



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**

**ELC MISC. APPLICATION NO. 155 OF 1999**

**PETER WAFULA WELIMO – A LEGAL**

**REPRESENTATIVE OF THE ESTATE**

**OF WELIMO MUKATI.....APPLICANT**

**VERSUS**

**MUKHWANA WALUCHO KITUYI.....RESPONDENT**

**R U L I N G**

In the Book of LUKE (NIV) CHAPTER 13 VERSE 24-25, it is written: -

*“Make every effort to enter through the narrow door, because many, I tell you will try to enter and will not be able to. Once the owner of the house gets up and closes the door, you will stand outside knocking and pleading, “Sir, open the door for us.” But he will answer “I don’t know you and where you come from.”*

For those members of staff at this court who caused the disappearance of **BUNGOMA CHIEF MAGISTRATE’S COURT MISC APPLICATION FILE No 49 of 1999** and **BUNGOMA HIGH COURT CIVIL MISC APPLICATION FILE No 155 OF 1999**, when you finally arrive in heaven, you will find the gate closed and when you ask the Angel *“Sir open the door for us,”* he will reply *“Sorry, the keys to the gate are lost like the two files that you hid at Bungoma Court”*.

The long, tortuous and frustrating path that **WELIMO MUKATI** (now deceased and substituted by **PETER WAFULA WELIMO** the Applicant herein) has endured in his quest for justice in the corridors of this court are well captured in the submissions of his counsel **MR OCHARO KEBIRA**. I can do no better than summarize those submissions.

At all material times, the deceased was the first registered proprietor of the land parcel **NO. EAST BUKUSU/SOUTH NALONDO/1036** (the suit land). **MUKHWANA WALUCHO** (the Respondent herein) lodged a claim for the suit land at the **CENTRAL NALONDO LAND DISPUTE TRIBUNAL** (the Tribunal) which found in his favour. The Tribunal’s award was adopted as a judgment at the **BUNGOMA CHIEF MAGISTRATE’S COURT MISC APPLICATION No 49 of 1999** on 9<sup>th</sup> June, 1999. Emboldened by that award, the Respondent had the suit land transferred in his names. Aggrieved by that decision, the deceased filed Judicial Review application in **BUNGOMA HIGH COURT CIVIL APPLICATION NO 155 of 1999**.

Meanwhile, the parties recorded a consent order staying the execution of the decree in the **CHIEF MAGISTRATE’S COURT MISC APPLICATION No 49 of 1999** pending the determination of the Judicial Review proceedings.

By a Judgment delivered on 21<sup>st</sup> January 2001, **MBITO J** quashed the Tribunal’s award. However, all attempts to enforce the orders issued by **MBITO J** were frustrated by the disappearance of both the **HIGH COURT** and **CHIEF MAGISTRATE’S COURT** files. And notwithstanding the fact that the Tribunal’s award had been quashed and all execution proceedings pursuant to the said award had been stayed pending the determination of the Judicial Review proceedings, the Respondent proceeded to have the title deed to the suit land issued in his names on 9<sup>th</sup> August 2005.

The issue regarding the disappearance of the two files was picked up by the then **KENYA ANTI-CORRUPTION COMMISSION (KACC)** but nothing appears to have come out of their investigations. Instead, by their letter dated 13<sup>th</sup> May 2011, the **KACC** referred the matter back to the **DEPUTY REGISTRAR HIGH COURT BUNGOMA** for appropriate action much to the relief, no doubt, of those involved in the disappearance of the two files.

Meanwhile, by an application dated 16<sup>th</sup> July 2011, the Applicant sought two main orders:

**1. A skeleton file be reconstructed in respect to BUNGOMA HIGH COURT CIVIL MISC APPLICATION No 155 of 1999, and,**

**2. THE DISTRICT LAND REGISTRAR BUNGOMA be directed to cancel the title deed issued to the Respondent in respect of the suit land and the same be registered in the names of the Applicant.**

That application was placed before MUKUNYA J. on 12<sup>th</sup> March 2015 (4 years later) and it would appear that even this skeleton file had disappeared for a while because the Judge made an order that it should “*remain under lock and key in the registry.*” However, on 8<sup>th</sup> November 2017, that application was dismissed for want of prosecution under the provisions of **Order 17(2) of the Civil Procedure Rules.**

It is against that background that the Applicant moved to this court by a Notice of Motion dated 2<sup>nd</sup> July 2020 and anchored on the provisions of **Sections 1A, 1B, 3, 3A and 80 of the Civil Procedure Act, Orders 45 Rule 1 and 7, Order 24 Rule 1, 4 (1) and (2) and Order 51 of the Civil Procedure Rules** as well as the overriding objectives of this court. The Applicant sought the following orders: -

**1. That this Honourable court be pleased to review and/or set aside the orders herein which dismissed the matter for want of prosecution pursuant to the provisions of Order 17 (2) of the Civil Procedure Rules with a consequent order reinstating the matter for hearing of limb 2 hereafter.**

**2. That this Honourable court be pleased to revive the instant matter.**

**3. Upon granting of prayer 2 above, this Honourable court be pleased to extend time within which the Applicant be substituted.**

**4. Upon granting of prayer 2, this Honourable court be pleased to substitute the Applicant herein with Peter Wafula.**

**5. That consequently, this Honourable court be pleased to order the COUNTY LAND REGISTRAR BUNGOMA to cancel the title deed that was issued to the Respondent. Consequently, the register be rectified to revert to the name of the deceased WELIMO MUKATI as the owner of LR. EAST BUKUSU/SOUTH NALONDO/1036.**

**6. That this Honourable court be pleased to give any such orders that it shall deem just and equitable that shall lead to a complete closure of this matter.**

**7. That costs of this application be provided for.**

This application is premised on the grounds set out therein and is supported by the affidavit of **PETER WAFULA WELIMO** the Applicant herein.

The gravamen of the application is that the Applicant is the legal representative of the deceased who was at the material time the first registered proprietor of the suit land. That in or about 1999, the Respondent lodged a claim at the Tribunal which awarded him the suit land. That award was confirmed by the **CHIEF MAGISTRATE’S COURT BUNGOMA** in case **No 49 of 1999** but was quashed by the **HIGH COURT IN BUNGOMA CIVIL MISC APPLICATION No 155 of 1999**. In the meantime, the Respondent had already transferred the suit land into his name after which both the files in the Subordinate Court and High Court disappeared and have never been found to – date. This necessitated the opening of this skeleton file vide **BUNGOMA HIGH COURT MISCELLANEOUS APPLICATION No 90 of 2011** which was not opposed. The deceased died on 15<sup>th</sup> March 2015 and by the time the Applicant obtained the grant of Letters of Administration, the suit had abated hence the application to revive it. That although this matter was dismissed for want of prosecution on 8<sup>th</sup> November 2017, no notice of dismissal had been served upon him contrary to what is deponed in the affidavit of service. That when the file was eventually found in the Archives by his Counsel, he was surprised to learn that the case had been dismissed on 8<sup>th</sup> November 2017 for want of prosecution. That the Judicial Review orders that were issued by this Court can only be given effect if the orders sought herein are granted.

Annexed to the supporting affidavit are several documents including the Limited grant of Letters of Administration issued to the Applicant on 13<sup>th</sup> April 2017, the Land Certificate in respect to the suit land dated 14<sup>th</sup> January 1976 in the names of the deceased, the Certificate of Search showing that the suit land is currently registered in the names of the Respondent since 9<sup>th</sup> August 2005, proceedings in **CHIEF MAGISTRATE’S COURT MISCELLANEOUS CIVIL APPLICATION No 49 of 1999** and **BUNGOMA HIGH COURT MISCELLANEOUS CIVIL APPLICATION No 155 of 1999** among others.

The Applicant’s Counsel **MR OCHARO KEBIRA** filed a Supplementary affidavit dated 7<sup>th</sup> April 2020 to which he annexed further documents being the Green Card to the suit and further proceedings in **THE BUNGOMA CHIEF MAGISTRATE’S MISCELLANEOUS CIVIL CASE No 49 of 1999**.

The application is opposed and by his replying affidavit dated 28<sup>th</sup> August 2020, the Respondent has deponed that the decree herein was issued on 16<sup>th</sup> September 2003 and so this application is barred by the provisions of the **LIMITATION OF ACTIONS ACT**. That it is now 17 years since he was registered as proprietor of the suit land and this application should be dismissed with costs.

By a consent letter dated 27<sup>th</sup> July 2020 and filed herein on the same day, the parties compromised on prayers 1, 2, 3 and 4 of the application. This ruling is therefore only on the remaining prayers 5, 6 and 7.

The application was canvassed by way of written submissions which have been filed both by **MR OCHARO KEBIRA** instructed by the firm of **OCHARO KEBIRA & CO ADVOCATES** for the Applicant and by **MS LUCY NANZUSHI** instructed by the firm of **LUCY NANZUSHI & CO ADVOCATES** for the Respondent.

I have considered the application, the rival affidavits and annexures as well as the submissions by Counsel.

In my view, this application can adequately be resolved on a determination of prayer No 5. To place the matter in context, that prayer which I have already alluded to above reads as follows: -

***“That consequently this Honourable Court be pleased to order the COUNTY LAND REGISTRAR BUNGOMA to cancel the title deed that was issued to the Respondent. Consequently, the register be rectified to revert to the name of the deceased WELIMO MUKATI as the owner of L.R EAST BUKUSU/SOUTH NALONDO/1036.”***

It is not in dispute that having heard the Judicial Review application, **MBITO J** quashed the Tribunal’s award which had directed that the suit land be registered in the names of the Respondent. And notwithstanding the fact that the parties had by a consent dated 29<sup>th</sup> June 2000 stayed execution of the Tribunal’s award as adopted by the Subordinate Court, the Respondent presented a Vesting Order based on a verdict that had been quashed, to the Lands Registry and was registered as the proprietor of the suit land. Counsel for the Applicant has submitted, and rightly so in my view, that this amounted to a fraudulent, unlawful un – procedural and irregular conduct on the part of the Respondent. This is because, following the Judgment of **MBITO J** in Judicial Review Application **No 155 of 1999**, the decree that followed was very specific in order No (b) which reads: -

***“The award of the tribunal and all consequential orders based thereon be and are hereby quashed.”***

Once an order is quashed, it ceases to have any legal effect. In **BLACK’S LAW DICTIONARY 10<sup>TH</sup> EDITION**, the term quash is defined as: -

***“To annul or make void; to terminate. To suppress or subdue, to crush.”***

The Judgment by **MBITO J** quashing the Tribunal’s award was dated 22<sup>nd</sup> January 2001 and was delivered on 20<sup>th</sup> March 2001. A decree was issued on 16<sup>th</sup> September 2003 yet, according to the register, the Respondent presented a Vesting Order to the Land Registrar Bungoma on 3<sup>rd</sup> December 2003 and on the strength of the said order, the suit land was registered in the names of the Respondent and on 9<sup>th</sup> August 2005, a titled deed thereto was issued in his names. That action was also in direct violation of the consent dated 29<sup>th</sup> June 2000 which stayed any further proceedings in **CHIEF MAGISTRATE’S COURT BUNGOMA MISCELLANEOUS APPLICATION No 49 of 1999** pending the hearing and determination of the Judicial Review Application in **BUNGOMA HIGH COURT CIVIL APPLICATION No 155 of 1999**. Clearly therefore, the registration of the suit land in the names of the Respondent and the subsequent issuance of the title deed in his names was not only fraudulent but was an abuse of the Court process and blatantly contemptuous.

The challenge in this matter, as I see it, is that the orders which the Applicant seek, and as much as this Court sympathizes with him, cannot be granted in such an application. This is a Judicial Review Application where the Court’s jurisdiction is limited to interrogating the illegality, irrationality or impropriety of the decision made – **PASTOLI .V. KABARE DISTRICT GOVERNMENT COUNCIL & OTHERS 2008 2 E.A 300**. If this Court grants the order sought in prayer No 5 of the application, I would be determining a dispute over ownership of the suit land. The orders that a Court handling a Judicial Review Applications can grant are now spent following the Judgment of **MBITO J**. While I am not in doubt that the Respondent’s conduct was fraudulent in the manner in which he acquired ownership of the suit land, the orders that the Applicant seek would require to be determined in a substantive civil suit. As was held in **R. V. CHAIRMAN AMAGORO LAND DISPUTES TRIBUNAL & ANOTHER EX – PARTE PAUL MAFWABI WANYAMA C.A CIVIL APPEAL No 41 of 2013 (2014 eKLR)**: -

***“Judicial review applications do not deal with the merit of the case but only with the process. For instance, Judicial review applications do not determine ownerships of a disputed property but only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were given an opportunity to be heard before it was made and whether in making the decision, the decision maker took into account relevant matters ..... It follows that where an applicant brings Judicial review with a view to determining contested matters of fact and in effect determine the merits of the dispute, the Court would not have jurisdiction in such proceedings to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suit.”***

Even assuming that there was a civil suit before me, such an order for cancellation of a title could not be granted on the basis of an application. It is not clear why the Applicant did not promptly move to Court and file an ordinary civil suit even as the Judicial Review file kept disappearing.

Counsel for the Applicant has implored this Court to invoke the provisions of **Section 34 of the Civil Procedure Act** which provides that: -

***“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction or the decree shall be determined by the Court executing the decree and not by a separate suit.”***

That is an attractive argument. However, the full decree dated 16<sup>th</sup> September 2003 that followed the Judgment of **MBITO J** reads as follows: -

*“This suit coming up for hearing and final disposal before Justice GIDEON MBITO on 20.11.2000 in the presence of M/S OMAGWA ANGIMA & CO ADVOCATES on the part of the applicant and M/S LUCY NANZUSHI & CO ADVOCATES on the part of the respondent present: -*

***IT IS ORDERED AND DECREED AS FOLLOWS: -***

- a. The application is hereby allowed.*
- b. The award of the Tribunal and all consequential orders based thereon be and are hereby quashed.*
- c. The Tribunal be and is hereby prohibited from ever hearing the claim again.*
- d. The Respondent is hereby ordered to pay costs.*

*GIVEN under my hand and the seal of this Court this 20<sup>th</sup> day of November 2000.*

*Dated this 16<sup>th</sup> day of September 2003.*

**DEPUTY REGISTRAR**

**BUNGOMA”**

It can be seen straight away that the above decree did not provide for the cancellation of title **NO EAST BUKUSU/SOUTH NALONDO/1036** or for the rectification of the register to revert the same to the name of the deceased. Therefore, for this Court to grant the orders sought in the application that would in effect amount to amending the above decree and to import into it a remedy that was not granted by **MBITO J** in his Judgment. Even if this Court was minded to take action to prevent an abuse of its process, it would end up usurping powers that it does not have. No doubt Courts have inherent jurisdiction to do justice and prevent the abuse of its processes. I am guided by the following words from **HALSBURY’S LAWS OF ENGLAND 4<sup>TH</sup> EDITION VOL 37 PARAGRAPH 14** as cited in **KENYA POWER & LIGHTING COMPANY LTD .V. BENZENE HOLDINGS LTD T/A WYCO PAINTS 2016 eKLR**

*“The inherent jurisdiction of the Court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ..... In sum, it may be said that the inherent jurisdiction of the Court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers which the Court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”*

However, I do not understand that to mean that such inherent powers is a jurisdiction that is at large. Clearly, it cannot be exercised arbitrarily or at the whims of the Court. It must be exercised within legal principles and on sound basis otherwise it may result in an injustice. In this case, even assuming that the Court, in the interest of justice, is minded to enforce the Judgment of **MBITO J**, that decree cannot be executed after 12 years as that would be in violation of **Section 4(4) of the Limitation of Actions Act** which provides that an action may not be brought upon a Judgment after the end of 12 years.

**MR KEBIRA** has also urged me to be persuaded by the decision of my brother **SERGON J** in the case of **ANERIKO SIMIYU .V. REDEMPTA SIMATI BUNGOMA HIGH COURT CIVIL APPEAL No 94 of 1999**. That decision was up – held on appeal in **ANERIKO SIMIYU .V. REDEMPTA SIMATI C.A CIVIL APPEAL No 227 of 2004 [2010 eKLR]**. That decision cannot assist the Applicant and is distinguishable from the circumstances of this case for two reasons. Firstly, **SERGON J** was being asked to review a Vesting Order that had been issued in error by the Deputy Registrar and which the Judge felt he had the jurisdiction to correct. Secondly, what was before **SERGON J** was a civil suit in which the ownership and acreage of a parcel of land was in dispute. One of the issues raised in the Court of Appeal was that **SERGON J** erred in revising orders made by **MBITO J**. In up – holding the ruling of **SERGON J**, the Court of Appeal had this to say: -

*“On the contrary, we are of the view that the superior Court **SERGON J** handled the situation admirably in terms of putting to an end what appears to have been a suspicion mutation and sub – division which unfortunately involved some Court officials when it was clear that such transactions are ordinarily handled by the Lands Office and the Survey Office.*

*Consequently, we are of the view that the review was within the ambit of review jurisdiction as captured in the case of **NATIONAL BANK OF KENYA .V. NDUNGU NJAU CIVIL APPEAL No of 1996 (un - reported).**”*

In the matter now before me, there is no suggestion that the decree arising from the Judgment of **MBITO J** is in error. What the Applicant is seeking is infact to issue an order that is completely at variance with that decree. And of course, most significantly, there is no civil suit before me where the ownership of the suit land has been determined. The same argument applies in the case of **NAKURU MACHINERY SERVICES LTD & ANOTHER .V. ECO BANK eKLR 2017** also cited by Counsel for the Applicant.

The up – shot of the above is that while this Court sympathizes with the Applicant’s predicament, there is no basis upon which it can grant the very substantive remedies sought in the Notice of Motion dated 2<sup>nd</sup> July 2020. I must also express my concerns, as did the Court of Appeal in **ANERIKO SIMIYU .V. REDEMPTA SIMATI**, about the involvement of *“some Court Official”* in *“suspicious”* conduct.

Hopefully, they will take heed of my opening remarks in this ruling because it appears that this abhorrent practice has been with us for a long time. Given the circumstances of this case and more so the conduct of the Respondent, he cannot be entitled to costs.

Ultimately therefore, the Notice of Motion dated 2<sup>nd</sup> July 2020 and filed herein on 3<sup>rd</sup> July 2020 is hereby dismissed with no orders as to costs.

**Boaz N. Olao.**

**J U D G E**

**19<sup>th</sup> October 2020.**

**Ruling dated, signed and delivered at BUNGOMA this 19<sup>th</sup> day of October 2020** by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines and as was advised to the parties.

**Boaz N. Olao.**

**J U D G E**

**19<sup>th</sup> October 2020.**