



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU**

**Civil Case 510 of 1991**

**K.G.G.C.U. LTD.....PLAINTIFF**

**VERSUS**

**MAJOR AUGUSTINE CHERUIYOT.....DEFENDANT**

**RULING**

The defendant/applicant filed an application dated 26<sup>th</sup> September 2006 by way of chamber summons brought under **Order XXI rule 22** and **rule 9(A and 9B, Order IXA rules 10 and 11** and **Order III rule 9A** of the **Civil Procedure Rules**. They sought the following orders:-

1. That the judgment entered against the defendant and any other consequential order or decree be set aside.
2. That pending the hearing and determination of prayer number 1 as hereinabove, interim stay of execution of the decree be granted.
3. That M/S Langat and Wandabwa Advocates be granted leave to act for the defendant in this matter.

The application was made on the grounds that the plaintiff herein obtained judgment against the defendant on 17<sup>th</sup> January 1992. That the defendant was never made aware of the said judgment nor had the suit been brought to his attention in any manner. The judgment was therefore irregular and the plaintiff had moved to execute the same.

In his affidavit in support of the application, the defendant deposed that on 9<sup>th</sup> September 2006, he was called by one Mr. Isaac Yego, his Farm Manager at his Kitale farm, who informed him that there were some people who had gone there purporting to proclaim his assets. That they left a proclamation and a warrant of attachment. He said that he had never been served with the court process in this matter and neither was he aware of the suit. He further stated that if any decree was issued against him in 1992, he had never been called upon to show cause why execution could not issue. He added that if any decree had been issued against him in this matter, the same was now statute barred and unenforceable since it had been in existence for more than twelve years. He urged the court to set aside the judgment for reasons foresaid.

Mr. S. N. Mukunya of Kagondu and Mukunya Advocates filed a replying affidavit and stated that the

defendant was duly served with summons to enter appearance and a copy of the plaint was back on 19<sup>th</sup> December 1991 and that he acknowledged service. A return of service dated 19<sup>th</sup> December 1991 was filed to that effect. A request for judgment was made on 10<sup>th</sup> January 1992, as the defendant had failed to enter appearance. Mr. Mukunya further deposed that the defendant demonstrated that he was aware of the decree that had been issued against him by his action of paying a sum of Kshs.100,000/- vide cheque number S477615 to the plaintiff's advocates on 5<sup>th</sup> February 1993. He was thereafter issued with an acknowledgment of receipt number 04618 by M/S Kagundu and Mukunya Advocates. The receipt clearly showed that the sum of Kshs.100,000/- was made in part payment of the decretal sum in this case. At the time of that payment, the applicant was well aware of the existence of the suit and the judgment that had been entered against him.

In his submissions, Mr. Wandabwa did not say much regarding the issue of service of summons to enter appearance and copy of the plaint. He dwelt on the impropriety of the execution process that had been set in motion. He submitted that the decree that was sought to be executed was issued in 1992 and in the circumstances, a notice to show cause ought to have been served upon the applicant before any execution could proceed. Such notice to show cause had not been issued. He further submitted that in the application for execution for the decree, interests had been calculated from 25<sup>th</sup> January 1992 to 25<sup>th</sup> August 2006. The law provided that interest on a decree could not be recovered after a period of six years, he submitted. He cited the provisions of **Section 4(4) of the Limitation of Actions Act** which provide 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.”*

He also cited the case of **MOHAMED VS SARDAR [1970] EA 358** where it was held that the time limit for the execution of a judgment was twelve years. He took issue with an ex parte application that had been filed by the plaintiff to seek police assistance in execution of the decree.

With regard to the replying affidavit sworn by Mr. Mukunya Advocate, Mr. Wandabwa submitted that Mr. Mukunya had deposed to contested issues in paragraphs 3 and 8 of the said affidavit and urged the court to strike out those paragraphs. Paragraph 3 of the affidavit stated that the defendant was duly served with the court process on 19<sup>th</sup> December 1991 and paragraph 8 referred to the sum of Kshs.100,000/- which the defendant paid after the said service. He stated that the advocate had not disclosed the source of his instructions. He cited several authorities to fortify his argument and one of them was **EAST AFRICA FOUNDRY WORKS (K)LTD VS KENYA COMMERCIAL BANK LTD [2002] 1 KLR 443.**

Mr. Mbugua Mbugua who held brief for Mr. Mukunya for the respondent opposed the said application. With regard to paragraphs 3 and 8 of Mr. Mukunya's replying affidavit, Mr. Mbugua submitted that counsel swore to matters that were on record and well within his knowledge. He reiterated that the applicant was duly served with the court process and proceeded to make a part payment of Kshs.100,000/- in part settlement of the decree as stated in the replying affidavit by Mr. Mukunya. That was not disputed by the applicant. In his view, the applicant had not come to court with clean hands. The applicant had not annexed any draft defence to his application, Mr. Mbugua added.

On the issue of limitation of time, Mr. Mbugua submitted that the execution was not statute barred and he cited **WAICHAJ WAIHIGA VS ARTHUR WAMBUGU HCCC No.91 of 1985** at Nakuru (unreported) and **INDUSTRIAL AND COMMERCAIL DEVELOPMENT CORPORATION VS ONYANGO [1983] KLR 416.** I will revert to those two decisions a little later in this ruling. Mr. Mbugua further submitted that a notice to show cause why execution could not proceed was served upon the applicant and an affidavit of service to that effect was filed. Upon perusal of the court file, I realised that a notice to show cause was taken out on 23<sup>rd</sup> May 2006. It was purportedly served upon the applicant on 26<sup>th</sup> May 2006. An application for execution was then made and the interest on the decretal amount was

calculated from the date of judgment i.e. January 1992 upto August 2006.

Regarding the application by M/S Langat and Wandabwa to come on record for the defendant, Mr. Mbugua submitted that it was made by an advocate who was not properly on record because a notice of appointment of the said advocate was filed on 4<sup>th</sup> October 2006, after the chamber summons herein had been filed on 27<sup>th</sup> September 2006. He therefore urged the court to find that the application was incompetent.

I have considered the rival arguments that were made by both counsel in this matter. I have also carefully perused the court file and all the affidavits that were filed by both parties. Mr. Wandabwa pointed out that he was under the impression that the defendant/applicant had acted for himself upto the time when judgment was entered against him that was why he had invoked the provisions of Order III rule 9A in his application. While I agree that counsel should have first filed a notice of appointment of advocates before filing the application herein, I allowed Mr. Wandabwa to argue the merits of his client's application because the intended auction of the applicant's property was scheduled to take place on 7<sup>th</sup> October 2006, barely two days after the date when the application was being heard and it was therefore in the interest of justice that the matter be determined expeditiously without undue regard to procedural technicalities which were not in any event prejudicial to the respondent. In **MICROSOFT CORPORATION VS MITSUMI COMPUTER GARAGE LTD & ANOTHER [2001]2 EA 460** it was held that it was not in the overall interest of justice to invoke procedural lapses to defeat applications unless such lapses went to the jurisdiction of the court or where substantial prejudice was going to be caused to the adverse party. That was not the case in this matter

The court record shows that the plaintiff filed this suit against the defendants on 15<sup>th</sup> August 1991 and claimed a sum of Kshs.1,392,964.70 on account of goods which had been sold and delivered to the defendant by the plaintiff at the defendant's request. The plaintiff also claimed interest on the aforesaid sum at the rate of 14% p.a. from the date of filing suit until payment in full. Summons to enter appearance together with a copy of the plaint were allegedly served upon the defendant on 19<sup>th</sup> December 1991 and an affidavit to that effect was filed on 3<sup>rd</sup> January 1992. A request for judgment in default of appearance was made on 10<sup>th</sup> January 1992 and on 17<sup>th</sup> January 1992, judgment was entered and a decree issued on 28<sup>th</sup> January 1992. An application for execution of the decree by way of attachment and sale of the defendant's moveable properties was made on 3<sup>rd</sup> February 1992 and warrants of attachment and sale were issued to Samburu Auctioneers on 4<sup>th</sup> February 1992. It is not clear what transpired thereafter but other warrants of attachment and sale were issued on 27<sup>th</sup> January 1993. Since then, no action was taken at all by the plaintiff until 8<sup>th</sup> May 2006 when an application for notice to show cause why execution could not issue in default of payment of the decretal sum was made by the plaintiff's advocate, M/S Kagundu and Mukunya. As earlier indicated, the notice to show cause was purportedly served upon the respondents on 26<sup>th</sup> May 2006. In the application for execution that was filed by the plaintiff's advocate, interest on the decretal sum was calculated from the date of the judgment upto August 2006.

The provisions of **Section 4(4)** of the **Limitation of Actions Act** as quoted hereinabove are explicitly clear. My understanding of that Section of the law is that a party may not execute a judgment after expiry of twelve years from the date on which the judgment was delivered or entered or twelve years after default in making payment of a decretal sum or delivery of any property. Likewise, arrears of interest in respect of a judgment debt cannot be recovered after expiry of six years from the date on which the interest became due. That issue was considered in **WAICHAHI WAIHIGA VS ARTHUR WAMBUGU** (supra) as well as in **MOHAMED VS SARDAR** (supra). It cannot therefore be denied that the plaintiff's attempts to execute the decree more than twelve years from the date when the judgment was entered is illegal and contrary to the provisions of **Section 4(4)** of the **Limitation of Actions Act**. Judgment having been entered on 17<sup>th</sup> January 1992, twelve years expired on 17<sup>th</sup> January 2004. Even if it were to be assumed that the defendant/applicant made part payment of the decretal sum on 5<sup>th</sup> February 1993, the plaintiff would still be caught up by limitation period, which in that case would be 5<sup>th</sup> February 2005. The plaintiff is guilty of laches and can only blame itself for its indolence since it did not take any action from

5<sup>th</sup> February 1992 when warrants of attachment and sale of the defendant's assets were issued. The issue of limitation of time was not brought to the attention of the Deputy Registrar at the time when the application for a notice to show cause why execution could not issue was listed for hearing.

I find that the execution proceedings herein are incompetent for the reason aforesaid. While I believe that the defendant was duly served with the summons to enter appearance accompanied by a copy of the plaint as a result of which he made part payment of the decretal sum way back on 5<sup>th</sup> February 1993, the plaintiff is now time barred and cannot purport to bring any action to recover the decretal sum nearly fourteen years from the date when judgment was entered. I therefore allow the defendant's application but order that each party bears its own costs.

DATED, SIGNED and DELIVERED at Nakuru this 26<sup>th</sup> day of October, 2006.

**D. MUSINGA**

JUDGE

Ruling delivered in open court in the presence of Mr. Mburu holding brief for Wandabwa for the defendant/applicant and N/A for the respondent.

**D. MUSINGA**

JUDGE