



**Gichuhi (Suing as the legal administrator of the Estate of Wanjiku Waititu) v Kihumba
(Civil Case 341 of 1991) [2023] KEHC 513 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 513 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE 341 OF 1991
TM MATHEKA, J
FEBRUARY 2, 2023**

BETWEEN

**JENET MUKUHI GICHUHI (SUING AS THE LEGAL ADMINISTRATOR OF
THE ESTATE OF WANJIKU WAITITU) PLAINTIFF**

AND

WANJIRU KIHUMBA DEFENDANT

RULING

1. On June 14, 2021 the applicant filed an application dated June 8, 2021 seeking orders that this court do find the respondent is in contempt of court orders issued *vide* a judgment delivered on March 3, 1993 and to consequently commit her to civil jail for a period of six (6) months, and the deputy registrar be directed to execute all the documents necessary for the transfer of the property herein in the name of the beneficiary/dependant.
2. The record shows that in the judgment delivered on March 3, 1993 the issue was the sale agreement between the parties for the sale and purchase of one and half acres of land out of plot number 604 Toniloyeta. After hearing the parties the court made the following orders:-
 1. Specific performance be and is hereby issued against the defendant directing her to specifically perform the sale agreement entered between them herein.
 2. The defendant to execute all the necessary documents to effect the transfer of the said portion to the plaintiff.
 3. The defendant be and is hereby directed to receive the balance of the purchase price due failing which the same be deposited in court for the defendant's collection.
 4. The plaintiff will have costs of the suit.



3. The respondent raised a notice of preliminary objection (PO) to the above application. The same is dated January 1, 2022 and it is premised on grounds that:-
 1. The application offends the provisions of order 22 rule 18(1) of the [Civil Procedure Rules, 2010](#).
 2. The application is time barred as it offends the provisions of section 4(4) of the [Limitation of Actions Act](#).
 3. The application is an abuse of the court process.
4. The applicant opposed the preliminary objection through her replying affidavit sworn on June 8, 2022. She deposed that the preliminary objection is improper as it was filed beyond the 30 days period, within which the same should be filed as the respondent was served with the application on July 22, 2021.
5. She averred further that the preliminary objection is improper since the issue as to whether or not the application was time barred is a matter of fact that can only be established by evidence and therefore cannot be determined at preliminary stage.
6. She deposed that this court should construe section 4(4) of the [Limitation of Actions Act](#) against the right to property, access to justice and fair trial and that contempt of court is criminal in nature and thus cannot have limitation.
7. She prayed that the preliminary objection be dismissed with costs.
8. The parties on June 9, 2022 through their respective advocates took directions to canvass the preliminary objection by way of written submissions. Only the defendant's submissions are on record.

defendant's Submissions

9. The defendant submitted four issues. Namely:-
 1. Whether the application offends the provisions of order 22 rule 18(1) of the [Civil Procedure Rules, 2010](#)
 2. Whether the application is time barred as it offends the provisions of section 4(4) of the [Limitation of Actions Act](#).
 3. Whether the application is an abuse of the court process
 4. Who should bear the costs of the suit?

Whether the application offends the provisions of Order 22 Rule 18(1) of the Civil Procedure Rules, 2010:

10. The defendant submitted that the plaintiff's application must be dismissed as it seeks to execute a decree that was issued more than 12 years ago. She submitted that she was never issued with a notice to show cause why the decree should not be executed against her as required under order 22 rule 18(1) of the [Civil Procedure Rules, 2010](#).
11. To bolster the above position the defendant relied on [Santowels Limited v Stanbic Bank Kenya Ltd \[2020\] eKLR](#) where the court stated that a notice to show cause ought to have been issued by the respondents noting that proclamation was done 18 months after issuance of the decree. That failure to do so rendered the execution in question irregular; [John Mubanda Muya & Another v Stanley K Kuria & Another \[2013\] eKLR](#) where the court similarly found that execution of a decree issued more than



a year against the respondent without compliance with order 22 rule 18 (1)(a) of the Civil Procedure Rules was irregular.

12. The defendant submitted that she was entitled to be served with a notice to show cause noting that the plaintiff is seeking to execute a decree made 27 years ago and that failure to do so rendered the application incompetent.

Whether the application is time barred as it offends the provisions of Section 4(4) of the Limitation of Actions Act;

13. The defendant referred this court to the provisions of section 4(4) of the Limitation of Actions Act and submitted that there was no dispute that the judgment in favour of the plaintiff which she sought to execute was delivered on March 3, 1993. To that end prayer 3 on the face of the application could not be issued because the suit is time barred. She argued that the purpose of limitation provisions is to eradicate stale claims and stop the vexing of litigants. That where a judgment creditor elects to sleep on a decree, he is estopped from waking up from his slumber after 12 years have lapsed, to claim his right. To support this proposition he relied on Mwaura Njoroge & Another v County Council of Kiambu & Another [2015] eKLR, M'Kiara M'Rikinkany & Another v Gilbert Kabeere M'Mbijiwe (2007) eKLR and Isaac Olang Solongo v Gladys Nanjekho Makokha (Being the administrator of the Estate Antonina Makokha (Deceased) & Another [2021] eKLR

Whether the application is an abuse of the court process;

14. The defendant submitted that owing to the above submissions the application herein is an abuse of the court process.

Who should bear the costs;

15. The defendant submitted that costs are discretionary as provided for under section 27 of the Civil Procedure Act and that they follow the event. She prayed to be awarded costs.

Analysis & Determination

16. The only issue that arises for determination is whether the preliminary objection is meritorious.
17. The notice of preliminary objection is anchored on Limitation of Actions Act section 4 (4) and order 22 rule 18(1) of the Civil Procedure Rules, 2010.
18. What amongst to a preliminary objection is well settled in Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd (1969) EA 696 thus;

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

19. Further Sir Charles Nebbold, JA stated 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



nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

20. It is evident 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. However, it cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion.
21. In the case of *Oraro v Mbaja (2005) 1KLR 141*, the court held that:-

“ Anything that purports to be a preliminary objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”
22. It has been submitted that the suit is statute barred. It is not in doubt that the issue of limitation goes to the jurisdiction of the court and the same does not require ascertainment of facts and as such it falls under the description of a preliminary objection.
23. So is the application herein time barred? The defendant submitted that it is under section 4(4) of the *Limitation of Actions Act*. The said section 4 (4) of the *Limitation of Actions Act* provides that: -

“(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.”
24. The application was filed on June 14, 2021 which is 28 years after the delivery of judgment. The last chance for the applicant was 12 years after judgment was delivered. As matters stand her claim has been caught up by the provisions of section 4 (4) of the act.
25. Clearly the preliminary objection based on section 4(4) of the *Limitation of Actions Act* is a pure point of law. The respondent has demonstrated that the claim is time barred. That settles the whole application hence succeeds.
26. The applicant’s application dated June 8, 2021 is accordingly dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 2ND DAY OF FEBRUARY, 2023.

MUMBUA T MATHEKA

JUDGE

CA Jennifer

ALP Kenya Advocates,

M/S M. Waititu & Co Advocates

