



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

ELC CASE NO. 372 OF 1989

MUCHIRI M'IKIARA.....PLAINTIFF

VERSUS

M'RINKANYA BAIKARA.....DEFENDANT

RUFUS MUNYUA MUCHIRI.....APPLICANT

RULING

Brief History

1. The Odyssey of this matter has been winding and treacherous. Original parties have since died and the original file apparently got lost. The matter has been in court for a record 30 years.
2. The Plaintiff, Muchiri M'Ikiara (deceased) had sued M'Rinkanya Baikara in 1989 claiming entitlement to half of the land **Title No. MWIBI/N.MUGUMANGO/6** by way of adverse possession. In 1993, the plaintiff obtained Judgement and decree to the effect that he had acquired half of the land **Title No. MWIMBI/N. MUGUMANGO/6** by adverse possession, that the defendant was to transfer half portion of the suit land to the plaintiff and in default, the Executive officer of the court was to sign all the necessary documents on his behalf so as to give effect to the Judgement. The plaintiff was also awarded costs of the suit.
3. The then Defendant, Mrinkanya Baikara (now deceased) appealed the decision of the trial Court in the Court of Appeal Civil Appeal No. 2538 of 1996, which appeal was dismissed on 29/10/1997 on the basis that the decree was defective. The Court held that the date in the decree was said to be 25th July 1994, whereas the judgement was apparently delivered on 27th may 1993. For avoidance of doubts, the decree is yet to be corrected and has never been executed.
4. The plaintiff, Muchiri M'Ikiara died on 12.7.1997. The defendant, M'Rinkanya Baikara also died soon thereafter in 1999 and his son, John Njagi Nkanya became his legal representative. John Njagi has also apparently died on 18/1/2018.
5. The present applicant is one Rufus Munyua Muchiri. He filed a miscellaneous application no 15 of 2017 at Meru ELC seeking leave to Re-construct the file as the original file could not be traced. This application was allowed. Rufus then filed the present applications geared towards the execution of the 1993 Judgment.

Application dated 10/5/2018 (brought under order 24 r4 of CPR)

6. In this application, Rufus desires that one JOHN MURIITHI NJAGI be made a party to this suit as he is the legal representative of JOHN NJAGI NKANYA who died on 18/1/2018. It is further claimed that JOHN NJAGI had become the registered owner of the suit land. Applicant has availed a copy of the limited grant as well as the copy of the green card in respect of the suit land.

Application dated 3/9/2018 (brought under order 24 r4 of CPR)

7. Applicant presents this application as the legal representative of the estate of the Plaintiff herein and he prays that the Court substitutes him in place of the Plaintiff. He is also seeking for the revival of the suit. He avers that the suit abated upon the death of the plaintiff but now there is a need to revive the same so that the estate of the plaintiff can pursue the execution of the Judgment.

8. On 17/10/2018, the proposed defendant was in court and he sought time (7 days) to file a Replying affidavit. He was granted his wish but he never filed any response as directed. The court was hence urged to allow the two applications.

Analysis and Determination

9. Although the two applications stand as unopposed, this court still has an obligation to look at the issues of law and fact to determine if the orders sought for are merited.

10. The starting point is that there is no suit, as the same abated years ago in 1998 seeing that plaintiff died in 1997 and no substitution has ever been made. Further, defendant herein also died on or about the year 1999. There is no evidence that he was ever substituted in this suit although it is alleged that JOHN NJAGI did become his legal representative.

11. The suit having abated, the remedy in law is to apply for its revival. The application for Revival should therefore precede all other prayers. The application of 10/5/2018 therefore ought to have been made either in the latter one of September 2018 or thereafter. However, the constitution mandates this court to exercise Judicial Authority without undue regard to procedural technicalities and I will hence consider the merits of both applications simultaneously.

12. Rule 7(2) of Order 24 of the CPR makes provision for revival of a suit but on condition that the court; 1) is satisfied by the party applying **that he was prevented by any sufficient cause from continuing the suit; and 2) revival of the suit shall be upon such terms as to costs or otherwise as it thinks fit- See Leonard Mutua Mutevu v Benson Katela Ole Kantai & another [2014] eKLR**

13. The reasons as to why Applicant wants the suit revived is primarily to execute a Judgment of 1993, **which action is already statute barred.**

14. The provisions of **Section 4 and 7 of the Limitation of Actions Act** makes the decree in this matter statute barred. The Judgement herein was apparently delivered **on 27th May 1993** (making the correct date of the decree as 27th May 1993). The same ought to have been executed within 12 years hence the same expired on **27th May 2005**. It is now 26 years since the date of the judgement.

15. The applicant contends that he was not aware of the judgement herein and only became aware of the same in the year 2014 when he was called to the Area chief by John Njagi (son of the defendant) claiming he had sold the land to another person. That it was then that he learnt of this case (after asking his mother) and that he has since become familiar to the same and the appeal filed in C.A 2538/1996.

16. Section 9 (2) of the Limitation of Actions Act provides that;

(2) Where a person brings an action to recover land of a deceased person, whether under a will or on intestacy, and the deceased person was on the date of his death in possession of the land, and was the last person entitled to the land to be in possession of the land, the right of action accrues on the date of death.

17. Going by this proviso, the applicant ought to have brought his cause of action 12 years after the demise of his father bringing the same to the year 2009. (From 1997) thus there are two dates which can be taken as date of expiry of the claim; 27.5.2005 and 12.7.2009.

18. Section 4(4) of the Limitation of Actions Act provides that;

“An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered.....”.

Whereas Section 7 provides that;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first

accrued to some person through whom he claims, to that person”.

19. In the Court of Appeal case of **M’IKIARA M’RINKANYA & ANOTHER v GILBERT KABEERE M’MBIJIWE [2007] eKLR** the court gave an in depth analysis of execution of decree and stated that

“Indeed, section 3 of the Act provides that part II of the Act which specifies various limitation periods is subject to part III which provides for extension of the periods of limitation”.

The court further stated as follows;

”Lastly, it is logical from the scheme of the Act, that a judgment for possession of land, in particular should be enforced before the expiration of 12 years because section 7 of the Act bars the bringing of action for recovery of land after the end of 12 years from the date in which the right of action accrued.”

If the judgment is not enforced within the stipulated period, the rights of the decree holder are extinguished as stipulated in section 17 of the Act.....”.

20. Taking cue from the elaborate analysis made in the aforementioned judgment, and aligning the same to the facts of this case, it is clear that the applicant has not established a burden of proof that affords him a right for the revival of the suit. Firstly the applicant has not shown why the deceased did not execute the decree during his lifetime and particularly the years 1993-1997. The Applicant does not also show why

his mother though aware of the proceedings did not seek to substitute the deceased in the years after the demise of the plaintiff.

21. The upshot therefore is that the Application dated 3rd September 2018 and the one dated 10/5/2018 lacks merit and the same are dismissed with no Orders as to Costs. Perhaps applicant's recourse is to file his own independent claim.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 7TH JANUARY, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Kithaka for applicant

HON. LUCY. N. MBUGUA

ELC JUDGE