



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
OF KISII

Civil Case 133 of 2005

NELSON ODUOR ONYANGO 1ST PLAINTIFF
MIJUNGU MISWETA..... 2ND PLAINTIFF
HEZRON OTIENO..... 3RD PLAINTIFF
ROSALINA NYAKURE 4TH PLAINTIFF
JAIRO OWINO ODERA 5TH PLAINTIFF
TIMOTHEO RAYAMO OKWACH 6TH PLAINTIFF
OBIERO OMEDO 7TH PLAINTIFF
ELIUD OGUTU SIRAMA 8TH PLAINTIFF
JOSEPH OMONDI RONGO 9TH PLAINTIFF
JAMES OMONDI ANINDO..... 10TH PLAINTIFF
JOSEPH ODIWUOR OCHOME 11TH PLAINTIFF
JOHN ONYANGO DAWO 12TH PLAINTIFF
CHARLES OBUNGA OKOMBO 13TH PLAINTIFF

VERSUS

TOWN COUNCIL OF AWENDO DEFENDANT

JUDGMENT

On 14th October, 2005 the plaintiffs filed Originating Summons brought under **Order XXXVI rule 1** of the **Civil Procedure Rules** and urged the court to determine seventeen questions which relate to the following parcels of land:

(a) Land Parcel No. North Sakwa/Kamasoga/46

- (b) Land Parcel No. South Sakwa/Waware/ 204
- (c) Land Parcel No. North Sakwa/Kamasoga/34
- (d) Land Parcel No. North Sakwa/Kamasoga/1081
- (e) Land Parcel No. North Sakwa/Kamasoga/1093
- (f) Land Parcel No. North Sakwa/Kamasoga/1111
- (g) Land Parcel No. North Sakwa/Kamasoga/1193
- (h) Land Parcel No. North Sakwa/Kamasoga/1067
- (i) Land Parcel No. South Sakwa/Waware/207
- (j) Land Parcel No. North Sakwa/Kamasoga/45
- (k) Land Parcel No. North Sakwa/Kamasoga/111
- (l) Land Parcel No. South Sakwa/Waware/202
- (m) Land Parcel No. South Sakwa/Waware/168

All the aforesaid parcels of the land shall collectively be referred to as **“the suit lands.”**

The defendant claims to have acquired the suit lands by way of compulsory acquisition through the Government of Kenya. The court was asked to determine the following questions:

“1. Whether the Government of Kenya

compulsorily acquired the above parcels

of land.

2. Whether the said acquisition (if any) by

the Government of Kenya was for the sole

purpose of establishing the nuclear estate

for South Nyanza Company Limited

(hereinafter referred to as “SONY”)

3. Whether the Government upon acquisition

(if any) utilized the whole or part of the

said parcels of land.

4. Whether Sony utilized only part of the said parcels of land leaving the balance which was unfit for the purposes of which the land was compulsorily acquired by the Government of Kenya.

5. Whether the unutilized portion of the above parcels of land reverts back to the original owners and/or their heirs or whether the original owners have rights over and above all others except the Government of Kenya.

6. Whether the respondent has any proprietary rights over and above the applicants in respect of the unutilized portions of the above listed parcels of land.

7. Whether the respondent acquired any proprietary rights from the Government of Kenya in respect of the unutilized portions in the above parcels through Gazettement.

8. Whether the respondent through its officers is guilty of fraudulent and unlawful dealings on the unutilized portions of the said parcels including irregular and unlawful subdivisions, allocations and allotments.

9. Whether the said dealings (if any) should be declared null and void and cancelled.

10. Whether the respondent and/or its officials have any right or authority to evict, demolish or interfere with the applicants' properties and quiet possession of the suit lands.

11. Whether the respondent has any right or interest over the suit property capable of being transferred to a third party.

12. Whether the applicants are the beneficial owners of the unutilized portions of the suit parcels of land and entitled to have the said interests registered as such at the relevant lands registry.

13. Whether an injunction should issue against the respondent by her self, her agents or

workers preventing her from evicting, dispossessing or in any way interfering with the applicants' occupation, use and quiet enjoyment of the unutilized portions of the said parcels.

14. Whether the respondent should compensate the applicants for any losses incurred through her acts of destruction of the applicants' properties on the suit lands.

15. Whether a perpetual injunction should issue restraining the respondent and its agents or workers from interfering with the applicants' quiet possession and use of the suit lands.

16. Whether the respondent should pay costs of this suit.

17. That such orders may be issued by the court as may attain the ends of justice."

Each of the plaintiffs swore an affidavit in support of the originating motion. The contents of the affidavits are more or less the same.

The first plaintiff stated in his affidavit that he was one of the owners of a parcel of land known as **North Sakwa/Kamasoga/46**. The said parcel of land was registered in the names of **Amara Obat, Odang Obat, Samson Oloo Onyango** and himself (**Nelson Oduor Onyango**) with each of the registered proprietors owning one quarter share thereof. The land measured 12.4 Hectares. The said registration was effected on 31st August, 1976. On 24th September, 1976, the Government of Kenya through Gazette Notice No. 2996 compulsorily acquired the aforesaid parcel of land. The Gazette Notice referred to was issued by the Commissioner of Lands and stated in part as hereunder:

"GAZETTE NOTICE NO. 2996

THE LAND ACQUISITION ACT 1968

(NO. 47 OF 1968)

NOTICE OF INTENTION TO ACQUIRE LAND.

IN PURSUANCE of section 6 (2) of the Land

Acquisition Act, 1968, I hereby give notice that

the Government intends to acquire the

following land for the South Nyanza Sugar

Scheme in South Nyanza District:"

In the Gazette Notice the registered owners of the ear marked parcels of land and the area or measurements of the parcels of land that were to be compulsorily acquired were set out. These were ancestral lands belonging to some local people in the said areas. The suit lands were to be acquired solely for the development and/or expansion of South Nyanza Sugar Company Limited (SONY) and not for any other purpose.

The first plaintiff deposed that out of the 12.4 hectares comprising North Sakwa/Kamasoga/46, only about 6.61 hectares were actually utilized for the said purpose and 6.70 hectares was never utilized and SONY does not require the remainder thereof.

The first plaintiff continued to occupy the unutilized portion of the suit land but the defendant attempted to evict him, claiming that it had acquired that land from the Government of the Republic of Kenya. The first plaintiff's contention was that he was still the beneficial owner of the unutilized portion of his ancestral land and the defendant has no proprietary interest over the same. He urged the court to make a declaration to that effect.

On 28th April, 2006 the defendant, through **Barnaba Kosgey**, the then Town Clerk, filed a replying affidavit to the aforesaid Originating Summons. He agreed that the Government of Kenya compulsorily acquired the suit lands for the purpose of development of SONY. He contended that when land is compulsorily acquired by the Government and parties are compensated as was the case herein, the rights of those who were hitherto private land owners become fully extinguished and the land remains state land. If there is any residue of the land after utilization for the purpose it had been acquired for by the Government, the residue thereof reverts to the Local Authority to hold in trust for the Government and the same cannot revert back to the original owners. He further stated that the suit lands are under the jurisdiction of the defendant who, by virtue of the provisions of the Constitution of Kenya and the Land Acquisition Act, has a better right over any residue thereof than any other party. The defendant's claim over the suit land is therefore lawful and the plaintiffs are busy bodies who are merely nursing the nostalgia of their extinguished rights, the deponent stated.

In his testimony before the court, the first plaintiff stated that he is living on the remaining portion of parcel No. 46. He produced a certified copy of the register as an exhibit. In the proprietorship section it is indicated that the Government of Kenya vide Gazette Notices Nos. 2996 of 24th September 1976 and 3737 - 8 of 24th December 1976 acquired the whole of the said parcel of land. He claimed that the defendant was alleging that it had acquired the remainder of the land through Gazette Notice No. 3737 of 24th December, 1976. He produced the said Gazette Notice which was issued by the Commissioner of Lands. A schedule was drawn for parcels of land that were to be acquired within Kamasoga sub-location, Waware sub-location and Waundaha Sub-Location. The first plaintiff said that plot No. 46 within Kamasoga sub-location was not among the parcels of land included in the aforesaid Gazette Notice. A perusal of the Gazette Notice confirms the first plaintiff's contention. He claimed that no enquiry was done before the Government purported to acquire a portion of the said land. He further stated that there was nothing to show that the defendant had acquired any lawful interest over the remaining portion of the land. He wondered why the defendant had purported to have acquired the land and subdivided the same.

In cross examination by Mr. Kiseru for the defendant, the first plaintiff said that he had not sued the Government of Kenya in respect of its acquisition of his land. He conceded that the extract of the land register which he had produced in court showed that the Government took the entire parcel of land. He denied that the defendant was holding the remainder of the land on behalf of the Government of Kenya. He further conceded that in 1976 he was paid for the portion that was compulsorily acquired.

In re-examination, the first plaintiff stated that he was no longer living on the remaining

portion of parcel No. 46 because his home was destroyed by the defendant. Thereafter the defendant subdivided the land into several plots and allocated them to various people. The Government did not give him a title deed for the portion that remained.

The second plaintiff was the registered owner of **Land Parcel No. South Sakwa/Waware/204**. He produced a copy of the title deed thereof. It showed that the approximate area of the land is 1.4 hectares. On the proprietorship section it is noted that the entire land was acquired by the Government vide Gazette Notice No. 3737 of 24th December, 1976. He however wondered how the defendant purported to have acquired the land from the Government since, according to him, the land had been acquired for the benefit of SONY. He also claimed that there was no enquiry made before the land was compulsorily acquired and there was no agreement on the amount of money that was paid as compensation. He further claimed that the defendant pushed him out of his land.

The third plaintiff, **Hezron Otieno**, claimed that he was the only son of **Nyadete Ndege** who was the registered proprietor of **North Sakwa/Kamasoga/34**. He conceded that the said parcel of land was listed in Gazette Notice No. 3737 of 24th December 1976 as one of the parcels of land that had been acquired by the Government for the SONY. He however insisted that the acquisition was not valid. He said that he was still residing on the land and the defendant was not entitled to it.

In cross examination, the third plaintiff said that at the time when he testified his mother was still alive and he did not have any power of Attorney issued by her enabling him to file the case and conduct it on her behalf. He also admitted that no suit had been filed against the Government in respect of the parcel of land.

The fourth plaintiff, **Rosalina Nyakure**, was the registered proprietor of **North Sakwa/Kamasoga/1081** measuring 0.18 hectares. According to the extract of the register which she produced as an exhibit, the Government of Kenya vide Gazette Notice No. 3738 of 24th December, 1976 acquired the whole of the said land. She however claimed that the defendant removed her from the land and no compensation was paid. The defendant had purported to allocate portions of the land to other people. She claimed that the defendant's action was illegal.

In cross examination, the fourth plaintiff stated that she did not have the title deed to the aforesaid parcel of land. She also conceded that she had not sued the Government challenging its acquisition of the said parcel of land.

The fifth plaintiff was the registered proprietor of **North Sakwa/Kamasoga/1093**. The said parcel of land appears on Gazette Notice No. 3737 of 24th December 1976 aforesaid. He alleged that he was not paid any compensation by the Government. He claimed that he was evicted from the land by the defendant.

In cross-examination, the fifth plaintiff said that he did not have any title deed to the said parcel of land and that he had been informed by the area Land Registry that a caution had been registered against the title. He also conceded that he had not sued the Government claiming any compensation.

The eighth plaintiff, **John Eliud Ogutu**, was the registered proprietor of parcel No. **North Sakwa/Kamasoga/1067**. The land measures 1.7 hectares. An extract of the title that was produced in court showed that the land was compulsorily acquired by the Government vide Gazette Notice No. 3738 of 24th December 1978. However, the eighth plaintiff said that he was not aware of such acquisition. He claimed that he was still in occupation of a portion of the land and the Government had not told him to vacate the same. However, the defendant had purported to subdivide the remaining portion of the land and allocate it to various people. He

added that he had no claim regarding the portion of his land that was utilized by SONY in growing sugarcane.

The eighth plaintiff referred to a letter dated 29th February, 1976 that was written by the Chief Land Registrar to the District Land Registrar, Homa Bay. The letter referred to various complaints from people whose lands were compulsorily acquired for the benefit of SONY. They complained that they had not been issued with title deeds for the portions of lands that remained after the compulsory acquisition exercise. The Chief Land Registrar further stated that:

“Some of those remainder portions have been subdivided by the owners but mutations have not been registered by your office for reasons which are not clear. It is also alleged that some of the remainder portions have been allocated to third parties by the Commissioner of Lands despite the fact that the owners are in occupation.

Some of the parcels affected are numbers South Sakwa/Waware/170, 171,153,154,592,594, and 652, and also the land of the late Andrea Amindo (parcel No. North Sakwa/Kamasoga/45).

Please have this matter sorted out once and for all in consultation with the District Surveyor, Migori. In case you do not have all the Gazette Notices concerned, you should arrange to obtain them from the Chief Valuer, Nairobi.”

In cross-examination, the eighth plaintiff said that he was not aware of the compulsory acquisition cited in Gazette Notice No. 3738. He said that he did not receive any compensation from the Government. He further claimed that he was occupying the whole of his land but the defendant has been interfering with it. He alleged that the defendant burnt his home on 25th August 2008 and a report was made to the police.

The tenth plaintiff, **James Omondi Anindo**, said that he was bringing the claim as an heir of the late **Andrea Anindo Nyakachunga** who was the registered proprietor of **North Sakwa/Kamasoga/45**. The said parcel of land measures 13.4 hectares. He said that he had been living on the land since 1954 when he was born. In 2003 his family was forcibly evicted from the land by the defendant. He produced an extract of the title (green card) which showed that the Government acquired 2.802 acres vide Gazette Notice No. 6 of 5th January 1979 for purpose of construction of a road. A copy of the said Gazette Notice was produced as evidence. There is also a restriction that was registered on 18th April 1994 restricting all dealings on the land until the entire land is transferred to the Government as per Gazette Notice No. 3737 of 24th December 1976. In the said Gazette Notice the area shown as having been acquired by the Government is 13.4 hectares. The witness said that apart from the area measuring 2.802 acres which was acquired for purposes of construction of a road, his family continued to occupy the remaining portion of the land and his late father's grave is on that land. He complained that the defendant had unlawfully allocated portions of the remaining land to third parties. He produced a plot card which showed that the defendant had allocated **plot No. 203** to one **Elizabeth Nyamwaya** sometime in 1990. He urged the court to nullify Gazette Notice No. 3737.

In cross examination, the witness stated that his father died in 1977 but since then no letters of administration in respect of his estate had been obtained.

The defendant called one witness, **Josphat Ayonga**, the Town Clerk, DW1. He testified that the suit lands are held by the defendant in trust for the Government of Kenya, the suit lands having been compulsorily acquired. He referred to Gazette Notices Nos.2996 of 24th September, 1976, 3346 of 5th November, 1976, No. 3737 of 24th December 1976 and 3738 of 24th December 1976. However, he did not produce the said Gazette Notices, he only produced extracts of the register in respect of the suit lands (Green Cards) which referred to those Gazette Notices. He said that all the previous owners of the suit lands were lawfully dispossessed of their lands following their compulsory acquisition by the Government.

The witness testified that any residue of the compulsorily acquired lands, that is, the portions that may have remained after attainment of the purpose for which the lands had been acquired, reverted to the Local Authority (the defendant). He cited the provisions of **section 119** of the **Constitution of Kenya**. He said that the Government acquired the suit lands for the benefit of SONY and the plaintiffs had not shown that any portions of the acquired lands remained unutilized. But even if SONY was not using all the lands that had been compulsorily acquired by the Government, the plaintiffs could not claim any portions thereof as they had been fully compensated. He urged the court to dismiss the case.

In cross examination, DW1 said that he had no letter from the President to show that the unutilized portions of the suit lands were to revert to the defendant. He reiterated that the suit lands were acquired for purposes of establishing SONY. The witness said that he was not aware that any portions of the suit lands remained in occupation of the plaintiffs.

The witness was shown a copy of Gazette Notice No. 3737 and he conceded that it does not include parcel **No. North Sakwa/Kamasoga/46** as one of the parcels of land that had been compulsorily acquired by the Government. However, the whole of that parcel of land was included in Gazette Notice No. 2996. The witness further stated that the defendant had no letter from the Commissioner of Lands or the Minister for Lands authorizing the defendant to

evict the plaintiffs from the suit lands. He further stated that he was not aware that the defendant was allocating or selling parts of the suit lands. When the witness was referred to the plot card that had been produced as plaintiff's exhibit 12, he said that the defendant does not receive any money when it allocates plots within its jurisdiction. That notwithstanding, he maintained that the plaintiffs, having been fully compensated by the Government, should vacate the suit lands if they were still in occupation upon which the defendant will be free to allocate those lands. He added that if the plaintiffs wished to apply for such allocation, they will be considered among other applicants.

Mr. Nyasimi for the plaintiffs and Mr. Kisera for the defendant filed written submissions which I have taken into consideration and I need not summarize the contents of the same.

The concept of compulsory acquisition of private land is an exception to the constitutional protection of private property under **section 75** of the **Constitution of Kenya**. **Section 75 (1)** thereof provides as hereunder:

“No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied –

(a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and

(b) the necessity thereof is such as to afford reasonable justification for the causing of hardship that may resort to any person having an

interest or right over the property;

and

(c) provision is made by a law

applicable to that taking of

possession or acquisition for the

prompt payment of full

compensation.”

The **Land Acquisition Act Cap 295** sets out the law under which the Government may compulsorily acquire land for the public benefit. Under **section 3** of the **Act**, whenever the Minister concerned is satisfied that a given parcel of land ought to be compulsorily acquired for a relevant public benefit, he causes a notice thereof to be published in the Kenya Gazette. A copy of the notice is delivered to every person who appears to be interested in the land.

Under **section 6 (1)** of the **Act**, the Minister has to be satisfied that the purpose of acquiring the land complies with the provisions of **section 75 (1) (a)** of the **Constitution** and also that the necessity thereof is such as to afford reasonable justification for the causing of any hardship that may result to any person interested in the land.

Those requirements are absolutely necessary. Such acquisition must be done in strict conformity with the constitutional provisions aforesaid and in absolute good faith. Where the minister is so satisfied he directs the Commissioner of Lands to acquire the land compulsorily. On receiving a direction from the Minister, the Commissioner of Lands causes a notice to be published in the Kenya Gazette and a copy thereof is served upon every person who appears to be interested in the land. The Commissioner is under an obligation to pay full compensation to all persons whose land is so acquired.

It is not in dispute that the Commissioner of Lands published Gazette Notices Nos. 3737 on 24th December, 1976 and 2996 on 8th October, 1976.

The plaintiffs testified that the suit lands were not acquired in their entirety, only portions thereof that were utilized. Their contention was that the unutilized portions of the suit lands ought to have reverted back to them. The defendant's contention on the other hand was that the plaintiffs, having been fully compensated, their interests on the suit lands were extinguished and the remainder of the suit lands that were not taken by SONY became Government property and the defendant was holding the same in trust for the Government. The defendant cited the provisions of **section 119** of the **Constitution**.

I do not think that section of the Constitution is applicable in this case because the suit lands did not form part of Trust Land as defined under **section 114** of the **Constitution**. The suit lands had been demarcated and registered under the relevant provisions of the **Registered Land Act** in names of individuals. **Section 115 (1)** provides that all Trust Land shall vest in the County Council within whose area of jurisdiction it is situated. Under **section 118** of the **Constitution**, where the President is satisfied that the use and occupation of the area of Trust Land is required for any purpose as specified in sub-section **(2)** thereof, he may, after consultation with the County Council concerned, give notice to the County Council that the land

is required to be set apart for use and occupation for those purposes and the land is thereafter set apart accordingly. **Section 119** of the Constitution applies where the land so set apart is no longer required for purposes it was set aside for by the Government. Where that is the case the section requires that the President shall in writing notify the county council and thereupon the setting apart shall cease to have effect.

I have highlighted the provisions of **section 114, 115, 118** and **119** of the **Constitution** to show that the defendant's contention that it is holding portions of the suit lands in trust for the Government of Kenya has no legal basis. Even if the suit lands were once part of Trust Land, upon the demarcation and registration of the same in the names of the plaintiffs, the land ceased to be under the jurisdiction of the local County Council and became private property. At the time when the Government compulsorily acquired the suit lands they were registered in the names of the plaintiffs and/or their family members.

Going back to the provisions of the **Land Acquisition Act, section 17** thereof states as follows:

“Where part only of the land comprised in documents of title has been acquired, the Commissioner shall, as soon as practicable, cause a final survey to be made of all the land acquired.”

From the plaintiffs' evidence, the Chief Land Registrar wrote to the District Land Registrar, Homa Bay, on 29th February, 1996 and drew his attention to the provisions of **section 17** as quoted herein above. The plaintiffs testified that they remained in occupation of the portions of their respective lands that were not put under sugarcane growing by SONY. Majority of them claimed that they were later evicted by the defendant. They claimed that the defendant was allocating portions thereof to third parties. **Section 19 (4)** of the **Land Acquisition Act** provides that after taking possession of land that has compulsorily been acquired the land vests in the Government absolutely free from encumbrances. But here is a situation where the Government or SONY did not take possession of the entire parcels of land which it had compulsorily acquired but only took possession of parts thereof. The plaintiffs remained in occupation of the remainder. Between the plaintiffs and the defendant, who has a better claim over the remainder of the suit lands if the Government, the legal owner, is not interested in the same? Is it equitable for the defendant to evict the plaintiffs out of the land and cause the same to be subdivided and allocated to other people? I do not think so. Equity requires that the unutilized portions be surrendered back to the persons from whom the land was compulsorily acquired, even if they have to pay back a proportionate amount of the compensation sum that had been paid to them. It must be borne in mind that these were private properties that were compulsorily acquired by the Government for a particular purpose. The plaintiffs did not voluntarily choose to sell their ancestral lands to the Government. One of the plaintiffs testified that his late father was buried on the remainder of the land which he was still occupying. It is unconstitutional for the Government to compulsorily acquire a citizen's ancestral land, having paid minimal compensation, utilize only a portion of the land and then allocate the unutilized portion to other people. That is what the defendant is purporting to do, saying that it is holding the land in trust for the Government. In **MOHAMED –VS- COMMISSIONER OF LANDS & 4 OTHERS**, KLR (E&L) 217, Waki, J. (as he then was), was not persuaded that upon compulsory acquisition of land and the consequent vesting of that land in the Government, the land falls to be used by the Government in any manner it desires other than the purpose for which it was so

acquired. He delivered himself thus:

“There is plainly no such *carte blanche* intended in the provisions of the law cited above. The land must be used, subsequent to the acquisition, for a lawful purpose, and as I see it, the only lawful purpose is the one for which it was intended.”

In MUNICIPAL COUNCIL OF SYDNEY –VS- CAMPBELL [1923] AC 338, it was held that:

“A body such as the municipal council of Sydney, authorized to take land compulsorily for specified purposes will not be permitted to exercise its power for different purposes, and if it attempts to do so, the courts will interfere.”

In my view, it is unacceptable that the plaintiffs are forced to sell their lands by the Government so as to establish SONY and later on the defendant forces them out of the unutilized portions so as to allocate the land to other people. I am not convinced that such allocation is done free of charge as DW1 wanted the court to believe. I do not know the basis upon which the defendant assumed any rights over the unutilized portions of the suit lands. It did not obtain any grant to itself from the Commissioner of Lands.

I will now proceed to determine the issues that were raised by the plaintiffs as hereunder:

1. Whether the Government of Kenya compulsorily acquired the suit lands.

The answer is definitely in the affirmative. I have already referred to the two Gazette Notices.

2. Whether the said acquisition was for the sole purpose of establishing the nuclear estate for SONY.

Yes, that was the purpose as clearly indicated in the Gazette Notices aforesaid and admitted by the defendant.

3 & 4 .Whether the Government upon acquisition of the suit lands utilized all or part of the aforesaid lands.

SONY did not utilize the suit lands in their entirety. Some parts were found to be unfit for sugarcane growing or were not put under sugarcane. The plaintiffs' contention to that effect was not challenged.

5. Whether the unutilized portion of the suit lands should revert back to the original owners and/or their heirs and/or whether the original owners have rights over and above all others except the Government of Kenya.

In my view, the unutilized portions of the suit lands should revert back to original owners. Other than the Government of Kenya, no other person has any better right over the unutilized portions than the original owners whom, I would state, have

equitable interest over the same.

6. Whether the defendant has any proprietary rights over and above the plaintiffs in respect of the unutilized portions of the suit lands.

The answer to this question is in the negative. The defendant sought to rely on the provisions of **section 119** of the **Constitution** to show that it is holding the land in trust for the Government but that was not proved. I have already determined that the above cited section of the Constitution cannot assist the defendant since this was not Trust Land.

7. Whether the defendant acquired any proprietary rights from the Government of Kenya in respect of the unutilized portions.

It was not demonstrated by the defendant that it acquired any proprietary rights from the Government of Kenya. There was no grant or any form of authorization from the Commissioner of Lands authorizing the defendant to move into the unutilized portions of the suit lands.

8 & 9. Whether the defendant through her

officers is guilty of fraudulent and

unlawful dealings with the unutilized

portions.

Having said that the original owners of the suit lands have equitable rights over the unutilized portions of the suit lands, and having stated that the defendant did not acquire any proprietary rights over the same, I believe the defendant acted fraudulently in evicting the original owners

from the unutilized portions of the land which they were still in occupation of. The defendant had no right whatsoever to subdivide the said lands and purport to allocate them to third parties. In the circumstances the defendant's dealings are null and void and are ordered cancelled.

10. Whether the defendant has any right to

**evict, demolish or interfere with the
plaintiffs' properties and their quiet
possession of the suit lands.**

In view of what has been stated above, the defendant has no right to evict the original owners from the unutilized portions of the suit lands or interfere with their possession in any manner.

11. Whether the defendant has any right

**or interest over the suit lands capable of
being transferred to a third party.**

The simple answer is no, a person cannot transfer that which he has no legal right over or authorization to transfer. If the defendant was to be allowed to do so, it would be enriching itself and benefiting third parties at the expense of the original land owners.

12. Whether the plaintiffs as the beneficial

**owners of the unutilized portions of the
suit lands are entitled to have the same
interests registered.**

Having established that the unutilized portions of the suit lands were found to be unsuitable for sugarcane farming and were not therefore occupied by SONY, and considering that **section 75** of the **Constitution** requires that once land has been compulsorily acquired ought to be used for the designated purpose only, the original owners of the suit lands ought to be registered as the lawful owners of the unutilized parcels of the suit lands. Those parcels that were not utilized by SONY should be re-surveyed and title deeds thereof issued to the rightful persons by the area Land Registrar.

13 & 15. Whether an injunction

**should issue against the defendant
to restrain her from evicting,
dispossessing or in any way**

interfering with the plaintiffs'

occupation of the unutilized

portions of the suit lands.

Since the plaintiffs and/or the original owners of the suit lands are the beneficial owners of those lands and the defendant has no rights over the same, an injunction ought to, and is hereby issued, restraining the defendant, her agents and/or servants from evicting, dispossessing or interfering with the plaintiffs' occupation, use and enjoyment of the unutilized portions of the suit lands.

14. Whether the defendant should

compensate the plaintiffs for any losses

incurred through her acts of destruction

of their properties.

I believe the original owners of the suit lands or their legal representatives are entitled to compensation by the defendant for the losses incurred through the defendant's acts of destruction of their properties. The plaintiffs may have to file appropriate cases and prove their losses before any compensation is paid to them.

16. Costs of this suit.

The defendant shall bear the costs of this suit.

DATED, SIGNED AND DELIVERED AT KISII THIS 13TH DAY OF NOVEMBER, 2009.

D. MUSINGA

JUDGE.