



**Atsulu v Wanawale (Environment and Land Appeal E029 of 2022)
[2023] KEELC 19827 (KLR) (19 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19827 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E029 OF 2022
DO OHUNGO, J
SEPTEMBER 19, 2023**

BETWEEN

FESTUS NYANJE ATSULU APPELLANT

AND

WYCLIFFE LABBY WANAWALE RESPONDENT

*((Being an appeal from the ruling and order of the Chief Magistrate's
Court at Kakamega (Hon. Linnus Kassan, Chief Magistrate) delivered on
29th June 2022 in Kakamega MC.CC Misc. Application No. 46 of 2017))*

JUDGMENT

1. The background to this appeal is that the parties litigated in Kakamega SPMCC Number 5 of 1995 wherein the respondent was the plaintiff while the appellant was the defendant. Judgment was delivered in the said matter on July 24, 1997, in favour of the respondent. The court granted a permanent injunction restraining the appellant “or his people” from continuing to use the parcel of land known as Marama/Lunza/1277 (suit property). The court further granted an eviction order for the removal of the appellant from the suit property if he failed to willingly vacate within thirty days from the date of delivery of the judgment. The court also ordered that if he failed to willingly vacate, he should be evicted with use of reasonable force necessary to enforce the judgment. The respondent was also awarded costs and interest thereon. A decree was issued in terms of the judgment.
2. There is no dispute between the parties that decree was enforced, and that the appellant was evicted in 1999. It is also not in dispute that after the eviction, the appellant returned to the suit property. The parties differ slightly on the actual date of return: the appellant maintains he returned in the year 2000 while the respondent insists that the appellant returned in the year 2007. As will become manifest later in this judgment, whether the return was in 2000 or 2007 is of no consequence for purposes of this appeal.



3. The parties are also in agreement that following the return, the appellant remains in the suit property to date. In a fresh effort to enforce the decree yet again, the respondent filed Notice of Motion dated March 24, 2021 seeking the following orders:
 1. That this application be certified as extremely urgent.
 2. That this honorable court be pleased to extend the time within which to execute the judgment delivered on July 24, 1997 beyond the statutory limit of 12 years.
 3. That this honorable court upon issuance of prayer No 2 do reissue eviction orders against the judgment debtor/respondent, his assignees, servants, agents and or any other person under his name from Land parcel No Marama/Lunza/1277.
 4. That this honorable court do issue an order to the OCS Butere Police Station to assist in the execution of the eviction order.
 5. That costs of this application be provided for.
4. The respondent filed the Notice of Motion in Kakamega MCCC Misc Application No 46 of 2017 and not Kakamega SPMCC Number 5 of 1995. It is not clear why the respondent opted not to file and pursue the application in the suit where the decree was issued. That said, I note that proceedings in Kakamega MCCC Misc Application No 46 of 2017 were commenced by the respondent in the year 2017 while seeking to have the appellant punished for disobeying the decree.
5. In view of prayer 2 of the Notice of Motion and considering that the application was brought *inter alia* under part III of the Limitation of Actions Act, the respondent seems to have been under the impression that the 12 years statutory limit for execution of the judgment had been reached.
6. Upon hearing Notice of Motion dated March 24, 2021, Hon Linnus Kassan (Chief Magistrate) delivered the ruling on June 29, 2022, allowing the application as prayed. Aggrieved by that outcome, the appellant filed this appeal through Memorandum of Appeal dated June 25, 2022 in which he prayed that the ruling of the Subordinate Court be reversed, and that Notice of Motion dated March 24, 2021 be dismissed. The following grounds are listed on the face of the memorandum:
 1. That the trial court erred in failing to hold that time within which to execute a judgment more than 12 years old cannot be extended.
 2. That the trial court erred in failing to hold that the provisions of the Civil Procedure Act and the rules made thereunder could not be used to extend time within which to execute a stale judgment.
 3. That the trial court erred in law by applying and relying on a wrong precedent that was not relevant in the circumstances.
 4. That the learned trial magistrate was wrong in applying and relying on a decision of the High Court as against superior relevant authority of the Court of Appeal cited and made available by the appellant.
 5. That the learned trial magistrate erred in holding that the appellant was wrong to have proffered the defence of adverse possession contrary to law and available precedent.



6. That the holding that the appellant was in contempt of court was wrong and flew in the face of crystallized prescriptive rights already acquired by the appellant as against the respondent.
 7. That the learned trial magistrate erred in law and fact in failing to hold that the respondent's rights over the land suit subject matter had been extinguished by operation of law more than 12 years since the return on the land by the appellant without eviction.
 8. That the principle of equity that the appellant had approached the court with soiled hands was wrongly applied against the appellant when it is the respondent who ought to have been blamed for indolence.
7. The appeal was canvassed through written submissions. The appellant argued that the Subordinate Court missed the point and failed to appreciate that the issue before it was not one of a stale claim but of a stale judgment. That the Subordinate Court wrongly applied the case of *Jane Dzidza Kutandaza v Kenya Power & Lighting Company Limited & another* [2015] eKLR. Relying on the case of *M'Kiara M'Rinkanya & Another v Gilbert Kabeere M'Mbijiwe* [2007] eKLR, the appellant further argued that having returned to the suit property and remaining there to date, even using the respondent's date of return of 2007, any action to execute the decree was barred by Section 4 (4) of the *Limitation of Actions Act* by the year 2019. That by filing Notice of Motion dated March 24, 2021, the respondent does not dispute the fact that the decree was time-barred. He went on to argue that having remained unenforced for over 12 years, the decree ceased to exist and that no law provides for its extension or revival. Citing the case of *Republic v Attorney General & another Ex-parte Derek Gyidei Mango* [2016] eKLR, the appellant argued that it was not open for the respondent to seek shelter under Article 159 (2) (d) of the *Constitution* or the general provisions of the *Civil Procedure Act* to circumvent the clear provisions of the *Limitation of Actions Act*. The appellant therefore urged the court to allow the appeal as prayed.
 8. In reply, the respondent argued that this court is called upon to determine the respondent's right to ownership of the suit property against the appellant who is both in contempt and breach of the decree and eviction order. That even if there are no specific provisions of the law prescribed for the extension of time within which to execute a judgment, it would not be in the best interest of justice and equity that the respondent who is an innocent party be punished because twelve (12) years have lapsed after the appellant's wrongful return. Relying on Section 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the *Civil Procedure Rules* and the case of *Anne Mumbi Hinga v Gaitbo Oil Limited* [2019] eKLR, he urged the court to uphold equity.
 9. The respondent went on to argue that the Court of Appeal decision in *M'Kiara M'Rinkanya & Another v Gilbert Kabeere M'Mbijiwe* [2007] eKLR is distinguishable since in the instant case the appellant has returned into the suit property after being evicted within the statutory period of twelve (12) years. Defending himself against any claim of indolence, the respondent argued that the appellant has not explained why he returned to the suit property after he was evicted. He urged the court to consider the special circumstances surrounding this case and that the appellant's occupation of the suit property has been forceful, interrupted, and illegal hence not amounting to adverse possession. In conclusion, the respondent urged that the appeal be dismissed with costs for want of merit.
 10. This being a first appeal, my mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. See *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR.



11. I have considered the grounds of appeal and the parties' respective submissions. The issues that arise for determination are whether time within which to execute the judgment ought to be extended and whether Article 159 (2) (d) of the Constitution and the general provisions of the Civil Procedure Act can aid the respondent.

12. At the core of this appeal is Section 4 (4) of the Limitation of Actions Act which 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.

13. Many facts in this dispute are not contested. The judgment sought to be enforced was delivered on July 24, 1997 and was enforced in 1999. The appellant later returned to the suit property in the year 2000 or 2007 and remains there even now. As the appellant himself concedes, his return to the suit property was contrary to the decree.

14. The import of Section 4 (4) of the Limitation of Actions Act was considered by the Court of Appeal in *M'Ikiara M'Rinkanya & Another v Gilbert Kabeere M'Mbijiwe* (supra) where the court held that where an attempt at enforcement of a decree after 12 years includes eviction proceedings, then such proceedings are statute-barred. The court went on to hold:

"... 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. ... 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."

15. At the end of 2019, the Court of Appeal revisited its *M'Ikiara M'Rinkanya & Another v Gilbert Kabeere M'Mbijiwe* decision in *Koinange Investment and Development Company Limited v Ian Kabiu Ngethe & 3 others (Being sued as the personal representatives of the Estate of Robert Nelson Ngethe (Deceased))* [2019] eKLR where it held that an order of stay of execution stopped time from running against a decree holder. The court stated:

"36. In the M'Ikiara matter, the Court held that all post judgment proceedings including originating proceedings and interlocutory proceedings for execution of judgments are statute barred after 12 years. However, in that matter the proceedings to recover the land in dispute had been filed nearly 18 years after the final judgment of the Court of Appeal and were rightly held to be statute barred.

37. Where a party is prevented from executing a lawful decree by a court order pending hearing and determination of an appeal against the decree, it would be unjust to hold that time still runs against the decree holder over the period when the appeal remains undetermined, and until the stay order is vacated."



16. My understanding of the decision in *Koinange Investment and Development Company Limited v Ian Kabiu Ngethe & 3 others (Being sued as the personal representatives of the Estate of Robert Nelson Ngethe (Deceased))* [2019] eKLR is that the provisions of Section 4 (4) of the *Limitation of Actions Act* are not cast in stone. There could be valid intervening circumstances such as an order of stay of execution, which would take a particular case out of the stranglehold of Section 4 (4) of the *Limitation of Actions Act*.
17. By the time the appellant returned to the suit property, the decree had been enforced. Indeed, it is the decree that led to his eviction. There is evidence on record that on October 28, 2019, the Subordinate Court made an order that the appellant shows cause why he should not be imprisoned for being in disobedience of the decree by virtue of his returning to the suit property. The order was made in in Kakamega MCCC Misc Application No 46 of 2017 as opposed to the file in which the decree was issued. Thus, the appellant's presence on the suit property in violation of the decree has been the subject litigation before the Subordinate Court.
18. The decree having been enforced, Section 4 (4) of the *Limitation of Actions Act* cannot be a bar to it since the said provision only deals with an unenforced judgment. Clearly, the appellant's return to the suit property and his remaining in it are in total disregard of the decree and are acts of impunity which cannot be tolerated. It remains to be seen whether such an occupation which is eminently unlawful can sustain a claim of adverse possession. There is more to proving adverse possession than simply occupying another person's land then casually tallying years.
19. I agree with the respondent that the decision of the Court of Appeal in *M'Ikiara M'Rinkanya & Another v Gilbert Kabeere M'Mbijiwe* [2007] eKLR is distinguishable since in the instant case the decree was enforced within the statutory period of twelve (12) years, yet the appellant returned into the suit property after being evicted. I find that there is no need to extend time within which to execute the judgment and decree herein simply because the decree had already been executed. Indeed, by dint of Article 159 (2) (d) of the *Constitution*, the appellant cannot wave technicalities in the form of Section 4 (4) of the *Limitation of Actions Act* to frustrate a decree that he concedes was enforced and further to give a veneer of legitimacy to his unlawful conduct.
20. In view of the foregoing discourse, I find no merit in this appeal. That said, the parties have not helped matters by filing applications in a miscellaneous cause instead of focusing on the original suit. Purely for purposes of clarity, to re-focus the parties on the original suit and to stem introduction of new aspects which were not covered in the decree, I will slightly modify the orders of the Subordinate Court.
21. I therefore make the following orders:
 - a. This appeal is dismissed with costs to the respondent.
 - b. The respondent is at liberty to continue enforcing the judgment and decree in Kakamega SPMCC Number 5 of 1995.
 - c. If there is need for any police assistance, an appropriate application be made in Kakamega SPMCC Number 5 of 1995.
 - d. All future proceedings towards enforcement of the judgment and decree in Kakamega SPMCC Number 5 of 1995 be filed in the said case.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 19TH DAY OF SEPTEMBER 2023.

D. O. OHUNGO

JUDGE



Delivered in open court in the presence of:

Mr Nyikuli for the appellant

Mr Osango holding brief for Ms Shimoli for the respondent

Court Assistant: E. Juma

