



**Wanjoh & 2 others & another ((Suing as the administrators of the Estate of Ethan Kaguanyo)) v Gachiengo ((The administrator of the Estate of Gachiengo Gichuhi)); Theuri (Interested Party) (Civil Suit 303 of 1999) [2024] KEHC 9349 (KLR) (24 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9349 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL SUIT 303 OF 1999  
HI ONG'UDI, J  
JULY 24, 2024**

**BETWEEN**

**DORCAS NJOKI WANJOHI MICHAEL WANJOHI NDERITU JOSEPH  
WAMBUGU WANJOHI (SUING AS ADMINISTRATORS OF THE ESTATE OF  
DANCAN KAMAU KIMANI) ..... 1<sup>ST</sup> PLAINTIFF**

**MARGARET MUKAMI MAINA ..... 2<sup>ND</sup> PLAINTIFF  
(SUING AS THE ADMINISTRATORS OF THE ESTATE OF ETHAN  
KAGUANYO)**

**AND**

**JANE WANJA GACHIENGO ..... DEFENDANT  
(THE ADMINISTRATOR OF THE ESTATE OF GACHIENGO GICHUHI)**

**AND**

**FELISTER W THEURI ..... INTERESTED PARTY**

**RULING**

1. This ruling is in respect of two applications. The first one is a Preliminary Objection dated 16<sup>th</sup> April, 2024 while the second one is Notice Motion dated 19<sup>th</sup> March, 2024.
2. In the Preliminary Objection the defendant/applicant prays for orders that;
  - i. The execution application is time barred, the decree herein having been issued on 14<sup>th</sup> June 2006.
  - ii. The 12 years contemplated by section 4(4) of the [Limitation of Actions Act](#) have lapsed and no further action can be taken it.



- iii. Consequently, the application before the court is incompetent and an abuse of the court process.
3. In the Notice of Motion the plaintiffs/applicants pray for the following orders;
    - i. That the production and or surrender of the original copy of the Certificate of Lease for Title Number Nakuru Municipality Block 10/19 to the land registrar, Nakuru at the time of registering the transfer from Jane Wanja Gachiengo & Felista W. Theuri to Utubora limited or any other purchaser be dispensed with and the land registrar do register the transfer without its production.
    - ii. That the costs of this application be provided for.
  4. The application is based on the grounds on its face and the affidavit of the 2<sup>nd</sup> plaintiff/applicant sworn on the even date.
  5. He deposed that his advocates pursuant to the orders issued vide the ruling delivered on 23<sup>rd</sup> November, 2023 served the copies of the Sale Agreement and Transfer form to the respondent. However, the respondent declined to receive the said documents and chased the process server away.
  6. He deposed further that the said documents were sent to Ms. Omwenyo & Co, the advocates on record for the respondent but they wrote back to his advocates stating that they had no instructions in the matter. That pursuant to the order of this court issued on 23<sup>rd</sup> November, 2023 he forwarded the Sale Agreement and Transfer to the Deputy Registrar of this court who signed and sealed them.
  7. He went on to depose that the Land Registrar could not register the transfer instrument without the surrender of the original copy of the certificate of Lease for Title Number Nakuru Municipality Block 10/19. Further, that by refusing to sign the transfer documents and surrender the certificate of lease the respondent intended to frustrate the implementation of the decree as she had all along been doing. He added that it was only fair and just that this honourable court dispenses with the surrender of the said certificate of lease at the time of registration of the transfer.
  8. The 2<sup>nd</sup> plaintiff/applicant filed a further affidavit dated 25<sup>th</sup> April, 2024. He deposed that in her affidavit sworn on 9<sup>th</sup> June, 2023 and filed in court on 12<sup>th</sup> June, 2023, the respondent at paragraphs 3, 4 and 6 acknowledged the decree. She further conceded to the sale of Nakuru Municipality Block 10/19 and offered to co-operate. That the delay in selling one half portion out of Title Number Nakuru Municipality Block 10/19 is because it is registered in the names of the respondent and the interested party.
  9. He went on to depose that the delay had further been caused by frustrations by the respondent and the property had since been sold to Utubora Limited as per the agreement of sale and transfer forms signed. All that remained was the registration of the transfer in favour of the purchaser upon order to dispense with the original copy of the certificate of lease at the time of registration.
  10. Both applications were canvassed by way of written submissions.

### **Plaintiffs/Applicants submissions**

11. These were filed by Mutonyi, Mbiyu & Company Advocates on 26<sup>th</sup> April, 2024. Counsel identified three issues for determination by this court.
12. The first issue is whether the decree is time barred. Counsel submitted that the judgment in this case was delivered on 14<sup>th</sup> June, 2006. He cited Section 4(4) of the [Limitation of Actions Act](#) (Cap 22) which



provides that an action may not be brought upon a judgment after the end of 12 years from the date on which the judgment was delivered.

13. Counsel submitted that the court in its judgment established that there existed trust in respect of the two properties held in the name of the defendant/respondent who was a trustee. Further, that they were in the process of recovering the said properties from her pursuant to the provisions of section 20(1) of the *Limitation of Actions Act* which provides as follows:

“None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action:

- a. in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or
- b. to recover from the trustee property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.”

14. The court’s attention was drawn to several cases among them being *Stephens & 6 Others v Stephe & Another* [1987] eKLR where the court held as follows;

“The philosophy underlying the English Limitation Act seems to be, that where confidence is reposed and abused, a defaulting fiduciary in possession of trust property or which he converted to his use, should not be shielded by time bar. So no plea of limitation is available to a fiduciary in such a case. (See section 19 (1) of the Limitation Act 1939). The parliament of Kenya clearly shares that policy and in the *Limitation of Actions Act* (cap 22) enacted a similar provision in almost identical language. Section 20(1)(b) of the *Limitation of Actions Act* (cap 22) provides that; ‘None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust which is an action: to recover from the trustee, trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.’”

15. The second issue is whether the surrender of the original copy of the Certificate of Lease should be dispensed with. Counsel submitted that the defendant/respondent had the Certificate of Lease in her custody and had refused to release the same to the plaintiff as per the orders of this court in the ruling dated 23<sup>rd</sup> November, 2023. Counsel submitted further that it was only fair and just that the surrender of the original title of the subject property be dispensed with so that the already signed transfer can be registered. Further, that the property had already been sold to Utubora Limited and the Agreement for Sale and Transfer of Land already executed by all the parties as per the court order. He urged the court to allow their application as prayed with costs to the plaintiffs/applicants.

### **Defendant’s submissions**

16. These were filed by Githuki King’ara & Company Advocates on 29<sup>th</sup> April, 2024. Counsel submitted that the plaintiffs had conceded that the judgment was delivered on 14<sup>th</sup> June 2006 which was more than 18 years, ago. He equally cited section 4 (4) of the *Limitation of Actions Act* and submitted that the application was time barred.



17. He submitted further that the issue of a matter being time barred goes to the heart of jurisdiction. In support of this position he relied on the case of *Bosire Ogero v Royal Media Services* [2015] eKLR where Aburili J stated s follows:

“The law of Limitation of Actions is intended to bar the plaintiffs from instituting claims that are stale and aimed at protecting defendants against unreasonable delay in the bringing of suits against them.....The issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same. And even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the court cannot entertain a suit which it has no jurisdiction over. See the case of *Pauline Wanjiru Thuo vs David Mutegi Njuru* CA 2778 of 1998...”

18. Counsel went on to submit that it mattered not that there was a mention of the word trust in the judgment and that no action could be brought in execution of a judgment after 12 years from the date the same was delivered. Further, that the application was brought under Section 20 of the Act which was inapplicable and the said provision was an afterthought. He placed reliance on the case of *Moses Kipkurui Bor v John Chirchir* [2019] eKLR and urged the court to strike out the application and allow the preliminary objection with costs.

### **Interested party submissions**

19. These were filed by Waiganjo & Company Advocates on 29<sup>th</sup> April, 2024. Counsel submitted that the judgment which was the subject of the preliminary objection did not fall under the provisions of section 4(4) of the *Limitation of Actions Act*. Further, that time stopped running as long as stay of execution orders were present and that it would not have been proper for the plaintiffs/applicants to proceed with execution when an appeal had been filed challenging the entire trial decision.
20. Counsel cited the case of *Koinange Investments and Development Company Limited v Ian Kahiu Ngethe & 3 others* [2015] eKLR where the Court of Appeal relied on ELC No. 5704 of 1992 (OS) *Hudson Moffat Mbue v Settlement Fund Trustes & 3 Others* (unreported), where it was held as follows;

“What I understand the law to be is that once a judgment has been rendered, execution of that: judgment must be commenced within the 12-year 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..... I hold the position therefore that the expression “An action may not be brought upon a judgment after the end of twelve years from the date on which judgment was delivered ----“ means that unless an application has been brought for enforcement of the judgment and has been completed and/or the same has not been concluded by the time the 12 year, period expires no fresh action for enforcement of the judgment can be brought after the expiry of 12 years from the date of the delivery of the judgment”

21. The court proceeded to find as follows:

“I therefore find that the judgement in question does not fall within the ambit of section 4(4) of the Limitation of Action Act as the execution process commenced before the lapse of 12 years from the date of judgment, and it was forestalled by the court. The Originating Summons is therefore without merit on that grant”

22. Lastly, on whether the preliminary objection had been raised by an advocate properly on record, counsel cited Order 9 Rule 9 of the Civil Procedure Rules which provides as follows: When there is a



change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-

- a. upon an application with notice to all the parties; or
- b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

23. She urged the court to dismiss the preliminary objection with costs.

### **Analysis and Determination**

24. I have considered the application and preliminary objection herein, the affidavits and the submissions by both parties. I will deal with the preliminary objection first since it raises the issue of the application being time barred under the Limitations of Actions Act.

25. It is trite law that for a preliminary objection to be valid; firstly, it must raise a pure point of law. Secondly, the objection is argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. Lastly, an objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. In *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969] EA 696, Law JA stated as follows:

“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

26. In applying the above principles to the objection herein, it is evident that the grounds therein raise points of law. The defendant contends invoking of provisions of section 4 (4) of the *Limitation of Actions Act* in applying for the striking out of the decree issued in favour of the plaintiffs in the judgment rendered against her by this court on 14<sup>th</sup> June 2006.

27. In addressing the same, this court is guided by the provisions of section 4(4) of the Limitation Act, Cap 22 Laws of Kenya which requires that judgment be executed within 12 years of the same being delivered. The said provision 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, in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”



28. The Court of Appeal in the case of Willis Onditi Odhiambo –vs- Gateway Insurance Co. Ltd [2014] eKLR stated as follows: -

“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”.

29. Further in the case of Hudson Moffat Mbue vs. Settlement Fund Trustees & 3 Others (unreported) also relied on by the Interested party, Mutungi J. had this to say;

“What I consider the law to be is that once a judgment has been rendered, execution of that judgment must be commenced within 12 years’ 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 Limitations of Actions Act will bar you from carrying on with such execution”.

30. In this case, execution was to be levied within 12 years after the decree was drawn is in line with the provisions of section 4(4) of the Limitations of Actions Act. The defendant in support of her preliminary objection argued that the plaintiffs had conceded that the judgment was delivered on 14<sup>th</sup> June 2006 which was more than 18 years. She cited section 4 (4) of the Limitation of Actions Act and submitted that the application was time barred.

31. On their part, the plaintiffs argued that they were not able to proceed with execution since they were in the process of recovering the properties which were registered in the defendant’s name as a trustee. They argued further that the rationale behind section 20(1) of the Act is that a trustee who had abused his trust could not be protected by limitation.

32. Upon perusal of the court record, I note that in the judgment delivered on 14<sup>th</sup> June, 2006 the court at pages 17 to 18 held that the defendant was registered as the owner of the suit properties known as Nakuru Municipality/Block 13/166 and Nakuru Municipality/Block 10/19. The said ownership was in trust for the plaintiffs as the administrators of the estate of Duncan Kimani Kamau and Ethan Kaguanjo.

33. The court further ordered that the suit properties be valued by two valuers each appointed by the plaintiff and the defendant. Thereafter, the defendant was to pay the plaintiffs 2/3 value of the said properties. In the event the defendant was unable to buy out the plaintiffs shares, those properties were to be sold and the proceeds divided equally in three portions between the plaintiffs and the defendant.

34. In a ruling dated 28<sup>th</sup> March, 2013 the defendant’s application for stay of execution pending appeal of the judgment delivered on 14<sup>th</sup> June 2006 was dismissed with costs after the court established that there was a delay on the defendant’s part in filing of the appeal and that she had tried selling the suit properties prompting the plaintiffs to place a caveat.

35. In a further ruling delivered by this court on 23<sup>rd</sup> November, 2023 the court ordered that the defendant surrenders to the plaintiffs’ counsel the title for land parcel number Nakuru Municipality Block



- 10/19, sign transfer instruments in favour of the purchaser together with her documents and other relevant instruments as would be required for finalizing of the conveyancing processes. In the event the defendant did not comply the Land Registrar was at liberty to sign the transfer instruments.
36. The plaintiffs have now filed an application dated 19<sup>th</sup> March, 2024 seeking for orders that the production and or surrender of the original copy of the Certificate of Lease for Title Number Nakuru Municipality Block 10/19 to the Land Registrar, Nakuru for the purpose of registration in favour of the purchaser be dispensed with and the Land Registrar do register the transfer without its production. In the affidavit in support of the said application the plaintiffs deponed that the defendant had refused to sign the transfer instruments and the same had to be signed by the Deputy Registrar.
37. In view of the foregoing, it is my opinion that the plaintiffs have adduced sufficient reasons showing why they have not been able to execute the decree from the time the judgment was entered and that it was the defendant who was frustrating the execution process. It is trite law that he who comes to equity must come with clean hands. The defendant having raised the instant preliminary objection, it seems that her hands are not exactly clean considering her conduct which continues to frustrate the execution process.
38. The English Appellate Court in *Lamb & Sons Ltd V Rider* [1948] 2 ALL ER 402 had this to say about execution:
- “.....Execution is essentially a matter of procedure – machinery which the Court can, subject to the rules from time to time in force, operate for the purpose of enforcing its judgments or orders .....”
39. It is well noted that this courts Rulings of 28<sup>th</sup> March, 2013 and 23<sup>rd</sup> November, 2023 have never been over turned. In view of the above, it is my considered view that the preliminary objection herein lacks merit.
40. Moving to the application dated 19<sup>th</sup> March, 2024 I find the issue for determination to be whether the same is merited. A perusal of the court record reveals the contents of the ruling delivered on 23<sup>rd</sup> November, 2023. This is clearly set out at paragraph 35 above. I will therefore not rehash it here.
41. In the case of *Simon Ng’ang’a Njoroge v Daniel Kinyua Mwangi* [2016] eKLR the court observed as follows:
- “I think we are dealing with a unique circumstance where a person who has lost a case, now wants to make it difficult for the successful party to procure registration in his name.
- I think it is only fair that I order the Land Registrar to dispense with the production of the original certificate before proceeding to register the plaintiff as proprietor of the suit property”.

42. The same is the situation in the instant case; the defendant vide the ruling dated 23<sup>rd</sup> November, 2023 was ordered to do certain acts. She was failed to comply with the orders. Section 1A of the [Civil Procedure Act](#) provides as follows:

1A. Objective of Act

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.



- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

Section 1B (1) of the [Civil Procedure Act](#) provides as follows;

1B. Duty of Court

- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-
  - (a) the just determination of the proceedings;
  - (b) the efficient disposal of the business of the Court;
  - (c) the efficient use of the available judicial and administrative resources;
  - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
  - (e) the use of suitable technology.

43. Section 3A of the [Civil Procedure Act](#) provides as follows:

“ 3A. Saving of inherent powers of court.

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

44. In the case of Stephen Gathua Kimani v Nancy Wanjira Waruingi T/A Providence Auctioneers [2016] eKLR the court stated as follows in respect of the overriding objective of the Rules:

“ The double O’s in the phrase Overriding Objectives are what coined what is today famously known as the term Oxygen Principle. In Hunker Trading Company Limited vs Elf Oil Kenya Limited, ([2010] eKLR) perhaps the first case to be grounded on the new provisions the [Appellate Jurisdiction Act](#) (Sections 3A and 3B), it was held that section 1A of the [Civil Procedure Act](#) came in to provide facilitation of just, expeditious and proportionate resolution of civil disputes in Kenya as the overriding objective of the Act.”

45. There is no doubt that the orders issued by this court on 23<sup>rd</sup> November, 2023 were in respect of the property known as Nakuru Municipality Block 10/19 which is the subject of the present application by the plaintiffs. The defendant herein failed to comply with the said orders prompting the plaintiffs to file the instant application seeking the court’s intervention. Clearly the defendant had been in constant defiance of the court orders for a while now and therefore preventing the plaintiffs from enjoying the fruits of their judgement. This conduct by the defendant is unacceptable and shall not be condoned by this court.



46. Considering the prevailing circumstances this court is enabled by the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act to take any measures necessary to expedite the finalization of this dispute between the parties herein. The special circumstances herein and the court's power under the above set out provisions of the Civil Procedure Act ought to be invoked by issuance of the orders sought in the merited application dated 19<sup>th</sup> March, 2024.
47. The upshot is that the preliminary objection lacks merit and is dismissed with costs. On the other hand the application dated 19<sup>th</sup> March, 2024 is merited and is allowed. The following orders to issue:
- i. The production and/or surrender of the original copy of the certificate of lease for Title No. Nakuru Municipality Block 10/19 to the Land Registrar, Nakuru at the time of registering the transfer from Jane Wanja Gachiengo and Felista W. Theuri to Utubora Limited or any other purchaser is dispensed with and the Land Registrar to register the transfer without its production.
  - ii. Costs of the application to the Plaintiffs/Applicants
48. Orders accordingly

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 24<sup>TH</sup> DAY OF JULY, 2024 IN OPEN COURT AT NAKURU.**

**H. I. ONG'UDI**

**JUDGE**

