



**County Government of Busia v Emasete & another (Civil Appeal
94 of 2018) [2022] KECA 1245 (KLR) (4 November 2022) (Judgment)**

Neutral citation: [2022] KECA 1245 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 94 OF 2018
PO KIAGE, M NGUGI & F TUIYOTT, JJA
NOVEMBER 4, 2022**

BETWEEN

COUNTY GOVERNMENT OF BUSIA APPELLANT

AND

**VINCENT WESONGA OSIMITA (SUING AS PERSONAL REPRESENTATIVES
OF THE ESTATE OF DESIRANDA AKANYATI OSUMATI
(DECEASED) 1ST RESPONDENT**

WILLIAM OSIMITA EMASETE 2ND RESPONDENT

*(Appeal from the Judgment and Orders of the Environment and Land Court at
Busia (A.K. Kaniaru, J) Dated 18th October, 2017 in BUSIA ELC NO. 33 of 2015)*

JUDGMENT

JUDGEMENT OF TUIYOTT, JA

1. The dispute giving rise to this first appeal is over the ownership of all that parcel of land known as Mundika/Bukhayo/329 (the suit property).
2. The common evidence is that the current registered proprietors of the suit property are William Osimata Emasete (the 1st respondent) and Vincent Wesonga Osimata (the 2nd respondent). This is not without controversy because at the time the respondents, as the personal representatives of the estate of Desiranda Akanyati Osumati (the deceased), brought proceedings being Busia ELR No. 33 of 2015 against the County Government of Busia (the County Government or the appellant), the suit property was registered in the name of the deceased to hold in trust for “Wesonga Osimatti”. An issue that has arisen in this appeal is whether that change could be lawfully effected despite the proceedings and the implication it would have on the capacity of the respondents to commence and prosecute the suit before the trial court in the manner in which they did. A second issue is whether the 2nd respondent,



Vincent Wesonga Osimata is the same person as Wesonga Osimatti- note the difference in spelling of the last names.

3. Anyhow, the complaint of the respondents was that the County Government had trespassed into the suit property and committed acts of trespass including mining murram, constructing a 12-meter road across the suit property and putting up a chain link fence on one side of the suit property.
4. The respondents sought the intervention of the ELC for the following orders:
 - a. A permanent injunction restraining the defendant, his 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 fences 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.
5. The defence of the County Government was that the suit property had been acquired by the National Government by way of compulsory acquisition vide Gazette Notices No. 1217 and 1218 of 1981 and that any entries in the register made after April 7, 1981 were illegal, fraudulent, null and void. The County Government asserts that it has a beneficial claim and interest in the suit property and prayed for the following orders in a counterclaim dated January 25, 2016;
 - a. A declaration that entries in the register after Entry No. 2 purporting to grant the Plaintiffs herein a right of claim to Land Parcel No. Bukhayo/Mundika/329 is unlawful, unprocedural and thus null and void.
 - b. A declaration that the Plaintiffs' purported occupation and use of Land Parcel No. Bukhayo/Mundika/329 amounts to trespass.
 - c. An order for cancellation of title deeds in respect of Land Parcel No. Bukhayo/Mundika/329 in the names of Wesonga Osimita and subsequent registration thereof in the names of the County Government of Busia.
 - d. Any other relief the court shall deem just and expedient.
6. Kenya Scouts Association (KSA) joined the proceedings as interested parties although it purported to file a defence and counterclaim dated April 18, 2016. In it, KSA contends that registration of the suit land in the name of the deceased was unlawful and that at any rate the registration was subject to an overriding interest of the compulsory acquisition which had extinguished the deceased's title. In the counterclaim KSA sought the following orders:
 - a. The deregistration/cancellation of the deceased's names in the land register.
 - b. The registration of the defendants as proprietors of the suit land.
 - c. The eviction of the plaintiffs from the suit land.
 - d. Costs.



7. At trial, William Osimita Emasete (the 1st respondent) testified for the respondents. In brief, his evidence was that the suit land originally belonged to his late father but was registered in the name of Desiranda Akinyati (the deceased), his late mother. He stated that his late father told him that although the government had intention to acquire the suit land, it did not do so. On who was in possession of the suit property, his testimony was that while the County Government had trespassed on a portion of the land, the respondents were using part of it.
8. In cross-examination he explained that the deceased held the suit property in trust for the 2nd respondent until he turned 18. That the deceased was not supposed to deal with the land after 1985, the year being important because it was then that the 2nd respondent turned 18. It was also his testimony that the gazette notice of the government's intention to acquire the suit property was degazetted through a court order, although he did not produce the court order or a copy of it.
9. The 2nd respondent, whose name in the plaint read Vincent Wesonga Osimita, stated that he is the Wesonga Osimatti for whose benefit the deceased held the land in trust.
10. One witness testified for the County Government. He is Tom Chepkwasi, then the Land Registrar, Busia County. He made reference to entry No. 2 of the register. It is dated April 7, 1981 and is a caution by the Government of Kenya notifying of an intention to take over the suit property vide Gazette Notice No. 1217 of April 16, 1981. It was his evidence that it was improper for entry No. 3 to be effected before entry No. 2 was discharged, presumably the removal of the caution. It was also his evidence that the process of compulsory acquisition cannot be done when the registered owner is already dead and that he did not know whether any compensation had been paid to the owner of the land for the compulsory acquisition.
11. Citing the repealed *Land Acquisition Act* (cap 295), the trial learned Judge held that it was crucial in a claim of compulsory acquisition that an inquiry be held and an award of compensation be made. The award ought to be in writing and served on the persons affected. The trial court held that the record of acquisition proceedings and of the award were not produced and therefore compulsory acquisition had not been proved. In the end the court dismissed the defendant's counterclaim.
12. In this appeal, the County Government raised 11 grounds but in the end the focus was on the capacity of the respondents to bring the suit as personal representatives of the deceased. This would not be surprising because the appellant, having failed to prove that the intention of the government to acquire the land by compulsory process had been perfected through taking of an inquiry, making of an award and payment to the owner, could not fault the finding of the ELC that it had failed to prove ownership over the suit property.
13. At the hearing of the appeal, Mr Makokha, learned counsel, appeared for the appellant. He submitted that the respondents brought the suit as the personal representatives of the estate of the deceased and on the basis that the deceased was the registered owner of the suit property. However, the documents produced in court showed the owner of the property to be the respondents. The transfers from the deceased to the respondents is explained as follows. Vincent Wesonga got registered as the owner of the land by way of transmission vide Nairobi High Court Succession Cause No. 1500 of 2014 and upon confirmation of the grant, the respondents became registered owners of the suit land in the ratio of 60:40, the bigger portion being to the 1st respondent. It is emphasized by the appellant that at the time of filing the suit, the respondents did so in their capacity as the personal representatives of the estate of the deceased and not in their personal capacities.
14. The appellant submits that at no time was the deceased a registered owner of the suit property as she merely held it in trust for Wesonga Osimatti. It is argued that the trial court did not address its mind



on the issue of ownership and had it done so, then it would have come to the conclusion that the suit land never belonged to the deceased so as to empower her legal representatives to have capacity to sue in respect thereof.

15. On a related issue, the appellant contends that in his testimony the 2nd respondent stated that he was the same person as Wesonga Osimatti appearing in entry No. 3 of the register. The appellant posed the question why, if the 2nd respondent had attained the age of majority at the time of filing the suit, did he need to obtain letters of administration in respect of her deceased mother who was not the registered owner of the suit land. I understand the appellant's argument to be that he could simply be registered as proprietor without the need for transmission.
16. The learned trial Judge was faulted for holding that the land registrar ought to have removed entry No. 2 before making entry No. (3?) on the basis that entry No.3 was informed by a court order. The appellant submits that there was no evidence of a court order upon which entry No. 3 was made and the ruling of 10th August, 1983 could not be such order. That in any event, the proper procedure would have been for the land to be registered first in the name of the deceased as trustee of Wesonga. Upon Wesonga attaining the age of majority, Wesonga Osimatti (not Vincent Wesonga Osimata) would have sought for vesting orders under section 45 of the *Trustee Act*.
17. Lastly, that it was not sufficiently proved that Wesonga Osimata whose name appears at entry No. 3 was the same person as the 2nd respondent.
18. In reply, Mr Isoe, learned counsel for the respondents, reiterated the findings of the trial court that the procedure set out in the law then dealing with compulsory acquisition was not followed by the government. We were urged to find that the issue of ownership of the property as between Masete Osimata, the deceased and Wesonga Osimati is irrelevant and was never an issue at trial.
19. This is a first appeal and the role of this Court is to re-evaluate the evidence afresh and to draw our own conclusion having regard to the fact that we have not seen or heard the witnesses. See *Selle & another v. Associated Motor Boat Company Ltd. & others* [1968] EA 123.
20. I first start by observing that while the respondents now argue that at trial no issue arose as to who between Maste Osimata, the deceased and Wesonga Osimati was the owner of the land, the respondents themselves introduced the issue into the proceedings in their final submissions. After framing one issue thus; whether the plaintiff are the owners of land parcel no. Bukhyayo/mundika/329, the appellants went on to justify that they were entitled to deal with the suit property in any manner they deemed fit. The appellant latched on the opportunity to draw a nexus between the issue of ownership and the capacity of the appellants to bring the action. Against this backdrop, the issue of capacity fell for determination. See *Odd Jobs vs Mubia* [1970] EA 476 where the court held;

“ A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision;
on the facts the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it”.

21. Before dealing with the substantial issue of capacity, I address the issue as to whether Wesonga Osimatti the named beneficiary of the suit property is the same person as the 2nd respondent. On this, the trial court held;

“ 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 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.”

22. In his testimony, the 2nd respondent stated that the deceased was his mother and that he was Wesonga Osimatti but in his introduction to court at the commencement of his testimony he stated his names to be Vincent Wesonga Osimita. The totality of the oral evidence and the written statement of 1st respondent, which was adopted as his evidence, was that the 2nd respondent was his brother and that his mother Desiranda Akanyati held the land in trust for him. No evidence was led by the appellant to refute this evidence and in that event, it is plausible to reach the conclusion that the 2nd respondent is the person referred to as Wesonga Osimatti in the register to the suit property. The holding of the trial court cannot be faulted.
23. In determining the issue of capacity, it helps to remember that the respondents filed their suit on April 17, 2015. As at that date, the proprietorship in the title read as follows:

“Wesonga Osimatti Mundika sublocation whole and to be held in trust for him by Desiranda Akunyati Osumati until age 18 years.”
24. From this entry, although the registered proprietor was the deceased, she held it in trust for Wesonga Osimatti until he attained the age of 18 years. The effect in law was that while the deceased was named in the register as proprietor, the proprietorship was subject to the trust. Of importance, as pointed out by counsel for the appellant, is that the 2nd respondent had attained the age of majority in 1985. This was way before the deceased died on August 8, 1991. Ideally, the trustee ought to have formally transferred the proprietorship of the property to the beneficiary upon the event upon which the trust was predicated happened, in this case upon the 2nd respondent attaining the age of 18 years. Yet, because this had not happened at the time of the death of the deceased, the entry in the register remained unchanged.
25. The appellant makes the argument that the beneficiary of the trust should have sought a vesting order as provided for under section 45 of the *Trustee Act* which states:
 45. Vesting orders of land

In any of the following cases—

 - (a) where the court appoints or has appointed a trustee, or where a trustee has been appointed out of court under any statutory or express power;
 - (b) where a trustee entitled to or possessed of any land or interest therein, whether by way of mortgage or otherwise, or entitled to a contingent right therein, either solely or jointly with any other person—
 - (i) is under disability; or



- (ii) is out of the jurisdiction of the court; or
 - (iii) cannot be found, or, being a corporation, has been dissolved.
- (c) where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any interest in land;
 - (d) where it is uncertain whether the last trustee known to have been entitled to or possessed of any interest in land is living or dead;
 - (e) where there is no personal representative of a deceased trustee who was entitled to or possessed of any interest in land, or where it is uncertain who is the personal representative of a deceased trustee who was entitled to or possessed of any interest in land;
 - (f) where a trustee jointly or solely entitled to or possessed of any interest in land, or entitled to a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or interest or a release of the right, to convey the land or interest or to release the right, and has willfully refused or neglected to convey the land or interest or release the right for twenty-eight days after the date of the requirement;
 - (g) where land or any interest therein is vested in a trustee, whether by way of mortgage or otherwise and it appears to the court to be expedient, the court may make an order (in this Act called a vesting order) vesting the land or interest therein in any such person in any such manner and for any such estate or interest as the court may direct, or releasing or disposing of the contingent right to such person as the court may direct:

Provided that—

- (i) where the order is consequential on the appointment of a trustee, the land or interest therein shall be vested for such estate as the court may direct in the persons who, on the appointment, are the trustees; and
- (ii) where the order relates to a trustee entitled or formerly entitled jointly with another person, and that trustee is under disability or out of the jurisdiction of the court or cannot be found, or being a corporation has been dissolved, the land, interest or right shall be vested in the other person who remains entitled, either alone or with any other person the court may appoint.

26. Even if I were to find that the *Trustee Act* would be applicable, looking at instances contemplated by (e), the statutory provision would not assist the 2nd respondent because there was no uncertainty as to who would be the personal representatives of the estate of the deceased and the respondents in fact eventually took out grant.
27. The suit property being trust property could not be available for disposal in the succession proceedings of the deceased as it did not form part of her estate. However, as the deceased remained the named proprietor and the trust had not been formally terminated, the trust in a sense was a continuing trust and the personal representatives of her estate would have the responsibility of giving effect to the trust which would be to formally transfer the property to the 2nd respondent. The personal representatives would, in the meantime, also be duty bound to protect the suit property. The personal representatives were therefore entitled to take out the trespass proceedings against the County Government. In a word, they had capacity to mount the suit.



28. The evidence is that the letters of administrators were confirmed on April 29, 2015, about 10 days after the suit had been filed in which the suit land was distributed to William Osimita Emasete (the 1st respondent) and Vincent Wesonga Osimita (the 2nd respondent) in the ratio of 60% to 40% respectively. It does seem that as the whole property was held in trust for him, the 2nd respondent was entitled to the entire parcel of land but if he chose to give a portion to his brother, then that was within his prerogative and should not concern us. It is pursuant to the confirmation that changes were made to the register on June 23, 2015 to reflect the new position. It also seems that the title to the suit land was closed on 24th July, 2015 upon the partition of the land into parcels 10243 to 10245.
29. At the time of the trial, the law applicable to the suit property was the now repealed *Registered Land Act*, section 163 of the repealed statute saved the application of the common law and doctrines of equity to properties registered under it. The doctrine of lis pendens which is both in common law and equity would be applicable to the litigation before the trial court and the changes made to the register after the filing of the suit were without the authority of the ELC and therefore in breach of the doctrine whose objective was discussed in *Baber A Mawji v United States International University & another* [1976] eKLR where Justice Madan, adopted the words of Turner L J in *Bellamy v Sabine* [1857] 1 De J 566, 584 and held as follows:-
- “We are unburdened by trammellings obtainable or operable in India upon the conditions of which country the Transfer of Property Act is, I say it respectfully, in many respects archaically based. I think the situation in Kenya is, or it ought to be, this: the Court has power to prevent a breach of the provisions of section 52 in proceedings before it in which any right to immoveable property is directly and specifically in question by imposing a prohibitory order against the title of the property to prevent all dealings in it pending the final determination of the proceedings, except under the authority of the court and upon such terms as it may impose. This is to ensure that which Turner L J had in mind does not happen. He said in *Bellamy v Sabine* (1857) 1 De G & J 566, 584, a case quoted by Mr Salter to further his argument:
- It is ... a doctrine common to the Courts both of law and equity, and rests, as I apprehend, upon this foundation – that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations pendente lite were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant’s alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to be defeated by the same course of proceeding.”
30. The transgressions of effecting changes in the register notwithstanding, the inevitable outcome of the litigation was that the appellant was not the owner of the suit land and was a trespasser. For that reason, the justifiable lamentation of the appellant aside, it cannot rely on the doctrine of lis pendens to upset the judgment of the ELC. In the result, I would propose that the appeal be dismissed with costs to the respondents.

JUDGMENT OF KIAGE, JA

1. I have had the benefit of reading in draft the judgment of Tuiyott, JA. I entirely agree with it and have nothing useful to add.
2. As Mumbi Ngugi, JA is in agreement, the appeal shall be disposed of as proposed by Tuiyott, JA



JUDGMENT OF MUMBI NGUGI, JA

1. I have had the benefit of reading in draft, the judgment of my brother, Tuiyott, JA. I entirely agree with the reasoning and conclusion arrived thereat and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 4TH DAY OF NOVEMBER, 2022.

F. TUIYOTT

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

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

SIGNED

DEPUTY REGISTRAR

