



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

E.L.C CASE NO. 647 OF 1994

MAKWORO NYAMARERI.....PLAINTIFF

VERSUS

NAFTALI BOSIRE ORINA.....DEFENDANT

RULING

INTRODUCTION

1. By a Notice of Motion dated 25th September 2018 the Plaintiff seeks the following orders:

- a) That the Deputy Registrar of this Honourable court be authorized to sign and/or execute transfer documents for and on behalf of the Defendant herein to effect the decree herein.
- b) The costs of this application be provided for.

2. The application is premised on the grounds set forth in the Notice of Motion and the Supporting Affidavit of David Momata Makworo, the administrator of the estate of the deceased Plaintiff herein. In the said affidavit the Applicant depones that on 1.10.2002, the court decreed that the Defendant transfers 23.35 acres of the suit property to the Plaintiff. Following a Notice to show cause filed by the Plaintiff, the court on 30.7.2008 ordered the Defendant to transfer the said 23.35 acres to the Plaintiff but the Defendant neglected and/or refused to do so thus necessitating the instant application.

3. The application is opposed by the Defendant through his Replying affidavit sworn on the 6th December 2019 in which he gives a brief background of this case which is as follows: The case was heard and determined and a decree issued in favour of the Plaintiff on 1st October 2002. Following the said judgment, the Defendant filed an appeal in the Court of Appeal vide Kisumu Civil Appeal No. 31 of 2003. On 22nd June 2006, the Court of Appeal declared the appeal as having abated as the Respondent who had since died had not been substituted. The Applicant obtained a Grant of Letters of Administration. The Applicant therefore seeks to execute the decree dated 1.10 2002 by virtue of being the administrator of the estate of the deceased.

4. The Defendant avers that the said decree cannot be executed through the Notice to show cause dated 25.9.2018 as the same is barred by the Limitation of Actions Act. The gist of the Defendant's submissions is that the application herein being an action in execution of the decree of the court issued on 12th November 2002 is barred by the provisions of section 4(4) of the Limitation of Actions Act Cap 22 of the Laws of Kenya.

5. On the other hand, the Applicant contends that the issue of limitation having been raised in the application dated 14.2.2015, this application is res judicata

6. The application was disposed of by way of written submissions. The Applicant's submissions dated 12.2.2020 were filed on 25.2.2020 while the Respondent's submissions dated 6.7.2020 were filed on 7.7.2020

ISSUES FOR DETERMINATION

7. Having considered the Notice of Motion, affidavits and rival submissions, the following issues arise for determination;

- i. Whether the application contravenes the provisions of section 4(4) of the Limitation of Actions Act, Cap 22 of the Laws of Kenya.

- ii. Whether the Applicant is entitled to the orders sought.

ANALYSIS AND DETERMINATION

8. It is not in dispute that the decree which the Applicant seeks to execute was issued on 12th November 2002 pursuant to a judgment delivered on 1st October 2002.

Section 4(4) of the Limitation of Actions Act provides as follows:

Section 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."

9. The question that I must determine is whether the Applicant is barred from executing the decree herein by virtue of the above provision of the Limitation of Actions Act. In order to answer this question, it is important to recall the history of this matter. The Plaintiff filed suit against the Defendant seeking a inter alia a declaration that being joint owners of land parcel number EKERUBO/50 which measures 46.7 acres the Plaintiff is entitled to half share of the said title which measures 23.35 acres. The case was heard and in a judgment delivered on 1st October 2002, the court made the following orders:

- a) A declaration is issued that the both the Plaintiff and the Defendant jointly bought one share in M/S EKERUBO F.C.S LTD and are thus entitled to the land now registered as EKERUBO/50 measuring 46.7 acres
- b) A further declaration that being joint owners of land parcel No. EKERUBO/50 which measures 46.7 acres the Plaintiff is entitled to half share which measures 23.35 acres.
- c) That the Defendant be ordered to transfer the half share measuring 23.35 acres in land parcel No. EKERUBO/50 measuring 46.7 acres to the Plaintiff.
- d) The Defendant, his agents and/or servants be permanently restrained from interfering with or evicting the Plaintiff from half share in land parcel No. EKERUBO/50 measuring 23.35 acres.
- e) Costs of the suit.

10. The Defendant filed an appeal against the judgment vide Civil Appeal No. 31 of 2003 at Kisumu. In the meantime, the Plaintiff died in 2004. When the appeal came up for hearing on 22nd June 2006, the court made an order that the appeal had abated under Rule 96 (2) of the Court of Appeal Rules as no application for substitution had been made within the prescribed period. On 23rd October 2013, the Applicant was appointed as the administrator of the estate of the deceased Plaintiff and on the basis of that appointment he applied for execution of the decree vide his application dated 27th February 2014.

11. In response to the Notice to Show Cause, the Defendant filed an application for stay of execution dated 14th February 2015. In the said application the Defendant also challenged the application for execution on the grounds that the Applicant lacked capacity and that the application was barred by statute by dint of section 4(4) of the Limitation of Actions Act as it was made outside the statutory period of 12 years allowed for execution.

12. In his ruling delivered on 14th October 2016 Mutungi J held that the period of limitation had not lapsed and therefore the personal representative of the deceased Plaintiff could not be barred from executing the decree. On 24th October 2016, the Defendant filed a Notice of Appeal against the said ruling but he appears to have abandoned the appeal.

13. Subsequent to the ruling dated 14th October 2016, the Applicant applied for re-issue of the Notice to Show Cause why the Defendant should not transfer 23.35 acres of land parcel No. EKERUBO/50 to the Defendant. On 30.7.2018 the Deputy Registrar granted the orders in the Notice to Show Cause but despite being served with the orders the Defendant refused to comply with the same thus necessitating the instant application.

14. On the face of it the Plaintiff appears to have applied for execution 16 years after the judgment. However, from an analysis of the circumstances under which the said application was made, it is clear that the Plaintiff did not make a fresh application for execution after a period of more than 12 years but rather he renewed his application for execution that had initially been filed on 2nd June 2014 but was interrupted by the Defendant's application for stay of execution dated 14th February 2015. A perusal of the file shows that by a letter dated 17.4.2018, counsel for the Plaintiff wrote to the Deputy Registrar applying for re-issue of the Notice to show cause as per the application filed on 2.6.2014. The process that started in 2014 must therefore be allowed to be concluded as envisaged by the ruling of Mutungi J dated 14th October 2016.

15. In arriving at the above finding I am guided by **HCCC NO. 5704 of 1992 (OS) Hudson Moffat Mbue –vs- Settlement Fund Trustees & 3 others** cited with approval in **Koinange Investments Company Limited v Ian Kahiu Ngethe & 3 Others (2015) eKLR** where an issue arose 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 took the view that the process must be allowed to be completed. The court 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”

16. For the foregoing reasons, the Notice of Motion dated 25th September, 2018 and filed in court on 28th September, 2018 for the Deputy Registrar of this Honourable Court to execute the transfer documents for and on behalf of the Defendant to effect the decree herein was, for all intents and purposes, an action in furtherance of the application for execution dated 2.6.2014 and is therefore not statute barred. The Plaintiff is thus entitled to the orders sought.

17. Accordingly, I find merit in the application and I grant it with costs to the Applicant.

Dated, signed and delivered at Kisii via email this 1st day of October, 2020.

J.M ONYANGO

JUDGE