



**Republic v Chief Magistrate Kimilili; Wepukhulu & another (Interested Parties); Wafubwa (Exparte Applicant) (Environment and Land Judicial Review Case E001 of 2022) [2023] KEELC 19153 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19153 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2022**

**EC CHERONO, J**

**JULY 28, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**CHIEF MAGISTRATE KIMILILI ..... RESPONDENT**

**AND**

**PATRICK MULONGO WEPUKHULU ..... INTERESTED PARTY**

**REGISTRAR OF TITLES-BUNGOMA ..... INTERESTED PARTY**

**AND**

**CAPT. J.N. WAFUBWA ..... EXPARTE APPLICANT**

**RULING**

1. The *ex-parte* applicant, vide a Chamber Summons application dated December 7, 2022 seeks the following orders;
  - i. An order of Certiorari directed at the Chief Magistrate’s Court in Kimilili to issue me with the proceedings in CMCC E006 of 2022 between Patrick Mulongo v elam Lusweti & The ex-parte Applicant
  - ii. An order of *Mandamus* directed to the Respondent, 2{{^nd}} interested party to restore the Ex-parte Applicant as the lawful owner of Kimilili/Kibingei/937 and cancel the vesting order against Kimilili/Kimilili/937 and cancel the vesting order against Kimilili/Kimilili/Kibingei/937 dated May 1996



2. That the leave to act as a stay from the further proceedings in CMCC EOO6 of 2022 pending the conclusion of this Judicial Review.
3. That the Costs of this application be provided for

The application is supported by the affidavit of the applicant and a further affidavit sworn on December 7, 2022 and March 1, 2023 respectively. The two affidavits are further supported by numerous annexures thereto. The application is opposed by the 1<sup>st</sup> interested party vide a Replying affidavit sworn on February 27, 2023.

## Background

4. The background to the applicant's claim is that he bought a parcel known as Kimilili/Kimilili/937 from one Elam Lusweti in the year 1985 and the suit property transferred in his name the same year. Without his knowledge, the 1<sup>st</sup> Interested party lodged a claim against both the applicant and Elam Lusweti (deceased) before Kimilili District Land Disputes Tribunal vide KKIB/LDT/26 of 1995. Upon hearing the claimant and the objectors, the panel of Elders agreed with the claimant and awarded the suit land to the claimant whom they said had bought the land earlier than the applicant herein. The award was later adopted by the Magistrate's Court at Kimilili vide Misc. Application No. 12 of 1996 and eventually a vesting order was issued. On the strength of the said vesting order, title was issued in favour of Wepukhulu who then became the registered owner of the suit land. In the meantime, dissatisfied with the decision of the Land Disputes Tribunal, Wafubwa sought to challenge it but appears to have breached the timelines for appeal set out under section 8 of the [Lands Disputes Tribunal Act](#). He was forced to seek leave to lodge an appeal out of time which he was granted by the High Court vide Bungoma Misc. Application No. 7 of 2003 on 10<sup>th</sup> June, 2003. Following that leave, Wafubwa filed Civil Appeal No. 94 of 2003 before the Western Province Appeals Committee
5. According to the ex-parte applicant, he is the rightful owner of land parcel No. Kimilili/Kibingei/937 which he allegedly bought from one Elam Lusweti in 1985 who had refused to sell and transfer to the Patrick Mulongo, 1<sup>st</sup> Interested party herein. After failing to transfer the land to the said Patrick Mulongo in 1977, the said Patrick Mulongo took the said Elam Lusweti before Kimilili Land Disputes Tribunal vide KKL/LDT/26 of 1995 and the award was subsequently adopted by the Magistrate's Court Misc. Application NO.12 of 1996 on 31<sup>st</sup> July 2002 and eventually a vesting order issued in the following terms;
  - “(a) Land Parcel No. Kimilili/kibingei/937 be transferred by the second respondent James Wafubwa Nyongesa to the Applicant/Decree holder herein Patrick Mulongo Wepukhulu forthwith in default the Executive Officer of Bungoma Law Courts is hereby duly authorized to sign necessary documents on behalf of the second respondent herein James Wafubwa Nyongesa to facilitate subdivision and transfer of land parcel NO. Kimilili/Kibingei/937 to Patrick Mulongo Wafubwa
  - (b) The signing of the necessary documents on the second Respondent/defendant JAMES Nyongesa Wafubwa is hereby dispensed with.
6. On the strength of that vesting order, title was issued in favour of Wepukhulu who then became the registered owner of the suit land.
7. It is clear from the facts stated herein above that the award by the Tribunal which was subsequently adopted by the Magistrate's Court in Misc. Application No. 12 of 1996 on 31/07/2002 has not been



set discharged, vacated or set aside to date. It is alleged that Elam Lusweti filed an appeal against the said order at Kakamega High Court in HCCA 13 of 1989. However, no outcome of the said Appeal has been availed to this court.

8. In the meantime, the ex-parte applicant filed a suit vide a plaint dated November 19, 2014 against Patrick Mulongo Nyongesa, the 1<sup>st</sup> interested party herein which claim was dismissed by Hon. Justice S.Mukunya on 13/12/2017. Aggrieved by the said decision, the ex-parte applicant preferred an appeal at Eldoret being C.A No. 64 of 2018 which appeal was also dismissed with costs.
9. What the ex-parte applicant is now seeking is to challenge the decisions of competent Superior courts by way of judicial Review. Order 53 Rule 2 provides as follows;

“2. Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

10. From the materials placed before me, it is clear that the order which the ex-parte applicant is seeking to challenge by way of these judicial proceedings was delivered on May 18, 2022. From the date the impugned order was issued and the date the present application was filed is more than six months. No leave was sought and obtained by the ex-parte applicant before filing this suit.
11. I also note that the decision which the ex-parte applicant seeks to challenge by way of Judicial Review is an order of a court of competent jurisdiction where appeal mechanisms are provided under the law. In the case of *Republic v National Environment Management Authority Ex-parte Sound Equipment Limited* (2011) KLR, the Court of Appeal observed thus;

“...Where there was an alternative remedy and especially where parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it...”

12. Again in *Secretary, County Public Service Board & Another v Hulubhai Gedi Abdille* (2017) KLR, the court held that;

“There is no doubt that the respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by section 7 of the Act. The section provides not only a forum through which the respondent could agitate her grievance at the first instance, but the jurisdiction thereof is a specialised one, specifically tailored by the legislators to meet needs such as the respondent’s. In our view, the most suitable and appropriate recourse for the respondent was to invoke the appellate procedure rather than resort to the judicial process in the first instance. In terms of *Republic v National Environment Management Authority (supra)*, we discern no exceptional circumstances in this appeal that would have warranted the bypassing of the statutory appellate process by the respondent. Her contention that she disregarded the appeal because it could not afford



her an opportunity to question the procedure followed by the appellant is in our view, without basis because section 77 has placed no fetter to the jurisdiction of the public Service Commission. There is no requirement for instance that reasons for the decision be availed to an aggrieved party before he can prosecute an appeal before it."

13. I agree entirely with the above decisions by the Court of Appeal which are binding on me.
14. In view of the matter aforesaid, I find the Chamber Summons application dated December 7, 2022 without merit and the same is hereby dismissed with costs.
15. Orders accordingly.

**READ, DELIVERED AND SIGNED IN THE OPEN COURT AT BUNGOMA THIS 28<sup>TH</sup> DAY OF JULY 2023.**

**HON. E.C CHERONO**

**ELC JUDGE**

In the presence of;

Ex-parte applicant-absent

Respondents/Advocate-absent

