



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwaduna ((Suing as the Legal Representative of the Estate of Ali Mwaduna - Deceased)) v Mkadha  
(Environment & Land Case 47 of 2014) [2024] KEELC 5574 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5574 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 47 OF 2014  
FM NJOROGE, J  
JULY 31, 2024**

**BETWEEN**

**AMINA ALI MWADUNA ..... PLAINTIFF  
(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ALI  
MWADUNA - DECEASED)**

**AND**

**MASHA MKADHA ..... DEFENDANT**

**JUDGMENT**

**Pleadings**

1. By a Plaint dated 13<sup>th</sup> March, 2014 the Plaintiffs sued the defendant seeking the following orders:
  1. Eviction orders be issued against the Defendant, his agent, servants from the parcel of land together with any structures therein;
  2. Costs to be provided for;
  3. Any other relief the court may deem fit to grant.
2. Initially the suit proceeded to formal proof in the absence of the defendant and judgment was delivered against the defendant on 17/10/2014 but it was set aside on 25/5/2018 by the court at the defendant's instance vide an application dated 26/3/2015.
3. The original plaintiff met his demise midway through these proceedings and his daughter who became his legal representative was substituted. In the amended plaint the plaintiff claims that the Senior Resident Magistrates' Court at Malindi held a public auction on 12<sup>th</sup> June 1990 in respect of the defendant's piece of land Kilifi/Ngerenya/331 in SRM Civil Suit No 8 Of 1989 and the plaintiff was declared the winner after he bid Kshs 68,500/= . Thereafter the plaintiff applied to the court for a



vesting order in his favour after being issued with a certificate of sale, which vesting order was issued on 29/6/1990. The plaintiff then filed an application in the High Court in HC Misc. Application No 174 Of 1994 for confirmation of the vesting order. On 12<sup>th</sup> October 1990 the vesting order was confirmed. However, the defendant refused to give vacant possession of the suit land to the plaintiff hence the present suit seeking the orders afore stated.

#### **The Further Amended Defence.**

4. The original defendant also died in the course of these proceedings and was substituted by his legal representative pursuant to an application dated 19/12/2022. The defendant then filed a further amended defence on 15/2/23. He denied the public auction occurred. He denied that the plaintiff was the winning bidder at the auction if it occurred. He denied the existence of the vesting order proceedings. He denied that a certificate of sale was ever issued. He denied the confirmation proceedings in HC Misc. 174 of 1994. He stated that if there was any auction that took place the same was conducted clandestinely and that it is notable that the plaintiff is attempting to enforce the order 25 years later and he has been indolent and is thus guilty of laches. He stated that the plaint as drawn disclosed no cause of action, is fatally defective and has been overtaken by the [Limitation of Actions Act](#). He denied having refused to give vacant possession as claimed in the plaint. He also stated that as at the period 1989 -1990 he did not have any title deed to the suit land and thus the public auction was irregular and had no force of law whatsoever. He also stated that no plot by the reference Kilifi/ Ngerenyi/331 exists.

#### **Evidence.**

##### **Plaintiff's evidence.**

5. PW1 Amina Ali Mwaduna testified on 9/6/22 and adopted a witness statement dated 13/3/14 as part of her evidence-in-chief. She stated that her father paid Kshs 68,500/- for the suit land at the auction.
6. Under cross-examination by the counsel for the defendant the plaintiff stated that she was of tender age when the transaction occurred between her father and one Sharriff Ahmed the auctioneer. She has never seen the judgment in the case; she has never seen the letters authorizing the auction conducted on 12/6/90. She never saw any notification of sale; she does not know if the defendant attended the auction. She also does not know the specific place where the auction took place. She admitted that P. Exh 2 does not state the plot number. She does not know if the plot had a title deed. Her father never took possession of the suit land. She had never been in occupation of the suit land. She also admitted that the deceased original plaintiff had a case in Kilifi with one Dr. Mwangome who had purchased a portion of the suit land, christened as plot no 1268 from the defendant.
7. Under cross-examination however the plaintiff stated that the defendant's transaction with Dr Mwangome occurred after the present suit was filed.

##### **Defendant's Evidence.**

8. DW1, Nicodemus Masha Mkadha, son to the original defendant testified on 30/11/23 and adopted the witness statement that his late father had filed as his evidence-in-chief. He stated that the present case emanated from Malindi CMCC No 9 Of 1989 between his father and one Hamisi Mwandoro involving dowry paid for Kadzo Masha, the plaintiff's sister. She had been married to Hamisi but she later returned home whereupon Hamisi came and demanded a refund of the dowry he had paid for her, amounting to Kshs 2330/=. The same was refunded through the court in that mentioned case. DW1 produced numerous receipts as evidence that the money was paid, partly to Hamisi and partly



to the court. He stated that in total his father paid Kshs 6848/= to Hamisi and Kshs 273/= in respect of court collection fees.

9. Upon cross-examination, DW1 stated that the plot had been subdivided into two plots, no 1267 and 1268 and that his father had sold the latter plot to one Charles. He stated that his family did not know of the existence of the present case as at the year 2014. On re-examination he stated that his family came to know of the case when some policemen came to their home presumably at the execution stage since judgment was delivered against the defendant on 17/10/2014 but it was later set aside on 25/5/2018 by the court at the defendant's instance vide an application dated 26/3/2015.

## **Submissions**

### **Plaintiff's submissions.**

10. The plaintiff filed submissions on 1/2/2024 and identified and addressed the following issues:
  - a. Whether the plaintiff purchased the suit land at an auction;
  - b. Whether the suit property was subdivided and parts of the same transferred to another person during the pendency of the present suit;
  - c. Who should bear the costs of the suit.
11. The plaintiff submitted that the deceased bid for the land and paid Kshs 68,500 as per P. Exh 1 and that the auctioneer gave him a certificate of sale; that the Magistrates' Court and the High Court respectively gave and confirmed the vesting order when he applied for such orders; that the defendant never appealed the decisions of the courts, and has never sought to set aside the vesting orders since 1989; that it being a sale court initiated, the plaintiff is entitled to the suit property as the court did receive his payment. He stated that if the court did receive any payment from the defendant as well, then he was not notified of such and his right should therefore be upheld.
12. On the second issue the plaintiff submitted that it is correct that the suit land was subdivided and part of it transferred. However, he stated that these transactions took place during the pendency of the suit and the doctrine of *lis pendens* applies to them.
13. The defendant filed submissions on 13/2/2024 and addressed the following issues:
  - a. Whether the suit discloses a reasonable cause of action;
  - b. Whether the plaintiff has discharged the burden of proof;
  - c. Whether the plaintiff can recover the fruits of his judgment 14 years after the judgment;
  - d. What is the balance of convenience?
14. On the first issue the plaintiff submitted that the plaintiff and the defendant are strangers with no privity over any transaction between them, the initial suit having been concluded between the defendant and a third party and the plaintiff having emerged only after the conclusion of the suit and purported to have purchased the suit land known as Kilifi/Ngerenyi/331 at a public auction. The defendant submitted that only a vesting order and the implementation of procedures under the CPR could have been useful in putting the plaintiff into possession and no new suit for the purpose of execution was necessary.
15. The defendant also decried the delay of 24 years that have lapsed since the final determination in the primary suit, and blamed the plaintiff for the possibility that the original file may have been destroyed



or taken to the archives; he stated that the plaintiff has failed to explain which steps he took since 1989 to ensure that he was put into possession of the suit property. The defendant stated that if the deceased had been uncooperative as alleged the court process could have been invoked against him to secure vacant possession.

16. Regarding the second issue as to whether the burden of proof has been discharged the defendant submitted that the plaintiff not only failed to call court officials to produce relevant records, but also failed to produce certified copies of court documents including proceedings, judgment, decree, vesting order including records from Misc. Application 174 of 1994, warrants issued to the court bailiff (or the auctioneer), the transfer that the plaintiff requested the court to execute upon default by the defendant. He stated that the plaintiff had failed to justify such a major omission; that no vesting order was produced and even the copy shown does not bear the name of the judicial officer who signed it and its authenticity is in doubt. He submitted that the plaintiff had failed to prove that the said auctioneer is now deceased. The defendant submitted that since the vesting order formed the bedrock of the plaintiff's case, its non-production fatally injured the plaintiff's case.
17. The uncorroborated evidence of the plaintiff, who was a mere infant at the time of the alleged transactions was also critiqued since she was not an eyewitness to the happenings at the time. It is also posited that the plaintiff never demonstrated that he ever attempted to take possession of the suit premises during the 24-year period.
18. The defendant further submitted that the plaintiff's case was barred by the provisions of Section 7 of the *Limitation of Actions Act*, at least 12 years having lapsed from the date the judgment was delivered and the plaintiff's rights to enforcement of the judgment were in any event extinguished and he can not exercise them in any manner.
19. Finally, the defendant avers that the balance of convenience tilts in his favour since he was born and raised up on the suit premises, and his family relies on the suit land for a livelihood. In contrast, he submits, the plaintiff has never been in occupation of the suit premises and lacks similar attachment thereto. In the same breath the defendant admits that the plaintiff on one occasion entered the suit premises and demolished the defendant's houses presumably in an eviction attempt.

#### **Determination.**

20. In this court's view, the issues that arise for determination in the present suit are as follows:
  - a. Was the plaintiff legally entitled to commence a fresh suit rather than enforce his claim within the lower court file record?
  - b. Did the plaintiff prove to the required standard that he purchased the suit land at a public auction authorized through court action?
  - c. Is the plaintiff's claim time barred?
  - d. Who ought to pay the costs of the suit?
21. The above issues are addressed as hereunder.
  - a. **Was the plaintiff legally entitled to commence a fresh suit rather than enforce his claim within the lower court file record?**
22. There is no doubt that there was a suit between the defendant and a third party in which the defendant lost and was condemned to pay a sum of money. The plaintiff's claim is that the defendant failed to give vacant possession after the plaintiff obtained a vesting order in the lower court suit and obtained



its confirmation in the High Court. Admittedly the plaintiff was not a party to the lower court suit and he only emerged after the judgment and he claims to have purchased the suit land when it was offered at a public auction for sale in execution of the decree in that suit. The issue arising is therefore whether the plaintiff's possession of a vesting order can competently entitle him to lodge a fresh suit against the defendant.

23. Ordinarily, the proceedings in the lower court suit ought to have terminated with the issuance of a vesting order which entitled the plaintiff to be put into possession of the suit land without any further separate suit being commenced. This court will refer to some relevant legal provisions.
24. Section 34 of the [Civil Procedure Act](#) provides as follows:

“ 34. Questions to be determined by court executing decree

- (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.
- (2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.
- (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.

Explanation. — For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.

25. Order 22 Rule 48 provides as follows:

48. Attachment of immovable property [Order 22, rule 48] (1) Where the property to be attached is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such purported transfer or charge, and the attachment shall be complete and effective upon registration of a copy of the prohibitory order or inhibition against the title to the property. (2) A copy of the order shall be affixed on a conspicuous part of the property.”

26. The recourse that remained for the plaintiff after purchase of the suit land was the taking of possession thereof from the defendant. He had all the legal provisions in support of that recourse but he failed to utilize them. As correctly put by the defendant the plaintiff has failed to demonstrate that he ever attempted to take possession of the suit property before the present suit was filed. Indeed, it appears that the only time that the plaintiff ever went to take possession was when he got a judgment of this court in the present suit, and even that event was short lived since the defendant set aside that judgment and the status quo ante was restored. It is also correct as urged by the defendant that there was no privity of contract or other relationship that created a nexus between the plaintiff and the defendant in respect of the suit land save the vesting order.



27. Should a citizen be allowed to institute a fresh suit against another for more orders using an already procured court order per se as the basis for the fresh suit? In *Salima Enterprises Limited v Nairobi City County (Environment & Land Case 351 of 2019)* [2022] KEELC 14421 (KLR) (22 September 2022) (Ruling) it was stated as follows by the court:

“In the premises, it is my finding and holding that the suit herein is clearly an Execution suit, whose primary purpose and/or intent is meant to achieve the sole purpose of enforcing the decrees of the court, albeit issued in separate and distinct cases....

My reading of the foregoing provision makes it explicit and unequivocal that matters pertaining to execution, satisfaction, enforcement or discharge of decrees, can only be taken and or dealt with in the suits where the impugned decrees were issued, but not vide a Separate and distinct suit.

In any Event, the provisions of Section 34(supra) proceeds to underscore that no fresh suit shall be filed for purposes of execution.

Premised on the foregoing position, where a Party proceeds and files a fresh suit, whose purport and tenor is to execute or enforce the decree issued elsewhere, such a suit is invalid and contrary to the clear tenets of the law and essentially, the provisions of Section 34(supra).”

28. In this court’s view, the filing of fresh suits for execution of past judgements and decrees may be counterproductive as it may lead to a multiplicity of suits and further clog our justice system whose backlog is borne of the inefficiencies of the past decades which the courts are still trying to clear under the new constitutional dispensation. As the plaintiff had no own set of facts to found a cause of action against the defendant it being that that he had purchased the suit land, a fresh suit was out of the question and he ought to have pursued the execution process to the ultimate end, to be registered as proprietor and also be put into possession which he never did. For that reason, I find that the plaintiff’s suit lacks any reasonable cause of action and on this ground per se it can be dismissed. In the event that this finding is incorrect I will proceed to the next issue.

**b. Did the plaintiff prove to the required standard that he purchased the suit land at a public auction authorized through court action?**

29. The original plaintiff having met his demise, PW1, a lady who was only a girl of tender years gave evidence in his place and adopted his witness statement. She never witnessed the transactions that she spoke of and much reliance has to be placed on documentary evidence that was filed by the original plaintiff of which the defendant has spoken so critically.
30. There is a payment receipt which appears to be the only document produced by the plaintiff as an exhibit with the rest of the documents numbering 3 in all, having been objected to by the defence and consequently marked for identification. Thus, even from the inception the probative value of the plaintiff’s evidence is quite weak. The receipt dated 19/6/1990 (P. Exh1) was issued by one Shariff Alwi Ahmed who is said to have been the auctioneer who sold the suit land to the plaintiff in execution of the decree in the lower court case. PMF2 is a letter purportedly issued by the said Shariff, also dated 19/6/1990. The said certificate states that the plaintiff was declared the purchaser of “the judgment debtor’s shamba with coconut trees orange trees cashew nut trees and any other trees,” and that he had paid in full the purchase price required of Kshs 68,500/= which had been forwarded to the Malindi court after deduction of the auctioneers’ fees. The third document PMF3 is a certificate of sale dated 28/6/1990 in favour of the plaintiff. The fourth document is a vesting order in respect of Plot No



331 Ngerenyi in favour of the plaintiff who had made an application for the order, and it cited the certificate of sale that this court has mentioned herein before; it vests the suit property in the name of the plaintiff absolutely and free from all encumbrances. Therefore, even though the defendant states that the suit land had no title deed between 1989-1990, that averment is of no consequence as the same was sufficiently identified for the purposes of the auction. The fifth document is the Order issued by Justice A. Mbogholi Msagha (as he then was) on 12<sup>th</sup> October 1994 confirming the vesting order issued by the lower court. It states that if the respondent, the defendant herein, refused to execute the transfer the Deputy Registrar be pleased to do so.

31. The centerpiece of the tragedy that is the plaintiff's case is that no originals or certified copies of the above documents, or even the original file records of the cases cited were produced in evidence in this case where the defendant has raised the defence that no such public auction sale took place. He who alleges proves. As the receipt admitted as P. Exh 1 lacks any specific reference to the suit land, no nexus can be drawn between it and the other documents marked for identification or indeed between it and the suit land. This court is thus of the view that the plaintiff did not establish to the required standard that he bought the suit land at a court initiated auction. As to whether the defendant established that he paid the monies demanded of him in the lower court suit, and, if he did so, whether that payment can defeat the plaintiff's claim of purchase at a public auction, that issue does not arise from the defence but only in the evidence and submissions and it shall therefore not be addressed here. In a similar situation the court in *North Kisii central Farmers Limited vs Jeremiah Mayaka Ombui and other* (2014) eKLR and *Elizabeth O. Odhiambo vs South Nyanza Sugar Company Limited* (2019) eKLR observed as follows:

“The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.”

32. In any event this court has already found that the plaintiff never adduced sufficient evidence of purchase at a public auction and the matter ought to be left at that.

### **c. Is the plaintiff's claim time barred?**

33. Section 7 of the Limitations of Actions Act provides as follows:

“7. Actions to recover land.

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

34. With respect to the limitation of actions defence, the defendant's appropriate statement is at paragraphs 11 and 16 and the two paragraphs read together can be understood to state that the plaintiff's present suit is an attempt to effect execution 25 years after the order intended to be executed was made. Since I have already indicated while determining the first issue herein above that the execution could have been effected within the court record of the lower court suit, it is the correct position that the plaintiff's suit is an attempt at finalizing execution. In that context Section 7 of the



Limitation of Actions Act must be read together with Section 4(4) of the same Act which provides as follows:

“(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.”

35. The judgment in the lower court case was delivered on 16/2/1990. For the purposes of Section 4(4) part of whose provisions provides for either judgment or “...a subsequent order” that “directs ... the delivery of any property” there is in this case, documentary evidence having not been produced to that effect, no evidence of any subsequent order as seen herein above; therefore, this court will adopt the date of the judgment as the starting point for the computation of the 12-year period provided for in the Act. Consequently 12 years from the date of judgment expired on or about 15/2/2002. The rule on time bar is quite unforgiving as seen in the cases of Willis Onditi Odhiambo vs. Gateway Insurance Company Limited (2014), eKLR, Hudson Moffat Mbue vs. Settlement Fund Trustees & 3 Others ELC No. 5704 of 1992(O.S), [2013]; Isaac Olang Solongo v Gladys Nanjekho Makokha (Being the administrator of the Estate Antonina Makokha (Deceased) & another [2021] eKLR and eKLRM’Ikiara M’Rinkanya & Another V Gilbert Kabeere M’Mbijiwe [2007] eKLR.

36. In the case of Isaac Olang Solongo v Gladys Nanjekho Makokha (Being the administrator of the Estate Antonina Makokha (Deceased) & another [2021] eKLR it was observed as follows by the court as follows:

“40. The further reason for holding that all action on judgment after 12 years is statute-barred in the M’Ikiara M’Rinkanya (supra) is that Section 7 of the Limitation of Actions Act still exists and excluding action in execution of judgment from limitation under Section 4(4) would not resonate but would in fact conflict with the doctrine of adverse possession embodied in Section 7 which our justice system upholds to date.”

### **Conclusion.**

37. It is therefore clear that the judgment from the lower court in Malindi SRM Civil Suit No 8 Of 1989 cannot be enforced at this late hour and through the present suit as it is 12 years after it was delivered.

38. The upshot of the foregoing analysis is that the plaintiff’s suit lacks merit and it is hereby dismissed. However, bearing in mind the circumstances of the present suit, each party shall bear their own costs of the suit.

**JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 31<sup>ST</sup> DAY OF JULY 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC MALINDI**

