



Terrazzo Enterprises Limited v Pavement Club N Café & 2 others (Civil Suit 568 of 2008) [2024] KEHC 2674 (KLR) (Commercial and Tax) (15 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2674 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 568 OF 2008
A MABEYA, J
MARCH 15, 2024**

BETWEEN

TERRAZZO ENTERPRISES LIMITED PLAINTIFF

AND

PAVEMENT CLUB N CAFÉ 1ST DEFENDANT

BLUE ELEPHANT LIMITED 2ND DEFENDANT

SHAILESH PATEL 3RD DEFENDANT

RULING

1. The plaintiff/decreed holder filed a notice to show cause on 11/8/2022. The 3rd defendant filed the application dated 19/5/2023 seeking a stay of the proceedings pending the hearing and determination of Civil Appeal E163 of 2023 Shalesh Patel & Another v Bank of Africa & 2 others.
2. When the application came up for hearing, the court directed the parties to file written submissions on the issue whether the decree issued 14 years ago was capable of being executed.
3. The plaintiff filed submissions dated 6/11/2023. It was the plaintiff's submission that according to section 4(4) of the *Limitation of Actions Act*, the word 'may not', implied that the Court could still exercise its discretion and entertain an action that had been brought beyond 12 years.
4. Counsel submitted that there had been no execution for the summary judgment in favour of the plaintiff since the bankruptcy orders in Bankruptcy Cause no 5 of 2010 had automatically stayed the execution of the decree. It was the plaintiff's submission that the bankruptcy proceedings should not be used to deny the plaintiff its right to its dues.



5. The 3rd defendant submitted that according to section 4(4) of the *Limitation of Actions Act*, a party could not execute a judgment after expiration of 12 years. That the execution that was being sought by the plaintiff was time barred and thus void ab initio. That the existence of a bankruptcy order did not stop the time running for execution since bankruptcy proceedings did not fall under the exemption for limitation period.
6. I have considered the averments by the parties and their written submissions. The issue for determination is the meaning and effect of section 4(4) of the *Limitation of actions Act*. It 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.”
7. In *Hudson Moffat Mbue v Settlement Fund Trustees & 3 others* (ELC NO. 5704 of 1992 (OS), while considering the application of section 4(4) of the *Limitation of Actions Act*, the court observed: -

“What I understand the law to be is that once a judgment has been rendered, execution of that judgment must be commenced within the 12year period otherwise you cannot obtain a judgment and fail to do anything about it and after 12 years have expired seek to execute the same. Section 4(4) of the *Limitation of Actions Act* will bar you from carrying on with such execution”.
8. The brief history of the matter is that, on 16/10/2009, summary judgment was entered in favour of the plaintiff against the defendants as per the plaint. The 3rd defendant filed bankruptcy proceedings and a receiving order was issued against it. That order was finally vacated on 6/5/2023.
9. Thereupon, the plaintiff filed a notice to show cause and the 3rd defendant filed an application for stay of proceedings pending the hearing and determination of Civil Appeal E163 of 2023 *Shalesh Patel & Another v Bank of Africa & 2 others*.
10. The plaintiffs position however was that the execution had been halted by the bankruptcy proceedings and should therefore not be prevented from enjoying the fruits of its judgment. The question therefore is whether time for execution stopped running after the receiving order was made.
11. The nature of bankruptcy proceedings is to protect a bankrupt who is unable to pay his debts by liquidating the assets. Once the receiving order is granted, the plaintiff is barred from executing any order against the bankrupt. This is what obtained here until the receiving order was discharged in May, 2023.
12. In *M'ikiara M'rinkanya & Another v Gilbert Kabeere M'mbijiwe*[2007] eKLR, the Court of Appeal held: -

“The main ground of appeal is that the learned judge failed to appreciate the meaning and essence of section 4 (4) of the Act and the authority cited to him. This appeal raises the question of the true construction of section 4 (4) of the Act. Firstly, there is the problem of the construction of the words “may not” in the phrase:- “An action may not be brought”. The learned Judge construed the phrase “may not” as giving the court discretion whether or not to allow the enforcement of a judgment after the expiration of twelve years from



the date of delivery. But does the court have any discretion in law? It is noticeable that the phrase “may not” is not confined to section 4 (4) of the Act only. The same phrase is used throughout in Part II of the Act in relation to the other causes of action. It is also used in the whole of section 4 of the Act in relation to actions founded on contract and other related actions. It is used in section 4 (2) of the Act in relation to actions founded on tort and in section 4 (3) regarding actions for accounts. It is also used in section 7 in relation to actions to recover land and in section 8 in actions to recover rent. It is again used in relation to other causes of action in sections 10 (3), 19 (1), 19 (2) of the Act. The use of the phrase “may not” does not however give the court absolute discretion whether or not to apply the limitation periods prescribed for various causes of action. If the legislature intended to give absolute discretion to the courts it would have expressly provided so in the Act. The Act should be construed as a whole in order to discover the legal meaning of the phrase. After prescribing limitation periods for various actions, the legislature provided safety mechanism or escape routes from the rigors of the Act to avoid injustice by providing for the extension of limitation periods in the restricted cases specified in part III of the Act. These include cases where a person to whom the cause of action accrues is under disability. Indeed, section 3 of the Act provides that part II of the Act which specifies various limitation periods is subject to part III which provides for extension of the periods of limitation.

It provides: ‘This part is subject to part III which provides for the extension of the periods of limitation in the case of disability, acknowledgment, part payment, fraud, mistake and ignorance of material facts’.

If the legislature used the phrase “shall not” instead of “may not” in relation to causes of action specified in part II of the Act, then, part II would have been repugnant to part III.

The learned judge erred in construing the phrase “may not” in isolation and thus arrived at a wrong finding. It is an erroneous construction of section 4 (4) of the Act or other sections in part II where the same phrase is used to say that the court has a discretion. The true construction in our respectful view, is that, the periods of limitation prescribed by the Act in part II are not absolute as they are subject to extension in cases where a party brings himself squarely within the ambit of the provisions of part III.”

13. In view of the above, the period of limitation is not absolute and is subject to extension as provided for under Part III of the Act. In the present case, the plaintiff has not demonstrated it falls in any of the extensive exclusions set out in that Part. I do not read the portion on disability to include legal disability in order to extend the time fixed under section 4(4) of the Act.
14. As harsh as it may seem, I find that notwithstanding the existence of the receiving order, time did not stop running and after the expiration of 12 years, the plaintiff could not execute the decree issued in 2009. The judgment had been caught by limitation.
15. Accordingly, I find and hold that, the decree herein being over 12 years old is incapable of being executed. I hope the parties would seek the wisdom of a higher Court on this.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MARCH, 2024.

A. MABEYA, FCI Arb

JUDGE

