REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELCL NO. 151 OF 2003

GEOFFREY MAKANA ASANYO ..... PLAINTIFF

VERSUS

KENYA AGRICULTURAL RESEARCH

INSTITUTE .....

DEFENDANT

1. The application before me is that dated 16 July 2025 filed by the defendant. It seeks the following orders :

   (1) THAT this application be certified as urgent and service of the same be dispensed with in the first instance and be heard ex-parte in the first instance.

   (2) THAT pending inter partes hearing and determination of this application, this Honourable Court be pleased to stay execution of the judgment and decree herein dated 31 May 2010.

   (3) THAT the firm of Millimo Muthomi & Co. Advocates be granted leave to come on record for the Defendant after judgment.

   (4) THAT an order be and is hereby given that the Judgement and Decree dated 31st May 2010 are barred from execution by Sections 4(4) and 7 of the Limitation of Actions Act and cannot be executed by the Plaintiff or any other person(s) against the Defendant whatsoever or at all

   (5) THAT the Land Registrar and the county Surveyor in Kisii County be notified of order (4) hereinabove and that the same be registered as an entry in the lands register in respect of Kisii Municipality/Block LR. No. 16757 and Kisii Municipality/ Block IV LR.No. 16758.

   (6). THAT the costs of the application be borne by the Plaintiff.

2. The application is opposed.
3. To put matters into perspective, this suit was commenced by the respondent through a plaint filed on 6 October 2003. The respondent pleaded that he is the registered proprietor of the land parcel LR No. 16757 measuring 0.511 Ha. He pleaded that this is a leasehold title held for 99 years with effect from 1 July 1992. He also pleaded to own the land parcel LR No. 16758 measuring 1.328 Ha also under a leasehold tenure of 99 years from 1 June 1992. At the time of filing suit, he had charged the two properties to National Bank of Kenya Limited and Delphis Bank respectively. He pleaded that on 15 August 2003 he commenced construction of a perimeter fence, but on 20 August 2003 as the contractor was continuing with works, he was stopped by the employees of the applicant. He thus filed suit seeking the following orders :
    (a) A permanent injunction restraining the defendant, its employees, servants and/or agents and any other person acting or purporting to act on behalf of the defendant from trespassing, occupying, alienating or otherwise interfering or dealing in any manner whatsoever with the plaintiff's properties being LR No. 16757 and LR No. 16758.
    (b) A permanent injunction restraining the defendant, its employees, servants and/or agents and any other person acting or purporting to act on behalf of the defendant from stopping, barring, interrupting and/or interfering in any manner whatsoever with the plaintiff's possession, ownership and/or development of the properties known as LR No. 16757 and LR No. 16758.
    (c) Damages for hiring the contractor and/or the cost of materials confiscated by the defendant together with interest thereon at court rates.
    (d) General damages for trespass.
    (e) Costs of the suit plus interest.

(f) *Any other relief as this honourable court may deem fit and just to grant.*

4. The applicant filed defence and counterclaim through the law firm of M/s Oguttu Mboya & Company Advocates. Inter alia she pleaded that the respondent had acquired the titles fraudulently for reason that the suit lands were public land duly allocated to the applicant for research purposes. In the counterclaim, she asked for the following orders :

   (a) *Declaration that the registration and issuance of the Certificate of Leases in respect of LR Nos. 16757 and 16758 in the name of the plaintiff was fraudulent, null and void.*

   (b) *Cancellation of the Certificate of Leases and Rectification of the Register in respect of the suit parcels respectively and also for mesne profit.*

   (c) *Permanent injunction restraining the plaintiff either by himself, agents, servants and/or employees from fencing, building, cultivating, and/or in any other manner whatsoever and/or howsoever from dealing with the suit parcels and also for an order of eviction.*

   (d) *Costs of the cross suit.*

   (e) *Such further and/or other relief as the court may deem fit and expedient.*

5. The suit was heard by Makhandia J (as he then was) who delivered judgment on 31 May 2010. He allowed the respondent's (plaintiff's) suit in terms of prayers (a) (b) and (e). He did not find any merit in the counterclaim and he dismissed it with costs. It will be observed that prayers (a) and (b) were orders permanently restraining the applicant from the suit land and prayer (e) was for costs.

6. Now, in this application, the applicant contends that despite the judgment, the respondent failed to execute the judgment and decree, and that this has continued for a period of almost 15 years, and therefore the respondent is

barred from executing it by dint of Sections 4 (4) and 7 of the Limitation of Actions Act, since 12 years from the time of judgment have lapsed. In the supporting affidavit sworn by Dr. Eliud Kireger, the Director General of KALRO (the successor of the original defendant), it is inter alia deposed that the applicant continued occupying the suit properties from the date of judgment. It is alleged that on 14 April 2025 the respondent and his agents invaded the applicant's 'possessed lands' with intention to forcefully take possession and place beacons by way of a survey exercise purporting to execute the judgment of 31 May 2010. It is deposed that the applicant was able to repel the intruders and reported the forcible invasion of its land to Kiong'anyo Police Patrol Base. It is averred that the respondent, through his counsel, issued a demand letter dated 16 April 2025, demanding that the applicant ceases control of the suit lands and notified some third parties to vacate within 14 days. It is claimed that the contents of that letter prove that the applicant did not cease occupation of the suit land after delivery of the judgment. He has further deposed that the Ministry of Lands, Public Works, Housing and Urban Development, in a notice dated 25 April 2025, informed the applicant that courtesy of the judgment the office will re-establish the boundaries of the suit lands on 9 May 2025 but the survey exercise did not proceed. He avers that he is advised by his counsel that by dint of Section 4 (4) and 7 of the Limitation of Actions Act, the respondent had 12 years to enforce the judgment and this period lapsed on 30 May 2022, thus rendering the judgment statute barred, and that the applicant is now released from the said judgment. He has continued to depose that on 9 July 2025, some unknown persons accompanied by police officers trespassed into the suit lands and established beacons which act was reported at Kisii Central Police Station.

7. There is a further affidavit sworn by Dr. Johnson Nyasani, the Centre Director, Kisii, annexing photographs of the beaconing exercise.

8. The respondent filed a replying affidavit to oppose the motion. He has pointed out that the court delivered judgment in his favour on 31 May 2010 and there was no appeal filed against it. He has deposed that to his knowledge the applicant never overtly breached any terms of the decree. He has deposed that the suit properties have remained in his possession although he would occasionally allow agricultural activities like planting of maize and napier grass by third parties known to him from the surrounding community. He has averred that in April 2025, he employed a surveyor to re-establish the beacons in readiness for fencing and further development, and also to fend off threatened encroachment of the land. To ensure security, he filed a Miscellaneous Application in the Magistrates' Court for orders to have the Kisii County Land Surveyor visit the properties to re-establish the beacons and he has annexed the order issued in his favour. On 9 July 2025, the County Surveyor moved to implement the orders and visited the land in the company of security officers. He has deposed that the exercise moved smoothly without any protest or interference from the applicant. He has deposed that prior to the re-establishing of the beacons he had constructed a structure on LR No. 16758 for his workers and there was no complaint or interference from the applicant and his workers are in occupation to date. He has deposed that the orders of 31 May 2010 are perpetual in nature with no expiry date and any subsequent encroachment would be contempt of court. He has deposed that the applicant has never been in active occupation of the suit properties. He has averred that this court lacks jurisdiction to discharge the injunctive orders as they were a final judgment and recourse lay in an appeal. He has urged the court not to be drawn into a speculative and misleading narrative suggesting that the applicant is in occupation and entitled to rights over his parcels of land. He has averred that the applicant has failed to demonstrate with any degree of specificity how it has come to occupy his parcels of land. On the maize and napier grass, he has deposed

that these were cultivated by him. He has added that there is no permanent structure of the applicant on the land.

9. There is a supplementary affidavit sworn by Dr. Nyasani. He says that it is false that the respondent has been in possession, and yet again refers to the letter dated 16 April 2025. On the exercise of 9 July 2025, he deposes that the police officers also claimed that they were enforcing a court order dated 27 June 2025 issued in Kisii CM Miscellaneous No. E008 of 2025 and because the applicant was not a party to that case, proceeded to make a report of trespass at Kisii Central Police Station. He has deposed that perusal of the file has shown that it was for orders to re-establish beacons and now they have applied to be joined to that case. He believes that the orders of 27 June 2025 were obtained to evade operation of the Limitation of Actions Act. On the structure on the land, he has averred that it is a small structure hurriedly built by the respondent on 9 July 2025 under the protection of the police and has remained vacant. He has deposed that the applicant uses part of the land to plant napier grass and maize, another part as a grazing paddock, and there is a portion occupied by Kioganyo Police Station.
10. I directed counsel to file submissions which they did and I also gave them an opportunity to highlight at the hearing of the application. I have taken the submissions into account before arriving at my decision.
11. At the outset, I will grant prayer 3, i.e the prayer for change of counsel.
12. The substance of the application is said to be hinged on the provisions of Sections 4 (4) and 7 of the Limitation of Actions Act, Cap 22, Laws of Kenya. These Sections are drawn as follows :

    S. 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.

S. 7. Actions to recover land

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

13. These are straight forward provisions of the law. Under Section 4 (4) one may not bring an action 12 years after judgment. A simple example would be a money judgment. If a defendant is ordered to pay the plaintiff, say the sum of Kshs. 100,000/= which the defendant does not pay, and no action is taken to execute for that money within 12 years, then the defendant cannot now come to court to execute it. The judgment becomes stale by effluxion of time and the plaintiff cannot enforce it. Section 7 bars a person owning land from recovering it, if he takes no action within 12 years of the action accruing. It is often used in cases for adverse possession.
14. In our case, the applicant contends that the respondent took no action after the judgment and now the judgment is stale. The respondent's argument is that he need not have taken any action, as what he filed in court was a case seeking to permanently restrain the applicant on the land, and the decree was in his favour. The respondent further argues that the applicant was restrained by an injunction which is permanent in nature.
15. I am persuaded that the respondent has a point. When you look at the pleadings and prayers in the plaint, the respondent actually never sued for any order of eviction. The facts of the case were that the respondent wished to commence fencing and when his contractor started the works, the applicant stopped him and confiscated his building materials. The case was not one where the respondent came to court to state that the applicant was

occupying his land and therefore he needed an order of eviction. On the contrary, it was the applicant who in fact asked for an order to evict the respondent from the suit land. She also asked for mesne profits. I do not see why the applicant would have asked for an order of eviction and mesne profits if the respondent was not the one in possession of the suit land. You ask for an order of eviction to remove a person from land that he/she is occupying and you ask for mesne profits because the other party is enjoying the fruits of the land. For the respondent, what he asked is to have the applicant permanently restrained from interference with his land and he got the orders with the court finding no merit in the case of the applicant. It would mean that the applicant was permanently restrained from the suit land. In that order, there was nothing for the respondent to execute, i.e it was not one for eviction so that he needs to move to evict the applicant; it was an order for the applicant to obey, by not interfering with the respondent's land. In those circumstances I do not see how the applicant is now saying that the judgment is stale because it has not been executed.

16. The applicant has placed a lot of premium in the letter dated 26 April 2025 written by the respondent's counsel. That letter is addressed to the Acting Center Director and the part relied on by the applicant states as follows :

"Contrary to the well settled issue of ownership, you have presided over subletting substantial portions of the properties to 3rd parties, to the colossal detriment of our client's clearly supreme proprietary rights.

Our instructions therefore are to DEMAND that you cease any purported control and notify the said 3rd parties to vacate the properties within fourteen (14) days from the date of this letter which we hereby do.

Be advised that your continued (sic) in the properties amounts to trespass and a furtherance of contempt of the orders issued by the High Court as explained. Failure to comply with the contents of this letter will leave our

client with no other option than pursue the stern remedies available in law at your own peril."

17. I do not see how this letter helps the applicant in asserting that the judgment is stale. First, this letter is not one under oath to constitute evidence. It is merely a demand letter. But even if we take that what is written therein is evidence, it still does not demonstrate that the judgment is stale. That letter does not say that the applicant has been in continuous possession of the suit properties from the time of delivery of the judgment. It only complains of some interference without giving any date.
18. The applicant of course asserts that after judgment she continued being in possession of the suit land but this is disputed by the respondent. I have certainly not seen any evidence presented by the applicant that can conclusively bring this court to the unequivocal conclusion that she has been in continuous occupation of the suit properties from the time of the judgment till this application was filed. In such circumstances, any shred of doubt must be in favour of the respondent, given that the respondent has a decree in his favour. I am thus not persuaded within the confines of this application that any time started running in favour of the applicant.
19. But if there was any time running in favour of the applicant, what the applicant is essentially saying is that she has acquired title to the suit properties by way of adverse possession. She cannot seek orders of adverse possession through an application such as this. That requires a full suit that has to be decided on its own merits after taking evidence, and this is no such suit.
20. The above aside, we cannot escape the fact that the applicant is a public body. It is expected that a public body will confine its activities to the land assigned to it by the Government. Thus, if the applicant has been given land for research purposes, it ought to confine its research activities to the land

that has been assigned to it. Indeed, there would be no rationale for the Government to allocate funds so that the same may be spent on land that does not belong to the public body. I do not see how the Government would budget for expenditures to be used by public bodies such as the applicant, if those expenditures are outside the confines of the land allocated to the public body. Prudent use of public resources would require the public body to use its resources within the confines of its land, or such other land that it has been permitted to use by the Government, or if private land, by the owner of the private land. In fact a public officer who now attempts to use Government resources away from what has been assigned to the institution is now going out on a frolic of his own.

21. A public officer is a trustee; he is expected to protect and preserve the resources allocated to him on behalf the public. In the same way that he is expected to protect and preserve what is for the public, he is also expected to respect what belongs to private individuals. He cannot now go on a frolic on his own, take public resources that he is supposed to use within the confines of the land entrusted to him, and now start using those resources on private land, more so private land that the public body has already been barred from by a court order. Public officers need to respect private property.

22. And by the way, the Government does not need help in grabbing other people's land. If the Government needs land, it has the state power of compulsory acquisition upon compensation being made to the private individual. Thus, if the Director of the applicant and the Acting Centre Director feel that the suit properties will help the applicant in undertaking research activities, all they need to do is approach the Government and ask the Government to compulsorily acquire the same. They cannot proceed to act as vigilantes purportedly on behalf of the state. The Government does not use, and should not use, such tactics to acquire private land.

23. We also need to remember that public land is land that is managed by the National Land Commission as provided under Article 67 (2) (a) of the Constitution. Anybody attempting to take over private land on behalf of the public needs to have the blessings of the National Land Commission because at the end of the day, the land will be managed by the National Land Commission. As I have said, a public servant ought not to purport to help the Government in grabbing private land. The Governent does not need such assistance. The only assistance the Government needs is for public officers to protect and preserve what is vested in them by the Government as they are trustees. I have seen no correspondence from the National Land Commission or any Government Ministry, directing the officers of the applicant to occupy and use the private land of the respondent.
24. I am actually appalled by the conduct of the applicant's Director and Acting Centre Director. They are public servants. They are supposed to use public finances prudently. I doubt that Treasury allocated money to them so that they can start activities on other people's private land. I am certain that whatever funding they got from the public was for use within land that has been assigned to them, not land that has been decreed by court to be belonging to other people and where a permanent injunction has been issued against the applicant. I have said it, and but it is worth repeating; if the Director of the applicant and its Centre Director feel that they need more land, let them request the Government to compulsorily acquire land.
25. While I was going through the evidence tendered at the hearing, it struck me that at the time of giving evidence, the witness of the applicant stated that the applicant does not have title to the land that it occupies. I would imagine that instead of going to try and grab land that has already been proved not to belong to the applicant, the officers of the applicant would direct their energies towards obtaining title to the land that should belong to the applicant. I have seen no such effort. Instead, what I see is a misplaced zeal,

spent on attempts to occupy private land which the applicant has been banned from. The applicant's officers should stop these shenanigans and proceed to ask the National Land Commission and the Ministry of Lands to map out the land that the applicant should occupy, get title to it, and protect it as any prudent manager of public resources ought to do. What has been decreed to be private property needs to be respected by all public servants including the officers of the applicant.

26. I think I have said enough to demonstrate that I see no merit in this application. It is hereby dismissed.

27. What about the costs ? In my view the costs ought to be borne personally by the Director and Centre Director of the applicant. As I have mentioned, I doubt that the applicant was given public resources to grab private land and I do not see why the public should be burdened with costs of the activities of the applicant's Director and Centre Director. The Director and Centre Director are acting on a frolic of their own as I have seen nothing from the National Land Commission or the Ministry instructing them to interfere with the respondent's land and that is why they need to personally pay the costs.

28. It is so ordered.

DATED AND DELIVERED THIS 23 DAY OF OCTOBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Ngethe instructed by M/s Millimo, Muthomi & Company Advocates for the applicant.

Mr. Bonuke instructed by M/s Bonuke & Company Advocates for the respondent.

Court Assistant – Michael Oyuko