Khamis & another v Omar - Trustee of the Estate of Malim Bin Hero & 4 others (Environment & Land Case 247 of 1964 & 265 of 1967 (Consolidated)) [2024] KEELC 13246 (KLR) (18 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13246 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 247 OF 1964 & 265 OF 1967 (CONSOLIDATED)

LL NAIKUNI, J

NOVEMBER 18, 2024

BETWEEN

MOHAMED SALMIN KHAMIS ..... 1ST PLAINTIFF

RAMLA SALMIN KHAMIS - ADMINISTRATOR OF THE ESTATE OF SALMIN KHAMIS BIN SALMAN ..... 2ND PLAINTIFF

AND

ABDULLA BIN OMAR - TRUSTEE OF THE ESTATE OF MALIM BIN HERO ..... 1ST DEFENDANT

MOHAMED BIN OMAR ..... 2ND DEFENDANT

THE COMMISSIONER OF LANDS ..... 3RD DEFENDANT

THE DIRECTOR OF SURVEY ..... 4TH DEFENDANT

THE HON ATTORNEY GENERAL ..... 5TH DEFENDANT

AS CONSOLIDATED WITH

ENVIRONMENT & LAND CASE 265 OF 1967

BETWEEN

MOHAMED SALMIN KHAMIS ..... 1ST PLAINTIFF

RAMLA SALMIN KHAMIS - ADMINISTRATOR OF THE ESTATE OF SALMIN KHAMIS BIN SALMAN ..... 2ND PLAINTIFF

AND

SALMIN MOHAMED OMAR ..... 1ST DEFENDANT

BASITY OMAR ..... 2ND DEFENDANT

ADMINISTRATOR OF THE ESTATE OF MOHAMED BIN OMAR

RULING

I. Introduction

1. This Honourable Court was called upon to make a determination onto a Notice of Motion application dated 22nd February, 2023 filed by Mohamed Salmin Khamis and Ramla Salmin Khamis (legal Representatives of the Estate of Salmin Khamis Bin Salman, the Plaintiffs/Applicants herein. It was brought under the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap. 21, Order 22 Rule 18 of the procedure Rules 2010 and Section 4(4) of the Limitations of Actions Cap 22 Laws of Kenya.

2. Additionally, while opposing the afore – stated application, the Court moved to consider and determine a Preliminary objection dated 26th March, 2024 raised by the Interested Parties. It also served as a response to the Notice of Motion application

3. Upon service of the Notice of Motion application to the Plaintiffs also responded to the Preliminary Objection through a Statement of grounds of opposition dated 22nd April, 2024.

II. The Plaintiffs/ Applicants' case

4. The Plaintiffs/Applicants sought for the following orders:-

    a. That this Honourable Court be pleased to grant the applicants leave to extend time to execute the Court Judgment and Decree of the Court issued on 18/3/1970 which judgment has not been appealed against, reviewed and or set aside.

    b. Cost of the Application.

5. The application was premised on the grounds, testimonial facts and the averments made by the 36 Paragraphed annexed affidavit of MOHAMED SALMIN KHAMIS the 1st Plaintiff and one of the Administrator of the estate of Salmin Khamis Bin Salman herein. The Applicant averred that:-

    i. On 7th December, 2022 this Court made orders requiring the Applicants to move court within 90 days and specifically address it on leave to extend time to execute Judgment herein.

    ii. On 18th March, 1970 this court delivered the Judgment in their favour against the Defendants. When the Judgment was delivered, decree was extracted and signed but after sometimes the original court file got lost and was not traced in excess of 12 years and was shortly traced in the year 2011 and then got lost again. When the court file got lost, execution proceedings could not done in the absence of the court file hence no execution could be done.

    iii. When the court file got lost, their father's Advocates severally followed up the issue and sought for directions to open skeleton file but were advised to be patient because the court registry was looking for it.

    iv. While the court file was lost and their father the Plaintiff was ailing, he attended to different several medications away from home and this caused breakdown of communication between the Plaintiff and his advocates.

v. When Judgment was delivered and decree signed, one of their father's Advocates Mr. Suchak took from their father all the documents of this case another document including title deed. While the court file got lost, on 25th 1970 their father's Advocates Chalalu Kofa Chalalu addressed the Court Deputy Registrar with a letter which was annexed in the affidavit marked as "MSK – 1".

vi. The ailment of their father after the delivery of judgment was on and off and continued until it claimed his life in the year 2001. Sometimes after the death of their deceased father the Plaintiff, Mr. Suchak Advocate one of the Advocates for their father went to South Africa to be with his children.

vii. When Mr. Suchak went to South Africa, he was not available at his Mombasa Law firm offices hence it was difficult to access the relevant documents he took from their deceased father and this disabled our efforts to make succession proceedings in good time for their deceased father the then Plaintiff.

viii. On 5th March, 2002, their advocates wrote a letter to Mr. Suchak Advocate to release to us the documents of this case and others he took from their deceased father and the said letter was annexed in the affidavit marked as "MSK – 2".

ix. Though Mr. Suchak Advocate had a Law Firm Office in Mombasa but stayed in South Africa most of the time, when he received the letter, he released to them the requested documents in 2016 and that was when they filed Mombasa Chief Magistrate succession cause no 138 of 2016 in respect of their deceased father.

x. When they were issued with the grant at Mombasa Chief Magistrate's Court, the grant was then revoked. They moved to the Mombasa High Court, and their grant was reinstated but much time had already been consumed. When the court files for this matter got lost at the court registry their father and his advocates closely and continuously followed it up with the court.

xi. On 16th March, 1971, their father's advocates the Law firm of Messrs. Chalalu Kofa Chalalu & Co. Advocates in a letter re- addressed the issue with the court Deputy Registrar which letter was annexed in the affidavit and marked as "MSK – 3".

xii. Despite their advocate's letter the Court files for this matter were not traced. Their father and his advocates never gave up but continued to press on and follow up the matter hence his advocates the Law firm of Messrs. Chalalu Kofa Chalalu & Co. Advocates wrote other letters dated 11th February, 1975, 26th January, 2000 and 18th July, 2007 and addressed the Court Deputy Registrar on the matter. The letters dated 11th February, 1975, 26th January, 2000 and 18th July, 2007 were annexed in the affidavit marked as "MSK – 4", "MSK – 5" and "MSK – 6" respectively.

xiii. The Court file was traced sometimes in 2011 that is in excess of 12 years after the Judgment was delivered but again the file shortly got lost from the Court registry and had not been traced to date.

xiv. In the absence of the court file which got lost, unavoidable circumstances and events thereto beyond the control of the Plaintiffs, it was not possible to initiate execution proceedings and execute the court Judgment within 12 years.

xv. Since the court file got lost in excess of 12 years after delivery of judgment, time for execution of the court Judgment/decree elapsed.

xvi. They seek for leave to extend time to execute the judgment which was delivered herein which judgment had not been appealed against, reviewed and or set aside.

xvii. Under the provision of Order 22 Rule 18 of the Civil Procedure rules, execution of Decree/ Judgment can only be done after a Notice to Show Cause was issued to the Defendant and the said notice could not be issued in the absence of the court file.

xviii. They shall suffer irreparable loss and damage if the leave to extend time sought herein will not be granted because they shall be deprived of their legal beneficial land and property's rights.

xix. If they were granted leave to extend time to execute the court Judgment delivered herein, we shall comply with the rules and procedure set in execution of Judgments/Decree and or any order/direction that will be given by this Honourable Court.

xx. If the leave sought herein was granted, before execution they shall issue the Respondents with a Notice to Show Cause in compliance with the provision of Order 22 Rule 18 of the Civil Procedure Rules 2010.

xxi. From the Notice to show cause, the parties would have their day in court and the court after hearing the parties shall determine the Notice to show cause as it shall deem fit in the ends and interest of justice.

xxii. The prevailing circumstances and events which attributed to the failure of execution of the Court Judgment within 12 years were neither deliberate nor their wish but beyond their control.

xxiii. It was not the wish of their deceased father or themselves to delay the execution of the court decree/Judgment and if at all any of us contributed to the delay of the said execution it was beyond their control.

xxiv. The advocates for their father the Plaintiff also closely followed up the matter of the lost files which was demonstrated by the attached several letters which form part of annextures.

xxv. If their father's Advocates at all contributed to the delay of execution of the Court decree/ judgment, the mistakes and sins of their father's advocates should not be visited on them.

xxvi. Due to the nature of this case, the circumstance and events beyond their control with their advocates, it was in the ends and interest of justice that this court be pleased to grant leave to execute the court Judgment/Decree delivered herein.

III. The Preliminary Objection

6. The Interested Parties opposed the Notice of Motion application dated 22nd February, 2023 through a 5 Paragraphed preliminary objection dated 26th March, 2024 on the following grounds:

   a. The Application was misconceived, bad in law and an abuse of the process of the court and it was likely to compromise the dignity of this court.

   b. Mohamed Salmin Khamis and Ramla Salmin Khamis were not Administrators of the Estate of the 'late' Salmin Khamis Bin Salman and there was no Authority granted by court for them to proceed with this suit and had not complied with Section 3 of Laws of Succession Cap. 160.

c. Mohamed Salmin Khamis and Ramla Salmin Khamis were imposters, out to deceive the court to grant them orders they were not deserving and acquire benefit where they did not deserve and as such have no locus standi to appear for the 'Estate' of Salmin Khamis Bin Salman.

d. Mohamed Salmin Khamis and Ramla Salmin Khamis had not presented any evidence before this court to show that Salmin Khamis Bin Salman was dead and that a Certificate of Death was issued and letters of Administration to that Estate granted to them as such they cannot purport to move this court alleging death without evidence.

e. This court had no jurisdiction to review a decree for purposes of execution 54 years after its issuance since this will be against Public Policy and good order

IV. The Affidavits in response of the Notice of Motion application

7. The Interested Parties attached to their Preliminary Objection a 4 Paragraphed affidavit sworn by KARISA BANDA MWAKILAGO a.k.a HAMZA KARISA BANDA on 26th March, 2024 where the deponent deposed that: -

a. He was an adult of sound mind; his name was know as KARISA BANDA MWAKILAGO and after he converted to Islam am known as HAMZA KARISA BANDA and he lived within the suit property and was conversant with the issues about this land since he had lived there since he was born.

b. He had filed an affidavit in this suit dated 12th July, 2023 which he wished to use as his response to the Application of 22nd February, 2023. Annexed marked as "B-1" was a copy of the same and which was clearly in the court file.

c. He also wished to rely on the same exhibits annexed to that affidavit to support his arguments against the revival of the decree.

d. All that was stated in the affidavit was true to the best of his knowledge, information and believed save where the same was passed to him and the source established.

V. The Statement Grounds of Opposition

8. The Plaintiff responded to the Interested Parties' Preliminary Objection through a 3 paragraphed statement of grounds of opposition dated 22nd April, 2024 on the following grounds: -

a. The Preliminary Objection never consisted of any pure point of law contrary to the learnings in the case of:- "Mukisa Biscuit Manufacturing Co.Ltd – Versus - West End Distributors Ltd [1969)EA 696".

b. The Preliminary Objection impermissibly raised factual contestations that require to be tested through the normal rules of evidence (See "Oraro – Versus - Mbaja [2005] eKLR").

c. The Preliminary Objection in its plain text improperly invited the court to undertake copious probing of evidence (See "Mehuba Gelan Keul & 2 others – Versus - Abdulkadir Shariff Abdirahim & 4 others [2015] eKLR").

VI. Submissions

9. On 8th May, 2024 while the Parties were present in Court, they were directed to have the Notice of Motion application dated 22nd February, 2023 and the Preliminary Objection dated 26th March, 2024 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the

parties obliged and on 23rd September, 2024 a ruling date was reserved on 12th November, 2024 by Court accordingly. However, due to unavoidable circumstances, it was deferred to 18th November, 2024.

A. Written Submissions by the Plaintiffs/Applicants

10. The Learned Counsels for the Plaintiffs/Applicants – the Law firm of Muriithi & Masore Law Associates filed their written submissions dated 30th May, 2024. Mr. Muriithi Advocate commenced by stating that following the court's ruling of 7th December 2022, they were now here to briefly address what appears to be the elephant in the room. Could the newly admitted Plaintiffs be granted leave to execute the Decree and Judgment of the court issued on 18th March 1970 having regard to the provisions of Order 22 Rule 18 of the Civil Procedure Rules and Section 4 (4) of the *Limitation of Actions Act*, Cap 22 Laws of Kenya?

11. The Learned Counsel stated that the Plaintiffs, in their motion of 22nd February 2023 sought leave to extend time to execute the Judgment and Decree of 18th March 1970. They had set out the grounds upon which that leave was sought and had also offered evidentiary support in the affidavit evenly sworn. At the time of writing these submissions, they had not received any response from the Defendants. Therefore, they took that none of the Defendants opposed the motion.

12. But that said, they understood why the court felt it needed to be addressed on the Plaintiff's request in light of the provisions of Section 4 (4) of the *Limitation of Actions Act* and Order 22 of Rule 18 of the Civil Procedure Rules, 2010. He averred being aware that under Order 22 Rule 18 of the Civil Procedure Rules, 2010,a notice to show cause must issue where an application for execution was made one year after the date of the decree. He was also aware that Section 4 (4) of the *Limitation of Actions Act*, Cap 22.

13. Thus, putting themselves in the court's shoes for a moment, the question would be, wasn't the Plaintiff's request time-barred, especially under Section 4 (4) of the *Limitation of Actions Act*, above?. They were aware that there was a legion of authorities both from this court and the Court of Appeal that suggested that there was no room for extension of time to execute a Judgment after expiry of 12 years from the date on which the Judgment was delivered. For instance, there was the case of: "M'ikiara M'rinkanya & Another – Versus - Gilbert Kabeere M'mbijiwe [2007] eKLR". According to the Learned Counsel, the reasoning in that decision from the court of appeal had been followed by this court and its sister courts, see for instance, "John Mwaniki Mwaura – Versus - John Ndonyo Njuguna [2018]eKLR and Celestine Nyaga – Versus - Minister for Finance & 3 others [2017] eKLR. If matters were that where one would hurriedly say that the Plaintiffs are time-barred by dint of Section 4 (4) of the *Limitation of Actions Act* and previous case law on the subject.

14. However, what was before this court was much more complex and different and not a matter of simple arithmetic. Indeed, it was admitted that the decree being sought to be executed was more than 12 years from the date it was issued. What then makes this case distinguishable? It was common ground that the original Plaintiff died in the year 2001. He was not the one moving the court to execute the decree. The court in its ruling of 7th December 2022, accepted that the Legal representatives (the present Plaintiffs) moved with speed to obtain a Grant of letters of administration. Although the legal representatives had to go through protracted litigation, they finally obtained the Grant of Letters of administration in the year 2018. It was on this basis that the court substituted the original Plaintiff with the present the legal representatives.

15. The Learned Counsel argued that the demise of the original Plaintiff left a vacuum, a situation that could not be controlled by neither any one, the original Plaintiff himself, nor the legal representatives.

For reasons accepted by the court, the deceased Plaintiff's estate remained unadministered. According to him, there was a distinction between a Decree Holder who obtained a favorable decree, relaxed and never made any move or take any action until the time for executing the decree expired, as against a situation where a decree had remained unexecuted for reasons beyond any party. And in this case death of the original decree holder and where representation was only obtained after expiry of the 12 years? Demise of a party to any litigation was no small matter. The court of appeal in the case of:- "Joseph Njenga Njoroge – Versus - Kabiri Mbiti [1986] eKLR, stated thus:-

> " The other point is that, there can never be any proceeding against a dead person.

16. It simply means that there could be no proceeding by a dead person. A legal representative must step in, hence the provisions of Order 24 of the Civil Procedure Rules,2010. The court of appeal in the case of "M'ikiara M'rinkanya & Another – Versus - Gilbert Kabeere M'mbijiwe (supra), holds that:-

> " All post judgment proceedings including originating proceedings and interlocutory proceedings for execution of Judgment are statute - barred after 12 years".
>
> The Learned Counsel wondered then whether limitation of action attach to dead man who was not there to tell any tale? He was not available for any form of proceeding, let alone any post Judgment proceedings. Why then should he be available for time to run against him for purposes of limitation of actions? Shouldn't limitation of action now attach to the legal representative who had now stepped into the shoes of the original Plaintiff to carry on post Judgment proceedings?

17. This court in the case of: - "Isaac Olang Solongo – Versus - Gladys Nanjekho Makokha (Being the administrator of the Estate Antonina Makokha (Deceased) & another [2021] eKLR agonized with the practical difficulties posed by a simple application of Section 4(4) of the *Limitation of Actions Act*. It held at length as follows:-

> " The execution process in this case stalled due to the demise of the original Plaintiff who died in 2003, that is 7 years into the 12 year limitation period within which the decree was to be executed. Representation to her estate was raised in the year 2015. Between 2003 and 2015 therefore the decree lay in limbo. Within 2 years of the grant of succession, the appellant had been substituted for the deceased original plaintiff and obtained an eviction order in execution of the decree. If the period when no representation to the deceased's estate is not included in the computation, that obtainance of an eviction order marked the 9th of the 12 year limitation period.

18. With regard to the specific question about demise of the original decree holder whose estate remains un-administered for long, the court continued:

> " The question that must be then asked is this: is the Section 4(4) intended to bar both the execution of decrees in which the Judgment holder though alive has failed to execute as well as decrees in which the decree holder dies before the 12 year limitation period is over and his estate remains without succession till the end of the 12th year? The further question that arises, as in the instant case is: if the decree holder dies and is unavailable to execute his decree and for example no next of kin becomes aware of the need to execute the decree or takes out letters of administration, and so his estate remains unadministered, would a valid decree of the court become incapable of being executed after the lapse of 12 years purely on account of death, a matter not within control of either the decree holder or their kin? The finer details of

the above two questions lie in the following question: in the vacuum occasioned by death of a decree holder,is the period between the date of death and the date representation is raised to his estate be deemed as part of the 12 year limitation period stipulated in Section 4(4).

19. The court considered the import of the "M'ikiara M'rinkanya & Another – Versus - Gilbert Kabeere M'mbijiwe (Supra) case and thought out loud that:

> " From the above observations it is clear that the predicament of successors to decree holders whose predecessors die prior to full execution and before expiry of 12 years from the date of judgment is quite complicated when they obtain grants to the deceased's estate after the mandatory 12 year statutory limitation period computed from the date the judgment became enforceable has lapsed; they are absolutely barred by Section 4(4) of the *Limitation of Actions Act* from executing such judgments. This court recommends a comprehensive law reform as that in England that will grant courts discretion to allow execution upon the occasional action being lodged beyond the 12 year limitation period to address situations such as the respondent in the instant appeal finds herself in.

20. Therefore, he submitted that, in light of the case before court, time was now nigh for the court to free itself from the shackles created by Section 4 (4) of the *Limitation of Actions Act* when the impossibility of executing the Judgment and Decree arose from death of the original decree holder whose estate for demonstrated reasons had remained un-administered. Limitation should kick in when there was somebody to represent the estate of the deceased and they failed to take action. In this case, the grant to represent the estate was obtained in the year 2018. The Plaintiffs were admitted as legal representatives in this case in December 2022. Worst case scenario, there was still over 7 years left on the clock for them to execute the Judgment against the 12 year rule.

21. Beyond demise of the original Plaintiff, the current Plaintiffs had explained the unavailability of the court file which led this court to order reconstruction in its ruling of 7th December 2022. Again, unavailability of the court file should not be heaped on any party to deny them fruits of litigation when the court had been shown robust efforts by a party to locate the file and even have the file reconstructed. Ideally, he averred that what was submitted tacitly took care of what Order 22 Rule 18 intended to achieve. The Defendants have not come forward to explain why time should not be extended for the Plaintiff to execute the decree. In any event, the Plaintiffs have explained that should time be extended, they are ready to serve a Notice to Show Cause in line with the Order should the court require further comfort.

B. The Written Submissions by the Interested Parties

22. While opposing the Notice of Motion application dated 22nd February, 2023 by the Plaintiffs, the Learned Counsel for the Interested parties the Law firm of Messrs. Stephen Oddiaga & Company Advocates filed their written submissions dated 16th May, 2024. Mr. Oddiaga Advocate commenced by providing a brief background of the matter. He stated that the Application before the Court was the one dated 22nd February 2023. It sought for leave to extend time to execute a Judgement and a Decree.

    He averred that the Interested Parties opposed the application and wished to the same and wished to rely on their filed Preliminary Objection dated 26th March 2024 and the Affidavit by Karisa Banda Mwakilago and the annextures therein.

23. To back the submissions by the Interested parties, the Learned Counsel framed three issues for consideration by this Court while making its determination. Firstly, wished whether there is a competent application for extension of time to execute a judgement. The Learned Counsel asserted

that under the *Limitation of Actions Act* Cap22 Laws of Kenya a party may approach the court to extend the period of Limitation. This could only be done under the provision of Sections 22, 26 or 27 of the Act considering the Applicant was relying on these Sections. Extension of time under the provision of Section 22 was only applicable in cases of none disability with certain exemptions. Further, it was applicable in cases of Fraud and mistake. This provision of law had exemptions as well. Extension of Limitation period in cases of ignorance of material facts was provided for under the provision of Section 27.The action has to be that founded on negligence.

24. His contention was that the Applicant could only be successful if they moved the court under one of the Sections and given reasons for the delay. The claim that the file got lost and that the Plaintiffs father was sick and undisposed could not hold for lack of evidence both from the Registry on Certificate of Loss of the file and Medical Report to confirm that whoever was being claimed to be sick was indeed unwell.

25. Secondly, whether this court could use its discretion to grant the said Application. The Learned Counsel argued that the Judgement was entered on 18th March, 1970. The Application for extension was being made in February 2023 - fifty three (53) odd years later! Their father one Salmin Mbiyo Salmin who died on 24th June 2001. He must have been a man of means and knowledgeable person because he was a chief as indicated in the death certificate (ex-chief). There was no evidence that the Chief ever attempted to execute "his" decree if he ever had one. No reason had been given for that failure. Even at the time of his death in the year 2001, the Judgement had been in existence for thirty one (31)years well over the twelve (12) years statutory required period. The application before Court was being made twenty two (22) years later. Again, no explanation had been given for the delay, suffice to say, that both the Plaintiffs late father Salmin Mbiyo Salmin and the Plaintiffs are both guilty of inordinate delay which had not been accounted for. This extension should therefore be rejected.

26. Thirdly, whether the Plaintiffs were proper parties in this suit. The Counsel averred that the Plaintiffs could only be proper parties to this suit if they were litigating on behalf of their late father one Salmin Mbiyo Salmin who died on 24th June 2001 the estate they were purporting to represent was that of Salmin Khamis Bin Salman. There was no evidence that Salmin Khamis Bin Salman died, there was no Certificate of death to confirm his death, no grant issued for his estate. Hence, it was such that there was a high possibility that the Plaintiff were impostors and masqueraders who had nothing to do with this suit.

27. Indeed, this fear was confirmed by the fact that in a suit filed in Malindi, the Plaintiffs had filed a copy of a title as an exhibit which had the name of Salmin Khamis Bin Salman of Post Office Box 196 Mwanza in Tanganyika. This was obviously a different person from their Salmin Mbiyo Salmin who was their late father. This would explain the long delay in bringing this application. The Plaintiffs must have been waiting to mastermind their illegal scheme. Should this court find that the Plaintiffs were not the correct parties in this suit, it should invoke Order 1 Rule 10 (2)of the Civil Procedure Rules and strike out their names from this suit. His contention was that extension of time being sort herein was not a right but was only an order available to a party who was honestly deserving. To buttress on this point, he referred Court to the case of:- "YH Wholesalers Limited – Versus - Kenya Revenue Authority (2021)eKLR" where the Court held:-

> "Time bar limits the right to seek judicial redress. It serves an important purpose in that it prevents inordinate delays which may be detrimental to the interests of justice. An application for leave to file suit out of time must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. An, what is more, the explanation given must be reasonable. The 10-year delay has not been explained at all.

> Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court. The applicant has manifestly failed to account for the delay and to lay a basis for this court to grant the leave sought. On this ground alone, the applicant's originating summons falls for dismissal.

28. Even if the Plaintiffs were the correct parties, they never explained the delay as regards the entire period. Additionally, the Learned Counsel cited the case of:- "Njuguna-vs- Njau(Madan, Law and Potter JJA) (1981) KLR Pg 225, the court considering the provision of Section 4(4) of the *Limitation of Actions Act*, Cap. 22 expressed itself as follows:-

> " I say that in the context of section 4(4) of the *Limitation of Actions Act* the word "action" is not intended to bear a restricted meaning and it includes all kinds of legal including execution proceedings, and the time limit for the execution of Judgement is twelve years".

29. Further in the case of:- "M'ikiara M'*rinkanya and Another – Versus - Gilbert Kabeere M'mbijiwe, civil appeal number 124 of 2003*(Tunoi, O'Kubasu and Githinji, JJA on 31 July 2007) (CAK) (2007) 2KLR 93; (2008) 1 EA 200 where the court referring to the Limitation of Action Act Cap 22 stated as follows:-

> " It is logical from the scheme of the Act, that a judgement 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.
>
> According to the definition in Section 2 (2) (3) of the Limitation Act, the institution of the proceedings to recover possession of Land including proceedings to obtain a warrant for possession is statute-barred after the expiration of 12 years".

30. The court further stated that:-

> " A Judgement for possession of land should be enforced before the expiry of the 12 years limitation period required in Section 7 of the Act. If the Judgement is not enforced within the required period, rights of the decree holder are extinguished as stipulated in Section 17 of the Act and the Judgement debtor acquires possessory title by adverse possession, which he can enforce in appropriate proceedings. 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 definition of "action" in section 4(4) of the Act would be inconsistent with the law of adverse possession".

31. The Plaintiffs' father died in the year 2001 this time the Judgement was already time barred. The cause of action would not survive Mr. Salmin Mbiyo Salmin for the children to proceed with. It was already gone and time barred.

32. The position was taken in the case of "Champion Motor Spares Limited -Versus - Phadke & Others (1969)E.A Pg 42 where the Court stated:-

> " You cannot extend a suit which is already time barred for reason that the person you are acting on behalf had died after limitation of time".

33. The Learned Counsel asserted that he authorities by the Plaintiffs were distinguishable. They do not give an explanation as to where there was a long delay. The case of "Joseph Njenga Njoroge" was not applicable in the current situation. In the "Isaac Olang Solongo's case he died 7 years into 12 years. The time had not expired. The parties acted with speed. In this case the death occurred in June 2001 and letter of Administration filed in 2016. The fifteen (15) years delay between death and procuring letters of Administration had not been explained.

34. In the case of:- "M'Ikiara M'rinkanya & Another case, in this case, the decree holder died before execution and before expiry of 12 years from the date of judgement. This authority does more support to the argument by the Interested Parties than the Plaintiffs' case. It is clear that the deceased did nothing when he was alive to execute this Judgement. By the time he died, he had slept on the case for thirty one (31) years, 19 years after the statutory 12 years period. The Plaintiffs were not deserving of an extension and this application should be dismissed with costs.

B. The Supplementary Submissions by the Plaintiffs

35. With the leave of Court, the Learned Counsel for the Plaintiffs filed a supplementary submissions dated 3rd July, 2024. Mr. Muriithi commenced by reiterating that what was for determination was the Plaintiff's Notice of Motion dated 22nd February 2023. Principally, the Plaintiffs seek leave of the court to execute the judgment of the court and decree issued on 18th March 1970. That Notice of Motion followed this court's ruling of 7th December 2022.

36. Before the joinder of the interested parties, the Plaintiffs had filed their submissions dated 3rd July 2022 (sic) should be 2023. He relied on those submissions. He stated that the Interested Parties filed a Replying Affidavit sworn on 26th March 2024 in opposing the motion. In that affidavit, they deposed that they relied on the depositions in the affidavit sworn on 12th July 2023 to oppose the motion of 22nd February 2023. The affidavit of 12th July 2023 was the one sworn to support their quest to be joined to these proceedings.

37. The Plaintiffs had opposed the Interested Parties application for joinder through a Replying Affidavit sworn on 22nd September 2023. From the court's pronouncement on the interested parties application for joinder, they felt that inadvertently, the Plaintiff's Replying Affidavit of 22nd September 2023 escaped the court's attention. Nonetheless, they were prepared to treat the Plaintiff's Replying Affidavit as a supplementary response to the Interested Parties affidavit of 26th March 2024 and urged the court to consider the Plaintiffs' depositions therein as it retired to rule.

38. In further opposing the motion of 22nd February 2023, the Interested Parties had filed a Notice of Preliminary Objection dated 26th March 2024. The Plaintiffs filed a statement of grounds of opposition dated 22nd April 2024 opposing the interested parties Preliminary Objection. Thus, they were now offering these supplementary submissions to expand the Plaintiffs' grounds of opposition.

The interested parties Preliminary Objection (PO)

39. On the Interested Parties' PO, the Leraned Counsel referred Court to the case of: "Mukisa Biscuit Manufacturing Co. Limited – Versus - West End Distributors Limited (1969) EA 696". He averred the a Preliminary Objection ought to constitute the following:-

    a. It must consist of a pure point of law;

    b. It must be pleaded or it must arise by clear implication out of pleadings;

    c. It is argued on the assumption that all the facts pleaded by the other side are correct; and

d. It cannot be raised if any fact has to be ascertained or if what is sought is exercise of judicial discretion.

40. Thus, to him, the interested parties Preliminary Objection was a non starter for lowing reasons. Firstly, on it's the ground that the Plaintiffs' motion was misconceived, bad in law and an abuse of the process of the court and it was likely to compromise the dignity of the court never raised any issue on pure point of law. On the contrary, the Interested Parties had tasked the court to consider the substance of the motion, its propriety or bonafides and establish whether the motion was "bad in law and an abuse of the process of the court." It was now widely accepted that the concept of abuse of court process is imprecise. It involved circumstances and factual scenarios of variety and infinite conditions'. Those were thus matters that did not lend themselves to being pure points of law. The court in the case of "Yooshin Engineering corporation – Versus - AIA Architects Limited [2020]eKLR"

> " For the trial court to determine all the issues raised in the preliminary objection, it had to consider the substance and propriety of the suit. By so claiming, the appellant had submitted itself to the jurisdiction of the court and was estopped from challenging the same, having tasked the court with the responsibility of looking into the substance and merit of the claim to determine whether it was "bad in law, frivolous, vexatious and an abuse of the court process..." which are not jurisdictional issues.

41. Secondly, on the ground that the Plaintiffs were not the administrators of the Estate of the late Salmin Khamis Bin Salman and that there was no authority granted by the court for them to proceed with the suit. Here, the Interested Parties were questioning the Plaintiffs' authority to proceed with the suit. Thus, it was rather obvious that the parties were not in any agreement on the facts. This was a factual inquiry that must be carried out by the court.

42. Thirdly, on the ground the PO suffered from similar malady. It charged that the Plaintiffs were imposters out to deceive the court to grant them orders where they do not deserve. See the case of "Satya Bhama Gandhi – Versus - Director of Public Prosecutions & 3 others [2018]Eklr

Again, the court was being invited to probe the Plaintiffs' bonafides and whether they were deserving of the court's discretion. That inquiry went beyond the realm of a PO. In case of "Oraro – Versus - Mbaja [2005] eKLR, the court repeated that:

> " where a Court needs to investigate facts, a matter cannot be raised as a preliminary point."

43. Fourthly, the fourth ground of the PO was self defeating. The Interested Parties charged that the Plaintiffs had not presented any evidence before the court to show that Salmin Khamis Bin Salman was dead. Quoting again from the persuasive decision of "Oraro – Versus - Mbaja [2005]eKLR" the Court stated:-

> " A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be confested and in any event, to be proved through the processes of evidence.

44. Fifthly, the objection was the court has no jurisdiction to review a decree for purposes of execution 54 years after its issuance. Firstly, the court has not been pointed to any specific law that ousts its jurisdiction to re - open an old decree for purposes of execution where good reason is shown. Secondly, the Interested Parties concurred that such a power to re - open a past decree called for the court to exercise judicial discretion. This ground was beyond the realm of a PO. Therefore, the PO fails with costs on all scores.

VII. Analysis and Determination

45. I have considered the Notice of Motion application dated 12th July, 2023 by the Intended Interested Parties, the Replying affidavit and the rival written submissions and cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and statures.

46. In order for the Honourable Court to arrive at an informed, fair and reasonable decision, it has crafted four (4) salient issues which fall for determination in the application. These are: -

    a. Whether the Preliminary objection dated 26th March, 2024 by the Interested Parties herein raises pure points of law based on Law and Precedents?

    b. Whether the Preliminary objection is merited?

    c. Whether the Notice of Motion application dated 22nd February, 2023 seeking leave to extend time to execute the Court Judgment and Decree of the Court issued on 18/3/1970 which Judgment has not been appealed against, reviewed and or set aside

    d. Who bears the costs of the Notice of Motion application dated 22nd February, 2023.

ISSUE No. a). Whether the Preliminary objection dated 26th March, 2024 by the Interested Parties herein raises pure points of law based on Law and Precedents?

47. Under this Sub – heading, its imperative that the Honourable Court keenly examines the Preliminary objection raised by the Interested Parties as a matter of precedence. Thus, in determining this instant Notice of Preliminary Objection, the Court will first consider what amounts to a Preliminary Objection and then Juxtapose the said description herein and come up with a finding on whether what has been raised herein fits the said description.

48. According to the Black Law Dictionary a Preliminary Objection is defined as being:

> " In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary....."

49. The above legal preposition has been made graphically clear in the now famous case of "Mukisa Biscuits – Versus - Westend Distributor Ltd [1969] EA 696", the court observed that: -

> " A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue."

50. The same position was held in the case of "Nitin Properties Ltd – Versus - Jagjit S. Kalsi & another Court of Appeal No. 132 of 1989[1995-1998] 2EA 257" where the Court held that;

> " A preliminary Objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of Judicial discretion."

51. Similarly, in the case of "United Insurance Company LTD – Versus - Scholastica A Odera Kisumu HCC Appeal No. 6 of 2005(2005) LLR 7396", the Court held that;

> " A preliminary Objection must be based on a point of law which is clear and beyond any doubt and Preliminary Objection which is based on facts which are disputed cannot be used to determine the whole matter as the facts must be precise and clear to enable the Court to say the facts are contested or disputed."

52. Therefore, from the above holdings of the Courts, it is clear that a preliminary Objection must be raised on a pure point of law and no fact should be ascertained from elsewhere. See also the case of "In the matter of Siaya Resident Magistrate Court Kisumu HCC Misc. App No. 247 of 2003" where the Court held that;

> " A Preliminary Objection cannot be raised if any facts has to be ascertained."

53. I have further relied on the decision of "Attorney General & Another – Versus - Andrew Mwaura Githinji & another [2016] eKLR":- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-

    (i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.

    (ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and

    (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

54. Taking into account the above findings and holdings of various Courts on what amounts to a preliminary Objection, in all fairness, the Court now turns to the specific grounds raised by the Interested Parties. One of it pertains to "the locus standi" of the Plaintiffs and that whether they had complied with the provisions of Laws of Succession Act, Cap. 160 and in particular Section 3 of the Act; Mohamed Salmin Khamis and Ramla Salmin Khamis had not presented any evidence before this court to show that Salmin Khamis Bin Salman was dead and that a Certificate of Death was issued and letters of Administration to that Estate granted to them as such they cannot purport to move this court alleging death without evidence. Further, they have raised the ground of this Court lacking jurisdiction to review a decree for purposes of execution after 54 years of its issuance since this would be against Public Policy and good order. Certainly, from the face value, I am fully satisfied that the objection raises issues of pure points of law in that the preliminary objection is on the doctrine of constitutional avoidance.

ISSUE No. b) Whether the Preliminary objection is merited

55. Under this sub – title the Court shall discuss the merits of the Preliminary Objection by the Interested Parties on the following issues:-

    a. Whether the Plaintiffs have locus standi to claim under this suit and whether Mohamed Salmin Khamis and Ramla Salmin Khamis had not presented any evidence before this court to show that Salmin Khamis Bin Salman was dead and that a death certificate was issued and letters of Administration to that Estate granted to them as such they cannot purport to move this court alleging death without evidence

b. Whether the Court has the jurisdiction to review a decree for purposes of execution 54 years after its issuance since this will be against Public Policy and good order.

56. With regard to the issue of "locus standi" and whether the Plaintiffs had proved the death of the deceased. This being a Court of record, I am compelled to refer to a ruling delivered by this Honourable Court on 7th December, 2022 arising from the Notice of Motion application dated 23rd November, 2021, the Applicants herein, Mr. Mohamed Salmin Khamis and Mr. Ramla Salmin Khamis. The Applicants had formally moved this Honorable Court to be substituted as Plaintiffs in their capacity as the duly appointed Legal representatives of the Estate of Salmin Khamis Bin Salman alias Salmin Mbiyo Salmin. During the said proceedings, the Honourable Court keenly examined the documents on record and being fully satisfied, it concluded by admitting to Plaintiffs as the legal representatives of the estate of Salmin Khamis Bin Salman alias Salmin Mbiyo Salmin. I find the issue now as moot as it was already decided. It should rest. Thus, raising the issue once more that had already been dealt with res judicata and on that (b), (c) and (d) fails.

57. Further, on the whether the Court has the jurisdiction to review a decree for purposes of execution 54 years after its issuance since this will be against Public Policy and good order. Critically speaking, at the core of this matter is the provision of Section 4 (4) of the *Limitation of Actions Act*, Cap. 22. It provides, "inter alia":

> " 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."

58. Undoubtedly, and its such a healthy fact that many factual aspects in this dispute are not contested. Fundamentally, the Judgment whereby the enforcement and execution is being sought from the filed Notice of Motion application dated 22nd February, 2023 was delivered on 18th March, 1970. From my own understanding, the basic bone of contention is two – fold - on the parties pursuing the legal action and the delay in causing the said action. I believe that the issue of the parties has already been dealt with above and thus I need not belabor the point.

59. However, there is great need to deal with the issue of the limitation of time. The import of the provision of Section 4 (4) of the *Limitation of Actions Act* was considered by the Court of Appeal in the case of "M'Ikiara M'Rinkanya & Another – Versus - Gilbert Kabeere M'Mbijiwe (supra)" extensively relied on by both the Learned Counsels for the Plaintiffs/Applicants and the Interested Parties. In this case the court held that where an attempt at enforcement of a decree after 12 years includes eviction proceedings, then such proceedings are statute-barred. The court went on to hold:-

> " ... .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. ... 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." (Emphasis is Mine)

60. Subsequently, at the end of year 2019, the Court of Appeal re - visited its "M'Ikiara M'Rinkanya & Another – Versus - Gilbert Kabeere M'Mbijiwe" decision in "Koinange Investment and Development Company Limited – Versus - Ian Kahiu Ngethe & 3 others (Being sued as the personal representatives of the Estate of Robert Nelson Ngethe (Deceased)) [2019] eKLR" where it held that an order of stay of execution stopped time from running against a decree holder. The court stated:

> 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. (Emphasis is Mine)

61. My understanding of the decision in "Koinange Investment and Development Company Limited – Versus - Ian Kahiu Ngethe & 3 others (Being sued as the personal representatives of the Estate of Robert Nelson Ngethe (Deceased)) [Supra]" is that the provisions of Section 4 (4) of the *Limitation of Actions Act* are not cast in stone. On this aspect, I fully concur with the Learned Counsel for the Plaintiffs/ Applicants when he submitted as follows:-

> "…….in light of the case before court, time was now nigh for the court to free itself from the shackles created by Section 4 (4) of the *Limitation of Actions Act* when the impossibility of executing the Judgment and Decree arose from death of the original decree holder whose estate for demonstrated reasons had remained unadministered".

62. From its own ruling delivered on 7th December, 2022, I found the Notice of Motion application dated 23rd November, 2021 by the Applicants had merit and was allowed with costs to be in the cause and upon the fulfillment of the following pre-conditions: -

a. That the Notice of Motion application dated 23rd November, 2021 be and is hereby found to have merit and thus is allowed as prayed to the following extent:-

   i. The Environment & Land Court Case no. 247 of 1964 be and is hereby revived.

   ii. The Deputy Registrar be and is hereby instructed by this Honourable Court to help the Applicants in the reconstruction of the court file from the copies of the documents exhibited in the affidavit supporting this application.

b. That an order be and is hereby made to have the Applicants, Mohamed Salmin Khamis and Ramla Salmin Khamis in their capacity as the legal representatives of the Estate of Salmin Khamis Bin Salman alias Salim Mbiyo Salmin are admitted and substituted as the Plaintiffs in this case.

c. That an order be made that the newly admitted Plaintiffs/Applicants to formally move this Court within the next ninety (90) days from this date hereof specifically seeking for the leave of Court to execute the Judgment and Decree of the Court issued on 18th March, 1970 pursuant to the provisions of Order 22 Rule 18 of the Civil Procedure Rules, 2010 and Section 4 (4) of The Limitation of Action, Cap. 22 of the Laws of Kenya.

d. That the Costs of this application be in the cause

63. This ruling was delivered on 7th December, 2022. The application was filed and dated 22nd February, 2023 which was within the stipulated directions that were given by this Honourable Court. For this reasons, ground (e) fails and subsequently the Preliminary Objection is therefore overruled.

ISSUE No. b). Whether the Notice of Motion application dated 22nd February, 2023 seeking leave to extend time to execute the Court Judgment and Decree of the Court issued on 18/3/1970 which judgment has not been appealed against, reviewed and or set aside

64. Under this sub title I will once more refer to the case of "M'Ikiara M'Rinkanya & Another vs. Gilbert Kabeere M'Mbijiwe [Supra]" in which the Court of Appeal held that:-

> "All post judgment proceedings including originating proceedings and interlocutory proceedings for execution of judgment are statute barred after 12 years"

65. I reiterate that the central to the issues before me is the interpretation to be given to the provision of Section 4 (4) of the *Limitation of Actions Act*, Cap. 22. In their submissions, Learned Counsel for the Plaintiffs/Applicants submitted that he was aware that under the provision of Order 22 Rule 18 of the Civil Procedure Rules, 2010, a notice to show cause must issue where an application for execution is made one year after the date of the decree. They were aware that there was a legion of authorities both from this court and the Court of Appeal that suggest that there is no room for extension of time to execute a Judgment after expiry of 12 years from the date on which the Judgment was delivered.

66. I fully agreed that what was before this court was much more complex and different. It may not be a matter of simple arithmetic. Yes, the decree being sought to be executed is more than 12 years from the date it was issued. What then makes this case distinguishable? It was common ground that the original Plaintiff died in the year 2001. He was not the one moving the court to execute the decree. The court in its ruling of 7th December 2022, accepted that the legal representatives (the present Plaintiffs) moved with speed to obtain a grant of letters of administration. Although the legal representatives had to jump through hoops of protracted litigation, they finally obtained the grant of letters of administration in the year 2018. It was on this basis that the court substituted the original Plaintiff with the present the legal representatives.

67. Apart from the above, the application would be incompetent for the reason that the provision of Order 22 Rule 18, which is precisely similar to Order XXI Rule 18 of the pre-2010 rules, provides as follows :-

> 18. Notice to show cause against execution in certain cases [Order 22, rule 18.]
>
> (1) Where an application for execution is made—
>
> (a) more than one year after the date of the decree;
>
> (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:
>
> Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last

order against the party against whom the execution is applied for, made on any previous application for execution, or inconsequence of the application being made against the legal representative of the Judgment Debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him:

Provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is caused solely by reason of the judgment-debtor having changed his employment since a previous order for attachment.

(2) Nothing in sub - rule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

(3) Except as provided in rule 6 and in this rule, no notice is required to be served on a judgment debtor before execution is issued against him.

68. In the present case, as history rehashed above shows, the original Judgment was delivered sometime in the year 1970. From the record, there is empirical evidence that the parties never just sat pretty during this ostensible protracted period. The Applicants have demonstrated attempts to enforce the Judgment since then. As acknowledged from the filed pleadings, the Respondents are aware about the judgment and about these efforts. They are also aware about the present Application for execution of the Judgment. It would be the ultimate apotheosis of technical fetish over substantive justice to refuse to grant orders of execution because a particular form intitule "Notice to Show Cause" should have first been served on the Respondents. The Respondents are well aware about the present proceedings to enforce the judgment. In the end, therefore, I find and discern that the Notice of Motion application dated 22nd February, 2023 is found to be meritorious and the same is allowed as the Preliminary objection is not.

ISSUE No. d). Who bears the costs of the Notice of Motion application dated 22nd February, 2023 and the Notice of Preliminary dated 26th March, 2024

69. It is now well established that the issue of Costs is at the discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The Black Law Dictionary defines cost to means:-

> " the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other"

70. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By following events means the outcome or result of the legal process. The provision of Section 27 provides as follows:-

> "(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or Judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or Judge has no jurisdiction

to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

71. A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book The Code of Civil Procedure, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise.

72. Additionally, the provision provides for 'costs of and incidental to all suit or application' which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book Judicial Hints on Civil Procedure, 2nd Edition, 2005 at 95 notes that the words 'the event' means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under section 27 remains at the discretion of the court.

73. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In "Morgan Air Cargo Limited – Versus - Evrest Enterprises Limited [2014] eKLR" the court noted that;

> "The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that ''Cost follow the event'' was driven by the fact that there could be no ''one-size-fit-all'' situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case."

74. In this case, the Plaintiffs shall have the costs of the Notice of Motion application dated 22nd February, 2023 and Notice of Preliminary Objection dated 26th March, 2024 to be paid by the interested parties.

VIII. Conclusion and Disposition.

75. Ultimately in view of the foregoing detailed and expansive analysis to the applications, the Court arrives at the following decision and makes the orders below:-

    a. That the Notice of Motion application dated 22nd February, 2023 by the Mohamed Salmin Khamis and Ramla Salmin Khamis (legal Representatives of the Estate of Salmin Khamis Bin Salman, the Plaintiffs/ Applicants herein be and is hereby found to have merit and is allowed in its entirety.

    b. That the Notice of Preliminary objection dated 26th March, 2024 by the Interested Parties be and is hereby found to lack merit and the same is overruled.

    c. That, the Honourable court be and is hereby pleased to grant leave and an extension of time to the Plaintiffs/ Applicants to execute the Court Judgment and Decree of the Court issued on 18th March, 1970 which judgment has not been appealed against, reviewed and or set aside.

    d. That the Plaintiffs/ Applicants shall have the costs of the Notice of Motion application dated 22nd February, 2023 and the Notice of Preliminary objection dated 26th March, 2024 to be paid by the interested party.

It is so ordered accordingly.

RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS .....18TH .....DAY OF .....NOVEMBER.....2024.

.....

HON. MR. JUSTICE L. L. NAIKUNI

ENVIRONMENT AND LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

a. M/s. Firdaus Mbula – the Court Assistant.

b. Mr. Muriithi Advocate for the Plaintiffs/Applicants.

c. Mr. Oddiaga Advocate for the Interested Parties.

RULING: ELC CASE NO. 247 OF 1964 Page 11 of 11 HON JUSTICE LL. NAIKUNI (JUDGE)