



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NO. 64 OF 2017

GIDAMBATI MWITA MAIRO.....PLAINTIFF

VERSUS

SARARA MATONGO.....DEFENDANT

RULING

1. On 15th November 2017, the applicant namely **GIDAMBATI MWITA MAIRO** through learned counsel, Mr. Thomas Muniko Robi mounted an application by way of a notice of motion of even date pursuant to Sections 3A and 63 (e) of the Civil Procedure Act (Cap 21 Laws of Kenya). He is seeking against the defendant, Sarara Matongo, the following orders:-

a) THAT the honourable court be pleased to issue an order compelling the respondent herein to sign, execute and/or endorse all the relevant papers and /or documents for transfer in respect of that stretch of land running along the Kenya-Tanzania border, 100 metres in depth on the Kenyan side of the border, the eastern end of which starts at a stream, in favour of the applicant forthwith and in default, the Deputy Registrar of this honourable court do sign, execute and/or endorse such papers or documents in favour of the applicant and on behalf of the respondent herein.

b) THAT the respondent do pay the cost of this application.

2. The application is anchored on the applicant's 16 paragraphed supporting affidavit and copies of annexed documents marked as follows:-

a) Judgment dated 23/10/1997 and proceedings in Kisii HCC NO. 10 OF 1990 (GMM 1 (a) and 1 (b)).

b) Decree issued on 11/9/2008 in Kisii HCCC No. 10 of 1990 (GMM-2).

c) A report dated 21st February 2016 by Agricultural Officer, Nyabasi West Ward (GMM-3)

3. The application is further based on grounds (a) to (p) on its face. The grounds as expressed, include :-

1) "The applicant herein is the legal and/or rightful owner of all that stretch of land running along the Kenyan – Tanzania border, 100 metres in depth on the Kenyan side of the border, the Eastern end of which starts at a stream thereon.

2) The applicant has been the rightful owner of the suit property for over 40 years prior to 1970.

3) The applicant instituted a civil suit before Kisii High Court being CC No. 1990, claiming for recovery of the suit portion of land measuring 18 Acres which was heard and determined in the applicant's favour by Justice Tom Mbaluto

4) The respondent have abundantly refused to sign, execute and/or endorse the necessary papers/documents in response to the suit property in favour of the applicant herein as per the Judgment dated 23rd October 1997 a subsequent decree issued on 11th September ,2008."

4. The respondent through M/s Oguttu , Ochwangi, Ochwal and Company Advocates, opposed the application in his 21 paragraphed replying affidavit sworn on 12th June 2018 and filed on 19th June 2018. He averred, inter alia, that the applicant is guilty of dishonesty and that he has come to court with unclean hands. That whereas the applicant commenced proceedings in Kisii High Court Civil Case No. 10 of 1990, which was heard and determined, the judgment delivered on 23rd October 1997 (GMM 1a) and resultant decree (GMM2) were obtained by corrupt practices and or undue inducement of the Honourable Justice Mbaluto (now retired), who was removed from the Judicial Service through due process on account of the bribery allegations arising out of the subject in dispute as shown on a copy of the extract marked "SM1"

5. The respondent further averred that the Judgment having been procured on the aforesaid account and since it is more than 12 years old, the same is stale and void. That the application has been brought with unreasonable delay hence the applicant is guilty of laches and that the court can not enforce an illegality.

6. Simultaneously with the replying affidavit, the respondent filed a statement of grounds of opposition of even date. The grounds of opposition include:-

i. The instant notice of motion application, is pre-mature, misconceived, incompetent and otherwise legally untenable.

ii. On the other hand, the judgment sought to be executed is more than 12 years and hence same is stale and beyond execution and /or implementation, whatsoever and/or howsoever.

iii. At any rate, the instant application is barred and/or prohibited by dint of Sections 4 (6) ,7 and 12 of the Limitation of Actions Act, Chapter 22, Laws of Kenya.

iv. Beside, the instant application constitutes and /or amounts to an abuse of the due process.

7. On 30th July, 2018, this court directed that the application be canvassed by way of written submissions; **see Order 51 Rule 16 of the Civil Procedure Rules, 2010**. In that regard, learned counsel for the applicant and learned counsel for the respondent filed and served submissions dated 10th August 2018 and 3rd September 2018 respectively.

8. Learned counsel for applicant submitted in brief that the applicant lawfully owns the suit stretch of land which the respondent only holds in his (applicant's) favour. That the respondent has refused to sign the relevant transfer documents further to the Judgment and decree in Kisii HC Civil case No. 10 of 1990. That the application is filed without delay and in good faith, seeking execution of the decree dated 11th September 2008 which is legally valid and has never been challenged through either review or appeal.

9. Counsel further submitted that bribery allegations by the respondent against the retired Judge who presided over the Kisii HC Civil case No. 10 of 1990 including a visit to the suit stretch of land and delivered his final verdict, are unproved and baseless. He urged the court to allow the application with costs to the applicant.

10. On his part, learned counsel for the respondent submitted, inter alia, that it is common ground that the Judgment obtained in Kisii High Court Civil case No. 10 of 1990 generated a complaint pertaining to bribery allegations against the trial judge in the matter and that the Honourable Judge was declared unsuitable to continue holding the office of a Judge in the Republic of Kenya. That at the time of filing the application, the judgment was more than 21 years of age.

11. Counsel framed four (4) issues for determination which include whether this court has the requisite jurisdiction to entertain the application, whether the same is barred by **section 34 of the Civil Procedure Act (Cap 21)** and the enforceability or implementability of the Judgment and the decree. Counsel further analysed each issue identified for determination, termed the application misconceived and sought its dismissal with costs.

12. To buttress their submissions, counsel for the respondent relied on authorities which include:-

a) Esther Gachambi Mwangi –v- Samwel Mwangi Mbiriri (2013) eKLR that jurisdiction flows from the law and the recipient court may not arrogate to itself jurisdiction through the craft of interpretation.

b) M'rinkanya and Another –v- M'mbijiwe (2007) eKLR where the court of Appeal held that a judgment for possession of land should be enforced, before the expiry of 12 years as stipulated under Section 7 of the Limitation of Actions Act (Cap 22 Laws of Kenya).

c) Sections 7 and 34 of the Civil Procedure Act (Cap 21) as well as Sections 4 (b) 7,17 and 37 of the Limitation of Actions Act (Cap 22).

13. I have anxiously considered the entire application, the replying affidavit, the grounds of opposition, and submissions for and against the application. I find the issues for determination are (a) to (c) as identified in the submissions of respondent's counsel and embrace them accordingly.

14. On whether this court has the requisite jurisdiction to entertain the subject matter, it is common baseline that the applicant commenced Kisii HCCC No. 10 of 1990 against the respondent and that Mbaluto J (retired) rendered Judgment on 23rd October 1997. The applicant contended that the judgment was just and fair thus the respondent's allegations that the Judge who delivered the decision was bribed over it were baseless and unproved. The respondent asserted that any application and or proceedings touching on the said civil suit can only be dealt with in that suit and not otherwise thus this court is devoid of jurisdiction over the instant application.

15. Black's Law dictionary 12th Edition defines "Jurisdiction" as :-

"A court's power to decide a case or issue a decree."

16. In the case of **Samwel Kamau Macharia and another –v- Kenya Commercial Bank Ltd and two others (2012) eKLR**, the Supreme

Court of Kenya held that jurisdiction of a court or tribunal flows from either the constitution or statute or both; see also **Esther Gachambi Mwangi casae (supra)**

17. In the locus classicus case of the **Owners of Motor Vessel Lillian “S” –v- Caltex Oil Kenya Ltd (1989) KLR 1**, the late Nyarangi JA (as he then was) held that jurisdiction is everything and once a court has no jurisdiction, it has no power to make one more step. The court has to down it’s tools.

18. In the instant application, the same dispute between the applicant and the respondent was resolved by the judgment rendered on 23rd October 1997 in Kisii HCCC No. 10 of 1990. Therefore, this court is barred from the matter which has been definitely settled by judicial decision (Re-judicata) by dint of **section 7 of the Civil Procedure Act (Cap 21)** and the Black’s law Dictionary (supra) which set out the three essential elements of res judicata thus:-

- a) An earlier decision on the issue.
- b) A final judgment on merits
- c) The involvement of the same party or parties in privity with the original parties.

19. Moreover, the applicant seeks to enforce the judgment and decree issued in Kisii High Court Civil case No. 10 of 1990. As aptly put by the respondent’s counsel in submissions, the instant matter turns out to be execution proceedings. I am aware of **Order 22 Rules 1 to 86 of the Civil Procedure Rules, 2010** on execution of decree and orders.

20. Be that as it may, the applicant ought to have brought the instant application for execution of the decree in Kisii High Court Civil Case No. 10 of 1990 and not in the instant matter. It is a mandatory legal requirement that all questions arising between the applicant and the respondent be determined in that suit and not through this separate suit. **Section 34 (1) of the Civil Procedure Act (Cap 21 Laws of Kenya)** provides that:-

“ All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit. ”(Emphasis added)

21. Interestingly, the applicant has commenced execution proceedings after more than 21 years from the date of judgment and decree. This disputes relates to ownership of the suit stretch of land and the timelines for the execution of judgment and or decree is 12 years as recognized under **sections 4 (6) and (7) of the Limitation of Actions Act (Cap 22)** and in **M’rinkanya case (supra)**

22. I am aware of **Article 159 (2) (b) of the Constitution of Kenya, 2010** which stipulates that justice must not be delayed. **Articles 23 (c) and 50 (1)** of the same Constitution provides for uncurtailed right to fair hearing. The doctrine of equity under **Article 10(2) (b) of the said Constitution, 2010** binds this court and the principles of equity include that delay defeats equity and equity aids the vigilant and not the indolent. Quite plainly, the instant application suffers from inordinate delay and it’s filing was unnecessary. It should have been made in Kisii High Court Civil case no. 10 of 1990 where Judgment and decree were rendered and issued respectively.

23. In the premises, I find the respondent’s grounds of opposition dated 12th June 2018 sound. I uphold the grounds accordingly. Therefore the present application lacks merit and it fails.

24. A fortiori, I dismiss the applicant’s notice of motion dated 15th November 2017.

25. By dint of the provisio **to section 27 of the Civil Procedure Act (Cap 21)**, costs of the notice of motion application shall be borne by the applicant.

DELIVERED, DATED and SIGNED at MIGORI this 12th Day of MARCH 2019.

G. M.A. ONGONDO

JUDGE

In presence of :-

Mr. Orlando learned counsel for the respondent.

Quinter Adoyo holding brief for Muniko learned counsel for the respondent

Tom Maurice – Court Assistant.