REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NYERI

Civil Appeal 124 of 2003

M'IKIARA M'RINKANYA

SEBASTIAN NYAMU ……..
APPELLANTS

AND

GILBERT KABEERE M'MBIJIWE …….……...
….....RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya Meru (Kasanga

Mulwa J) dated 23rd January, 2003 In H.C.C.C. NO. 216 OF 2001)

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JUDGMENT OF THE COURT

The two appellants are aggrieved by the judgment and decree of the superior court at Meru (Kasanga Mulwa, J.) in Meru *High Court Civil Case No. 216 of 2001* (2001 suit) dated 23rd January, 2003 whereby the superior court dismissed the appellants' suit against the respondent. In the dismissed suit, the appellants' had sought a declaration, *inter alia*, to the effect that by virtue of *section 4 (4)* of the Limitation of Actions Act, the respondent could not take any action including execution in respect of the decree/judgment in Meru Senior Resident Magistrate's court *Civil Suit No. 115 of 1979* (the 1979 suit).

The 1979 suit was filed by the respondent herein Gilbert Kabeere M'Mbijiwe, a former Minister in the Government, on 17th November, 1972 against M'Ikiara M'Rinkanya (1st appellant) and Sebastiano Nyamu (2nd appellant) for eviction of the respondents from plot No. 58 Nkubu market, Meru, allegedly allocated to the respondent by Meru Country Council in 1967. The appellants filed a defence in that suit alleging that the plot in dispute was allocated to them by the Meru County Council sometime in 1971.

Although a copy of the judgment of the trial court is included in the record of appeal, the pleadings and the proceedings in the 1979 suit are not included. The trial court allowed the respondent's suit and ordered the eviction of the appellants from the plot in dispute and further awarded Shs.2,000/= as general damages to the respondent. The appellants appealed to the superior court against the eviction order vide *Civil Appeal No. 4 of 1979* in the High Court at Nyeri. However, the superior court (Cockar, J.) dismissed the appeal on 10th July, 1979. Thereafter, the appellants filed a second appeal in this Court being *Civil Appeal No. 13 of 1980*. The second appeal was however dismissed by this Court (Porter &

Kneller JJ.A. & Chesoni, Ag. J.A.) on 21st February, 1984. The judgments of the two appellate courts were not included in the record of appeal. However, Mr. Opulu, learned counsel for the respondent, has cited and provided the judgment of this Court in the appeal as one of the authorities he relies on. The appellants have also omitted from the record of appeal the application for execution filed in the Magistrate's court in the original suit which resulted in an order of eviction given on 16th November, 2001 which order in turn gave rise to the 2001 suit. Given that the facts relating to the disputed plot are not in dispute and that the suit in the superior court was based on a legal issue we have called for the original record to verify the state of the record.

The following brief facts were not in dispute. Sometime in 1967 the respondent applied to Meru County Council for the allocation of a commercial plot at Nkubu market. The application was approved and the respondent was allocated plot No. 58 which was far much bigger than the standard plots. The Commissioner of Lands approved the development plan for Nkubu market sometime in 1970 and subsequently the market was surveyed including plot No. 58. In early 1971, the appellants made a joint application for allocation of a plot in Nkubu market to Meru County Council which application was approved by the Trade and Markets Committee on 1st February, 1971. Thereafter, the respondent's large plot – plot No. 58 was sub-divided into four sub-plots and renumbered plots Nos. 57, 58, 58 and 59 which were allocated as follows:

57 - M'Rimberia

58 - M'Mbijiwe (Respondent)

58A - M'Mukanya and Nyamu (appellants)

59 - M'Mulagwa.

The appellants took possession of the sub-plot No. 58 and started constructing a commercial building. That led the respondent to inquire from Meru County Council about the state of ownership. He was informed that his name had been removed from the register and the plot split and the appellants given part of it. The respondent promptly filed the 1979 suit. It seems that the appellants had completed the construction of the building on sub-plot No. 58 in 1975 about 2 years before the suit was filed. An occupation permit dated 20th August, 1975 was tendered at the trial. This was further confirmed by the evidence at the trial which showed, among other things, that, in 1977 the Meru County Council resolved that the appellants should be given notices to demolish their buildings. Indeed, the trial magistrate recognized in the 1979 judgment that the appellants had constructed a building on the disputed plot. The disputed plot (Plot No. 58A) was valued for purposes of 2001 suit by M/s. S. K. Mburu & Associates on 4th July, 2002 at Shs.3,100,000/=. After the appeal was dismissed by this Court on 21st February, 1984, the respondent filed a Notice of Motion in the superior court dated 30th March, 1984 seeking an order that a warrant be issued for the eviction of the appellants from the disputed plot. That application was not however prosecuted at all.

The record shows that on 16th November, 2001 the respondent filed a Notice of Motion dated 15th November, 2001 in the trial court under *Order XXI Rule 30 (1)* and *31 Civil Procedure Rules* (CPR) and *section 3A Civil Procedure Act* for the following main order, namely:

"*(b) That the court do issue a warrant to the court broker …… for eviction of the respondents from plot no. 58 Nkubu market and demolish all illegal structures thereon".*

The application was supported by the affidavit of the respondent. It was heard ex parte on the day of the filing and an eviction order given on the same day.

The respondent filed a further application in the trial court on 26th April, 2001. It is a chamber summons application made under *section 3A Civil Procedure Act* and *order XXI Rule 18 (1)* CPR for leave of the court to execute the judgment and decree out of time. It is based on the ground that the

applicant was unable to enforce the decree in his favour due to long illness. The appellant filed several grounds to oppose the application including the ground that a court cannot allow the execution of a time-barred judgment under Limitation of Actions Act. Apparently the second application was not prosecuted because the appellants had already filed the 2001 suit on 27th November, 2001 and had obtained an order staying execution.

The 2001 suit was based on the provisions of *section 4 (4)* of the Limitation of Actions Act (Act) which 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 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"*.

The appellants averred in the plaint that the respondent never executed the 1979 judgment even after the appeal was dismissed on 21st February, 1984. The appellants sought a declaration to the effect that the execution of the judgment was statute barred. More particularly, prayer (a) of the plaint seeks:

"*An order of declaration that an action may not be taken including execution of the decree/judgment in respect of Meru CMCC No. 115/1979"*.

The respondent averred in paragraph 6 of the defence that:

"*…… he is entitled to execute the judgment of this nature with leave of court for provisions of Limitation of Actions Act …..… are not in mandatory terms"*.

The superior court agreed with the construction of *section 4 (4)* of the Act by the respondent and held:

"*The final judgment in this case was delivered on 21.2.1984. Evidently the 12 years period has elapsed, it is to be noted that the statute uses the words "may not" in the section above quoted. The wording of the statute does not call for mandatory adherence and appears to leave the court with a discretion to allow or not to allow execution even after the 12 years period has lapsed"*.

The superior court considered the principles upon which the court exercises judicial discretion and exercised discretion in favour of the respondent.

The main ground of appeal is that the learned Judge failed to appreciate the meaning and essence of *section 4 (4)* of the Act and the authority cited to him.

This appeal raises the question of the true construction of *section 4 (4)* of the Act. Firstly, there is the problem of the construction of the words "*may not"* in the phase:- "An *action may not* be brought ….." The learned Judge construed the phrase "*may not"* as giving the court discretion whether or not to allow the enforcement of a judgment after the expiration of twelve years from the date of delivery. But does the court have any discretion in law? It is noticeable that the phrase "*may not"* is not confined to *section 4 (4)* of the Act only. The same phrase is used throughout in Part II of the Act in relation to the other causes of action. It is also used in the whole of *section 4* of the Act in relation to actions founded on contract and other related actions. It is used in *section 4 (2)* of the Act in relation to actions founded on tort and in *section 4 (3)* regarding actions for accounts. It is also used in *section 7* in relation to actions to recover land and in section 8 in actions to recover rent. It is again used in relation to other causes of action in *sections 10 (3), 19 (1), 19 (2)* of the Act. The use of the phrase "*may not"* does not however give the court absolute discretion whether or not to apply the limitation periods prescribed for various causes of action. If the legislature intended to give absolute discretion to the courts it would have expressly provided so in the Act. The Act should be construed as a whole in order to discover the legal meaning of the phrase. After prescribing limitation periods for various actions, the legislature provided safety mechanism or escape routes from the rigours of the Act to avoid injustice by providing for the

extension of limitation periods in the restricted cases specified in part III of the Act. These include cases where a person to whom the cause of action accrues is under disability. Indeed, *section 3* of the Act provides that part II of the Act which specifies various limitation periods is subject to part III which provides for extension of the periods of limitation. It provides:

"*This part is subject to part III which provides for the extension of the periods of limitation in the case of disability, acknowledgment, part payment, fraud, mistake and ignorance of material facts"*.

If the legislature used the phrase "*shall not"* instead of "*may not"* in relation to causes of action specified in part II of the Act, then, part II would have been repugnant to part III.

The learned Judge erred in construing the phase "*may not"* in isolation and thus arrived at a wrong finding. It is an erroneous construction of *section 4 (4)* of the Act or other sections in part II where the same phrase is used to say that the court has a discretion. The true construction in our respectful view, is that, the periods of limitation prescribed by the Act in part II are not absolute as they are subject to extension in cases where a party brings himself squarely within the ambit of the provisions of part III.

In this case, the respondent did not rely on any of the provisions of part III of the Act and the learned Judge did not specifically make any finding that circumstances obtained which extended the limitation period. The only reasons given in favour of the respondent were that the court file was missing and that it was unjust in the circumstances to rely on technicalities. Those grounds, with respect, are not recognized as extending the limitation periods under part III of the Act.

Secondly, the construction of the word "*action"* in *section 4 (4)* of the Act is problematic. The Notice of motion dated 30th April, 1984 for a warrant of eviction is the first application for the enforcement of the judgment. The application was not however prosecuted. It was contended on behalf of the respondent that the application for execution was made about seven years from the date of the judgment of the trial magistrate which period is shorter than the stipulated limitation period of 12 years. The respondent however, did nothing more after filing the application. The mere filing of an application for execution is not the same as the execution of the decree.

The next application for warrant of eviction was made by a notice of motion dated 15th November, 2001 which was filed on the following day. That application was filed nearly 18 years after the judgment of this Court made on 21st February, 1984 and over 20 years from the date of the judgment of the trial court dated 25th January, 1979. The appellants have been in uninterrupted occupation of the suit premises in all those years.

If the word "*action"* in *section 4 (4)* of the Act includes eviction proceedings, then, in our view, the proceedings would be statute – barred.

The respondents' suit in the Magistrate's court was for an order of eviction. Kneller JA in the appeal, however, was of the view that the appropriate remedy should have been a declaration. The decree of the Magistrate's Court was in effect a decree for possession as stipulated in *order XX rule 12 (1)* CPR which is executed by delivery of the property and eviction of any person who refuses to vacate (*rule 30 (1)* of *order XXI* CPR). A warrant to give possession in the prescribed form (Form 9 Appendix D CPR) is issued to the court Bailiff. The CPR do not prescribe a period for limitation for execution of decrees save the requirement in *rule 18 (1)* of *order XXI* CPR that a notice to show cause be issued in cases specified in that rule.

That rule provides:

"*Where an application for execution is made:*

(a) more than one year after the date of decree; or

(b) against the legal representative of a party to the decree; or

(c) for attachment of salary or allowance of any person under rule 43 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".

Mr. Kariuki, learned counsel for the appellants, relied on the case of *Mohamed v Sarda* [1970] EA 358 where the High Court of Kenya held that the word "*action"* covers both originating proceedings as well as ancillary or interlocutory proceedings. In this Court he has relied on *Njuguna vs. Njau* [1981] KLR 225 and *Malakwen Arap Maswai vs. Paul Koskei*, Eldoret *Civil Appeal No. 230 of 2001* (unreported) both decisions of this Court where the Court construed the word "*action"* in *section 4 (4)* of the Act as including all kinds of civil proceedings including execution proceedings. The two decisions of this Court specifically deal with the decrees for possession of land. In the latter case, (Malakwen's case), this Court relied on two decisions of the English Court of Appeal, namely, *LAMB & SONS LTD V RIDER* [1948] 2 ALL ER 402 and *LOUGHER V DONOVAN* [1984] 2 ALL ER 11.

In *Lougher v Donovan* the landlord obtained against the tenant an order of possession of demised house from the court. The order for possession was extended so long as the rent was paid. After the landlord defaulted in paying rent a warrant for possession was obtained by the landlord but it expired. The warrant was thereafter extended for six months. After the tenant died, his widow remained in occupation of the house. She was later substituted as a defendant in the old action for possession. The landlord thereafter applied for extension of time for enforcing the old warrant for possession given more than 12 years before. The widow filed a defence pleading limitation to both the claim for possession and to the proceeding for the first order for possession against her deceased husband. The order for extension was granted. On second appeal against the order by the widow, the court of appeal held that the application for extension of time was an "*action"* and that the claim was barred by *section 2 (4)* of the Limitation Act, 1939. *Section 2 (4)* of English Limitation Act 1939 and the definition of the word "*action"* in the English Act is identical to *section 4 (4)* of our Act and the definition of "*action"* in *section 3 (1)* of the interpretation and General Provisions Act respectively.

The case of *W. T. Lamb & Sons Ltd* concerned the enforcement of a money decree after the period of six years stipulated by the Rules of Supreme Court. It was argued in that case that the execution of a judgment is an "*action"* – a proceeding in a court of law, and, that under *section 2 (4)* of Limitation Act, 1939, such proceedings may be brought within twelve years from the date on which the judgment became enforceable, and, accordingly, the rule of procedure limiting time for execution of decrees to six years was *ultra vires* in so far as it cuts down the right of execution. The court in effect, held that *section 2 (4)* dealt with substantive law and not procedural law of execution and that the issue of execution is within the discretion of the court after the six years limitation period had elapsed. The Court said in part at page 407 paragraph G:

"*It follows from the above brief survey that the right to sue on a judgment has always been regarded a matter quite distinct from the right to issue execution under it and that the two conceptions have been the subject of different treatment. Execution is essentially a matter of procedure – machinery which the court can, subject to the rules from time to time in force, operate for the purpose of enforcing its judgments or orders …..…".*

The English Court of Appeal had occasion to consider both the *Lougher v Donovan* and *W. T. Lamb v Rider* in *National Westminister Bank PLC v Powney* [1991] Ch. 339 which construed *section 24 (1)* of the English Limitation Act, 1980, which has replaced the Limitation Act 1939. That section provides:

"*1. An action shall not be brought upon a judgment after the expiration of six years from the date on which the judgment became enforceable.*

2. No arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due".

The word action is defined by *section 38 (1)* of the Act as including, "*any proceedings in a court of law*".

The Court of Appeal in *National Westminister Bank* case concluded that the two decisions in *Lougher v Donovan* and *W. T. Lamb & Sons v Rider* respectively were irreconcilable and chose to follow the latter case (i.e. *W. T. Lamb & Sons* rather than *Lougher v Donovan*) saying at pages 356 paragraph C:

"*We have to say that we cannot understand why Lougher v Donovan was not relevant. The effect of that decision was that an application to extend the process of execution on a judgment was that an "action" within section 31 (1) of the Act of 1939. The effect of the decision in W. T. Lamb & Sons v Rider was an application for leave to issue execution was not an "action" within section 31 (1). We are quite unable to reconcile those two decisions*".

The question whether *section 24 (1)* of Limitation Act, 1980 bars execution of a judgment after six years, or whether it only bars the bringing of a fresh action on the judgment arose in the House of Lords in *Lowsley vs Forbes* [1999] 1 AC 329. The House of Lords considered the previous relevant decisions including *Lougher v Donovan*; *W. T. Lamb & sons v Rider* and *National Westminister Bank PLC v Powney* and held that, an "*action*" in *section 24 (1)* of the Limitation Act 1980, means a fresh action and does not include proceedings by way of execution of a judgment in the same action. The House of Lords did not overrule any of the previous decisions and seemed to distinguish *Lougher v Donovan* case from *W. T. Lamb & Sons v Rider* case at page 339 paragraph D, thus:

"*The explanation (for apparent inconcistency) may be that the application for warrant for possession in Lougher v Donovan was regarded as a separate proceeding and not as a form of execution. It was not until 1966 that a writ of possession was included for the first time in the definition of writs of execution for the purposes of Order 46*".

The House of Lords examined the development of the law, both before and after the Limitation Act, 1939 and observed at page 338 paragraph D:

"*Thus the position after the Limitation Act 1939 came into force was that a judgment debt became statute – barred after 12 years. This was the meaning which the court had given to the language of section 2 (4) of the Act of 1939 and its predecessors for over 100 years. The existence of statutory bar was not regarded as being in any way inconsistent with a discretionary bar or execution after six years under Ord. 42 r. 23 (a) of the Rules of Court, now R.S.C. Ord. 46 r. 2 (1) (a)*".

Lastly, the House of Lords investigated the reasons for reducing the limitation period from twelve years for actions upon judgment to six years in *section 24 (1)* of the 1980 Act. For that purpose, the House of Lords studied the relevant paragraphs of the Report of the Law Reform Committee on Limitation of Actions (1977) CMND 6923).

In paragraph 4.13 of the report the committee reported, among other things, that the period for action on a judgment has since 1833 been the same as that for an action relating to land, that, since the actions on judgment are nowadays very rare the special provision for judgments should not be preserved. The House of Lords digested the paragraph 4.14 of the Report at page 340 E thus:

"*What it does (paragraph 4.14) is to propose a statutory compromise. All forms of execution were to be removed from the sphere of limitation and instead made subject to a discretionary bar after six years. There would then be no need for the special limitation period of 12 years for bringing suit on a judgment. It was in light of that proposal that Parliament passed the Limitation Amendment Act 1980, which in turn consolidated in Consolidation Act of that year*".

It is clear from that comparative survey of the English case law that English courts generally construed the word "*action*" both in the erstwhile *section 2 (4)* of the Limitation Act, 1939 and *section 24 (1)* of the Limitation Act, 1980 to mean a substantive and fresh action on the judgment excluding procedural proceeding for the enforcement of a judgment. The *Lougher v Donovan* case is one of the few

exceptions. In England all forms of execution including application for a warrant of possession have been removed from the provisions of the Limitation Act and consigned to procedural law – Rules of Supreme Court.

The construction given to the corresponding *section 4 (4)* of the Act by the courts in this country is much wider. All post judgment proceedings including originating proceedings and interlocutory proceedings for execution of judgment are statute – barred after 12 years.

The question which arises is whether this Court should depart from its own previous decisions in preference to the construction given to corresponding provision of Limitation Act by English courts, particularly, by the House of Lords in *Lowsley v Forbes*. This Court is free to depart from its previous decisions if it appears right to do so. (See *Dhodia v National & Grindlays Bank Ltd* [1970] EA 195.

A close examination of the local decisions however, shows that they cannot be impeached.

Firstly, as regards recovery of judgment debts,, the construction of *section 4 (4)* of the Act by local courts barring recover after 12 years, is as shown in *Lowsley v Forbes*, consistent with the construction given by English courts to *section 2 (4)* of the Limitation Act 1939 and its predecessors for over 100 years – that a judgment debt becomes statute – barred after 12 years.

Secondly, the narrow construction given by the English courts, is now backed by law reform, both substantive and procedural law. The period for taking action on judgments has been reduced from 12 years to six years as it has been recognized, among other things, that fresh actions on judgments are nowadays very rare. The time for executing judgment without leave of the court has been extended to six years and thereafter the extension of the period for execution depends on the discretion of the court. (See RSC *Order 46 rule 2 (1) (a)*). However, our circumstances are totally different and any construction of our statute to conform with the construction by English courts would be tantamount to importing the English statutes into our law and the courts would thereby in effect, be usurping the powers of the legislative. Such construction would also offend the canons of construction of statutes.

Lastly, it is logical from the scheme of the Act, that a judgment for possession of land, in particular should be enforced before the expiration of 12 years because section 7 of the Act bars the bringing of action for recovery of land after the end of 12 years from the date in which the right of action accrued. By the definition in *section 2 (2) (3)* of the Limitation Act:

"*Reference in this Act to a right of action to recover land include reference to a right to enter into possession of the land and reference to the bringing of an action in respect of such right of action include reference to making of such an entry*".

According to that definition the institution of proceedings to recover possession of land including proceedings to obtain a warrant for possession is statute – barred after the expiration of 12 years.

In *MEGARRY & WADE: The LAW OF REAL PROPERTY* 6th Ed., the authors state in paragraph 21 – 054 page 1325 regarding enforcement of a judgment for possession of land under *Order 46 rule 2 (1) (a)* RSC, thus:

"*Conversely, if enforcement does not take place within six years, the true owner may begin new proceedings for possession provided that at the time of the commencement, his right of action has not been barred by 12 years adverse possession*".

This view is re-inforced by Dillon LJ in *B.P. Properties Ltd v Buckler* [1987] 2 EG LR 168 at page 171 (as quoted from *National West Minister Bank v Powney* (supra) page 356 paragraph F – H).

"*The true position, in my judgment, under the Act of 1939 was that after a judgment for possession had been obtained in an action for recovery of land begun in due time, the successful plaintiff had 12 years from the date of judgment to enforce the judgment before any question of limitation could arise. The*

result may follow from the view expressed by Scott LJ in Lougher v Donovan [1948] 2 All ER 11 that an application to issue or extend a warrant for possession under judgment for possession is itself an "action brought upon a judgment for which there was a prescribed period of 12 years under section 2 (4) of the Act of 1939. Alternatively, it may be based on the view expressed by the editors of the County Court Practice in their notes to the present Ord. 26 rule 5 that, although the right to sue on a judgment has always been regarded as a matter quite distinct from the right to issue execution under it which is essentially a matter of procedure (W. J. Lamb & Sons v Rider [1948] 2 KB 331), nevertheless leave to issue a warrant of execution will not be granted, nor will warrant issued be renewed, at a time when the limitation period appropriate to an action on the judgment has expired".

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.

For the foregoing reasons, the Notice of Motion dated 15th November, 2001 and filed in court on 16th November, 2001 for warrant of eviction was, for all intents and purposes, an "*action"* upon a judgment to recover possession of land. The proceedings to recover land having been filed nearly 18 years after the final judgment of the Court of Appeal were statute – barred. Moreover, since the respondent sought to execute the judgment over one year after it was delivered, a notice to show cause why judgment should not be executed should have been issued and the appellants given an opportunity to be heard.

Mr. Opulu, submitted that the suit was a nullity *ab initio* because by *section 34 (1)* of the *Civil Procedure Act*, any objection to the execution of the decree should be determined by the court executing the decree and not by a separate suit. Mr. Opulu, is not with respect correct. The issue raised in the suit was not merely a procedural issue about the execution, discharge or satisfaction of a decree. It was a substantive issue of law whether recovery of the suit premises was barred by the Limitation of Actions Act and whether the court had jurisdiction to issue eviction order.

By *Order II rule 7* CPR, an objection to the suit cannot be raised merely because it seeks a declaratory judgment or order. As that rule provides, in a declaratory suit the court can make a binding declaration of right whether any consequential relief is claimed or could be claimed. In any case, the respondent cannot be heard on that ground in the absence of a notice of affirmation of the appeal on that ground as stipulated in *Rule 91 (1)* of the Court of Appeal Rules.

For the reasons we have already given, we are satisfied that the execution of the decree for possession of the land was statute – barred and the superior court erred in dismissing the appellants' suit.

As regards the costs of the suit, it is just in all the circumstances for this case that each party should bear its own costs of the suit and the appeal.

Accordingly, we allow the appeal, set aside the judgment of the superior court delivered on 23rd January, 2003 dismissing the appellants' suit and substitute therefor an order allowing the appellants' suit and granting declaratory judgment in terms of prayer (a) of the plaint dated 24th November, 2001 only.

There will be no orders of costs of this appeal and in the court below.

Dated and delivered at Nairobi this 31st day of July, 200**7.**

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR