



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 28 OF 2017

CHARLES NGARE KARAYA.....PLAINTIFF/RESPONDENT

VERSUS

FLORENCE MUTHONI.....1ST DEFENDANT/APPLICANT

SARAH NJOKI MUNGE

t/a SANJOM AUCTIONEERS.....2ND DEFENDANT

RULING

1. **By an application dated the 13th June 2017**, the 2nd Defendant hereof sought that the plaintiff's suit against her be struck out with costs on four main grounds that:

- 1. The claim is barred by the Limitation of Actions Act Cap 22 Laws of Kenya.***
- 2. That the suit contravenes Section 34 of the Civil Procedure Act.***
- 3. That the suit is against an agent for a disclosed principal and therefore unsustainable in law and***
- 4. That as against the 2nd defendant, it is frivolous, scandalous, vexatious and an abuse of court process.***

2. The plaintiff objected to the above by his replying affidavit sworn on the 21st October 2017 and filed on the 28th October 2017 on grounds that the 2nd defendant/applicant has, in its affidavit in support, admitted the claim which arose from a tort of conversion and trespass to property, emanating from execution of a decree issued by a competent court in a separate case being **Milimani Commercial Court case No. EJ Civil Case No.196 of 1996** where he was not a party, and whereof the proceedings thereto are yet to be closed, and therefore he could not be time barred under Cap 22 Laws of Kenya.

3. I have considered the oral and written submissions, as well as the plaintiff's claim as stated in his plaint dated the 25th May 2017. It is for a liquidated sum of Kshs.10,796,139/= plus costs and interest. It is stated to be loss of profits occasioned by the defendants jointly and severally by wrongful and illegal attachment of the plaintiff's property in the execution of a decree in **Nairobi HCCA No. 971 of 2005** between the two parties and another, and which attachment was declared to have been unlawful and illegal by an order of the court, in the Nairobi Milimani case on the 21st February 2007.

4. It is not in dispute that the attachment was illegal as declared by the court, and therefore the plaintiff is entitled to a suitable relief by way of compensation as stated in the plaint against the defendants.

5. **What is in issue is whether the suit as filed is competent, the subject of the suit having been determined in a separate suit as stated above.**

I am minded that striking out a suit should only be ordered in very plain and clear circumstances and only when an amendment for instance, cannot save it – see **Court of Appeal in Co-operative Bank of Kenya Ltd -vs-George Fredrick Wekesa C.A No. 54 of 1999**.

6. The issues here are however distinguishable from the above case. It is not said that there is no cause of action but that the suit is time barred by Limitation of Actions and that it contravenes **Section 34 of the Civil Procedure Act**.

As stated in the case **Elijah Sikona and George Periken Narok** on behalf of **Trusted Society of Human Rights Alliance -vs- Mara**

Conservancy and 5 Others HCCC No. 37 of 2013 (2014) e KLR, (Emukule J) there are well established principles which guide the court in exercise of its jurisdiction under the **Civil Procedure Rules**, and I add, such rules ought to be adhered to unless good reasons are stated to persuade the court of a need to deviate therefrom.

7. **Section 34 Civil Procedure Act** deals with questions to be determined the court executing a decree as follows:

34(i) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

8. The subject of the present suit arose from the court's ruling dated the 21st February 2007 in HCCC No. 971 of 2005(Nairobi), to the extent that the execution was illegal.

All parties were well represented by their authorised advocates. The applicant urged that the present reliefs ought to have been sought in the said court executing the decree in terms of **Section 34(1) Civil Procedure Act** and in support cited the holdings in **James Wainaina Imunyio & 6 Others -vs- Karanja – Mbugua & Co. Advocates (2012) and Nazir Jinnah -vs- Asmahan Peterson & 2 Others (2013) e KLR**, where the courts held that any questions touching on execution of decrees and all issues arising therefrom ought to be determined by the court executing the decree.

9. The respondent is however of the contrary view that **Section 34(1) of Civil Procedure Act** does not talk of damages payable to a person against whom a decree is executed when that person is not the judgment debtor, and cites the case **Kuronya Auctioneers -vs- Maurice O. Odhoch & Another C.A 31 of (2002)**. I have considered the learned judges judgment delivered on 9th July 2003.

I do not hold the same view with Learned Advocate Mr. Mbugua. The facts of the case are quite distinguishable and not applicable to the case before me. The plaintiff in that case was not a party to the case hence the holding of the Honourable Judges of Appeal.

10. The plaintiff/Respondent was the plaintiff in the suit and court that ordered execution of the decree so were the defendants.

As such, I agree with the applicant that the plaintiff ought to have sought compensatory orders for the wrongful and unlawful attachment of his property in the same suit and court that declared the execution unlawful, and not by filing a fresh suit – see **Nazir Jinnah** above.

11. The 2nd defendant was an agent of the 1st Defendant. Being an Auctioneer she had authority and instructions to execute the courts decree from the decree holder, the 1st defendant. It can not be said that the 2nd defendant was not a party, as she was by dint of the 1st Defendants authority. This is properly captured in the plaintiffs plaint paragraph 5 when he states

“-----in which the 1st Respondent therein (Florence Muthoni) and her auctioneers (now the 2nd Defendant herein,) were restrained by a valid court order-----”

12. For the above reasons, I proceed to hold that the plaintiff is barred by the provisions of **Section 34** of the **Civil Procedure Act** from filing a fresh suit, and therefore this suit is incompetent and subject to an order of striking out, as being an abuse of the court process pursuant to provisions of **Order 2 rule 15 of the Civil Procedure Act – See James Wainaina Imuyo (Supra)**.

13. On the matter of **Limitations of Actions Act Cap 22 Laws of Kenya, Section 4(2)** states:

An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.

14. The tort of wrongful attachment of the plaintiff's property was pronounced by the court on the **21st February 2007**. The suit therefore ought to have been filed by the **20th February 2010**. I have stated that this suit was filed on the 6th June 2017, out of time by seven years. No reasons were advanced for the inordinate delay.

No order of extension of the time was shown to the court.

It is therefore undoubtedly barred by law and cannot be sustained.

15. Madan JA (as he then was) in **DT Dobie & Co. (Kenya) Ltd -vs- Muchina (1982) KLR** rendered that no suit ought to be summarily dismissed unless it appears plainly hopeless and so weak that even an amendment cannot redeem it. I am of the same opinion that this suit cannot be redeemed in any manner there being no justifiable explanation whatsoever.

Issue of Limitation is a jurisdictional matter and goes to the core of the suit. Once a suit is time barred by law, a court cannot give itself jurisdiction to entertain the claim unless an order of extension of the time is obtained – **Civil Appeal No.116 of 2011 Patrick S.K. Kimiti -vs- John Ngugi Gachau & Another (2015) e KLR**. None was so obtained.

16. By the foregoing the 2nd Defendant's application dated the 13th June 2017 has merit. It is allowed with costs to be paid by the Respondent/Plaintiff.

17. **What then is the fate of the case as against the 1st Defendant?** This court has not been called upon to make findings in respect of the

1st Defendant's case. I leave it at that as I am bound by the pleadings before me - **IEBC & 2 Others -vs- Stephen Mutinda & 3 Others (2014) e KLR.**

Orders accordingly.

Dated, signed and delivered this 6th day of December 2018.

J.N. MULWA

JUDGE