



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.37 OF 2018

JOHN MWANIKI MWAURA.....PLAINTIFF

VERSUS

JOHN NDONYO NJUGUNA.....DEFENDANT

RULING

(Application to extend time for execution of a decree over land; applicant having entered into a consent with the respondent in the year 1997 where it was agreed that the respondent would buy the suit land from the applicant and in default he be evicted; respondent defaulting on the consent; application for eviction filed more than 20 years later; whether court has discretion to extend time to the applicant; Section 4(4) Limitation of Actions Act providing for 12 years for filing an action based on a judgment; no provision for extension of time; application dismissed).

1. The application before me is that dated 11 April 2018 filed by the plaintiff. It is an application seeking the following substantive order which is prayer (b) of the application being :-

That the Honourable Court be pleased to extend time within which to execute the consent judgment recorded in court on 26 November 1997 beyond the statutory limit of 12 years.

2. In his supporting affidavit, the applicant has averred that he is the owner of the land parcel Solai/Dungiri Block 3/612 (Wanyororo B) having acquired it from Wanyororo Farmers Company. He sued the defendant because the defendant occupied the said land. Within the suit, the parties entered into a consent recorded on 26 November 1997 as follows :-

1. Judgment be and is hereby entered for the plaintiff against the defendant as per plaint.

2. That the defendant to bear his own costs and the plaintiff's costs of the suit.

3. That the plaintiff has agreed to sell and the defendant agreed to buy the suit premises at Kshs. 200,000/= payable on or before 30/11/98 whereas the plaintiff undertakes to sign all the relevant documents to facilitate transfer on receipt of the purchase price and that this agreement is irrevocable.

4. That there be a stay of execution of the decree until 30/11/98 and in default of item 3 above execution to issue.

Signed by Lawrence Mwangi & Co Advocates, for the plaintiff and Kamere & Co. Advocates for the defendants.

3. I am not too sure what the parties may have meant by clause 1 of the above consent, that judgment be entered for the plaintiff against the defendant as per plaint. In any event I have not seen a copy of the plaint which is not annexed to this application, this application having been filed in a skeleton file as the original file cannot be traced. My own deduction of the consent is that the parties agreed that the defendant would purchase the suit property at a consideration of Kshs. 200,000/= payable on or before 30 November 1998 and in default, he be evicted.

4. It will be seen that in this application, the applicant wants an extension of time to execute the consent beyond the statutory limit of 12 years. In his supporting affidavit, the applicant has averred inter alia that the defendant defaulted on the terms of the consent and a letter was written by the applicant's advocate reminding him and requesting him to comply. He has stated that he has been suffering from hypertension and diabetes since the year 1996 which sickness worsened sometimes in May 2005 thus making him unable to follow up on his matter as his doctor advised him to avoid stressful situations, bad news and worries. In the year 2010, he has stated that he was diagnosed with rheumatoid arthritis which worsened his health. He has annexed a letter from his doctor. He has further deposed that his previous advocate lost interest in the matter due to his bad health. He has also averred that the court file has vanished mysteriously and has asked that it be reconstructed. It is

his view that it is circumstances beyond his control which befell him.

5. The application is said to be brought pursuant to the provisions of Article 159 (2) (d) of the Constitution, Section 1A, 1B and Section 95 of the Civil Procedure Act, Cap 21; Part III of the Limitation of Actions Act, Cap 22; Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, plus all other enabling provisions of law. There is no response to the application.

6. I have considered the application and the brief submissions made by Mr. Gioche for the applicant. He pointed me to Section 95 of the Civil Procedure Act, as giving this court discretion to extend time. He however admitted not having any specific provision in law, which gives the court jurisdiction to grant the orders sought. His view was that this falls upon the discretion of court.

7. The application seeks an extension of time to execute the consent judgment of 26 November 1997. This consent gave the defendant upto 30 November 1998 to pay the sum of Kshs. 200,000/= to the applicant in order for the defendant to purchase the suit land. It is averred in this application that the defendant did not comply.

8. The limitation period in respect of judgments is contained in Section 4(4) of the Limitation of Actions Act, Cap 22, Laws of Kenya, which provides as follows :-

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 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.

9. Apart from Section 4 above, Section 7 of the Limitation of Actions Act is also operative. It provides as follows :-

7. 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.

10. It can be deduced from Section 4 (4) above that the limitation period for executing judgments is therefore 12 years. The applicant can only benefit if there is a provision in law which allows him an extension of time. Part III of the Limitation of Actions Act, which provides for extension of limitation periods has been cited. I have gone through this part of the statute but nowhere does it provide for an extension of a limitation period in relation to judgments. Indeed, counsel for the applicant referred me to no particular provision of Part III as giving this court jurisdiction to extend the time period given for executing judgments. Section 95 of the Civil Procedure Act, only allows the court discretion to extend time for periods which have been prescribed under the said Act. This thus cannot cover periods covered under the Limitation of Actions Act, which is a different statute. I do not see how Sections 1A, or 1 B of the Civil Procedure Act, can assist the applicant. These are general provisions of the law which direct the court to be efficacious and efficient in the discharge of its duties. Order 51 Rule 1 is a general provision of the law directing that applications be filed by way of Notice of Motion. Order 50 Rule 6, does give power to the court to extend the time frames given in the rules directing the periods within which to do certain acts. This cannot extend to periods under the Limitation of Actions Act. Article 159 (2) (d) of the Constitution, enjoins the court to do justice without undue regard to procedural technicalities. However, limitation periods cannot be said to be procedural technicalities, for they are provisions of substantive law, and in my view, Article 159 (2) (d) cannot be used to extend limitation periods.

11. I have also mentioned that Section 7 of the Limitation of Actions Act, is operative. One unique feature in land matters is that a person who is possessing land without the permission of the land owner, may acquire rights over the same through adverse possession, meaning that as time runs out against the land owner, the same is being positively accumulated by the trespasser, and the trespasser has a right to claim the land under the doctrine of adverse possession. An owner of land must thus advance his rights of possession of the same within 12 years or else his rights to claim the land may be barred. It is already way past 12 years when the applicant is now claiming to assert his rights of possession over the suit land. He is barred by law from doing so.

12. My above holding has backing in the decision of the Court of Appeal in the case of ***M'Ikiara M'Rinkanya & Another vs Gilbert Kabeere M'Mbijiwe, Court of Appeal at Nyeri, Civil Appeal No. 124 of 2003 (2007) eKLR***. In this case, the appellants successfully argued that the respondent could not execute a decree for eviction, where the decree has remained unexecuted for a period of more than 12 years.

13. I do not see on what basis the applicant can persuade me that I have the jurisdiction to extend the time to enable him execute the judgment 20 years after it came into effect. Even if I had the jurisdiction, which as I have mentioned above, I do not have, I still would not have allowed the application. The applicant had 20 years to execute his judgment. His explanation that he suffered from diabetes, high blood pressure, and arthritis to me, does not effectively explain his inactivity. If he was completely debilitated, he could easily have donated a power of attorney to another person to assist him with the matter. Indeed, he cannot argue that he is incapacitated for he had the ability to file this application and swear an affidavit in support of it. If he is worse of today, than he was, when the judgment took effect, then clearly, he had the capacity and ability to file this application much earlier, which he never did.

14. I really do not see any merit in this application and it is hereby dismissed.

15. I make no orders as to costs for the defendant did not respond to this application.

16. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 27th day of September 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of :-

No appearance on the part of M/s Joseph Kiarie & Co Advocates for the applicant.

No appearance on the part of M/s Kamere & Co Advocates for the respondent.

Court Assistant :Nelima Janepher .

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU