



**Thiru v Cannon Assurance (K) Limited (Miscellaneous Application E154 of 2023)
[2024] KEHC 83 (KLR) (Commercial and Tax) (17 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 83 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E154 OF 2023**

**A MABEYA, J
JANUARY 17, 2024**

BETWEEN

ALEX KIARIE THIRU PLAINTIFF

AND

CANNON ASSUARANCE (K) LIMITED DEFENDANT

JUDGMENT

1. The applicant took out an Originating Summons dated 12/4/2023 under Order 37 rule 4 of the [Civil Procedure Rules](#) 2010 and section 3A of the [Civil Procedure Act](#).
2. The Summons sought a declaration that the judgment delivered by Justice P. Kihara Kariuki in Civil Case No 731 of 2003 has since expired and therefore unenforceable pursuant to section 4(4) of the [Limitation of Actions Act](#), Cap 22 Laws of Kenya. That the defendant be ordered to execute a discharge of charge dated 24/10/1995 over the property known as L.R.NO Dagoretti Thogotto/447 and release the same to the plaintiff. That the defendant be restrained from transferring, charging or disposing off the plaintiff's title in the said property.
3. The Summons was premised on the grounds set out on its face and the plaintiff's supporting affidavit. The plaintiff contended that in or about 1995, he applied for a loan of Kshs.1,000,000/- from the defendant but the defendant only advanced Kshs.750,000/- creating a legal charge on L.R No. Dagoretti/Thogoto/447 ("the suit property").
4. A dispute arose in respect of the said borrowing and the defendant instituted Milimani Civil Case No. 731 of 2003, Alex Kiarie Thiru vs. Cannon Assurance. The defendant counterclaimed against the plaintiff and on 12/11/2010, judgment was entered in favor of the defendant for Kshs. 4,026,033/- together with interest at court rates from 1/8/2003.



5. That the said judgment has never been executed and was now not capable of being executed against the plaintiff by dint of section 4(4) of the *Limitation of Actions Act*. According to the plaintiff, the defendant was required to make an election on the remedies available to it and since it preferred to sue for the amount, it lost the right to exercise its statutory power of sale in respect to the outstanding amount.
6. The defendant opposed the suit vide a replying affidavit dated 22/6/2023 sworn by Esther Waiya, its legal officer. The defendant admitted the fact of advancement and the legal charge over the suit property. That the plaintiff failed to service the loan and judgment was entered against him in its favor. That however, the defendant faced difficulties in executing the said judgment as the plaintiff went into hiding and only resurfaced 12 years later to file the present suit.
7. It contended that section 90(3) of the *Land Act* did not impose any requirement that the defendant was only entitled to choose one remedy for realizing the debt. That initially, its desire was to sell the suit property but was forced to file a counterclaim after the plaintiff sued it. That for the charge to be discharged, the plaintiff ought to pay the outstanding amount.
8. The suit was canvassed by way of written submissions which I have considered. The plaintiff submitted that twelve years had lapsed from the time of judgment was made. It had neither been appealed against nor reviewed. That in accordance with section 90(3) of the *Land Act*, the defendant automatically lost its right to exercise its statutory power of sale in respect to the outstanding amount when it decided to sue the plaintiff for the outstanding amount. It was the plaintiff's submission that the defendant did not have any claim against the plaintiff regarding the facility and the suit property.
9. On its part, the defendant submitted that it had not sought to execute the judgment beyond the twelve years and the court ought to dismiss that prayer. That the plaintiff was obligated to comply with the judgment without waiting for execution to issue. It was further submitted that section 90(3) of the *Land Act* did not bar the defendant from pursuing the recovery of the defaulted money as it could choose from the options stated therein. That the chargees rights under the charge still existed and the judgment did not extinguish this right.
10. I have considered the parties' averments in their respective pleadings and the submissions made. The suit seeks to declare the judgment made on 12/11/2010 unenforceable and to compel the defendant to execute a discharge of charge of the suit property. The plaintiff's contention is that by dint of section 4(4) of the *Limitation of Actions Act* the said judgment can no longer be executed. On its part, the defendant contends that the judgment could not be executed as the plaintiff went into hiding. That section 90(3) of the *Land Act* did not bar it from seeking other remedies with respect to the charge.
11. Section 4(4) of *Limitation of Actions Act* 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.”
12. In this case, the impugned judgment was delivered on 12/11/2010 and the same had not been executed by the time this suit was filed. It is clear that the enforceability of that judgment expired upon expiry of 12 years from the date of its passing, that is on 12/11/2022.



13. In *Willis Onditi Odhiambo –vs- Gateway Insurance Co. Ltd (2014)* eKLR, the Court of appeal stated: -

“In other words, the appellant wanted to execute the said decree against the respondent out of time. Execution of judgments and/or decrees is governed by section 4(4) of the *Limitation of Actions Act* which is in the following terms-

“4(4) an action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered”.

The judgment which the appellant sought to execute was passed on 26th August, 1996. The judgment should therefore have been executed on or before 27th August, 2008”.

14. In the present case, it is not in dispute that the impugned judgment is over 12 years. The defendant’s contention is that the plaintiff had gone into hiding after the passing of the judgment. That may be so but the defendant could have attached the suit property in execution of that judgment. The suit property must not have been hidden from the defendant. It must have remained available to be attached and sold in execution of the decree. To that extent, the judgment is stale and cannot now be enforced.

15. The next issue is, whether, the defendant is barred from enforcing the other remedies under section 90(3) of the *Land Act*. That section provides for remedies under the charge as follows: -

“(3) If the chargor does not comply within ninety days after the date of service of the notice under, subsection (1), the chargee may—

- (a) sue the chargor for any money due and owing under the charge;
- (b) appoint a receiver of the income of the charged land;
- (c) lease the charged land, or if the charge is of a lease, sublease the land;
- (d) enter into possession of the charged land; or
- (e) sell the charged land;

16. In *David Karanja Kamau v Harrison Wambugu Gaita & another* [2020] eKLR, the court held that: -

“Subsection (3) provides for the options available to the chargee if the chargor does not comply within the period given. The chargee may (a) sue the chargor for any money due and owing under the charge; (b) appoint a receiver of the income of the charged land; (c) lease the charged land, or if the charge is of a lease, sublease the land; d) enter into possession of the charged land; or (e) sell the charged land. Subsection 4 provides for other remedies available to the chargee where the charge is over land held under customary rights or is community land.

A proper reading of section 90(3), therefore, shows that the 2nd defendant, as chargee, was required to make an election on which of the remedies to go for. The subsection uses the word or which means the remedies are disjunctive and not conjunctive, distinct and not cumulative. The 2nd defendant could only choose one remedy and not more.

In this regard, the 2nd defendant having elected to sue for the outstanding loan amount and having obtained a judgment and decree in its favour, it lost its right to exercise the statutory



power of sale. The 2nd defendant could not purport to exercise a right that was extinguished the moment it elected to sue for the outstanding amount.”

17. I am in agreement with the foregoing rendition of the law. In its wisdom, the Legislature was clear in its mind when it set out the remedies of the charge in section 90(3) of the *Land Act*. If its intention was that the remedies be cumulative and not disjunctive, it would have used the term and instead of or. By using the disjunctive term, the Legislature intended that the charge elects either of the remedies. A chargee cannot purport to exercise all the said remedies or any of them at the same time. That would be oppressive and unlawful.
18. Accordingly, the defendant had the option of suing for the amount owed or selling the suit property to realize the amount owed. By filing a counterclaim, the defendant opted to sue and judgment was delivered in its favour. Having slept on that judgment for 12 years without executing it, the defendant had opted to sleep on its rights. The same has been caught up with limitation and loss shall lie where it has fallen.
19. By electing to sue, the defendant waived its right to recover the money from the sale of the property. In this regard, the plaintiff has made out a case for discharge of the charge. I find merit in the Originating summons and the same is allowed as prayed.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JANUARY, 2024.

A. MABEYA, FCI Arb

JUDGE

