Edon Consultants (Sued as a Firm) & another v Davson & Ward & another (Civil Appeal 29 of 2019) [2025] KECA 450 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KECA 450 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 29 OF 2019

F SICHALE, F TUIYOTT & FA OCHIENG, JJA

MARCH 7, 2025

BETWEEN

EDON CONSULTANTS (SUED AS A FIRM) ..... 1ST APPELLANT

JEREMIAH EDDY OBAR NDONG ..... 2ND APPELLANT

AND

DAVSON & WARD ..... 1ST RESPONDENT

GEOMAX CONSULTING ENGINEERING ..... 2ND RESPONDENT

(An appeal from the Ruling and Order of the high Court of Kenya at Nairobi (J. K. Sergon, J) delivered on 6th day of November 2018 in Petition No. 1619 of 1993)

JUDGMENT

1. This second appeal has its genesis from the notice to show cause proceedings before a Deputy Registrar. The first appeal to the Judge (Sergon, J) was pursuant to the provisions of Order 49 Rule 7 of the Civil Procedure Rules and this appeal was filed with leave by the High Court granted on 22nd September 2016.

2. Davson & Ward (the 1st respondent) and Geomax Consulting Engineers (the 2nd respondent) sought to execute a decree issued on 17th February 1994 against Edon Consultants (sued as a firm) Jeremiah Eddy Obar Ndong (the appellant). The controversy that arose before the Deputy Registrar, the High Court Judge and now before us is whether execution of that decree was time barred by the provisions of the *Limitation of Actions Act* (the Act). The appellant asserted that the NTSC dated 14th May 2016 taken out in execution of a decree from a judgment entered on 17th February 1994 was hopelessly time barred.

3. On their part, the respondents do not consider the matter being that straightforward. They contend that immediately after the judgment was entered, a dispute arose as to the computation of the amounts due to the respondents, which the Deputy Registrar grappled with over a long period of time, with the

appellant filing application after application in an attempt to block the execution process. When the respondents took out the notice to show cause, it was met by a preliminary objection by the appellant who contended that the decree sought to be executed was time barred under the provisions of section 4(4) of the Act.

4. In dismissing the preliminary objection, the Deputy Registrar cited a passage from a Ruling by Justice Khamoni made in this matter after which the Deputy Registrar observed and held:

> "These sentiments by the Judge give a concrete summary of the judgment debtor's attitude and negative efforts in blocking execution in this matter...
>
> It is therefore my considered view that the defendant cannot be aided to continue evading meeting(sic) the obligation to satisfy the judgment herein by clinging onto provision of the law above cited."

5. This was a holding endorsed and reiterated in the impugned judgment of Sergon, J.

6. Before us, learned Counsel Mr Obar for the appellant submitted that the 12 years' limitation period lapsed on or about 2006; the 6 years' interest limitation time lapsed on or about April 1998; after April 1998, interest could no longer accrue; and after 2006, the decree could not be executed.

7. Secondly, the appellant argues that the filing of numerous applications was an irrelevant consideration taken up by the learned Judge in light of the fact that there was no stay order and also taking into account the mandatory provisions of section 4(4) as there was no evidence that the appellant was avoiding the execution process by filing the applications.

8. The respondents, through learned Counsel Ms Njoki, retorted that execution of the judgment debt in question does not fall within the ambit of section 4(4) since the execution process commenced long before the lapse of 12 years from the date of judgment and the process of execution was stalled by the respondent. The respondent cites Koinange Investment and Development Company Limited v Ian Kahiu Ngethe & 3 others (Being sued as the personal representatives of the Estate of Robert Nelson Ngethe (Deceased)) [2019] eKLR, a High Court decision which was upheld by this Court.

9. Thus, after hearing the appellant's appeal, the learned judge arrived at justified conclusions and inference based on the evidence adduced before him.

10. In this second appeal our remit is limited to reviewing matters of law only, a remit that is carried out with deference to concurrent conclusions of fact reached by the Deputy Registrar and the Judge, unless the conclusions are reached on consideration of matters that should not have been considered or by failure to consider matters that should have been considered, and looking at the entire decision, it is perverse or completely unsupported by the evidence. (See for example Kenya Breweries Ltd v Godfrey Odoyo [2010] eKLR cited by counsel for the appellant).

11. Section 4(4) of the *Limitation of Actions Act* reads:

> " 4. Actions of contract and tort and certain other actions.
>
> (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 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 judgment debt may be recovered after the expiration of six years from the date on which the interest became due."

12. Emerging from the rival submissions, it is clear to us that the singular issue for our determination is whether, taking into account the events after the judgment, 12 years had lapsed before the impugned notice to show cause was taken out.

13. It bears repeating that the appellant contends that the principal amount claimed as at 2nd October 1992 was Kshs.3,050,724; the six (6) years on which to compute interest would lapse in 1998; accordingly under the Act, interest would cease to accrue from 1998 and; the decree was dated 7th February 1994 and issued on 27th July 1994 and the limitation period lapsed on or about the year 2006.

14. We observe that both decisions cited the ruling of Khamoni, J. for drawing the conclusion that the appellant had deliberately obstructed the execution of the decree and could not benefit from the statue of limitation. We also think and hold that the ruling has a substantial bearing on the answer to the controversy and seek to demonstrate why.

15. The record of appeal filed by the appellant does not contain the entire record of proceedings at the trial court and so we do not have the motion dated 11th July 2007 that was before Khamoni, J.

16. However, the address by learned Counsel Mr. Mutubwa who represented the appellant before Khamoni J. on 4th March 2009, reveals the crux of the motion. Counsel ,in part, says as follows:

> " Moreover there are no specific provision for stay of what Deputy Registrar is doing as in this matter. But section 3A of Civil Procedure comes. In this matter, the defendant is saying has overpaid. The plaintiff is saying, there is a balance. That is why the Registrar is called upon to provide accounts. But he is not doing so properly."

17. To be gleaned from this address is that there were proceedings before the Registrar for taking of accounts as there was a contestation, raised by the appellant, on whether there was really an amount due. No issue of limitation had been raised this far.

18. In a ruling of 27th March 2009, the learned Judge observed:

> " The sum of money to be paid as interest in terms of the decree was worked out at the court's registry in the normal manner this court's registrar, being responsible and it was indeed worked out. I do understand on two different occasions the defendants have had the Deputy Registrar review the relevant figures and that this application before me is an attempt to have a third review done."

19. The Judge then held, regarding the appellant's motion of 11th July 2017;

> " ... I entertain no doubt in my mind that this is an attempt by the defendant to open another line of long litigation in this suit in an attempt to delay, or deny all together, the plaintiff's acquisition of the fruits of the judgment in this suit."

20. What the Judge was saying was that, by abuse of court process, the appellant had frustrated the execution of the decree. The ruling of Khamoni, J. therefore removed one of the many roadblocks the appellant had placed on the path of execution. So for purposes of resolving when time would start to count, regarding limitation, the date of that decision is critically important. This is because it would be

unjust to reckon time against the respondents prior to that date when attempts at execution had been stonewalled through abuse of Court process.

21. The date of the ruling was 27th March 2009. Bearing this date in mind, was the notice to show cause dated 14th May 2012 time barred as argued by the appellant before the Deputy Registrar? But first we observe that the preliminary objection to the notice to show cause raised by the appellant read:

> " That the cause of action is statute barred under section 4(4) of the Limitation of Action Cap 22 Laws of Kenya the notice to show cause having been brought 12 years after the delivery of judgment."

22. The arguments by the appellant before the Deputy Registrar and the trial Court Judge were along those lines. Now before us, counsel Obar for the appellant attempts to widen the scope of argument by contending that no arrears of interest could be recovered because of expiration of 6 years from the date on which the interest became due. The issue that recovery of interest was statute barred never arose before the Deputy Registrar or in the first appeal and it is impermissible to take it up for the first time in a second appeal. We shall not deal with that aspect.

23. From 27th March 2009, twelve years would be on or about 27th March 2021. Indubitably, the notice to show cause of 14th May 2014 was squarely within time. There can be no reason to fault the decision of the Deputy Registrar and of the learned Judge on the first appeal.

24. Ultimately, the appeal is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH 2025.

F. SICHALE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.