



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
MISC.CIVIL APPLICATION NO. 278 OF 2015 (O.S)

IN THE MATTER OF A JUDGEMENT DELIVERED BY HIS LORDSHIP MR JLA
OSIEMO ON 14TH OCTOBER 2002 IN NAIROBI HCC NO.3164 OF 1995 (COMMERCIAL &
ADMIRALTY DIVISION) between ROBERT NELSON
NGETHE (PLAINITFF) (DECEASED) AND KOINANGE INVESTMENT LIMITED
(DEFENDANT)

AND

IN THE MATTER OF SECTIONS 4(4) AND 7 OF THE LIMITATIONS OF ACTIONS ACT AND
ALL OTHER ENABLING PROVISIONS OF LAW

AND

IN THE MATTER OF AN APPLICATION TO DECLARE ANY INTENDED ACTION BY THE
SAID ROBERT NELSON NGETHE,OR THE PERSONAL REPRESENTATIVES OF HIS
ESTATE TO EXECUTE OR BENEFIT FROM THE SAID JUDGEMENT AFTER THE
STATUTORY PERIOD OF 12 YEARS, WHICH LAPSED ON 14TH OCTOBER, 2014, NULL
AND VOID AND OF NO EFFECT WHATSOEVER

AND

IN THE MATTER OF AN APPLICATION BY THE PLAINITFF HEREIN FOR A
DECLARATION THAT IT IS NOW THE SOLE AND LEGITIMATE OWNER OF THE
PORTION OF L.R.NO.209/9099(i.e LR 209/9099/2 NAIROBI) THAT WAS THE SUBJECT
MATTER OF HCCC NO. 3164 OF 1995 (COMMERCIAL AND ADMIRALTY DIVISION)

BETWEEN

KOINANGE INVESTMENTS AND DEVELOPMENT COMPANY LIMITED.....PLAINITFF

VERSUS

IAN KAHIU NGETHE

NICHOLAS NGETHE

EDDAH GACHUKIA

RAPHAEL KAMAU (Being sued as the Personal Representative

of the estate of ROBERT NELSON NGETHE) (DECEASED).....DEFENDANTS

JUDGEMENT

1. The Plaintiff in this case took out an originating summons under Section 1A, 1B, 3A, 38 of the Civil Procedure Act Cap. 21 Laws of Kenya and Order 37 Rule 4 of the Civil Procedure Rules. The Plaintiff seeks the following orders;

- a. *A declaration that in view of the provisions of Section 4(4) of the Limitation of Actions Act Cap 22 of the Laws of Kenya, the judgement delivered on 14th October, 2002 by his Lordship Mr. Justice L.A.Osiemo in Nairobi HCCC Number 3164 of 1995 (Commercial and Admiralty Division) is no longer capable by the Defendant of being executed against the Plaintiff, that is, Koinange Investments and Development Company Limited because a period of more than 12 years has lapsed since the delivery of the said Judgement against the Plaintiff herein and the same remains unexecuted to date.*
- b. *A declaration that all actions by the Defendant in respect to the Judgement delivered on 14th October, 2002 by his lordship Mr. Justice L.A Osiemo in Nairobi HCCC Number 3164 of 1995 (Commercial and Admiralty Division) be permanently stayed and the same be declared null and void;*
- c. *A declaration that in view of the provisions of Section 7 of the Limitations of Actions Act cap 22 of the Laws of Kenya the Plaintiff herein having continued to be in continuous and uninterrupted possession of the portion of L.R No. 209/9099 (also identified as L.R 209/9099/2) for a period of more than 12 years after delivery of a judgment by his Lordship Mr. Justice L.A.Osiemo in Nairobi HCCC Number 3164 of 1995 (Commercial and Admiralty Division), the Plaintiff be declared the legitimate and sole owner of the said portion and any right that the Defendant's may have acquired in respect thereof be extinguished forthwith.*
- d. *Cost of this suit.*

2. The OS was supported by the affidavit and further affidavit of Edda Wanjiru Mbiyu sworn on 8th June, 2012 and 30th July, 2015 respectively. According to the Plaintiff the parties entered into a sale agreement dated 5th December, 1988 for the purchase of a portion measuring exactly 0.2642 hectares to be excised from L.R No. 209/9099 (hereinafter known as suit property). The purchase price of the suit property was Kshs. 50,000,000/=. The option was expressed to be exercisable within 90 days of the date of the agreement or before the expiry of 30 days of the availability of a survey deed plan. After execution of the said agreement, the deceased filed **HCCC No. 3164 of 1995 Robert Nelson Ngethe –vs- Koinange Investment and Development Ltd**, for the purpose of enforcing the agreement. It was the Plaintiff's disposition that subsequently, judgement was entered in favour of Mr. Ngethe against the Plaintiff on 14th October, 2002 and the decree was issued on 25th October, 2002 in the following terms;-

- a. *That the Deed of 5th December 1998 is valid; That the Plaintiff has validly exercised his option there under ;*
- b. *That the defendant do within 30 days complete the subdivision of the plot sold to the Plaintiff measuring approximately 0.2642 of a hectare divided and exercised from LR No. 209/9099 and in default the Plaintiff be at liberty to carry out the exercise of subdivision;*
- c. *That the defendant do transfer the subdivision to the plaintiff and in default the deputy registrar may execute any necessary documents to necessitate the transfer and that the defendant do pay to the plaintiff the costs of this suit to be taxed and certified by the Taxing Master of this Court.*

3. According to the Deponent, the Plaintiff thereafter filed an application for the court to set aside the judgement entered on 14th October, 2002 and the orders given in the judgement be stayed pending the hearing and disposal of the application. The said application was however dismissed vide a ruling dated 28th November 2002. The deponent went on to add that sometime in May 2003, the Plaintiff appealed this ruling vide Civil Appeal Number 108 of 2003. In the meantime, it was alleged that a Notice of Motion dated 12th October, 2003 was filed by the Deceased Defendant where he sought for orders to the effect that the Plaintiff forwards the title documents of the suit property to the deceased to carry out the subdivision.

4. Additionally, it was prayed that the Deputy Registrar of the High Court to facilitate the subdivision by executing the transfer by the Plaintiff to the deceased. The said application was heard ex parte where the orders sought were granted on 19th November, 2003. Aggrieved by this decision, the deponent contended that the Plaintiff filed an appeal against the same. It further obtained orders staying the execution of the order pending the determination of the aforementioned appeal number 108 of 2003. It was emphasized that the orders that had been stayed were those that were sought independently by the defendant and which were issued ex parte without according a hearing to the Plaintiff. The Plaintiff was therefore of the opinion that both the judgement and the decree issued on 14th October, 2002 and 25th October, 2002 respectively, were intact and were unaffected by the Orders issued by the court on 7th June, 2006. In the foregoing, the deponent opined that the judgement that was obtained by the Defendant on 14th October, 2002 had lapsed due to the effluxion of time as 12 years had passed without any action being taken upon it.

5. It was also the Plaintiff's argument that the Defendants were yet to pay up the amount of Kshs. 50,000,000/= that was the consideration for the transfer of the suit property. Further, the Plaintiff contended that it had been in quiet possession of the suit premises for a period exceeding 12 years. That no attempt had been made by the deceased defendant to assert his right over the property and as such, the Plaintiff was now claiming ownership of the property by virtue of adverse possession.

6. In affidavit of reply, sworn on 22nd June, 2015, the Defendants through Ian Kahi Ngethe, deponed that the applicant/ plaintiff herein failed to disclose to the court that there was an order to stay of execution of the decree and orders relating to the judgement delivered by Mutungi J on 7th June, 2006. The defendants gave a chronological account on the matter. The deponent stated that after judgement was delivered, a decree was extracted on 15th October, 2003 and thereafter the deceased Plaintiff applied to court to execute the decree. The said application was allowed by Ibrahim J (as he then was) on 19th November, 2003.

7. The Defendants also stated that thereafter the Plaintiff, who was the Defendant in that case, applied for a stay of the order and stay of execution in respect of the decree. The said prayers were granted by Mutungi J on 7th June 2006. The Defendants therefore contended that in essence the execution of the decree was stayed pending the hearing and determination of the **Court of Appeal Civil Appeal Number 108 of 2003 Koinange Investments & Development Limited –vs- Robert Ngethe.** The deponent also deposed that the appeal was eventually heard on 6th June 2012 where a Judgment was delivered on 23rd March, 2012 wherein the Appeal was dismissed with costs. Aggrieved by the decision, the Applicant moved to the Supreme Court where the application was rejected. In view of the foregoing, it was the defendants' assertion that the decree of the court could not be executed while the matter was still pending before the appellate courts as the same would have been in breach of the orders granted by Mutungi J on 7th June, 2006. The defendants therefore reasoned that the process of executing was restarted after the applicant's remedies both at the Court of Appeal and the Supreme Court were exhausted.

8. Consequently, the deponent contended that time with regard to the judgement did not run when the stay of execution orders were in force. In view of the foregoing, the deponent argued that the Originating summons were misplaced as the applicant was guilty of non-disclosure.

9. It was further contended that the Applicants were abusing the court process as there were three

applications before the court namely, an application seeking to have the transfer executed by the Deputy Registrar recalled and cancelled; an application for leave to amend the defence and include a counterclaim and an application for review of the judgement delivered on 14th October, 2002. The Defendants asserted that these applications were incompatible with the present application or suit. That further the matter was delayed pending the substitution of the deceased plaintiff. In sum, it was the defendants' contention that the continued litigation of a matter that has gone all the way to the Supreme Court is clearly an abuse of the court process.

10. The application was canvassed by way of written submissions by the respective parties. The large part of these submissions dwelt upon the facts in the affidavit as put before the court. The Plaintiff filed its submissions on 14th September, 2015, while the Defendants filed submissions on 21st September, 2015.

11. It was the submission of the Plaintiff that its application was premised on Section 4(4) of the Limitation of Actions Act which stipulates that any action may not be brought upon a Judgement after the end of twelve years from the date on which the Judgement was delivered. That a Judgement was entered against the Plaintiff, in a dispute revolving around the sale of the suit property. A decree was thereafter issued on 25th October, 2002.

12. It was the submission of the Plaintiff that effectively time for execution started running against the deceased on the date of judgement and that the same should have been executed before 14th October, 2014. According to the Plaintiff this was not done by the deceased and therefore the Judgement could not be executed due to the effluxion of time. Mr. Mbaabu, learned counsel to the Plaintiff also argued that the Defendants had not illustrated to this court that they were within the exception to section 4(4) of the Limitation of Action Act.

13. While citing the case of **M'ikiara M'rinkanya & Another –vs- Gilbert Kabeere M'Mbijiwe(2007) eKLR**, he insisted that the word action contained in section 4(4) of the Limitation of Actions Act includes execution proceedings.

14. Mr. Mbaabu further submitted that the Defendants' position that the term "action" did not constitute execution proceedings in light of the aforementioned court of appeal case is therefore erroneous, as the case binds this court.

15. The Plaintiff additionally submitted that the order of stay of execution of the orders issued by this Court on 19th November, 2003 pending appeal could not and did not stay the execution of the Judgement delivered on 14th October, 2002 or the Decree issued on 25th October, 2002. Mr. Mbaabu, citing the case of **Berliner Industrie bankAktiengesellschaft –vs- Jost (1968 B. No. 3173)** submitted that a stay order would not stop time from running against the judgement. He went on to add that the Stay Order issued on 17th June 2006 affected only the orders made by this court on 19th November, 2003 and the same only affected the mode of execution. That in essence the same did not apply to the Judgement and Decree issued. It was also the submission of the Plaintiff that the deceased failed to pay Kshs. 50,000,000/= equivalent of the purchase price and the court should not allow the defendants' to benefit from property that they did not pay for

16. In conclusion, it was Mr. Mbaabu's submission that it was in the interest of justice to grant the orders sought as the Defendants cannot acquire a property for nothing. The Plaintiff therefore asked the court to allow the orders sought together with the costs of the application.

17. In a rebuttal to the above submissions, the defendants argued that the court record shows that the transfer of the suit property has already been executed by the Deputy Registrar of this court. Mr. Murungara, learned counsel for the Defendants stated that what remains is effecting the transfer. He also contended that there was a pending ruling on the registration of the transfer executed in respect of the suit property.

18. With regard to the substantive arguments of the Plaintiff, the defendants submitted that Section 4(4)

of the Limitation of Actions Act gives the court discretion on whether or not to allow the enforcement of a judgement after the expiration of twelve years after the date of delivery if the same falls within the exceptions provided in section 3. It was also submitted that Section 4(4) of the Limitation of Action Act applies to an action on judgement and not to execution under the judgment. That therefore the limitation of 12 years under the aforesaid section of the law applies to the bringing of a fresh action based on the judgement. The defendants relied on the case of **Lowsley –v- Frorbes (t/a L.E designs Limited) (1999) 1 A.C 329**, **W.T Lambs & Sons –v- Rider (1948) 2 KB 331** and **Berliner IndustriebankAktiengesellschaft –vs- Jost (1968 B. No. 3173)** in support of this argument. The Defendant thus sought to persuade this court that the execution of the judgment in question cannot be said to be barred by effluxion of time.

19. Further Mr. Murungara added that this court must make a distinction between the **M’ikiara M’rinkanya & Another –vs- Gilbert KabeereM’Mbijiwe** case cited by the Plaintiff and the present case. He argued that the former case involved Section of 7 of the Civil Procedure Act Cap 22 Laws of Kenya. That in the current case, the judgement has already been executed and the transfer documents are awaiting registration.

20. It was also submitted that just in case the Defendants’ position is wrong on this front, the court will have to interpret the effect of the order of stay of execution granted by Mutungi J on 7th June 2006. That in view of the order of stay of execution in the subsequent proceedings in the Court of Appeal and in the Supreme Court it cannot be said that the execution of the judgement delivered by Osiemo J on 14th October 2002 is time barred as that execution could not have gone on with stay orders in force. Time would run only when the orders of stay were not in force. On the matter of the deceased not fulfilling the conditions of payment of Kshs. 50,000,000/=, the Defendants insisted that the same was not part of the decree and the Plaintiff’s cannot therefore raise the issue at this stage. In view of the foregoing arguments, the Defendants urged the court to reject the Originating Summons and dismiss it with costs.

DETERMINATION

21. Taking into consideration the rival submissions and the pleadings adduced by the respective parties, I find that the issue for determination herein is whether the import of Section 4(4) of the Limitation of Actions Act Cap 22 of the laws of Kenya includes execution of judgement. Further the court will also have to interpret the effect of the order of stay of execution granted by Mutungi J o 7th June 2006. I propose to start with the first issue.

22. The contested Section 4(4) of the Limitation of Actions Act, Cap 22 Laws of Kenya provides:-

“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, 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, in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

23. From the reading of the above provision, it is apparent that Section 4(4) of the Limitation of Actions Act is unclear as to what the term “an action” refers to. The question then becomes whether the same refers to the institution of a fresh action or to any sort of action taken in executing the judgment or to both? In the Defendants’ submission while citing the case of **Lowsley –v- Forbes (t/a L.E Designs Limited) (1999) 1 A.C. 329**, the true construction of the term action in the aforementioned clause meant a fresh action and did not include proceedings by way of execution of a judgment in the same action. The Plaintiff however reiterated that this was not the case and in fact Section 4(4) also applies to execution proceedings.

24. I have considered the rival positions of the parties. The Court of Appeal Judges in the case of **Willis Onditi Odhiambo –vs- Gateway Insurance Co. Ltd (2014) eKLR** were clear that Section 4(4) of the Limitation of Actions Act covers execution of Judgments. In the case they stated as follows:-

“In other words the appellant wanted to execute the said decree against the respondent out of time. 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”.

25. Although the matter that gave rise to the above appeal was a fresh suit brought to enforce a judgment in an earlier suit the court of appeal was emphatic that section 4(4) of the Limitation of Actions Act, governs execution of Judgments and decrees. Further, in the case of **ELC NO. 5704 of 1992 (OS) Hudson Moffat Mbue –vs- Settlement Fund Trustees & 3 others (unreported) Mutungi J** while considering the application of Section 4(4) of the Limitation of Actions Act where an application for execution of judgment had been brought before the expiry of the 12 years had lapsed but was determined until after the period had expired observed thus;

“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”.

26. From the above pronouncements, it is therefore clear that the Section 4(4) of the Limitation of Actions Act, governs execution of Judgments and decrees. Consequently the submission by Counsel for the Defendants that Section 4(4) of the Limitation of Actions Act only relates to the filing of fresh actions and not to execution applications is unsupported and the view held by the House of Lords in **Lowsley – vs- Forbes (Supra)** that the provision does not apply to execution proceedings as in the instant application finds no favour in the Kenyan jurisdiction and the Court must therefore decline to accept it.

27. An issue also arises as to whether Section 4(4) of the Limitation of Actions Act can apply where the execution process had been started even if completion comes after the statutory 12 year period. The court in **Hudson Moffat Mbue –vs- Settlement Fund Trustees & 3 others(Supra)** took the view that the process must be allowed to be completed. The court therefore expressed itself thus on the issue:-

“I hold the position therefore that the expression “An action may not be brought upon a judgment after the end of twelve years from the date on which judgment was delivered -----“ means that unless an application has been brought for enforcement of the judgment and has been completed and/or the same has not been concluded by the time the 12 year, period expires no fresh action for enforcement of the judgment can be brought after the expiry of 12 years from the date of the delivery of the judgment”

28. Having made the above findings , the question left for determination is whether there was execution of the decree after judgement was delivered and whether in fact, the said decree was stayed by the court. In doing so, the court has to trace the history of the matter. On 14th November, 2002 , Osiemo J rendered a default judgement with orders for specific performance framed as follows;

“(a) A declaration that the deed of 5th December 1998 (sic) is valid

(b) A declaration that the Plaintiff has validly exercised his right of purchase there under.

(c) An order that the Defendant do within 30 days complete subdivision of the plot sold to the Plaintiff and in default the Plaintiff be at liberty to carry out the exercise of subdivision.

(d) An order that the Defendant do transfer the subdivision to the Plaintiff and in default the Deputy Registrar may execute all necessary documents to necessitate (sic) the transfer.”

29. Immediately after the delivery of the judgement, the Plaintiff made an application before the same judgement to set aside the default judgement on grounds that the applicant had not been properly served hearing notice as directed as per an earlier order issued by Ringera J. The application was however dismissed. Aggrieved by this holding, the Plaintiff moved to the Court of Appeal through **Court of Appeal Civil Appeal Number 108 of 2003 Koinange Investments & Development Limited –vs- Robert Ngethe** and subsequently, the Supreme Court, through **Supreme Court Application Number 4 of 2013 Koinange Investments & Development Limited –vs- Robert Ngethe** where the same were dismissed on rulings rendered on 23rd March, 2012 and 13th March, 2014 respectively. I however note that as correctly pointed out, the Deceased defendant, after judgement was delivered, extracted the decree on 15th October 2003. Thereafter the deceased applied to court to execute the decree in the following terms;

“ (a)The defendant do within 14 days forward the title documents to LR No. 209/9099 to the advocates for the Plaintiff to enable the Plaintiff to carry out the exercise of sub-division of LR No. 209/9099.

(b) Mr. Reuben N. Nyakundi Deputy Registrar of the High Court of Kenya do execute the transfer by the defendant to the plaintiff of the sub-division measuring approximately 0.2642 of a hectare divided and excised from L.R. no. 209/9099.

(c) Mr. Reuben N. Nyakundi be authorized to sign all further documents necessary for the transfer of the said land.

(d) The costs of this application be paid by the defendant”

30. The application together with the prayers sought therein were allowed by Ibrahim J (as he then was) on 5th February, 2004. The Plaintiff upon learning of these orders promptly moved to court an application dated 1st September, 2004. The same sought inter alia, a stay of execution of the Order issued on 5th February, 2004 pending the hearing and determination of **Court of Appeal Civil Appeal Number 108 of 2003 Koinange Investments & Development Limited –vs- Robert Ngethe**. I have read the ruling of Mutungi J on the concerned application at Page 8 of the Defendants’ Replying Affidavit. The Judge states as follows when granting the orders sought;

“.....what is clear in my mind is that to preserve the substance of the appeal herein, there is every need to preserve the substance of the appeal herein, there is every need and logic to grant the order of the stay prayed for the application herein.

Accordingly, and for the above reasons, the Notice of Motion herein is granted and I grant an order of Stay of Execution of this court’s order, dated 5/2/04 pending the hearing and determination of Civil Appeal no. 108 of 2003.”

31. From the above, it is clear that Mutungi J temporarily suspend the execution of the court order issued on 5th February, 2004. The said court order was to give effect to the process of sub- division, specifically that the Deputy Registrar could execute any documentation with regard to the sub-division and subsequent transfer of the suit property.

32. I therefore agree with the Defendants submission that in view of the order for stay of execution, it would have been improper for the Defendants to carry out any form of execution of the decree. A decree or order becomes enforceable from its date. Therefore time on the judgement delivered on 14th October, 2002 started running as from the date of its delivery.

33. However, the filing of appeal number 108/2003 would not affect the enforceability of the judgement/decree. However this court, through the orders of **Mutungi J** stayed the judgment decree's operation. I am therefore of the view that the judgment has not lapsed due to the effluxion of time as argued by the Plaintiff. The orders of Mutungi J had the net effect of suspending the completion of the ongoing execution of the judgment in any terms, as long as an appeal was being determined in the Court of Appeal.

34. I therefore find that the judgement in question does not fall within the ambit of section 4(4) of the Limitation of Action Act as the execution process commenced before the lapse of 12 years from the date of judgment, and it was forestalled by the court. The Originating Summons is therefore without merit on that front.

35. With regard to the issue that the Defendants had failed to fulfil their end of their bargain to pay Kshs. 50,000,000/= plus interest thereon, I am in agreement with the submissions of Mr. Murungara, that this was not a condition that was contained in the Decree or Judgement thereon. The same can therefore not be raised in this application as the Plaintiff purported to do.

36. I now turn to the issue of adverse possession. A claim under adverse possession is based on certain principles. Any person who claims to be entitled to land by adverse possession has the right to apply to the High Court for an order that he be registered as the proprietor of the land. The person must prove that he has been in occupation and possession of the land exclusively and openly and as of right and without interruption for a period of 12 years. The adverse party is the one who dispossesses the true owner of the property. The former must openly occupy the property exclusively, keeping out others, and use it as if it were his own. Some jurisdictions permit accidental adverse possession as might occur with a surveying error. Generally, the openly hostile possession must be continual (although not necessarily continuous or constant) without challenge or permission from the lawful owner, for a fixed statutory period to acquire title. See the case of **Virginia Wanjiku Mwangi v David Mwangi Jotham Kamau [2013] e KLR.**

37. Bearing these principles in mind, it is rather obvious that the Plaintiff falls short on all the principles. First, the Plaintiff cannot claim adverse possession of its own property. Further the Plaintiff has not been dispossessed of the suit property. Further, no transfer of the suit property had ever occurred. As such the claim must be frowned upon as a mere afterthought and subsequently dismissed.

38. From the foregoing, the court holds that the Originating Summons is without merit and is hereby dismissed with costs to the Defendants.

Dated, signed and delivered in court at Nairobi this 6th day of November, 2015.

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C. KARIUKI

JUDGE