REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

LAND AND ENVIRONMENTAL DIVISION

ELC CIVIL SUIT NO. 1636 OF 1996

GEORGE WAWERU NJUGUNA …….....PLAINTIFF

VERSUS

STEPHEN GITAU KAMUYU……...…… DEFENDANT

RULING

Before the court for ruling is the plaintiff/Applicant's Notice of Motion dated 21st October 2014. The application seeks an order that:-

The Defendant/Respondent be committed to civil jail for a period of six months or such other period for failure to obey this Honourable court orders of 25th September 1998 requiring that they stop trespassing on land parcel **Escarpment/Kinari, block 1/1440.**

The plaintiff's application is premised on the ground that there is a lawful judgment of this court dated 25th September 1998 that the Defendant is flagrantly disobeying despite notice. The plaintiff, **George Waweru Njuguna** has sworn an affidavit in support of the application dated 21st October 2014.

The plaintiff depones that he filed the present suit in 1996 to enforce his proprietary rights over land parcel **Escarpment/Kinari/Block.1/1440** and that on 25th September 1998, **Hon. Mr. Justice Githinji** (as he then was) struck out the defence and entered judgment in favour of the plaintiff and ordered the Defendant not to interfere with the plaintiff's proprietary interest or trespass on land parcel **Escarpment/Kinari/Block 1/1440** as per the copy of the order annexed and marked "**GWN1**". The Defendant was served with the order and the Notice of Penal consequences. The plaintiff wants the Defendant punished for disobedience of court orders and to be evicted from the plaintiff's land.

The Defendant opposes the plaintiffs application and raises basically two grounds in opposition. Firstly, the Defendant avers that he was never served with the order made on 25th September 1998 and further that a similar application as the instant one was dismissed by **Ougo J** on 10th December 2012, Secondly, the Defendant avers that the judgment/order sought to be executed having been issued more than 12 years ago, the same is by virtue of Section 4(4) of the Limitation of Actions Act, Cap 22 Laws of Kenya not capable of being executed as the same is caught by limitation.

The parties filed written submissions to canvas the application. The plaintiff's submissions dated 14th

April 2015 were filed on 15th April 2015. The Defendant/Respondents submissions dated 5th February 2015 were filed on 6th February 2015. The plaintiff applicant in his submissions contends that the instant application is not statute barred by virtue of Section 4(4) of the Limitation of Actions Act and argues that what is contemplated under section 4(4) is the filing of a new action which cannot include the filing of an application within the same suit to effectuate a judgment as in the instant application. The plaintiff has referred the court to the House of Lords decisions in the case of **Lowsley –vs- Forbes (1998) 3 ALL ER 897** where the court held that an "**action**" under section 24(1) of the English Limitation Act, 1980, which is **"in pari materia**" with our Section 4(4) of our Limitation of Actions Act, means a fresh action and does not include proceedings by way of execution of a judgment in the same action. The plaintiff submitted that the instant application is in the nature of an execution application and therefore could not be barred by limitation by reason of Section 4(4) of the Limitation of Actions Act since it was not a new action.

The Defendant/Respondent took the opposite view that the application by the Plaintiff/Applicant is statute barred by reason of Section 4(4) of the Limitation of Actions Act. The Defendant/Respondent referred the court to the Court of Appeal decision in the case of **Willis Onditi Odhiambo –vs- Gateway Insurance Co. Ltd (2014) eKLR** where the learned Judges dismissed an appeal where the appellant had appealed against the decision of the High Court refusing to extend time to enable the appellant to bring a declaratory suit to enforce a judgment against the Respondent. The Defendant further submits that the court order arising out of the order by **Honorable Mr. Justice Githinji** in 1998, if at all it was served on the defendant, the service was out of time and therefore ineffectual.

The contested Section 4(4) of the Limitation of Actions Act, Cap 22 Laws of Kenya provides:-

> **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 orat recurring periods) the date of the default in making the payment or delivery in question, in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.**

It is apparent that Section 4(4) of the Limitation of Actions Act is unclear as to what the term "**an action**" refers to. Does it refer to the institution of a fresh action or to any sort of action taken in executing the judgment or to both? In the case of **Rachel Mwikali Mwandia –vs- Ken Wameu Kasinga (2013) e KLR Hon. Justice E.K.O Ogola** while considering a claim for recovery of interest arrears in relation to the relevant part of Section 4(4) of the Limitation of Actions Act which provides thus:-

> **"------and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from which the interest became due".**

Held as follows:-

> **"It is trite law that equity aids the vigilant and in that case the plaintiff or rather her advocates should have known better that time was of the essence. Having found so. I have no option but to find that the action to recover interest is time barred".**

This court in a ruling delivered on 18th June 2015 in **ELC NO. 5704 of 1992 (OS). Hudson Moffat Mbue –vs- Settlement Fund Trustees & 3 others (unreported**) while considering the application of Section 4(4) of the Limitation of Actions Act where an application for execution of judgment had been brought before the expiry of the 12 years had lapsed but was determined until after the period had expired observed thus:-

> **"What I understand the law to be is that once a judgment has been rendered execution of that judgment must be commenced within the 12 year period otherwise you cannot obtain a judgment and fail to do anything about it and after 12 years have expired seek to execute the same. Section 4(4) of the Limitation of Actions Act will bar you from carrying on with such**

execution".

Where the execution process had been started, the court took the view that the process must be allowed to be completed even if completion comes after the statutory 12 year period. In the case I expressed myself thus on the issue:-

> **"I hold the position therefore that the expression "An action may not be brought upon a judgment after the end of twelve years from the date on which judgment was delivered -----" means that unless an application has been brought for enforcement of the judgment and has been completed and/or the same has not been concluded by the time the 12 year, period expires no fresh action for enforcement of the judgment can be brought after the expiry of 12 years from the date of the delivery of the judgment".**

The court of appeal Judges in the case of **Willis Onditi Odhiambo –vs- Gateway Insurance Co. Ltd (Supra)** were clear that Section 4(4) of the Limitation of Actions Act covers execution of Judgments. In the case they stated as follows:-

> **"In other words the appellant wanted to execute the said decree against the respondent out of time. Execution of judgments and/or decrees is governed by section 4(4) of the Limitation of Actions Act which is in the following terms-.**
>
> **"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".**
>
> **The judgment which the appellant sought to execute was passed on 26th August, 1996. The judgment should therefore have been executed on or before 27th August, 2008".**

Although the matter that gave rise to the appeal was a fresh suit brought to enforce a judgment in an earlier suit the court of appeal was emphatic that section 4(4) of the Limitation of Actions Act, governs execution of Judgments and decrees. Consequently the submission by Counsel for the plaintiff that Section 4(4) of the Limitation of Actions Act only relates to the filing of fresh actions and not to execution applications is unsupported and the view held by the House of Lords in **Lowslef –vs- Forbes (Supra)** that the provision does not apply to execution proceedings as in the instant application finds no favour (at least for the moment) in this jurisdiction and I decline to accept it.

Turning to the application before me, I think the plaintiff has deliberately made it obscure. Under what provision of the law has the application been brought? Although the application is couched as an application for execution, the application seeks to have the Defendant punished for what essentially is disobedience of a court order. In other words it is an application to have the defendant punished for contempt of court. I have perused the proceedings and more specifically the ruling by Hon. **Justice Githinji** delivered on 25/9/1998. In real terms what **Githinji, J** gave was an interlocutory judgment. No decree was extracted in this matter although an order was extracted and no formal application for execution appears to have been taken out against the Defendant. Why did the plaintiff not fix the suit for formal proof and/or if the defendant was in possession why was no application for eviction made?.

The application dated 21st October 2014 does not specify the acts of disobedience complained of and or when they occurred. If the defendant was in physical occupation of the suit premises at the time of judgment in 1998 then the plaintiff ought to have sought and obtained an order of eviction. If he was not in physical occupation then when did he enter into occupation so that he ought to be evicted as is deponed in the plaintiff's affidavit in support of the application.

A similar application as the present one was heard by **Hon. Lady Justice Ougo** and dismissed on 10th December 2012. Inter alia she stated as follows:-

> **"Secondly I note that the actual disobedience by the defendant by the defendant is not**

expressly stated. The affidavit should have specially described the disobedience by the defendant when it was and how he is in disobedience".

As I have observed the instant application has the same deficiency and a court of law will not punish a party for contempt of court unless the contempt is proved to a standard which is higher than on a balance of probability. I do not think the plaintiff has proved in what way or manner the defendant is in contempt and I decline to grant the orders sought. The court gets the feeling that the plaintiff wants to obtain through the contempt proceedings what perhaps because of poor pleading and/or lack of astuteness on the part of his legal advisors he failed to get in 1998 or soon thereafter. The court will not allow itself be used in that manner.

The application by the plaintiff is dismissed with costs to the defendant.

Ruling dated, signed, and delivered this **10th** day o**f September** 2015.

J. M. MUTUNGI

JUDGE

In the presence of:

……. For the Plaintiff

…….. For the Defendant