



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPEAL NO.177 OF 2016

BETWEEN

KOINANGE INVESTMENT AND

DEVELOPMENT COMPANY LIMITED.....APPELLANT

AND

1. IAN KAHIU NGETHE

2. NICHOLAS NGETHE

3. EDDAH GACHUKIA

4. RAPHAEL KAMAU NGETHE

(Being sued as the personal representatives of the Estate of

ROBERT NELSON NGETHE (DECEASED).....RESPONDENTS

(An appeal from the judgment of the High Court of Kenya at Nairobi

(C.Kariuki, J.) dated 6th November, 2015 in H.C.C.C NO. 278 of 2015 (O.S.)

.....
JUDGMENT OF THE COURT

INTRODUCTION

1. The appellant's advocates, *M/s Lawrence M. Mbaabu & Associates*, in their written submissions, have succinctly stated the gravamen of this appeal as follows:-

“In our view, the whole dispute revolves around the issue:

‘whether the orders of stay of execution issued by the Superior Court (Justice O.K. Mutungi) in HCCC No. 3164 of 1995 (judgment suit) on 7th June, 2016 stopped time from running or not.’ ”

The appellant's advocates went on to state:-

“Our submissions shall endeavour to persuade your Lordships to answer the foregoing issue in the negative; that is: - that the orders of stay of execution issued by the Superior Court on 7th June, 2006 did not stop time from running against the judgment delivered by the Superior Court in HCCC No. 3164 of 1995 on 14th October, 2002 since a stay of execution is not one of the exceptions provided for under part III of the Limitations of Actions Act.”

FACTUAL BACKGROUND

2. The factual background of this appeal is that the appellant and **Robert Nelson Ngethe** (now deceased), entered into an agreement dated 5th December, 1988 by which the appellant granted the deceased the option to purchase a parcel of land measuring approximately 0.2642 Ha. The suit land that was to be excised from **L.R No.209/9099**. The agreed purchase price was Kshs.50 million.

3. The said option was exercisable by notice in writing to the vendor:

(a) Any time before the expiry of 90 days from the date of the agreement, or

(b) Before the expiry of 30 days from the date on which all subdivisional conditions were to be complied with by the vendor (the appellant) and the Survey Deed Plan availed and evidence thereof supplied to the purchaser (the deceased), whichever expiry date was to occur last.

4. It was further agreed that upon exercise of the said option the purchaser shall pay to the vendor a deposit of Kshs.5 million, being 10% of the agreed purchase price, upon which the agreement and the said notice would constitute a contract of sale of the said property.

5. After the conditions for subdivision had been complied with by the appellant, he requested the deceased to exercise his option. By a letter dated 16th August, 1995, the deceased exercised the option to purchase and deposited Kshs.5 million into the appellant's account. By a letter dated 12th September, 1995, the appellant's advocate rejected the deposit and stated that the deceased had no rights under the agreement.

6. That letter prompted the deceased to file **HCCC No. 3164 of 1995** seeking the following orders:-

“a) A declaration that the deed of 5th December, 1988 is valid.

(b) A declaration that the plaintiff had validly exercised his option thereunder.

(c) An order that the appellant do within a time to be fixed complete the subdivision of the plot sold and in default the plaintiff may do so.

(d) Judgment for any costs incurred by the plaintiff under prayer (c) above.

(e) An order that the appellant do transfer the subdivision sold to the plaintiff or to his order and that in default the registrar may execute the necessary documents.”

7. The appellant was served with all the court processes, including a hearing notice, but did not attend court to defend the suit. Consequently, by a judgment delivered on 14th October, 2002, **Osiemo, J.** granted the orders as sought and a resultant decree was issued on 25th October, 2002.

8. Thereafter the appellant made an application to set aside the judgment but the application was dismissed. Aggrieved by the refusal to set aside the judgment, the appellant preferred an appeal to this Court, to wit, **Civil Appeal No. 108 of 2003**. In the meantime, the deceased made an application for execution of the decree, which was allowed vide a ruling delivered on 5th February, 2004.

9. The appellant then filed an application to stay execution of the orders issued on 5th February, 2004 pending hearing and determination of Civil Appeal No. 108 of 2003. The orders sought were granted vide a ruling delivered by **Mutungi, J.** on 7th June, 2006.

10. The appeal before this Court was unsuccessful. The appellant sought leave to appeal to the Supreme Court but leave was not granted. The respondents thereafter sought to execute the decree dated 25th October, 2002 but the appellant filed a suit by way of Originating Summons, **HCCC No. 278 of 2015** seeking orders that the judgment delivered on 14th October, 2002 in HCCC No. 3164 of 1994 was no longer capable of execution as the limitation period of 12 years under the Limitation of Actions Act had lapsed; permanent stay in respect of all the respondent's actions relating to the said judgment; and a declaration that the appellant was the legitimate owner of the property in dispute by virtue of adverse possession.

TRIAL COURT'S FINDINGS.

11. In a judgment delivered on 6th November, 2015, **Kariuki, J.** dismissed the suit. The learned judge held, *inter alia*, that **section 4 (4)** of the **Limitation of Actions Act** governs execution of judgments and decrees; that execution was commenced within the stipulated period of time but was stayed pending hearing and determination of Civil Appeal No. 108 of 2003; and in the circumstances it would have been improper for the respondents to carry out any form of execution of the decree.

12. The learned judge concluded as follows:-

“I therefore find that the judgment in question does not fall within the ambit of section 4(4) of the Limitation of Actions Act as the execution process commenced before the lapse of 12 years from the date of judgment, and it was forestalled by the Court.”

13. Regarding the appellant's claim under the doctrine of adverse possession, the learned judge held that the appellant had not satisfied the principles under which such a claim lies; and that a person cannot claim to be in adverse possession of his own property which he had not

been dispossessed of.

APPEAL TO THIS COURT

14. Being aggrieved by that decision, the appellant appealed to this Court on six grounds that may be summarized as follows: that the trial court erred in law by finding that the orders of stay of execution pending appeal had the effect of extending the period of limitation provided by **section 4(4)** of the **Limitation of Actions Act**; that time began to run in respect of the first judgment on 14th October, 2002 when the judgment was delivered and ran continuously for a period of 12 years until 14th October, 2014; the judgment/decreed became unenforceable by virtue of the provisions of section 4(4) of the Limitation of Actions Act; and that the learned judge erred in law by failing to make a finding that the appellant had acquired prescriptive rights over the suit property under the doctrine of adverse possession.

15. The appeal was mainly canvassed by way of written submissions, with minimal highlights. As earlier stated, the main issue for determination in this appeal is whether the grant of an order of stay of execution of a judgment has the effect of stopping the running of time with regard to the provisions of **section 4 (4)** of the **Limitation of Actions Act** which states as follows:-

“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...”

16. The appellant’s pertinent submission on this issue is simple and straightforward: that judgment was entered in favour of the deceased on 14th October, 2002; the time for execution of the resultant decree started running against the deceased on that day and expired on 14th October, 2012; and consequently, the decree was not executable thereafter, irrespective of any order that may have been issued directing stay of its execution pending appeal. The appellant’s learned counsel stated:

“...Our contention is that an order for stay of execution of judgment pending appeal does not stop time from running within the Republic of Kenya.”

17. Counsel argued that no orders were issued to stay execution of the judgment delivered on 14th October, 2002 or to stay execution of the decree issued on 25th October, 2002; that there was no legal impediment (save for non-compliance by the deceased to pay the agreed purchase price) that could have prevented the execution of the decree for a period of 12 years. In his view, the deceased’s application dated 12th October, 2003 sought for “an order to specify the name of the Deputy Registrar and for forwarding the Title Documents by the Appellant.” The orders were not part of the judgment of the decree; consequently, the orders made on 7th June, 2003 were superfluous and did not amount to stay of execution of the judgment or the decree.

18. Citing the provisions of **section 4(4)** of the **Limitation of Actions Act**, the appellant’s counsel submitted that the word

“action” also applies to execution of decree proceedings. He cited this Court’s decision in ***M’Ikiara M’Rinkanya & Another v Gilbert Kabeere M’Mbijiwe [2007] eKLR*** where the Court held:-

“From the above analysis, it is clear that a judgment for possession of land should be enforced before the expiry of the 12 years limitation period stipulated in section 7 of the Act. If the judgment is not enforced within the stipulated period, the rights of the decree holder are extinguished as stipulated in section 17 of the Act and the judgment debtor acquires possessory title by adverse possession which he can enforce in appropriate proceedings. So, quite apart from the authority of *Lougher v Donovan*, which we consider as still good law in this country, and the previous decisions of this Court, there is a statutory bar in section 7 of the Act for recovery of land including the recovery of possession of land after expiration of 12 years. It follows, therefore, that, to hold that execution proceedings to recover land are excluded from the definition of “action” in section 4(4) of the Act would be inconsistent with the law of adverse possession.”

19. Further, he submitted, **section 7** of the **Limitation of Actions Act** states that an action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him. He added that part III of the Limitation of Actions Act is explicit as to the instances under which extension of the periods of limitation may be allowed and these are: in case of disability (section 22); fresh accrual of right of action on acknowledgement or part payment (section 23); in case of fraud or mistake (section 26); and in case of ignorance of material facts in actions of negligence (section 27). Counsel concluded that there is no provision for extension of the limitation period beyond 12 years under the Act with respect to execution of a decree.

20. The appellant further submitted that the order of stay of execution pending appeal issued by this Court on 19th November, 2003 could not and did not stay execution of the judgment delivered on 14th October, 2002 or the decree issued on 25th October, 2002.

21. Regarding the appellant’s claim under the doctrine of adverse possession, it was submitted that the appellant had been in open and continuous possession of the suit property for a period exceeding 12 years and its claim satisfied all the well established legal principles.

22. In response to the appellant’s submissions, the respondents submitted that the appellant was wrong in stating that the orders of Mutungi, J. of 7th June, 2006 extended the limitation period. Kariuki, J. found that even though time started running on the date of the judgment, the respondents had to be allowed to complete the process of execution as the same had already been begun. The respondents stated that it was not possible to continue with the process of execution of the decree as the same had been stayed by the ruling of 7th June, 2006; any attempt to do any further execution during the subsistence of the order of stay would have amounted to contempt of court. Counsel cited, *inter alia*, ***Hadkinson v Hadkinson [1952] 2 ALL ER 567***, where the Court of Appeal held:-

“...Orders must be obeyed whether one agrees with them or not. If one does not agree with an order, then he ought to move the court to discharge the same. To blatantly ignore it and expect that the court would turn its eye away is to underestimate and belittle the purpose for which the court is set up.”

23. The respondents’ counsel further submitted that the purpose of **section 4(4)** of the **Limitation of Actions Act** is to bar a party that has, for no good reason, failed to exercise its rights, but does not apply to a party that could not take any action due to a court order barring such action from being taken.

24. Regarding the appellant’s claim under the doctrine of adverse possession, the respondents submitted that the ground has no basis in law because the elements that such a claimant ought to establish had not been satisfied. Counsel cited this Court’s decision in **Wambugu v Njuguna [1983] KLR 172** where the court held that in order to acquire by adverse possession title to land which has a known owner, the owner must have lost his right to the land by either being dispossessed of it or by having discontinued his possession of it. The Court further stated that dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the land for the purpose for which he intends to use it. In this case, the appellant had been the registered owner of the suit property and had also been in possession all along; the appellant cannot therefore argue that he was in adverse possession of his own land.

25. In his oral submissions, **Mr. Tugee**, learned Counsel for the respondents, faulted the appellant for introducing in the written submissions an issue that is not contained in the memorandum of appeal and which therefore under **rule 104**

(a) of this Court’s Rules cannot be argued. The appellant had argued that the learned judge erred in law by failing to appreciate the actual reason for the deceased’s failure to execute the decree was that he had not paid the purchase price of Kshs.50,000,000.

26. We have perused the memorandum of appeal and indeed this is not one of the six grounds of appeal. **Rule 104(a)** states as follows:-

“104. At the hearing of an appeal-

(a) No party shall, without the leave of the Court, argue that the decision of the superior court should be reversed or varied except on a ground specified in the memorandum of appeal or in a notice of cross-appeal, or support the decision of the superior court on any ground not relied on by that court or specified in a notice given under rule 93 or rule 94.

27. We must therefore disregard the appellant’s submission on the aforesaid issue. In any event the trial judge had himself stated as follows:-

“With regard to the issue that the Defendants had failed to fulfil their end of their bargain to pay Kshs. 50,000,000/= plus interest thereon, I am in agreement with the submissions of Mr. Murungara, that this was not a condition that was contained in the Decree or Judgement thereon. The same can therefore not be raised in this application as the Plaintiff purported to do.”

Furthermore the issue of alleged non-payment of the said sum by the deceased was not one of the declarations that the appellant sought in his Originating Summons that gave rise to the impugned judgment. We cannot therefore pronounce ourselves on the issue.

ANALYSIS AND DETERMINATION

28. Although there are six grounds of appeal, they essentially relate to only two issues,

(i) Whether the learned judge erred in finding that the order of stay of execution issued by the High Court on 7th June, 2006 had the effect of stopping time from running against the judgment delivered in HCCC No. 3164 of 1995 on 14th October, 2002; and,

(ii) Whether the learned judge erred in law in finding that the appellant had failed to establish his claim over the suit land under the doctrine of adverse possession.

29. Regarding the first ground of appeal. It is not in dispute that by an application dated 1st September, 2004 the appellant moved the High Court to stay execution of orders that had been issued on 5th February, 2004 pending the hearing and determination of Civil Appeal No. 108 of 2003 that had been preferred to this Court. The orders issued on 5th February, 2004 compelled the appellant to forward to the deceased’s advocate within 14 days the title documents to L.R No. 209/9099 to enable the deceased to carry out the sub-division of the property; and the Deputy Registrar was empowered to execute the transfer of the subdivision measuring approximately 0.2642 of a hectare that was to be excised from L.R No. 209/9099 in favour of the deceased.

30. The appellant’s application was heard by Mutungi, J. and in his ruling on 7th June, 2006 the learned Judge concluded it in the following words:-

“What is clear in my mind is that to preserve the substance of the appeal herein, there is every need and logic to grant the order of stay prayed for in the application herein.

Accordingly, and for the above reasons, the Notice of Motion herein is granted and I grant an order of Stay of Execution of this court’s order, dated 5/2/04 pending the hearing and determination of Civil Appeal No. 108 of 2003.

It is so ruled.”

31. What was the effect of the above orders? In our view, it is obvious, the deceased was temporarily stopped from executing the orders issued on 5th February, 2004 until the appellant's appeal No. 108 of 2003 was heard and determined. A party has a duty to obey a court order once it is served upon him or he becomes aware of it. See *Hadkinson v Hadkinson* (*Supra*).

32. For reasons that we are not clear from the record, the determination of Civil Appeal No. 108 of 2003 took almost 9 years. This Court delivered its judgment on 23rd March, 2012. Shortly thereafter, the appellant filed an application for leave to appeal to the Supreme Court. By a ruling dated 8th March, 2013, this Court declined to grant leave. Undeterred, the appellant filed an Originating Motion before the Supreme Court seeking a review of this Court's ruling of 8th March, 2013 denying him leave to appeal. The Supreme Court dismissed the application for review vide a ruling delivered on 13th March, 2014.

33. Between 7th June, 2004 when Mutungi, J. granted stay of execution of the decree pending appeal and 23rd March, 2012, when the appeal was dismissed, a period of almost 8 years, the deceased could not execute a valid decree, not because he had slept on his right, but because there was a court order in force. The deceased could not be faulted for obeying a court order.

34. After dismissal of the appeal, it would have been improper for the deceased to re-commence the execution process when the matter was before the Supreme Court. Eventually, the deceased passed away on 8th October, 2014 and the respondents were now sued as the deceased's personal representatives in the matter that was instituted on 9th June, 2015.

35. We do not agree with the appellant's interpretation of *sections 4(4) and (7)* of the *Limitation of Actions Act*.

While we agree that the word "*action*" in section 4(4) includes all kinds of civil proceedings (including execution proceedings) as held by this Court in *M'Ikiara M'Rinkanya & Another vs Gilbert Kabeere M'Mbijiwe* (*supra*) we must state that the deceased was not commencing fresh execution proceedings, rather he was proceeding with an execution exercise that had

already been commenced but halted by the court pending hearing and determination of an appeal.

36. In the *M'Ikiara* matter, the Court held that all post judgment proceedings including originating proceedings and interlocutory proceedings for execution of judgments are statute barred after 12 years. However, in that matter the proceedings to recover the land in dispute had been filed nearly 18 years after the final judgment of the Court of Appeal and were rightly held to be statute barred.

37. Where a party is prevented from executing a lawful decree by a court order pending hearing and determination of an appeal against the decree, it would be unjust to hold that time still runs against the decree holder over the period when the appeal remains undetermined, and until the stay order is vacated. In *Berliner Industriebank Aktiengesellschaft v Jost [1971] 2 ALL ER 1513*, the Court of Appeal held that:-

"Where a stay is granted pending the hearing of an appeal, it is assumed that nothing can be done by the successful plaintiff to enforce the judgment until the appeal has been heard."

38. We therefore find that the order of stay of execution that was issued by the High Court on 7th June, 2006 stopped time from running against the decree holder (the deceased), in respect of the judgment entered in his favour on 14th October, 2002. Consequently, we dismiss grounds 1, 2, 4, 5 and 6 of the appeal.

39. We now turn to consider the remaining ground of appeal, that is, whether the learned judge erred in law in failing to find that the appellant had acquired prescriptive rights over the suit property under the doctrine of adverse possession. The appellant's learned counsel submitted as follows:-

"The appellant's claim for adverse possession is fully supported by the facts of this case. The appellant has been in open and continuous possession of the suit property for a period exceeding twelve (12) years. The appellant has been in occupation peacefully, without force and without any permission from the Respondents or the deceased."

40. We think this ground of appeal is without merit. Possession of land by its registered owner cannot be said to be adverse. The learned judge was spot on when he remarked that "*the plaintiff cannot claim adverse possession of its own property.*"

41. The appellant's learned counsel must have overlooked the express provisions of *section 13(1)* of the *Limitation of Actions Act* which states as follows:-

13. (1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

42. There is a plethora of decisions by this Court as to how rights of ownership of land can be acquired under the doctrine of adverse possession. See for example, *Wambugu v Njuguna* (*supra*). The appellant has all along been in possession of the suit land, which is registered in its own name; has never lost possession of the suit land to the respondents; and it cannot therefore claim ownership of the suit land under the doctrine of adverse possession.

43. All in all, we find this appeal devoid of merit and dismiss it with costs to the respondents.

Dated and delivered at Nairobi this 20th day of December, 2019.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR