



Ojuok & 6 others v County Government of Kakamega & 2 others (Environment & Land Case 31 of 2012) [2024] KEELC 1056 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEELC 1056 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 31 OF 2012
DO OHUNGO, J
FEBRUARY 29, 2024**

BETWEEN

**MOHAMED KWEYA OJUOK 1ST PLAINTIFF
ABISAI ORINA OMOLO 2ND PLAINTIFF
NORA KOMBO TOLOI 3RD PLAINTIFF
SELFA INDAKWA ANANGWE 4TH PLAINTIFF
ABUBAKAR ABDI BIRO 5TH PLAINTIFF
JACOB RATANDE MUKABANA 6TH PLAINTIFF
TAWAKAL ABDULRAZAK BURHAN 7TH PLAINTIFF**

AND

**COUNTY GOVERNMENT OF KAKAMEGA 1ST DEFENDANT
MUMIAS NUBIAN COMMUNITY 2ND DEFENDANT
HON ATTORNEY GENERAL 3RD DEFENDANT**

JUDGMENT

1. The plaintiffs moved the court through a plaint filed on 11th December 2012 wherein they averred that they were the owners of the parcel of land known as South Wanga/Ekero/772 which was allocated to them by Paramount Chief Nabongo Mumia in 1936 and which upon adjudication in 1967 became South Wanga/Ekero/772 (the suit property) which was trust land reserved for Nubian estate and held by the second defendant as a trustee. That the first defendant illegally subdivided the parcel into South Wanga/Ekero/2363 and South Wanga/Ekero/2364 and that no compensation was paid to the inhabitants.



2. The plaintiffs therefore prayed for judgment against the defendants for an order that

“the land designated as South Wanga/Ekero/772 which was illegally subdivided by the first defendant to South Wanga/Ekero/2363 and South Wanga/Ekero/2364 which is community trust land be given back to us as Nubian estate.”

They also prayed for costs and any other relief the court may deem fit to grant.
3. The first defendant filed amended statement of defence and counterclaim in which it averred that the plaintiffs lack locus standi to bring the suit. That the suit property was compulsorily acquired by the government and was therefore public land and that removal of a restriction on 8th October 2002 by the Land Registrar Kakamega as well as subdivision of the suit property into South Wanga/Ekero/2363 and South Wanga/Ekero/2364 was illegal and fraudulent. The first defendant therefore prayed for an order of cancellation of the subdivision of the suit property into South Wanga/Ekero/2363 and South Wanga/Ekero/2364, for reversion to the suit property under ownership of the first defendant and for an order that the third defendant

“to authorize the Chief Valuer to produce status statement on compulsory acquisition as per restriction of 11/6/1987.”
4. The second defendant filed statement of defence in which they averred that the plaintiffs lack locus standi since all save for two are neither Nubians nor trustees of the community as per Mumias Nubians Trust Deed. That the plaintiffs are not entitled to the reliefs sought and that the second defendant has no objection to the land in dispute being developed through the Ministry of Land provided that the process is carried out through the trustees and officials of Mumias Nubian Community Trust. They therefore urged the court to strike out the suit.
5. The third defendant did not file any defence.
6. At the hearing, Abubakar Abdi Biro testified as the sole witness in respect of the plaintiffs’ case. Pursuant to a consent recorded by the parties on 3rd April 2019, he adopted Mohamed Kweya Ojuok’s (deceased’s) witness statement dated 24th October 2016 as his testimony and produced, as Plaintiffs’ exhibits, copies of the documents listed as item numbers 1 to 9 in the Plaintiffs’ list of documents filed on 11th December 2012. He further produced the documents listed as item numbers 2, 9 and 11 to 13 in the Plaintiffs’ list of documents dated 24th October 2016 as exhibits and stated that Kakamega County Council became the registered proprietor of the suit property on 21st April 1967 to hold it in trust for the Nubian Community and that a restriction pending compulsory acquisition was registered against the parcel on 22nd June 1967 a restriction was registered but the compulsory acquisition process was not completed by the chief valuer.
7. He further testified that the plaintiffs are residents of the area where the suit property is located and that the first and second plaintiffs are deceased. That he neither knew nor was a member of Nubian Trust and that although the suit property was subdivided into South Wanga/Ekero/2363 and South Wanga/Ekero/2364 without involving the community, the suit property still exists in the register. He further conceded that the plaintiffs are not listed in the register of the suit property as proprietors and added that the said parcel does not belong to the government but to the Nubian Community.
8. Abubakar Abdi Biro went on to testify that he was born in 1961 on the suit property and that as a community, they do not accept the subdivision of the suit property and that they want it nullified so that the parcel reverts to the community. That he was an elected leader of the Nubian Community



and that the plaintiffs had neither seen nor were they parties to the Deed of Trust in the defendants' list of documents filed on 27th January 2015.

9. The plaintiffs' case was thus closed.
10. Ezekiel Buhuru Nandwa, a surveyor working for the County Government of Kakamega, testified next as DW1 and adopted his witness statement dated 28th January 2022 as his testimony. He further produced, as defence exhibits, the documents listed as item numbers numbered 1 to 13 in the First Defendant's further list of documents dated 5th October 2018. He went on to state that Kakamega County Council was registered as the first proprietor of the suit property on 21st April 1967 and that the County Government of Kakamega was the registered proprietor as of the date of his testimony. He further produced a copy of green card or register for the suit property duly stamped by the Land Registrar on 21st January 2022 which states that the said parcel was acquired by the government. He added that the restriction was not properly removed and urged the court to dismiss the case. The first defendant's case was thereby closed.
11. For the second defendant, Abdallah Ali Saghair testified as DW2 and adopted his witness statement dated 26th October 2016. He stated that he is the only surviving trustee of the Nubian Community and produced a copy of the Deed of Trust listed as item number 2 in Defendants' list of documents filed on 27th January 2015. He further testified that both the first and second plaintiffs had passed away and that the first plaintiff was not a Nubian and was buried in Bunyore. That the third plaintiff is the widow of the first plaintiff and that she has a house on the suit property while the fourth plaintiff is no longer resident on the suit property. He added that the suit property belongs to the Nubian Community and that the said community has been in occupation of the suit property since 1937. That he had been in occupation of the suit property throughout and that neither he nor the community was ever notified of any compulsory acquisition. He also stated that the plaintiffs are not leaders of the Nubian Community and that the suit property should be registered in the name of the trustees of the Nubian Community.
12. Under cross-examination, DW2 conceded that he did not have any identity card to show that he is Nubian. He added that he was chosen by the elders as a trusted at a meeting in 2011 but he did not have any minutes of the meeting. That the plaintiffs are not members of the Nubian Community and that deceased trustees in the Deed of Trust have never been replaced and never met. The second defendant's case was then closed. Since there was no appearance for the third defendant, his case was also closed upon application by the counsels for the rest of the parties.
13. Directions were then given that parties file and exchange written submissions. The plaintiffs, the first and the second defendants filed submissions. The third defendant did not file any.
14. I have considered the parties' pleadings, evidence including the witness statements, as well as the submissions. The issues that arise for determination are whether the first defendant held the suit property in trust for the Nubian Community, whether the suit property was compulsorily acquired and whether the reliefs sought are available.
15. The plaintiffs' case is built around the claim that they are members of the Nubian Community which they contend has been in occupation of the suit property since the 1930s. They contend that the suit property is their ancestral home which was allotted to them by Senior Chief Nabongo Mumia on behalf of the then colonial government. The plaintiffs' claim that they are members of the Nubian Community is strongly contested by the defendants.
16. As a starting point, it is useful to examine the register of the suit property which was produced by both the plaintiffs and the second defendant. Its perusal reveals that the said register was opened on 21st



April 1967 and that the parcel measured 3.8 hectares. The first registered proprietor was the Kakamega County Council, under entry number 1 dated 21st April 1967 in Part B of the Proprietorship Section. There are two undated entries in Part A under “Easements” which state,

Reserved for Nubian Estate” and “Acquired by the Government.” According to the plaintiffs, Nubian Estate is the same as Nubian Community. On my part, the plaintiffs have not persuaded me that the reservation was meant for them as the plaintiffs herein or as members of a community. In any case, the plaintiffs have not established their membership of what they refer to as Nubian Community. The plaintiffs have not demonstrated that the first defendant held the suit property in trust for the Nubian Community.

17. Further perusal of the register shows that pursuant to entry number 2 dated 11th June 1987 in the Proprietorship Section, a restriction against all dealings

“until the matter of compulsory acquisition is sorted out by the chief valuer.”

The restriction was later removed through entry number 3 on 8th October 2002 pursuant to Mumias Town Clerk’s letter Ref No. A./16/17/VOL. 1/28 of 11.9.02.” The similarities between the registers produced by the parties however end there.

18. The plaintiffs’ version has entry number 4 dated 8th October 2002 stating that the title was closed upon subdivision into South Wanga/Ekero/2363 and South Wanga/Ekero/2364. The second defendant’s version does not have entry number 4. The second defendant’s version, which bears the Land Registrar’s stamp dated 21st January 2022, does not have any entry number 4. Instead, it leapfrogs from entry number 3 to entry number 5 dated 6th November 2014 which records the proprietors as Mohamed Kiveya Ojuok, Abisai Orina Omolo, Norah Kombo Tolo and Abubakar Abdi. The said entry was made pursuant to a decree issued following an initial judgment that was delivered in this matter on 16th October 2014. It is important to note that the said judgment was later set aside pursuant to a ruling delivered on 23rd January 2015. The import of the setting aside is that the registered proprietor remained the Kakamega County Council, in terms of entry number 1 dated 21st April 1967. Thus, the suit property remained public land as defined at Article 62 of the Constitution.

19. Curiously however, there is yet another entry in the register, being entry number 6 which simply states:

“acquired by the government.”

Entry number 6 is undated. I say curiously because besides being undated, it is not explained why the government could acquire the suit property, which we have already shown to be public land, from itself. Amidst the confusion in the registers that they produced, none of the parties called the Land Registrar to testify with a view to verifying the status on the register. The parties have not demonstrated that the suit property was compulsorily acquired by the government.

20. Flowing from the foregoing discourse, I find no merit in the plaintiffs’ case, and I therefore dismiss it. Similarly, the counterclaim is not proven. I equally dismiss it. In view of the outcome, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 29TH DAY OF FEBRUARY 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:-



Mr Udoto holding brief for Mr Osundwa for the Plaintiffs

No appearance for the First and Third Defendants

Mr Abdallah Ali Saghair (the Second Defendant) present in person

Court Assistant: E. Juma

