



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA IN BUSIA
LAND & ENVIRONMENTAL DIVISION

ELC NO. 33 OF 2015

1. WILLIAM OSIMATA EMASETE

2. VINCENT WESONGA OSIMATA.....PLAINTIFFS

**(Suing as Personal Representatives of the Estate
of Desiranda Akanyati Deceased)**

VERSUS

COUNTY GOVERNMENT OF BUSIA.....DEFENDANTS

J U D G E M E N T

1. The two Plaintiffs – **WILLIAM OSIMATA EMASETE** and **VINCENT WESONGA OSIMATA** – filed this suit here on 17/4/2015 vide a plaint dated 15/4/2015. Initially, the suit was against only one Defendant – **THE COUNTY GOVERNMENT OF BUSIA** – but another Defendant – **KENYA SCOUTS ASSOCIATION** – came on board later. The dispute between the parties relates to Land parcel No. **MUNDIKA/BUKHAYO/329** (“Suit Land” hereafter) which the late **DESIRANDA AKANYATI OSUMATI** was said to own. The Plaintiffs are the personal representatives of the estate of the late **DESIRANDA**.

2. The Plaintiffs complaint is that the Defendants have trespassed and/or encroached on the suit land and undertaken illegal activities that have interfered with their rights of possession and/or occupation. Some of the alleged activities include mining murram, constructing roads and fencing. The Plaintiffs allege that as a result of all these, they have suffered loss and damage.

3. Various orders are sought against the Defendants as follows:

(a) A permanent injunction restraining the Defendants, their employees, servants or agents from possessing, occupying, trespassing, constructing, encroaching or in any other way interfering with the suit premises or any part thereof.

(b) An order directed at the Defendant to remove any fence or structure erected or road constructed on the suit premises and restore the same to the previous state and condition within such time-frame as this honourable court may deem fit.

(c) Mesne profits for illegal occupation and trespass.

(d) Costs of this suit.

(e) Interests on (c) and (d) above at court rates.

(f) Such other or further relief that this honourable court may deem fit to grant.

4. The two Defendants filed their defences on various dates and counter-claimed. The 1st Defendant – **COUNTY GOVERNMENT OF BUSIA** – filed its defence on 25/1/2016. The Plaintiffs claim was denied and the 1st Defendant averred that the suit land is government land, having been acquired sometime back through the process of compulsory acquisition. That being the case, 1st Defendant continued, the entries regarding ownership appearing in the land register showing the Plaintiffs and/or their family owning the land were said to be fraudulent, unlawful, unprocedural and null and void.

5. According to 1st Defendant, there were illegal and fraudulent entries on the green card from 14/10/2013 which found their way into the record without an earlier entry evincing government's intention to compulsorily acquire the land being revoked. The Plaintiffs were also accused of failing to disclose the fact of compensation and were also said to be acting on behalf of a deceased person who was never a registered owner.

6. In the counter-claim, declarations were sought to the effect that the entry purporting to grant the Plaintiffs the right of ownership was unlawful, unprocedural and null and void and that the Plaintiffs purported occupation and use of the suit land amounts to trespass. The court was asked to cancel the title deed in the names of Wesonga Osimita and order registration thereof in the name of 1st Defendant. Also sought was any other just relief.

7. The 2nd Defendant – **KENYA SCOUTS ASSOCIATION** – filed its defence on 18/4/2016. The defence is generally like that of 1st Defendant but the 2nd Defendant does not seek any declaratory orders. It sought instead deregistration of the deceased parent of the Plaintiffs as owner followed by registration of the Defendants as proprietors. The 2nd Defendant also sought to evict the Plaintiffs from the land.

8. This matter was heard on 28/2/2017 and 27/4/2017. The first to testify was the 1st Plaintiff – **WILLIAM OSIMATA EMASETE** – followed by 2nd Plaintiff – **VINCENT WESONGA OSIMATA**. The two testified as PW1 and PW2 respectively. The two are brothers and the thrust of their evidence is that the suit land was initially owned by their late father – **OSIMITA MASETE** – who became the registered owner in 1971. The father died and the suit land was meant to devolve to 2nd Plaintiff. The 2nd Plaintiff was however too young. The suit land was therefore registered in the name of the mother – **DESIRANDA AKANYAIT** – to hold in trust for 2nd Plaintiff. Desiranda also died and the two Plaintiffs became administrators of her estate.

9. According to the Plaintiffs, there was intention by the government to compulsorily acquire the land. The process of compulsory acquisition even started but was never concluded. No compensation was ever paid. The ownership of the land then reverted to the Plaintiffs parent. As things stand now, the 2nd Plaintiff is the registered owner of the land.

10. Then sometimes in the year 2014, the 1st Defendant started constructing roads and mining murram on the land. Part of the land was also fenced apparently to protect a cultural centre. The Plaintiffs then raised their concerns with the first Defendant. There was no amicable settlement and this suit became the next logical step to take.

11. During cross-examination by Makokha for 1st Defendant, the 1st Plaintiff was asked many questions including when their mother died, when the alleged fence was put up on the suit land, when the cultural centre was put up, the alleged encroachment by the cultural centre, when the survey was done on the land

to establish encroachment, and the entries on the green card. The court saw and heard the 1st Plaintiff say their mother died in 1991; the fence on the suit land was put up sometimes in the past but the Plaintiff saw it in 2014; that the cultural centre was also put up in the past but he saw it in 2014; that the cultural centre has encroached part of the suit land; that the survey was done in the year 2014; and that the green card shows placement of a caution by the government with the intention of compulsorily acquiring the land.

12. On the defence side, only the Land Registrar testified. He did so as DW1 and strictly speaking, he was not a witness for defence only. He was an expert witness called to shed light on some of the issues arising in the case. For the proper evidence for defence, the Defendant sought to rely on the supporting affidavit that accompanied the application dated 23/7/2015. The court had delivered its ruling on that application on 18/11/2015. To make the supporting affidavit evidence in this suit, it was agreed that the affidavit be filed afresh. A consent to that effect was entered on 28/2/2017. The Defendants however failed to comply with the consent.

13. It is necessary to have a look at the evidence of DW1. This witness merely made reference to entries in the relevant green card relating to the suit land. And the entries cover the period when the land was owned by Plaintiffs mother, the attempted acquisition by government, and the transmission of the ownership of the land to 2nd Plaintiff. The defence sought to demonstrate the illegalities of the entries by pointing out that entry No. 2 in the green card, which shows placement of caution by government, ought to have been cancelled before insertion of entry No.3 which reflects change of ownership to Wesonga Osimatti.

14. The Plaintiffs on the other hand sought to make the point that entry No.3 was done through a court order and that no compensation was shown to have been paid.

15. Both sides filed written submissions. The 2nd Defendant however was content to adopt the submissions of the 1st Defendant. The Plaintiffs submissions were filed on 11/5/2017. After giving some background and history, the Plaintiff submitted that the suit is not effectively defended, the Defendants having failed to file afresh some affidavit in an application which they intended to use as evidence. It was also said that no compensation was ever paid and the Defendants therefore cannot claim to have become owners through the process of compulsory acquisition. The entries made in the land register by the government evincing intention to compulsorily acquire were said not to be evidence of ownership. According to the Plaintiffs the orders sought should be granted. The decided cases of **KANINI FARM LIMITED vs COMMISSIONER OF LANDS (1984) eKLR** and **PASHITO HOLDINGS & Another vs NDUNGU & 2 Others [1997] eKLR** were availed for guidance.

16. The Plaintiff averred that no compensation was paid. **KANINI'S** case (supra) is authority for the proposition, inter alia, that such compensation should be paid and should be based on the market value of the land. The Plaintiff further took the position that nobody from their side was ever heard regarding the intended compulsory acquisition. **PASHITO's** case (supra) stands for proposition inter alia that the person whose land is to be compulsorily acquired needs to be heard.

17. The Defendants submissions, styled "The 1st Defendant submissions" were filed on 4/7/2017. The Defendant first took issue with names of people appearing in some documents. For instance, they wondered whether the estate the Plaintiffs represent is that of **DESIRANTA AKANYATI OSUMATI** or **DESIRANTA AKUNYATI OSUMATI**, the difference in names here being **AKANYATI** and **OKUNYATI**. It was the Defendants further or other position that the suit land is shown to be owned in one entry by one **DESIRANDA AKUNYATI OSUMATI**, again here the name **DESIRANDA** being different from the name **DESIRANTA** mentioned in connection with the estate of the registered owner. According to the Defendants, these names are not for one and the same person.

18. Issue was also taken with the name of the person in whose trust the land was held. That name is shown in the land register as **WESONGA OSIMATI**. According to the Defendants, this is different from **VINCENT WESONGA OSIMATI** the 2nd Plaintiff, on whose behalf the trust was allegedly held. Simply put, the Defendants dispute ownership on the basis that the names shown on record are different

from the names alleged by the Plaintiffs.

19. But issues of entries in some records did not end there. The parcel of land is pointed out as appearing to be BUKHAYO/MUNDIKA/29 and also BUKHAYO/MUNDIKA/329. The Defendants said that these entries raise confusion.

20. The thrust of Defendants submissions then changed and focused on compulsory acquisition. It was pointed out that entry No.2 in the green card is a caution placed by the government. Then entry No.3, which shows apparent shift in ownership was made without cancelling entry No.2. According to Defendants entry No. 2 needed to be cancelled or rescinded before making entry No.3. That it was not cancelled means that entry No.3 is void or unprocedural. And that is the same position for all other subsequent entries.

21. The Plaintiffs were also accused of instituting a suit for land that had allegedly ceased to exist, the suit land having mutated from BUKHAYO/MUNDIKA/329 to BUKHAYO/MUNDIKA/10243 and BUKHAYO/MUNDIKA/10245. The Plaintiffs were faulted for causing all these and not disclosing it to court. It was pointed out that the suit was filed on 17/4/2015 while the mutation seems to have taken place only shortly later – on 24/7/2015, to be specific.

22. The court was asked to accept the claim of compulsory acquisition, the Plaintiffs having not challenged it in their pleadings. The Defendants submitted that the law relating to compulsory acquisition was complied with.

23. The Plaintiffs were also said to have failed to show encroachment. It was averred that the Defendants are in occupation of the suit land and have put up a cultural centre there. And that occupation was said to have started way back in 1981.

24. Noting that the Plaintiffs faulted the Defendants for proposing negotiations only to change position later, the Defendants urged the court to ignore the aspect of negotiations as the case has now been heard and is for determination.

25. And finally, the decided cases availed by the Plaintiffs were said to add no value to this case. And this position was taken because, according to Defendants, the said cases deal with the issue of compulsory acquisition and appeals on awards while this case itself did not bring forth such issues.

26. So far, I have given an overview of what each side presented. It is now crunch time. A decision has to be made.

27. When this suit was initially filed by the Plaintiffs, ownership was not an issue. The Plaintiffs instituted it on the premise that they were the owners of the suit land. Their beef with the 1st Defendant then was that it had trespassed and/or encroached and had engaged in illegal activities on the land. The issue of ownership came later when the defences and counter-claims were filed. It turned out that the Defendants were claiming that the government had compulsorily acquired the land in the past.

28. The Defendants expressed doubts as to the names appearing in the land register and the grant given to Plaintiffs to represent their mother's estate. The Plaintiffs have no doubt that the names belong to them and/or those they represent. The Defendants on the other hand aver that the names refer to different people. In the Plaintiffs submissions, the discrepancies in names were explained as spelling mistakes made by the people who were putting the names on record. And the mistakes were said to have come about because those people were likely to have had different language background from the Plaintiffs. To the court, this explanation is plausible. A look at the documents shows that the discrepancies are minor. They involve such small things as putting an "a" where a "u" should be or a "t" where a "d" should be. The Defendants were also raising a doubt as to the number of the suit land when one entry "29" is shown instead of "329". All these appear to the court to be minor mistakes that have no material impact on the thrust of the Plaintiff's case.

29. But if the Defendants felt that the discrepancies were material, they should have gone further than they did. They needed to demonstrate well that the names referred to different individuals. Names of people are not their only expressions of identity. The name of the 2nd Plaintiff for instance was doubted because his Christian name VINCENT appears in this suit while he is WESONGA OSIMATTI in the green card. The same Plaintiff is expressed as OSIMITA in the suit while he is OSIMATTI in the green card. The 2nd Plaintiff testified here. The Defendants did not ask for his identity card. It would have been expected that his name would be checked against his identity card. Then bearing in mind that identity cards are also used in registration of land, it was upon the Defendant to check identity card details of the WESONGA OSIMATTI stated in the green card. If the details happened to turn out different, the Defendants then would have made out a case of mistaken or different identity.

30. In case of discrepancies in the number of the land, the Defendants had a duty to show that “No 29” refer to a parcel different from “No. 329”. They needed to demonstrate too that before “No 29” was entered, the transactions preceding the entry consistently referred to parcel “No. 29” instead of “329”. If the transactions preceding entry as “No. 29” showed that parties were actually transacting over “No. 329”, then it would be obvious that No. 29 as a single entry was a mistake. In all these, it was the Defendants, not the Plaintiffs, who were supposed to demonstrate. The Plaintiffs gave their explanation. The Defendants needed to go further to prove. They are the ones who made the allegation. The burden to prove was on them.

31. When all this is considered, it is clear that the Defendants allegations ring hollow. The allegations are rejected.

32. The Plaintiffs took issue in their submissions with the Defendants failure to file afresh the affidavits said to constitute their defence. Court records show that when the Plaintiffs closed their case, the Defendants sought to rely for their defence on supporting affidavits in application that the court had already ruled on. There was a consent entered that such affidavits be filed afresh. This was never done. This omission on the part of defence was serious. The supporting affidavits were actually addressed to, and focused on, the applications that were filed with them. They were not meant for the suit. More specifically, they were not statements for use in the suit. When the applications were ruled on, they, together with the supporting affidavits, became spent. This in effect also means that the evidence in the affidavits also became spent.

33. The consent entered to file the affidavits afresh served a useful purpose. The re-filing would ensure revival of the evidence and a re-focus for them to be used as statements in the suit. This would also mean that the affidavits would become just like any other statements in the suit and if the Plaintiffs desired to cross-examine on them, that could be done without problems. Re-filing would also ensure that the court does not loose revenue. Other statements are normally paid for. These affidavits should not be different. Failure to re-file them means that the Defendants were trying to have second use of the affidavits while circumventing the need to pay for them. As things stand now, the affidavits still remain spent evidence in spent applications. The result of all this is a dent in the effectiveness of the Defendant’s defence. The court therefore agrees with the Plaintiffs on this issue.

34. The issue of trespass or encroachment was raised. The Plaintiffs alleged it. The Defendant tried to justify it on the basis of ownership. In the court records, encroachment is vouched for in both oral and documentary evidence. The Plaintiffs averred it in their evidence. Then as part of their documentary evidence, they availed diagrams showing constructed roads and encroached parts that are already fenced. To this court, it is clear that the Defendants presence and activities on the suit land is well demonstrated. As to whether such presence and/or activities are justified, much will depend on how the issue of ownership turns out.

35. And this now turns me to the issue of ownership. As far as official records go, the Plaintiffs are the current owners. They have intimated however that there was attempted compulsory acquisition that did not succeed. The Defendants position on the other hand is that there was compulsory acquisition that succeeded. The law that governed compulsory acquisition at the time was the Land Acquisition Act (cap 295, Laws of Kenya). The procedure set out in the law was not complicated. It involved issuing and

serving the requisite notices, surveying and/or inspecting the land, conducting the necessary inquiry or proceedings, and making the necessary award for compensation and promptly paying the same to the owner of the land. Ultimately, the land owner's title has to be surrendered and/or changed so that the intended public body becomes the new owner.

36. Crucial in the conduct of inquiry or proceeding is the need to hear all the parties (see Pashito's Case (supra) and also to assess and award compensation in light of prevailing market prices (Kanini's case (supra)). The law envisages that the proceedings should be recorded. In particular, section 10(1) of the now repealed statute – The Land Acquisition Act (cap 295) – provided as follows:-

“Section 10(1)

Upon the conclusion of the inquiry, the Commissioner shall prepare a written award, in which he shall make a separate award of compensation to each person whom he has determined to be interested in the land.”

Section 11 made another provision as follows:

“Section 11:

On making an award, the commissioner shall serve on each persons whom he has determined to be interested in the land a notice of the award and offer of compensation.”

37. Of crucial concern in this case is what the Defendants have availed to prove compulsory acquisition. It seems to me that the compulsory acquisition is pegged on a gazette Notice on the basis of which a caution was placed on the land register expressing the government's intention to compulsorily acquire the land. That gazette notice was No. 1217 of 7/4/1981. Simultaneously with that notice also appeared another one – Gazette Notice No. 1218 – expressing intention to conduct an inquiry into claims of compensation by interested persons.

38. Crucial in a claim of this nature is demonstration that the inquiry was actually held and an award was made. It is important to appreciate that the inquiry needs to be in writing and is supposed to be held in a manner that gives priority to fairness. The award of compensation, if any, is also supposed to be in writing and that award must be demonstrated to have been served on the persons for whom it was intended. Curiously missing in these proceedings is the record of the inquiry proceedings and/or record of any award. And without these two, it is obviously idle and/or wishful thinking that any court can find allegations of compulsory acquisition proved.

39. The gazette notices availed by the Defendants as proof of ownership are not adequate proof. They are merely illustrative of the fact that compulsory acquisition was contemplated and started. They do not show it was concluded. In other words, the two gazette notices demonstrate what the Plaintiffs say namely: that compulsory acquisition was intended and commenced but floundered at some point and never got concluded. The process of compulsory acquisition is one of records. In my view, it should not be difficult for the Defendants to prove it if it really happened. And if, by any chance, such records are not available, the land register itself should be reflecting change of title from the original owner to the public body for which the land was being acquired. As things stand, there is really nothing that demonstrates compulsory acquisition. The Defendants claim therefore seems to be all wind and fury but no substance.

40. Closely tied to the issue of ownership is the allegation by the Defendants that entries made in the land register after the placement of caution by the government are illegal because the caution was not first removed before the entries were made. DW1, the Land Registrar, seemed to agree with this position. This state of affairs cannot, in my view, be visited on the Plaintiffs. And this is so because the Plaintiffs are not the ones who make entries in the Land Register. This is the work of the Land Registrar and/or his officials. Infact it is a bit baffling that the Land Registrar agrees with this while some entries were made in 2015 right under his watch, he himself having intimated that he has been in-charge of that office since

2012.

41. It is worth noting that the first alleged illegal entry, which is entry No. 3 in the Land Register, was, by DW3’s own assertion, made pursuant to a court order. All court orders, unless successfully challenged, are deemed to be legal orders. Nothing suggests in this matter that the court order leading to the entry in the land register was ever successfully challenged. What this in effect means is that that court order still stands. Ultimately then, whether one is talking of the manner of that entry or the substantive meaning of the court order leading to the entry, one is bound to find that the averment of illegality by the Defendants are wishy-washy and unhelpful.

42. When all is considered therefore, it is clear that the Defendants have not shown that they acquired the suit land through compulsory acquisition. Infact, what they based their claim on falls far short of proving it. The Defendants claim is therefore not proved on a balance of probability and I hereby dismiss it with costs. The Plaintiffs claim is one of trespass, encroachment and/or illegal use. But I must observe that some of the prayers made by the Plaintiffs were not well demonstrated. For instance, mesne profits for illegal occupation. One is bound to ask: what evidence was led to prove this? And the answer is NIL. The point is this: Some prayers cannot be granted. Doing the best, I hold that the Plaintiffs claim is well proved on a balance of probabilities and the prayers of permanent injunction (prayer a), prayer of restoration of land (prayer b), costs (prayer d), and interest on (d) (prayer e) are all granted. For the prayer of restoration (prayer b) however, should the Defendants fail to do it, the Plaintiffs are granted the option of doing it themselves at the Defendants own costs. I grant this option in light of prayer (f) which request the court to grant any other suitable relief.

Dated, signed and delivered at Busia this 11th day of October, 2017.

A. K. KANIARU

JUDGE

In the Presence of:

1st Plaintiff:

2nd Plaintiff:

1st Defendants:

2nd Defendants:

Counsel: