IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), GATEMBU & M'INOTI JJ.A)

CIVIL APPEAL NO. 232 OF 2011

BETWEEN

PETER OUMA OMOLO.....1ST APPELLANT

JAMES ODINDO OMOLO.....2ND APPELLANT

AND

COUNTY GOVERNMENT OF MIGORI.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

(Appeal from a Judgement and decree of the High Court of Kenya at Kisii (Makhandia, J.)(as he then was), dated 4th May, 2011

in

HCCC No. 144 of 2003)

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JUDGMENT OF THE COURT

It is common factor that the parcel of land known as **North Sakwa/Kamasoga/33** measuring 3.4 hectares was originally registered in the joint names of appellants. By a **Gazette Notice No. 2996** of 8th October, 1976, the Government notified the general public of its intention to compulsorily acquire the said **North Sakwa/Kamasoga/33** on behalf of the Ministry of Agriculture for the South Nyanza Sugar Scheme (Awendo Township Expansion). Whereas the appellants insist that after this gazette notice the original land was subdivided into 2 parcels, **North Sakwa/Kamasoga/1946, measuring 1.82 hectares and North Sakwa/Kamasoga/1947 measuring 1.58 hectares** with **t**he latter being compulsorily acquired and registered in the name of South Nyanza Sugar Company Limited and the former being retained in the names of the appellants, the respondent on the other hand maintains that the Government compulsorily acquire the entire **North Sakwa/Kamasoga/33** and fully compensated the appellants for it; that the subdivision into **North Sakwa/Kamasoga/1946** and **North Sakwa/Kamasoga/1947** and the subsequent registrations were fraudulent.

The dispute having thus been narrowed down to a single question, whether the Government of Kenya acquired the entire **North Sakwa/Kamasoga/33** measuring 3.4 hectares or just part of it, **North Sakwa/Kamasoga/1946,** measuring 1.82 hectares, the learned trial Judge, in dismissing the appellants' claim found, on the basis of the pleadings and evidence presented to him, that the entire **North Sakwa/Kamasoga/33** was acquired by the Government in 1977; and that the purported subdivision and transfers, coming 25 years later were fraudulent, illegal, null and void. He dismissed the appellants' contention that, although the Government had expressed an intention to acquire the original parcel of land, it did not actually acquire it.

Aggrieved, the appellants now bring this appeal arguing that the learned Judge ought to have found that the Government, after expressing its intention to acquire **North Sakwa/Kamasoga/33** did not in fact acquire it; that by Gazzatte Notice No. 3737 of 24th December, 1976 the Government instead gave another notice to acquired **North Sakwa/Kamasoga/34;** that the registration of the appellants as joint proprietors of **North Sakwa/Kamasoga/1946** was conclusive evidence of their ownership of that property and it was in error for the Judge to nullify the title; that the Judge ought not to have relied on oral evidence to oust documentary evidence such as the gazette notices, official correspondence and a certificate of title issued to the appellants. Finally, the appellants complained that they had proved trespass by the respondents for which they were entitled to an award of damages.

We must point out that those submissions are contained both in the memorandum of appeal and the written submissions and that despite service with the hearing notice, the firm of G.S Okoth & Company Advocates representing the appellants in this appeal did not attend court to highlight their submissions.

Opposing the appeal, Mr. Kisera, learned counsel for the 1st respondent supported the decision of the learned Judge and urged us not to disturb it. He maintained that **North Sakwa/Kamasoga/33** was lawfully compulsorily acquired after the Government published its intention to acquire the entire parcel; that the intention was eventually actualized and executed when the appellants were fully compensated and the Government became the registered owner of the parcel on 30th May 1997. Based on this, he submitted, the issue of a re-survey conducted at the instance of the appellants culminating with the subdivision of the original parcel was illegal and of no effect in law.

Mr. Eredi, learned counsel for the Attorney General, who was described in the appeal as the interested party,(the 2nd respondent) similarly agreed with the conclusion of the Judge that due process was followed in the compulsory acquisition of the land; that Gazette Notice No. 2996 of 8th October 1976, was issued under **section 6 (2)** of the Land Acquisition Act (repealed) indicating clearly the intention to acquire the entire 3.4 hectares; that afterwards the entire parcel was acquired and the appellants duly compensated; and that after the acquisition the Government placed restriction on the land.

This is a first appeal, and the role of this Court on first appeal is to subject the whole of the evidence to a fresh scrutiny in order to arrive at its own independent conclusions, always bearing in mind that it did not have the opportunity of receiving the testimonies of the witnesses first hand. See **Selle & Another V Associated Motor Boat Co. Ltd & Others** (1968) EA 123.

Evidence is the foundation stone upon which a case is built. If it is absent there can be no case. If it is weak, the case crumbles. Therefore, any party wishing to obtain judgment in court as to the existence of any legal right or liability must prove that those facts exist. According to **sections 107, 108, 109** of the Evidence Act the burden of proof in an action lies on that person who would fail if no evidence at all were given on either side; and the burden of proving any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. The standard of proof in civil cases is on the balance of probabilities or, as they sometimes say, by a preponderance of the evidence.

We reiterate that the sole question before us as it was indeed before the court below is whether the original land, **North Sakwa/Kamasoga/33** was wholly compulsorily acquired. We cannot accept the appellants' contention that **North Sakwa/Kamasoga/33** was not acquired at all by the Government. According to them the Government merely expressed an intention which was not carried through; and that later on it expressed yet another intention to acquire a different parcel of land altogether. The appellants have not been consistent in advancing that position because at some point they climbed down from that stance to insisting that only a portion of **North Sakwa/Kamasoga/33** was acquired leaving one portion to them. In other words, it was the appellants' case that **North Sakwa/Kamasoga/1947** is what the Government acquired, and **North Sakwa/Kamasoga/1947** is what they retained and is the one in dispute. In asserting that the suit land belonged to them, the burden of proving that fact was on them. Upon our own assessment of the pleadings and the evidence, we are persuaded that after expressing its intention in 1976 to acquire **North Sakwa/Kamasoga/33** for the purpose of establishing South Nyanza Sugar Company Limited and for the expansion of Awendo Township, the Government proceeded to acquire the entire **North Sakwa/Kamasoga/33.**

Starting with the Gazette Notice of 8th October, 1976, there is no doubt at all that the parcel of land targeted by the Government was **North Sakwa/Kamasoga/33** measuring 3.4 hectares. Secondly, the extract of the register; the green card of 19th June, 2006 and a certificate of search obtained on 12th February, 2001 together augment the evidence that the Government acquired the entire original parcel and it was subsequently registered as the owner. In addition, the Part Development Plan prepared in 1979 prove that the acquisition was for the whole of **North Sakwa/Kamasoga/33.**

There were also serious anomalies in the appellants' case. For instance, the mutation forms upon which the subdivision was based did not disclose the name of the surveyor. Against the requirements of **section 19 (1)** of the since repealed Registered Land Act the subdivision exercise did not involve "every person shown by the register to be affected by the correction". The respondents have deposed, without being contradicted that they were not aware of the exercise. Secondly the aforesaid **section 19(1)** demands that no such correction of the borders or subdivision can "*be effected except on the instructions of the Registrar in writing in the prescribed form, to be known as a mutation form, and the mutation form shall be filed*." None of these were complied with.

At the time of the alleged subdivision the appellants were shown in the mutation form as the registered owners of **North Sakwa/Kamasoga/33;** and were in that capacity applying for its sub-division. This was on 14th October, 2002 when the appellants clearly knew the fact of its ownership. The extract of the register and certificate of search confirm as at that date the Government was the registered owner. It would follow therefore that if at all there was need for subdivision, it was only the Government, as the owner, that could execute the mutation forms and not the appellants. Strangely, in the alleged subdivision 1.82 hectares was being transferred to South Nyanza Sugar Company Limited and not the Government which was the owner by virtue of the compulsory acquisition.

The District Surveyor (PW3) was categorical that;

> **"The Clerk to Awendo Town Council instructed us to have the remainder portion revert to the original owners as parcel 33."**

From that testimony one gets the sense that, although the Government acquired **North Sakwa/Kamasoga/33**, it did not put the entire parcel into the use for which it was acquired for several years. It is this void that the appellants exploited with the help of local officials of the Lands Department. That explains why they took 25 years to apply for the sub division. Even as they did this, they knew fully well that they had been divested of the ownership of the property and fully compensated for it; and that the parcel belonged to the Government. For these reasons, we reject the invitation to apply **sections 17, 18, 19(1)** and **20(2) (b)** of the Land Acquisition Act (repealed) and be guided by the case of **Commissioner of Lands & Another V Coastal Aquaculture,** Civil Appeal No. 252 of 1996, that required that whenever part only

of the land is acquired, the Government would only be entitled to the portion acquired and the final survey would be based on that reality.

The case before us was not one of partial acquisition but one where the Government acquired the entire parcel, but did not fully utilize it. Even though this was so, it did not amount to a license for the appellants or anybody else to invade it and claim ownership. The facts in case are different from those in **Town Council of Awendo V. Nelson Odour Onyango & 13 others,** Civil Appeal No. 161 of 2010 where this Court (Onyango Otieno, Azangalala & Kantai, JJ.A) made a conclusion that where the Government does not use the entire land acquired for public purpose, the original owners can apply to have the unutilized part re-surveyed for purposes of it being reverted to them. There was a whole procedure for this under **Section 17** of the Land Acquisition Act.

The subdivision by the appellants was unlawful because by October 2002 when they purported to subdivide it, the land had been duly registered as public land and could only be used for the benefit of the public from the time it was acquired in accordance with **section 75** of the former Constitution and **section 6(1)** of the Land Acquisition Act (repealed). Under the latter, once the Minister is satisfied that any land is required for the purposes of a public body, and that the acquisition is necessary in the interests of promoting the public benefit, the Commissioner of Lands would upon receiving direction from the Minister cause to be published in the Gazette, a notice of the intention to acquire the land. That procedure was strictly complied with. Based on the aforementioned, we reiterate that the Government became the owner of the land from 1977 and the appellants ceased to be proprietors.

Then there was oral evidence before the trial court confirming that the appellants were compensated. The District Land Registrar (PW2), the appellants' witness, during whose term the events in this dispute took place confirmed that before the original land was surveyed in 2002/2003 there was a restriction registered by the Government against any transaction in 1977; that the District Land Registrar unilaterally lifted the restriction before the subdivision. The witness explained that;

> **"I have been a Land Registrar for 10 years. Vide G.N. No. 2896, the Government acquired Plot No. 33. The acreage is shown to be 3.4 ha. The Government fully compensated the owners of the plots acquired. The search dated 12/2/2001 indicates that as of 30/5/77 the land was Government land. It is entry No. 2 on the green card. A restriction was placed against the title in 1977.**
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> **When the Government acquires land and the whole portion is not used for purpose intended, the balance remains with the Government. The Gazette Notice did not say any balance will revert to the plaintiffs."**

The District Surveyor called as a witness by the respondents (DW1) also established that as a matter of fact the suit land is within the perimeter boundary of Awendo Township; that it was acquired in 1976 by the Government as part of the whole of **North Sakwa/Kamasoga/33** whose size stood at 3.4 hectares; that after acquisition, it was only the Government that could conduct its re-survey.

In the result, we come to the ultimate conclusion that the appellants failed to prove their case in accordance with **sections 107** and **109** of the Evidence Act and as propounded by the Supreme Court in the case of **Raila Odinga V. IEBC & 3 Others,** Petition No. 5 of 2013 as follows:

> **"…a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden."**

They failed to demonstrate that they were the legal owners of the suit land. They failed to show that they acquired the suit land lawfully after it had been compulsorily acquired from them by the State. They have not been able to explain the cheque payment of 19th May, 1977.

We cannot find any fault with the determination of the learned Judge to warrant our interference with his decision to dismiss the appellants' claim.

Accordingly, this appeal fails and is hereby dismissed. We make no orders as to costs.

Dated and delivered at Nairobi this 8th Day of June 2018.

W. OUKO, (P)

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR