



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELC NO. 12 OF 2016

JOE DAVID ABETTER.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF BUSIA.....DEFENDANT

J U D G E M E N T

1. By a plaint filed here on 12/2/2016 and dated the same, the Plaintiff – **JOE DAVID ABETTER** – complains that the Defendant – **COUNTY GOVERNMENT OF BUSIA** – has aggrieved him by reneging on an agreement to pay him Kshs.3.5 million as compensation for acquisition of his land parcel No. BUKHAYO/MATAYOS/3644 measuring 0.66Ha. The Defendant is said to have already occupied the land and constructed several structures. The Defendant is said to own the adjacent parcel of land where it operates a health centre. It desired to acquire the Plaintiff’s land to expand the health facility. The process was initiated by the Defendant’s predecessor – **BUSIA MUNICIPAL COUNCIL**.

2. According to the Plaintiff, a written agreement was made and officials of the Defendants predecessor went with it to have it typed. Thereafter they were to consult the relevant office in Nairobi regarding compensation. In the meantime, the Defendant occupied the land and started using it. The Plaintiff waited for his payment and asked for it many times. When he persisted, he neither got the pay nor his copy of agreement that the officials of the Defendants predecessor had gone with. He then decided to come to court. He still has the title deed to the land. The Defendant is evidently in occupation still.

3. The Defendant denied the Plaintiff’s claim vide a defence dated 27/6/2016 filed on 28/6/2016. The defence contains bare denials. It is, if you like, what one may call a defence without substance. It explains nothing; it substantiates nothing. And it did not come accompanied with any witness statement or any documents.

4. The Plaintiff replied to the defence on 28/6/2016, the same day it was filed, and pointed out, *interalia*, that it contained mere denials.

5. The court heard the matter on 11/10/2017. The Plaintiff testified as PW1. He was the only witness. His evidence followed the general thrust of his plaint and during cross-examination, he generally maintained the narrative of his evidence in chief. The defence did not call any witness. No evidence therefore was availed by that side.

6. Both sides filed written submissions. The Plaintiff’s submissions were filed on 17/10/2017. They contain an overview of the Plaintiff’s case, and a brief look at the defence. It was then pointed out that the Plaintiff had shown the court his title. A history of the Plaintiff’s dealings with the Defendant’s predecessor was then given and the court was ultimately told to make a finding that the Plaintiff has proved his case.

7. The Defendant’s submissions were filed on 2/11/2017. The Plaintiff was faulted for not availing the agreement allegedly made between him and the Defendant predecessor. He was also faulted for demanding 4,500,000/= first and then 3,500,000/= later. According to the Defendant, there is no proof that the Defendant entry into the Plaintiff’s land was on the basis of any agreed or proposed sale. It was pointed out that the entry could have been conditional upon an event that happened or failed to happen or that the land could have been a gift or that the occupation was subject to some act to be performed.

8. The court was told that there was no sufficient evidence availed to prove the Plaintiff’s case.

9. I have considered the pleadings, evidence, and rival submissions. It is true the Plaintiff was unable to avail any sale agreement. But he availed his title deed and showed he is the registered owner of the land. It is clear that the Defendant occupies the land. The Defendant availed nothing to displace this position. And once it was demonstrated that the Defendant occupies the land, I think the Defendant was duty-bound to explain how it came into occupation. Such explanation was not forthcoming. Instead, the Defendant, though in occupation, could only engage in conjecture.

10. The attempted explanations seem laughable, nay, even baffling, considering that the Defendant should be a keeper of records. It was explained that the occupation could have been conditional upon some event, or was probably a gift or perhaps subject to some act. This kind of guesswork is possible for somebody without evidence. And that is precisely how the Defendant is.

11. To me, the explanation given for not availing sale of land agreement seem reasonable in absence of contrary evidence from defence. As pointed out, the Defendant is already in occupation of the Plaintiff's land. It has permanent structures there and from the Plaintiff's evidence, plans are afoot to do more developments. All this is happening inspite of the fact that the Defendant is not the title holder to the land. Surely, the law must protect the title holder. To the court, the title held by the Plaintiff is *prima facie* evidence that he is the absolute and indefeasible owner of the land.

12. Such ownership goes with various rights and privileges which cannot be defeated without following due process. The Defendant has been unable to explain how it came to occupy the Plaintiff's land. It has not been able to show that it has compensated the Plaintiff. For how long can the Defendant be allowed to continue occupying and using land owned by a private individual? What would be the legal basis for such occupation or use? Quite clearly, the Plaintiff here is the wronged party. The Defendant has the option of compensating the Plaintiff or vacate the land if it does not deem compensation suitable.

13. The upshot is that the court finds the Plaintiff's claim proved on a balance of probabilities. The Defendant is therefore ordered to do the following: compensate the Plaintiff or vacate the land. Pay the costs of the suit also.

Dated, signed and delivered at Busia this 19th day of April, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

Defendant:

Counsel of Plaintiff.....

Counsel of Defendant.....