



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

CIVIL SUIT NO. 43 OF 2006

**ROBERT WAFULA WANYAMA (Suing as the personal representative of the Estate
of GEORGE WANYAMA WEPUKHULU – (DECEASED))..... PLAINTIFF**

VERSUS

JOSEPH MWASAME.....1ST DEFENDANT

ALFRED NABISWA MWASAME.....2ND DEFENDANT

ROBINSON MWASAME 3RD DEFENDANT

JACKSON KUNDU.....4TH DEFENDANT

J U D G M E N T

ROBERT WAFULA WANYAMA (the plaintiff herein) filed this suit as the legal representative of the Estate of his late father **GEORGE WANYAMA WEPUKHULU (WEPUKHULU)** seeking Judgment against **JOSEPH MWASAME, ALFRED NABISWA MWASAME, ROBINSON MWASAME** and **JACKSON KUNDU** (the 1st to 4th defendants respectively) with respect to the land parcel **NO BOKOLI/BOKOLI/718** (the suit land) in the following terms as per paragraphs 14, 15 and 18 of the plaint: -

- 1. A declaration that a purported vesting order that removed a restriction on the land parcel NO BOKOLI/BOKOLI/718 and which subsequently led to the sub – division of the said land parcel into parcels NO BOKOLI/BOKOLI /1925, 1926, 1927 and 1928 was null and void.**
- 2. A declaration that the registration of the resultant sub – divisions into the defendants’ names was null and void and an order do issue compelling the LAND REGISTRAR BUNGOMA to strike off the said sub – divisions and an order to amend and restore the register in its original state.**
- 3. In the alternative, the DEPUTY REGISTRAR of the Court be ordered to sign all the necessary forms and documents to vest the parcels of land now held by the defendants into the names of the plaintiff to be held in trust for all beneficiaries of the Estate of GEORGE WANYAMA NATEMBEYA.**
- 4. Costs**
- 5. Interest**
- 6. Any other relief.**

The basis of the plaintiff’s case is that at all material times, the suit land was registered in the names of his father **WEPUKHULU** who died on 12th September 1999. That at the time of the demise of **WEPUKHULU**, the defendants had filed proceedings against him at the **BOKOLI LAND DISPUTES TRIBUNAL** (the Tribunal) being case **No 3 of 1998** which ended up at the **KAKAMEGA LAND DISPUTES APPEAL COMMITTEE** (the Committee) as case **No 93 of 1998** filed by **WEPUKHULU** against the Tribunal’s award. However, before the Committee could hear and determine the appeal, **WEPUKHULU** died and the appeal was dismissed even before **WEPUKHULU** could be heard. Meanwhile, the Tribunal’s award was adopted as a Judgment of the Court in **WEBUYE COURT LAND CASE No 27 of 1998** on 18th May 2001. The plaintiff has also pleaded fraud against the defendants in paragraph 13 of the plaint as follows:

a. **Registration and sub – division in the face of a Court order barring registration.**

b. **Failure to head the Court order.**

c. **The then Executive Officer of WEBUYE COURT misleading the Land Registrar Bungoma on the status of the file in his possession.**

d. **Collusion of the Land Registrar and the defendants in causing sub – division and registration.**

Together with his plaint, the plaintiff filed two witness statement the first dated 16th September 2013 and the second dated 9th April 2014. He also filed two lists of documents also dated 16th September 2013 and 9th April 2014.

The gist of the two statements which he adopted as his evidence together with the list of documents during trial is that the suit land belonged to **MESHACK WEPUKHULU (MESHACK)** who was the father to **GEORGE WANYAMA WEPUKHULU (WEPUKHULU)** who was the father to the plaintiff. However, the defendants who were the children of **MWASAME** and who had been settled by their father in his land at **SIUNA** and **MAANGA** came to the suit land as relatives but following the death of their father **MESHACK** and as the plaintiff was applying for Letters of Administration in respect to the Estate of his father **WEPUKHULU**, the defendants started claiming land alleging that they too were beneficiaries to the Estate of **WEPUKHULU**. That the defendants proceeded to obtain a vesting order from the **WEBUYE COURT** and sub – divided the suit land to give rise to land parcels **NO BOKOLI/BOKOLI/1925, 1926, 1927** and **1928** following proceedings that were conducted at the Tribunal and the Committee without substituting his father who had died in the course of the proceedings.

The defendants filed a joint amended defence and Counter – claim dated 10th November 2010 and filed herein on 22nd November 2010. In the said defence and Counter – Claim, the defendants denied the allegations of fraud. They added that although **WEPUKHULU** was registered as the proprietor of the suit land, he was only a trustee for the defendants and that the defendants were registered as proprietors of their respective sub – divisions of the suit land following a valid decree issued by the Court. They therefore sought for orders striking out the plaintiff's suit with costs for being frivolous, incompetent and disclosing no cause of action against them.

The 2nd and 3rd defendants in their Counter – Claims pleaded that the plaintiff had encroached on their land parcels and sought orders that they be evicted therefrom.

The 2nd defendant pleaded that since January 2005, the plaintiff had encroached on his land parcel **NO BOKOLI/BOKOLI/2553** while the 3rd defendant pleaded that the plaintiff had encroached onto ½ acre of his land parcel **NO BOKOLI/BOKOLI/1927**. They also sought orders for costs on their Counter – Claim.

The 2nd defendant passed away in the course of the trial and was not substituted. Therefore, both the case against him and his Counter – Claim abated by operation of the law.

Together with their defence and Counter – Claim, the defendants filed their witness statements and list of exhibits dated 18th April 2013.

In his statement dated 18th April 2013 and which was replicated by his brothers who are the 3rd and 4th defendants herein, **JOSEPH MWASAME** the 1st defendant stated that he and his co – defendants are brothers and the children of the late **PAULO MWASAME** who, before his demise in 1970, was the owner of land measuring 73 acres. That **PAULO MWASAME** appointed their eldest brother **MESHACK** to administer the land due to his old age. That **MESHACK** was given 24 acres and the remaining 49 acres was apportioned as follows: -

1st defendant – 12 acres

2nd defendant – 10 acres

3rd defendant – 9 acres

4th defendant – 14 acres

That the defendants have lived on their respective portions of the suit land since their birth and following the death of **MESHACK**, their clan met and sub – divided the suit land as indicated above. However, the plaintiff who is the eldest son of their brother **MESHACK** did succession and had the suit land registered in his names. The defendants therefore lodged a complaint at the Tribunal which made an award in their favour and confirmed the sub – division of the suit land as above. The award was adopted as a Judgment of the Court at **WEBUYE** which authorized the Executive Officer to sign the necessary transfer documents to facilitate the registration of parcel **NO BOKOLI/BOKOLI/1925** in his names.

The 3rd and 4th defendants in their statements also dated 18th April 2013 confirmed the contents of the 1st defendant's statement. The 3rd defendant added that he is currently the registered proprietor of the land parcel **NO BOKOLI/ BOKOLI/1927** and the 4th defendant confirmed that he is currently the proprietor of the land parcel **NO BOKOLI/BOKOLI/1928** following the orders issued by the **WEBUYE**

COURT.

The plaintiff filed a reply to defence and defence to Counter – Claim in which he reiterated the averments of his plaint. He denied having encroached onto the parcels of land registered in the names of the 3rd and 4th defendants stating that his occupation thereof is as of right and putting the defendants to strict proof thereof. He urged the Court to dismiss the defendant’s Counter – Claim with costs.

The hearing commenced on 27th February 2020 with the parties adopting as their evidence, the contents of their statements already referred to above. They also produced as their documentary evidence the list of documents filed herein.

Although the defendant filed their statement of issues on 22nd April 2013, the record shows that the parties had, by their previously agreed issues jointly signed by Counsel on 27th December 2006 and filed on 5th January 2007 agreed on the following issues for determination by this Court and which will also guide this Judgment. These are: -

- 1. Whether the plaintiff’s father GEORGE WANYAMA WEPUKHULU was the registered owner of the land parcel NO BOKOLI/BOKOLI/718.**
- 2. Whether the said GEORGE WANYAMA WEPUKHULU held the land parcel NO BOKOLI/BOKOLI/718 in trust for the defendants.**
- 3. Whether or not the BOKOLI LAND DISPUTES TRIBUNAL award and the KAKAMEGA PROVINCIAL APPEALS award had abated and therefore null and void.**
- 4. Whether there were proceedings capable of being adopted vide WEBUYE COURT MISCELLANEOUS APPLICATION No 27 of 1998 and whether the said proceedings were capable of being enforced.**
- 5. Whether or not the sub – division and registration of the suit parcels of land in the names of the defendants was actuated by fraud and mis – representation.**
- 6. Whether the sub – division and registration of the suit parcels of land in the name of the defendant was done contrary to any Court orders barring registration.**
- 7. Whether the orders compelling the LAND REGISTRAR BUNGOMA to delete the defendants’ registration as proprietors and for vesting orders are available to the plaintiff herein.**
- 8. Whether the prayers sought are tenable in law.**
- 9. What are the appropriate orders as to costs?**

At the end of the trial, submissions were filed both by the plaintiff who is now acting in person after his Counsel ceased acting and also by **MR BWONCHIRI** instructed by the firm of **OMUNDI BW’ONCHIRI ADVOCATES** for the defendants.

I have considered the evidence by all the parties as well as the submissions filed.

The gist of the plaintiff’s complaint with regard to the suit land is that the vesting order that resulted in the sub – division of the suit land to give rise to land parcels **NO BOKOLI/BOKOLI/1925, 1926, 1927 and 1928** and which parcels were subsequently registered in the names of the defendants were null and void and should therefore be cancelled and the suit land to revert to the names of the plaintiff’s father **WEPUKHULU**.

It is clear from the documents filed herein that the suit land was first registered in the names of **MESHACK** on 26th October 1967. It was subsequently registered in the names of **WEPUKHULU** on 18th July 1976 and he obtained the title thereto on 5th June 1997. That title was closed on 19th March 2001 following its sub – division to create the parcels **NO BOKOLI/BOKOLI/1924, 1925, 1926 and 1927**. The Green Card shows that the sub – division was carried out following the vesting order issued in **WEBUYE COURT CASE No 27 of 1998**. That vesting order which was issued by the **WEBUYE** Court in **MAY 2001** (the date is not indicated) by **LILLIAN MUTENDE - SENIOR RESIDENT MAGISTRATE** (as she then was) was itself pursuant to a decree issued by the same Court on 1st May 2001 following the adoption of the Tribunal’s award as a Judgment of the Court. Those proceedings were no doubt conducted pursuant to the provisions of the then **LAND DISPUTES TRIBUNAL ACT** (now repealed). An appeal to the Committee was dismissed as is clear from the record herein. **MR BWONCHIRI** has submitted, citing **FLORENCE NYABOKE MACHANI .V. MOGERE AMOSI OMBUI & OTHERS 2014 eKLR**, that the only option available to the plaintiff was to appeal the decision of the Committee to the High Court as provided under **Section 8(9) of the repealed law** which the plaintiff did not do. The plaintiff cannot now allege fraud as against the defendants in the manner in which the suit land was sub – divided to give rise to the land parcels **NO BOKOLI/ BOKOLI/1925, 1926, 1927 and 1928**. This is because, that sub – division was done pursuant to a decree issued by a competent Court against which no appeal had been preferred. Indeed, the **LAND REGISTRAR BUNGOMA** would have been liable for contempt proceedings had he ignored or failed to act as directed by the Court.

The plaintiff has also alleged that the registration of the defendants as proprietors of the land parcels **NO BOKOLI/BOKOLI/1925, 1926, 1927 and 1928** was done in the face of a Court order barring such registration. No such Court order was produced by the plaintiff in support of that allegation. However, upon perusal of the record herein, the Court noted a Notice of Motion dated 10th March 2017 in which the defendants sought to have this suit struck out for being an abuse of the process of the Court. Among the documents annexed to that

application are the orders issued by **K. MULWA J** on 16th November 2001 in **BUNGOMA HIGH COURT MISCELLANEOUS APPLICATION No 220 of 2001** in which the plaintiff as Applicant had sought leave to apply for orders of certiorari to remove and quash the decision of the Tribunal as adopted by the **WEBUYE COURT**. It is clear from the orders issued that in granting leave, the Judge also directed that the said leave do operate as a stay of enforcement of the decision of the Tribunal. If that is the order that the plaintiff is referring to, it does not aid his case because by the time that order was being issued on 16th November 2001, the decision of the Tribunal had already been adopted as a Judgment of the **WEBUYE COURT** and a decree drawn on 1st May 2001 followed by the vesting order also in May 2011. The orders issued by **K. MULWA J** on 16th November 2001 therefore came six (6) months late and could not bar the registration of the land parcels **NO BOKOLI/BOKOLI/1925, 1926, 1927 and 1928** in the names of the defendants. The plaintiff should have pursued the Judicial Review Application having obtained leave to do so. However, it is clear that he did not pursue that route. There would be no basis therefore upon which this Court can order for the cancellation of the defendants titles for having been obtained through a fraudulent process and for the title **NO BOKOLI/BOKOLI/1718** to be restored to its original state. The plaintiff's suit is clearly for dismissal.

Following the demise of the 2nd defendant, the only Counter – Claim that I need to consider is that of the 3rd defendant. He seeks the eviction of the plaintiff from a portion of the land parcel **NO BOKOLI/BOKOLI/1927** measuring ½ acre which he claims the plaintiff has encroached onto since January 2005. In his defence to the 3rd defendant's Counter – Claim, the plaintiff has pleaded in paragraph 3 thereof that his occupation of the land parcel **NO BOKOLI/BOKOLI /1927** *“is as of right and put(s) the defendant to strict proof thereof.”*

In support of his Counter – Claim, the 3rd defendant produced a copy of the title deed to the land parcel **NO BOKOLI/BOKOLI/1927** issued to him on 13th March 2002. It is indicated in the title deed that it was a sub – division of the suit land. As the registered proprietor of the land parcel **NO BOKOLI/BOKOLI/1927**, the 3rd defendant's title is protected by the provisions of **Sections 24 and 25 of the Land Registration Act 2012**. Similar provisions were found in the repealed Registered Land Act under which the said title was issued. The 3rd defendant therefore enjoys all the rights and privileges belonging or appurtenant thereto free from all other interests and claims subject only to any charges or encumbrances if any or other overriding interests recognized in law. I have not heard the plaintiff deny that he is in fact encroaching on ½ acre of the land parcel **NO BOKOLI/ BOKOLI/1927**. His defence to that claim is that he is in fact occupying the land *“as of right.”* This Court having already found that the registration of the 3rd defendant as the proprietor of the land parcel **NO BOKOLI/BOKOLI/1927** was done procedurally, the plaintiff has no right to continue encroaching on any portion of the said land. He is clearly trespassing thereon and among the rights that the 3rd defendant, as the proprietor thereof enjoys, is the right to have him evicted from the ½ acre portion of the land parcel **NO BOKOLI/BOKOLI/1927** which he is unlawfully occupying.

It must also be remembered that this Court is not seized of any appeal from the decision of the Tribunal as confirmed by the Committee. Once the award was adopted by the **WEBUYE COURT**, the avenue which the plaintiff ought to have pursued was an appeal.

The defendants also pleaded in paragraph 4 of their defence that **WEPUKHULU** was merely holding the title to the suit land in trust for them. The issue of trust was also among those that the parties placed before the Court for its determination by their joint statement of issues dated 27th December 2006 and filed on 5th January 2007. I shall therefore also consider it in light of the evidence herein.

As already stated above, the suit land was first registered in the names of **MESHACK** on 26th October 1967 before it was transferred to **WEPUKHULU** on 18th July 1976 and he obtained title thereto on 5th June 1997. In his plaint, the plaintiff pleaded in paragraph 4 that the defendants were only cousins of **MESHACK** and therefore had no right to the suit land. The defendants on the other hand claimed that **MESHACK** was in fact their elder brother who had been given the land by their father **PAULO MWASAME** to administer it on behalf of the family. What this Court has to consider is whether in fact the defendants are entitled to the suit land by way of a customary trust. In **ISACK M'INANGA KIEBIA .V. ISAAYA THEURI M'INTARI & ANOTHER 2018 eKLR**, the **SUPREME COURT** stated that some of the elements which a Court considering a claim based on a customary trust will take into account include: -

- 1. Whether the land in question before registration was family, clan or community land.**
- 2. Whether the Claimant belongs to such family, clan or community.**
- 3. The relationship of the Claimant to such family, clan or group and whether it is so remote and tenuous as to make the claim idle or adventurous.**

I did not hear the plaintiff deny the claim that the defendants are in fact the sons of **PAULO MWASAME** the original owner of the suit land before it was registered. Indeed, I have perused the proceedings before the Tribunal and they stated as much. It is not lost to this Court that the 1st, 2nd and 3rd defendants share the name **MWASAME**. The defendants have also stated that **MESHACK** who was first registered as the proprietor of the suit land was their elder brother and held it in trust for them. The plaintiff claims that in fact the defendants are only cousins of **MESHACK**. Either way, there is cogent evidence that the suit land was indeed family land prior to being registered. Most significantly, however, the defendants' evidence is that they were born on the suit land and indeed continue to occupy their respective portions thereof. That is sufficient evidence upon which this Court can find, which I hereby do, that in fact **WEPUKHULU**, who was the son to the defendants' brother **MESHACK**, only held the suit land in trust for the defendants. The issue of trust is therefore determined in favour of the defendants.

On the issue of costs, the parties herein are family although the plaintiff appears to have been determined to steal a march over his relatives. Nonetheless, and in order not to further draw them apart, I will order that each of them meets their own costs.

Ultimately therefore and having considered all the evidence herein, this Court makes the following final orders: -

- 1. The plaintiff's suit is dismissed.**

2. The 3rd defendant's Counter – Claim is allowed in the following terms: -

a. The plaintiff shall within 30 days of the delivery of this Judgment vacate the ½ acre portion of land that he is occupying on the land parcel NO BOKOLI/BOKOLI/1927.

b. In default of (a), the plaintiff shall be evicted from the said portion of land parcel NO BOKOLI/BOKOLI/1927.

3. Each of the parties to bear their own costs.

Boaz N. Olao.

J U D G E

21st January 2021.

Judgment dated, signed and delivered at **BUNGOMA** this 21st day of January 2021 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

Right of Appeal explained.

Boaz N. Olao.

J U D G E

21st January 2021.