



Williams v Gachini t/a Ukulima Bora Wholesalers (Civil Case 81 of 2007) [2024] KEHC 9235 (KLR) (23 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9235 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL CASE 81 OF 2007
DKN MAGARE, J
JULY 23, 2024**

BETWEEN

ANTHONY MAINA WILLIAMS PLAINTIFF

AND

**CHRISPUS WAITHAKA GACHINI T/A UKULIMA BORA
WHOLESALEERS DEFENDANT**

RULING

1. This is a ruling in respect of the application dated 13/3/2023. The same was opposed.
2. The plaintiff filed suit on 7/11/2007 claiming a sum of Kshs. 1,350,000/= and interest of Kshs. 2,970,000/= on the principal balance. A request for judgment was filed on 10/12/2007. A decree was issued on 11/3/2008 and a certificate of costs on 11/3/2008.
3. Subsequently warrants were issued for Kshs. 4,463,697/=. On 7/2/2019 a consent was recorded to have the firm of Michuki & Michuki take over from A.F. Gross & Co. Advocates.
4. The said firm made an application dated 31/1/2019. A Notice of Change was filed on 26/3/2019. On 6/9/2019 the firm of Gachiri Kariuki & Company Advocates came on record for the defendant. They sought to set aside the ex-parte judgment. A consent appear to be recorded on payment. Warrants issued thereafter for the balance.
5. An objection was filed by Purity Nyachomba Gacheru dated 20/5/2021. The plaintiff indicated that they did not intend to proceed.
6. An unsigned application was filed on 22/7/2021 seeking to attach Iriaini/Kairia/1795. The defendant stated that he had paid Kshs. 593,175/=. They sought for time to pay. The court granted the order on 17/3/2022.
7. An application dated 13/3/2023 was filed seeking the following orders:-



- a. Spent.
 - b. That there be a stay of sale of the property known as Iriaini/kairia/1795 pending hearing and determination of this application.
 - c. That the consent Order dated 2nd July, 2020 be stayed and/or reviewed pending hearing and determination of this application.
 - d. That the costs of the application be in the cause.
8. The plaintiff filed a replying affidavit on 5/4/2023. He stated that there was a consent on payment.
 9. Parties filed submissions. The Applicant filed submissions and relied on the case of *Jomo Kenyatta University of Agriculture and Technology v Kwanza Estate Limited* (Civil Appeal 64 of 2022) [2023] KECA 700 (KLR) (16 June 2023), where the court considered Covid-19 as factor capable of frustrating performance of a contract. The court cited the case of *Charles Mwirigi Miriti vs Thbananga Tea Growers Sacco Ltd* [2014] eKLR, in which the court revisited the multi-factorial approach set out in *Halsbury's Laws of England*, Vol. 1. 9(1), 4th Edition at paragraph 897 as follows:-

“As subsequently developed, the doctrine of frustration operates to excuse from further performance where:

- (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place; and
- (2) before breach, an event in relation to the matter stipulated in head (1) above renders performance impossible or only possible in a very different way from that contemplated.

This assessment has been said to require a ‘multi-factorial’ approach. Five propositions have been set out as the essence of the doctrine. First, the doctrine of frustration has evolved to mitigate the rigour of the common law’s insistence on literal performance of absolute promises so as to give effect to the demands of justice. Secondly, the effect of frustration is to discharge the parties from further liability under the contract, the doctrine must not therefore be lightly invoked but must be kept within very narrow limits and ought not to be extended. Thirdly, the effect of frustration is to bring the contract to an end forthwith, without more and automatically. Fourthly, the essence of frustration is that it should not be due to the act or election of the party seeking to rely upon it, but due to some outside event or extraneous change of situation. Fifthly, that event must take place without blame or fault on the side of the party seeking to rely upon it; nor does the mere fact that a contract has become more onerous allow such a plea.”

10. The respondent filed submissions and relied on *Flora N. Wasike v Destino Wamboko* [1982-1988] KAR 925; *John Njuguna Mugo v Kenya Commercial Bank Limited* [2018] eKLR; *African Cotton Industries Limited v Rural Development Services Limited* [2021] eKLR; *Ismail Surnderji Hirani v Noorali Kassam* [1952] EACA 131 and *Alice Wanjiru Mugo v Kenya Commercial Bank Limited* [2018] eKLR.



Analysis

11. The problem the defendant is involved is self-inflicted. The Decree had become time barred. However the defendant sought to set the same aside. This was professional suicide. The decree had become time barred by 10/3/2020. Proceedings thereafter were a nullity. There was no decree to enforce. In *Macfoy v United Africa Co. Ltd* [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;
- “If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”
12. The consent and subsequent proceedings were breathing life into a nullity. By dint of Section 4(4) of the *Limitation of Actions Act* there was no decree to enforce having become time barred. The suit cannot be revived. The said section states as follows: -
- “(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, 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. In the circumstances, the proceedings for execution are all a nullity. Though premised on different grounds, there can be no life breadth into a dead decree. I direct that the decree given on 11/3/2008 is time barred and is incapable of being revived. The same is dead and there can be no execution. The file is closed

Determination

14. I make the following orders: -
- a. The proceedings herein are a nullity since the decree became time barred by dint of Section 4(4) of the *Limitation of Actions Act*.
 - b. There can be no execution in this suit.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 23RD DAY OF JULY, 2024.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Opundo for the Plaintiff/Respondent

Ms. Muchai for the Defendant/Applicant

Court Assistant - Jedidah

