



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 415'B' OF 2017

FRANCIS MAINA MATHII - PLAINTIFF/APPLICANT

VS

PETER NGURU BEDAN - DEFENDANT/RESPONDENT

RULING

1. The Plaintiff filed a Notice of Motion dated 30/5/17 seeking orders that;
 - a. That this Honourable Court may be pleased to issue an Order evicting the Respondent/Defendant from the Applicant's land parcel No. Loc.14/Gakurwe/82, to give vacant possession to the Applicant, the valuation and compensation notwithstanding.
 - b. An Order that the Respondent do transfer the whole of the suit land to the Applicant and in default of the Respondent to sign the necessary transfer documents the Deputy Registrar to sign in his place
2. The application is grounded on the reasons thus;
 - a. The Respondent was ordered to be compensated for development he had carried out on the said land parcel No. Loc.14/Gakurwe/82 and the Applicant to pay for compensation.
 - b. The Applicant has since the said Judgement and on several occasions approached the Respondent with a view to having the said development valued but the Respondent has refused and/or neglected to do so.
 - c. That due to the refusal by the Respondent to co-operate and have his developments on the Applicant's said land valued in order for the Applicant to compensate him, the Applicant has suffered irreparable damages because the Respondent has occupied the said and illegally.
 - d. The Respondent can now be only evicted by this Court to give vacant possession, the valuation and compensation notwithstanding.
3. The application was supported by the Affidavit of Francis Maina Mathii sworn on 30/5/17. According to the Plaintiff/Applicant the Defendant/Respondent entered into the suit land Loc.14/Gakurwe/82 in 1967 with the permission of his late father who died in 1972. In 1977 he succeeded the suit property and was registered as proprietor on 17/4/78 and issued with a title deed. In the same year he filed RMCC No. 134 of 1978 Murang'a and the Court found the sale between the Defendant and the Plaintiff's father null and void on account of lack of land control board consent. The Court however ruled that the Defendant could only be evicted after the payment by the Plaintiff of all the developments carried out by Defendant

on the suit land.

4. Further and in addition the Plaintiff also obtained Judgement in his favour in the HCCC No. 36/1988 Nyeri on 25/1/2001. He deponed that the Court held that the Plaintiff is entitled to the suit land only after compensating the Defendant for the developments he had carried out on the suit land.

5. The Plaintiff further deponed that thereafter the Defendant has frustrated the execution of the Judgement issued on 25/1/2001 by refusing to cooperate to have a valuer carry out a valuation of the developments on the suit property for purposes of determining the quantum of compensation to the Defendant. It is after compensation that the Defendant would vacate or be evicted from the suit property.

6. According to the Plaintiff the Defendant's refusal to value the developments as aforesaid is an act in contempt of the Court Orders and therefore he should be evicted and hence his current plea to this Court.

7. The Defendant on 15/6/17 through G K Kibira & Co. Advocates filed grounds of opposition inter alia that the application offends section 4 (4) of the Limitation of Actions Act Cap 22 which states that an action may not be brought upon a Judgement after the end of 12 years. Further that the decree dated 25/1/01 did not grant Orders for eviction.

8. In the affidavit of reply dated 15/6/17 the Defendant gave a long chronology of events surrounding the dispute in respect to the suit land. In summary, he deponed that he bought the suit land in 1967 from the father of the Plaintiff and paid the full purchase price of Kshs.1800/= and was put in possession which possession he still wields. That the seller died in 1972 before Land Control Board consent was obtained thus invalidating the transaction.

9. Seeking to recover possession of the suit property from the Defendant, the Plaintiff filed suit CMCC NO. 134 of 1978 for eviction of the Defendant and obtained judgement in his favour. The Court held that the Plaintiff to compensate the Defendant for developments before evicting him. Further the Plaintiff undeterred (while sitting on a judgement in his favour) filed HCCC No. 36 of 1985 against the Defendant seeking *inter alia* that the parties agree on a valuer to carry out the valuation of the developments of the suit land thereafter abide with the valuers decision and the Defendant on receipt of payment for the said developments remove the caution registered on the suit land on 21/1/78 and vacate the suit land.

10. Consequently, the matter was submitted to arbitration which decided in favour of the Defendant. Aggrieved by the decision, the Plaintiff filed an appeal in the Court of Appeal in Nyeri which held that the case be retried in the High Court. The High Court heard the case *denovo* before Justice J V Juma who pronounced judgement on 25/1/001 as follows;

“I therefore hold that the Plaintiff is entitled to the suit land only after he has compensated the Defendant for the development the Defendant has carried out of the suit land.” I therefore enter Judgement for the Plaintiff accordingly with costs. The counter claim is dismissed with costs”.

11. In response to para 9 of the Supporting Affidavit of the Applicant the Defendant refutes the allegations of fraud and states that he was registered as owner of the land pursuant to the Judgement delivered in Nyeri HCCC No. 39 of 1988 by Justice P K Tunoi (as he then was). The Defendant further contends that the decree issued by the Court on 25/1/01 in favour of the Plaintiff remains unexecuted nor complied with by the Plaintiff. He refutes that he was ordered by the Court to value his developments on the Plaintiffs land. Denying that he has been uncooperative in respect to valuation of the developments on the suit land, challenged the Plaintiff to present evidence/correspondence to the contrary. He opined that the Plaintiff has been barred by limitation of time and cannot enforce the decree given on 25/1/01 as 12 years have lapsed.

12. Further the Defendant deponed that allowing the Plaintiffs application will occasion the Defendant irreparable loss and suffering if he is to vacate the suit land without refund of the purchase price of Kshs. 1800/= together with the compensation for the developments carried out by the Defendant on the suit land. He added a rider that if the Plaintiff was to act in good faith he should enter into negotiations with

the Defendant. He contends that the Plaintiff should refund the purchase price at market value since it is his failure to do so from way back in 1978 when the Court held in his favour and ordered that the Defendant be refunded the purchase price and compensation for the developments.

13. In reply to the grounds of opposition and reply to affidavit of the Defendant, the Plaintiff reiterated his earlier grounds and stated that execution of the decree has been frustrated by the Defendant's refusal to have the developments valued so much so that the Limitations of Actions does not arise. That it is the reason he has sought the intervention of the Court.

14. The application was canvassed by written submissions by the respective parties. The Plaintiff christened his written submission as Applicant's statement and on the 14/11/17 when he appeared in Court for mention to confirm filing of written submissions he confirmed to the Court that those are his written submissions. The Plaintiff dwelt on the averments as stated in his supporting affidavit aforesaid. It is his submission that he filed the HCCC No 36 of 1988 seeking the following orders;

- a. That the Defendant do accept a valuer to value his developments in this parcel Loc.14/Gakurwe/82.
- b. That the parties to agree on one valuer and bide with the valuer's decision.
- c. That the Defendant do vacate the parcel of land after receiving his payment for the said development, and do remove his caution registered on 21st January, 1978.
 - a. That the Defendant to pay cost of this suit.
 - b. That the Honourable Court do grant any better relief it may deem fit to grant.

That in effect, his claim in this suit was to secure the execution of the Orders of the Court issued in his favour in the SRMCC NO 134 of 1978. It is his position that the Defendant has continued to frustrate the valuation of the developments, and hence his delay in compensating the Defendant to pave way for the defendant to vacate the suit land.

15. In rebutting the above submissions the Defendant at the onset objected to the Plaintiff pleadings to wit the answer to Replying Affidavit sworn and filed on 11/9/2017 and answer to grounds of opposition dated 11/6/2017 without leave of the Court. The Defendant through his Learned Counsel Mr. G.K. Kibira argued that the same should be struck out. Further that the Plaintiff filed written submissions out of time and equally the same should suffer the same fate-strike out for noncompliance of Court Orders issued on 4/10/17 which required the filing of written statement within 14 days. The Plaintiff filed his on 3/11/2017, about 15 days later.

16. With regard to the Judgement in RMCC No. 134 of 1978 the Defendant averred that the same is still in force as no appeal was preferred by any of the parties. That the Plaintiff should now refund the Defendant the purchase price at the prevailing market rates. Further that transfer of the suit to the Defendant's name was in compliance with the Judgement of the HCCC in Nyeri by Hon. P K Tunoi (as he then was) and not through corrupt practices as alleged by the Plaintiff.

17. Opining that the Plaintiff has come to Court with unclean hands, the Defendant states that the Plaintiff whilst holding two judgements in his favour; RMCC No 134 of 1978 delivered on 27/3/79 & HCCC No. 36 of 1998 delivered on 25/1/01 has not complied with the said parallel judgements. That he has also not shown any evidence that the Defendant has refused to cooperate in the valuation of the developments nor the legal steps he has taken to execute the decree.

18. In regards to the Judgement dated 25/1/01 in HCCC No. 36/1988, the Defendant submitted that the same is clear, the Plaintiff was to get the land only after compensating the Defendant. That since no compensation has been made to the Defendant, the Judgement has lapsed for noncompliance. Further that the Plaintiff is not entitled to the prayers sought in the Notice of Motion dated 30/5/17.

19. In addition, the Defendant submitted that the Plaintiff's application is time barred by dint of section 4 (4) of Limitations of Actions Act and the same is not available for execution after 12 years. That unless the parties agree to an out of Court settlement the same is time barred. He relied on the cases of ;

a. Koinange Investments & Development Company Limited vs Ian Kahi Ngethe & 3 Others (2015).

b. Kenya Commercial Bank vs. John Gathogo Ndegwa – Nyeri HCCC NO. 77B of 1994.

20. I have considered the pleadings and the rival submissions by the respective parties and the issues that commend themselves to this Court for determination are: Whether the judgement delivered on 25/1/10 is time barred by dint of section 4(4) of Limitations of Action Act; Whether the Defendant was to value the suit property; Whether the Plaintiff is entitled to an Order for eviction against the Defendant.

21. The Defendant has raised a procedural issue, which I must deal with at the onset, relating to the Plaintiff filing documents out of time/without leave of the Court. I have read the record which directed parties on 4/10/17 to file written submissions within 14 days. The same should have been filed by 15/10/17. The Plaintiff filed his on 3/11/17 clearly out of time and without leave of the Court. Equally the Plaintiff filed an answer to replying affidavit and grounds of opposition without leave. Whilst concurring with the Defendant on the issue, I note the party is unrepresented and being a lay man would be hesitant to so strike out the proceedings notwithstanding the above procedural gaps. I rely on Article 159 (2) (d) which binds this Court to do justice without undue regard to technicalities.

22. It is not in dispute that the Court delivered a judgement on 25/1/2001 in favour of the Plaintiff in the following terms (see the decree);

a. That the Judgement be and is hereby entered for the Plaintiff.

b. That the Plaintiff be and is hereby entitled to the suit land parcel No. Loc.14/Gakurwe/82.

c. That the Plaintiff do compensate the Defendant for the development the Defendant has carried out of the suit land.

d. The Defendant's counter claim be and is hereby dismissed.

e. That the Defendant be and is hereby ordered to pay the cost of this suit, to the Plaintiff.

23. This Judgement was important in several ways; other than pronouncing that the Plaintiff is entitled to the suit land, it did give a condition. The condition to be fulfilled by the Plaintiff before taking over the suit land is the issue of compensation to the Defendant of the developments on the suit land. The judgement however did not go into details on how the valuation of the developments was to be carried out. The Plaintiff in his supporting affidavit stated that the Defendant has not been cooperative in carrying out the valuation of the developments in the suit land. My reading of the judgement did not obligate the Defendant to carry out the valuation. It is silent on the modality of valuation. All it said is that the Plaintiff is entitled to the suit land only after he has compensated the Defendant (emphasis is mine). I concur with the Defendant that the Plaintiff has not placed before this Court any evidence to show that the Defendant has refused to cooperate; nor to value the developments. In such a case it is expected that the parties would, if in dispute, agree to a joint valuer to do the valuation i.e. independent expert to determine the values of the developments. In this particular case it appears that there is unwillingness or non-cooperation from either one or both sides. The parties seem to be trading blame against each other. Given that the Plaintiff had a judgement in his favour, one would have expected him to move with speed and execute the decree.

24. As to whether the Judgement delivered on 25/1/01 is time barred, a review of section 4 (4), of the Limitations of Actions Act states 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”.

The purpose of the above section is to eradicate stale claims and stop vexing of litigants. Where a judgement creditor elects to sleep on a decree, he is estopped from waking up from his slumber 12 years later to claim his right. The law bars such claims.

25. In the case of **Willis Onditi Odhiambo vs. Gateway Insurance Company Limited (2014) eKLR**, the Court of Appeal held that the term ‘action’ covers execution of judgements. In the instant case the Plaintiff wants to execute the Judgement out of time. The judgement delivered on 25/1/01 should have been executed on or before 24/1/13. The Court was emphatic that section 4 (4) governs execution of judgements and decrees. Further in the case of **Hudson Moffat Mbue vs. Settlement Fund Trustees & 3 Others (unreported) ELC No 5704 of 1992(OS) Mutungi J.** had this to say;

“what I consider the law to be is that once a judgement has been rendered execution of that judgement must be commenced within 12 years period otherwise you cannot obtain a judgement and fail to do anything about it and after 12 years have expired seek to execute the same. Section 4(4) of the Limitations of Actions Act will bar you from carrying on with such execution”.

26. Does the word “may not” stated in section 4(4) above donate discretionary powers to the Court? Section 7 of the Limitations of Actions Act, Cap 22 states;

“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”.

In section 7 it states that Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.

27. The word “may not” does not donate discretion to the judge in determining whether or not action may be brought after the expiry of 12 years. My reading of this section is in harmony with section 7 of the Act which states that an action may not be brought for recovery of land after the end of 12 years from the date on which the right to action accrued to him. Under this section if the judgement is not executed before expiry of 12 years the rights of the decree holder are extinguished as stipulated in section 17 of the Act and the judgement debtor acquires possessory rights which are enforceable.

28. The Plaintiff has laid blame on the Defendant for failure to execute the judgement. He alleges that the Defendant refused to value the developments on the suit land. There is no evidence to support this. There is equally no evidence of any steps taken by the Plaintiff to have the developments valued. There is no evidence of an offer to the defendant as the compensation for the developments. The Plaintiff has not indicated that he is still willing to compensate the Defendant as directed by the Court in 2001.

29. Further the Plaintiff has not given any circumstances that could have prevented him from executing the Judgement so as to afford him the relief provided for under section 3 and part II of the Act such as disability, acknowledgement, part payment, fraud mistake and ignorance of material facts. The Plaintiff has lost his rights both in law and in equity. He is purporting to execute an Order 16 years later. Equity does not aid the indolent but rather the vigilant. I find and hold that the execution of this judgment is time barred by section 4 (4) of the Limitations of Actions Act and the Plaintiff cannot purport to claim under it.

30. The Plaintiff sought for Orders of eviction against the Defendant from the suit land. The Defendant

has opposed the application on grounds that firstly the judgement did not provide for eviction of the Defendant. It provided that the Plaintiff is entitled to the land after compensating the Defendant. In view of the finding in Para 29 above eviction is not available to the Plaintiff against the Defendant. The judgement that the Plaintiff seeks to enforce is expired. Even if the judgment was in force, he would only have succeeded in evicting the Defendant after paying the compensation of the developments. His rights of ownership became stale and expired by operation of law in 2013. In any event the word 'eviction' can be construed to be part of execution of judgement which is now statute barred.

31. In the end it would appear to me that the matter of determining the ownership rights of the parties in respect to the suit land is Resjudicata, the same having been heard and determined by a competent Court and a judgment delivered thereto on 25/1/2001, albeit that the said judgment is now time barred by dint of section 4(4) of the Limitations of Actions Act, Cap 22 Laws of Kenya.

32. In conclusion I hold and find that the application dated 21/6/17 has no merit and the same is hereby dismissed with costs to the Defendant/Respondent.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 25TH DAY OF JANUARY, 2018

J.G. KEMEI

JUDGE