Waithaka) being the registered owner thereof, in accordance with the Decree issued by this Honourable Court on 18th November 1991.

2. THAT the District Surveyor, Thika do confirm the boundaries and beacons of the Land parcel Title No. LOC 16/MBUGITI/1011.

3. THAT the Officer Commanding Police Division (OCPD) THIKA station do supervise the execution of this orders.

3. THAT WILSON GITAU KAIGUA, STANLEY MUIGAI KAIGUA, JOSEPH MBOGO KAIGUA and JOHN KIHONGE KAIGUA and MARY WAMBUI KAIGUA be detained in prison for a period the Court may deem fit for resisting and or obstructing the completion of the execution of the decree herein.”

The Defendant before the hearing of that application raised a preliminary objection. The objection is in the following terms:

“(i) The application is fatally incompetent by virtue of Order XXI Rule 18(1) of the Civil Procedure Rules and should therefore be struck out with costs forthwith.

(ii) The application is fatally incompetent and indeed

fundamentally misconceived by virtue of the demonstrably manifest extinction of the subject judgment dated 18th November 1991 and should therefore be struck out with costs.”

In support of that preliminary objection counsel for the Defendant submitted in the following terms: he began by saying that the Chamber Summons dated 31st March 2005 is defective for it seeks to enforce a decree issued after the judgment dated 18th November 1991. Counsel referred to *Order XXI Rule 18* of the Civil Procedure Rules. That rule provides that where a decree has not been executed within one year a Notice to Show Cause should be issued to the judgment debtor. In this regard the Defence counsel argued that for failing to apply for notice to show cause the Plaintiff's application is incompetent. The Counsel further submitted that the parties to whom the application is directed to, in particular the second to the sixth Respondent were persons not in this action. The Plaintiff having failed to apply for Notice to Show Cause against these Respondents counsel was of the view that the application should be struck out. He also referred to *Order XXI Rule 86* which the Plaintiffs rely upon and stated that that too required a notice to show cause to be issued. The Defendant's counsel further argued that the application rightly ought to have come before the Deputy Registrar for the hearing of the Notice to Show Cause. He however, argued that had the matter been taken before the Deputy Registrar the Respondent would have referred it to the judge for the hearing of the objection that the decree was being executed beyond the 12 years limitation period. In this regard defence relied on the concise law dictionary for the definition of the word “execution”. It is defined as follows:

“The act of completing or carrying into effect (1) Of a judgment, compelling the defendant to do or to pay what has been adjudged. Writs of execution are addressed to the sheriff, whose function it is to enforce the judgment.

Counsel relied on *Section 4(4)* of the Limitation of Actions Act to argue that the Plaintiff was barred from executing a decree that is more than 12 years old. That section provides 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, 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.”

Counsel further relied on the case of **Civil Appeal No. 230 of 2001 between MALAKWEN ARAP MASWAI V PAUL KOSGEI**. In this case the parties had entered into a consent that the suit be marked as settled. Twelve years later the Respondent to the appeal sought the eviction of the Appellant. He sought his eviction on the basis of the consent order which had been recorded over 12 years previously. The Court of Appeal found that *Section 4(4)* of the Limitation of Actions Act barred the Respondent from seeking to execute that order after twelve(12) years period. In making that finding the Court of Appeal found that execution is within the definition of an action as provided by *Section 4(4)*. Defence Counsel further submitted that *Order XXI Rule (3)* provides the manner of execution of an order in respect of an order in respect of immovable property.

The objection was opposed by the Plaintiff's counsel. Plaintiff's counsel drew the Court's attention to the orders under which the application is brought. He stated that the application is brought under *Section 3A and 51* of the Civil Procedure Act and *Order XXI Rules 86, 97 and 91* of the Civil Procedure Rules. The application, he argued, addresses itself to third parties who were standing in the way of the decree holder getting possession of the immovable property. He argued that the sections and the rules relied

upon were not subservient to *Order XXI Rule 18*. With regard to the decree he accepted that it was issued on 18th November 1991. Thereafter in accordance with an order of the court the transfer of the immovable property to the Plaintiff was signed by the Executive Officer of this Court. He therefore submitted that by 1994 all that needed to be done in execution of the decree had been done. He further drew the Court's attention to further affidavits on record sworn on behalf of the Plaintiff which affidavits showed that the Plaintiffs were barred from proceeding with taking possession by the Respondents' injunction/application at Thika Magistrate's Court which was issued to stop the Plaintiff intermeddling with the immovable property. The Plaintiff further relied on the supporting affidavit, which showed that the Plaintiffs were issued with the title in their name on 16th May 2003. Those titles were annexed thereof. The injunction that had been issued by the Thika Magistrate's Court was not lifted until the counsels presently representing the parties in this matter filed a consent dated 18th March 2002 which essentially annulled a grant relating to the property in question. Plaintiff's counsel therefore argued that if there is limitation the same should be calculated from the date of that consent. Plaintiff relied on *Section 3(2)* of the Judicature Act, which he stated mandated the court do substantial justice without undue attention to rules of procedure.

I have considered the objection raised by the Respondents. In order to understand the matter before court, it is essential to give a brief background of the matter. The suit was originally filed by the Plaintiffs against their late father. They sought the subdivision of the property **LOC. 16/MBUGITI/69**. Their father had a polygamous family. By consent of the parties that matter was referred for arbitration. Subsequently judgment was entered by this court in accordance with the award of that arbitration. The award was to the effect that the property was to be divided into three equal portions for each wife of the deceased. The Executive Officer was mandated to execute the transfers. Those transfers are the ones that counsel for the Plaintiff submitted were executed and titles issued before the twelve(12) years period . What the Court needs to decide is whether the Plaintiff's application is competent. Was there a requirement for the Plaintiff to have sought a notice to show cause? The present application is directed against persons who the Plaintiff alleges are on their portion of land. Notice to show cause would be necessary where the Plaintiff is executing the decree. I find and I hold that the Plaintiff in the present application is not executing the decree but rather seeks orders against the third parties on their property which was awarded to them by the judgment of the court. The Court in going through the various affidavits on record in this matter has found that the 2nd Respondent made an application for injunction to stop the Plaintiffs intermeddling with the aforesated property. The Court issued an injunction on the 14th July 1994. That injunction essentially stopped the Plaintiffs from going on their property. The injunction was not set aside until a consent was reached between the parties which is dated 18th May 2002. I find that I am in agreement with the Plaintiffs that if indeed there was limitation, time would begin to be calculated from March 2002. I am, however, of the view that that limitation cannot arise in respect of the third parties who have allegedly refused to get out the Plaintiff's land. I am therefore of the view and do hold that the preliminary objection dated 5th June 2007 is incompetent and the same is hereby dismissed with costs to the Plaintiff. Orders accordingly.

Dated and delivered at Nyeri this 28th day of September 2007.

MARY KASANGO

JUDGE