



**REPUBLIC OF KENYA**  
**IN THE KADHI'S COURT AT NAIROBI**  
**MLIMANI COMMERCIAL COURTS**  
**CIVIL SUIT NO. 36 OF 1999**

**MAIMUNA KENYI SULEIMAN.....PLAINTIFF**

**-VERSUS-**

**AMINA IBRAHIM.....DEFENDENT**

**R U L I N G**

The Plaintiff/ Applicant moved this court vide application for execution of decree dated 3<sup>rd</sup> February, 2016 and filed on the same date for eviction from 2/3 of the un-surveyed plots Nos. 159, 160A and 160B Makina, Kibera, Nairobi and Attachment and sale of movable property to be executed by Bealine Auctioneers against the Defendant/Judgment debtor. The NTSC was taken out by the Plaintiff

On 18th February 2016 the Defendant/Judgment debtor filed a ground of opposition to the application for execution of decree dated 3rd February 2016.

The background information to this ruling is that the Plaintiff moved to this court, by way of a plaint dated 28th April 1998 and filed on the same day, where she prays for:-

- a) Restraining the defendant from interfering with plaintiff's right of inheritance.
- b) The plaintiff be given his right to inherit.
- c) Cost of this suit .

On 12th July 2002 this court rendered judgment in favor of the Plaintiff in the following terms:

1. That the Respondent is restrained from interfering with the disputed property until the matter is finalised or pending further orders.
2. That rent collected be deposited with this court until the matter is finalised or pending further orders.
3. That the costs of this application be provided to be applicant by the respondent.

Further to the judgment rendered by this court and upon visiting the suit premises, the following final orders are made:-

i. That the heirs of the late Suleiman Kenyi are:-

a) The Plaintiff whose share is 2/3

b) The late Zeina Suleiman whose share is 1/3

ii. That the Defendant Amina Ibrahim is not a beneficiary of the late Suleiman Kenyi but she is one of the beneficiaries of the late Zeina Suleiman who was her mother.

iii. That the 18 rooms built during the life time of the late Suleiman Kenyi belong to the estate and will be shared between the plaintiff and the beneficiaries of Zeina Suleiman at the ratio of 2:1 (this ratio being in value form not in number of the rooms).

iv. That all those constructions made after the death of the late Suleiman Kenyi on the plot belong to the estate of the late Suleiman Kenyi. Those who made the constructions will be shared by the heirs of the late Suleiman Kenyi according to the mode already mentioned above.

v. That the defendant is ordered to account for all monies collected either in any of the 18 rooms or the constructions of JENGA YAKO JENGA YANGU and any sale of the part of the plot which she made as proved by the plaintiff.

vi. That both parties submit the income and expenditure for which they were involved since the death of the late Suleiman Kenyi to date.

vii. That the defendant will pay the costs of the suit.

viii. That a date be fixed by consent of the two parties for assessment.

### ***Applicant's Submissions.***

The Plaintiff submitted that her application dated 3rd February 2016 seeks for the execution of decree rendered on 28th March 2002 in favour of the plaintiff and that service of NTSC was duly effected on 3rd February 2016

The Applicant further stated that she was not served with any documentation objecting her application, thus she prays for her application be allowed .

She further requested for the assistance of OCS Kilimani Police Station in the eviction process.

### ***Defendant's submissions.***

In opposition to the application for execution of the decree the defendant file her grounds of opposition just after some minutes after the trial had commenced ,raising two points of preliminary objections as follows:-

a) The plaintiff has no locus standi to execute the judgment delivered on 28th March 2002 as she is improperly before this court .

b) The suit is time barred and that this court lacks jurisdiction to entertain the said application.

The court has considered the submissions by learned counsels and other submissions that do not necessarily appear in this ruling.

It is obvious from the Defendant/Judgment debtor has not complied totally with the order of the court granted vide judgment dated 28th March 2002, thus the Applicant is legally rightful before this court to seek for execution.

However, on the basis of the objection raised by the defendant , I will begin with the second preliminary point of objection in law, that the suit is time barred .

when an issue of limitation of action is raised, it is a preliminary issue touching on the competence of not only the action, but of the court before which the action pends. It's long settled that an issue of jurisdiction is a periphery matter which must be resolved before proceeding to determine the merits of the case, where the issue is found not to have any merit.

It is trite that jurisdiction is very fundamental to adjudicate and that where a Court lacks the competence to hear and determine a matter but proceeds to do so, a decision resulting there from is bound to nullification.

In the instant case, the deceased died on 12th August 1981; the Letters of Administration Ad Litem was issued to the plaintiff on the 28th August 2013; the succession suit was initiated by filing of plaint on 28th April 1998; On 28th March 2002 the judgment was delivered in favor of the plaintiff; On 3rd February 2016 the current Application for execution of decree was filed after protracted post judgment proceedings which started on 24th April 2004 barely two years after the judgment.

The plaintiff/applicant took the opposite view that the plaintiff's application is time barred by reason of section 4(4) of the Limitation of Action Act on the sole ground that the said statute is not applicable in the Kadhi's Court.

To answer whether or not the Limitation of Action Act, Cap 22 Laws of Kenya; the Court's attention is drawn to Section 6 of the Kadhis' Courts Act, Cap 11 Laws of Kenya , where it provides that:

**The law and rules of evidence to be applied in a Kadhi's Court shall be those applicable under Muslim law.....**

It is apparent that section 6 of the Kadhis' Courts Act is clear as to what laws shall apply in the Kadhi's Court. It refer to all those laws which are in consonance with Islamic law notwithstanding its connotation with Muslim law provided such applications shall not occasioned a failure of justice.

In fact, the effect of a statute of limitation under the general principles of Islamic law, see *Al-mausuu'a Al-fiqhiyyah Al-kuwaitiyya Vol. 13 at pg.118* , such as the provisions of the Limitation of Action Act , on both cause of action and the right of action is that it bars the right of action and not the cause of action.

The cause of action refers to the facts or combination of facts which the plaintiff must adduce to entitle him or her to the relief(s) claimed while the action or right to institute the action remains the means or medium affording the plaintiff the opportunity to ventilate his grievances- cause of action or bundle of facts, as variously described by the courts over the years. The effect of a statute of limitation on the action of a plaintiff to institute the action but leaves him with his cause of action intact, though, without the right to enforce same or right to judicial relief.

The sharia only take different position , as it give the personal right to the one who claim possession, but this right is not absolute unlike the other laws. It allows the possession of ownership on a raw undeveloped land not owned by anyone as it states" that who revives a dead land it is his"

The reason for such a different stance is thus: The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. Time limit fixed for approaching the court in different situations in not because on the expiry of such time a bad cause would transform into a good cause.

Rule of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. the object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Time is precious and the wasted time would never

revisit. During efflux of time newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. Law of limitation is thus founded on public policy. It is enshrined in the maxim *Interest reipublicae up sit finis litium* (it is for the general welfare that a period be put to litigation/Masaalih al Mursalah). Rules of limitation are not meant to destroy the right of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

see. N. Balakrishnan v. M. Krishnamurthy, (1998) 7 SCC 123 also *Al-mausuu'a Al-fiqhiyyah Al-kuwaitiyya Vol. 13* (????????? ?????????? ??????????, ?????? 13

In the premises the question as to whether the Limitation of Action Act is applicable in Kadhis' Courts is answered in affirmative.

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, 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.**

The judgment which the plaintiff sought to execute was passed on 28th March 2002. The judgment should therefore have been executed on or before 28th March 2014.

It's clear from the record of the court and as acknowledged by the counsels the cause of protracted proceedings was occasioned by the prevailing circumstance relating to the handwritten judgment of Hon. Hamad .

**State of Haryana v. Chandra Mani & Ors.**, (1996)3 SCC 132 has held as under :-

“The doctrine must be applied in a rational common sense pragmatic manner. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk. Judiciary is not respected on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so.”

**Dhiraj Singh (Dead) through L.Rs. v. State of Haryana & Ors.**, (2014) 14 SCC 127

as under :- “15...The substantive rights of the appellants should not be allowed to be defeated on technical grounds by taking hyper technical view of self-imposed limitations.....”

Law of limitation may harshly effect a particular party but it has to be applied with all its rigour when the statute so prescribe and the Courts must take into account in computation of time. In **Kenya Airways Limited vs Donald Osewe Oluoch Industrial Court**

**Cause No. 1302 of 2013** wherein Nduma, J. cited **K. J. Tomji, the Law of Limitations and Adverse**

**Possession Vol. 1 ButterWorths No. 1938** page 234 paragraphs 14 (1); as follows:

**“In computing the period of limitation prescribed for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first**

***instance or in a Court of Appeal against the Defendant, shall be excluded where the proceedings is founded upon the same cause of action and is prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain it.”***

Answer to issue no. 2

To answer the question whether or not the plaintiff has locus to execute the judgment delivered on 28th March 2001 pursuant to section 45(1) of the Laws of Succession.

The applicable Law with regard to issue of succession in Kenya is the Law of Succession Act, Cap 160, Law of Kenya, which came into force on the 1<sup>st</sup> day of July 1981. Section 2(1) and (2) of the Act provide as follows;

***“Except as otherwise expressly provided in this Act or any other written law, the provisions of this act shall constitute the Law of Kenya in respect of, and shall have Universal application to, all cases of Intestate or testamentary Succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons”.***

***“The estate of persons dying before the commencement of this Act are subject to the written Laws and customs applying at the date of death, but nevertheless the administration of the estate shall commence or proceed so far as possible in accordance with this Act”.***

Basically, the Court’s view in relation to the above provisions is that other systems of succession may apply but as exceptions to the law of succession Act. It’s clear where different laws apply, the same must be legally backed and provided for by the law of succession Act or through any other written Law. In 1990 an amendment to the law of successions Act through Statute (Miscellaneous Amendment) Act (Act No. 2 of 1990) exempted Muslims from the substantive provisions of the Law of Successions Act. Those relating to testamentary or Intestate Succession, thereby subjecting the estate of a deceased Muslim exclusively to Islamic Law of succession.

Section s2(3) and (4) of the Act provides as follows;

***“Subject to subsection (4), the provision of this Act shall not apply to testamentary or Intestate Succession to the estate of any person who at the time of his death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim Law.***

***“Notwithstanding the provisions of subsection (3), the provisions of part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim Law apply in case of every Muslims dying before, on or after the 1<sup>st</sup> January 1991.”***

In this regard I am satisfied that the deceased Suleiman Kenyi, died a Muslim, the veracity thereof is not objected by parties herein- the devolution and distribution of his estate shall be governed by Islamic Law as provided by Sec. 2(3) and 4 of the Law of Succession Act, Cap 160, Laws of Kenya.

Sincerely speaking, Islamic law of succession did not recognize the concept of administration of estate of the deceased muslims. It merely laid down machinery for the distribution of the estate of the deceased among the legatees and the heirs.

In the words of Fyzee, ***“It is as though die estate were a round cake, which from a distance seems entire; but as each heir approaches the table, the cake is found to be carefully cut up and divided proportionately; and all that remains to be done is to hand over to him his particular piece”.***

The concept of administration of estate was introduced in Kenya for the first time by the British rulers.

In modern Kenya, the administration of the deceased Muslim is governed by Law of Succession Act,

Cap.160, where they are not inconsistent with those of Muslim Laws.

It should be noted that the substantive law that is applicable to the estate of a deceased Muslim is Muslim law as provided by Sec. 2(3) of the Act.

When a Muslim dies without appointing an executor , or dies intestate there is no harm in approaching the court of law in obtaining letters for administration for the purpose of:-

- a) collecting and preserving the estate of the deceased.*
- b) paying all charges against the estate.*
- c) paying debts and legacies.*
- d) distributing the remaining property among rightful heirs....among others.*

The Court attention was also drawn to the decision of Indian Court of Appeal of :

**Ibrahim Aboobaker and Anor. Vs. Teik Chand Dolwani and Others. Reported in to AIR 1953 SC 298; (1954) 56 BOMLR6** wherein it stated that:

*“It’s well recognized proposition of law that the estate of a deceased Mohammedan devolves on his heirs in specific shares at the moment of his death.....”*

In the premises I hold that the plaintiff has a locus standi to execute the judgment of this court delivered on 28th March 2002.

Accordingly, and for all the reasons given above, I hereby dismiss the objection raised by the defendant and allow the application of the plaintiff as prayed for.

**Dated and delivered at Nairobi this 25th day of April 2016.**

**Hon. A. I . Hussein**

**Kadhi II**

In presence of ;

Mr. Farah for the Plaintiff