



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 11 OF 1989

IN THE MATTER OF THE ESTATE OF KIBIWOT ARAP KIGEN

also known as KIGEN (DECEASED)

ELIZABETH TUNGO KIGEN.....PETITIONER/RESPONDENT

VERSUS

MICHAEL K. KIGEN.....OBJECTOR/APPLICANT

R U L I N G

1. Kibiwot Arap Kigen aka Kigen (deceased) died in 1980. In 1989 his widow, Elizabeth Tungo Kigen filed Succession Cause Number 11 of 1989 with regard to his estate which comprised of LEMBUS/SAOS/64 – 20.63 hectares. Following the outcome of the cause she was registered as the proprietor on 22nd November 1989 and title deed issued.

2. From the record before me, in 1994, Michael Kangoswo Kigen filed Summons for Revocation of the Grant. After a full hearing the *Hon. Lady Justice S. Ondeyo* delivered a judgment on 7th August 1995, where she made the following orders;

1. Land No. LEMBUS/SAOS/64 is family land and the objector and the family of the deceased KIMUGEN have a share in it.
2. The deceased (KIBIWOTT ARAP KIGEN) held this land for himself and also in trust for his two younger brothers i.e. KIMUGEN ARAP KIGEN and MICHAEL KANG'OSWO KIGEN).
3. The objector is entitled to ten (10) acres of this land and so is the family of the deceased KIMUGEN KIGEN.
4. The parties shall arrange for survey and subdivision to enable each party to be registered for their respective portions.
5. Should the petitioner refuse to co-operate, a court official shall sign her portion on the relevant forms to make survey, subdivision and transfer possible.
6. Each party shall bear its own costs of these objection proceedings.
7. The Grant issued in favour of the petitioner is thus revoked.

In addition, the objector and the petitioner were appointed joint administrators. The record shows that when this judgment was delivered both counsel were present together with the objector but the petitioner was absent.

3. The matter went to sleep until 5th October, 2007 when the objector filed a Notice of Motion dated 1st October 2007 seeking orders;

(a) This Honourable Court be pleased to issue a Vesting Order authorizing the executive officer to sign relevant documents to transfer 10 acres to MICHAEL KANGOSWO KIGEN and 10 acres to the family of the deceased KIMUGEN KIGEN to be excised from land parcel No. LEMBUS/SAOS/64 who are the decree holders in this case.

(b) That the costs of this application be provided for.

The request was on the grounds: -

(i) That the judgment was delivered on 25th day of July 1996 in favour of the Applicants/Decree Holders.

(ii) That the Petitioner/Respondent is reluctant to sign the relevant documents to facilitate the transfer of 10 acres to MICHAEL K. KIGEN and 10 acres to the family of the deceased KIMUGEN KIGEN excised from land parcel No. LEMBUS/SAOS/64 to the decree holders herein.

It was also supported by the affidavit of Michael K. Kigen, sworn on 1st October, 2007. In it he reiterated the gist of the judgment and that it is the petitioner who had failed to comply with the judgment.

4. In her Replying Affidavit Elizabeth Tungo Kigen deponed that the land that the objector was speaking about was registered in her name, that the applicant was not a beneficiary of the estate of the deceased, and that the judgment he was seeking to enforce had been caught up by the **Limitation of Actions Act**.

5. That the applicant's failure to enforce the decree was itself proof that he had no interest in the land.

6. From the record I noted that the applicant, sought leave to change advocates after judgment, to enable him prosecute the application. This was granted and the firm of Wambeyi Makomere took over from M/s Rotich & Company Advocates and came on record on 2nd September 2009.

7. For some reason the application dated 1st October 2007 was not prosecuted until 2019 but the record shows that on 6th November 2014 the firm of Mirugi Kariuki & Company Advocates had filed submissions for the petitioner with regard to the same application.

8. On 13th November 2019 I heard the Petitioner/Respondent. She gave the same evidence she gave before *Justice Ondeyo* in 1994. The same issues that were raised before the judge were raised in cross examination of the petitioner. The applicant did not testify.

9. Counsel chose to file written submissions. I noted no fresh submissions were filed on behalf of the petitioner.

10. For the objector/applicant submissions were filed on 20th November 2019. One issue was framed for determination, **whether the applicant was a beneficiary to the deceased's estate**. To support the position that he is and is entitled to the estate, I was referred to **Monica Adhiambo vs Maurice Odera Koko [2016] eKLR**. Counsel alluded to the judgment delivered on "25th July, 1996" in favour of the applicant and that this was never appealed from by the petitioner/respondent. There was no attempt to address the issue of limitation raised by the petitioner/respondent.

11. For the petitioner/respondent, two (2) issues were raised for determination;

i) Whether twelve (12) years had lapsed and decree unenforceable.

ii) Whether the application was an abuse of the process of court.

12. On the first issue it was submitted that under **Section 4(4) of the Limitation of Actions Act Cap 22** the applicant's claim was time barred and any remedies available to the applicant had been removed by that limitation, irrespective of their merits. Relying on **Malakwen Arap Maswai vs Paul Kosgei [2004] eKLR** it was argued that the execution proceedings i.e. the application seeking a Vesting Order amounted to "an action" as provided for under **Section 4(4)**. Addressing the issue of when time began to run against the applicant, counsel relied on **Fredrick Kiura Nyaga Waweru & 2 Others vs Justino Njue M'Mbuchi & 24 others [2013] eKLR** where it was held that the effective date was the date when judgment was delivered. On the second issue it was submitted that the application was an abuse of the court process as the same was time barred.

13. It is not in dispute that the court had found in favour of the applicant that he had a beneficial interest in the estate. The issues for determination are when the judgment herein was delivered and whether this application is time barred, and if so what orders to issue.

14. So, when was the judgment herein was delivered? Counsel for the applicant had stated that it was **26th July 1996**. I do not know where they obtained that date because the certified copy of the proceedings in the file show that judgment was delivered on 7th August 1995. This was in the presence of the applicant and his counsel, and counsel for the respondent. The respondent was absent.

15. Going by that date, is this application time barred? My arithmetic shows that counting from 7th August 1995, by 5th October 2007 when the application for a Vesting Order was made, twelve (12) years had passed on 8th August 2007. Hence it is an undisputable fact that by 5th October 2007, the order being sought had already become time barred.

16. Clearly therefore, the applicant was given orders in his favour on 7th August 1995. He never pursued that judgment to effect the same in his favour.

17. So, what orders should issue? **Section 4 (4) of the Limitation of Actions Act Cap 22** states;

"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.”

18. The application for a Vesting Order is an action as stated by **Section 4(4) of Cap 22**. In *Malakwen arap Maswai* the court states;

“So it would appear that the term “action” is wider than the term “suit” since the latter term is included in the term action. Based on the interpretation, the respondent’s notice of motion for the eviction of the appellant would qualify as “an action”. We would also rely on the authorities cited both before us and before the learned Judge. Both Lamb & Sons Ltd. vs Rider [1948] 2 ALL E.R. 402 and Loughter v Donovan [1948] 2 ALL E.R. 11 dealt with similar provisions under the relevant English statutes. It was held in both cases that an action to enforce a judgment after the twelve-year period is statute barred. Locally the point was conclusively determined in the case of Njuguna vs Njau [1981] KLR 225 where the Court held that “action” in the context of Section 4(4) of Cap 22 is not intended to bear a restricted meaning and therefore embraces all kinds of civil proceedings including execution proceedings.”

19. Further in *M’Ikiara M’Rinkanya & Another vs Gilbert Kabeere M’Mbijiwe* [2007] eKLR the Court of Appeal settled the issue as to whether this court would have any discretion in the matter of the application of **Section 4(4) of Cap 22**. In that case the High Court had determined it had discretion regarding extension of time beyond the twelve (12) year limitation. The Court of Appeal said;

“The learned Judge erred in construing the phrase “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.”

20. I have carefully considered this matter. It is curious that the objector/applicant herein obtained judgment in his favour in 1995. It involves land. It was a Succession Cause, which pitted a widow and her brothers -in law. After she obtained the grant and it was confirmed and the land transferred to her they filed objections. They never pursued that judgment until it has become time barred. In *M’Ikiara M’Rinkanya & Another* the court stated;

“It is clear that a judgment for the possession of land should be enforced before the expiry of 12 years’ limitation period.....If the judgment is not enforced within the stipulated period the rights of the decree hold are extinguished...”

21. The applicant herein had brought an application for a Vesting Order to portions of Lembus/Saos/64 to himself and his brother, but he is time barred.

22. The application is dismissed.

23. Each party to bear its own costs.

Dated and Signed at Nakuru this 7th day of May, 2020.

Delivered , and signed this 7th May 2020.

Mumbua T. Matheka

Judge

In the presence of:- VIA ZOOM

Edna Court Assistant

Wambeyi Makomere & Company Advocates N/A

Mirugi Kariuki & Company Advocates Ms Kinuthia