



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT EMBU**

**ENVIRONMENT AND LAND CASE NO. 57 OF 2017**

**FORMERLY NAIROBI HCCC NO. 1253 OF 1979 (OS)**

**NDAGARA W/O KAUTHUMBU substituted by PETER MURIITHI &**

**MURIUKI KAUMBUTHU.....APPLICANTS**

**VERSUS**

**MBOGO KATHARANGUSHU substituted by NYAGA S/O MBOGO (Deceased)  
.....RESPONDENTS**

**JOSEPH MBOGO**

**JAMES NYAGA MBOGO (DECEASED)**

**NJOMO MBOGO KATHARANGUSHU**

**PATRICIA MUTITU.....AGGRIEVED PARTIES**

**R U L I N G**

1. I am called upon to determine the preliminary objection dated 16.3.2021 and filed on even date. The preliminary objection targets the application dated 19/2/2021 filed by the applicants. The objection is premised on three (3) grounds as follows:-

*i. That the Honourable court is devoid of jurisdiction to reinstate the decree issued on 9<sup>th</sup> April, 1987, the same having been statute barred by Section 4(4) of the Limitations of Actions Act.*

*ii. The Applicant's notice of motion dated 19<sup>th</sup> February, 2021 is res judicata, a similar application having been made by the very applicants herein and determined by this honourable court vide ruling delivered on 27<sup>th</sup> July, 2017 by the Honourable Justice Angima.*

*iii. The application is otherwise an abuse of the court process and is only but a proper candidate for dismissal with costs to the respondents.*

2. In the application dated 19.2.2021, **PETER MURIITHI NYAGA** and **MURIUKI KAUMBUTHU** acting as legal representatives to the estate of **Ndagara W/O Kaumbuthu & MURIUKI KAUMBUTHU** are the applicants, **NYAGA S/O MBOGO** acting as legal representative to the estate of **MBOGO KATHARANGUSHU** are the respondents. These two respondents are deceased. **JOSEPH MBOGO, JAMES NYAGA MBOGO, NJOMO MBOGO KATHARANGUSHU, SALESIO KINYUA NYAGA & PATRICIA MUTITU** are shown as the aggrieved parties in the suit. The preliminary objection is brought by the aggrieved parties, who, for purposes of the application dated 19/2/2021 are the proper respondents, the two respondents mentioned earlier being already deceased.

3. In the application, the applicants sought the reinstatement of a decree dated 9. 4.1987 on grounds that there were orders for review of the decree issued to the aggrieved parties on 3.10.2017. The orders for review are said to have quashed the decree. According to the applicants, the orders for review have never been implemented and the non-implementation of the orders is said to be prejudicial to them as the aggrieved parties are enjoying the suit parcel of land at the applicants' expense.

4. The applicants have relied on the maxim of equity that equity is for the vigilant and not for the indolent and have therefore urged the court

to reinstate the decree in the interest of justice and fair play.

5. The preliminary objection was canvassed by way of written submissions. The applicants' submissions were filed on 3.4.2021. They relied on the contents of the application dated 19.2.2021. They submitted that there is a judgment by Justice Schofield which they contend still stands as there was never an application to set it aside. They have relied on Order 45 Rule 1(1b) which provides that one who desires to obtain a review of a decree or orders may apply for a review of a judgment to the court which passed the decree or made the order without unreasonable delay. The court is called upon to consider the delay in reviving the case considering the decree by the land registrar to register the land in the applicant's name was registered on 16<sup>th</sup> September 2011.

6. The respondent on his part filed submissions on 26.7.2021. He relied on the contents of the preliminary objection. It was reiterated that the court lacked jurisdiction to entertain the application as it was time barred. The application was said to be *res judicata* as according to the respondent, the applicants had filed a similar application which was determined by the court in a ruling delivered on 27. 7.2021 which is said to have been dismissed by the court. The application was said to be an abuse of the court process and the court was called upon to strike it out with costs.

7. The applicants filed supplementary submissions on 18.8.2021. They reiterated that the contested decree was given effect by the land registrar on 16. 9.2011 and that changes were made in the register of land parcel No. Kagaari/Kigaa/404. To them there was unreasonable delay since at the time the respondents had approached the court, the decree had already been extracted.

8. I have considered the objection as raised, the submissions by the parties and the court record. The issues that commend themselves to me for determination are whether;

i. *The decree is statute barred as under section 4(4) of the Limitation of Action Act.*

ii. *The application is res judicata in view of the ruling delivered on 27<sup>th</sup> July 2017.*

9. The decree which is the subject of the preliminary objection was in respect to a suit filed by the deceased Ndagara W/O Kaumbuthu and her son (the 2<sup>nd</sup> applicant herein), against Mbogo Katharangushu over land parcel number Kagari/Kijaa/404. The court had made a determination in favour of applicants to the effect that Mbogo Katharangushu the respondent in the suit was holding the land in trust for them. The Judgment was delivered on 24<sup>th</sup> June 1975. In the year 2011, the applicants applied to the deputy registrar for the decree to be extracted. Consequently the decree was extracted on 23.2.2011 to the effect that the applicant be registered as proprietors of the subject parcel of land in equal shares and an order was made to the land registrar to effect the order.

10. An application was brought by the aggrieved parties who are in the suit by virtue of being beneficiaries to the estate of **MBOGO KATHARANGUSHU**. In the application they sought to review the decree the subject of this suit, which application was allowed on basis that the decree extracted was time barred by virtue of Section 4(4) of the Limitation of Actions Act.

11. The application by the applicants is for reinstatement of the decree which was set aside by the court to which the respondents have contested by way of preliminary objection on grounds that the decree is statute barred by virtue of Section 4(4) of the Limitation of Action Act.

12. Section 4(4) of the Limitation of Actions Act 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”.*

13. The provisions of sections 4(4) of the limitation of actions act are clear that no action can be brought after 12 years from the date a judgment is delivered. The term action as envisaged in the act is not specific on what exactly 'the action' not to be brought before the court is. However courts have held that execution of judgments is contemplated under section 4(4) of the Limitation of Actions Act and cannot therefore be done after a period of 12 years. In the case of **Koinange Investments and Development Company Limited v Ian Kahi Ngethe & 3 others [2015] eKLR** which cited with approval the case of **ELC NO. 5704 of 1992 (OS) Hudson Moffat Mbue –vs- Settlement Fund Trustees & 3 others (unreported) Mutungi J** it was stated that

*“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”.*

14. Further in the case of **Willis Onditi Odhiambo v Gateway Insurance Co Ltd [2014] eKLR** the court in determining execution of a judgment after expiry of 12 years held as follows; *“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.”*

15. It is not in dispute that the judgment was delivered in the year 1975 and that the decree was extracted in 2011. Further, there was an

application for review that allowed review of the decree. It is contended by the applicants that the application for review did not adhere to Order 45(1) (1b) of the Civil Procedure Rules which would have mandated them to seek for review of the judgment first. I note that I am not called upon to determine the application for review herein as the same was determined by a competent court and there is no evidence that the determination by the court was set aside.

16. However, I have perused the ruling dated 27.7.2017 and on page 3 of the ruling the court considered the provisions of Order 45 of the Civil Procedure Rules in making a determination of the review application and determined that the application had not met the threshold as envisaged under order 45 for review. Nevertheless, the court proceeded to grant the application for review on grounds that the decree extracted was time barred under section 4(4) of the Limitation of Actions Act.

17. Apart from the issue raised on non-adherence to Order 45(1b) of the Civil Procedure Rules, the applicants have contended that the decree though having been executed in 2011 was given effect by the deputy registrar when she allowed the decree to be extracted and subsequently changes made on the land register. To me, this is not the case as there was an application that sought for review of the decree which application was allowed and in essence nullified the actions of the deputy registrar. Furthermore, as at the time the decree was sought to be implemented, twelve years had already lapsed and the extracting of the decree was already a nullity and had no effect. It therefore follows that any action that emanated from the decree is also a nullity.

18. I now turn to the issue of **RES-JUDICATA**. The application dated 19.2.2021 is said to be resjudicata the application dated 16.5.2012. The court pronounced itself on the application dated 16.5.2012 vide a ruling delivered on 27.7.2017. The second limb of the application states that the applicants in the application dated 19.2.2021 are the same applicants in the earlier application dated 16.5.2012. They were not and the second limb of the objection is therefore flawed.

19. The applicants in the application dated 16.5.2012 were **JOSEPH MBOGO, JAMES NYAGA MBOGO, NJOMO MBOGO KATHARANGUSHU SALESIO KINYUA NGAGA** and **PATRICK MUTITU**. These same people are respondents in the application dated 19.2.2021, the applicants being **PETER MURIITHI NYAGA** and **MURIUKI KAUMBUTHU**. In view of the flawed nature of the 2<sup>nd</sup> limb of the objection, the issue of **RES-JUDICATA** cannot be sufficiently addressed and the court finds that it is not demonstrated. I may venture to add that the earlier application was about review of the decree extracted with a view to overturning or setting it aside. The application dated 19.2.2021 seeks the opposite namely: Reinstatement of the same decree. The two applications are totally different in my view and **RES-JUDICATA** would not apply. The second limb is rejected.

20. The third limb of the objection is about abuse of the court process. This issue is only given a casual/or fleeting mention in the submissions filed in court. There was no effort made to explain the kind of abuse alleged. The third limb is therefore also rejected.

21. As a summation, the objection is upheld on the basis of the first limb only, which is about the decree being barred by Section 4 (4) of the Limitation of Actions Act (Cap 22, Laws of Kenya). The application dated 19/2/2021 is therefore struck out for the reason that the orders sought are not grantable in the circumstances of this case. I make no order as to costs.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **8<sup>TH</sup> DAY** of **DECEMBER, 2021**.

In the presence of the Applicants, M/s Muriuki for Rene for respondents and in the absence of the Aggrieved parties.

Court assistant: Leadys.

**A.K. KANIARU**

**JUDGE**

**8.12.2021**