



IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO 4408 OF 1988

NELSON ITEBA OMBONGI.....PLAINTIFF

VERSUS

PATRICK KIMELI CHEPNGOKDEFENDANT

RULING

1. I have perused the court record herein. The Plaintiff's claim in this very old suit filed in 1988 was in negligence. He sought damages for injuries received in a road accident on 26th June 1986. The Defendant did not enter appearance or file defence, and on 4th June 1991 interlocutory judgment was entered against him. On 17th September 1992 the case was heard for assessment of damages, and on 19th October 1992 final judgment was entered (Mwera, J). The Plaintiff was awarded a total of KShs 833,200/00 in general and special damages. On 30th June 1994 the Plaintiff's costs were taxed at KShs 34,474/00.

2. The court record further discloses that between 24th October 1994 and 16th January 2001 there were attempts at execution of the decree. On that later date the matter was stood over generally for non-attendance by the parties, and the Plaintiff/Decree-Holder was condemned to pay court adjournment fees. Apparently these efforts at execution did not bear fruit.

3. The matter then went quiet until 2nd May 2012 when a notice to show cause was issued for 13th June 2012. Nothing happened on that date. On 22nd August 2013 another notice to show cause was issued for 3rd October 2013. On that date the Deputy Registrar issued a warrant for the arrest of the Defendant in execution of decree, notwithstanding that the assistance the Plaintiff had sought in his application for execution was attachment and sale of the Defendant's moveable assets sufficient to discharge the decree. The decretal sum as calculated by the Plaintiff had now grown to the relatively huge figure of KShs 3,788,363/00 because of interest charged.

4. The Defendant subsequently raised a preliminary objection to the execution proceedings by **notice dated 24th December 2013**. The main legal points taken were –

- (i) That pursuant to **section 4(4)** of the *Limitation of Actions Act, Cap 22* the judgment was not enforceable as the same was now time-barred by limitation.
- (ii) That further, no interest upon the decretal sum was recoverable, again upon grounds of limitation.

5. In support of the preliminary objection the Defendant's learned advocates filed written submissions on 5th March 2014. They relied on those submissions fully at the hearing of the preliminary objection. The Plaintiff's learned counsel on the other hand made oral submissions. I have considered the submissions, including the case cited by the Defendant's counsel.

6. Section 4(4) of the Limitation of Action Act 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, 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.”

7. As at 3rd October 2013 when the Deputy Registrar issued the warrant of arrest in execution of decree against the Defendant, the judgment, which was delivered on 19th October 1992, was over twenty (20) years old. The latest proceedings taken by the Plaintiff in 2013 to enforce it were clearly forbidden by law as the judgment was over 12 years old since it was delivered. It is also to be remembered, as already noted, that the warrant of arrest issued by the learned Deputy Registrar was not what had been sought by the Plaintiff/Decree-Holder.

8. The technical objection raised by the Plaintiff's learned counsel in his submissions regarding failure of the Defendant's counsels to properly place themselves on record will not derogate from the very serious legal objection upon limitation raised by the Defendant.

9. In the circumstances I must uphold the Defendants' preliminary objection. The execution proceedings commenced by the Plaintiff which resulted in the warrant of arrest issued on 3rd October 2013 are hereby set aside. The warrant of arrest is also set aside. Parties will bear their own costs of this preliminary objection. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF OCTOBER 2014

H P G WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER 2014