



**Njoroge & another v County Council of Kiambu & another (Civil Suit
964 of 1979) [2015] KEELC 843 (KLR) (26 October 2015) (Ruling)**

Mwaura Njoroge & another v County Council of Kiambu & another [2015] eKLR

Neutral citation: [2015] KEELC 843 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL SUIT 964 OF 1979
SO OKONG'O, J
OCTOBER 26, 2015**

BETWEEN

MWAURA NJOROGE 1ST PLAINTIFF

KAMAU NJOROGE 2ND PLAINTIFF

AND

COUNTY COUNCIL OF KIAMBU 1ST DEFENDANT

WAWERU NJOROGE 2ND DEFENDANT

RULING

1. This suit was heard and judgment delivered in favour of the Plaintiffs against the 2nd Defendant by Mbitio J. on 31/5/1993. The court found among others that the 2nd Defendant held LR No. Lari/Kirenga/741 (“the suit property”) in trust for his deceased father’s three houses represented by his three wives namely, Nyamagu, Mumbi and Wanjiku and ordered that the suit property be sub-divided and portions hereof transferred to the sons of each of the 2nd defendant’s deceased father’s wives aforesaid according to the shares that was determined by the court. From the record, no action was taken in the matter by the Plaintiffs with a view to executing the said judgment from 31/5/1993 when it was delivered until 25/6/2014 when the Plaintiffs’ advocates on record wrote to the court to supply them with the decree that was extracted from the said judgment. The decree was extracted by the court as requested and issued to the plaintiffs on 9/7/2014.
2. The Plaintiffs thereafter moved the court through Notice of Motion application dated 3/12/2014 seeking an order that the registrar of this court be authorized to execute the instruments of transfer in respect of the suit property in place of the 2nd defendant herein in execution of the decree aforesaid. The application was brought under the provisions of order 51 Rule 13 of the *Civil Procedure Rules* and section 98 of the *Civil Procedure Act*. The same was brought on the grounds that judgment was entered



herein in favour of the Plaintiffs on 31/5/1993 and that the 2nd defendant has since that date refused to execute the instruments of transfer to facilitate the transfer of the portions of the suit property to the beneficiaries thereof in accordance with terms of the said judgment.

3. The Plaintiff's application was opposed by the 2nd Defendant through a replying affidavit and further affidavit sworn on 8/6/2015 and 3/07/2015 respectively. In his two affidavits, the 2nd Defendant contended that he was dissatisfied with the judgment of Mbitio J. that was delivered on 31/5/1993 and filed a notice of appeal against the same to the Court of Appeal. He thereafter applied for certified copies of the proceedings to enable him lodge the appeal. The same were however not supplied to him in time due to the fact that the court file went missing. It was not until 23/10/2012 that he received the said proceedings. The 2nd Defendant has contended that Mbitio J. erred in his judgment aforesaid and as such the same should not be executed until his intended appeal to the court of Appeal is heard and determined.
4. The Plaintiff's application was canvassed by the way of written submissions. The plaintiffs filed their submissions on 30/7/2015 while the 2nd Defendant filed his submissions on 14/8/2015. I have considered the application and the affidavits filed in opposition hereto. I have also considered the submissions by the parties and the authorities cited in support thereof. What I need to determine is whether this is an appropriate case in which the court should exercise its discretion to authorize the registrar of this court to execute on behalf of the 2nd Defendant the instruments of transfer of portions of the suit property in favour of the beneficiaries thereof under the decree of the court issued herein on 9/7/2014.
5. The application before me is essentially seeking the execution of the decree issued herein on 9/7/2014. Order 22 rule 18 (1) of the Civil Procedure Rules provides that when an application for execution is made, more than one year after the date of the decree or against the legal representative of a party to the decree or for attachment of salary or allowance of any person, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him. I am of the view that the application for execution before me has been brought prematurely. Since the application has been made more than one year after the date of the decree, the plaintiffs were under an obligation to serve upon the 2nd defendant a notice to appear in court and show cause why the decree should not be executed against him. There is no evidence before me that the plaintiff applied for such notice to issue or that the same was issued and served upon the defendant. I am not in agreement with the Plaintiff's submission that such notice was not required. The Plaintiff's advocates' interpretation of the words "the date of the decree" is not correct. The Plaintiffs' contention that the decree issued herein is not more than one year old has no basis. The decree is in fact more than 22 years old. It is not disputed that the judgment in favour of the Plaintiffs which is sought to be executed was delivered on 31/5/1993. Order 21 Rule 8 (1) of the Civil Procedure Rules provides that, a decree shall bear the date of the day on which the judgment was delivered. It follows that the date when the judgment is delivered is the date of the decree. The date of the decree is not the date when the decree was issued as submitted by the plaintiffs. The date of the decree sought to be executed is therefore 31/5/1993. Since the plaintiff's application for execution was made on 19/3/2015 which is about 22 years after the date of the decree, the defendant was entitled to be served with a notice to show cause before the application is considered. The application before me is in the circumstances premature.
6. Having reached the conclusion that the date of the decree sought to be executed is 31/5/1993, it is my further finding that the Plaintiffs' application for execution is time barred. It is not correct as submitted by the plaintiffs that the life of a decree is indefinite. Section 4 (4) of the Limitation of Actions Act, Cap 22 Laws of Kenya provides that no action can be brought upon a judgment after the expiry of 12 years



from the date on which the judgment was delivered. In the absence of any order extending time within which to execute the decree issued herein on 9th July, 2014, the application for execution before me is time barred and as such incompetent. The decision of Ochieng J. in the case of, *Esther Chebwogen Mutai v Elizabeth Cherugut*, Kitale HCCC No. 76 of 2007 (unreported) is of no assistance to the Plaintiffs. In that case, the court did not decide that a decree can be executed in perpetuity. The upshot of the foregoing is that this is not an appropriate case in which this court can exercise its discretion under section 98 of the *Civil Procedure Act* to direct the registrar to execute the instruments of transfer that the 2nd defendant has refused to execute in accordance with the decree issued herein.

7. For the reasons given above, I find no merit in the plaintiffs' application dated 3/12/2014. The same is dismissed with no order as to costs.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF OCTOBER, 2015

S. OKONG'O

JUDGE

In the presence of

.....for the Plaintiffs

.....for the Defendants

