



**Wafubwa v Wepukhulu (Civil Appeal 64 of 2018)  
[2022] KECA 107 (KLR) (11 February 2022) (Judgment)**

Neutral citation: [2022] KECA 107 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPEAL 64 OF 2018  
RN NAMBUYE, F TUIYOTT & PO KIAGE, JJA  
FEBRUARY 11, 2022**

**BETWEEN**

**JAMMIES NYONGESA WAFUBWA ..... APPELLANT**

**AND**

**PATRICK MULONGO WEPUKHULU ..... RESPONDENT**

*(Being an appeal from the judgment & Decree of the Environment &  
Land Court Bungoma (S. Mukunya, J) dated and delivered at Bungoma  
on 13th December, 2017 in BUNGOMA ELC NO. 213 OF 2014)*

**JUDGMENT**

- [1] Under discussion in this appeal is the effect of a transitional provision of the Environment and Land Act, No. 19 of 2011.
- [2] There is a contest between Jammies Nyongesa Wafubwa (the appellant or Wafubwa) and Patrick Mulongo Wepukhulu (the respondent or Wepukhulu) over ownership of a parcel of land described as Kimilili/Kibingei/ 1937. The case of Wafubwa is that he bought this land from one Elam Lusweti Muswahili (now deceased), through an agreement dated 6<sup>th</sup> May, 1985. He says that he thereafter took possession of the land and planted sugarcane on it. Later, he learnt that Wepukhulu was staking a claim over the same parcel, he too as a purchaser.
- [3] The contest in ownership turned into a dispute and Wepukhulu lodged a claim against both the deceased and one Nyongesa under the now repealed Land Disputes Tribunals Act (chapter 303A) . In a judgment of 6<sup>th</sup> February, 1996, the Land Disputes Tribunal in Kimilili Land Tribunal LDT/26 of 1995 held:

“The objector sold this parcel of land to two people viz Patrick Mulongo Wepukhulu and James Nyongesa Wafubwa. It was erroneous (sic) that the objector, by mistake sold land



that belonged to Patrick Mulonge. He ought to have revoked the agreement he had made or written and accepted his money. He should have refunded that cash of Kshs. 6,000/= together with interest or otherwise first before selling the case land to the second objector.”

- [4] Subsequently, the judgment was adopted as a decree of court in Resident Magistrate’s Court at Kimilili 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 Execution 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 disposed with.”

- [5] On the strength of this order, title was issued in favour of Wepukhulu who then became the registered owner of the suit land.

- [6] In the meantime, dissatisfied with the decision of the Land Dispute Tribunal, Wafubwa sought to challenge it but appears to have breached the timelines for appeal set by section 8 of the Lands Disputes Tribunal Act. He was forced to seek leave to lodge an appeal out of time and that leave was granted by the High Court sitting in Bungoma in Misc. Civil Application No 7 of 2003 on 10<sup>th</sup> June, 2003. Following that permission, Wafubwa filed Civil Appeal No. 94 of 2003 before the Western Province Appeals Committee.

- [7] The Land Disputes Tribunals Act was repealed by the provisions of the Environment and Land Act before the appeal was heard.

- [8] By a plaint dated 19<sup>th</sup> November 2014, Wafubwa moved the High Court in Environment and Land Case No. 213 of 2014 Jammies Nyongesa Wafubwa v Patrick Mulongo Wepukhulu challenging the ownership of Wepukhulu to the suit land. In that plaint, in which he pleads that the appeal before the Western Province Appeals Committee was overtaken by events as a result of the repeal of the Land Disputes Tribunals Act, Wafubwa prayed for judgment against Wepukhulu for the following:

“(a) An order of declaration that the Defendant’s title against the plaintiff was obtained irregularly and illegally hence being null and void and order cancelling the Defendant’s title LR NO. KIMILILI/KIBINGEI/937 and the same be reverted in the plaintiff’s name.

(b) An order of eviction and mesne profits against the Defendant.

(c) Costs of the suit.

(d) Any other relief this Honourable Court may deem fit and just to grant.”

- [9] The suit was heard by Hon. Mukunya, J, who in a judgment dated 13<sup>th</sup> December, 2017, dismissed it. In doing so the judge held:

“This land was registered in the name of the defendant through the due process of the law. There are no fraud involved at all. The appeal processes were open to the plaintiff. He should have explored them and pursued them diligently instead of filing a parallel suit while the



original judgment appealed from is still a valid judgment of the court. The prayers sought by the plaintiff cannot be granted at all.”

[10] This appeal impugns that decision and although it raises 7 grounds, these can be collapsed to one substantial issue, namely that the Trial Court erred in law in dismissing the suit by determining the matter on procedural technicalities rather than interrogating the substance of the award of the defunct Land Disputes Tribunal which was null and void as the Tribunal was without jurisdiction to deal with title over land.

[11] The appellant reiterates this ground in argument while the respondent did not file any submissions. The duty of a first appeal Court is expressed in *Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA*;

“..... this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally”

[12] In the pleadings before the trial court, the appellant did not invite the court to set aside the decision of the Land Disputes Tribunal which was subsequently adopted as a judgment in Kimilili Senior Resident Magistrate’s Court. While the appellant pleaded that the Tribunal acted without jurisdiction, he did not mount a frontal attack on the jurisdiction of the Tribunal to determine the matter in the manner in which it did. It was therefore inconceivable that the trial court would make the orders sought by the appellant, which included cancellation by the respondent’s title to the suit land, without first setting aside or quashing the decision of the Land Disputes Tribunal.

[13] More importantly, it was not open to the trial court to make orders that were incongruent with the clear transitional provisions of section 30 of the Environment and Land Act. Those provisions read:

“All proceedings relating to the environment or to the use and occupation & title to land pending before any Court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment & Land Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.

The Chief Justice may, after the Court is established, refer part-heard cases, where appropriate, to the Court.”



[14] Pursuant to those provisions, the Chief Justice made Practice Directions relating to the environment and the use and occupation of, and title to land on 9<sup>th</sup> February 2012 vide Gazette Notice No. 1617. Direction 3 read:

“ All proceedings which were pending before the Provincial Land Appeals Committee as at the date of enactment of the Environment and Land Court Act, 2011, shall be moved to the nearest High Court for hearing and determination.”

By virtue of the express words of section 30 of the Act that direction had the force of law.

[15] The Environment and Land Court Act, 2011 was assented to on 27<sup>th</sup> August, 2011 and commenced three days later on 30<sup>th</sup> August, 2011. As of the later date, the appellant’s appeal No. 94 of 2003 was pending before the Western Province Appeals Committee. All the appellant needed to do was to pursue that appeal before the High Court at Bungoma as the appeal would have been moved to that court on the strength of Direction 3. We notice that one of the grounds of appeal raised by the appellant before the Appeals Committee was that the Land Disputes Tribunal erred in entertaining the dispute when it was bereft of jurisdiction. The other was that the Tribunal acted in excess of jurisdiction by ordering the transfer of his land to the respondent. The appellant had opportunity to urge these issues before the High Court had he taken advantage of the Practice Directions. It was unhelpful for him to commence and pursue parallel proceedings.

[16] The Trial Court cannot be faulted. This appeal is for dismissal and is hereby dismissed with costs.

**DATED AND DELIVERED AT KISUMU THIS 11<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

