



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO. 19 OF 2018**

**JAPHETH KIBIWOTT RUTO (Suing as legal personal representative of the Estate of**

**KIBIWOTT ARAP MWOLOMET (Deceased).....PLAINTIFF**

**VERSUS**

**VIRGINIA NJERI MAINA.....DEFENDANT**

**VINCENT RONGEI KOTOKOTO.....DEFENDANT**

**RULING**

**The Application**

1. By a Notice of Motion dated 24/5/2021 and filed in court on 26/5/2021 brought under **Section 3** and **3A** of the **Civil Procedure Act**, **Order 2 Rule 15(1) (e)** and **(d)** of the **Civil Procedure Rules**, and **Section 4 (4)** and **Section 7 of Limitation of Actions Act**, the 2<sup>nd</sup> defendant/applicant sought for the following orders:

**(1) That this honourable court be pleased to order to be struck out the plaintiff's amended plaint dated 19/2/2021 on the grounds that:**

**(i) It may prejudice, embarrass or delay the fair trial of this suit.**

**(ii) It is otherwise an abuse of the process of the court.**

**(2) That this honourable court be pleased to order that this suit is statute barred and the same be struck out.**

**(3) That the plaintiff be condemned to pay costs of this application and the entire suit.**

2. The application is supported by the affidavit sworn on 24/5/2021 by the 2<sup>nd</sup> defendant. The grounds on the face of the application are that neither the 2<sup>nd</sup> defendant nor his father were party to **Kitale SPM Land Case No. 52 of 1997**; that the decree dated 11/9/1997 was not only a lawfully issued but also cannot be enforced owing to **Section 4 (4)** of the **Limitation of Actions Act**; that the respondent inherited two acres from his father upon signing the final area list forwarded to the authorities on 3/10/2005 and has never challenged the certified area list since then; that the certificate of confirmation of grant to the estate of the respondent's father confers upon the respondent **Sinyerere/Sitatunga Block 7/Chepkoiyo/81** and therefore there is no evidence of his ownership **Sinyerere/Sitatunga Block 7/Chepkoiyo/82**.

**The Response**

3. The plaintiff filed Ground of Opposition and oppose the application dated 24/5/2021 on the following grounds:

**(i) The issues raised can only be properly determined on a full hearing.**

**(ii) The application does not meet the prerequisites of striking out of the pleadings.**

**(iii) The application is an afterthought, premature and an abuse of the process of the court.**

## Submissions

4. On **16/6/2021** the court directed the application be disposed of by way of written submissions. I have perused the file record and find no submissions filed on behalf of the respondent but the submissions of the applicant were filed on **29/6/2021**.

## Analysis and Determination

5. The twin issues that arise from the instant application are as follows:

**i. Whether the instant suit is statute barred and an abuse of the process of the court; and**

**ii. Whether the suit should be struck out.**

6. The amended plaint states that Kibiwot arap Mwolomet (deceased) owned **27.4 acres** of land in Chepkoiyo Farm and his ownership of the same was confirmed in **Kitale Principal Magistrate's Court Land Case Number 52 Of 1997- Kibiwot arap Mwolomet vs Samuel arap Too**; that after the judgment in that case the family of the late Samuel arap Too sold to the defendants among others portions of the suit land without the plaintiff's consent of knowledge; that the defendants have already obtained title deeds to their portions; that neither Samuel arap Too or his family had any disposable interest in the suit land; that the plain tiff therefore claims for two declarations, namely, that the registration of the various parcels in respect of each of the defendants is unlawful and that he is the rightful owner of all the said parcels.

7. The 2<sup>nd</sup> defendant pleaded Limitation under **Cap 22** in the amended defence filed on **9/3/2021**.

8. Among other things the 2<sup>nd</sup> defendant avers that he was not party to the first suit in the lower court and that in any event besides the decree relied on not being capable of conferring the plaintiff any legal right against him, it is time barred.

9. The decree in issue reads as follows:

**"Claim for 27.4 acres from Chepkoiyo Farm Sinyerere.**

**By judgement of this court dated 4<sup>th</sup> day of July 1997 it is ordered and decreed that following the decision of the elders formally (sic) filed in this court on the 16<sup>th</sup> day of June 1997 the said award is hereby confirmed as judgment of this court and so orders as follows:**

**1. The defendant Samuel arap Too do move out of the plaintiff's 27.4 acres.**

**Dated at Kitale this 4<sup>th</sup> day of July 1997."**

10. It appears that the plaintiff's case is purely premised on the decree dated **4/7/1997** above. That decree ordered *Samuel arap Too* to vacate the suit land. It appears that instead of vacating the suit land Samuel and/or his family sold some of the land to the defendants.

11. The first observation is that neither of the defendants named in this suit is named as a defendant in the earlier suit and neither is Samuel arap Too named as a defendant in this suit and without more, I agree with the 2<sup>nd</sup> defendant that the decree has no effect on the defendants' ownership of the land subject matter of the instant suit.

12. The second issue that the applicant raises is that the decree is time barred. He cites **Section 4(4)** of the **Limitation Of Actions Act Cap 22** which 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. It is clear that either the applicant or his father should have enforced the judgment of the lower court within **12 years** from the date of issue of the decree, that is, by **3<sup>rd</sup> July 2012**. The instant suit was filed on **14/2/2018** long after the expiry of the **12 year** period provided limited by **section 4(4)** of **Cap 22**.

14. Going by the judgment of the Court Of Appeal in **M'Ikiara M'Rinkanya & Another V Gilbert Kabeere M'Mbijiwe [2007] eKLR** and this Court's observations in **Kitale ELC Appeal No. 9 OF 2018 - Isaac Olang Solongo Vs Gladys Nanjekho Makokha (Being the administrator of the estate of Antonina Makokha (Deceased) and Eliya Makhokha 2021 eKLR**, the decree that the plaintiff relies on is expired and can not, even if the defendants were deemed to have been parties in the earlier suit in which it was obtained, be enforced for the recovery of land now registered in their names.

15. In the **Isaac Olang Solongo case (supra)** the 2<sup>nd</sup> respondent had sought to enforce a decree that was **16 years** old against the appellant. This court observed that the mandatory requirement by law that a decree must be enforced within a **12 year** period was harsh where extenuating circumstances present themselves and recommended a review of the provisions of **Section 4(4)** of the **Limitation of Actions**

Act, stating as follows:

**“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.”**

**16.** This court declined to uphold the execution of the decree in the **Isaac Solongo case (supra)**. In the instant case the decree is even older. It is clear that it can not also be enforced.

**17.** Consequently, as the decree relied on by the plaintiff was not enforced within **12 years** of its issuance, the instant suit is an abuse of the process of the court and cannot lie. The application dated **24/5/2021** has merit and it is therefore granted in terms of **prayers no 1(i) and (2)** thereof. I therefore hereby strike out the amended plaint dated **19/2/2021** with costs to the defendants. This case shall be marked as finalised.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 5<sup>TH</sup> DAY OF AUGUST, 2021.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**