IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI JJ.A)

CIVIL APPEAL NO. 161 OF 2010

BETWEEN

TOWN COUNCIL OF AWENDO …..... APPELLANT

AND

NELSON ODUOR ONYANGO, MIJUNGU MISWETA,

HEZRON OTIENO, ROSALINA NYAKURE,

JAIRO OWINO ODERA, TIMOTHEO RAYAMO OKWACH,

OBIERO OMEDO, ELIUD OGUTU SIRAMA,

JOSEPH OMONDI RONGO, JAMES OMONDI ANINDO,

JOSEPH ODIWUOR OCHOME,.....1ST – 13TH RESPONDENT

ATTORNEY GENERAL ….....14TH RESPONDENT

(Appeal from the judgment and/or decree of the High Court of Kenya at Kisii

(Musinga, J) dated 13th November, 2009

in

KISII HIGH COURT CIVIL SUIT NO. 133 OF 2006 (OS))

****

JUDGMENT OF THE COURT

The genesis of the entire saga that has ended up in this appeal before us is pieces of land which originally belonged to various respondents herein, on the basis of various claims and which, in order to enable ***South Nyanza Sugar Company*** expand its nuclear scheme were acquired by the Government under the ***Land Acquisition Act No. 47 of 1968*** pursuant to ***Gazette Notice No. 2996***. The same Gazette Notice made specific the purpose for which the same pieces were acquired. It stated:-

"Gazette Notice No. 2996

The Land Acquisition Act 1968 No. 47 of 1968.

Notice of intention to acquire land. In pursuance of Section 6

(2) of the Land Acquisition Act, 1968, I hereby give notice

that the Government intends to acquire the following land for

the South Nyanza Sugar Scheme in South Nyanza District."

The same Gazette Notice set out the registered owners of each of the same pieces of land, the area or sizes of the various parcels that were to be acquired. Almost all the people affected were local people from the area and most of those people were living on their respective pieces of land. That Gazette Notice was of 24th September, 1976. Later, vide another Gazette Notice dated 24th December, 1976, Gazette Notice No. 3737, most pieces were acquired. Most of those pieces of land were in ***Kamasoga*** and ***Waware areas*** of ***North Sakwa.*** They were as follows:-

(a) Land parcel No. North Sakwa/Kamasoga/46 registered in the name of

the first respondent, Nelson Oduor Onyango,

(b) Land Parcel No. South Sakwa/Waware/204 registered in the name of Mijungu Misweta, the second respondent,

(c) Land parcel No. North Sakwa/Kamasoga/34 registered in the name of

the third respondent, Hezron Otieno,

(d) Land parcel No. North Sakwa/Kamasoga/1081 registered in the name of

the fourth respondent, Rosalina Nyakure,

(e) Land parcel No. North Sakwa/Kamasoga/1093 registered in the name of Jairo Owino Odera, the fifth respondent,

(f) Land parcel No. North Sakwa/Kamasoga/1111 registered in the name of Timotheo Rayamo Okwach, the sixth respondent,

(g) Land parcel No. North Sakwa/Kamasoga/1193 registered in the name of Obiero Omedo, the seventh respondent,

(h) Land parcel No. North Sakwa/Kamasoga/1067 registered in the name of Eliud Ogutu Sirama, the eighth respondent,

(I) Land parcel No. South Sakwa/Waware/207 registered in the name of Joseph Omondi Rongo, the ninth respondent,

(j) Land parcel No. North Sakwa/Kamasoga/45 registered in the name of James Omondi Onindo, the tenth respondent,

(k) Land parcel No. North Sakwa/Kamasoga/111 registered in the name of Joseph Odiwuor Ochome, the eleventh respondent,

(h) Land parcel No. South Sakwa/Waware/202 registered in the name of John Onyango Dawo, the twelfth respondent,

and (m) Land parcel No. South Sakwa/Waware/168 registered in the name of Charles Obunga Okombo, the thirteenth respondent.

After the Gazette Notices acquiring the above parcels had been issued and South Nyanza Sugar Company had acquired and utilised whatever portion it wanted for the expansion of its scheme, parts of the pieces above remained unutilised by the same company. The evidence in the record shows that some of the respondents continued to live on some parts of the land parcels and were not disturbed by South Nyanza Sugar Company in respect of the parts that the same company did not require for the purposes of their expansion. However, the appellant in this appeal the ***Town Council of Awendo***, which is a local authority established under the *retired Local Government Act*, and which is the local authority established near Sony Sugar Scheme area, was allegedly attempting to evict the respondents on the basis that the land acquisition was for purposes of its expansion and on the basis that as the land had been acquired under the ***Land Acquisition Act,*** none of it was any longer the property of the respondents and thus it required the respondents to vacate their various remaining portions and it is in evidence that it started allocating those parcels to third parties albeit temporarily. This did not go well with the respondents who felt that as South Nyanza Sugar Company in favour of which the land was acquired did not use the parts they occupied, the appellant had no legal right to take over such parcels and to evict them from the same pieces of land.

The respondents lodged their complaints with the ***Chief Land Registrar.*** The record shows that the 8th respondent was one of the complainants to the Chief Land Registrar. In response, the Chief Land Registrar in a letter reference ***No. GEN/A/I VOL V/107*** dated 29th February, 1996, addressed to the District Land Registrar Homa Bay stated as follows:-

"RE: COMPULSORY LAND AQUISITION FOR VARIOUS

PROJECTS IN SOUTH NYANZA.

I refer to your letter SN/LR/92/4 dated 29th June, 1994 on the above matter.

I have received complaints from people whose lands were compulsorily acquired in part for nuclear estate of South Nyanza Sugar Company Limited to the effect that they have not been issued with their titles for the portions of those lands that remained for them after the acquisition. Some of those remainder portions have been subdivided by the owners but the mutations have not been registered by your office for reasons which are not clear. It is also alleged that some of the remainder portions have been allocated to third parties by the Commissioner of Land despite the fact that the owners are in occupation.

Some of the parcels affected are numbers South Sakwa/Waware/170.171,153,154,592, 594 and 652 and also the land of the late Andrea Anindo (parcel number North Sakwa/kamasoga/45.

Please have this matter sorted out once and for all in consultation with the District Surveyor Migori. In case you do not have all the Gazette Notices concerned, you should arrange to obtain them from the Chief Valuer, Nairobi.

Please give the exercise top priority and advise us of the progress you make in the matter.

F.R.S. ONYANGO

Chief Land Registrar."

That letter was copied to the Permanent Secretary Ministry of Lands and The Commissioner of Lands among others. The record before us does not show any reaction from the then District Land Registrar Homa Bay. But from the affidavits in

the record sworn by each respondent, the appellant, The Town Council of Awendo, took over the control

of the pieces of land that were not utilised by the the South Nyanza Sugar Company Ltd and as the letter says, it started allocating it to third parties and evicting the respondents on the pretext that as the parcels had been acquired by the Government, the original owners no longer had any claim on any part of it unused by the original intended beneficiaries and particularly because the original owners had allegedly been compensated for the pieces of land. The respondents complained to the Ministry of Local Government which in turn, apparently contacted the Town Clerk, Awendo Town Council on the matter.

As no satisfactory results were received by the respondents, they moved to the High Court - *Civil Case No. 133 of 2005 (O.S)*. This was filed pursuant to ***Order XXXVI rule I*** of the ***Civil Procedure Rules*** and all other enabling provisions of law and ***Section 3A*** of the ***Civil Procedure Act.*** Even though the entire Originating Summons is lengthy , yet because of its importance, we do reproduce it below. It reads:-

> *"LET AWENDO TOWN COUNCIL, within 15 days of the service of this Summons upon it enter an appearance when the council which claims to have acquired title to the following parcels of land namely:-*
>
> *(i) Land parcel No. North Sakwa/Kamasoga/46.*
>
> *(ii) Land parcel No. North Sakwa/Kamasoga/204.*

iii. *Land parcel No. North Sakwa/Kamasoga/34.*
iv. *Land parcel No. North Sakwa/kamasoga/1081.*
v. *land parcel No. North Sakwa/Kamasoga/1093.*
vi. *Land parcel No. North Sakwa/Kamasoga/1111.*
vii. *Land parcel No. North Sakwa/Kamasoga/1193.*
viii. *Land parcel No. North Sakwa/Kamasoga/1067.*
ix. *Land parcel No. South Sakwa/Waware/207.*
x. *Land parcel No. North Sakwa/Kamasoga/45.*
xi. *Land parcel No. North Sakwa/Kamasoga/111.*
xii. *Land parcel No. North Sakwa/Waware/202.*
xiii. *Land parcel No. South Sakwa/Waware/168.*

> *By compulsory land acquisition through the Government of Kenya for the determination of the following questions:-*

1. *Whether the Government of Kenya compulsorily acquired the above parcels of land.*

2. *Whether the said acquisition (if any) by the Government of Kenya was for the sole purpose of establishing the nuclear estate for South Nyanza Company Limited (Hereinafter referred to as "Sony.")*

3. *Whether the Government upon acquisition (if any) utilised the whole or part of the said parcels of land.*

4. *Whether Sony utilised only part of the said parcels of land leaving the balance which was unfit for the purposes for which the land was compulsorily acquired by the Government of Kenya.*

(5) Whether the unutilised portion of the above parcels of land reverts back to the original owners and/or their heirs or whether the original owners have rights over and above all others except the Government of Kenya.

(6) Whether the respondent has any proprietory rights over and above the applicants in respect of the unutilised portions on the above listed parcels of land.

7. *Whether the respondent acquired any proprietory rights from the Government of Kenya in*

respect to the unutilised protions in the above parcels through Gazettement.

8. *Whether the Respondent through its officers is guilty of fraudulent and unlawful dealings on the unutilised portions of the said parcels including irregular and unlawful subdivisions, allocations and allotments.*

9. *Whether the said dealings (if any) should be declared null and void and cancelled.*

10. *Whether the Respondent and/or its officials have any right or authority to evict, demolish or interfere with the Applicants properties and quiet possession of the suit land.*

11. *Whether the Respondent has any right or interest over the suit property capable of being transferred to a third party.*

12. *Whether the Applicants are the beneficial owners of the unutilised portions of the suit parcels of land and entitled to have the said interest registered as such at the relevant lands registry.*

13. *Whether an injunction should issue against the Respondent by herself, her agents or workers preventing her from evicting, dispossessing or in any way interfering with the Applicants' occupation, use and quiet enjoyment of the unutilised portions of the said parcels.*

14. *Whether the Respondent should compensate the Applicants for any losses incurred through her acts of destruction of the Applicants properties on the suit lands.*

15. *Whether a perpetual injunction should issue restraining the Respondent and its agents or workers from interfering with the Applicants' quiet possession and use of the suit lands.*

16. *Whether the Respondent should pay costs of this suit.*

17. *That such orders may be issued by the court as may attain the ends of justice."*

The respondents cited eight grounds in support of the Originating Summons, a summary of these grounds is that the respondent has no proprietory rights over the subject land parcels; that the attempted eviction of the respondents from the suit parcels is illegal and unlawful; that, the Government never utilised the entire acreage of any of the suit parcels of land; that the appellant was intending to fraudulently and unlawfully subdivide the unutilised portions of the suit land so as to allocate them or dispose of them to third parties; that the respondents were bound to suffer irreparable losses if the intended evictions, subdivisions and allotments that were planned by the appellants were not quashed or prohibited; that the respondents had lived on the suit land for over thirty (30) years and they had their homes, some permanent homes and fences on the suit land, and that the respondents' ancestors, parents and their other kin were buried on the same land. Further, the originating summons was also buttressed by affidavits sworn by each respondent to which were annexed exhibits including documents of title in each case and a letter dated 26th May 2004, addressed to the appellant's Town Clerk by the Permanent Secretary Ministry of Lands. In our view, all the thirteen affidavits were in substance the same in that each of the thirteen respondents on the main claimed to be the registered owner to one of the parcels in dispute; gave its registration number; stated how the appellant had through its employees trespassed on to his/her land parcel and that the Government acquired the whole portion of the registered land through ***Land Acquisition Act*** but subsequently the portions remained unutilised by South Nyanza Sugar Company for whose expansion the subject land was acquired and briefly stating his/her prayers to the court. As we have stated, other than the different names of the respondents, the different parcel numbers which are and must in such cases be different, the contents of the affidavits are in essence the same.

On being served with the summons, the appellant filed a Notice of Preliminary Objection in which it claimed that the entire summons was bad in law and incurably defective as the matter was subjudice before that court and that the summons was an abuse of the process of the court and contravened mandatory provisions of the law and lastly, that the same is misconceived. That Notice of Preliminary

Objection was filed on 26th April, 2006. In the replying affidavit sworn by the then clerk to the appellant, Mr. Barnaba Kosgey, the appellant deponed in brief that it was conceded that the Government of Kenya compulsorily acquired the suit parcels of land in whole for the agreed purpose of the development of South Nyanza Sugar Company Limited; that once the compensation is paid to the original owner in such a situation where the land is compulsorily acquired, the rights of the owner to such a piece of land are wholly extinguished and the subject land remains that of the Government; that where there is any residue of land after the purposes is satisfied and thus after utilisation of such land by the Government, such residue would revert to the Local Authority to hold in trust and the same land would never revert to the original owner as the rights of such original owner had been extinguished; that pursuant to the provisions of the Constitution and Land Acquisition Act, the Appellant in the circumstances has better title to such residues and that being so, he contended that the Appellant has better rights to the residues and the respondents were busy bodies.

When the Originating Summons came up for directions, it does not appear that the Preliminary Objections filed together with Replying affidavit, was pursued. The parties, by consent agreed to treat the originating summons and all the supporting affidavits as plaint and the replying affidavit as defence and thus the hearing to proceed by way of *Viva voce* evidence in open court.

After hearing seven witnesses for the respondents and one witness for the appellant and considering written submissions filed by the learned counsel for both the appellant and the respondents, the learned Judge *(Musinga, J. as he then was),* in a lengthy judgment dated and delivered on 13th November, 2009, granted the main orders sought by the respondent. The learned Judge in doing so answered each and every question posed by the originating summons answering each and every question on its own. On the main issue of the situation as regards whether the respondents were entitled to have the unutilised portions of the suit land registered in their names, the learned Judge stated:-

> **"Having established that the unutilised portions of the suit lands were found to be unsuitable for sugar cane farming and were not therefore occupied by SONY, and considering that Section 75 of the Constitution requires that once land has been compulsorily acquired ought to be used for the designated purpose only, the original owners of the suit lands ought to be registered as the lawful owners of the unutilised parcels of the suit land. Those parcels that were not utilised by SONY should be re-surveyed and title deeds thereof issued to the rightful persons by the area Land Registrar."**

Coupled with that order, the learned Judge also issued injunction order in these terms:-

> **"Since the plaintiffs and/or the original owners of the suit lands are the beneficial owners of those lands and the defendant has no rights over the same, an injunction ought to, and is hereby issued restraining the defendant, her agents and/or servants from evicting, dispossessing or interfering with the plaintiffs occupation, use and enjoyment of the unutilised portions of the suit land."**

The learned Judge was also of the view that the respondents were entitled to compensation by the appellant for the losses incurred through the appellant's acts of destruction of the respondents properties, but that is the furthest he went and rightly so because the issue of compensation was not fully pleaded and fully canvassed before him. As we have stated, the learned Judge considered each question posed by the originating summons and made a finding on each. We have reproduced the two findings above as we deem them as the final orders made on the matter that could be executed.

The appellant felt aggrieved by the entire decision and hence this appeal before us premised on five grounds which are:-

> *"1. That the learned trial Judge erred in finding that the acquisition of the suit parcels of lands was not meant for the benefit of the appellant contrary to the Gazette Notices.*

2. *That the learned trial Judge erred in finding in favour of the respondents without taking into account the fact that the Government which acquired the said parcels was never made a party to this suit.*

3. *That the learned trial Judge erred in finding in favour of the respondents in a claim that was statutorily time barred and therefore the court had no jurisdiction to entertain the claim.*

4. *That the learned trial Judge erred entertaining (sic) the suit brought by way of originating summons when the issues involved are not suitable for determination by way of originating summons.*

5. *That the learned trial Judge's finding was against the weight of evidence,"*

Mr. Kisera, the learned counsel for the appellant in his address to us referred us to *page 112* of the record where a gazette notice No. 3737 is annexed and invited us to observe that that gazette notice says that the acquisition of the suit parcels was for the expansion of the appellant and thus the finding that the acquisition was only for the expansion of the South Nyanza Sugar Company Limited is not, according to Mr. Kisera altogether proper. On the second ground, Mr. Kisera submitted that in so far as the Government was not made a party, the respondents' Originating Summons could not succeed as the lands, on acquisition, reverted to the Government and that being so the Government was a necessary party for the success of the suit. On third ground, Mr. Kisera stated that the originating summons was filed in October, 2005 and was for a claim of land which was allegedly acquired in 1977 and the suit was time barred. He however conceded that this complaint was not raised in a proper way before the trial court and was not an issue properly raised and argued before the trial court but he maintained that as it was a point of law this Court could still go over the record and deliberate on it. On the fourth ground Mr. Kisera's take was that, as there was need to adduce proper evidence and full pleadings the matter should have proceeded by way of a plaint and defence, and on the last point he argued i.e the fifth ground he submitted that the entire decision was against the weight of evidence that was before the court as though the learned Judge found that the residue of the acquired land should revert to the respondents yet there was no evidence adduced as to what was the residue or unutilised land that could revert to the original owners. He urged us to allow the appeal.

Mr. Maroro, the learned counsel who represented the office of the Attorney General opposed the appeal. He submitted that it was true that the various pieces of land were acquired under the ***Land Acquisition Act*** for purposes of South Nyanza Sugar Scheme. In one of the Gazette Notices, Awendo Town Council is entered in brackets and that was to him because South Nyanza Sugar Scheme was not separated from Awendo Township. There was a residue and the appellant had admitted that much. However, Mr. Maroro, stated, there was nothing on the record to show that the Government had given the remaining portions to the appellant and under the Constitution, the residue would revert to the original owners of the land as there was nothing to show that the residue or whatever unutilised portions of the various land parcels were handed over to the appellant by the Government. He asked us to dismiss the appeal.

Mr. Nyasimi, the learned counsel for the respondents also opposed the appeal contending that after the Government had acquired the parcels of land in dispute through ***Land Acquisition Act*** and fenced off the land required, some portions remained and this was admitted by the appellant. This was after the purpose of the acquisition had been realised. There was nothing to show that Government handed over this land to the appellant, and according to Mr. Nyasimi, the Chief Land Registrar, in his letter we have reproduced herein above agreed that the unutilised parcels should have been surveyed and the original owner given his/her title respectively. Instead, the appellant started claiming the subject parcels and started allocating them to various third parties thereby leaving the original owners with nothing. He submitted that as the Government did not do wrong to the respondents, they could not join the Government in the suit. He further submitted on the issue of limitation that the Originating Summons did touch on limitation and the affidavit of the appellant which was treated as statement of defence also did not touch on the issue of limitation and thus in law it is not an issue in dispute. On whether the procedure adopted by the court in handling the originating summons was proper, Mr. Nyasimi argued that the

parties accepted the procedure and the originating summons was treated as plaint whereas the replying affidavit was treated as statement of defence and that was proper in law. As to the claim that the land parcels in question were not identifiable, Mr. Nyasimi's take was that the learned Judge of the High Court had directed that the subject land parcels be resurveyed before title deeds were issued and that took care of that claim.

In reply, Mr. Kisera felt that as the Government of Kenya was not joined as a party the Originating Summons was defective and he felt it was unfortunate that Mr. Maroro for the Attorney General should have stated that the Government was comfortable. He again urged us to allow the appeal.

We have anxiously considered the evidence that was before the High Court together with the exhibits that were produced at the trial in that court. We have considered, again anxiously, the judgment rendered by the High Court, the grounds of appeal, the able submissions by the Counsel on both sides of the divide for which we feel indebted to them and finally we have also considered the law. It is not in doubt that the subject parcels of land were originally registered either in the names of the respondents or in the names of those from whom they would in law claim legal interests in their properties. It is also, not in dispute that the subject pieces of land were acquired by the Government pursuant to the ***Land Acquisition Act 1968 Act NO. 47 of 1968*** Laws of Kenya and there were more than one Gazette Notices through which each of them were acquired. The respondents maintained that the various parcels were acquired for the sole purpose of expansion of South Nyanza Sugar Company (SONY) Scheme and although Mr. Kisera in his submissions before us says in support of his first ground of appeal that the learned Judge erred in finding that the acquisition of the suit parcels of lands was not meant for the benefit of the appellant, that contention is contradicted by the only witness called by the appellant, ***Josphat Ayonga*** the then Town Clerk of the Town Council of Awendo who said in his evidence in chief.

> *"The Government acquired the parcels of land for South Nyanza*
>
> *Sugar Company, ….....*
>
> *Even if SONY is not using the lands, the plaintiffs cannot claim the*
>
> *land,"*

and said in cross examination that :-

> *"The lands were taken for purposes of establishing SONY."*

We shall revisit this aspect later in this judgment when we will be discussing the grounds of appeal each of which we intend to consider in turn.

As the matter before us, is in essence touching on the right to property, the proper starting point when considering it is the Constitution of Kenya at the relevant time, *ie the retired Constitution* **Section 75** of that Constitution provided as follows:-

> **"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 interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of property so as to promote the public benefits; and**
>
> **(b) the necessity thereof is such as to afford reasonable justification for the causing of hardship that may resort to any person having an interest 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."

Pursuant to the provisions above, *Land Acquisition Act Chapter 295* Laws of Kenya was enacted. The preamble to that Act stated:-

"An Act of Parliament to make provision for the compulsory acquisition of land for the public benefit.

(underlining provided)

Section 3 of the same Act gave the Minister power if satisfied that the need for acquisition of some land was likely to arise under the provisions of ***Section 6***, to direct, a Gazette Notice to be published by the Commissioner of Lands of that impending acquisition and affected parties would be served with a copy of that Gazette Notice and under ***Section 6***, the Minister is directed to consider certain specific circumstances before he directs the Commissioner of Lands to issue notices for the acquisition of such parcels of land. ***Section 17*** and ***18*** of the ***Act*** dealt with what happens where part only of the parcel is acquired leaving a part remaining ***Section 17*** states:-

"Where part only of the land comprised in document of title has been acquired, the Commissioner shall, as soon as practicable, cause a final survey to be made of all the land acquired."

Section 19 deals with taking of possession and vesting of the acquired land in the Government and stipulates upon the land so acquired being vested in the Government, a notice that possession of the land has been taken and that the land has vested in the Government and a notice to that effect has to be served upon all registered proprietors of the land. We observe that in this case no such notices were exhibited by either party. But as that was not made an issue before us, we will not belabor it. Each of the respondents gave evidence to the effect that after acquisition of their lands, part of their lands remained which apparently was not surveyed as was required vide ***Section 17*** of the ***Land Acquisition Act*** and thus the respondents remained on those parcels now in dispute. This in effect means that the Government did not in practice take the whole of the land acquired through the various Gazette Notices and equally South Nyanza Sugar Company Limited for whose benefit the land was being acquired also did not utilise the acquired land fully. There remained parts of the acquired land which were not surveyed notwithstanding the letter from the Chief Land Registrar we have reproduced herein above, and on which the respondents continued to live. The appellant, under the pretext of being a local authority in the area and on the assumption that the unutilised parcels of land were Trust land, assumed authority over the same land, and according to the evidence on record started removing the respondents who were physically on the land to give room for its own expansion and also started allocating to third parties either parts or whole of those parcels of land.

We think we have, in our capacity as the first appellate Court on this appeal analysed the matters that were before the High Court to a fairly detailed extent and we now revert to the grounds of appeal each of which as we have stated, we will discuss in turn.

We have, to an extent considered the first ground. The first Gazette Notice No. 2996 states in its preamble as follows:-

"THE LAND ACQUISTION ACT 1968

(NO. 47 OF 1968)

NOTICE OF INTENTION TO ACQUIRE LAND IN

PURSUANCE of Section 6 (2) of the Land Acquisition Act

1968, I hereby give notice that the Government intends to

acquire the following land for the South Nyanza Sugar

Scheme in South Nyanza District."

That Gazette Notice leaves no doubt that the land acquisition was for South Nyanza Sugar Scheme. The second Gazette Notice was No 3737. It stated in its preamble as follows:-

"<u>THE LAND ACQUISTION ACT 1968</u>

<u>(NO. 47 OF 1968)</u>

NOTICE OF INTENTION TO ACQUIRE LAND

IN PURSUANCE OF SECTION 6 (2) of the land

Acquisition Act 1968. I hereby give Notice that the

Government intends to acquire the following land

for the South Nyanza Sugar Scheme (Awendo

Township Expansion) in South Nyanza District."

That in our view meant that the main purpose for acquiring land was South Nyanza Sugar Scheme and that Awendo Township expansion was within the sugar scheme complex. Several land parcels fell in this category. Gazette Notice No. 6 of 5th January 1979, did not mention Awendo Town Council and stated that the purpose for the acquisition was the South Nyanza Sugar Roads in South Nyanza. We have looked at the Gazette Notices on the record before us and we are unable to find out one that says the purpose of the acquisition was meant for the benefit of the appellant. Indeed if that were so nothing would have stopped the Government, once it acquired the same parcels to allocate all of them to the the appellant for its control. Further in its affidavit sworn by its then Town Clerk, Barnaba Kosgey, to which we have referred above, the appellant readily admitted at paragraph 4 and 5 that the purpose of the acquisition of the subject parcels of land was for the development of South Nyanza Sugar Company Limited. Hear him:-

"4. That the applicants have all admitted that the Government of Kenya compulsorily acquired the suit parcels of land in whole.

5. That, the purpose is also agreed to have been for Development of South Nyanza Sugar Co. Ltd."

That was a clear admission by the then clerk to the council who was the person in custody of its assets and all matters pertaining to land that the parcels were acquired for purposes of development of South Nyanza Sugar Company Limited. At *paragraphs 6* and *7* of that affidavit, Mr. Kosgey explained the basis of the appellant's claim to the residue or the unutilised portions of the acquired land. He does not claim at any stage that the land was acquired for the development of the appellant council. That affidavit was by consent, at the time of directions treated as defence and thus this ground is in effect complaining against a position that the learned trial Judge had no alternative but to take as the appellant never offered any evidence to the effect that the disputed parcels were acquired for the development of the Town Council of Awendo. In fact Mr. Josphat Ayonga, the only witness called by the appellant and who, as we have said was its Town Clerk later when the case was heard said that the land in dispute was held by the appellant in trust for the Government of Kenya. His further evidence was that the land reverted to the appellant merely because it was the local authority within which the compulsorily acquired land was situate. He also stated categorically as we have stated elsewhere as follows in his evidence in

chief:-

"The Government acquired the parcels of land for South Nyanza Company,"

and agreed as we have stated that the lands were taken for purposes of establishing SONY. Indeed he conceded that he had no authority in writing from the Commissioner of Lands or the Minister authorising the appellant to evict the plaintiffs.

We have considered the first ground of appeal at great length, but we cannot see any merit in it. The mere fact that in Gazette Notice No. 3737 the name of the appellant was included in brackets as we have stated only meant that South Nyanza Sugar Company Scheme would include the appellant as it was in proximity within the area covered by the scheme and did not mean it was beneficiary of the compulsory acquisition.

The second ground is in our view also not tenable. The Government acquired the land parcels for the benefit of South Nyanza Sugar Company. The company did not utilise all the parcels acquired for its purposes. The Government through the Chief Land Registrar wrote to the District Land Registrar way back, in fact some nine years before the originating summons was filed, indicating that it was alive to the respondents' complaints and appreciated the same. It did not stand in the way of the respondents getting their unutilised portions back. That being the case, much as it would have been legally more clinical, particularly for purposes of execution of court orders, for the Government to be made a party, the respondents had no claims against the Government.

On the contrary, it was the appellant which needed to have it joined as a party for it was the appellant which was claiming through the Government as it was stating that it had a right to hold onto residues that resulted from the compulsory acquisition as according to it the same land was trust land, *(which we agree with the learned Judge was a misconception)*, and it was the local authority in whose geographical area the residue fell therefore it had a right to control it. It was the appellant who needed the Government for its success. We do not see how the appellant's case cannot succeed on account of non inclusion of Government as a party. In any event, before us, Mr. Maroro, representing the Attorney General asked us to dismiss the appeal thereby disowning the appellant's claim. We are not persuaded that non inclusion of the Government renders the Originating Summons so defective as to warrant the Originating Summons being quashed and the appeal being allowed.

The third ground claims that the suit was statutorily time barred. This complaint is being raised for the first time in this appeal. We have perused the appellant's replying affidavit which was treated as defence when directions were taken on the Originating Summons and limitation was not raised in that affidavit. We have perused carefully the proceedings and questions put in cross examination to the respondents' witnesses and there is no indication that that issue of limitation was being canvassed. We have lastly perused the appellant's written submissions in the High Court and that issue of limitation is not raised anywhere. The law, as spelt out in ***Order 2 Rule 4 (1)*** of the ***Civil Procedure Rules*** is clear, that the defence of limitation must be pleaded before a party can rely on it and before a court of law can entertain it. That rule states:-

> **"4 (1) A party shall in any pleading subsequent to a plaint plea specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant statute of limitation or any fact showing illegality:**
>
> **(a) Which he alleges makes any claim or defence of the opposition party not maintainable....**
>
> **(b) ….....**
>
> **….....**
>
> **….....**

(c) Which raises issues of fact not arising out of the proceeding pleading."

But even if it were not a matter specifically required to be pleaded before it is canvased still, the fact that it was not pleaded is fatal, particularly as the issue was never canvased and left to the court to decide upon. In the case of **Galaxy Paints Co. Ltd vs Falcon Guards Ltd (2000) EA 885** this Court held:-

> **"The issue of determination in a suit generally flowed from the pleadings and a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court's determination. Unless pleadings were amended, parties were confined to their pleadings. Gandy v Caspair (1956) EACA 139 and Fernandes v People Newspapers Ltd (1972) EA 63 considered."**

That is the law. In cases where parties have canvassed the issue and left it to the court, the court can pronounce judgment on it though it was not pleaded. This was the holding in the case of **Odd Jobs vs Mubia (1970) EA 476**, where it was held:-

> **"A court may base its decision on unpleaded issue if it appears from the course followed at the trial court that the issue has been left to the court for decision."**

In the matter before us the issue of limitation was not pleaded as the law requires pursuant to ***Order 2 Rule 4 (1)*** we have cited above, neither was it pleaded in general even if the law had not required it to be pleaded and in any case it was not canvased in the course of trial and left to the court to decide upon. That being the case how would one find fault with the trial court? Where would one find fault with? He heard the case to its completion and pronounced judgment without the appellant raising limitation at all. The ground cannot succeed and must be and is hereby rejected.

The fourth ground is again a non starter. It complains that the learned Judge erred in entertaining the suit brought by way of Originating Summons when issues involved were not suitable for determination by way of Originating Summons. The reason why we say it is a non starter is because the record speaks for itself. The matter was commenced by way of Originating Summons for whatever reasons. But the record shows that immediately the matter was placed before Deputy Registrar, for mention, the Originating Summons was fixed for directions on 29th March, 2006. On that day the originating summons was placed before *Bauni J. (as he then was)* but directions could not be taken because the appellant was absent and had not filed replying affidavit though it had filed Memorandum of Appearance. The matter was adjourned and came up for directions on 4th July, 2006. On that day both Mr. Nyasimi for the respondents who were the applicants and Mr. Kisera for the appellant which was the respondent then, appeared before *Bauni J. (as he then was)* and Mr. Nyasimi informed the learned Judge that the matter was for directions and that both of them requested that the parties do give *viva voce* evidence. Mr. Kisera responded to that by saying **"That is so."** Upon that consent by the two, the learned Judge made an order as follows:-

> **"Order Parties to give viva voce evidence. Applicant to be referred to as plaintiff and respondent as defendant. The O.S. and supporting affidavit be regarded as plaint and replying affidavit as defence. Parties to get a date."**

Pursuant to that, the matter now as a complete suit with plaint and defence was fixed for hearing by the parties for 29th November, 2006 and the hearing indeed started on that day. Under that scenario, it is difficult to appreciate why the appellant could not mount a full hearing as is done in respect of a plaint and a defence. In any case, if the appellant felt the issues involved could not be determined by way of Originating Summons which was already a plaint, why did he not seek to file a further or supplementary affidavit to boost his defence in the matter? We say no more on that ground.

The last ground is not clear, but on our own and having analysed and evaluated the evidence that was before the High Court, we have no reason to accept that the judgment was against weight of evidence. Mr. Kisera submitted on this that there was no evidence of unutilised portions as there had

been no survey of what was allegedly the residues. We find an answer to this in the learned Judge's order which reads as follows:-

> **"Having established that the unutilised portions of the suit lands were found to be unsuitable for sugarcane farming and were not therefore occupied by SONY, and considering that Section 75 of the Constitution requires that once land has been compulsorily acquired ought to be used for the designated purpose only, the original owners of the suit land ought to be registered as the lawful owners of the unutilised parcels of the suit land. <u>Those parcels that were not utilised by SONY should be re-surveyed and title deeds thereof issued to the rightful persons by the area Land Registrar</u>."**

In short, much as the sizes of the unutilised parcels of land in dispute are as yet not clear, the owners are known and some of them are the respondents, and as the utilised land is known, a re-survey of the unutilised parcels will reveal the real sizes and the respondents will each be registered as appropriate. This would not be a difficult task, nor would it be a matter of law if the entire parcels had been registered and their acreages known and were cited in the relevant Gazette Notices. It would be a surveyor's duty to resurvey the residues and have the original owners registered as appropriate.

We think we have said enough to indicate that this appeal cannot succeed. It lacks merit and is hereby dismissed with costs to the respondents.

Judgment accordingly.

Dated and Delivered at Kisumu this 18th day of October, 2013.

J.W. ONYANGO OTIENO

….....

JUDGE OF APPEAL

F. AZANGALALA

….....

JUDGE OF APPEAL

S. ole KANTAI

….....

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

<u>DEPUTY REGISTRAR</u>