



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC APPEAL NO. 41 OF 2014

JIMNAH IRUNGU N. MWANGI APPELLANT

-VERSUS-

EUNICE NDUTA KAMAU RESPONDENT

JUDGMENT

Introduction

1. This appeal is in respect of the ruling and order of **JJ Masiga, RM** delivered on 25th February, 2013 in Muranga SPMC Civil Case No. 111 of 1991. In that ruling the trial magistrate (hereinafter TM) dismissed the appellant’s application dated 27th June, 2011 in which the appellant sought enlargement of the time within which the judgment entered in his favour, dated 17th may, 1994, could be executed. In dismissing the application the TM observed:-

“...Outside the provisions of PART III of the Limitation of Actions Act, the Court has no jurisdiction to extend any period of limitation for whatever reason. Am further guided by what the Court of Appeal stated in the above case;

‘Lastly it is logical from the scheme of the Act that a judgment for possession of land should be enforced before the expiration of 12 years because S.7 of the Act bars bringing of an action for recovery of land after the end of 12 years from the date in which the right of action accrued.’

What the above statement means is, even by virtue of S. 7 of the Limitation of Actions Act, this action would be barred by limitation. Lastly, from the court records, vide an application dated 30/5/2011, this judgment was on the 16/9/2011 declared unexecuted and expired. To date the said orders have never been set aside or varied, yet the applicant has the audacity to file an application to enlarge time for executing the very same judgment that was declared unexecuted and expired. Allowing this application would certainly result in two conflicting rulings over what is essentially the same issue.....In the final analysis I find the court has no jurisdiction to extend time for execution of the judgment herein both under PART III of the Limitations of Actions Act and Order 50 Rule 6 of the Civil Procedure Rules. The court also takes great exception to the fact that the applicant has the audacity to bring this application knowing only too well that this judgment was declared unexecuted and expired on the 16th day of September, 2011. Such an act amounts to a total abuse of court process. In the end the application

is dismissed with costs as it lacks merit and it is an abuse of court process.”

2. Aggrieved by the aforementioned decision of the lower court, the appellant brought the current appeal on the grounds that the learned TM erred by:-

- 1) finding that the lower court has no jurisdiction to enlarge time under the Limitation of Actions Act and the Civil Procedure Rules, 2010;
- 2) finding that the Limitation of Actions Act, Cap 22 Laws of Kenya and the Constitution do not cushion litigants who move the court for enlargement of time;
- 3) ruling that part three of the Limitation of Actions Act does not have provision to enlarge time for a judgment that that has not been executed for a period of 12 years.
- 4) Failing to find that there were mitigating circumstances in favour of the appellant as to why he did not execute the judgment on time in respect of land parcel No. Loc. Maragua Ridge/207.
- 5) not finding that the appellant could not have executed the judgment when the former defendant was dead.
- 6) not finding that the land in issue was registered under the settlement fund trustees and the appellant could not have executed the judgment against the respondent until the land was registered.
- 7) not finding that the appellant was entitled to the fruits of his judgment.

3. The appeal was disposed of by way of written submissions.

4. On behalf of the appellant, it pointed out that the appellant has been in occupation of the suit property for over 30 years. The TM is faulted for having failed to take into account that fact and for having failed to take into account the circumstances that led to the delay in execution of the judgment. It is explained that the fact that the original defendant (respondent) passed on before the judgment could be executed also contributed to the delay in execution of the decree issued in favour of the appellant.

5. It is pointed out that there was delay in substituting the original defendant because a grant of letters of administration in respect of the original defendant's estate had not been issued to the respondent herein. The TM is also said to have failed to consider the fact that the suit property was held in trust for the settlement fund trustees and that it took substantial time to dissolve the trust. In view of the foregoing, the impugned decision of the TM is said to be out of league with the available evidence.

6. It is further submitted that the fact that the appellant had established a case in the lower court against the original defendant cannot be wished away. The court is therefore, urged to interrogate the evidence adduced in the lower court and find in favour of the appellant.

7. On behalf of the respondent, it is pointed out that the appellant obtained judgment against the respondent's predecessor in claim to the suit property on 17th May, 1994. It is contended that despite the fact that the respondents preferred an appeal against the judgment and decree of the trial court, there being no stay of execution of the decree obtained in respect of the judgment, time within which the decree ought to have been executed started running from 17th May, 1994.

8. Based on the provisions of **Section 4(4)** of the Limitation of Actions Act, Cap 22 Laws of Kenya, it is submitted that the appellant had twelve (12) years within which to execute the judgment/order. It is contended that upon lapse of the 12 years the decree became in executable. The period of 12 years is said to have lapsed on 17th April, 2006.

9. It is pointed out that the defendant in the original suit passed on on 2nd March, 2010 and was

subsequently substituted with the current respondent vide an order dated 18th March, 2011.

10. It is also pointed out that vide an application dated 31st May, 2011 the respondent moved the lower court seeking a declaration that the judgment delivered on 17th May, 1994 is incapable of execution the same having been caught by the law of limitation. In the alternative, the respondent sought to annul and/or cancel all the proceedings including the judgment dated 17th May, 1994 for being *res judicata*.

11. After the respondent's application was considered in its merit, it was allowed.

12. It is pointed out that the original decree in this suit was only stayed for 30 days. That stay is said to have lapsed on 9th September, 1994, paving way for the appellant to execute the judgment.

13. The import of the ruling delivered in respect of the respondent's application dated 31st May, 2011 is said to have been to render the decree obtained in respect of the judgment delivered on 17th May, 1994 in favour of the appellant in executable.

14. It is pointed out that the appellant did not appeal or apply for review of the court order declaring the judgment expired and in executable.

15. Concerning the lower court's refusal to extend time within which to execute the judgment hereto, it is submitted that unlike the Civil Procedure Act and the Rules made there under, the Limitation of Actions Act does not have a provision for extension of time within which to carry out execution.

16. The reasons offered by the appellant for failing to execute the judgment within the time provided for in law are said to be not recognised as grounds for extension of time under Cap 22 Laws of Kenya.

17. In view of the foregoing, it is submitted that the TM was right in dismissing the appellant's application for extension of time within which to execute the judgment that had already been declared unexecuted and expired.

Analysis and determination

18. It is not in dispute that the appellant obtained a judgment in his favour against the respondent and/or her predecessor in title or claim. The said judgment was vide a ruling delivered on 16th September, 2011 declared unexecuted and expired. In that ruling, **J. Gathuku** held:-

“...the issue of limitation of the judgment made on 17th may 1994 was not opposed. Over 12 years have expired since the judgment was made and under Section 4(4) of the Limitations of Actions Act the same is declared unexecuted and expired.”

19. It is also not in dispute that the said ruling of the lower court declaring the judgment expired and unexecuted was not reviewed or appealed from, instead the appellant decided to proceed with his application for extension of time within which to execute the judgment yet it had been declared expired.

20. Noting that the decision declaring the judgment expired had not being appealed from or set aside, the TM **J.J Masiga, R.M**, *inter alia*, observed:-

“...From the court record, vide an application dated 30/5/2011, this judgment was on the 16/9/2011 declared unexecuted and expired. To date the said orders have never been set aside or varied, yet the applicant has the audacity to file an application to enlarge time for executing the very same judgment that was declared unexecuted and expired. Allowing this application would certainly result in two conflicting rulings over what is essentially the same issue.... The court also takes great exception to the fact that the applicant has the audacity to bring this application knowing only too well that this judgment was declared unexecuted and expired on the 16th day of

September, 2011. Such an act amounts to a total abuse of court process.”

Did the TM err in making the above determination?

21. My answer to this question is negative. I say this because, the proper procedure of dealing with the order declaring the judgment expired was to apply for review of those orders or appeal against them. Since there was no evidence to show that such a thing had been done, the TM cannot be reasonably faulted for refusing to allow the application to enlarge time within which to execute a judgment that had already been declared expired by a court of concurrent jurisdiction.

22. Given the fact that this appeal is not in respect of the ruling that declared the judgment in favour of the appellant expired and incapable of execution, I find it to be incapable of forming the ground for issuance of the orders sought. In my view, the issues raised in this appeal would only be relevant if the decision that declared the judgment expired and in executable had been reviewed or set aside. Since this had not been done, I reiterate my finding that the TM cannot be reasonably faulted for having refused the application for enlargement of time. That application was, in my view, bad in law for want of substratum.

23. The upshot of the foregoing is that the appeal has no merit and the same is dismissed with costs to the respondent.

Dated, signed and delivered at Nyeri this 28th day of September, 2015.

L N WAITHAKA

JUDGE

In the presence of:

N/A for the appellant

N/A for the respondent

Court assistant - Lydia