



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND COURT CASE NUMBER 48 OF 2021**

**DAN MAURICE HAYA**

**[Suing as the Administrator of the estate of Walter Nyawanda Ajugu (deceased)].....PLAINTIFF**

**VERSUS**

**COUNTY GOVERNMENT OF SIAYA.....DEFENDANT**

**JUDGEMENT**

**Introduction**

1. By way of a plaint dated 11/03/2021 the plaintiff who is the administrator of the estate of Walter Nyawanda Ajugu who is the registered proprietor of land parcel number **L.R. No. South Sakwa/Barkowino [hereinafter “the suit property”]** filed suit against the defendant and sought orders of mesne profits, eviction and damages for trespass against the defendant.
2. In response, the defendant filed a defence dated 30/3/2021 and denied the assertions in the plaint. It admitted that though it had been served with demand notices, it had refused to honour them.

**The plaintiff’s case and evidence**

3. The plaintiff’s case is contained in his plaint, witness statement, documents produced as “**P Exh “1”**” to “**7**” and oral evidence tendered in court during the hearing.
4. In summary, it is the plaintiff’s case that in the year 2003, the plaintiff entered into an agreement with the defunct Bondo Town Council for the council to acquire the suit property. He stated that the defendant took immediate vacant possession of the suit property with the promise that it would formalise the acquisition process at a later stage; which it did not. The plaintiff stated that the defendant put up a slaughterhouse on the suit property however, it had blatantly failed to vacate or compensate him for usage of the suit property. He stated that the defunct council had held a meeting to compensate the registered owner by means of allocating him an alternate parcel of land however, it had not complied with the resolution of that meeting.
5. The 1<sup>st</sup> plaintiff testified as **PW 1** in which he stated that the suit property is registered in the name of his deceased father Walter Nyawanda Ajugu and that the defendant had not compensated his father for utilising the suit property for a period of 18 years. He stated that the defendant had built another slaughterhouse elsewhere which had rendered the suit property idle and wasted.

**The defendant’s case**

6. The defendant’s case is contained in its defence dated 30/03/2021. Though it filed a witness statement of one Jeconia Were who is its Director of Survey, it decided not to call any witness and it proceeded to close its case. In its defence, the defendant stated that it had neither acquired nor been in possession of the suit property.

**The Plaintiff’s submissions**

7. The plaintiff filed written submissions dated 10/12/2021. He framed three issues for determination; (i) whether there was any form of agreement between the plaintiff and the defendant over the suit property, (ii) Whether the defendant was and is in possession of the suit property and, (iii) whether the plaintiff is entitled to mesne profits and other remedies sought.
8. On the 1<sup>st</sup> issue, the plaintiff contended that as evidenced from minutes of the defendant’s then committee, the defendant had agreed to compensate the plaintiff with an alternate parcel of land for utilisation of the suit property. He asserted that the minutes were an acknowledgement of an existing agreement.

9. On the 2<sup>nd</sup> issue, he contended that the minutes, demand letters and the valuation report that he had produced in court was evidence that the defendant had been in occupation of the suit property for a period of over 18 years.

10. On the 3<sup>rd</sup> issue, he asserted that though he had prayed for mesne profits, he had not tabulated the mesne profits payable to him and he estimated that the amount of Kshs.100,000 per month would suffice. He urged the court to direct an inquiry in order to ascertain the kind of profits the defendant was making from the suit property. He placed reliance on **Peter Mwangi Mbuthia & another v Samow Edin Osman [2014] eKLR** and **Karanja Mbugua & another v Marybin Holding Company Limited [2014] eKLR**

#### The Defendant's submissions

11. The defendant filed written submissions dated 16/12/2021. It narrowed down its issues for determination to two; (i) whether the defendant has been in actual possession and use of the suit property and, (ii) whether the plaintiff is entitled to mesne profits.

12. On the 1<sup>st</sup> issue, the defendant submitted that the burden of proving that the defendant was in actual possession of the suit property lay with the plaintiff. It submitted that the committee minutes were not certified copies of the original and it could not be relied upon. It further stated that the plaintiff had failed to prove by evidence that the defendant was in actual possession of the suit property.

13. On the 2<sup>nd</sup> issue, the defendant asserted that a court cannot award both mesne profits and damages and that mesne profits must be pleaded and proved. The defendant placed reliance on the case of **Peter Mwangi Msuitia & another v Samow Edin Osman [2014] eKLR** that held that mesne profits must be stated in figures and a justification of that amount must be given.

#### Analysis and determination

14. I have considered the pleadings together with the parties' respective submissions and evidence tendered in court together with the relevant legal frameworks and jurisprudence. The following are the key issues falling for determination: (i) Whether there was a valid sale agreement between the plaintiff and defendant (ii) Whether the plaintiff has discharged proof that the defendant was in occupation and possession of the suit property and, (iii) Whether the plaintiff's suit was statutory barred. I will sequentially make pronouncements on these three issues.

15. On the first issue, **Section 144** of the retired **Local Government Act** provided that a local government could acquire private property through a two thronged process; either by means of compulsory acquisition or a private agreement with the proprietor of a property.

16. From the evidence tendered in court, the plaintiff alludes that it was the latter process that was followed in his dealings with the defendant on the suit property. The question that begs to be answered is was there a valid agreement between the parties? The plaintiff produced minutes of a meeting as proof of a subsisting agreement. Looking at these minutes, it contends that it will allocate the registered proprietor a plot in Got Winyo Market for surrendering land to the defendant. The suit property is not mentioned in the said minutes. Further, there is no evidence that a surrender of the suit property was ever made because as it stands, the suit property is still registered in the name of the registered owner. The parties did not produce evidence that a Minister ever gave consent for such an exchange of land in accordance with the provisions of **Section 144** of the retired **Local Government Act**.

17. Further, the minutes do not meet the requirements of **Section 3(3)** of the **Law of Contract Act** which provides that no suit shall be brought on a disposition of land unless it is in writing, signed by the parties and attested by a witness. In my view it matters not that the defendant had been let into possession of the suit property or not if the contract pursuant to which the plaintiff was granted possession was not done in accordance with the law. This position of law has been upheld in a line of court decisions including; **Silverbird Kenya Limited –vs- Junction Ltd & 3 Others [2013] eKLR** and **Patrick Tarzan Matu & Another –vs- Nassim Shariff Abdulla & 2 Others [2009] eKLR**.

It is my finding on this issue that the plaintiff has not discharged proof that there was a valid sale agreement between the parties.

18. On the 2<sup>nd</sup> issue, the plaintiff has contended that the defendant had built a slaughter house on the suit property and in support of his case he relied on the minutes of a council meeting. As earlier observed, the minutes do not refer to the suit property. The valuation report which the plaintiff has relied upon merely states that there is an old structure on the premises. Such a statement cannot connote occupation.

19. The plaintiff did not adduce evidence that a "change of user" of the suit property was ever undertaken so as to change the previous usage to bring it in conformity with the purported current usage. This requirement is provided for by **Section 32** of the **Local Government Act**. Equally too, he did not proffer evidence that an application for development was ever made and that it was approved in accordance with the provisions of **Section 31, 32 and 33** of the **Local Government Act**. Consequently, it is the finding of this court on this issue that the plaintiff has not discharged proof that the defendant was in occupation and possession of the suit property.

20. Though the plaintiff has failed to prove his case on a balance of probabilities on the 1<sup>st</sup> and 2<sup>nd</sup> issue, it is the considered view of this court that it is important to address the 3<sup>rd</sup> pertinent issue. From the pleadings of the plaintiff, it is evident that the causes of action arose from contract and tort. The plaintiff contends that the contract that was allegedly entered into between the parties in the year 2003 which was 18 years to the time the plaintiff filed suit. The plaintiff produced as "**P Exh 3**" a demand letter dated 11/6/2010 demanding compensation from the defendant for utilizing the suit property. This implies that as at this date, the purported breach of contract or tortious action, if at all there was one, became ripe in 2010 yet this suit was filed 11 years later. **Section 3(3)** of the **Public Authorities Limitations Act** limits causes of action on contract and tort against government to three years and 12 months respectively and it therefore follows that the plaintiff's cause of action is statutory barred.

21. The court having come to its finding on the three issues, it therefore follows that the plaintiff is not entitled to the orders sought in the

plaint and in the absence of special circumstances, the general principle that costs follow the event will apply meaning the plaintiff shall bear the costs of the suit.

22. Ultimately, the court finds that the plaintiff has failed to prove his case against the defendant to the standard required by the law. The orders sought are declined and the plaintiff shall bear the costs of the suit.

23. It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY**

**DATED, SIGNED AND DELIVERED THIS 10TH DAY OF FEBRUARY, 2022**

**IN THE PRESENCE OF:**

**MR. OCHIENG HOLDING BRIEF FOR M/S AGASNA.**

**NO APPEARANCE FOR THE DEFENDANT.**

**COURT ASSISTANT: ISHMAEL**

**HON. A. Y. KOROSS**

**JUDGE**

**10/2/2022**