



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 1162 OF 1986

1. MWANGI NJUNJU

2. MAINA GITHACU & 1,500 OTHERS.....PLAINTIFFS

=VERSUS=

MOSES KUBAI.....1ST DEFENDANT

RIAKANAU FARMERS SOCIETY LIMITED....2ND DEFENDANT

R U L I N G

1. The Honourable Cocker J (as he then was) dismissed this suit on 3/5/1989. He further decreed that all the plaintiffs settled on the suit property were to vacate within twelve months. In default, the defendant was granted liberty to execute. On 29/8/2016, approximately 27 years later, the defendants brought a Notice of Motion dated 24/8/2016, seeking an eviction order, to be enforced by the Machakos County Police Commander. That Application is the subject of this Ruling. Mr Omwenga who appeared for the Decree holder urged the court to grant the application in view of the fact that it was not opposed.

2. Although the Application is unopposed, it raises one key legal question which calls for determination after a careful interrogation of the law. The question is whether the Application is statute-barred by dint of the provisions of Section 4(4) of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya. Section 4(4) of the Limitation of Actions Act provides as follows:

“An action may not be brought upon a judgment after the end of twelve years from the date on which the judgement was delivered, or (where the judgement 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 judgement debt may be recovered after the expiration of six years from the date on which the interest became due.”

3. Section 3 of the Interpretation and General Provisions Act defines action as **“any civil proceedings in a court and includes any suit as defined in Section 2 of the Civil Procedure Act”**. Section 2 of the Civil Procedure Act defines suit as **“all civil proceedings commenced in any manner prescribed.**

4. The judgement which the applicant seeks to enforce was made on 3/5/1989. The formal decree was issued on 18/7/1990. Indeed, a copy of the formal decree is attached to the supporting affidavit sworn by Philip Makau in support of the Application. The defendants’ application seeking enforcement of the judgement and decree by way of issuance and execution of an eviction order was made on 29/4/2016. As stated in the opening paragraph, this is a period of about 27 years from the year when the decree was issued.

5. Mr. Philip Makau has made the following depositions at paragraphs 4 to 6 of the supporting affidavit.

“4.THAT a decree was issued on 18th July 1990 pursuant to the judgement delivered in our favour requiring the plaintiffs to vacate our land (copy of a decree marked PM “1”).

5. THAT our then advocate on record who practiced under the name and style of Z. K. Nyangah passed on while trying to obtain eviction order.

6. THAT it took us a long time to know that he passed on”

6. It is clear from the above depositions and also from the court record that no execution proceedings were taken by the decree holder for the last 26 years.

7. Kenyan courts have on several occasions pronounced themselves on the legal implications of Section 4(4) of the Limitation of Actions Act. They have been categorical that judgment for recovery of land must be enforced within 12 years. In **M’Ikiara M’Rinkanya & Another Vs Gilbert Kabeere M’Mbijiwe (2007) eKLR**, the Court of Appeal made a lengthy comparative analysis of Section 4(4) of the Limitation of Actions Act, defined “**action**”, and reached the following conclusion and holding:-

“From the above analysis, it is clear that a judgement for possession of land should be enforced before the expiry of the 12 years limitation period, stipulated in Section 7 of the Act. If the judgment is not enforced within the stipulated period the rights of the decree holder are extinguished as stipulated in Section 17 of the Act and the judgement debtor acquires possessory title by adverse possession which he can enforce in appropriate proceedings. So quite apart from the authority of Lougher Vs Donovan, which we consider as still good law in this country, and the previous decisions of this court, there is a statutory bar in Section 7 of the Act for recovery of land including the recovery of possession of land after expiration of 12 years. It follows, therefore, that, to hold that execution proceedings to recover land are excluded from the definition of “action” in Section 4(4) of the Act would be inconsistent with the law of adverse possession.

For the foregoing reasons, the Notice of Motion dated 15th November 2001 and filed in court on 16th November 2001 for warrant of eviction was, for all intents and purposes an “action” upon a judgment to recover possession of land. The proceedings to recover land having been filed nearly 18 years after the final judgment of the court of Appeal were statute barred. Moreover since the respondent sought to execute the judgement over one year after it was delivered, a notice to show cause why judgment should not be executed should have been issued and the appellants given an opportunity to be heard.”

8. The Court of Appeal reiterated the above interpretation of Section 4(4) of Act in the more recent case of **Willis Onditi Odhiambo Vs Gateway Insurance Co. Ltd (2014) eKLR**. The court further observed that the saving framework in Section 27 of the Act is not available to a litigant who fails to enforce a judgement within the time frame stipulated in Section 4(4) of the Act.

9. Informed by the legal framework in Sections 4(4) and 7 of the Limitation of Actions Act, and guided by the interpretation accorded to that framework both by the Court of Appeal and by this court, I am of the view that any proceedings seeking enforcement of the judgement passed herein by Cocker J on 3/5/1989 is statute-barred under Section 4(4) as read together with Section 7 of the Limitation of Actions Act. In light of the above legal position, I find that the Defendants’ Notice of Motion dated 24/8/2016 seeking an eviction order against the plaintiffs is statute-barred. The Notice of Motion is dismissed with no order as to costs.

Dated, signed and delivered at Nairobi on this 31st day of August 2017.

B M EBOSO

JUDGE

In the presence of:-

.....Advocate for the Plaintiffs

.....Advocate for the Defendant

.....Court clerk