



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA IN BUSIA**

**ENVIRONMENT AND LAND COURT**

**HCCC NO. 23 OF 2009**

**DISMAS EGESA OSINYA..... PLAINTIFF**

**VERSUS**

**THE COUNTY GOVERNMENT OF BUSIA.....DEFENDANT**

**J U D G M E N T**

**Introduction**

1. By a plaint dated 21<sup>st</sup> July 2009 the Plaintiff – **DISMAS EGESA OSINYA** – moved the Court as the registered owner of LR. No. BUKHAYO/MUNDIKA/7883 seeking relief against the Defendant – **THE COUNTY GOVERNMENT OF BUSIA** - for unlawful appropriation of about 10 acres of his property by its predecessor, the defunct Municipal Council of Busia, for use as a sewerage treatment plant. The Plaint was later amended on 26<sup>th</sup> January 2015 and re-amended on 3<sup>rd</sup> December 2015.

2. The Defendant entered appearance on 31<sup>st</sup> July 2009 and in its Defence to the Amended Plaint dated 12<sup>th</sup> November 2015, denied the Plaintiff's pleadings on ownership of the suit property as well as the construction of a sewerage plant on the said property.

3. The Plaintiff seeks special loss/compensation of Kshs.70,000,000 being the value of the acquired land, general damages for conversation and aggravated damages for trauma, mesne profits of Kshs.100,000 per year for loss of user and in the alternative an order of eviction and a concurrent order of permanent injunction against the defendants, their servants, agents successors and all those claiming under them.

**Plaintiff's case**

4. The Court heard the matter on 17<sup>th</sup> January 2017. The Plaintiff testified as PW1. He stated that he was the registered owner of Land Parcel No. BUKHAYO/MUNDIKA/7883 (*"hereinafter referred to as the suit property"*). The suit 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. Ownership in the said parcel passed onto the Plaintiff after he carried out succession proceedings. He produced copies of the certificate of official search and title deed of the original property as Plaintiff Exhibits 2 and 3 respectively.

5. Land Parcel 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 9<sup>th</sup> 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 which he later re-buried. He made a complaint to the Defendant but declined a monetary offer from them.

6. The Plaintiff 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.

7. The Plaintiff resided in Uganda from 1970. His late father passed on in 1974 and he was the sole heir to his estate. Sometime in 1988, he came back from Uganda and found large holes on the suit property. On further inquiry, he was informed that the Government was responsible for the works which had been carried out by a company called KAMCON. Interestingly, the Plaintiff did not take action nor did he seek court intervention at the time when the works would have been halted. He returned to Uganda and came back in 2004 whereby he carried out the aforementioned subdivision. 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.

8. The Plaintiff 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 property before subdivision.

9. The Plaintiff also called **ISAAC LUNALO WIKRUDA** (PW2), a land economist and registered valuer based in Nairobi. He enumerated his credentials and produced his valuation certificate as well as his practising certificate in support of the same. 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 valued the suit property at Kshs.70,000,000.

10. 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 the 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 indicated 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 a background check.

11. 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 totalling about Kshs.120,000,000. He however gave a conservative figure of Kshs.70 million which he deemed reasonable.

### **Defence case**

12. The Defence did not call any witnesses. The Plaintiff's case therefore remains uncontroverted.

13. After the conclusion of hearing, written submissions were filed by both parties. The Plaintiff filed his submissions on 8<sup>th</sup> February 2018. It was submitted that the Municipal Council of Busia acquired the suit property and had sewerage disposal ponds dug on it which now straddle the entire 15 acres. The Plaintiff's counsel relied on Article 40 of the Constitution of Kenya 2010 that protects one's right to acquire and own property. It was contended that the Defendant's actions were unconstitutional. He also relied on the Land Act No. 6 of 2012 to demonstrate that due process was not followed in the compulsory acquisition of the suit property which was now unsuitable for human habitation and use based on its current state.

14. It was further submitted that the Plaintiff had proved ownership of the suit property. The subdivision undertaken by the Plaintiff was consented to by the Land Control Board of the Municipal Council of Busia and no government agency objected to it. The Plaintiff's Counsel cited the case of **Shalein Masood Mughal Vs Attorney General and 5 others High Court Petition No.186 of 2013** where the Court declared that the Petitioner's rights had been violated by the Respondents' action of taking his land and constructing a road on it. The Court faulted the Respondents for not adhering to the provisions of the Land Acquisition Act (repealed). The decision however differs from the current case and was overturned by the Court of Appeal because part of the suit property was a road reserve whose purpose was designated prior to the Petitioner's acquisition of the property. See **Kenya National Highway Authority Vs Shalien Masoon Mughal & 5 others (2017) eKLR**.

15. The Defendant filed its submissions on 1<sup>st</sup> March 2018. It was submitted that the Plaintiff had failed to prove his case. The Defendant's Counsel took issue with the fact that the Plaintiff did not object to the possession of his land after finding out that it was underway. He contends that the Plaintiff should have produced a demand letter or a notice of intension to sue the Defendant. He further submitted that the Plaintiff conceded that he had previously been offered compensation, the land was uninhabited and fallow when the Defendant took possession of its and that the figure of Kshs.70,000,000 quoted in the valuation report was unsubstantiated.

16. In as much as the Plaintiff's pleadings indicate that the cause of action arose in June 2009, it is evident from his testimony that the Defendant appropriated the suit property and began construction on or about 1988. The following issues arise:

- (i) Whether the Defendant followed due process in compulsory acquiring Land Parcel No. BUKHAYO/MUNDIKA/7883
- (ii) What portion of the suit property was acquired
- (iii) What reliefs if any are available to the Plaintiff
- (iv) Who shall bear the costs of the suit

17. The Plaintiff has proved on a balance of probabilities that he is indeed the registered owner of the suit property. The certificates of official search confirm this position. The mutation form further explains how the initial Parcel No. BUKHAYO/MUNDIKA/6339 was subdivided into Parcel Nos 7883 and 7884. The Letter of Consent from the Busia Municipality Land Control Board apart from signifying consent to the subdivision confirms the dimensions of the suit property. The underlying question is whether the Defendant compulsory acquired the suit property, and if so, whether due process was followed in the undertaking.

18. I have considered the pleadings, evidence, case law provided and rival submissions. This is essentially a case touching on the right to property. The cause of action arose in 1988. The applicable law therefore is former Constitution of Kenya of 1963 and the Land Acquisition Act No. 47 of 1968. The Constitution at Section 75 states as follows:

**“75. Protection from deprivation of property.**

**(1) 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 therefore is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in 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.”**

19. The process of compulsory acquisition is provided for in the Land Acquisition Act (supra). Section 6 thereof requires that a Gazette Notice be published by the Commissioner of Lands of the intended acquisition and that a copy of said notice be served upon all affected parties. The Gazette notice dated 7<sup>th</sup> April 1981 availed by the Defence detailed the purpose for which the land parcels enumerated therein were to be acquired, namely for the “Busia Sewerage Project.” It however did not make reference to the suit property as correctly observed by the Plaintiff. The Plaintiff also avers that he did not receive any notice of the impending acquisition nor was he or his kin ever compensated for it. It can therefore be safely concluded from the evidence on record that the suit property was unlawfully appropriated by the Defendant.

20. As pointed out earlier, the Plaintiff’s case is not controverted. The Defendant did not deem it necessary to bring anybody to testify. The Plaintiff testified and explained his side of the story. He also took the trouble to undertake professional valuation of the suit property. He showed well that he owns the land. He showed well too that the Defendant is on the land. The Defendant seemed to take the position that the law was followed in the acquisition of the suit property. But the law applicable prescribes various steps to actualise compulsory acquisition. Necessarily, each of these steps has, or should have, the required back-up records. And this is so even regarding any compensation paid. That the Plaintiff did not avail the necessary back-up records is an indication that the law was not followed to the letter. This in effect gives plausibility to the Plaintiff’s claim.

21. In matters where compensation is claimed, it is always prudent to suggest a counter or alternative compensatory figure to be considered by the court just in case the decision goes against the sued party. In this matter itself, the Defendant has denied the Plaintiff’s claim. But it would have been prudent to undertake a valuation of the suit property for consideration by the court just in case the resulting decision is not in its favour. The Defendant never did so.

22. As things stand, it is clear to me that due process was not fully followed in the acquisition of the suit property. The Plaintiff is still in legal or registered ownership of the property though the Defendant is the one in occupation and use. And given the extensive and heavy infrastructure put on the land by the Defendant, the Plaintiff can never hope to regain possession or use of the land. It is clear to me that he deserves compensation. And I think compensation should be for the whole of the suit property including any unutilised portion of it. Any such unutilised portion is useful for future expansion and/or use. And given that the only given figure for compensation is the one availed by the Plaintiff, I have no choice but to go by that figure. I therefore award compensation at Kshs.70,000,000 (Seventy Millions Shillings Only).

23. The Plaintiff has sought various other reliefs. For instance, mesne profits or loss of earnings is asked for. The figure for that is put at Kshs.100,000 but it’s not clear whether that is a monthly or yearly figure. And the basis for its assessment is not demonstrated. The submissions also suggest a figure of Kshs.5,000,000 as general damages. Some evidence should have been led to justify the award. The Plaintiff’s evidence however focussed largely on compensation for compulsory acquisition. The other aspects of the Plaintiff’s claim were only given a perfunctory or fleeting attention. I therefore decline to award the damages sought. The only other things that I award the Plaintiff are costs of the suit and interests at court rates.

**Dated, signed and delivered at Busia this 5<sup>th</sup> day of December, 2018.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Plaintiff: Absent

Defendant: Absent

Counsel for Plaintiff: Present

Counsel for Defendant: Present

Court Assistant: Nelson Odame