



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 647 OF 1994**

**MAKWORO NYAMARERI .....PLAINTIFF**

**VERSUS**

**NAFTAL BOSIRE ORINA .....DEFENDANT**

**DAVID MOMATA MAKWORO .....RESPONDENT**

**RULING**

1. Before the court for determination is the defendant's application dated 14<sup>th</sup> February 2015 brought under Sections 3 and 3A of the Civil Procedure Act, Order 22 Rule 1 and Order 24 Rule 5 of the Civil Procedure Rules. By the application the defendant inter alia seeks orders that:-

**(i) Pending the hearing of the application the execution proceedings be stayed.**

**(ii) That the court do find that the execution herein is bad in law.**

**(iii) That the costs of the application be provided for.**

2. The grounds upon which the application is founded are set out on the face of the application and on the supporting affidavit sworn by Naftali Bosire Orina the defendant herein on 14<sup>th</sup> July 2015. The first defendant/applicant avers that the respondent lacks the capacity to execute the judgment dated 1<sup>st</sup> October 2002 and that the respondent's quest to execute is malicious and unlawful. The applicant contends the respondent's actions are calculated to intimidate the applicant to surrender his land to the respondent.

3. The applicant states that the suit was determined on 1<sup>st</sup> October 2002 in favour of the plaintiff and the plaintiff in the suit died on 30<sup>th</sup> November 2002. The applicant further avers that as at 27<sup>th</sup> February 2014 when the present application for execution was filed, the respondent was not part of the suit he having been made party to the suit on 24<sup>th</sup> September 2014. The applicant in the premises avers that the respondent having not been made a party within one year of the plaintiff's death lacks the capacity to sustain the application for execution and that the application lacks any legal basis.

4. The respondent filed grounds of opposition to the applicant's application on 14<sup>th</sup> August 2015 and set out the following grounds:-

**1. The suit herein having been heard and disposed of on 1<sup>st</sup> October 2002 means that the suit would not have abated after 1 year from date of death of decree holder herein.**

**2. That the death of a litigant in a concluded suit does not require substitution under the law and hence the application for execution herein filed on 1<sup>st</sup> October 2002 was properly filed and the same is valid and lawful.**

**3. That the application is premature, frivolous and an abuse of the court process.**

**4. That the execution herein is not malicious.**

**5. That the execution herein is lawful and proper as it is meant to effect a decree and decision of this honourable court.**

**6. That the application is grounded on the wrong provisions of the law.**

5. The parties argued the application by way of written submissions. The defendant/applicant's submissions dated 5<sup>th</sup> July 2016 were filed on 6<sup>th</sup> July 2016 while the respondent's submissions dated 10<sup>th</sup> July 2016 were filed on 11<sup>th</sup> July 2016. The applicant by his submissions sets out a brief history/background of the matter thus:-

**(i) That judgment in the suit was entered in favour of the plaintiff on 1<sup>st</sup> October 2002 and a decree extracted thereafter on 12<sup>th</sup> November 2002.**

**(ii) That the applicant appealed the judgment to the court of appeal vide C. A No. 31 of 2003 at Kisumu but the plaintiff having died in the year 2004 the appeal abated as no application for substitution was made within the prescribed time precipitating the court of appeal to make an order that the appeal had abated under Rule 96 (2) of the rules of that court when the appeal came for hearing on 22<sup>nd</sup> June 2006.**

**(iii) That the respondent was on 23<sup>rd</sup> October 2013 appointed administrator of the deceased plaintiff's estate and on the basis of that appointment the respondent made the application for execution of the judgment of 1<sup>st</sup> October 2002 and the decree emanating therefrom.**

6. The plaintiff submits that as there was no application made by the legal representatives of the plaintiff to be made a party to the proceedings/suit within one year following the death of the plaintiff the suit abated. According to the plaintiff no steps can be taken on the suit, including execution proceedings without leave of the court and on sufficient reasons being shown. The plaintiff relies on the provisions of Order 24 Rule 3 (1) and (2) of the Civil Procedure rules which provide thus:-

**3(1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.**

**3(2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff.**

7. The defendant/applicant has also submitted that the application for execution is barred by statutory limitation by dint of Section 4 (4) of the Limitation of Actions Act, Cap 22 Laws of Kenya. The defendant avers that the application for execution made by the respondent on 2<sup>nd</sup> June 2014 was made outside the statutory period of 12 years allowed for execution of judgments and is therefore caught by limitation. It is not clear why the applicant makes this assertion since the judgment in this case was rendered on 1<sup>st</sup> October 2002 and a period of 12 years from that date would not lapse until 30<sup>th</sup>

September 2014. It would therefore follow that the application made by the respondent on 2<sup>nd</sup> June 2014 was well within the limitation period and cannot therefore be statute barred on account of limitation.

8. The respondent in response to the applicant's submissions submits that, notwithstanding the abatement of the appeal filed by the applicant a valid judgment and decree remained as rendered by the High Court. It is this judgment and decree that the respondent seeks to have enforced on behalf of the plaintiff's estate. The respondent further submits Order 24 Rule 3 of the Civil Procedure has no application in the circumstances of the present case since the suit had been finalized and a judgment rendered by the time the plaintiff died. The respondent in this regard relies on the provisions of Order 24 Rule 10 which provides as follows:-

**10. Nothing in rules 3, 4 and 7 shall apply to proceedings in execution of a decree or order.**

9. Quite clearly where a matter has been finalized and a judgment has been rendered there is no requirement that the legal personal representative of a deceased decree holder is required to be appointed and substituted or made a party to the suit or proceedings within 12 months of the death of the relevant party to be able to execute the decree or order. Rule 10 of Order 24 of the Civil Procedure Rules is express that the provisions on the substitution of a deceased plaintiff or defendant do not apply in case of execution of a decree or order. The rationale is not difficult to see. Once a judgment/decree or order has been given, the court has determined the rights and/or interest of the parties and has made a decision and all that remains is the execution of the decree or order. If a party is dissatisfied by the decree or the order and lodges an appeal and the opposite party dies during the pendency of the appeal then there is an obligation to apply to substitute the deceased party otherwise the appeal abates after the expiry of requisite period within which the application should be made as happened in the instant matter. Where an appeal abates, the decision appealed from is restored and becomes binding to the parties. This was the position in the present case.

10. The respondent has further submitted that the applicant's assertion that the respondent's application for execution is statute barred on account of limitation by virtue of Section 4 (4) of the Limitation of Actions Act, Cap 22 Laws of Kenya is misplaced since the application was not made after 12 years. The court record shows that the application for Notice to Show Cause why execution should not issue was filed on 27<sup>th</sup> February 2014 which was clearly not outside the 12 years limitation period for execution of decrees. The application by the respondent seeking to be granted leave to take over the conduct of the suit on behalf of the plaintiff for purposes of executing the decree was filed on 2<sup>nd</sup> June 2014, again well within the period of limitation. This application was heard and granted by the Deputy Registrar on 25<sup>th</sup> September, 2014.

11. I have considered the two authorities referred to me by the applicant namely **Hirji Pitamber –vs- Attorney General & Another [1962] EALR 595 and Kampala City Council –vs- Nuliyati [1974] E.A 400** which I find have no application having regard to the facts and circumstances of the present case. In both cases the period of limitation had lapsed in regard to certain aspects of the matters which were under consideration before the court and the court held that no actions would be sustainable where limitation had occurred. In the instant case my position is that the period of limitation had not lapsed and therefore the respondent as the personal legal representative of the deceased plaintiff cannot be barred from executing the decree in favour of the plaintiff.

12. Accordingly, I find the defendant's application dated 14<sup>th</sup> July 2015 to be devoid of any merit and order the same dismissed with costs to the respondent.

13. Orders accordingly.

**Ruling dated, signed and delivered at Kisii this 14<sup>th</sup> day of October, 2016.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Mr. Soire for the plaintiff/respondent

Mr. Odero for Begi for the defendant/Applicant

N/A for the respondent

Ngare Court Assistant

**J. M. MUTUNGI**

**JUDGE**