



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT THIKA**

**ELCA NO 32B OF 2020**

**PETER MWANGI MACHARIA.....APPELLANT**

**VERSUS**

**ALPHAXARD WAROTHO KOMU.....1<sup>ST</sup> RESPONDENT**

**NDUNGU KARANJA.....2<sup>ND</sup> RESPONDENT**

**MBUGUA GICHU.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

1. The Appellant instituted this appeal vide a Memorandum of Appeal dated 12/8/2020 against the Judgment delivered on the 30/5/2018 in Thika CMCC No. 93 of 2005. The said Memorandum of Appeal contains nine grounds;-

**a. THAT the Learned Magistrate erred in law and in fact when she failed to consider that the Appellant was the legally registered owner of land parcel number NDARUGU/GAKOE 654.**

**b. THAT the Learned Trial Magistrate erred in law and in fact by failing to consider that no transfer of land parcel Number NDARUGU/GAKOE/654, had been effected to the Respondents of Thika County Council.**

**c. THAT the Learned Trial Court erred in law and in fact by not considering that the Respondents had not raised any claim over land parcel Number NDARUGU/GAKOE/654.**

**d. THAT the Learned Trial Magistrate erred in law and in fact by not considering that the Appellant had successfully taken up a loan with title for land parcel number NDARUGU/GAKOE/654 without any objection by the Respondents.**

**e. THAT the Learned Trial Magistrate misguided herself in law and in fact by not upholding the sanctity of title as is laid down in Section 26 of the Land Registration Act.**

**f. THAT the Learned Trial Court erred and misguided herself by holding that the cattle dip erected in the Appellant's land was for public interest yet the Appellant was not involved in the purported meeting that decided to put a cattle dip on the Appellant's land and there was no public participation in erecting the same.**

**g. THAT the Learned Magistrate erred in fact and in law in failing to consider that the Appellant was never compensated.**

2. When the appeal came for directions on the 14/10/2021 the Respondent's counsel, Mr Ngaruiya informed the Court that the appeal was opposed. Parties elected to canvass the appeal by way of written submissions.

3. The Appellant filed submissions through the firm of Messrs Muturi Njoroge & Company Advocates while the Respondents failed to comply with the directions of the Court with respect to the filing of written submissions.

4. The Appellant submitted that he acquired the suit land in 1980 from one Mr P Mucheru Kabutu and even later charged the suit land to AFC to secure financial facilities which he is still paying. That his acquisition was supported by the documents of transfer backed with the land control board consent dated the 6/6/1980. That as such his title is protected under Section 26 of the Land Registration Act (LRA) as no grounds were laid by the Plaintiffs to assail the same.

5. It was contended by the Appellant that no transfer of the suit land was effected in the name of the County Council of Thika as averred by DW2. That this step having been missed as admitted by the witness means that the suit land belongs to the Appellant and the Appellant being a third party cannot be bound by unregistered interests on the land.

6. Further the Appellant faulted the trial Court for not making a finding that the Respondents raised no claim by way of counterclaim on the suit land. That finally the trial Learned Magistrate misdirected herself in holding that the cattle dip erected on the land was for public purpose /interest yet the Appellant was not consulted when the same was alienated for that purpose. That the Appellant purchased the land from Mucheru free from any encumbrances and third party interests and that indeed the cattle dip was on another parcel of land and not the suit land. He faulted the Respondents for not cautioning the land to protect their interest, if any. He submitted that no compensation has been made in respect to his land which he has a right to peaceful and quiet enjoyment as a registered proprietor.

7. Having read and considered the pleadings, the evidence adduced on trial, the record of appeal and the submissions on record the Court finds that the key issue for determination is whether the Plaintiff acquired a valid interest in the suit land and who meets the costs of the suit.

8. As a first appellate Court, this Court's duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the Court is a first appeal such as this one was stated in **Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123.**

9. According to the evidence on record P Mucheru exchanged the suit land in 1972 with the County Council of Kiambu then going by the minutes of the Council dated the 26/5/1972 which stated as follows;

**“Min 69/72; Gakoe Thunguri Cattle Dip – Mr Mucheru Kambutu.**

**The request by the above named to be compensated with county plots on exchange with his offer of a piece of land for cattle dip was recommended.**

**Certified true copy of the original.”**

10. On the 6 /6/72 the County Council of Kiambu in a full Council Meeting ratified and approved the minutes of the Finance and General Purpose Committee of 26/5/1972.

11. Both these minutes have not been controverted by the Appellant.

12. It was the evidence of the Appellant that he purchased the suit land from Mucheru in 1980 vide a transfer of land registered on the 9/6/1980 and a title was issued to him on the 16/6/1980. He has attached the copy of the letter of consent from the Land Control Board dated the 6/6/1980. The Appellant admitted that though he purchased parcel 654 from Mucheru he settled on parcel 594 until 2004 when he realized that the land he holds title is parcel 654 and not 594. He says he did not ask Mucheru why he showed him the wrong land. He conceded that the parcel he has been occupying is registered in the name of Thika County Council as shown by the official search dated the 15/2/2005. That he has planted coffee on the said parcel which Mucheru showed him. He admitted in evidence that he has occupied parcel 594 for over 20 years but now wants the Respondents being the officials of the public cattle dip to be enjoined from the suit land (parcel 654) and that the cattle dip be removed altogether.

13. DW1 led evidence and informed the Court that he is the Chairman of the cattle dip which was built in 1972 by the public with the help of donor funding from Denmark. He reiterated the evidence of DW2 that parcel 594 belongs to the Council and that having been found unsuitable for the construction of a cattle dip, Mr Mucheru offered his land, parcel 654 for the purpose of constructing the cattle dip. That Mucheru was compensated with parcel 594 which he took over and occupied for over two decades. That parcel 594 was along the river and the suit land is next to the road on a higher ground hence suitable for the construction of the cattle dip. That the Plaintiff acquired the land from Mucheru and planted tea and occupied it for over 20 years. Gachege Tea Factory Co Ltd vide its letter dated the 21/1/2005 confirmed that the Appellant has planted 1053 mature tea bushes on parcel 594. This evidence was not challenged and supports the fact of the long occupation of parcel 594 by the Appellant.

14. DW2 like DW1 informed the Court that the exchange of the land between the County Council of Kiambu and Mucheru was completed in 1972 and that Mucheru was compensated with parcel 594 which he conveyed to the Appellant. This evidence is in agreement with the occupation of the land by the Appellant. How else could the Appellant have occupied the land belonging to the council for over two decades? It is the finding of the Court that the Appellant knew or ought to have known that Mucheru had no interest in the suit land. This was corroborated by his own evidence at the trial when he stated as follows;

**“I have stayed on 594 for over 20 years. I took a loan (with parcel 654) when the case was in Court. It is against land parcel 654. I took AFC to the land and I showed them that there was a cattle dip. I told them that the title belonged to the public.”**

15. The above evidence lends credence to the Court's finding that the Appellant became aware that the land he purported to purchase from Mucheru was public land. He is a resident of the area and his occupation has been confirmed by the tea factory where he supplies green leaf. Land for a cattle dip is public land and it is inconceivable that he just discovered in 2004 that he was occupying the wrong plot. The evidence was there for him to see/know that he was buying a public land, given that the cattle dip was developed in 1972 way before the transaction took place.

16. The Court believes the evidence of the DW1 and DW2 that there was indeed an exchange of parcel 654 with parcel 594 in 1972. At that point Mucheru relinquished all his interest title and estate in parcel 654 and what was remaining was the formal transfer and registration of the exchange of the lands. Mucheru was compensated with parcel 594. Mucheru held the title in the suit land in trust for the County Council

and therefore there was nothing to convey to the Appellant.

17. It is evident that the parties acted on the exchange and changed their positions – the Defendants continued to utilize the land as a cattle dip since 1972. The land has therefore changed character from private to public or trust land. The Appellant too acquiesced in the occupation of 594 and continued to develop it as his own as evidenced by the growing of a cash crop in form of 1053 tea bushes for over two decades. He is therefore estopped from claiming public land two decades later. Had the Appellant carried out proper due diligence at the time of acquiring the land from Mucheru he would have discovered that Mucheru had relinquished his interest in the suit land in 1972 and was compensated with parcel 594. The Appellant admitted that Mucheru put him in possession of 594 after the sale in 1980 and that he never enquired why. The reason can only be because Mucheru had relinquished his interest to the County Council in 1972 with respect to parcel 654 and held it in trust for the said Council.

18. I concur with the trial Court that the Appellant's remedy is against Mucheru whom he never bothered to enjoin in the suit.

19. Having analyzed the appeal in my considered view, the appeal is unmerited and it is hereby dismissed with costs payable by the Appellant.

20. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 28<sup>TH</sup> DAY OF MARCH 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of:**

Appellants – Ms Mwangi holding brief for Muturi

Respondents 1, 2 & 3 – Absent

Phyllis – Court Assistant