



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 1667 OF 1996

HENRY ONYANGO WETENDE.....PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION.....DEFENDANT

RULING

1. The Defendant's Preliminary Objectors dated 14th June, 2014 objects to the Plaintiff's Notice of motion application dated 14th November, 2012 on the following grounds:

(a) The application as filed herein is time barred and does not lie in law by virtue of Section 4 of the Limitation of Actions Act Cap 22 Laws of Kenya.

(b) This Honourable court lacks the requisite jurisdiction to entertain, hear and/or determine the said application.

2. The background to the preliminary objection is a judgment entered herein in favour of the Plaintiff against the Defendant on 4th February, 2000. The Plaintiff through an application dated 29th July, 2008 applied for the re-issuance of a warrant of arrest against the Defendant's Managing Director to Show Cause Why he should not be committed to civil jail for contempt of court for failure to pay the decretal sum. The Application was allowed on 26th September, 2008. The Plaintiff later filed the application dated 14th November, 2012 which is the subject of the Preliminary Objection. In the said application, the Plaintiff seeks orders for the re-issuance of the warrant of arrest. The Plaintiff alleges none payment of his terminal dues. The Plaintiff also filed a further affidavit in which he has explained the delay in filing the application. It is stated that the court file went missing and that the Plaintiff is now based in Butere and spends alot of money to come to Nairobi to pursue his dues.

3. In response to the application dated 14th November, 2012, the Defendant filed a replying affidavit and stated that the application is time barred. The Defendant averred that the Plaintiff was paid the full decretal sum and exhibited copies of documents acknowledging the payments.

4. The Preliminary Objection was canvassed by way of written submissions which I have considered.

5. As stated in the celebrated case of **Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors (1969) EA 696:**

“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Sir Charles Newbold P. added as follows at page 701:

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

6. In the case at hand, the question of limitation of time is a point of law. The same arises from undisputed matters.

7. Section 4(4) Limitation of Actions Act:

“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.”

8. The court record reflects that the judgment herein was entered on 4th February, 2000. By the time the application dated 14th November, 2012 was filed, the twelve years provided for by the law had lapsed.

9. In the persuasive case of **Kangondi Farmers Co-op society Ltd v J. K. Gatuguta & Co Advocates [2016] eKLR** the court when faced with a similar issue stated as follows:

“This being the case, the Plaintiff/ Respondent is subsequently barred from executing the decree dated 10th May, 2001 by law... Consequently, I declare that the decree issued on 10th May, 2001 has expired by effluxion of time by virtue of Section 4(4) of the limitation of Actions Act hence the same is null and void.”

10. On the issue raised that the court file was missing, the option of re-constructing the file was available to the Respondent. I am persuaded by the exposition in **Rachael Mwikali Mwandia v ken Maweu Kasinga [2013] eKLR** thus:

“16.I have noted the Plaintiff’s explanation for the delayed execution of the said judgment. Unfortunately, it is not uncommon for court files to go missing. The Plaintiff’s case is that their attempts to trace the lost file did not bear fruit until December, 2011 when the high Court relocated to its current station. While this may be a valid reason, I am of the considered view that if the attempts of tracing the lost file were not forthcoming, the Plaintiff had the option of making an application to reconstruct the court file. Trying to trace a file for almost eleven years with no result is such a long time. There are also no correspondences to show what efforts the Plaintiff’s advocates made in trying to trace the lost file.

17. It is trite law that equity aids the vigilant and in that case the Plaintiff or rather her advocates should have known better that time was of the essence. Having found so, I have no option but to find that the action to recover the interest is time barred.”

11. On the warrant of Arrest for committal to civil jail over a civil debt this court takes cognizance of Article 11 of the International Covenant on Civil and Political Rights which Kenya has ratified as part of the Kenyan Law which guarantees parties basic freedoms of movement and of pursuing economic social and cultural development.

12. In the case of **Rachael Mwikali Mwandia (Supra)** it was rendered as follows:

“As regards the defendant’s committal to civil jail, I do agree that by virtue of Section 2(6) of the Constitution of Kenya, international treaties and conventions that Kenya had ratified are imported as part of the sources of Kenyan Law. Thus, the provision of Article 11 of the International Covenant on Civil and Political Rights which Kenya has ratified is part of the Kenyan Law. Therefore, enforcing a civil debt through imprisonment is against the said Covenant which guarantees parties basic freedoms of movement and of pursuing economic social and cultural development. The Plaintiff has other options of execution to explore like attaching the defendant’s property. Therefore, committal to civil jail should be the very last option.”

13. With the foregoing, I find merits in the Preliminary Objection and uphold the same. The application dated 14th November, 2012 is hereby dismissed with costs.

Date, signed and delivered at Nairobi this 9th day of Oct., 2018

B. THURANIRA JADEN

JUDGE