



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**HCC 763 OF 1992**

**MOSES KIPKURUI BOR.....PLAINTIFF**

**VERSUS**

**JOHN CHIRCHIR.....DEFENDANT**

**RULING**

***(Application for execution of decree for vacant possession of land; decree passed in the year 1994; application for execution being filed in the year 1997; said application remaining unprosecuted until the year 2018; whether the prosecution of the said application is caught up by the limitation period; general principle being that a judgment must be executed within 12 years; same principle must apply to the prosecution of an application for execution of a judgment; application declared to have been caught up by limitation and dismissed with costs)***

1. The application before me is that dated 18 March 1997 filed by the plaintiff. The application seeks the following orders :-

*(a) That this Honourable Court be and is hereby pleased to direct that the judgment debtor/defendant do give vacant possession of LR No. Lembus/Sigoro Extension/3.*

*(b) That in the event the judgment debtor resists or obstructs the applicant in obtaining possession of the land, the Chief Lumbus Location and the OCS, Eldama Ravine Police Station be and are hereby directed to provide security to the court bailiff.*

*(c) That the costs of this application be borne by the judgment debtor/respondent.*

2. To put matters into context, this suit was filed on 14 December 1992. The plaintiff/applicant averred that he is the registered owner of the land parcel Lembus/Sigoro Extension/3. He claimed that in the year 1990, the defendant/respondent without his consent, entered into the land and constructed a house and planted 500 coffee plants, thus depriving him use of the suit land. In the suit, the applicant asked for orders of eviction, permanent injunction, and costs of the suit. The defendant filed defence vide which he contended that he entered the suit land in the year 1977 and has since been living on it with the knowledge of the plaintiff. He claimed to have acquired title by adverse possession. He also alleged that any registration of the land in the name of the applicant was acquired unlawfully.

3. In a brief judgment delivered on 3 February 1994, Rimita J, entered judgment for the applicant and inter alia ordered the respondent to give vacant possession in three months or else he be evicted. Nothing much seems to have happened to the case until this application was filed on 18 March 1997. Neither does much seem to have happened after the application was filed. It was mentioned a couple of times resting with the mention of 31 October 2000, when the judge directed a date taken on priority. All lay quiet until close to 18 years later, 16 January 2018 to be precise, when the plaintiff filed an application dated 12 January 2018, seeking orders of eviction of the defendant from the suit land. A preliminary objection was raised that the said application offends the provisions of Section 4 (4) of the Limitation of Actions Act, Cap 22, Laws of Kenya, and that the applicant's right to the land got extinguished on expiry of 12 years following delivery of the judgment. Perhaps faced with that formidable objection, the applicant withdrew the application dated 12 January 2018. Upon its withdrawal the respondent filed a motion dated 22 October 2018, seeking orders that the application dated 18 March 1997 be struck out for the reason that the judgment sought to be executed is now more than 12 years old. I directed that the two applications be heard together and directed counsel to file written submissions which they both did.

4. Central to the issues before me is the interpretation to be given to Section 4 (4) of the Limitation of Actions Act, which provides as follows :-

*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.*

5. In her submissions, counsel for the plaintiff submitted that Section 4 (4) of the Limitation of Actions Act, Cap 22, does not apply to the application dated 18 March 1997, for what is contemplated therein is a new action but does not cover an application filed before the expiry of 12 years. She argued that the application dated 18 March 1997 was filed before expiry of 12 years from the date of the judgment. She relied on the case of ***Koinange Investment and Development Company Limited vs Ian Kahi Ngethe & 3 Others (2015) eKLR*** and the case of ***Geoffrey Ajuang Okumu –vrs- Nicholas Odera Opinya (2017) eKLR***.

6. On the part of the defendant, counsel submitted that the application dated 18 March 1997 was filed after lapse of a period in excess of one year and no leave was sought by the plaintiff to file the application out of time. He also thought that the decree has been overtaken by Section 4 (4) of the Limitation of Actions Act. He relied on the Court of Appeal decision in the case of ***M'Ikiara M'Rikinkany & Another vs Gilbert Kabeere M'Mbijiwe (2007) eKLR***.

7. Before I go too far, let me reiterate the significant dates in issue in this application. There is no question that there is judgment in favour of the plaintiff which was entered on 3 February 1994 and the defendant ordered to give vacant possession within 3 months. The only attempt to execute the judgment has been through the application dated 18 March 1997. The last time that application was in court was 31 October 2000. The next time there was effort to revive that application was 1 October 2018 when the application dated 12 January 2018 was withdrawn and counsel signalled intention to proceed with the application dated 18 March 1997. It is therefore apparent that the application dated 18 March 1997 has remained unprosecuted, at the very least for about 18 years, since it was last adjourned on 31 October 2000. The question is whether it is now too late to execute the judgment given that Section 4 (4) of the Limitation of Actions Act, requires that judgment be executed within 12 years of the same being delivered.

8. Ms. Kipruto's argument is that the application herein was made within 12 years of the judgment and cannot therefore be caught up by Section 4 (4) of the Limitation of Actions Act. I have looked at the authorities that Ms. Kipruto referred me to, but I do not think that they assist her in any way. The case of ***Koinange Investments*** (supra) was an Originating Summons basically seeking orders of adverse possession. In that case, there had been a decree in favour of the defendant which was issued in the year 2002. An appeal was preferred to the Court of Appeal and a stay of execution pending appeal was issued. The appeal was then determined on 23 March 2012. Clearly, the plaintiff could not succeed on his claim that the judgment remained unexecuted for 12 years for there had been a stay of execution of the decree and this period could not count for the 12 years. I do not see how that decision helps us in this case. In the case of ***Godfrey Ajuang Okumu*** (supra) there was demonstrated attempts to execute the decree before expiry of the limitation period and again I do not see how this case helps the plaintiff.

9. In as much as the application herein was for execution of the decree and was filed before 12 years from the date of judgment lapsed, does it mean that the mere fact that it has been filed, without any step taken to prosecute it, would conclude that it is alive? Does it mean that such application can be left for an indefinite duration of time? I do not think so. My view of the matter is that if one files an application for vacant possession of land in execution of a decree, he must take steps to prosecute such application at the latest within 12 years of filing such application, or at least within this period of time, take steps towards prosecution of that application so that even if a decision is made outside the 12 years, this would not be because the application has remained unprosecuted for that duration of time. If such decree holder does not take steps to prosecute such application within 12 years of filing it, my view of the matter is that the application will be caught up by Section 4 (4) of the Limitation of Actions Act, and would be statute barred. It certainly could not be the intention of the law to have a party simply file an application for vacant possession and fail to prosecute it for an indefinite period of time, then at whatever time in the future, seek to now prosecute it. In matters of land, it should be appreciated that time starts running in favour of the occupant, who can claim adverse possession if 12 years lapse when his occupation is undisturbed. To me, failure to prosecute such application would be akin to allowing the possessor quiet occupation of the suit land, and after 12 years, any action which attempts to reclaim the suit land would be time barred. This reasoning appears to be backed up by the Court of Appeal decision in the ***M'Ikiara M'rinkanya*** case (supra) where the court stated as follows :-

*“Lastly, it is logical from the scheme of the Act, that a judgment for possession of land, in particular should be enforced before the expiration of 12 years because Section 7 of the Act (Limitation of Actions Act) bars the bringing of action for recovery of land after the end of 12 years from the date in which the right of action accrued. By the definition in Section 2(2) (3) of the Limitation Act :*

*‘reference in this Act to a right of action to recover land include reference to a right to enter into possession of the land and reference to the bringing of an action in respect of such right of action include reference to making of such an entry.’*

*According to that definition the institution of proceedings to recovered possession of land including proceedings to obtain a warrant for possession is statute-barred after the expiration of 12 years.”*

10. Apart from the above, the application would be incompetent for the reason that Order 22 Rule 18, which is precisely similar to Order XXI Rule 18 of the pre-2010 rules, provides as follows :-

**18. Notice to show cause against execution in certain cases [Order 22, rule 18.]**

(1) Where an application for execution is made—

(a) more than one year after the date of the decree;

(b) against the legal representative of a party to the decree; or

(c) for attachment of salary or allowance of any person under rule 43,

*the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:*

*Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him:*

*Provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is caused solely by reason of the judgment-debtor having changed his employment since a previous order for attachment.*

*(2) Nothing in subrule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.*

*(3) Except as provided in rule 6 and in this rule, no notice is required to be served on a judgment debtor before execution is issued against him.*

11. The above law provides inter alia that where a decree is more than one year old, before executing it, the decree holder needs first to issue a notice to the judgment creditor to show cause why the decree should not be executed. The application dated 18 March 1997 is a direct application for execution, but there first needed to have been filed, and served, a notice to show cause, which the plaintiff does not pretend to have done. On that basis, the application dated 18 March 1997, would in any event, be incompetent.

12. It is for the above reasons that I find that the application dated 18 March 1997 is time barred and for that reason I dismiss the same with costs.

13. Orders accordingly.

**Dated, signed and delivered in open court at Nakuru this 31<sup>st</sup> day of July 2019.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of : -**

Ms. Alwala holding brief for Ms. Gitau for the plaintiff/applicant.

Ms. Mungai holding brief for Mr. Orege for the defendant/respondent.

Court Assistants- Nelima Janepher/Patrick Kemboi.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**