REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC APPEAL NO. 9 OF 2018

ISAAC OLANG SOLONGO.....APPELLANT

VERSUS

GLADYS NANJEKHO MAKOKHA

(Being the administrator of the estate of

ANTONINA MAKOKHA (DECEASED).....1ST RESPONDENT

ELIYA MAKOKHA.....2ND RESPONDENT

(Being an Appeal against the entire Ruling and orders of Hon. M.I.G MORANG'A, Esq. Senior Principal Magistrate in Kitale CMC Land Case No. 96 of 1996 that was read and delivered on

23rd July, 2018)

BETWEEN

ANTONINA MAKOKHA

(Suing through 4

GLADYS NANJEKHO MAKOKHA

as Administrator).....PLAINTIFF

VERSUS

ELIYA MAKOKHA.....DEFENDANT

ISAAC OLANG SOLONGO.....APPLICANT

JUDGMENT

1. Being dissatisfied with the with the Ruling of **Hon. M.I.G Morang'a (SPM)** delivered on the **23/7/2018** in **Kitale Chief Magistrate's Court** in **Land Case No. 96 of 1996,** the Appellant has appealed to this Court against the said ruling and he sets forth the grounds of appeal as follows:

1. That the Learned Senior Principal Magistrate erred in law and in fact in failing to find and hold that the decree given on 16/7/1996 in the Subordinate Court is stale and time-barred and cannot be executed against the appellant.

2. That the Learned Senior Principal Magistrate erred in law and in fact in failing to find and hold that the execution proceedings as commenced in the subordinate court against the appellant are bad in law as the appellant is not a personal representative of the 2nd respondent-judgment debtor who passed away on 4/3/2003 and has not been substituted by a personal representative in the proceedings in the subordinate court to date.

3. That the Learned Senior Principal Magistrate erred in law and in fact to find and hold that the execution process

commenced in the subordinate court against the appellant by way of notice to show cause and the consequential orders arising therefrom are irregular in law and ought to be set aside.

4. That the Learned Senior Principal Magistrate misdirected herself in considering extraneous factors hence arriving at an erroneous decision.

2. The Appellant prays that:

1. That the ruling de livered by Hon. M.I.G Morang'a (SPM) on 23/7/2018 and orders arising there from be varied and set aside.

2. That the execution proceedings as commenced by the 1st Respondent against the appellant culminating of which is the eviction order given by Hon. C.C. Kipkorir (SRM) on 1/2/2017 be set aside and be expunged from the record of the subordinate court.

3. That the costs of this appeal and the case below be awarded to the appellant.

3. Before I delve into the issues arising out of the instant appeal, it is only appropriate that I give brief background to the present appeal.

4. The Plaintiff and the defendant in the lower court are now the 1st and 2nd Respondents in this Appeal. The appellant is a purchaser of the land which he purchased from **John Sawenja** who apparently has been mentioned in the decree dated **16/7/1996** (as a seller).

5. The original Plaintiff and the original Defendant had a land dispute and presented their case before **Kiminini Division Land Dispute Tribunal** vide **Land Dispute case No. 33 of 1995**. Upon hearing and determination of the case, the Tribunal pronounced an award in favour of the original Plaintiff which was adopted by the court-Kitale Magistrates' Court as its judgment on **16/7/1996.**

6. I will reproduce the decree verbatim as below:

IN THE SENIOR PRINCIPAL MAGISTRATES' COURT AT KITALE

LAND CAUSE NO. 96 OF 1996

ANTONINA MAKOKHA.....PLAINTIFF

VERSUS

ELIYA MAKOKHA.....DEFENDANT

DECREE

Claim for ownership of 4 (four) acres of land at Birunda at Kiminini Division on Trans-Nzoia District.

BY JUDGMENT of this Court dated 16/7/1996

IT IS ORDERED AND DECREED that following the award of Panel of Kiminini Division Land Dispute Tribunal filed in Court on 7th July, 1996 the same is adopted as judgment of the court as follows:

1. THAT, the person who occupied the ½ (Half) Acres of Land which was sold to him by John Sawenja should vacate the said land immediately so as FRANCIS WANYAMA to occupy 4 (four) acres of the same land at Birunda which was exchanged by the plaintiff to him with 4 (four) acres at Kamukuywa.

Dated at Kitale this 16thJuly, 1996

L.N. MUTENDE (MS)

RESIDENT MAGISTRATE

7. It is this decree that was due for execution from **16/7/1996** when it was delivered by the honourable court. Unfortunately, in **2003**, the original Plaintiff (decree holder) passed on and later in the same year the original defendant also passed on.

8. The 1st Respondent in this case intimates that the reason why the decree was never executed is because there was no administrator of the estate of the deceased decree-holder who could proceed with execution of the decree as against the Appellant herein. It was only in **2015** when she obtained *Ad Litem* Letters of Administration and was substituted in place of the plaintiff decree holder. Thereafter she applied for execution of the decree which application was allowed. That resulted to the filing of the application dated **4/4/2017** seeking to vary or set aside the eviction order, which application was dismissed thus precipitated the appellant to file the instant appeal.

9. For purposes of arguing the appeal, this court gave directions that the same be canvassed by way of written submissions. Unfortunately as I write this judgment, the Respondents have not filed their submissions. However, the Appellant filed his on **26/1/2021** which I have considered.

10. I am now tasked to determine whether the Learned Senior Principal Magistrate erred in law and in fact in failing to find and hold that the decree issued on **16/7/1996** in the Subordinate Court is stale and time-barred and could not be executed against the appellant.

11. This being a first appeal, the role of this court

12. As to whether the execution of the decree arising from the judgment delivered on **16/7/1996** is time barred, a reading of **Section 4 (4)**of the **Limitations of Actions Act** states 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".**

13. The purpose of the above section is to eradicate stale claims and stop the vexing of litigants. Where a judgment creditor elects to sleep on a decree, he is estopped from waking up from his slumber after **12 years** have lapsed to claim his right. The law bars such claims.

14. In the case of **Willis Onditi Odhiambo vs. 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 that 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."**

15. Consequently in the **Willis Onditi** case above the suit for declaratory orders seeking to execute a decree after **12 years** was held to have been rightly dismissed.

16. Further in the case of **Hudson Moffat Mbue vs. Settlement Fund Trustees & 3 Others ELC No. 5704 of 1992(O.S),[2013] eKLR the applicant sought by a motion dated 3/2/2004 to execute a** court's decree given on **27/9/1995** by way of execution of the land transfer documents by the Deputy Registrar of the court. The application was unopposed and the applicant conceded that the 3rd defendant had died before executing the transfer documents. While granting the application, **Mutungi J**. had this to say:

> **"The plaintiff has deposed that the 3rd defendant has since passed on and he is unaware who the personal legal representatives of the defendant are. There is no evidence that the decree of the court has been appealed from, varied or reviewed. Court orders and decrees are intended to be complied with and the plaintiff is but seeking compliance with the court order or the decree of the court. By granting the orders sought the court will be effectuating the orders of the court."**

17. In the instant case the 1st Respondent also intended to execute the Judgment and to do so apparently out of time. Ordinarily, the judgment delivered on **16/7/1996** should have been executed on or before **17/7/2008**. The Court in **Willis Onditi Odhiambo** case (supra) was emphatic that **Section 4(4)** governs execution of judgments and decrees.

18. In the instant case, execution commenced in **2017**. As at the time of obtaining an eviction order dated **1/2/2017** against the appellant almost **21 years** had lapsed since the decree was issued by the Court. Notably, both the Plaintiff and the defendant died in **2003** that translates to seven **(7) years** after the decree was issued.

19. As a general rule, upon the death of any of the party to a suit, the suit abates after **12 months** from the death of the party. However an examination of **Order 24 Rules 3, 4** and **7** suggests that abatement does not apply to instances where the suit is at the execution stage.

20. **Order 24 Rules 3(1) and 3(2) , 4** and **7** provides that:

> **(1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.**
>
> **(2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:**
>
> **Provided the court may, for good reason on application, extend the time.**

21. **Order 24 Rule4(1)**provides that:

> **4(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.**
>
> **2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.**
>
> **(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.**

22. **Order 24 rule 7** states:

> **(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.**
>
> **(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.**

23. However, there is an exception to the general rule provided for by **Order 24 Rule 10** it provides:

> **"Nothing in rules 3, 4 and 7 shall apply to proceedings in execution of a decree or order."**

24. It is clear from the provision that the suit cannot abate at the execution stage where a party to the suit is deceased. It follows therefore in my considered view that there is no need for substitution of the judgment debtor where the judgment debtor dies; the decree holder can execute upon any party who is intermeddling with the property.

25. In the case of **Agnes Wanjiku Wang'ondu V Uchumi Supermarket Ltd [2008] eKLR,** the Court in its analysis of the provisions of **Order 24** and **Order 31** of the **Civil Procedure Rules** held that the requirement for substitution does not apply to proceedings in "execution of an order"; that while **Order 30 Rule 1 (**now **Order 31 Rule 1)** states that it shall not ordinarily be necessary to make them parties to the suit, it does not say that they cannot be made parties to the suit. So, in appropriate circumstances, the personal representative can and should be allowed to be enjoined in the suit.

26. **Article 159 (2) (d)** discourages overreliance on technicalities at the expense of substantive justice.

27. The position in the **Dhulla Harichand** case was adopted in **Mueni Kiamba v Mbithi Kimeu Kimolo [2017] eKLR. The court in the latter case was more explicit on the two options open to a person wishing to execute where a decree holder is deceased. The appellant in the latter case was the defendant. At the execution stage the objection was raised that the deceased plaintiff had not been substituted.** Referring to **Order 24 rule 10** of the **CPR** the Court held as follows:

> ***"I find there is wisdom in the above provision in that matters that have reached execution stage should be allowed to proceed without the need for substitution of deceased parties. This goes a long way in ensuring the overriding objective of the Civil Procedure Act and Rules namely the timely and expeditious determination of disputes between parties. Hence, it is my considered view that it was not mandatory to substitute the deceased decree holder at the execution stage and therefore the learned trial magistrate misapprehended the law when he ruled that the non-substitution of the decree holder was fatal to the suit.…"***

28. The proper position in law is therefore that it is not mandatory to substitute a deceased decree holder. If the non-execution of the decree was premised on the demise of the judgment debtor *per se*, and the **12** year limitation period expired during the lifetime of the judgment creditor, a court would having regard to the provisions of **Order 24 Rule 10** be justified to reject the attempted execution and declare the decree stale. The decree holder should not wring his hands in helplessness owing to the demise of a judgment debtor or undertake lengthy succession proceedings to facilitate substitution. He should by simply accessing the premises take possession while holding the decree as evidence of his right as against the whole world, which would terminate the execution.

29. The application of **Order 24 Rule 10** and the application of **Section 4(4)** of the **Limitation of Actions Act** are two very different things.

30. In this court's view **Order 24 Rule 10** is purely calculated to expedite the progression of execution without mandatory substitution to get rid of suits that have been concluded, in which there is no substantive dispute remaining to be determined. The exclusion of mandatory substitution means that parties would not be needlessly held up in court corridors and take up time meant for hearing of other cases on the merits.

31. On the other hand **Section 4(4)** of the **Limitation of Actions Act,** as far as it relates to decrees is meant to bar the execution of stale decrees that have lasted more than **12** years without execution.

32. The execution process in this case stalled due to the demise of the original plaintiff who died in **2003,** that is **7** years into the **12** year limitation period within which the decree was to be executed. Representation to her estate was raised in the year **2015**. Between **2003** and **2015** therefore the decree lay in limbo. Within **2 years** of the grant of succession, the appellant had been substituted for the deceased

original plaintiff and obtained an eviction order in execution of the decree. If the period when no representation to the deceased's estate is not included in the computation, that obtainance of an eviction order marked the **9th** of the **12** year limitation period.

33. The question that must be then asked is this: is the **Section 4(4)** intended to bar both the execution of decrees in which the judgment holder though alive has failed to execute as well as decrees in which the decree holder dies before the **12 year** limitation period is over and his estate remains without succession till the end of the 12th year? The further question that arises, as in the instant case is: if the decree holder dies and is unavailable to execute his decree and for example no next of kin becomes aware of the need to execute the decree or takes out letters of administration, and so his estate remains unadministered, would a valid decree of the court become incapable of being executed after the lapse of **12 years** purely on account of death, a matter not within control of either the decree holder or their kin?

The finer details of the above two questions lie in the following question: in the vacuum occasioned by death of a decree holder, is the period between the date of death and the date representation is raised to his estate be deemed as part of the **12 year** limitation period stipulated in **Section 4(4).**

34. An apparently simplistic approach to **Section 4(4)** would be as follows: that bearing in mind that by the decree his estate obtained accrued rights of which the judgment debtor is aware, this court is of the opinion that it should not owing to the simple reason of "*impossibility*;" that however when representation is raised to his estate the remainder of the **12 year** limitation period should ordinarily start running, for the reason that the vacuum has been filled by his representative. One could be convinced that though the provisions of **Order 24** may not expressly evince the fact, there is a world of difference between a situation where the *decree holder* dies and that where the *judgment debtor* dies. In the former if representation is not raised to his or her estate, there would be nobody to execute. In the latter, the demise entitles the decree holder to simply, in a case of land, take possession of the property, using the decree as evidence of his claim against all the world. If the immediately foregoing discourse were adopted in the instant case, the inevitable finding would be that the non-execution of the decree within the consecutive **12 years** following its issuance was due to the death of the plaintiff, a matter that lay beyond the control of any of the parties; consequent to that finding would be its corollary that the issue of time-bar under **Section 4(4)** of the **Limitation of Actions Act** should not apply in the instant case.

35. In dismissing the appellant's application, the learned Magistrate had stated as follows:

> **"If the defendant died on 14/3/03 that was 7 years into the time within which the decree was to be executed. I concur that since then (time) stopped running and against the deceased and therefore cannot be the basis upon which the personal/legal representative should be denied execution of the decree."**

36. The further persuasion for upholding the trial magistrate's decision would have been that the appellant herein has never filed any suit for any declaration regarding his rights over the suit land; that he has nothing so to speak save his claim that the land was sold to him by one John S. Sawenja, a person who was not a party to the suit leading to the decree; that it would not have been hard to find that the limitation period ceased running from the date the decree holder died and thus the execution process stalled and that it is only when the personal representative was appointed that time started running, that is in **2015**. As such, the **12** year period would not have lapsed at the time the application was presented before the trial court; that thus the decree was not statute-barred and that the 1st Respondent cannot be barred from enjoying the fruits of the judgment on that ground. In that case this court would have declined to interfere with the decision of the learned Magistrate.

37. That however is not the proper legal position at present in Kenya.

38. In construing the true interpretation of **Section 4(4)** of the **Limitation of Actions Act** the Court of Appeal in a very comprehensive judgment in the case of **M'Ikiara M'Rinkanya & Another V Gilbert Kabeere M'Mbijiwe [2007] eKLR** considered number of English decisions on the meaning of the word "*action*" and observed that from that comparative survey of the English case law, English courts generally construed the word "*action*" both in the erstwhile **Section 2 (4)** of the English **Limitation Act, 1939** and **Section 24 (1)** of the English **Limitation Act, 1980** to mean a substantive and fresh action on the judgment excluding procedural proceeding for the enforcement of a judgment. The Kenya Court of appeal analysed the House of Lords decision in **Lowsley vs Forbes [1999] 1 AC 329** and found that the House of Lords had following a study of the **Report** of the **Law Reform Committee on Limitation of Actions (1977) CMND 6923)** concluded that the law reform in England was primarily based on the observation that actions on judgment were rare and that hence there would be no need for the special limitation period of **12 years** for bringing an action on a judgment and that:

> ***"All forms of execution were to be removed from the sphere of limitation and instead made subject to a discretionary bar after six years."***

39. However, the Kenya Court of Appeal in **M'Ikiara M'Rinkanya (supra)** held that in Kenya where such specific element of law reform on the issue is lacking, the legal position remains that all post-judgment proceedings including originating proceedings and interlocutory proceedings for execution of judgment are statute barred after **12** years, and the English position can not be followed as it would be tantamount to importing English statutes into local law and in usurpation of the powers of the Legislature.

40. The further reason for holding that all action on judgment after **12** years is statute-barred in the **M'Ikiara M'Rinkanya (supra)** is that **Section 7** of the **Limitation of Actions Act** still exists and excluding action in execution of judgment from limitation under **Section 4(4)** would not resonate but would in fact conflict with the doctrine of adverse possession embodied in **Section 7** which our justice system upholds to date. **Section 7** provides that:

> **"An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."**

41. The Court of Appeal stated as follows in **M'Ikiara M'Rinkanya (supra)**:

> **"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."**

42. This court is according to the doctrine of stare decisis bound by the holding of the court in the **M'Ikiara M'Rinkanya case (supra)**.

43. From the above observations it is clear that the predicament of successors to decree holders whose predecessors die prior to full execution and before expiry of **12 years** from the date of judgment is quite complicated when they obtain grants to the deceased's estate after the mandatory **12 year** statutory limitation period computed from the date the judgment became enforceable has lapsed; they are absolutely barred by **Section 4(4)** of the **Limitation of Actions Act** from executing such judgments.

44. This court recommends a comprehensive law reform as that in England that will grant courts discretion to allow execution upon the occasional action being lodged beyond the **12 year** limitation period to address situations such as the respondent in the instant appeal finds herself in.

45. In the final analysis, I find that the appeal before me has merit. Consequently, the appellant's appeal is allowed. The ruling and order dated **23/7/2018** are hereby set side and substituted with an order quashing the execution proceedings commenced against the appellant herein as they are of no legal effect since they are time-barred.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 24TH DAY OF JUNE, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.