REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELCA 17 OF 2017

JAMES KARIUKI KIBUBA.....APPELLANT

VS

THIKA COUNTY COUNCIL.....RESPONDENT

(Being an Appeal from the judgement delivered by Hon C W MEOLI CM

(as she then was) in CMCC NO 271 OF 2000 at Thika on the 18/8/2009).

JUDGMENT

1. The Appellant herein being aggrieved by judgment and decree of C W Meoli, then Chief Magistrate (as she then was) proferred the present appeal vide a memorandum of appeal dated 11/9/2009 on the following grounds; That the learned trial magistrate erred in law and fact in;

a. Finding that plot No LOC1/MUKARARA/666 was a first registration to the 1st Respondent and that the title deed was issued to the 1st Respondent back in 1962 while the 1st Respondent was established in 1994 deriving its authority from Murang'a County Council.

b. Plot LOC1/MUKARARA/373 was a family land which was not inclusive of Plot No LOC1/MUKARARA/666 bearing a 1st registration to the Appellants father (deceased) prior to 1963.

c. LOC1/MUKARARA/373 was 9.3 acres as stated in title deed and plot No LOC1/MUKARARA/666 should be severed from LOC1/MUKARARA/373 which would reduce the actual physical acre range compared to the stated figure on the title deeds.

d. That LOC1/MUKARARA/666 had been demarcated on LOC1/MUKARARA/373 prior to 1962 basing the same on unsupported or unfounded evidence.

e. In reaching the decision and conclusion that did in view of the evidence and circumstances of the case before her.

2. Subsequently the Appellant made the following prayers;

a. The Appeal be allowed and the lower Court judgement be reversed.

b. An injunction order be issued restraining the Respondents from making any water point and a declaration that LOC1/MUKARARA/666 within the Plaintiffs Land LOC1 /MUKARARA/373 belongs to the Plaintiff.

3. In the lower Court the Appellant filed a plaint dated the 23/3/2000 in which he averred that he is the registered proprietor of the suit land namely LOC1/MUKARARA/373. That during the land demarcation in the area in 1963 a water point on LOC 1/MUKARARA/666 was marked on the map but not physically on the ground. He asserts that parcel LOC1/MUKARARA /666 is comprised in his land parcel LOC1/MUKARARA/373 and that there is no land earmarked for the water point or public land under the name of the Respondent. In the alternative he argues that should there be a water point then the same was taken out of his land parcel LOC1/MUKARARA/373 and therefore the said land containing the water point is part of his land LOC1/MUKARARA/373.

4. In his plaint he sought the following orders;

a. That an order of injunction be given restraining the 1st and 2nd Defendants from marking the water point for public use or in any other way interfering with the use boundaries ownership of title no LOC1/MUKARARA/666 and LOC1/MUKARARA/373 until the suit is heard and determined.

b. An order that the water point marked LOC1/MUKARARA/666 inside the Plaintiff's land belongs to the Plaintiff.

c. An order that the first Defendant has no right whatsoever in the title No LOC1/MUKARARA/666.

d. Costs of the suit.

5. The Appellant denied the Respondent's claim and stated that it is the proprietor of the land LOC1/MUKARARA/666 which contains a public water point for public use. It stated that the suit as filed did not disclose any cause of action against the Respondent and sought to raise a Preliminary objection.

6. At the hearing of the case in the lower Court the Appellant led evidence and informed the Court that he is the registered owner of the suit land. He produced a copy of the Registry Index Map (RIM) showing the two parcels of land and informed the Court in evidence that there is no land belonging to the Respondent. That parcel LOC1/MUKARARA /666 is part of his land comprised in LOC1/MUKARARA/373. That his acreage on the title is 9.3 acres while on the ground is 9.0 acres and sought to convince the Court that the deficit of 0.3 acres is to be found in plot LOC1/MUKARARA/666 which measures 0.25 acres and the road leading to the water point is 0.38 acres.

7. The Respondent led evidence through its witness, Joyce Waruguru Muniu, who informed the Court that parcel LOC1/MUKARARA/666 belongs to the Respondent and is indeed a water point for public purposes. She stated that the water point is properly demarcated on the map and is accessed through an access road. That land parcel LOC1/MUKARARA/666 was reserved for public utility in 1963 but the Appellant has blocked access to the well.

8. Upon hearing both parties trial Court dismissed the suit. It is this judgment that led to the appeal at hand.

9. The Appellant submitted that the trail Court erred in finding that the Plaintiffs claim was time barred by dint of section 148 of the Registered Land Act as the same should have been filed within 6 months of the date of the demarcation of the land.

10. Further that Art 40 of the Constitution prohibits the Government from acquiring private land except for public purpose and with prompt fair and full compensation. He faulted the 1st Respondent for producing a RIM for the year 1991 with amendments. He contends that the water point was included in the amended RIM but was not in the original RIM. That the Respondents acquired the land in 1973 and by then the land had not mutated to the amended RIM. He argued that he was not the registered owner as at 1971.

11. He argued that claims touching on violations of fundamental rights are not subject to limitations of actions Act. The Appellant argued that he has no problem in the land being acquired subject to fair and prompt compensation. That the suit land initially belonged to the Appellant before the Respondent registered it in its name and marked it as a water point.

12. The 1st Respondent did not file any written submissions to the appeal.

13. Being the first appellate Court, I must caution myself in the words of the Honorable Judges in the case of in the case of **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** regarding the duty of first appellate Court:-

> "This being a first appeal, we are reminded of our primary role as a first appellate Court namely, to re-evaluate, re-assess and reanalyze 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."

14. I have reviewed the RIM adduced in evidence which clearly shows that parcel LOC1/MUKARARA/373 and LOC1/MUKARARA /666 are separate. Parcel LOC1/MUKARARA /666 is accessed via a road that is well demarcated. This parcel is exclusive of the Appellant's parcel. I have also perused the official searches adduced by the Appellant which indicate that parcel LOC1/MUKARARA/ LOC1/MUKARARA/373 belongs to the Appellant and parcel LOC1/MUKARARA/666 was registered in the name of the Thika County Council on the 11/2/1962. LOC1/MUKARARA/Therefore as between the Appellant and the Respondent, the title of the Respondent was a first registration and therefore enjoyed legal protection in form of indefeasibility under Section 143 of the Registered Land Act.

15. The law mandates the Court to take a certificate of title as primafacie evidence of proprietorship. The Appellant did not lead evidence to challenge the title of the Respondent. He did not adduce evidence to support his claim respecting the suit land. His argument about the acreage was not supported at all.

16. The main contention was that the parcel No LOC 1 /MUKARARA / 666 reduced the acreage in parcel LOC 1 /MUKARARA / 373.The Appellant averred that the latter parcel measured 9.3 as per title documents and mapping out the water point 0.3 acres would reduce his land .The Court considering the evidence of parties noted that the public well had not been curved out of the Appellant parcel during demarcation.

17. The Court referred to Section 148 of the Registered Land Act which provides that

> "….. As between the Government and a proprietor, no claim to indemnity shall arise and no suit shall be maintained on account of any surplus or deficiency in the area or measurement of any land disclosed by a survey showing an area or measurement differing

from the area or measurement disclosed on any subsequent survey or from the area or measurement shown in the register or on the registry map. (2) As between a proprietor and any person from or through whom he acquired the land, no claim to indemnity shall be maintainable on account of any surplus or deficiency in the area or measurement above or below that shown in any other survey or above or below the area or measurement shown in the register or on the registry map, after a period of six months from the date of registration of the instrument under which the proprietor acquired the land.

18. The effect of the provision is that where there is a claim for surplus or deficient land after or on account of measurements disclosed by survey or any subsequent survey, it must be brought within 6 months from the date of registration of the instrument of title.

19. Section 26-29 of the Land Adjudication Act provides that objections must be lodged and further appeals be brought within 6 months from the date of demarcation. In the case of **Stephen Onyango Oloo v Nelson Makokha Kaburu & 4 others [2015] EKLR** the Court Of Appeal in 2014 upheld an appeal where the learned judge rightly concluded that since no objection was raised within the stipulated period following the land adjudication exercise, the Appellant was estopped from seeking to adjust the acreage on the Land Register on the basis that the acreage on the ground differed from the acreage specified on the Land Register. ….. Without any such objection, the terms of Section 27 of the Land Adjudication Act, were applicable, and the Adjudication Register was at that point deemed to have been duly finalize.

20. In the case of **George Owen Nandy -Vs- . Ruth Watiri Kibe, CA No. 39 of 2015**, the Court of appeal reasoned as follows regarding new issues that are raised before it for the first time:

> "**…**In general a litigant is precluded from taking a completely new point of law for the first time on appeal. The jurisdiction of this Court is not to decide a point, which has not been the subject of argument and decision of the lower Court unless the proceedings and resultant decision were illegal or made without jurisdiction."

21. In respect to the Appellants ground that he was deprived of his land without compensation, having held that the land belonged to the 1st Respondent, this ground fails. Fundamentally, it fails because a party is precluded from raising new issues at the appellate stage .The Appellant did not plead compensation for compulsory acquisition in the lower Court. Infact as at the time of filing suit, the provisions of the Registered Land Act and the Constitution of Kenya 2010 had not been enacted. The set of facts before the trial Court is that the Respondent acquired the parcel during demarcation and consolidation and not within the power of the commissioner of lands under the Registered Land Act to acquire land for public interests .That ground is an afterthought and must fail.

22. It is not lost on the Court that the Respondent was not served at all with the appeal and the hearing dates. I have perused the file and the affidavit of service which indicate that at all times the Appellant served the Gounty Government of Murang'a. The Appellant who is represented by counsel did not offer any explanation for this scenario. The Court finds that there is no evidence that the Respondent was served.

23. Even if the service was taken as effected (which is not), the Court observes that the Respondent is not a legal entity capable of being sued and suing. The Appellant failed to amend the appeal and it is not clear whether the Respondent refers to the County Government of Muranga or Kiambu.

24. The law is that the Court cannot interfere with the judgment of the trial Court unless it is satisfied that the judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice. **See Coffee Board of Kenya -Vs- Thika Coffee Mills Limited & 2 Others [2014] eKLR**.

25. Going by the reasons advanced in the preceeding paras, I find no grounds to fault the analysis of the pleadings and the evidence tendered before the trial Court and its eventual decision.

26. In the upshot, the Court has come to the conclusion that the appeal is without merit. The decision of the trial Court is upheld.

27. The Appellant shall meet the cost of the appeal.

28. It is so ordered.

DATED DELIVERED & SIGNED AT MURANG'A THIS 21st DAY OF NOVEMBER 2019.

J.G. KEMEI

JUDGE.

Delivered in open Court in the presence of;

Appellant: Present in person.

Respondent: Absent

Ms Irene and Ms Njeri, Court Assistant