



No. 2797

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 144 OF 2003

PETER OUMA OMOLO.....1ST PLAINTIFF

JAMES ODINDO OMOLO.....2ND PLAINTIFF

-VERSUS-

AWENDO TOWN COUNCIL.....DEFENDANT

JUDGMENT

On 11th September, 2003, the plaintiff filed this suit against the defendant praying for a permanent injunction to restrain the defendant from interfering with their rights over land parcel **North Sakwa/kamasoga/1947** hereinafter "**the suit premise**", a declaration that the plaintiffs were the rightful owners of the suit premises, Kshs.71,710/=, costs and interest.

According to the plaint, the suit was informed by the fact that the plaintiff were the initial owners of land parcel **North Sakwa/Kamasoga/33** which parcel of land was later subdivided into **North Sakwa/Kamasoga/1946** and the suit premises. Parcel no.1946 aforesaid was subsequently compulsorily acquired by the commissioner of lands on behalf of Ministry of Agriculture. The plaintiffs' portion of land not compulsorily acquired as aforesaid is the suit premises and measures 1.58 ha and to date is still registered in their names. On or about 2002, the plaintiffs constructed two semi-permanent houses on the suit premises for their occupation and use. However on 22nd and 23rd August, 2003 respectively the defendant through its agents trespassed on the suit premises, demolished the two houses and destroyed all the personal effects belonging to the plaintiffs in the houses valued at Ksh.71,710/=. The suit premises was the only parcel of land that the plaintiffs depended on for cultivation of crops for their daily subsistence, hence the prayers for injunction, declaration and the sum of Kshs.71,710/= as special damages.

The defendant denied the plaintiffs' claim. By an amended statement of defence dated 28th April, 2010, it averred that the original parcel of land **North Sakwa/Kamasoga/33** was wholly acquired by the government for establishing South Nyanza Sugar Company Limited and expansion of Awendo Township. The subsequent subdivision of the same into parcel number 1946 and suit premises in 2002 and the registration of the suit premises into the plaintiffs' names were fraudulent and illegal. The defendant proceeded to give particulars of fraud. The defendant further pleaded that the original parcel of land **North Sakwa/Kamasoga/33** having been wholly compulsorily acquired by the government in 1976, the plaintiffs' right to claim a portion thereof lapsed in 1988 courtesy of the provisions of limitation of Actions Act. Therefore the plaintiffs could not acquire title in the year 2002, hence, the purported acquisition of title to the suit premises by the plaintiffs as aforesaid was illegal and statute barred.

The hearing of the case first commenced on 20th June, 2006 before **Bauni J** (as he then was). The first plaintiff testified. The gist of his evidence was that the original land parcel **North Sakwa/Kamasoga/33** measuring 3.4 ha was registered in their names jointly. By a Gazette Notice number 2996 of 8th October, 1976 issued pursuant to the **Land Acquisitions Act**, the Government gave Notice of its intention to acquire the aforesaid parcel of land amongst others listed in the said Kenya Gazette. The Government duly proceeded and acquired the land and paid the plaintiffs Kshs.11,178/=. However, according to the 1st plaintiff, only 1.82ha out of 3.4 was acquired. They were left with 1.88 ha. He later managed to have 1.88ha registered in their name. He later ran into problems with the defendant over the suit premises. He denied that the suit premises were subject of fresh acquisition for development of Awendo Town Council. Apparently, the District Surveyor and Land Registrar visited the original land parcel and subdivided it into 1946 and the suit premises. The compulsorily acquired portion was the one given parcel No.1946.

On 24th February, 2003 he was issued with the title deed for the suit premises in the joint names of the plaintiffs. He had been using this portion for cultivation. He constructed two semi-permanent houses on the same. The two houses were demolished by the defendant. Inside the house were personal effects valued at Kshs.71,710/= all of which were destroyed. He tendered in evidence the inventory of the items and photographs of the destroyed houses. The defendant did not inform him as to why it had demolished his houses. The acquisition was not done by the defendant. He therefore prayed that his brother and himself be declared the owners of the suit premises, the defendant ordered not to interfere with them, pay compensation for the demolished houses and property destroyed.

Cross-examined by **Mr. Kiseru**, learned counsel for the defendant, he conceded that the whole of the original parcel of land was to be acquired. It measured 3.4 ha. The official search showed that the entire parcel of land was indeed acquired by the government. He stated that he was not aware that compulsorily acquired land cannot revert to the original owner. Shown the green card, he confirmed that the original land had been acquired by the government. He was also not aware that in order for the land acquired by government to revert to the original owner, there must be a degazettement. He could not recall who took photographs of the destroyed houses. The inventory had been prepared by him though he was not a loss adjuster.

PW2 was **Dickson Okore Dulo**, the then District Land Registrar, Migori. Between 2002 and 2006 whilst at Migori, he had received complaints from the plaintiffs with regard to the original parcel of land 33. They claimed that part of the said 33 had been compulsorily acquired by the government but a portion was left for them. Together with the District Surveyor, they visited the suit premises and found that it had not been interfered with. The District Surveyor subdivided the original land. The acreage in use for sugar cane planting was 1.82ha and was being utilised by Sony Sugar Company. The remaining portion was for the plaintiffs. Upon subdivision of the original parcel 33, the resultant parcels were number 1946 and the suit premises. Title deeds were issued on 24th February, 2003. Nobody was claiming the suit premises. There was a restriction though before the subdivision was made but the District Land Registrar

lifted it.

Cross-examined, he conceded that the government acquired the entire original 33 and fully compensated the owners. The search dated 12th February, 2001 confirmed that as 30th May, 1977 the land was government land. That when the government acquires land and the whole portion is not used for purposes intended, the unused portion still remains with the government. Though the chief land registrar had written that parts of the land revert to the owners, a letter perse could not cancel a Gazette Notice.

Asked by court, he responded that it was the surveyor who did the actual survey and gave him the acreage. The government acquired 3.4ha. What the land office did was illegal as there was no degazettment.

The third witness called by the plaintiffs was none other than **Simon Oloo Omolo**, a surveyor at Migori District Surveyor's Office. His evidence was that according to mutation forms, the original parcel was owned by the plaintiffs. It was subdivided in the year 2002 into two parcels 1946 and the suit premises respectively. The suit premises measured 1.58ha whereas 1946 measured 1.82ha. The mutation was registered on 14th October, 2002. At this juncture, the witness was stood down in order to produce a certified copy of the mutation form.

When the hearing of the case next resumed, **Bauni J** had passed on. The case was thereafter taken over by **Gacheche J.** PW3 then produced the certified copy of the mutation form and was cross-examined. He stated that the original 33 was initially 8.4ha. The government acquired the same. The survey was done in 2002. He had not seen a Notice degazetting the acquisition notice. With that the plaintiffs closed their case.

When the case next came up for hearing, **Gacheche J** had left the station on transfer. On 17th February, 2009, parties filed a consent in terms that the case proceeds from where it was left by **Gacheche J.** That consent was adopted by **Musinga J** who had replaced **Gacheche J.** On 6th May, 2010, the case was scheduled for hearing before **Musinga J.** However he reclused himself on the ground that he had dealt with a matter of similar nature and given judgment. It was on that basis that the suit landed on my desk.

On 16th June, 2010, parties appeared before me and agreed that I take over the case form where **Gacheche** had left.

The defence called a total of two witnesses. The first to take the stand was **Peter Wanjala**, a District Surveyor, Migori. He was familiar with original land parcel 33. During October, 2002, the parcel in question underwent a subdivision survey with the intention of separating the portion that was being utilized by the nuclear estate of the defendant from the portion that was still under the registration of the owners. The portion that was to go to the owners happened to be within the perimeter boundary of Awendo Township. The owners of the original 33 were the plaintiffs. The government acquired the entire parcel of land on 8th October, 1976 vide **Gazette Notice No.2996** dated 8th October, 1976: he conceded that there seems to have been an anomaly by the District Land Registrar so that even after the compulsory acquisition was concluded, the names of the original owners were never struck off of the register. Following the re-survey two titles resulted; 1946 and the suit premises. In the light of compulsory acquisition aforesaid, it was only the government which could have asked for a resurvey. The government did not ask for a re-survey. Rather it was the plaintiffs. This was not proper.

Cross-examined by **Mr. Okoth**, Learned Counsel for the plaintiffs, he stated that the Gazette Notice talked of Notice of intention to acquire the land. He went on to state that the government subsequently acquired a portion of the land measuring 1.82 ha. In his opinion, the government only intended to acquire and did not actually acquire the land. Re-examined he clarified that he had not come across any Gazette Notice showing that the government had varied the size of the land it intended to acquire.

DW2, **Eunice Muthoni Kariuki** was the District Physical Planner for Migori. The suit premises fell within Awendo town council. Initially it had been acquired by Government for Awendo. Her office prepared a development plan covering the suit premises which was approved in 1979. She tendered in evidence the plan. The suit premises was earmarked for a school. With that the defendant closed its case.

Parties thereafter agreed to file and exchange written submissions. This was subsequently done. I have carefully read and considered them alongside cited authorities.

From the pleadings, evidence led and the submissions filed, the issues for determination appears to be fourfold;

- **Whether the government compulsorily acquired the whole of original 33 measuring approximately 3.4 hectares**

- **Whether the subsequent subdivision into 1946 and the suit premises was lawful**

- **Whether the plaintiffs have proved their case**

- **Costs**

Dealing with the 1st issue, I have no doubt at all in my mind that the entire original 33 was compulsorily acquired by the government; the testimony of the plaintiff to the contrary notwithstanding. The evidence led by the personnel from the lands office, Migori at various times point irresistibly to my aforesaid conclusion. That oral evidence is supported by the documentary evidence from the same lands office. Starting with the Gazette Notice itself. It is categorical that the Government intended to compulsorily acquire the plaintiffs' parcel of land measuring 3.4 hectares. The original 33 then registered in the name of the plaintiffs and which was the subject of acquisition measured 3.4 ha. The plaintiffs have submitted that what the Government intended was subsequently not actualised. In other words, they are saying that though the government initially intended to acquire their entire original 33, it subsequently chose to acquire only 1.82 ha thereof leaving the suit premises measuring 1.82 ha to them. However, this assertion is not supported by the records in the lands office. The green card and the certificate of official search on record shows clearly that the government became the registered owner of the entire original 33 on 30th May, 1977. The acreage therein is indicated as 3.4 ha. Indeed even the green card tendered in evidence by the plaintiff clearly shows that the government had placed a restriction on the original 33 on the basis that it had compulsorily acquired the whole land. Further the mutation form tendered by the defence recognized the fact of such acquisition. In his testimony, PW2 confirmed that at the time of subdivision, there was a restriction which was lifted by the District Land Registrar. The witness also confirmed that the government acquired the entire original no.33 and the plaintiffs were fully compensated. The cheque issued to the plaintiffs is in the sum of Kshs.11,178. It was issued to them around about 19th May, 1977. This is the same time that the government compulsorily acquired the entire

of original 33. It cannot therefore be correct as the plaintiffs allege that though the government initially expressed intention to acquire the entire original 33, it subsequently only acquired a portion thereof.

All the witnesses summoned from the lands office were in agreement that once land is compulsorily acquired by the government, it belongs to the government even if a portion thereof is unused. It can only revert to the original owner or indeed any other person through the process of degazettment. This was not done in the circumstances of this case. As far as these witnesses were concerned, it was in fact illegal for the plaintiffs to have proceeded subsequently to have the land resurveyed and fresh titles issued in respect of the land which had been compulsorily acquired by the government. The initial gazette notice had not in any event said that the unutilised portion of the acquired land would revert to the plaintiffs. Under cross-examination, PW2 was very succinct. He delivered himself thus “... ***I was aware it was illegal to subdivide the land when there was a Gazette Notice. The proper channel should have (sic) to write for a degazettment. It was never been (sic) done to date...***” And examined by court, he stated “...***the government acquired 3.4 ha. What the land office did was illegal as there was no degazettment...***”. As for DW1, he testified thus “...***there seems to have been an anomaly by the land registrar that even after the said acquisition, the names of the original owners were never sruck out of the register...***”. In the light of compulsory acquisition aforesaid, it is only the government which could ask for a re-survey. The government did not ask for such re-survey. However, the applicants were the plaintiffs. This was not proper.

From all the foregoing, the answer to issue one framed must be obvious; the government acquired albeit compulsorily the whole of original 33. Accordingly, the plaintiffs’ assertion that only 1.82ha thereof were acquired is false and un-supported by both oral and documentary evidence on record.

With regard to the issue number two and flowing directly from what I have stated in the preceding paragraphs, the answer again must be obvious. The subdivision of the original 33 into 1946 and the suit premises and the subsequent transfer of the suit premises into the names of the plaintiff was illegal, null and void. The original 33 having been entirely acquired by government compulsorily and registered in its name on 30th May, 1977, the same could not again have been available to be subdivided and transferred to anybody including the plaintiff without its consent or following the laid down legal machinery. The process would have entailed degazetting the portion of original 33 that the plaintiffs craved for before they could have it hived off from original 33, transferred and registered in their names. This was not done in the circumstances of this case. As correctly submitted by counsel for the defendant, the process which was basically engineered by the District Lands Office at Migori was illegal, a fact which District Land Registrar who had implemented same admitted before this court as unlawful. Indeed under cross-examination PW2 did concede to the following facts as set out by defendant in its submissions:-

- **That the government acquired 3.4ha which was the entire of original 33.**

- **That the plaintiffs were fully compensated.**

- **That if land is acquired by the government for any purpose, the unutilized portion still remains government property.**

- **That a letter of a chief land registrar which the plaintiff used as catalyst to cause the subdivision could not oust or cancel a gazette notice. This can only be achieved or done by subsequent**

degazettment which was never done.

- **That he was aware that it was illegal to subdivide the original 33 when the gazette notice was in force and finally,**

- **That the entire process was illegal and unlawful.**

It is also instructive that though the plaintiffs were aware that the government acquired a portion of their land in 1977 as they claimed, they did nothing to assert their title to the portion they claimed was left to them following the acquisition. They conceded that they only moved to the said portion and erected two semi-permanent houses 25 years after compulsory acquisition of land. What were they doing all these years. Further it was not until 24th February that they acquired the title to the suit premises. The manner they went about the subdivision points irrefragably to fraud. It was so discreet such that even the mutation forms were not signed by the proprietor of the land, in this case, the government as is the normal practice. Indeed even the surveyor in his testimony stated that the name of the surveyor who prepared the mutation is not shown which he admitted was an anomaly.

Arising from all foregoing, this court is not satisfied that the plaintiffs have proved their case on a balance of probability as required by law. In the plaint the plaintiffs have sought for an order of permanent injunction against the defendant and declaration on the basis that the suit premises belong to them. However, as I have been able to establish, the process leading to the acquisition of the suit premises was flawed, illegal, null and void. To grant the prayers sought will be tantamount to this court placing a seal of approval to an illegality. This court cannot sanction such illegality. It cannot reward the plaintiffs mischief.

As regards the claim for special damages of Kshs.71,710/= I cannot award the same for similar reasons. Because of the flawed manner by which they came by the suit premises, they are equally trespassers. The foregoing notwithstanding and even if I was inclined to grant them the special damages, though pleaded, they were not specifically proved as required by law. The inventory tendered in evidence was prepared by the plaintiffs. There is no proof that they owned the alleged property destroyed when the two semi-permanent houses were demolished. It matters not that the inventory was admitted in evidence. It was still incumbent upon the plaintiffs to show that they owned those properties and that they were destroyed. One cannot even tell the value of the alleged two semi-permanent houses destroyed.

Costs ordinarily follow the event. In this case since the plaintiffs have failed to sustain their claim, the same is hereby dismissed with costs to the defendant.

Judgment dated, signed and delivered at Kisii this 4th day of May, 2011.

ASIKE-MAKHANDIA

JUDGE