Assia Pharmaceuticals Ltd v Kenya Alliance Insurance Co. Ltd (Civil Case 1605 of 1999) [2021] KEHC 19 (KLR) (Commercial and Tax) (21 July 2021) (Ruling)

Neutral citation: [2021] KEHC 19 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE 1605 OF 1999

JM MATIVO, J

JULY 21, 2021

BETWEEN

ASSIA PHARMACEUTICALS LTD ..... APPLICANT

AND

KENYA ALLIANCE INSURANCE CO. LTD ..... RESPONDENT

An application for recovery of interest on a court judgment/decree cannot be made after lapse of six years from the date on which the interest became due.

Reported by Kakai Toili

Civil Practice and Procedure *– execution of decrees and orders - application for recovery of interest on a court judgment - limitation period for recovering interest on court judgments - where the application was brought after the expiration of six years from the date on which the interest became due - whether an application for recovery of interest on a court judgment/decree could be made after lapse of six years – Limitation of Actions Act (cap 22) section 4(4).*

Limitation of Actions *- execution of decrees and orders - arrears of interest arising from a judgment debt - where an action was instituted for the recovery of interest arising from a judgment that was delivered 17 years before the filing of the action - whether the action was time-barred - Limitation of Actions Act (cap 22) section 4(4).*

Brief facts

By an application, the applicant sought an order that the respondent's directors be summoned for purposes of being cross-examined under oath so as to determine their means and assets of satisfying the judgment/ decree issued in the instant case on June 2, 2004 and to produce the defendant's books of accounts and other documentary evidence. The applicant stated that the examination of the directors was necessary to determine the mode of execution of the court's decree. The applicant further stated that on August 13, 2014, the defendant made a part payment of Kshs. 7,507, 243 being part of the accrued interest but had failed to pay the outstanding sum and interest amounting to Kshs. 22,446,656.57.

The respondent filed grounds of opposition stating that the move to cross-examine its directors was premature because the alleged indebtedness was based on an erroneous calculation not agreed upon by the parties or done by the court. The respondent stated that the applicant no longer existed as an entity and therefore it was incapable of prosecuting the instant case. The respondent further claimed that its appeal was heard and decided and the principal amount of Kshs. 7,507,243 was paid. Further, no notice to show cause had ever been issued to the respondent; hence, the current application was premature and bad in law.

The respondent submitted that the decree was extracted 15 years prior to the filing of the instant application which was an application in the nature of execution and thus, it ought to have been preceded by a notice to show cause. Further, the respondent argued that the interest covered a period of over 16 years, hence it was statute barred by section 4(4) of the Limitation of Actions Act which provided that no arrears of interest in respect of a judgment debt could be recovered after the expiration of six years from the date on which the interest became due.

Issues

i. What was the limitation period for recovering interest on court judgments?
ii. Whether an application for recovery of interest on a court judgment could be made after the lapse of six years from the date on which the interest became due.

Relevant provisions of the Law

Limitation of Actions Act, (cap 22)

Section 4 - Actions of contract and tort and certain other actions

(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.

Held

1. The law of limitation was founded upon maxims such as interest *reipublicae ut sit finis litium,* which meant that litigation had to come to an end in the interest of society as a whole, and *vigilantibus non dormientibus jura subveniunt,* which meant that the law assisted those that were vigilant with their rights, and not those that slept thereupon. The law of limitation identified the need for limiting litigation by striking a balance between the interests of the State and the litigant.
2. The last part of section 4(4) of the Limitation of Actions Act provided that no arrears of interest in respect of a judgment debt could be recovered after the expiration of six years from the date on which the interest became due. The judgment was dated June 2, 2004 and a period of 17 years had lapsed since then. From the applicant's own admission, the last payment was made on August 13, 2014. Even though the applicant was not clear, the sum of Kshs. 7,507,243 was in respect of the principal sum. Without providing a clear tabulation as to how the amount being claimed was arrived at, the applicant stated that the amount of Kshs. 24,023,177.60 being pursued comprised of accrued interests.
3. According to section 4(4) of the Limitation of Actions Act, recovery of interest on a court judgment could not be done after the expiry of 6 years. When the Limitation of Actions Act or any other statute prescribed a period of limitation for initiating legal proceedings, any legal action had to be brought within such prescribed period. As it was imperative to give finality to administrative as well as judicial decisions in the interests of justice, no court or tribunal could entertain any petition/suit/application made after the expiry of the limitation period, unless sufficient cause for delay had been proved by the petitioner/plaintiff/applicant. Therefore, those who slept over their rights had no right to agitate for them after the lapse of the prescribed period.

4. The Limitation of Actions Act provided the limitation periods for different claims. Regarding claims for interests on court judgments, it provided six years from the date the interest became due for actions relating to arrears of interest with regard to a judgment debt. The word "action" in section 4(4) of the Limitation of Actions Act had been judicially construed to include execution proceedings. The use of the word "may" meant that the provision was not couched in mandatory terms.
5. The periods of limitation prescribed by the Limitation of Actions Act were not absolute as they were subject to extension in cases where a party demonstrated sufficient cause for the extension. Despite that clear position of the law, and notwithstanding the fact that the respondent in its grounds of opposition filed on June 2, 2020 cited section 4(4) of the Limitation of Actions Act, the applicant never took cue from the objection to cure the defect by seeking an extension from the court. Instead, it opted to prosecute its application which had been pending in court since 2019.
6. The applicant's application being a mode of execution to recover outstanding interest and therefore an action within section 4(4) of the Limitation of Actions Act was brought 17 years after the delivery of the judgment and about 7 years after the respondent paid the sum of Kshs. 7,507,243. If the court was to compute time from the date of the last payment which according to the applicant was on August 13, 2014, then, over 6 years had since lapsed.

Application dismissed; respondent's objection allowed.

Orders

Costs to the respondents

Citations

Cases

1. *Otieno, Barrack Ofulo v Instarect Limited* Civil Appeal 770 of 2007; [2015] eKLR — (Explained)
2. *Muya, John Muhanda & another v Stanley K Kuria & another* Civil Case 223 of 2000 ;[2017]eKLR — (Explained)
3. *Nyambu,Justine v Jaspa Logistic* Cause 201 of 2013;[2017]eKLR— Interpreted
4. *Malakwen Arap Maswai v Paul Koskei* Civil Appeal 230 of 2001;[2004]eKLR— Followed)
5. *Masefield Trading (K) Ltd v Rushmore Company Limited & another* Civil Suit 1794 of 2000; [2008] eKLR— (Explained)
6. *M'ikiara M'rinkanya & nother v Gilbert Kabeere M'mbijiwe Civil Appeal* 124 of 200 [2007]eKLR — (Followed)
7. *Bor, Moses Kipkurui v John Chirchir* Civil Case 763 of 1992 [2019]eKLR— (Explained)
8. *Njuguna v Njau* {1981} KLR 225— (Followed)
9. *Nyali Chemicals Limited v Thugi River Estate Limited & 7 others* Civil Suit 134 of 1999; [2016] eKLR — (Explained)
10. *Gitau,Regina Waithira Mwangi v Boniface Nthenge* Civil Appeal 327 of 2012 [2015]eKLR— (Explained)
11. *Ngui ,Simon Isaac v Overseas Courier Services (K) Ltd* Civil Case 1632 of 1997;[1998]eKLR — (Explained)
12. *Tropical Wood Limited v Samilis International Investments* Civil Suit 207 of 2015; [2019]eKLR— (Explained)
13. *Kisya Investments Ltd v Attorney General & another* Civil Miscellaneous Application 339 of 1999[2000]eKLR-(Explained)

Statutes

1. Civil procedure Rules,2010 (cap 21 Sub Leg) — Orders 19, 22 rules 18, 25 R 35 — (Interpreted)
2. Companies Act,2015 (Act No 17 of 2015) — sections 628 (1) (3)(4); 635; 636; 638 (a) (b) — (Interpreted)
3. Limitation of Actions Act (cap 22) — sections 3, 4(2)(3) (4) ;7 ;8; 10 (3);19 (1) (2) -(Interpreted)

Texts

Stanley, H., Halsbury, G., (Eds) (1969) *Halsbury's Laws of England* London: Butterworths 3rd Edn

Advocates

Mr Odhiambo Obonyo for the Applicant
Mr David M. Mereka, for the Respondent

RULING

1. By an application dated November 26, 2019, the plaintiff/applicant seeks an order that the respondent's directors, namely; Charles Ngalaka Mulinge, Michael Okiror Ogwapit, Louise Wangui Ngugi, Pius Mbugua Ngugi and EBM Barua Chele and its Ag Managing director Michael Gota be summoned by for purposes of being cross-examined under oath as to the defendant's means and assets of satisfying the judgment/decree issued in this case on June 2, 2004 and to produce the defendant's books of accounts and other documentary evidence. In default of complying with the said order, the applicant prays that such further orders be issued as this court may deem fit. Lastly, it prays for costs of this application to be provided for.

2. The applicant states that the examination of the directors is necessary to determine the mode of execution of this court's decree dated June 2, 2004. Mr Odhiambo Obonyo, the applicant's advocate swore the supporting affidavit dated November 26, 2019 the substance of which is that the respondent's appeal against the said judgment was dismissed on November 15, 2013. Further, on August 13, 2014 the defendant made a part payment of Kshs 7,507, 243 being part of the accrued interest but has failed to pay the outstanding sum and interest amounting to Kshs 22,446,656.57.

3. Further, that on July 26, 2018, the Deputy Registrar of the Court of Appeal taxed the applicant's Bill of Costs at Kshs 637,432.50 as against the respondent, thus, the total outstanding amount du is Kshs 23,084,080.07. Additionally, it is the applicant's case that the respondent disputed the draft Court of Appeal decree, but the Court of Appeal settled it on November 19, 2018.

4. Also, it states that it is unable to enforce the decree because it cannot ascertain the respondent's assets, so it is necessary to examine the directors as prayed. It states that a search at the Companies Registry established that the said persons are the respondent's directors while Michael Gota is its Ag Managing Director. The applicant states that it is necessary for the said persons to be summoned by this court and examined on oath as to the respondent's means and assets and to produce the respondent's books of account and other documentary evidence to enable the plaintiff to execute the decree. Lastly, it states that it is in the interest of justice that the application be allowed to enable it to realise the fruits of this court's judgment and the Court of Appeal judgment.

Respondent's grounds of opposition

5. The respondent filed grounds of opposition dated June 2, 2020 stating that the move to cross-examine its directors is pre-mature because the alleged indebtedness is based on an erroneous calculation not agreed by the parties or done by the court. Further, that the application offends order 22 rule 18 of the *Civil Procedure Rules* and at which stage will the exact amount due and payable will be determined.

6. Further, the respondent states that the alleged indebtedness of Kshs 23,084,080.07 includes this court's judgement and the judgment of the Court of Appeal which cannot be legally put together for purposes of the orders sought. Also, the respondent states that the affidavit in support of the application offends order 19 of the Civil Procedure Rules and no basis has been shown to warrant the orders because order

25 rule 35 talks of officer as opposed to officers. Lastly, the Respondent states that the Plaintiff no-longer exists as an entity and therefore it is incapable of prosecuting this case.

Applicant's supplementary affidavit

7. The applicant filed the supplementary affidavit of Mr Odhiambo Obonyo dated June 25, 2020 in response to the above grounds. He reiterated the earlier affidavit and averred that the interest sum of Kshs 24,023,177.60 excludes the judgment sum of Kshs 7,507,243, and both sums aggregate to Kshs 31,530,420.60. Further, that the applicant is still in existence and it rebranded itself and is now trading as Phibro Animal Health Corporation pursuant to a Share Purchase Agreement.

Respondent's replying affidavit

8. Mr David M. Mereka, the respondent's advocate swore the replying affidavit dated January 29, 2021 in opposition to the application. The substance of the affidavit is that the judgement was issued on June 2, 2004 awarding the applicant Kshs 7,507,243/= plus interests at 21% from the date of filing of the suit and costs of the suit. Further, that, the respondent's appeal was heard and decided on November 15, 2013 and the principal amount of Kshs 7,507,243/= was paid. Further, no Notice to Show Cause has ever been issued upon the respondent; hence, the current application is premature and bad in law. Lastly, that the applicant is non-existent and therefore the whole application is incompetent since it has been brought by a non-existent entity.

Applicant's advocate submissions

9. The applicant's counsel cited order 22 rule 35 of the Civil Procedure Rules, 2010 which provides that, where a decree is for the payment of money, the decree-holder may apply to the court for an order that –

> a. the judgment-debtor;
>
> b. in the case of a corporation, any officer thereof; or
>
> c. any other person,
>
> be orally examined as to whether any or what debts are owing to the judgment-debtor, and whether the judgment-debtor has any and what property or means of satisfying the decree, and the court may make an order for the attendance and examination of such judgment-debtor or officer, or other person, and for the production of any books or documents.

10. He submitted that the applicant has satisfied the requirements of the above rule because the application relates to a money decree in favour of the applicant; that the Respondent is a corporation which is legally subsisting and is a going concern; and the directors outlined in the application and the CR12 dated September 23, 2019, are the current directors of the respondent and therefore competent to be examined on the respondent's means of settling the decree. Counsel cited *Tropical Wood Limited v Samilis International Investments*[1] which held that the power of the court to summon a person to attend and be examined under order 22 rule 35 is circumscribed within the purpose set out in the Rule, namely; (a) whether any or what debts are owing to the judgment creditor; and (b) whether the judgment debtor has any and what property or means of satisfying the decree. Further, the court in the said case held that 'as long as the applicant has shown that the Respondent is in a position to provide information in the nature of discovery... as to whether any or what debts are owing to the judgment creditor, and whether the judgment debtor has any and what property or means of satisfying the decree,

[1] [2017] eKLR.

the court should summon the person to attend and be examined in relation to the purpose stated in the Rule.'

11. Counsel submitted that the judgment debt is still outstanding against the respondent who has not denied the debt, but is only disputing is the calculation of the interest. He argued that on August 13, 2014, the respondent, in a bid to settle the accrued interest, paid to the applicant the sum of Kshs 7,507,243, as part payment of the accrued interest, 10 years after delivery of the Judgment, being June 2, 2004.

12. Counsel argued that the applicant has been unable to ascertain the respondent's assets despite efforts to do so and that the respondent has been uncooperative. Further, that the directors sought to be examined are best placed to confirm the financial position of the company and whether or not it has the property or means to satisfy the decree. (Citing *Masefield Trading (K) Ltd v Rushmore Company Limited & another*[2]).

13. Additionally, counsel cited section 628 (1) of the *Companies Act* which provides that a company is under a duty to keep proper accounting records. He also cited section 628 (3) of the Act which provides that the accounting records should contain: (a) entries from day to day of all amounts of money received and spent by the company and the matters in respect of which the receipt and expenditure takes place; and (b) a record of the assets and liabilities of the company. He also cited section 628 (4) of the Act which provides that if the company deals in goods, then the accounting records should contain the following: (a) statements of stock held by the company at the end of each financial year of the company;(b) all statements of stock takings from which any statements of stock as is referred to in paragraph (a) has been or is to be prepared; and (c) except in the case of goods sold in the ordinary course of ordinary retail trade, statements of all goods sold and purchased, showing the goods and the buyers and sellers in sufficient detail to enable them to be identified.

14. Counsel submitted that only the Respondent is in a position to confirm its assets and its overall financial position which can only be done through its directors who are custodians of its accounting records/information. He argued that the directors have the day-to-day conduct of the Respondent's affairs, and, that the list of directors contained in the CR12 had not been disputed or that they are the custodians of the Respondent's financial/accounting records.

15. Further, counsel argued that section 635 of the Act places a duty on the company's directors to prepare individual financial statements for each financial year and failure to do is a criminal offence. Also, he cited sections 636 and 638 (a) and (b) of the Act which requires the individual financial statement to give a true and fair view of the company's assets, liabilities and profit or loss. That, the individual financial statements should contain a balance sheet as at the last day of the financial year; a profit and loss account; a statement of cash flow; a statement of change in equity; in the case of the balance sheet, provide a true and fair view of the financial position of the company as at the end of the financial year; and in the case of the profit and loss account, provide a true and fair view of the profit or loss of the company for the financial year.

16. He argued that the respondent's directors are under an obligation to keep true and fair accounting records, so, they are t competent to appear before this court for examination as to the respondent's property and means of satisfying the decree. Lastly, the applicant's counsel urged the court to allow the application and cited *Justine Nyambu v Jaspa Logistic*.[3]

2 [2008] eKLR

3 [2017] eKLR.

Respondent's advocates submissions

17. The respondent's counsel submitted that the decree was extracted 15 years prior to the filing of the instant application which is basically an application in the nature of execution, hence, it ought to have been preceded by a Notice to Show Cause. He cited *Moses Kipkurui Bor v John Chirchir*[4] which underscored the need to issue a Notice to Show Cause if a decree is over one year old.

18. Also, counsel argued that the Court of Appeal case and the this courts decree are two different matters and therefore the Court of Appeal Taxation should be counted in the computation of time under the provision of order 22 rule 18. He cited *John Muhanda Muya & another v Stanley K Kuria & another*[5] which upheld a similar position.

19. He submitted that the sum in dispute is based on the allegation that what was paid to the applicant was the interest which had accrued and not the principal sum. He submitted that interest cannot be paid before the principal sum is paid. Further, he argued that the interest covers a period of over 16 years, hence it is statute bared by section 4 (4) of the Limitation of Actions Act which provides that "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. He also cited *Nyali Chemicals Limited v Thugi River Estate Limited & 7 others*[6] and argued that once the principal sum has been paid to the decree holder, such other sums stop accruing interest.

20. He argued that the amount is disputed the application cannot proceed until the amount is determined by way of a Notice to Show Cause why the respondents should not be executed against.

21. Further, counsel argued that the applicant no-longer exists and that a non-existent company cannot legally execute a judgment. Also, counsel took issue with the affidavits in support of the application sworn by an advocate and argued that they contain disputed facts. He cited *Otieno,Barrack Ofulo v Instarect Limited*[7] in which the court citing *Halsbury's Laws of England, 3rd Edition, Paragraph 845* in support of the said proposition. He also cited *Simon Isaac Ngui v Overseas Courier Services (K) Ltd*[8] which held that an advocate should not enter into the arena of the dispute by swearing affidavit on contentious matters of fact. Additionally, counsel cited *Simon Isaac Ngui v Overseas Courier Services (K) Ltd*[9] and *Kisya Investments Ltd & Others v Kenya Finance Corporation Ltd* in support of the proposition that it is not competent for a party's advocate to depose to evidentiary fact at any stage of the suit.

22. Counsel argued that without a single thread of evidence showing the connection between the two entities, the applicant is not properly in court and no proceedings should be allowed to proceed in the plaintiff's name.

4 [2019] eKLR.

5 [2013] eKLR.

6 [2016] eKLR.

7 [2015] eKLR.

8 [2015] eKLR.

9 [1998] eKLR.

23. Further, the Respondent's counsel submitted that none of the authorities cited by the applicant's counsel has similar facts to those in the instant suit because the principal sum has been fully settled and what is pending payment and/or determination is interest unlike [10] cited by the applicant and *Tropical Wood Limited v Samilis International Investments*.[11] He also submitted that in *Justine Nyambu v Jaspa Loqistic*[12] also cited by the applicant, the Respondent issued a cheque in settlement of the decree which was dishonoured and that the application to cross-examine the directors was not opposed.

24. Lastly, counsel submitted that the applicant has not demonstrated any efforts made in executing the decree against the Respondent which is a well-known Insurance Company with known offices across the country and is still run as going concern, to warrant the institution of the application herein.

Determination

25. A key ground cited by the respondent is that the applicant's claim for accrued interest is statute barred. Despite the fact that this is a highly dispositive issue, the applicant's counsel never addressed it at all even though a argument founded on the Limitation of Actions Act goes to the root of a case and its competence.

26. The law of limitation is found upon maxims such as "*Interest Reipublicae Ut Sit Finis Litium*" which means that litigation must come to an end in the interest of society as a whole, and "*vigilantibus non dormientibus Jura subveniunt*" which means that the law assists those that are vigilant with their rights, and not those that sleep thereupon. The law of limitation identifies the need for limiting litigation by striking a balance between the interests of the state and the litigant.

27. Section 4 (4) of the Limitation of Actions Act provides that: -

> (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.

28. The last part of the above provision is instructive. It provides that "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." The judgment is datedJune 2, 2004, 17 years ago. From the applicant's own admission, the last payment was made on August 13, 2014. Even though the applicant was not clear, the sum of Kshs. 7,507,243/= was in respect of the principal sum. What is clear is that without providing a clear tabulation as to how the amount being claimed is arrived at, the applicant states that the amount of Kshs. 24,023,177.60 being pursued comprises of accrued interests.

29. One thing is clear from a reading of section 4(4) cited above, that is, recovery of interest on a court judgment may not be recovered after the expiry of 6 years. When the Limitation of Actions Act or any other statute prescribe a period of limitation for initiating legal proceedings, any legal action has to be brought within such prescribed period. As it is imperative to give finality to administrative as

10 [2008] e KLR.

11 [2019] eKLR.

12 [2017] e KLR.

well as judicial decisions in the interests of justice, no court or tribunal can entertain any petition/suit/application made after the expiry of the limitation period, unless sufficient cause for delay has been proved by the petitioner/plaintiff/applicant. Therefore, those who sleep over their rights have no right to agitate for them after the lapse of the prescribed period.

30. The Limitation of Actions Act provides the limitation periods for different claims. Regarding claims for interests on court judgments, it provides six years from the date the interest became due for actions relating to arrears of interest with regard to a judgment debt. It is important to mention that the word "action" in section 4(4) of the Limitation of Actions Act has been judicially construed to include execution proceedings. This position was appreciated by the Court of Appeal in *Njuguna v Njau,*[13] *Malakwen Arap Maswai v Paul Koskei*[14] and *M'ikiara M'rinkanya & another v Gilbert Kabeere M'mbijiwe*.[15] In these three decisions, the Court of Appeal construed the word "action" in section 4 (4) of the Act as including all kinds of civil proceedings including execution proceedings.

31. The other important point to note is the nomenclature of section 4(4). The word "may" has been appears in the said provision. The use of the said word means that provision is not couched in mandatory terms. This position was enunciated by the Court of Appeal in *M'ikiara M'rinkanya & another v Gilbert Kabeere M'mbijiwe* (*supra*) that: -

> " The main ground of appeal is that the learned judgefailed 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 phase:- "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 rigours 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

13 [1981] KLR 225.

14 Eldoret Civil Appeal No 230 of 2001 (unreported

15 [2007] eKLR.

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 phase "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."

32. From the above excerpt, it is clear that the periods of limitation prescribed by the Limitation of Actions Act are not absolute as they are subject to extension in cases where a party demonstrates sufficient cause for the extension. Despite this clear position of the law, and notwithstanding the fact that the respondent in its grounds of opposition filed on June 2, 2020cited section 4 (4) of the Limitation of Actions Act, the applicant never took cue from the objection to cure the defect by seeking an extension from this court. Instead, it opted to prosecute its application which has been pending in court since 2019.

33. The above being the position, the applicant's application being a mode of execution, to recover outstanding interest and therefore an action within section 4 (4) of the Limitation of Actions Act is being brought 17 years after the delivery of the judgment and about 7 years after the respondent paid the sum of Kshs 7,507,243. If we are to compute time from the date of the last payment which according to the applicant was on August 13, 2014, then, over 6 years have since lapsed. The applications claim is caught up by the provisions of section 4 (4) of the Act. It follows that the respondents objection premised on the said provision is merited and therefore it succeeds. Having so found, I find no reason to consider the other grounds cited in support of or against the application. The upshot is that the applicant's application dated November 26, 2019 is dismissed with costs to the respondent.

Orders accordingly

SIGNED, DATED AND DELIVERED VIA E-MAIL AT NAIROBI THIS 21ST DAY OF JULY 2021

JOHN M. MATIVO

JUDGE