



**Wafula (Suing as the Legal and Personal Representative of the Estate of the Late Patrick Mapango Wafula) v Wabule & another (Environment and Land Appeal 7 of 2022) [2024] KEELC 5128 (KLR) (10 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5128 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT AND LAND APPEAL 7 OF 2022**

**FO NYAGAKA, J  
JULY 10, 2024**

**BETWEEN**

**DINA NAKHUMICHA WAFULA (SUING AS THE LEGAL AND PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE PATRICK MAPANGO WAFULA) ..... APPELLANT**

**AND**

**SIMIYU WABULE ..... 1<sup>ST</sup> RESPONDENT  
FRANK ANDIVA BUTACHI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment and of the decision of Honorable C. M. Kesse, Senior Resident Magistrate, delivered on 20th May 2019 in Kitale Civil Case No. 158 of 1993)*

**JUDGMENT**

**Background**

1. By an Amended Complaint dated 13/12/2018 the Respondent sued the Appellant for the reliefs that, there be a declaration that the 1983 Agreement was null and void; an order of eviction from the suit land; an order for the payment of mesne profits of Kenya shillings 50,000/= per year from the date of filing the suit to the time of judgment and till payment in full and costs of the suit.
2. Briefly, his claim was that one Simiyu Wabule (deceased) was the allottee of all that parcel of land known as number 111/511 in Kosprin Settlement Scheme, having acquired it from the Settlement Fund Trustees. In 1983 the deceased entered into a written agreement with the defendant for the Defendant to purchase the parcel at the consideration of Kenya shillings for 25,000/=. The Defendant paid only Kenya shillings 13,000/=. The transaction did not materialize therefore the Land Control Board consent was never obtained.



3. The 2<sup>nd</sup> plaintiff, Frank A. Butachi, bought the said parcel of land from the Deceased at the sum of Kenya Shillings 80,000/=. Then vide a decree of the court given in Kitale Principal Magistrates Court Civil Case No. 501 of 1992 on 27/11/1992 the land was registered on 12/03/2008 in the 2<sup>nd</sup> Plaintiff's name. The Defendant never challenged the judgment in any way. The 2<sup>nd</sup> Plaintiff denied the Defendant's Counterclaim, by averring that it was time barred by virtue of Section 35 of the Limitation of Actions Act since it was filed on the 15/11/2018, which was 13 years outside of the limitation period.
4. The Defendant denied the claim but he admitted having entered into an agreement with the 1<sup>st</sup> Plaintiff (deceased) for the purchase parcel of land but in the sum of Kshs. 29,625/=, which was paid in full. He averred further that if there was a sale of the suit land to the 2<sup>nd</sup> plaintiff it was fraudulent. He listed particulars of fraud. He then raised a Counterclaim by which he averred that he was the lawful owner of the parcel of land and the plaintiff silently and unlawfully obtained registration of the land in his name. He prayed that the transaction be declared null and void. He also prayed for a declaration that the registration of the land in the name of Frank Andiva Butachi as proprietor be declared unlawful, null and void. He also prayed for any other relief, the court would grant.
5. The suit proceeded to hearing and the trial court delivered its Judgment on 28/05/2019. By the Judgment the Plaintiff's claim was allowed. The court declared null and void the 1983 agreement and issued an order of eviction against the Defendant. He was also ordered to pay costs.
6. Aggrieved by the judgment, the Defendant appealed to this Court on the following grounds:
  1. That the Learned Trial Magistrate erred in law and in fact in entering judgment against the Appellant in total disregard of the evidence on record and particularly the fact that the plaintiff had been peaceful and uninterrupted occupation of the land parcel No. Trans Nzoia/Kosprin/111 since 1984 to date.
  2. That the Trial Magistrate erred in law and in fact in failing to appreciate that the Respondent's title to land parcel No. Trans Nzoia/Kosprin/111 was subject to the unregistered and overriding interests of the appellant.
  3. That the Learned Trial Magistrate erred in law and in fact in declaring the 1983 agreement null and void when there was no evidence on record to support their findings.
  4. That learned trial Magistrate did not fully and adequately appraise himself of the evidence on record, frame the issues for determination and in his finding thereon and hence the judgment falls below the threshold required by law.
7. The Appellant prayed for the appeal to be allowed, the findings and position of the lower court be set aside, the Respondent's suit in the lower court be dismissed and the Counterclaim allowed. He also prayed for the costs of the appeal and those of the suit and Counterclaim.
8. The appeal was disposed of by way of written submissions. The appellant submitted on 26/03/2024 while the respondent filed his dated 19/05/2024.
9. Before this court proceeds to determine the merits or otherwise of the appeal it needs to be satisfied that the appeal is properly before it.
10. The appellant filed the instant appeal against the Judgment delivered by the. Honorable. C. M. Kesse SRM on 28/05/2019 in Kitale Civil Case No. 158 of 1993. The Appellant instituted the instant appeal on 07/04/2022 vide a payment receipt issued on the same date at 16:48 hours. The Memorandum of Appeal was stamped the same date. A simple calculation of the period between when the judgment



was delivered and when the appeal was filed leads one to a conclusion that the latter event occurred two years, eleven months and nine days.

11. Section 79G of the *Civil Procedure Act* provides that,

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

12. This Court has carefully, analysed the Memorandum of Appeal. Nowhere does it purport to indicate that it was filed out of time but the lower court certified that there was delay in preparation and delivery of the decree of the court or with leave of the superior Court to do so or that there was an extension of sorts of the time for the filing of the appeal. I have also studied the entire record of appeal. It does not contain any order granting leave or extension of time to file the appeal out of time. As it is then it means that the Appeal was filed without leave of the Court and cannot stand.

13. In *Nicholas Kiptoo Korir Arap Salat v Independent Electoral & Boundaries Commission & 7 Others*, [2014] eKLR, the Supreme Court of Kenya judges held as follows:

“By filing an appeal out of time before seeking extension of time, and subsequently seeking the court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the court cannot do.

To file an appeal out of time and seek the court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this court will not accept a document filed out of time without leave of the court. It is unfortunate that petition No 10 of 2014 has been accorded a reference number in this court’s registry. This is irregular as the document is unknown in-law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time the much he can do is to annex the draft intended petition of appeal for the Court’s perusal when making his application for extension of time and not to file an appeal and seek to legalize it. Petition No 10 of 2014 having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court’s Record.

14. In the instant appeal, the Appellant did not even attempt to apply for this court to deem the appeal duly filed, although that still would have borne no fruit. In the circumstances I find the appeal incompetent, improperly filed and needs no analysis on the merits thereof. It is a nullity and I strike it out with costs to the Respondent. I direct that the execution of the lower court decree may proceed without the necessity of awaiting the taxation of the costs of the appeal.

15. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA TEAMS PLATFORM THIS 10<sup>TH</sup> DAY OF JULY, 2024.**

**HON. DR. IUR FRED NYAGAKA**

.....



**JUDGE, ELC KITALE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

**In the Presence of**

G. Murunga Advocate ----for the Appellant

Nafula Advocate-----for the Respondent

