



**Tolimo & another v Ntoinyo (Environment & Land Case  
90 of 2009) [2022] KEELC 13440 (KLR) (5 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13440 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 90 OF 2009  
A NYUKURI, J  
OCTOBER 5, 2022**

**BETWEEN**

**LERASONA OLE TOLIMO ..... PLAINTIFF**

**AND**

**NAIROBI CHANNEL AUCTIONEERS ..... APPLICANT**

**AND**

**KIOKAI OLE NTOINYO ..... DEFENDANT**

**RULING**

**Introduction**

1. The application before court is the ex parte chamber summons dated May 10, 2021, filed by the plaintiff/applicant seeking for the following orders;
  - a) Spent
  - b) That the honourable court be pleased to issue fresh warrants to the court bailiff/broker/applicant for eviction of the defendant's family, his agents and or servants from the plaintiff's land parcel number Kajiado/Dalaletuk/902 and demolish all illegal structures erected and or established thereon.
  - c) That upon grant of prayers (2) above, this honourable court be pleased to direct the Ward Police Commander, Kajiado central to provide security to applicant m/s Nairobi Channel Auctioneers, their servants or agents when evicting the defendants/judgment debtor herein, his family, servants and agents form the suit land being Kajiado/Dalaletuk/902.
  - d) That this honourable court may issue any other order that deems it fit to grant for enforcement of court orders.



- e) That cost of this application be provided.
2. The application was anchored on grounds on the face of it and supported by the affidavit of the plaintiff. The applicant averred that in 1999, this court issued a decree in his favour directing the defendant to vacate the suit property and deliver vacant possession thereof to the him; that on March 26, 2001, an eviction order was issued to JN Kilonzo t/a Base Auctioneers, which order is still valid as it has not been vacated and or set aside by way of review and/or appeal; that there is no other option to have the applicant enjoy the fruits of his judgement other than having the respondent, his family, agents or servants forcefully evicted and that despite the judgement, the respondent has been adamant and has refused to vacate the suit property.
  3. The plaintiff further averred that to effectively execute the orders issued by the court, it is necessary that the court broker, and his agents are fully protected by the police as the defendant and his family may resist the eviction and organize mobs to create commotion thereby obstructing the execution of the said orders. Further, that the applicant has a sentimental attachment to the suit property, which is where he resides and which is a source of his livelihood.
  4. Although the defendant was duly served, he did not file any response. Besides, on January 20, 2022 the court directed that the application be canvassed by way of written submissions. However, none of the parties filed any submissions.

### **Analysis and determination**

5. Having considered the application and the supporting affidavit, it is my considered view that the issue that arise for determination is whether the applicant is entitled to the orders sought. The applicant is seeking to enforce a decree that was issued in the year 1999, that is about twenty-two (22) years before the application herein was filed. According to the applicant, an eviction notice was issued to one JN Kilonzo trading as Base Auctioneers in March 2001 and that the said order was still valid as it had neither been appealed against nor set aside. That means that it is over twenty years since the said auctioneer was instructed to execute the judgment. The question that this court ought to address is whether this court has the power to issue orders of execution of a judgment passed twenty-two (22) years ago.
6. Section 4 (4) of the *Limitation of Actions Act* cap 22 Laws of Kenya provides for a time limitation for execution of a judgment in the following terms:

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.
7. Essentially, section 4 of the *Limitation of Actions Act* takes away the power of the court to entertain an application that seeks to execute a judgment for recovery of immovable property which was passed over 12 years, before the application for execution is filed. In the case of *Njuguna v Njau* [1981] KLR, the Court of Appeal held that an action in the context of section 4 (4) of the *Limitation of Actions Act*, is not intended to bear a restricted meaning hence it includes all kinds of civil proceedings including execution proceedings.



8. Similarly, in the case of *Malakwen Arap Maswai v Paul Kosgei* [2004] eKLR, the Court of Appeal cited with approval the English decisions of *Lamb & Sons Ltd v Rider* [1948] 2 ALL ER 402 and *Lougher v Donovan* [1948] 2 ALL ER 11, and held that the term “action” is wider than the term “suit” and therefore, an application for eviction would qualify as an action.
9. The purpose of limitation provisions is to bar the prosecution of stale actions. Where a judgment creditor elects to sleep on a decree made in their favour, the law does not allow them to simply wake up from their slumber after the lapse of 12 years to enforce their rights. Since a judgment conclusively determines the rights of parties, thereby creating new rights for such parties, an enforcement of such judgment is rightly an action and must be made within 12 years.
10. The Court of Appeal in *M’Kiara M’Rinkanya & another v Gilbert Kabeere M’Mbijiwe* [2007] eKLR held as follows;  
  
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.
11. Similarly, in the case of *Willis Onditi Odhiambo v Gateway Insurance Company Limited* (2014) eKLR, the Court of Appeal held that the term ‘action’ covers execution of judgments and that the time within which to execute a decree could not be extended once expired. In the said case, the Court of Appeal stated as follows:  
  
In the matter before us, it matters not that the original suit was founded on the tort of negligence and damages claimed were in respect of personal injuries as a result of the tort of negligence. Here, the extension was sought to enforce a judgment and/or decree. Time within which to lodge such action cannot be extended under the provisions of section 27 of the *Limitation of Actions Act*.
12. In the instant application, the applicant has sought to execute a judgment delivered 22 years ago. It is clear that the decree holder simply slept on his rights and his attempt to execute a stale judgment cannot be countenanced by the provisions of section 4 (4) of the *Limitation of Actions Act*. It is too late in the day for him to seek to execute the judgment herein.
13. The upshot of the above is that the application dated May 10, 2021 is incompetent and the same is struck out with no order as to costs.
14. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 5TH DAY OF OCTOBER, 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the Presence of;**

Mr. Nairi for the Plaintiff/Applicant.

No appearance for the Defendant/Respondent.



Court Clerk - Ashley

