IN THE COURT OF APPEAL

AT NYERI

(CORAM: KIHARA KARIUKI (PCA), NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 55 OF 2015

BETWEEN

JIMNAH IRUNGU N. MWANGI…...……..……..……APPELLANT

AND

EUNICE NDUTA KAMAU……..……..…….... RESPONDENT

(An appeal against the judgment of the Environment and Land Court at Nyeri (Waithaka J.) dated 28th September 2015

in

E. L. C. A. NO. 41 OF 2014)

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JUDGMENT OF THE COURT

(1) This is an appeal by **Jimnah Irungu N. Mwangi** (the appellant) arising from the judgment and decree of the Environment and Land Court at Nyeri dated the 28th September, 2015 and delivered by the Honourable Lady Justice L. N. Waithaka. The appeal is a second appeal, the issues on appeal having originated from the orders made on the 28th February, 2013 by Honourable J. J. Masiga, Resident Magistrate at Murang'a in SPMCC No.111 of 1991.

(2) To put the matter in perspective, the appellant instituted by way of plaint a suit against **Kamau Thuita**, now deceased (the deceased) and substituted by **Eunice Nduta Kamau**, as the legal representative of the deceased (the respondent), seeking orders directing the deceased to transfer to the appellant four acres of land, being a portion of Plot No. 207 – Maragua Ridge (the suit property). The appellant's cause was founded on a written agreement dated the 19th February, 1979 between the appellant and the deceased for the purchase of the suit property at the price or sum of Kshs. 20,000. The appellant contended that he had paid the entire purchase price yet the deceased had refused to transfer the suit property to him. He also averred that he had paid the purchase price in full whereupon he took possession and occupied the portion of Plot No. 207 as shown to him by the deceased.

(3) In his defence, the deceased admitted the existence of the sale agreement and the terms thereof. The deceased, however, denied that the appellant had paid the entire purchase price, contending that the appellant had paid only the sum of Kshs. 15,000. The deceased also admitted to not having transferred

the suit property for various reasons including that he had requested the appellant to accept a refund of the monies paid. The matter went to trial and the appellant's suit was successful. By an order made by the presiding learned magistrate on the 17th May, 1994 the deceased was ordered to transfer the suit property.

(4) From the record, we discern that the deceased preferred an appeal against the learned magistrate's decision. Unfortunately, we were not privy to the nature and grounds of such appeal as these are not on the record. We did nonetheless take note of the appellant's averment in one of his affidavits on record that the said appeal was dismissed for want of prosecution on the 6th February, 2002. Subsequently, the deceased passed on, prompting the appellant to file an application to substitute him with the respondent. The appellant's application was allowed by an order issued by the resident magistrate's court on the 18th March 2011.

(5) The respondent through her advocates then filed an application dated the 30th May, 2011 seeking the following main orders:

> ***a. THAT this Honourable Court be pleased to issue and order declaring*** *(sic)* ***the judgment delivered by the court on 17.5.1994 as inexecuted*** *(sic)* ***by being caught up by the law of limitation or alternatively or together with the above declaration***
>
> ***b. THAT this honourable court be pleased to annul and / or cancel all the proceedings herein including the judgment dated 17.5.1994 for being res judicata.***

This application was grounded on the provisions of **section 4(4)** of the **Limitation of Actions Act** and **section 7** of the **Civil Procedure Act 2010**. The appellant opposed the application through his affidavit dated the 20th June, 2011 in which he explained the delay to proceed with execution of the judgment in his favour whilst arguing that time had not lapsed.

(6) The position summarized hereinabove notwithstanding, the appellant also filed an application dated the 27th June, 2011 seeking orders to enlarge time within which to execute the judgment of the court dated the 17th May, 1994. This application was brought under the provisions of the **Limitation of Actions Act** and **Order 50 rule 6 of the Civil Procedure Rules**. The grounds in support of it were largely similar to the grounds in opposition to the respondent's application dated the 30th May, 2011. The respondent filed grounds of opposition to the intent that the appellant's application was meant to defeat and frustrate the respondent's application and that the court lacked jurisdiction to enlarge time within which to execute judgment.

(7) Although the two applications were to be heard concurrently, only the respondent's application dated the 30th May, 2011 was fully argued with directions by the presiding Resident Magistrate Honourable J. Gathuku that the appellant's application awaits the outcome of the ruling. Learned counsel on record proceeded to submit on the application. Though counsel for the respondent argued both limbs to wit, limitation and *res judicata*, counsel for the appellant argued on one limb only being *res judicata*. Inevitably and though the limb on *res judicata* was unsuccessful, the respondent's application was allowed, the limb on limitation having been deemed to have been unopposed.

(8) The application by the appellant dated the 27th June 2011 was subsequently fixed for hearing and was eventually argued. The appellant relied on the grounds on the face of the application as supported by the appellant's affidavit while the respondent relied on the grounds of opposition as filed. In his submission on behalf of the appellant/ applicant, Mr. Njoroge stated that the reason for the lapse in time was that the original file had to be transferred to the High Court (Environment and Land Court) at Nyeri as a result of the deceased having filed an appeal. The file was transferred back to Murang'a on the 26th June 2003 following the dismissal of the appeal on the 6th February 2002, by which time the deceased had passed on. The appellant submitted that he had to wait for succession proceedings that were determined in the year 2005 in favour of the respondent. The judgment being in place, the appellant urged that he should be allowed to enjoy the fruits of judgment.

(9) In opposing the application, Mr. Kirubi learned counsel for the respondent submitted that there was no reason preventing the appellant from executing the judgment in the absence of an order of stay. He relied on the provisions of **order 42 rule 6** of the **Civil Procedure Rules** to the effect that an appeal does not operate as a stay. Counsel also submitted that **section 4(4)** of the **Limitation of Actions Act** does not donate any powers to enlarge time and that the provisions of **Order 50 rule 6** of the **Civil Procedure Rules,** which the appellant sought to rely on, are inapplicable as they apply only to what is contemplated under such rules.

(10) In his ruling dated the 25th February, 2013 the trial magistrate framed the issues for his determination as follows:-

> ***a. Does the court have jurisdiction to enlarge time in this case under the Limitation of Actions Act;***
>
> ***b. Does the court have jurisdiction in this case under Order 50 rule 6 of the Civil Procedure Rules.***

The learned trial magistrate then proceeded to apply himself on the above two issues. On the first issue and relying on Court of Appeal decisions, the magistrate found that the court had no jurisdiction to extend any period of limitation. Moreover, the judgment sought to be executed had been earlier declared as unexecuted and expired through a ruling made on the 16th September 2011. That ruling not having been challenged by the appellant, it would be conflicting to allow application sought by the appellant. On the second limb, the magistrate found that the same was inapplicable in the circumstances as the period of limitation in issue is stipulated under the **Limitation of Actions Act** and not the **Civil Procedure Rules**, the two legislations not overlapping at any point.

(11) Aggrieved by this ruling made on the 25th February, 2013, the appellant lodged his appeal in the Environment and Land Court at Nyeri. Though the record of appeal filed before the Environment and Land Court at Nyeri has not been incorporated in the record of appeal before us, we discern from the written submissions filed by the appellant in the proceedings before the Environment and Land Court that the appellant disagreed with the findings of the magistrate's court. The appellant restated his position and explained the delay that occasioned his failure to execute the judgment urging the Environment and Land Court to interrogate the evidence adduced before the trial court and overturn the ruling in his favour. On her part, the respondent reiterated the trial magistrate's ruling and reasoning and urged the Environment and Land Court to dismiss the appeal.

(12) In her judgment, the learned judge of the Environment and Land Court agreed with the determination by the resident magistrate adding that the proper procedure of dealing with the order declaring the expiry of the judgment was to apply for review of those orders or appeal against them. Since there was no evidence to show that either of these courses of action had been taken, the judge declined the application for enlargement of time within which to execute a judgment that had already been declared expired by a court of concurrent jurisdiction. In the judge's analysis, the issues canvassed by the appellant in his appeal would only have been relevant if the orders declaring the judgment expired had been reviewed or set aside. The application was therefore found to be bad in law for want of substratum. The upshot of the foregoing is that the appeal lacked merit.

(13) The appellant, aggrieved once more filed the present appeal before this Court. From his memorandum of appeal, he contends that the learned judge erred in the following respects:-

> ***a) In finding that there was a judgment in favour of the appellant in the lower court.***
>
> ***b) In finding that the lower court had no power to extend time for execution of the judgment of the lower court.***
>
> ***c) In not interrogating the circumstances that led to the expiry of time for execution of the judgment of the lower court***

d) In not overturning the ruling of the lower court.

At the hearing of the appeal, learned counsel Mr. T.M. Njoroge, Advocate, appeared for the appellant while learned counsel Mr. J.N. Kirubi, Advocate, appeared for the respondent.

(14) In his submissions, Mr. Njoroge consolidated the grounds of appeal. He submitted that the defendant had passed on and had to be substituted, this being amongst the issues that resulted in the expiry of the judgment of the Magistrate's court. Learned counsel also faulted the refusal by the Environmental and Land Court to extend time. He argued that a court of competent jurisdiction has power to extend time pointing out that the appellant has been in occupation of the suit property for over 30 years.

(15) In opposing the appeal, Mr. Kirubi submitted that judgment had been delivered on the 19th May 1994 while the appellant sought to execute the same in the year 2010, sixteen years later. Relying on **Section 4(4)** of the **Limitation of Actions Act**, counsel submitted that judgment cannot be extended after the lapse of a period of 12 years. Effectively, the 12 years ended in May 2006. Counsel submitted that **Parts II and III** of the **Limitation of Actions Act** deal with instances where time may be extended, amongst them being disability, acknowledgement and part payment, fraud, mistake and ignorance of material facts. None of these were demonstrated by the appellant. Learned counsel further argued that though the respondent had filed an appeal, the same did not operate as a stay of execution.

(16) Mr. Kirubi also submitted that the respondent had filed an application dated the 30th May, 2011 which was allowed declaring the judgment as inexecutable. No appeal or review having been preferred, the appellant's application could not be allowed and the appellant had filed the application for extension of time after the judgment had already been rendered incapable of enforcement. Counsel pointed out that the allegation that the court file was missing did not amount to an instance of review contemplated under **Part III** of the **Limitation of Actions Act**. In conclusion, counsel argued that extension of time is a matter of law in which the court has no discretion and therefore urged us to dismiss the appeal.

(17) We have considered this appeal in light of the above background and submissions. This being a second appeal, we are obliged to consider only issues of law by virtue of Section 79 D of the **Civil Procedure Act** and the following grounds set out in **Section 72** of the **Civil Procedure Act**:

(a) The decision being contrary to law or to some usage having the force of law;

(b) The decision having failed to determine some material usage of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force which may possibly have produced error or defect in the decision of the case upon the merits.

(See also ***Kericho Nursing Home Limited v Rael Langat*** [2016] eKLR).

(18) From the record and submissions made on behalf of the appellant, the appeal hinges mainly on whether time within which to execute a judgment may be extended as sought by the appellant. We took note that the application the subject to this appeal was predicated on the Limitation of Actions Act without reference to any specific provision thereof and Order 50 rule 6 of the Civil Procedure Rules.

(19) We have carefully analysed the rival arguments made by the parties at the Magistrates Court, the Environment and Land Court and now before this Court and decipher that no fresh argument has been availed. Both the learned Magistrate who heard the application at the first instance, the learned Judge of the Environment and Land Court who heard the application as an appellate court and now ourselves as a second appellate court have had the benefit of the same arguments. With the burden of proof lying on the appellant, it is incumbent upon him to argue his appeal in light of our mandate as a second appellate court. Learned counsel for the appellant did not offer much assistance as he neither referred us to any legal provisions nor cited authorities to support the appeal.

(20) There exist several undisputed facts one of which is that there was a judgment by the magistrate's court delivered on the 17th May, 1994 in favour of the appellant. It is also undisputed that the deceased lodged an appeal which by virtue of the provisions of Order 42 Rule 6 of the Civil Procedure Rules did not operate as a stay of execution beyond the initial 30 days stay granted by the Magistrate's court. There was also no demonstration of the appellant's intention and effort to execute the judgment.

(21) The only evidence of the appellant's effort in executing the judgment that we found in the record is the appellant's application seeking orders to compel the deceased to execute the necessary documents to effect the transfer of the suit property in his favour. However, we did not have the benefit of that application or information on what transpired as none of the parties addressed us on it. Accordingly, we were unable to consider the same further.

(22) On her part, the respondent filed an application dated the 30th May, 2011 seeking to declare the judgment as expired and incapable of being executed. We noted that the appellant in his replying affidavit denied that the judgment had expired and subsequently filed an application on the 27th June 2011 seeking to extend time. As earlier observed, these two applications were to be heard concurrently but the trial Magistrate directed that the former application be heard first and no objection was recorded as having been raised by the appellant at that juncture. It was therefore not surprising that the appellant did not maintain his line of argument to the effect that the judgment was yet to expire when the application dated the 30th May 2011 was argued. The trial magistrate, in his ruling made on the 16th September, 2011 allowed the prayer declaring the judgment as expired and inexecutable, the appellant not having opposed the respondent's prayer in this respect.

(23) When the appellant appealed to the Environment and Land Court as a first appellate court, the first appellate court considered the merits of the appellant's grounds of appeal and agreed with the reasoning of the resident magistrate. The appellant never took steps to challenge the Resident Magistrate's orders declaring the judgment as expired. Accordingly, the learned Judge of the Environment and Land Court also declined to extend time within which to execute a judgment that had already been declared as expired.

(24) We have not seen any abuse of discretion or misdirection in the circumstances both by the trial Magistrate and the learned Judge of the Environmental and Land Court to warrant our interference. We are persuaded that all issues raised and canvassed by the parties at the hearing of the application leading to the judgment the subject to this appeal were satisfactorily addressed by the respective courts.

(25) In our decision, we bear in mind the caution this Court has given in several instances including our decision in the case of ***Maina vs Mugiria*** **(1983) KLR 79** when it held, *inter alia*, that:-

> ***"The Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis justice."***

This Court's position has been fortified by the Supreme Court's decision in ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others*** [2014] eKLR where it was held that:

> ***"Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it."***

(26) In the result, we do not find merit in the appeal and order that the same be and is hereby dismissed with costs.

Dated and delivered at Nyeri this 9th day of November, 2016.

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

…….……

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR