



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

HCCC NO. 146 OF 1989

STANLEY K. CHEMNGOREM.....PLAINTIFF

VERSUS

FRANCIS MIBEL.....1ST DEFENDANT

KIROBON FARMERS CO. LIMITED.....2ND DEFENDANT

RULING

(Suit seeking possession of land from the 2nd defendant; judgment entered in 1997; no execution until the year 2014 when application to have judgment executed is filed; held that the judgment cannot be executed as it is statute barred; judgment needed to be executed within 12 years; application dismissed)

1. The application before me is that dated 29 May 2014 filed by the plaintiff. The application is said to be brought pursuant to the provisions of Order 5 Rule 1 of the Civil Procedure Rules, 2010. It seeks the following Orders :-

(a) Spent (certification of urgency)

(b) This Honourable Court be pleased to avail the decree to read LR Njoro/Ngata Block 2/188 (Kirobon A) to read Njoro/Ngata Block 2/3524, 3818-3828 in the name of the defendant (sic).

The application is based upon the following grounds:-

(a) At the time of delivery of judgment and subsequent time the defendant's suit land read LR Njoro/Ngata/Block 2/188 (Kirobon A).

(b) The defendant has recently subdivided the same land into several portions namely LR Njoro/Ngata Block 2/3515-3524.

(c) The new numbers must appear in the decree to facilitate execution for the judgment of the court.

2. Before I go very far, I think it is necessary put matters into perspective.

3. This suit was commenced by way of a plaint which was filed on 16 May 1989. The plaintiff sued Kirobon Farmers Company Limited, a land buying company, and Francis Mibei. He averred that he was a member of the 1st defendant company holding 2 shares and entitled to 37 acres of land. He averred further that through his shareholding, he was allocated the Plots No. 186 and 195 (New numbers 170 and 188). He took possession, fenced the area, built a house and other developments. He remained in possession until the year 1981, when he received a letter from the secretary of the 1st defendant alleging that the land parcel No. 188 has been allocated to the 2nd defendant alongside all the developments that he had done including his house. He also pleaded that the 2nd defendant had encroached into the parcel No. 170 and had ploughed about 2.5 acres of it. He complained that the 2nd defendant had been issued with title to the land parcel Nakuru/Njoro/Ngata Block 2/188 for 20.6 acres including 2.5 acres from the plaintiff's land parcel Nakuru/Njoro/Ngata Block 2/170. In the suit, he sought a declaration that he is the owner of the land parcels Nakuru/Njoro/Ngata Block 2/170 and 188. He sought a further declaration that the 2nd defendant's occupation of the land parcel Nakuru/Njoro/Ngata Block 2/188 and his occupation of 2.5 acres of Nakuru/Njoro/Ngata Block 2/170, was illegal. The 2nd defendant filed a defence vide which he asserted ownership of the land parcel Nakuru/Njoro Ngata Block 2/188 and averred that he was not concerned with the property Nakuru/Njoro Ngata Block 2/170.

4. Through a consent recorded on 4 November 1996, the parties agreed to have the dispute referred to arbitration by a panel of elders to be chaired by the District Officer, Rongai.

5. At the arbitration proceedings, it emerged that the plaintiff's plot No. 186 was 16 ½ acres instead of 18 ½ acres. The 2nd defendant's plot No. 195 measured 20 ½ acres instead of 18 ½ acres. The plaintiff was also entitled to a second share, but he was not given the plot No. 195 which was given to the 2nd defendant, and instead compensated by a Plot No. 223. This plot was however less by 5 ½ acres (a full plot being 18 ½ acres). The tribunal decided that the 2nd defendant should surrender 2 acres to the plaintiff out of the Plot No. 195 and the 1st defendant to allocate him a further 5 ½ acres to enable him fill up on the shortfall in the Plot No. 223. This plot No. 195 as pleaded by the plaintiff in his plaint, was reassigned the number 188 and registered as Njoro/Ngata Block 2/188 (Kirobon).

6. The award was adopted on 30 September 1997 and on 28 May 1998, the parties agreed to refer the matter to M/s Werugia Licenced Surveyors to demarcate the 18 ½ portion due to the 2nd defendant and the balance to go to the plaintiff (presumably out of the Plot No. 195 same as Njoro/Ngata Block 2/188 (Kirobon)). I have seen a letter from Mr. Werugia, informing the parties to be on the land on 15 June 1998, when he intended to effect the court order. I do not know what happened on this day, but on 13 July 1998, when the case was mentioned, Mr. Kimatta, learned counsel for the plaintiff, stated that they had agreed to give the surveyor more time to complete his work. The matter was then fixed for mention on 28 September 1998. On 28 September 1998, the parties did not appear in court and the case was stood over generally. There is no record of any proceedings until an application dated 19 October 2012 was filed by the plaintiff, seeking orders that the surveyor be given police protection. On 2 November 2012, when Mr. Kimatta appeared before court, the court was not persuaded of the need for police protection. Matters then went quiet until the plaintiff filed this application on 11 June 2014.

7. While this application was pending, an application dated 19 September 2014 was filed by seven persons, namely, Rachel Mibei, Crispin Kiplangat Rono, Brigid Cherotich Mibei, Maureen Chelangat Mibei, Gladys Chepkurui Mibei, Redemptor Chepkemoi Mibei, and Stella Chepkorir Mibei. They wished to be enjoined in the matter as interested parties. They averred that the 2nd defendant died on 6 March 2005 and therefore the suit has since abated. They also stated that there no longer exists any land known as Njoro/Ngata Block 2/188 (Kirobon) and as such this land can no longer be subject of further litigation. They stated that the land parcel No. 188 has been subdivided and registered in their names. They also sought a declaration that the judgment, having been delivered on 20 May 1998 (Sic), is time barred. In the supporting affidavit, sworn by Rachel Mibei, the widow of Francis Mibei, the original 2nd defendant, she deposed inter alia that upon the death of her husband, she was appointed the administrator of the estate. His estate was then distributed and the land subdivided into the several portions. She herself is registered as proprietor of the land parcel Njoro/Ngata Block 2/3518 measuring 2.807 Ha; Crispin Kiplangat Rono is registered as proprietor of the land parcel Njoro/Ngata Block 2/3524 measuring 3.248 Ha; Brigid Cherotich Mibei is registered as proprietor of the land parcel Njoro/Ngata Block 2/23523 measuring 0.2020 Ha; Maureen Chelangat Mibei is registered as proprietor of the land parcel Njoro/Ngata Block 2/3522 measuring 0.2020 Ha; Gladys Chepkurui Mibei is registered as proprietor of the land parcel Njoro/Ngata Block 2/3521 measuring 0.2020 Ha; Redemptor Chepkemoi Mibei is registered as proprietor of the land parcel Njoro/Ngata Block 2/3519 measuring 0.2020 Ha; and Stella Chepkorir Mibei is now registered as proprietor of the land parcel Njoro/Ngata Block 2/3520 measuring 0.2020 Ha. She deposed that the judgment is time barred and that the plaintiff cannot seek to execute it.

8. I heard the application for joinder and I allowed it through my ruling of 16 March 2016.

9. The interested parties have opposed this motion through the affidavit of Rachel C. Mibei. She has averred that she is the widow and administratrix of the estate of Francis K. Mibei. She has mentioned that the late Mr. Mibei owned the land parcel No. 188 and that he died on 6 March 2005. She was appointed administratrix on 23 May 2006 and she has reiterated that the grant was confirmed and the land distributed. She has pointed out that no application for substitution has ever been made and it is her view that the case abated within one year of the death of Mr. Mibei. She has averred that the plaintiff is their neighbour and knew about the death of Mr. Mibei but he never applied for substitution. She has further deposed that there is no decree in existence in the file which may be amended. It is her position that the application will affect the rights of interested parties who were not parties to the original suit.

10. I invited counsel to file submissions, but I have only seen the submissions of Mr. Kimatta for the applicant. He more or less reiterated the history of the case and added that when the estate of the deceased was distributed, there was not set aside the 1.77 acres that belonged to the applicant.

11. I have considered the matter. I do not doubt that the plaintiff got judgment in his favour for about 2 acres of land to be excised off the land parcel Njoro/Ngata Block 2/188. I have seen that the award was adopted by the court on 30 September 1997, and that ought to be taken as the date of the judgment of the court. There is a limitation period for execution of judgments and this is provided for in Section 4 (4) of the Limitation of Actions Act, Cap 22, Laws of Kenya which 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.”

12. It is clear from the above that one has 12 years to execute his judgment. In our case, 12 years lapsed on or about 30 September 2009. This application has been filed on 11 June 2014. It is close to 5 years after the limitation period had lapsed. I thus do not see how the plaintiff can try to execute that judgment as it is now time barred.

13. This position was indeed upheld by the Court of Appeal, in the case of **Sebastian Nyamu vs Gilbert Kabeere M'Mbijiwe, Court of Appeal at Nyeri, Civil Appeal No. 124 of 2003 (2007) eKLR**. In this case, the Court of Appeal considered the legal issue whether a person may execute a judgment for possession of land after the lapse of 12 years. The Court analysed the point and in an elaborate judgment, held that one cannot execute such a judgment after 12 years.

14. The above aside, so far, there has not been any substitution of the deceased 2nd defendant. If the plaintiff were to be allowed to execute this judgment, he can only execute it against a legal representative of the 2nd defendant, who would have to be substituted for the deceased defendant before proceeding to apply for execution. This has not been done. But this is besides the point, as the principal reason why I do not find merit in this application is that it is time barred. It appears as if after getting judgment in his favour, the plaintiff went to sleep, and I now

wonder whether he indeed was at all interested in the two or so acres that he got in his favour. If he was keen, he would in fact have executed for it even before the death of the 2nd defendant, for the 2nd defendant died in 2005, almost 7 years from the time that the plaintiff got judgment in his favour.

15. There is a reason why we have limitation periods and I think part of the reason is to safeguard parties who stand to be adversely affected by the inactivity of a person holding a judgment. Life does not remain at a stand still. In issues of land for example, there may be need to subdivide land or sell it. One is not tied forever to a particular judgment if the decree holder does not execute it. He will be released after 12 years and he can deal with the land if the decree holder has not moved to execute it. That is exactly what has happened in this case. The land of the judgment debtor has been subdivided and people have basically moved on. To try and bring them back to the position that obtained in 1998 would negate the very principle why we have limitation periods.

16. For the above reasons, I do not find merit in this application and it is hereby dismissed with costs.

17. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 4th day of July 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of:-

Ms. Langat holding brief for Mr. Kimatta for the plaintiff/applicant.

No appearance for the defendants.

No appearance for the interested parties.

Court Assistants: Nelima Janepher/ Patrick Kemboi.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU