Ekesah (Suing as the Administrator of the Estate of John Alfred Ekesa – Deceased) v County Government of Busia & 3 others (Environment and Land Appeal E011 of 2021) [2024] KEELC 5930 (KLR) (19 September 2024) (Judgment)

Neutral citation: [2024] KEELC 5930 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIRONMENT AND LAND APPEAL E011 OF 2021

BN OLAO, J

SEPTEMBER 19, 2024

BETWEEN

JOSHUA SAMWELS EKESAH (SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOHN ALFRED EKESA – DECEASED) ..... APPELLANT

AND

COUNTY GOVERNMENT OF BUSIA ..... 1ST RESPONDENT

COUNTY GOVERNMENT OF BUSIA, DEPARTMENT OF LANDS, HOUSING & URBAN DEVELOPMENT ..... 2ND RESPONDENT

HEAD OF BUSIA COUNTY PUBLIC SERVICE ..... 3RD RESPONDENT

SUB-COUNTY ADMINISTRATOR, NAMBALE ..... 4TH RESPONDENT

(Being an appeal from the Judgment delivered on 29th July 2021 by HON. P. A. OLENGO SENIOR PRINCIPAL MAGISTRATE in BUSIA CMC ELC CASE NO 62 of 2019)

JUDGMENT

1. This judgment was originally scheduled for delivery on December 19, 2023 after counsel for the parties were directed to file and serve their submissions on or before 22nd August 2023. On that date, however, none of the parties had complied and a further extension was granted to 16th October 2023. By that date, however, only counsel for the Appellant had filed his submissions without notice to counsel for the Respondents who, by his letter dated 8th December 2023, sought and obtained an extension of time to file his submissions vide a letter dated 13th December 2023 and with my approval, the Deputy Registrar advised counsel for the Respondent that time had been extended and judgment would therefore be delivered on 22nd February 2024.

2. On that date, however, I was not sitting since I was then attending to my ailing step mother who unfortunately passed away 14th March 2024 and was buried on 30th March 2024. I resumed duties in April 2024 then in May 2024 I proceeded on my annual pre-scheduled leave upto July 2024 followed soon thereafter with the vacation upto mid-September 2024.

3. The above explains the delay in the delivery of this judgment which is highly regretted but was inevitable in the circumstances. I have therefore taken the earliest opportunity in the new term to deliver it.

4. Joshuah Samwels Ekesah (the Appellant herein) suing as the Administrator to the Estate of John Alfred Ekesa (the deceased herein) approached the Chief Magistrate's Court Busia vide his plaint dated 13th May 2019 and amended on 1st July 2020 seeking judgment against the County Government of Busia, County Government of Busia Department of Lands, Housing And Urban Development, Head of Busia County Public Service and Sub County Administrator Nambale (the 1st to 4th Respondents respectively) in the following terms with respect to plot No 7983/25 (the suit property) situated at Nambale Trading Centre, i.e:

    a. An order of permanent injunction restraining the Respondents, their servants, agents and those claiming through them from entering, surveying, pulling down structures or otherwise dealing with plot No 7983/25 situated at Nambale Trading Centre until the end of the lease period.

    b. In the alternative compensation of Kshs.6,000,000 as per the valuation report by Dunhil Africa Valuers Ltd.

    c. Damages

    d. Costs of the suit.

    e. Any other relief the Honourable Court shall deem appropriate.

5. The basis of the Appellant's case was that his late father the deceased herein was at all material times the owner of the suit property situated at Nambale Trading Centre. That the same had been leased to him in 1977 for a period of 99 years yet the Respondents wanted to take it over and pull down the structures thereon before the end of the lease and which would occasion him loss and damage thus necessitating the filing of the suit.

6. The Respondents filed their amended defence dated 7th September 2020 in which they pleaded, inter alia, that the suit property is public land earmarked for the Nambale Bus Park and was not therefore available for allocation to the Appellant. Further, that the Appellant was in illegal occupation of the suit property and that infact, the Appellant had no right of audience in the Court since he was not the right person to institute the suit. The Respondents therefore sought the dismissal of the Appellant's suit with costs.

7. The dispute was heard by Hon. P. Olengo Senior Principal Magistrate who, after hearing the evidence of the Appellant and his mother Florence Florida Ekesa (PW2) as well as that of the 1st Respondent's Chief Officer Housing and Lands namely Everline Teresia Mbigi (DW1) who were the only witnesses who testified on behalf of the parties, delivered his judgment on 28th July 2021 in which he dismissed the Appellant's suit with an order that each party meet their own costs.

8. Aggrieved by that judgment, the Appellant has now moved to this Court on appeal. He seeks that the said judgment be set aside and the following orders be made:

a. The Respondents to pay the Appellant the sum of Kshs.6,000,000 as an award for the suit property.

b. Interest on Kshs.6,000,000.

c. Costs of this appeal and in the lower Court.

d. Any other relief that is just and expedient.

9. In urging this Court to set aside the impugned judgment, the Appellant has proferred the following five (5) grounds:

1. That the learned trial Magistrate erred in law and in fact by disregarding the 50 years period for which the Appellant's father and the Appellant dutifully and consistently paid rates and rent to the local authorities.

2. That the learned trial Magistrate erred in law and in fact by it's conduct the Respondents had made the Appellant (sic) that the land had been genuinely and validly allocated to the Appellant and as a result the Appellant had developed the land and put up structures wherefrom he has been earning income to which conduct and action the Appellant was stopped by law from reneging from.

3. That the learned trial Magistrate erred in law and in fact in failing to find that if Respondent was keen to reclaim the land, it was under a duty to compensate the Appellant.

4. That the learned trial Magistrate erred in law and in fact in failing to appreciate that the conduct of the Respondents towards the Appellant had created reasonable expectations in the Appellant that he was the lawful owner of the property as a leasee and/or allottee and that any attempt to make repossession of the same would result in damages to the Appellant.

5. That the learned trial Magistrate erred in law and in fact actions by the Respondents to the Appellant amounted to compulsory acquisition of the Appellant's land and that naturally the Respondents are bound to make compensation.

10. Directions were taken that the appeal be canvassed by way of written submissions. The same have been filed by Mr Wambura the County Legal Counsel for the Respondents and by Mr J. V. Juma Advocate instructed by the firm of J. v. Juma & Company Advocates for the Appellant.

11. I have considered the record herein and the submissions by counsel.

12. This is a first appeal. I must therefore be guided by the principles set out in various cases while considering this appeal. In the case of Peters -v- Sunday Post Ltd 1958 E.A. 424 some of those principles were set out as follows:

> " Whilst an appellate Court has jurisdiction to review the evidence to determine whether the conclusions of the trial Judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it shown that the trial judge has failed to appreciate the weight or bearing circumstances admitted or proved, or had plainly gone wrong, the appellate Court will not hesitate to so decide."

Similarly, in the case of Abok James Odera t/a Odera & Associates -v- John Patrick Machira 2013 eKLR, the duty of a first appellate Court was reinstated in the following terms:

> " This being a first appeal, we are reminded of our primary role as a first appellate Court namely; to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way."

Grounds 1 and 2 of the memorandum of appeal can be considered together. Therein, the Appellant faults the trial Magistrate for disregarding the fact that he and his father had for 50 years paid the rates and rent for the suit property, developed it and that by their conduct therefore, the Respondents had made the Appellant to believe that the suit property had been allocated to it. In the impugned judgment, the trial Magistrate made the finding that the suit property was public land and was not therefore available for alienation to the Appellant. Although the Appellant had pleaded in paragraph 6 of his plaint that the deceased was:

> 6: "At all material times relevant to this suit ... the owner of plot NO 7983/25 situated at Nambale Trading Center."

there was really no documentary or other tangible evidence placed before the trial Court to prove such ownership. Even if the deceased and, after him, the Appellant had occupied and developed the suit property for over 50 years and paid rates and rent, that alone did not confer any proprietary rights to them over the suit land. The Appellant had not approached the Court seeking orders that he had acquired the suit property by way of adverse possession. His claim, as is clear from paragraph 6 of his amended plaint, was that at all times relevant to the suit, the deceased was the "owner" of the suit property. As was held by the Court of Appeal in the case of Wreck Motors Enterprises -v- The Commissioner of Lands & 3 Others C.A. Civil Appeal No 71 of 1997 [1997 eKLR].

> " Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held. See DR *JOSEPH N. K, Arap NG'OK -V- JUSTICE MOIJO OLE KEIWUA & 4 OTHERS CIVIL APPLICATION NO NAI 60 of 1997* (unreported)".

The mere occupation of land per see, does not confer ownership or any title to land as the Appellant wanted the trial Court to believe. And although the Appellant had in paragraph 4 of his statement in support of his claim stated that:

> 4: "That my late father was leased the said plot in the year 1977 by the County Council of Busia, now County Government of Busia for a period of 99 years."

no such lease document was exhibited during the trial. Indeed vide their letter to the Appellant dated 2nd May 2019, the 1st Respondent made it clear that his occupation of the suit property was merely on "TOL terms" which simply means Temporary Occupational License. In my view, the mere payment of rates and rent cannot amount to proof of ownership of the suit property by the Appellant.

13. Grounds No 1 and 2 must be dismissed.

14. In grounds No 3 and 5, the trial Magistrate is faulted for failing to make a finding that the Respondents had by their conduct compulsorily acquired the suit property. In page 5 of the impugned judgment,

the trial Magistrate made the finding that the suit property was public land reserved for the bus park. This is what he said:

> "From the land (sic) above, it is therefore clear that plot No 7983 was not available to be allocated to the individuals on the issue or (sic) to whether plaintiff's father was allocated plot No 7983/25, the plaintiff did not produce any allotment letter or lease certificate to prove ownership.
>
> Yes there were receipt for paying of the rents and rates at constant reminders and demand notes from the defendant whenever land rent and rates delayed but those documents does (sic) not counter right of ownership.
>
> They only show that the plaintiff was in occupation of the defendants' land and had to pay land rent and rates. The plaintiff's claim that his father applied for an allocated plot L.R No 7983/25 which was even later on extended to 99 years does not help much because as I had said above the land in question was public land reserved for bus park the same could not be allocated to private individuals even if the correct procedure was followed."

I understand the Appellant to be complaining that the suit property was compulsorily acquired by the Respondents without him being compensated. The procedure for compulsory acquisition of land is elaborately set out in Sections 107 to 133 of the *Land Act*. The Respondents' defence to the Appellant's claim was that the suit property was public land and that the Appellant only had a TOL – Temporary Occupational License allowing him to utilize the suit property upon payment of rates and rent. The Respondents cannot be accused of compulsory acquisition of land which in the first place was infact public land set aside for use as a bus park. The Respondents were therefore limiting the use of the suit property for public good.

15. Grounds No 3 and 5 are also therefore for dismissal.

16. Finally, in ground No 4, the Appellant takes issue with the trial Magistrate for failing to appreciate that the Respondents had created a reasonable expectation that the Appellant was the lawful owner of the suit property as leasee or allottee. I hear the Appellant to be claiming that by their conduct, the Respondents created a legitimate expectation that the Appellant was the owner of the suit property. In De Smiths Judicial Review 6th Edition the authors state as follows with regard to a legitimate expectation:

> "It follows therefore that the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a certain manner. For the promise to hold, the same must be made within the confines of law. A public body cannot make a promise which goes against the express letter of the law."

Therefore, before it can be held that the Respondents created a reasonable or legitimate expectation or representation, the same must both be precise and specific and most importantly, it must be lawful. While it is true that the Appellant has been paying rates and rent for the suit property, it is not disputed that the suit property is infact public land reserved for use as a bus park. As I have already stated above, it is in public interest that it remains such. In the case of *NIAZ MOHAMED JAN MOHAMED -V- COMMISSIONER OF LAND & OTHERS H.C.C..C NO 423 of 1996* it was held that land which is reserved for public interest cannot be alienated or allocated for private use. Under *the Constitution* of Kenya 2010, only the National Land Commission has the mandate to alienate and allocate public land. Therefore, even if any reasonable expectation was created in the mind of the Appellant, it was not lawful, nor actionable.

17. The Appellant's counsel has submitted that there existed a valid contract between the Appellant and the Respondents over the suit property. This is how counsel has addressed that issue in his submissions:

> " In the instant case, the reasonable expectation of the plaintiff was that the defendants had allotted him the suit parcel and by virtue of allowing him to continue paying land rates and even demanding from him land rates when they fell overdue, any reasonable man would make an inference that there existed a valid and enforceable contract between the two parties."

Counsel then goes on to add citing the case of G. Percy Trentham Ltd -v- Archital Luxfer (1993) L Lloyds Rep 25 and states:

> " In the instant case, the plaintiff made an application for an allotment of the suit property which application was accepted and paid for, further, the plaintiff after the issuance of a Gazette Notice for parties to extend the lease period of 99 years which application was accepted and paid for. Subsequently, the County Government acknowledged the plaintiff as the legal proprietor of the suit parcel by virtue of it's letter dated 17/10/2017 addressed to the plaintiff's late father. It therefore goes without say, that there was offer and acceptance which is a key ingredient of a valid and enforceable contract."

In response to those submissions, counsel for the Respondents stated as follows in his submissions:

> " The correct position is that, vide the minutes of the Nambale Town Council meeting held on 9th July 2004 (forming part of the Respondents' list of Documents) the meeting had made a clarification that, the late John Alfred Ekesa was to be accommodated by the subject property on temporary basis as a tenant."

It is clear therefore that if there was any doubt between the parties over the status of the Appellant's occupation of the suit property, that confusion must have been clarified by the Respondents vide the minutes dated 9th July 2004. In the circumstances, any suggestion of a contract being inferred does not arise.

18. Ground No 4 of the memorandum of appeal must also collapse.

19. On the issue of costs, the trial Magistrate found it prudent to order that the parties meet their own costs. Costs are at the discretion of the Court and I see no reason to depart from the trial Magistrate's discretion in the circumstances of this case.

20. The up-shot of all the above is that this appeal is devoid of merits. It is dismissed and each party shall meet their own costs.

BOAZ N. OLAO

JUDGE

19TH SEPTEMBER 2024

JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 19TH DAY OF SEPTEMBER 2024 BY WAY OF ELECTRONIC MAIL AND WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO

JUDGE

19TH SEPTEMBER 2024