REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

E.L.C CASE NO. 136 OF 2012

GATHENYA NGUMI...PLAINTIFF

VERSUS

THE BOARD OF GOVERNORS, BARINGO HIGH SCHOOL............DEFENDANT

AND

NATIONAL LAND COMMISSION...INTERESTED PARTY

JUDGMENT

1. This is a suit which has taken a tragically long time to conclude. The Plaint was filed in this Court on 27/06/2003. Even then, the cause of action arose much earlier – in 1992. The Plaintiff stated that he was afraid to file suit while the former President of the Republic of Kenya, Daniel Arap Moi, was still in power because he feared for his life. Thus, he only filed the present suit as soon as he left office in 2003.

2. Even then, for a variety of reasons, the case has taken very long to conclude. The hearing first took off before Justice Daniel Musinga (as he then was) in September, 2004. The Learned Judge took the evidence of the Plaintiff and then adjourned the hearing at the request of the Defendant's then counsel.

3. By the time the case was listed for cross-examination of the Plaintiff after a few mishaps led to adjournments, Justice Musinga had been transferred out of the station. It fell upon Justice David Maraga (as he then was) to record the cross-examination of the Plaintiff on 08/06/2010. For a variety of reasons, the hearing was adjourned a number of times. As a result, now Chief Justice Maraga left the station before its conclusion.

4. Although the matter was filed in 2003 long before the Constitution of Kenya, 2010 established the Environment and Land Court, the suit was somehow transferred by administrative fiat to the ELC in 2013. While there, it was finally heard and hearing concluded by Justice Yuvinallis Angima (of Embu ELC) who was visiting the station during service week. However, tragedy dogged the file: between the typing of the proceedings in order to forward the file to the Learned Justice Angima for the writing of the judgment, the hand-recorded proceedings of all the evidence taken before the Learned Justice Angima disappeared from the Court file.

5. As a result, Justice Angima was unable to write the judgment. The file was sent back to Nakuru. The Learned Justice Sila Munyao of Nakuru ELC, then, determined that the most appropriate case for the hearing and disposition of the case is the High Court. He therefore re-transferred back the case to the High Court. This is how I became seized of the matter in June, 2018.

6. By the time the file landed on my lap, there were two developments. First, the Honourable Attorney General had come on record in the place of Kipkenei & Co. Advocates as counsel for the Defendant, Baringo High School. Second, as soon as I started handling the matter, the Honourable Attorney General filed an application to enjoin the National Land Commission (NLC) as an Interested Party in the case. Although it was very late in the day, the parties agreed by consent that it would serve the interests of justice for the NLC to be enjoined. The orders were issued and NLC entered appearance through its Principal Legal Officer, C. Masaka. However, despite being served with the pleadings in the case as well as subsequent hearing notices, the NLC neither filed any other document in Court nor attended any of the hearings.

7. When I first started hearing the matter in June, 2018, the parties agreed that the case would proceed from where it had reached before Justice Maraga (as he then was). This meant that the Court would rely on the testimony of the Plaintiff as recorded. I then took the evidence of PW2 and the Plaintiff closed his case. The defence called one witness and called its case after it was unable to call any other witnesses despite being granted several adjournments in order to do so.

8. There appears to be little factual disagreement in the case. The Plaintiff testified that he is the owner of the parcels of land known as Plot

No. 498/12/Sec/Ravine (Plot No. 12) and Plot No. 498/13/Sec/Ravine (Plot No. 13) in Eldama Ravine. The two parcels are adjacent to each other and they both constitute 12 acres of land. The two parcels of land are also adjacent to the Baringo High School. The Plaintiff testified that he purchased the parcels from a Juma Haji.

9. The Plaintiff produced an Indenture dated 30/01/1960 for Plot No. 12 and a copy of an Indenture for Plot No. 13. He testified that he did not have the original of the Indenture for Plot No. 13 because it was taken away by CID Officers on 31/08/1984. The Officers gave him a handwritten letter of even date confirming that they had taken the title from him together with other documents.

10. The Plaintiff testified that he was in possession of the Suit Properties from when he acquired them until sometime in 1991 when he was forced out by Baringo High School. He testified that a group of people invaded his farm and told him that they had been sent by officials of Baringo High School. Upon further inquiry, the Plaintiff says that he was referred to the then Head of State, Mr. Daniel Arap Moi. He felt helpless to do so.

11. Meanwhile, the Plaintiff says that his parcel of land was fenced off and he was required to leave. He was, thus, forced to leave not only the land but the *posho* mill, butchery, shops and farm he was operating on the combined parcels of land. The Plaintiff testified that all the assets on his property at the time were valued at Kshs. 2.5 million at the time they were confiscated. He further testified that his businesses on the property were generating more than Kshs. 150,000/- per month.

12. The Plaintiff testified that the parcels of land have been in possession of Baringo High School since they were taken over from him. He further testified that he was never compensated for the land and other properties forcefully taken over from him. On oath, he denied having received any allotment letter to any land on Nyota Farm as alleged by the Defendant.

13. The Plaintiff’s grandson, Gathenya Ngumi, reiterated the testimony of his grandfather. He testified under a Power of Attorney since by the time the hearing resumed, the grandfather had started losing his memory.

14. The Defendant called one witness. DW1 was Pius Kipror Kibet. He is an ex-official of Baringo High School as well as the Senior Chief of Ravine Location. He testified that the Plaintiff was malicious and opportunistic in filing the case. He told the Court that the Plaintiff accepted the eight acres of ADC Nyota Farm in exchange of 6.03 acres of land in Eldama Ravine and that he was now attempting to back off from that arrangement.

15. The witness also said that the Plaintiff was also trying to take advantage of Former President Moi’s retirement without enjoining him in the suit. He protested that the suit was filed so late in time yet the Plaintiff had an opportunity to complain earlier. Mr. Kibet testified that it is false that there was invasion of the Plaintiff’s land. Instead, Mr. Kibet insisted, the “whole deal was mutual and peaceful.” By this he meant that the Plaintiff was requested to give up his land for the School and that he was given alternative land at Nyota Farm.

16. Mr. Kibet told the Court that the in question was bordering Baringo High School and the former President visited the school and when the students were going to meet him they were also joined by villagers from Nyeri village near the school. The school had apparently witnessed a lot of strikes in the school because the students would just walk to the village and take alcohol and other hard drugs. So this formed the genesis for requesting those in the village to be relocated elsewhere.

17. According to Mr. Kibet, the former President asked the Commissioner of Lands to look for an alternative land for the people who were occupying that land. The land was 12 acres. There was LR 498/IV/12-13. Mr. Kibet testified that the Commissioner of Lands allocated land in Nyota ADC Farm to those displaced by the allocation of land to Baringo High School. According to Mr. Kibet, the occupants of the two parcels were as follows:

a. Mundia - 10 acres

b. Ngumi - 8 acres

c. Ernest - 12 acres

d. Gatebe - 8 acres

e. Murage - 6 acres

18. Mr. Kibet said that this totalled 44 acres. Mr. Kibet insisted that all the five individuals were given land in Nyota Farm to compensate for the land taken away from them. He produced a letter dated 1/4/2003 for the Chairman of the Board, Baringo High School, Mr. E.C. Kotut to the principal Baringo High School. I wish to produce it. He said that the letter names each of the persons who were to be relocated.

19. Mr. Kibet also wanted to produced letters of allotment he said were issued to the five individuals. The Plaintiff’s lawyer objected to the production stating that his client had never received the alleged letter and that someone from ADC needed to attend Court to produce the letters. The State Counsel had the letters marked for identification for production by an official from ADC. However, the trial ended and the Defence closed its case before it had been able to locate any witness from ADC who could testify on its behalf.

20. Mr. Kibet testified that after the parcel was allotted to the School, it took possession of the land. That was in 1990. The land is now used partly as a play field and the other part as a school farm. He claimed that no one had ever come to claim. He insisted that the Plaintiff had been allotted land in Nyota farm and wondered why he waited until the other four people had died before the he came forward with his complaints. Mr. Kibet produced an allotment letter dated 25/01/1991 by the Commissioner of Land allocating the land to Baringo High School.

21. In support of the Defendant's prayer in the counter-claim, Mr. Kibet asked the Court to declare that Plots No. 12 and 13 are the properties of the Defendant school. He also asked the Court to grant a permanent injunction against the Plaintiff and his Agents from claiming the land.

22. On cross-examination, Mr. Kibet admitted that he knew the Plaintiff and that the Plaintiff operated a *posho* mill on the land. He conceded that the *posho* mill was housed in a structure. He also claimed that he personally went to Nyota Farm to see the parcels allocated to those displaced at Eldama Ravine. He, however, conceded that he never went there with the Plaintiff.

23. Given the pleadings in the case and the evidence adduced, the issues arising for determination are simple enough:

a. Were the parcels of land namely Plots No. 12 and 13 owned by the Plaintiff?

b. Were the two parcels taken over and occupied by Baringo High School?

c. If (b) is in the affirmative, was the Plaintiff compensated for the said parcels of land? In particular, was the Plaintiff given and did he accept alternative land at Nyota Farm in Molo?

d. What reliefs, if any, is the Plaintiff entitled to?

24. In the Statement of Defence, the Defendant appeared to deny that the Subject properties (Plots No. 12 and 13) belonged to the Plaintiff. During the trial, the Plaintiff gave straightforward testimony that the two parcels belonged to him and were so registered. He produced a document of title with respect to Plot No. 12 and a letter which credibly explained that his title to Plot No. 13 was taken by CID Officers who gave him the said letter. He also produced receipts and rent demands to show that he had been paying rents for the parcels. What is more is that the Defendant's own witness conceded that the two parcels belonged to the Plaintiff before they were taken over by the Defendant. The witness' only come back was that the Plaintiff had been persuaded to give up the land in exchange for one at Nyota Farm. It is, therefore, my finding that it was established to the required standard of proof that the two parcels of land which are the subject matter of this suit belong to the Plaintiff and are so registered under his name.

25. The next issue for determination is whether the two parcels were taken over by Baringo High School around 1990 and whether the School has occupied them since then. Again, on this issue, the evidence of the Plaintiff and the Defendant's witnesses coincide. Both agree that the School took over the parcels. They differ on actual acreage – with the Plaintiff saying it was 12 acres and the Defendant saying it was 8 acres – but both parties agree that the School, at the instance of the Head of State and the Board, took over the property. Indeed, the Defendant produced, as evidence, a letter of allotment by the Commissioner of Lands allocating the parcels to the Defendant. The Defendant also produced a letter from the then Chair of the Board of Governors, Mr. Kotut, stating that the Plaintiff and the other four individuals whose land had similarly been taken over by the school will be given alternative land. It is, therefore, ineluctable that the only verdict to be returned on this question is that the Defendant did take over the Plaintiff's Suit Properties.

26. If the parties have somewhat common positions on the first two issues – that the land belonged to the Plaintiff and that it was taken over the Defendant around 1990 – they sharply differ on the third issue: whether the Plaintiff was compensated for the land. The Plaintiff insists that the takeover was un-procedural and illegal; that people simply invaded his land and told him to move out. When he inquired, the Plaintiff says, he was told to get answers from the Head of State. He says he was never compensated for the land. He denied categorically that he was given an allotment letter to a parcel of land in Nyota Farm. He challenged the Defendant to show him the parcel of land or produce the title to the said parcel.

27. The Defendant's witness had with him copies of an allotment letters to the Plaintiff and four others. The letters could not be authenticated. An official from ADC Farm who was supposed to come to Court to both authenticate the letters and confirm that the land was, indeed, available, never made it to Court. The Defendant was unable to produce any credible evidence that there was any compensation at all to the Plaintiff. What is more is that if this process was meant to be the process of compulsory acquisition of land for public purposes (a public school), then the procedure used, even for a pre-2010 transaction, was, to say the least, quite casual and in violation of the law.

28. Compulsory land acquisition in the pre-2010 period was governed by section 75 of the repealed Constitution and the Land Acquisition Act. In short, the process of compulsory land acquisition involved the following distinct steps:

a. Identification of land needed for public purposes;

b. Issuance of notice of intended acquisition;

c. Survey of the land to be acquired;

d. Determination of reasonable compensation (including land swap);

e. Publication and service of the notice of compensation award to the owner of the land;

f. Taking of possession by the commissioner of lands;

g. Surrender of documents by the owner of the property; and

h. Payment of reasonable compensation (award) to the owner.

29. Even by the account of the Defendant, these steps were not followed in this instance. The Defendant could not produce any documentation to show that the land was procedurally determined to be for public purposes; what compensation was deemed reasonable; and that the award was communicated officially to the Plaintiff. In short, there is simply no evidence at all that the Plaintiff was compensated for the land. Indeed, there is no evidence that the land was procedurally acquired for public purposes. As things stand, the land still technically belongs to the Plaintiff. I therefore return the verdict, on the evidence available, that the Plaintiff was never compensated for the two parcels.

30. Given these findings, what is the appropriate relief for the Plaintiff? In his Plaint, the Plaintiff made the following prayers:

> *a) A declaration that the plaintiff is still the owner of the parcel of land known as Plot No. 498/12/SEC/RAVINE and NO. 498/13/SEC/RAVINE and that the seizure of the two parcels of land by the Defendant is wrongful, illegal and a nullity.*
>
> *b) An order for mandatory injunction compelling the Defendant to return to the plaintiff his posho mill and the other business items seized from him.*
>
> *c) Damages for loss of business and trespass*
>
> *d) Costs of this suits*
>
> e) *Any other or further relief as the Court may deem fit to grant.*

31. I have already made a finding that the Suit Properties were owned by the Plaintiff and that the seizure was unlawful and un-procedural. I have also made a finding that the State made no compensation to the Plaintiff for the taking. The question that lingers is whether a declaration should issue that the Suit Properties still belong to the Plaintiff going forward – more than twenty-nine years after they were taken over by the Defendant and put to use as part of a public school. In my view, a declaration that part of the land which has been occupied and used by a public school for almost three decades is now private land is inimical to public interest. While every injury must have a remedy, the relief sought here will militate against prudence and public interest. After all, it is acknowledged that the Plaintiff has been out of the Subject Properties for almost three decades. It is also acknowledged that the State as the owner of radical title to property may compulsorily acquire any property for public use. It is also acknowledged that the Subject Properties acquired here, while acquired without following due process, were, in fact put to public use.

32. It seems to me, then, that the more appropriate relief would be one that acknowledges that the private property belonging to the Plaintiff was, in fact, seized from him and put to public use. The State, therefore, owes the Plaintiff the reasonable compensation for the private property so seized. He is, in the first place, entitled to the payment of reasonable compensation for the two parcels of land.

33. In the second place, the Plaintiff is entitled to payment for the structures which were on the land. Both the Plaintiff and the Defendant's witnesses were in agreement that there was a structure which included a *posho* mill. The Plaintiff thought that the structure was worth about Kshs. 2.5 Million in 1990. That appeared to me to be a reasonable figure since it was not contested by the Defendant. I will award that for compensation of the structures attached to the land which the Plaintiff was forced to leave on the Suit Properties. That figure shall attract interests from the date of the suit.

34. Given the nature of the suit and the time it took the Plaintiff to bring suit – even while empathizing with his reasons – the apprehension of suing the Head of State in Kenya in the pre-2003 period, I will not award any general damages for trespass or mesne profits. I will also not award any damages for loss of business. This is because there was very sparse evidence about the business. All we had was a bald statement from the Plaintiff that the businesses used to fetch him about Kshs. 150,000 per month. This head of damages needed to be better particularized and proved for them to be recoverable.

35. The upshot is that the Plaintiff has generally succeeded in this suit. The final disposition shall be as follows:

> **a. The State, through the National Land Commission, is hereby ordered to compensate the Plaintiff for the seizure of Plot No. 498/12/SEC/RAVINE and NO. 498/13/SEC/RAVINE. The two parcels shall, thereafter, be considered to have been compulsorily acquired for public use and belong to the Defendant.**
>
> **b. The State shall also pay the Plaintiff Kshs. 2.5 Million for the structures on the land plus interests from the date of filing this suit.**
>
> c. **The State shall pay the costs of this suit**.

36. Orders accordingly.

Dated and Delivered at Nakuru this 19th day of December, 2019.

....

JOEL NGUGI

JUDGE