



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC NO. 23 OF 2009

formely HIGH COURT CIVIL CASE No. 23 of 2009

DISMAS EGESA OSINYA.....PLAINTIFF

= VERSUS =

COUNTY GOVERNMENT OF BUSIA.....DEFENDANT

JUDGEMENT

1. By a Re-amended Plaint dated 3rd December, 2015 the Plaintiff impleaded the Defendant in this suit and prayed for judgement against it for:

- a. **Special loss/Compensation of K. Shs. 70,000,000/=;**
- b. **mesne profits for loss of user from June 2009@ Kshs 100000 per year until settlement in full;**
- c. **General and/or aggravated damages for the conversion and the trauma resulting from the exhumation of his parent's remains**
- d. **Costs of this suit and interests;**
- e. **Any other just and expedient relief this Honourable Court may deem fit to award ALTERNATIVELY, an order of eviction against the Defendant, their agents, servants, successors and all those persons claiming under or through them and a concurrent order of permanent injunctions against the Defendant, their servants, agents, successors and all those claiming through and/or under them.**

2. The Plaintiff pleaded that although he is the absolute owner and registered proprietor of the land parcel known and L.R NO. BUKHAYO/MUNDIKA/7883 (the **Suit Property**) but the Defendant has, without any colour of right, justifiable cause or consent appropriated to itself about 15 acres of his land and have begun the process of excavating a gigantic sewerage site that would be a sewerage cleansing plant. That this project has unlawfully and compulsorily acquired the Plaintiff's 15 acres leaving a mere 3 acres which has gone into roads that run into and around the intended plant, another portion has been taken up by a seasonal stream and the remainder constitutes a graveyard to the Plaintiff's parents.

3. The Plaintiff particularised the special loss as a result of the Defendant's action as below:

- a. Value of the land illegally compulsorily acquired at K. Shs. 70,000,000;
- b. Loss of earnings per year from the ten acres K. Shs 100,000 and/or mesne profits for loss of user; and
- c. That the Plaintiff claims general and aggravated damages for the conversion and the damages for the trauma resultant from the exhumation of his father's remains.

4. The defendant filed its Statement of Defence on the 24th of November, 2015 denying the Plaintiff's averments that he is the absolute owner of the suit land and/or that the Defendant has unlawfully appropriated the land. The Defendant also took issue that the Plaintiff's suit is time barred by filing a preliminary objection which objection this court directed to be dealt with during the hearing of the main suit. The Defendant urges this Court to dismiss his entire suit with costs.

5. The Plaintiff, **DISMAS EGESA OSINYA** testified on 17th January 2017 as **PW1**. Although the judgement entered in his favour on 5th December 2018 was set aside on 30th July 2020 when the Defendant was granted leave file and serve his witness statements and further list of documents, the Plaintiff was not recalled to give further testimony. Pw1 stated that he was the registered owner of Land Parcel No. BUKHAYO/MUNDIKA/7883 which property was derived from Land Parcel No. BUKHAYO/MUNDIKA/6339 that originally belonged to his late father Joseph Osinya, who passed on sometime in 1974. That ownership in the said parcel passed onto the Plaintiff after he carried out succession proceedings in the estate of his late father. He produced copies of the certificate of official search and title deed of the original property as Plaintiff Exhibits 2 and 3 respectively.

6. The witness continued that L.R No. BUKHAYO/MUNDIKA/6339 was subdivided into land Parcels Nos 7883 and 7884. The Plaintiff produced a Mutation Form, a Letter of Consent from the Land Control Board and Application to the Land Control Board dated 9th June 2004 as Plaintiff Exhibits 4, 5 and 6 respectively. He further testified that he resides with his family at the upper part of the suit property. The sewerage treatment plant was constructed on the lower part of his property rendering it uninhabitable due to the foul smell. The Plaintiff claimed that the Defendant exhumed many bodies of his buried relatives during the construction of the Plant which he later re-buried. He made a complaint to the Defendant but declined a monetary offer from them which was being used as an inducement.

7. **PW1** stated that he neither received any notice from the Defendant before the disputed construction began nor was he compensated. He denied having knowledge of the government's compulsory acquisition of the suit property. He also questioned the legitimacy of the Gazette Notice and mutation form of 1975 availed by the Defence. He observed that the mutation form did not indicate the name of the person undertaking the subdivision and the gazette notice did not make any reference to the suit property. Moreover, the development plan and the particulars therein did not pertain to the suit property.

8. In cross-exam, **PW1** stated that he resided in Uganda from 1970 and his late father passed on in 1974 while he was still in Uganda. It is the Plaintiff's evidence that he was the sole heir to his estate. Sometime in 1988, he came back from Uganda and found large holes dug on the suit property which on further inquiry, he was informed that the Government was responsible for the works which had been carried out by a company called KAMCON. He returned to Uganda until the year 2004 when he returned to Kenya and undertook the subdivision of the land. Based on valuation that was carried out on the suit property at his behest, the Plaintiff places the value of his property at Kshs. 70,000,000.

9. **PW1** asserted that the suit property does not share a boundary with AFTC and Farmview Hotel and that his father was not compensated for its acquisition. He has not been able to cultivate the suit property since the sewerage treatment plant was constructed but used to do so before. He also had no knowledge of the Land Parcel No. BUKHAYO/MUNDIKA/311 which the Defence insinuated was the original number of the property before subdivision.

10. **ISAAC LUNALO WIRUNDA** a land economist and registered valuer based in Nairobi testified as **PW2**. He enumerated his credentials and produced his valuation certificate as well as his practicing certificate in support of qualification to practice. PW2 produced the Valuation Report that had been referred to by the Plaintiff and marked for identification as PEX 7. He informed the Court that he was assigned to value the suit property and conducted the valuation after ascertaining that the land belonged to the Plaintiff. He made reference to a certificate of official search confirming the Plaintiff's ownership. PW 2 further stated that the suit property located near Farm View Hotel measured 6.1Ha, approximately 15.73acres. He took photographs of the property that showed sewer ponds on the suit property. **PW2** opined that the land cannot be used for farming as the sewerage plant has altered its usage. He gave a value to the suit property at Kshs. 70,000,000.

11. On cross-examination, **PW2** stated that he had used the land map of the area, Map Sheet No. 8 but did not annex it to his report. However, on re-examination, he confirmed that the Certificate of Search of the suit property which he relied on indicated the map sheet number as No. 8. He had used the market values of the area to ascertain the value of the suit property at Kshs.70 million but admitted that the method he used to arrive at that figure was not provided in the report. **PW2** further confirmed that the County Council was utilising the land and that he performed a valuation of the suit property as instructed, not from a background check.

12. On re-examination **PW2** informed the Court that he used Google insert and a survey map in his valuation. He confirmed that the suit property is near Busia Town Centre. It is about 1km from Busia County Hospital and is surrounded by several high- and middle-income developments. He stated that the same can be subdivided into 150 plots which can each fetch Kshs.800,000 totaling to about Kshs.120,000,000. He however gave a conservative figure of Kshs.70 million which he deemed reasonable.

13. The defence hearing commenced on the 22nd of February, 2021 with **EVERLYN MBINGI** testifying as **DW1**. She stated that she is the current Chief Officer in charge of Lands and Housing with Busia County Government and she was well aware of the matter particularly the allegation that the Defendant settled on the suit property without compensating the Plaintiff. She continued in evidence that the original number of the suit parcel was L.R No. BUKHAYO/MUNDIKA/1295 and it was taken over for purposes of a sewerage project on 31st October, 1981. She produced a letter from the Commissioner of Lands giving the notice of taking over possession produced as Dex 1. That the land was subdivided and the same property is now occupied by the Defendant's sewerage facilities.

14. Dw1 continued that the land was gazetted on 7th April,1971 vide gazette notice No.1217(Dex 2) for purposes of compulsory acquisition. There was no objection by the Plaintiff or the owner of the land towards the acquisition of the land. The owner of the suit land at the time was Joseph Osinya-deceased who had 4 sons. DW1 produced a letter from the Commissioner of Lands addressed to the DO dated 3/3/1983 confirming the names of the sons of the deceased produced as Dex 3. That a response to this letter was made vide a letter dated 16/3/1983 produced as Dex 4 and the Plaintiff was paid compensation through a letter dated 6/7/1983 addressed to the Chief Valuation Officer and produced as Dex 5. The said letter enclosed a cheque No. Z/A033232 addressed to Dismas Osinya for KShs. 29,900/-.

15. **DW1** continued to state that between 1983 and 2009 they received no complaints from the Plaintiff that the County had taken possession of the land. She concluded by stating that the land had been procedurally acquired, compensation paid and the land developed. As a matter of fact, she stated that all the sewer system in Busia is connected to the sewerage project on the land hence the Plaintiff is being dishonest with his claim.

16. On cross-examination by Mr Ashioya learned counsel for the Plaintiff, **DW1** confirmed that the Government serves notices on property owners of the properties identified for acquisition and that for this particular property, the notice was served through the Gazette Notice for 5.2Ha which is what was acquired. **DW1** also confirmed that she knew Joe Maurice Odundo who was her predecessor and that he attached a green card to the suit property No. 1295 which gives its acreage as 6.14Ha. DW1 agreed that the title size acquired was more than the gazetted portion.

17. **DW1** stated that she had no evidence with her to confirm that the Defendant received the compensation cheque. She admitted that where no compensation is paid, the acquisition becomes null and void. That the letter dated 6/7/1983 from Lands to the Chief Valuation Officer enclosed several cheques while the letter from OP by L.N Muchiri has no addressee in respect of L.R No. BUKHAYO/MUNDIKA/1295 and that the number 1295 is handwritten. She confirmed that the letter was confusing as to whether or not the whole of the land was being acquired. That the letter dated 3.3.1983 was about sharing compensation and the letter dated 16/3/1983 confirms that there were several correspondences exchanged regarding the compensation. That there was no letter from the District Commissioner confirming payment to the Plaintiff although the cheque number can be traced to confirm payment.

18. Upon re-examination, **DW1** reiterated that the land reflected in the gazette notice is the same land that the Government took over and there was never a complaint that the land acquired was more. The Government has been in possession of the land since 1983 to date and the said land was gazetted before acquisition. She concluded by stating that she had no evidence that the cheque addressed in the Plaintiff's name was returned unpaid.

19. **CHARLES MOEMI** testified as **DW2**. He stated that he worked at the Ministry of Physical Planning as a director of land valuation with over 30 years' experience as a valuer. He adopted his statement dated 29/4/2021 as his evidence in chief in this case. He stated that the suit land was acquired under the provisions of the Land Acquisition Act Cap 295, (now repealed). That it was the Minister who directed the Commissioner to acquire the land and the same was gazetted via notice No. 1217 of 7th April, 1981. The Commissioner then gave an award of K. Shs. 66,334 dated 10th July, 1981 which was to be paid out as follows:

a) Deputy Registrar Court K. Shs. 29,900/=;

b) Moses Shikuku, K. Shs. 6,000 (Dex3);

c) Peter Juma, K. Shs. 3275/=;

d) Alfred Bwire K. Shs. 6,524/=;

e) Moses Inyambukho K. Shs 10,216/; and

f) Mokyia K. Shs. 10,419.

20. **DW2** clarified that the KShs. 29,900 was not paid to the Deputy Registrar because the District Commissioner Busia adjudicated on who was to be paid by a letter dated 3/12/1982. That the parcels in question were L.R Nos. 1236,1295 and 1254 (Dex 5). He continued that the Commissioner wrote back seeking clarification (Dex 6) and the District Commissioner responded by stating that they had confirmed the sole recipient was the Plaintiff (Dex 8). The Commissioner wrote back on 15/7/1983 enclosing the payments. That the Plaintiff was paid via cheque No. ZA033232.

21. **DW2** stated further that he has perused the file and found no complaints raised and noted also that the Plaintiff was actively involved in the matter. That acquisition is usually done with the involvement of the local administration and the District Commissioner wouldn't have recommended him if he was not involved in the process. **DW2** concluded by stating that the procedure relating to the acquisition of the land was duly followed and the acquired land was to be used for the purpose for which it was acquired.

22. Upon cross-examination, **DW2** reiterated that he had 30 years' experience as a Government valuer. He confirmed that land ownership is a right that cannot be taken away without following the stringent procedures in place. He explained the procedure as: gazettelement after identification; presentation of proof of ownership by the owner; valuation of the property and a report is prepared and proposal of the compensation by the proprietor of the property. That the valuation is not done in the presence of the owner. He confirmed that the award did not bear the Plaintiff's name and that he had no acknowledgement from the District Commissioner that he received the compensation cheque. That the cheques were written in the names of the owners and not that of the District Commissioner.

23. **DW2** stated further that compulsory acquisition cannot be complete without payment and that the owner has the right to contest an award. DW2 confirmed that he did not have proof of service of the award upon the Plaintiff as this was to be done by the Commissioner of Lands. On the matter of valuation, DW2 stated that there was no need for a valuation to be done as he had not been asked to undertake one and neither did he look at the valuation presented by the Plaintiff making it difficult for him to comment on it.

24. On re-examination, **DW2** confirmed that he is the Chief Valuer. That the awards were prepared and served on the interested persons and there was no contestation of the award. With regards to the identification of the proprietors of the properties, **DW2** stated that this was the role of the District Commissioner.

Submissions

25. The Plaintiff filed his submissions on the 21st of July, 2021 and submitted that his case rest on action by the then Municipal Council of Busia purported to set aside his property for commercial development without following due procedure. That the Defendant proceeded to exhume his parents remains and build a sewerage plant on the property without compensating him for the land as provided under Part VIII of

the Land Act, No. 6 of 2012. He submitted further that the activity that the land has been subjected to negates any possibility of the same reverting to the Plaintiff. While relying on the valuation report by Dunhill Africa filed on the 26.9.2016 the Plaintiff urged this Court to agree with the valuer that the current value of the land is 70,000,000. He prayed for judgement of K. Shs. 70,000,000 plus costs and interests.

26. The Plaintiff relied on the decisions of the following cases:

a. **Shalein Masood Mughai vs. Attorney General & 5 others, Nairobi High Court Petition No. 186 of 2013** where Justice Majanja stated that:

*“The procedures require that appropriate notice be given to the registrar of lands and the fact of acquisition noted on the land register to serve notice on all persons dealing with the land. This procedure the Court of Appeal held in **Commissioner of Lands vs. Coastal Aquaculture Limited** must be adhered to strictly...”*

b. **Machareus Obaga Anunda vs. Kenya Electricity Transmission Co. Limited, Kisii ELC Case No. 197 of 2015**, where the Justice Okongo stated that:

“The Act provided that compensation shall be payable to anyone for use of land of which the person is in lawful or actual occupation...Section 148 (4) of the Act places the duty to pay compensation upon the State Department, County Government, Public Authority...”

27. The Defendant filed its submissions on the 2nd of August, 2021 and submitted that the suit is statute barred by virtue of the provisions of Sections 4 (1) (c) of the Limitations of Actions Act, Cap 22 Laws of Kenya. That whether the suit was for a contract or the recovery of land it is statute barred. That the Plaintiff has been aware of the acquisition since 1981 and 28 years had since lapsed by 2009 when the Plaintiff filed his case and as such it is statute barred. The second issue that the Defendant submitted on was whether the acquisition was done. They submit that the Government through the Commissioner of Lands acquired the suit property measuring 6.14Ha as per the gazette notices nos. 1217 and 1218 dated 7th April, 1981. On the issue of whether the Plaintiff was compensated for the acquisition of the suit property, the Defendant submitted that cheque No. ZA 033232 for the sum of K. Shs. 29,900/- is sufficient evidence that the Plaintiff was compensated in full.

28. The Defendant further submitted that the suit land was lawfully acquired and vested in the Government and the interest of Joseph Osinya Buluma (deceased) or his estate was extinguished by operation of the law and the suit land ceased being part of the estate of the deceased thus the Plaintiff had no right to include it in the said estate. That a caution was placed on the title and the certificate of official search indicates as much. The said caution was never lifted making it difficult for the Plaintiff to subdivide the land already acquired by the Government unless the caution was lifted illegally or fraudulently.

29. The Defendant also submitted that the Plaintiff had sued the wrong party in that the acquiring authority of the Property then was the Commissioner for Lands. The proper party to sue therefore was the Government of Kenya, to be represented by the Attorney General as prescribed under section 40 of the Government Proceedings Act, Cap 40 Laws of Kenya and not the Municipal Council of Busia. That the suit is therefore defective and lacks merit. The Defendant concluded by submitting that the Plaintiff wants to defraud the County Government of the KShs 70,000,000/= as an alleged value of the land and as such the suit must fail for not only being a fraud, but also limitations of actions, misrepresentation and suing the wrong party. They urged this Court to dismiss the suit with costs on higher scale against the Plaintiff.

30. The Defendant sought to rely on the decisions of these cases:

i. **Kennedy Mureithi & another vs. Peterson Karimi Gacewa (2016) eKLR**, where the court while setting aside the ruling of the trial court stated in part that:

‘...the use of may not does not however give the Court the absolute discretion whether or not to apply the limitations period prescribed for various causes of actions. If the legislature intended to give absolute discretion to the Courts, it would have expressly provided so in the Act. The Act should be construed as a whole order to discover the legal meaning of the phrase.’

ii. **Edward Moonge Lengusuranga vs. James Lanaiyara another (2016) eKLR** where the Court held that;

“In the case of Bosire Ongero vs. Royal Media Services (2015) eKLR, the Court held that the issue of limitation goes to the jurisdiction of the Court to ascertain claims and therefore if a matter is statute barred, the Court has no jurisdiction to entertain the same.

I have considered the foregoing and I find that limitation being a substantive law, the provisions of sections 1A and 1B of the Civil Procedure Act cannot be invoked with a view to disregard the provisions of another Act of Parliament. Even if the Limitation of Act was a procedural legislation, section 3 of the Civil Procedure Act provides...”

iii. **Grace Adhiambo Ogaga (suing as legal representative of the estate of Trufena Kemunto Ogaga) vs. William Ochieng Ogaga & 3 others (2018) eKLR**; and

iv. **Kahindi Ngala Mwangandi vs. Mtana Lewa (2014) eKLR** where the Court held that:

“The law of limitation therefore cannot be equated with a law which arbitrarily deprives one of his land because it protects individuals and the society at large from stale claims; prevents land from falling into disuse; facilitates conveyancing, an important component in the growth of the economy of an agrarian society like ours prevents disturbance and deprivation of what may have been acquired in equity and justice by long use and enjoyment. The law on limitation has been accepted in all the open and democratic states and prays a constructive, not a destructive.”

31. The Plaintiff filed further submissions as a response to the Defendant’s submissions on the 23rd of September, 2021. He particularly addressed the issue of the suit being statute barred and submitted that there was no contract between the Plaintiff and the Defendant and as such the six-year limitation period cannot be said to apply to the present suit. He submitted further that the present suit was for compensation and not for recovery of land. He relied on the case of **Joan Akinyi Kabasellah & 2 Others vs, Attorney General & 2 others (2014) Eklr** where it was held...

Determination

32. Having considered the parties’ pleadings, submissions and the applicable law, the issues which in my opinion arise for determination are as follows:

- a. Whether or not the suit property was compulsorily acquired;**
- b. Whether the suit is statute barred;**
- c. Whether the Defendant is non-suited therefore not liable**
- d. Whether any compensation is due to the Plaintiff for the acquisition of the suit property by the Defendant; and**
- e. Who pays for the costs of this suit?**

33. Before delving into the substantive issues that arise, it is imperative that the issue of whether or not the suit is statute barred be dealt with because the issue of limitation questions the jurisdiction of this Court and jurisdiction is everything. Once this is determined then the deliberation or not of the other issues can be done. In the case of **Bosire Ogero vs. Royal Media Services (2015) eKLR**, Hon. Justice R.E Aburili held that:

“The law of limitation of actions is intended to bar the plaintiffs from instituting claims that are stale and aimed at protecting defendants against unreasonable delay in the bringing of suits against them. The issue of limitation goes to the jurisdiction of court to entertain claims and therefore if a Matter is statute barred, the court has no jurisdiction to entertain the same. And even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the court cannot entertain a suit which it has no jurisdiction over. See the case of Pauline Wanjiru Thuo vs David Mutegi Njuru CA 2778 of 1998. It is for that reason that the issue of jurisdiction must be raised at the earliest opportunity. As has been severally held, jurisdiction is everything, without which, a court of law downs its tools in respect of a matter before it the moment it holds the opinion that it is without it. (see Owners of Motor Vessel “Lillian S” vs Caltex Oil (k) Ltd (1989) KLR 1 Per Nyarangi JA. See also the Court of Appeal decision in Owners and Masters of Motor Vessel “Joey” VS Owners and Masters of the Motor Tugs “Barbara” and “Steve B.” [2008]1 EA 367 where, echoing the decision in the case of Owners of Motor Vessel “Lillian S”, the Court of Appeal held, inter alia:

“The question of jurisdiction is threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step...”

34. The better part of the Defendant’s defence is that the suit is time barred because the cause of action arose on the 7th of April, 1981 when the Government issued Gazette Notices No. 1217 and 1218 for the proposed acquisition of the suit property for the construction of a sewerage system within the then Busia Municipality. The Plaintiff testified that he went to Uganda in 1970, came back in 1988 and went back to Uganda the same year, returning to Kenya in 2004 to find that the land had been acquired by the Government and a sewerage plant constructed thereon.

35. Assuming the Plaintiff was unaware of the acquisition of the suit property, he became aware of the defendant’s “illegal activities” on the land in 1988 when the Defendant began undertaking construction of the Sewerage Plant. From his evidence, the Plaintiff stated that:

“In 1988, I came and found somebody had dug holes on my land parcel where parcel No. 7883 is. I asked who had done it and I was told it was the Government. I was young and I went back to Uganda in the year 1988.”

36. The Plaintiff stated that he was young, however it is presumed that he had attained the age of majority because he had earlier stated that he went to Uganda in 1970. Therefore, by 1988, he was 18 years old and capable of bringing a suit in his own name. A copy of his identity card produced in evidence gives the year of birth as 1949. Further, the plaintiff stated that his claim is not for recovery of his land yet he is claiming compensation for the value of the land. The right to be compensated for a lost item in my opinion is the same as being put in a position that is makes you recover what is lost. The reason for seeking the compensation is that the Plaintiff lost his land and want it recovered but because the use it has been put to makes it difficult to get back the land, he opted for compensation. Section 7 of the Limitations of Actions Act provides that

“An action may not be brought by any person to recover land after the end of twelve (12) years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

37. Once a period of 12 years has lapsed, then a party is estopped from bringing an action for the recovery of land unless the Court grants them leave to do so. The Plaintiff became aware of the cause of action in the year 1988 which means by 2000 his right to bring an action had lapsed. In the case of Mtana Lewa vs. Kahindi Ngala Mwagandi [2015] eKLR, the Court of Appeal sitting at Malindi stated thus:

“It is in the public interest and indeed in the interest of justice that an absentee landlord should not be allowed to hang the sword of Damocles over the heads of landless squatters in such times when the commodity is so scarce. Limitation of time for land claims as with claims of any other nature exist for three main reasons which are:

- i. *A plaintiff with a good cause of action ought to pursue it with reasonable diligence (equity does not aid the indolent);*
- ii. *A defendant might have lost evidence over time to disprove a stale claim; and*
- iii. *Long dormant claims have more cruelty than justice in them (Halsbury’s Laws of England, 4th Edition)”*

38. The Plaintiff in his submissions opined that because his claim is not for the recovery of land but for compensation, it falls cannot be said to fall under section 7 of the Limitations of Actions Act and neither can it fall under section 4(1) (c). Section 4(1)(c) provides that:

‘The following actions may not be brought after the end of six years from the date on which the cause of action accrued:

(c) actions to enforce an award;’

39. The Plaintiff did not submit an alternative section under which the suit may fall under. He however quoted section 75(1) of the Old Constitution of Kenya which outlined the conditions for compulsory acquisition of land. The case of Joan Akinyi Kabasellah (supra) as quoted by the Plaintiff has completely different facts from the present suit. The case is a petition for the violation of fundamental freedoms and rights while the present suit is a suit for the compensation and damages of land illegally occupied/acquired. The infringement of fundamental freedoms and rights is not covered by any limitation while compensation for damages whether under contract or tort is provided for exhaustively under section 4 of the Limitations of Actions Act.

40. After the period of limitation, the Plaintiff’s title automatically lapsed. The Plaintiff’s title was extinguished by section 17 of the Limitation of Actions Act which provides thus:

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”

41. The Limitations of Actions Act provides exceptions to the time running in the event of fraud or mistake. This is provided under section 26 of the Act:

Where, in the case of an action for which a period of limitation is prescribed, either—

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.

42. Neither the element of fraud or mistake have been pleaded by the Plaintiff. He only seeks compensation for special & aggravated damages and mesne profits. This places the claim under section 4(1) (a), 4(1) (c) or 4 (1) (e) of the Limitations of Actions Act whose period of limitation is six years. The Plaintiff was aware of the acquisition since 1988 but opted not to pursue the claim until the year 2009 when he filed the present suit for compensation of the suit land acquired by the Government at the current market value. The title of Joseph Osinya Buluma to the said property was extinguished in the year 2000 and as such cannot be said to form part of the estate of the Deceased or the Plaintiff’s property. This was the holding in Peter Mbwe Kibiriti V Board of Management, Kabare Girls Secondary School & 6 Others; Milka Muthoni Wagoko (Interested Party) [2021] where the Court dismissed a suit for compensation for acquisition by the Government because it was brought 53 years after the acquisition was done.

43. Despite my finding that the suit is statute barred, this court will still consider whether the Plaintiff has proved his case on merits i.e that there was no compulsory acquisition of the suit title. The Plaintiff gave a narration of how the suit title was created by stating that he subdivided the original number Bukhayo/Mundika/6339 in the year 2004 to create parcel numbers Mundika/7883 & 7884. That none of these numbers were mentioned in the gazette notices no. 1217 and 1218 relied upon by the Defendant. Indeed, it is true that parcel no 6339 or 7883 is not listed in the gazette notice number 1218 dated 16th April 1981. The Defendant has however explained the relation of the suit land to

L.R. number 1295 which appeared in the said gazette notice.

44. The Defendant included in their list dated 16th January 2017 a letter from the Land Registrar, Busia which stated that parcel number Bukhayo/Mundika/311 originally registered in the name of Joseph Osinya was first subdivided in 1975 to create parcel numbers 1295 and 1296. That there were subsequent subdivisions with parcel number 7883 being one of the subdivisions tracing their history to parcel number 311. Parcel number 1295 appears in the gazette notice number 1218. Although the plaintiff denies that his land was compulsorily acquired, he did not provide evidence to contradict the content of the Land Registrar's letter. During cross-exam of both DW1 and DW2, the witnesses agreed that where acquisition is done without compensation or due process, the same is null & void.

45. The governing statute at the time the acquisition is alleged to have taken place was the Land Acquisition Act Cap 295. The Plaintiff avers that due process was not followed neither was he paid any compensation cheque. In denying the allegation of the Plaintiff, the Defendant produced the gazette notice that served notice of the intended acquisitions. They also produced as Dex 5 to 9 correspondences relating to who owned the lands set for acquisition and the people to receive the payments. The details of the respective letters have already been mentioned in the summary of the evidence given herein above. Save for Dex 3 where parcel number is written in hand on the document, and which also has the awards handwritten, the remainder of the letters the parcel number 1295 is typed. For instance, the letter dated 3rd December 1982 from the District Commissioner to the Commissioner of Lands the names of the owners are clearly set out with Joseph Osinya recorded as owning Bukhayo/Mundika/1295.

46. In Dex 6 is a letter dated 15th July 1983 from the Commissioner of Lands to the District Commissioner, Busia District enclosing cheques for distribution to the people listed therein. The Plaintiff's name appears in the list with his cheque number given as 033232 for amount of Kshs 29900. The Plaintiff denied receipt of this cheque but for the purposes of these proceedings, it confirms that the acquisition process was followed and completed by a cheque being prepared in favour of the Plaintiff. On whether the cheque reached him or not, the benefit of doubt is made in favour of the defendant because the case was brought after undue delay so that tracing the evidence was an uphill task. In any event, the defendant was not the acquiring authority.

47. The plaintiff submitted that his claim is for compensation for the value of the Land and put reliance on the provisions of part VIII of the Land Act. The Defendant is a government with the difference being that it is a devolved government. Section 6(2) (b) of the County Government Act, No. 17 of 2012 provides thus:

Without prejudice to the generality of subsection (1), a county government may;

(b) acquire, purchase or lease any land;

48. As a government or government institution, it is governed by section 5 1 (a) and (c) of the National Land Commission Act, CAP 5D, which is grounded upon Article 67 (2) (a) of the Constitution which provides that for the purposes of acquiring land for carrying out a government project it must acquire the same through the National Land Commission. Although the Defendant argued that it is non-suited, I disagree because the National Land Commission cannot be sued without including the benefiting institution. Secondly, the Defendant has capacity to sue and be sued and the Plaintiff did not have to sue the national government to defend it.

49. The last question for the court to determine is the size of land acquired. From the documents produced in particular gazette notice no 1217, the size of land that was being acquired from the suit title is given as 5.2ha. The size of the entire parcel of land is given (as per the mutation produced in evidence) to be 6.1ha. The Defendant does not deny that it is in occupy of the entire parcel of land hence it occupies a portion of the land measuring approx. 0.9ha without any legal justification. To the extent that the occupation of the unacquired portion has been continuous from 1988 and continues to date, the claim for compensation over the same is not caught with limitation of time

50. The plaintiff is therefore entitled to be compensated for the value of the 0.9ha taking into consideration that the use to which the defendant has put the land to as a sewerage plant for collecting sewer of the entire area originally known as Municipality does not permit the plaintiff to recover the said portion. The Defendant did not provide alternative valuation of the entire land were the Court to find in favour of the Plaintiff. Therefore, in calculating damages payable, this court shall be guided by the Plaintiff's valuation report on record which assessed the value of the entire land which is 15.073ha at Kshs 70,000,000. Therefore, for the 0.9ha, the value going by PW2's assessment is Kshs 4,500,000 which will suffice as compensation for the Plaintiff.

51. From the observations made, it is certain that the Plaintiff is guilty of laches in respect to the size of the suit land measuring 5.2ha and the present suit is time barred. Secondly, it is my finding that the suit is partially without merit to the extent of the 5.2ha where due process was followed in its acquisition with compensation duly paid to the Plaintiff. Consequently, the Plaintiff's suit partially succeeds. I make the following final orders;

a) The plaintiff's claim against the defendant for compensation in the sum of Kshs 70,000,000 being the value of the whole land parcel S.Teso/Angorom/7883 is dismissed.

b) Instead I enter judgement for the Plaintiff to be compensated in the sum of Kshs 4,500,000 for the 0.9ha of the land S.Teso/Angorom/7883 that was not compulsorily acquired and which the Defendant has appropriated.

c) Upon payment of the sum of Kshs 4,500,000 in (b), the Plaintiff's interest in the whole land S.Teso/Angorom/7883 measuring 6.1ha shall be extinguished.

d) Interest on (b) awarded at court rate from the date of this judgement until payment is made in full

b) The Plaintiff is awarded half costs of the suit to be agreed and or taxed

DATED, SIGNED AND DELIVERED AT BUSIA THIS 26TH DAY OF JANUARY, 2022.

A. OMOLLO

JUDGE