IN THE COURT OF APPEAL
AT NYERI
Civil Appeal 123 of 2006
MUTUMA ANGAINE ……..……...…… APPELLANT

AND

M'MARETE M'MURONGA ……..……. RESPONDENT

(*Being an appeal from the decree of the High Court of Kenya at Meru (Lenaola, J.) dated 27th March, 2006* in

H.C.C.A. NO.6 OF 2003)

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JUDGMENT OF THE COURT

By a plaint dated 9th January, 1996 and filed in the Chief Magistrate's Court at Meru on 1st February, 1996 the appellant, ***Mutuma Angaine*** (plaintiff in the subordinate court) sought an order of eviction of the respondent ***M'Marete M'Murago***, on the ground that he owned land parcel known as **Meru Municipality/Block 11/335** (the suit land) which had been allocated to him following compulsory acquisition of the same by the Government on 13th May 1977.

The material paragraph in his plaint states as follows:

"4. The said plot was surveyed out of land parcel Number Ntima/Igoki/1836 formerly registered in name of defendant but which parcel was wholly acquired by the Government of Kenya vide Gazette Notice Number 1263 dated 13th May, 1977 and the defendant was wholly compensated in accordance with the provisions of Land Acquisition Act Cap 295 and the defendant was directed to give physical possession of the land on or before the 31st December, 1978."

The respondent's simple answer to that allegation is contained in paragraphs 3 and 4 of his defence filed on 4th April 1996, as follows:-

"3. The defendant denies any knowledge of the plaintiff's proprietory interest in plot No. MERU MUNICIPALITY BLOCK 11/335 as pleaded in paragraph 3 of the plaint.

4. The defendant denies that his plot was acquired in 1977 or any other time and shall insist that his plot remains No. NTIMA/IGOKI 1836."

After hearing the evidence presented before his court, the learned trial magistrate (Mr. N. Ithiga) found for the appellant, and ordered the eviction of the respondent from the suit land.

Aggrieved by that decision, the respondent preferred an appeal to the High Court. In his judgment dated 27th March, 2006, Lenaola, J., reversing the decision of the subordinate court, found that there was no evidence that the suit land had ever been compulsorily acquired by the Government, or that the respondent had been compensated for the same. The learned judge expressed himself, in part, as follows:-

"12. The evidence on record shows that title No. Ntima/Igoki/1836 was not the subject of compulsory acquisition and no evidence was availed to show that the appellant was served with a Notice of Intention to acquire that particular parcel of land. It must be remembered that S.69 of the interpretation and General Provisions Act, Cap 2 reads as follows:

*'**The production of a copy of the Gazette containing a written law or notice, or of a copy of a written law or a notice, purporting to be printed by the Government Printer, shall be prima facie evidence in all courts and for all purposes whatsoever of the making and tenor of the written law or notice.'***

What this means is that it is not upon the respondent or the court to say that Gazette Notice NO. 1263 of 13/5/1977 referring to the compulsory acquisition of plot NO. 1826 was actual (sic) **a reference to title No. Ntima/Igoki/1836. The Gazette Notice unless any error is printed and publicized shall remain conclusive."**

The appellant is now before us in this second and possibly final appeal. He has presented six grounds of appeal, and although needlessly wordy, we reproduce them here only because the oral submissions were based more or less along the same lines. The grounds are as follows:-

"1. The learned Judge of the superior court erred in law in finding that land parcel NO. NTIMA/IGOKI/1836 was not compulsorily acquired by the Government of Kenya even when there was overwhelming evidence to the contrary.
2. The learned Judge of the superior court was pedantic in seeking reliance on Section 69 of the Interpretation and General Provisions Act Chapter 2 Laws of Kenya as relates to the gazette Notice NO. 1263 of 13th May, 1977 over the compulsory acquisition of Land Parcel NO. NTIMA/IGOKI/1826 instead of NTIMA/IGOKI/1836 even on the face of overwhelming evidence to demonstrate that land parcel No. NTIMA/IGOKI/1826 was not compulsorily acquired and could not be compulsorily acquired for the purposes for which compulsory acquisition was being done to wit "the extension of Meru Municipality Commercial and Industrial area" as;

i) It was well over seven (7) kilometers away;

ii) It was in somebody else's names to wit RINTARI RINYIRU;

iii) Only land parcel No. NTIMA/IGOKI/1836 was within the area compulsory acquisition was being carried out and

iv) The respondent did not have any other land parcel within the area compulsory acquisition was being carried out.

3. The learned Judge of the superior court further erred in law in finding that the appellant had not demonstrated that parcel NO. NTIMA/IGOKI/1836 had been compulsorily acquired when the appellant had actually demonstrated that Notice was given, compensation awarded to the respondent and indeed notice to take possession given and the register of land parcel No. NTIMA/IGOKI/1836 endorsed with the remarks that it was "wholly acquired by the Government of Kenya vide Gazette Notice No. 1263 dated 13.5.1977.

4. The learned Judge of the superior court further erred in law in requiring the appellant to prove his case beyond the standard requirement in Civil matters of prove (sic) on a balance of probabilities.

5. The appellant was an innocent allottee of plot NO. Meru Municipality/Block II/335 after the re-planning of the various parcels of land compulsorily acquired by the Government of Kenya vide Gazette

Notice No.1263 of 13.5.1977 (over which he holds a lease) and whether there were some omissions in the process of compulsory acquisition and in particular over land parcel No. NTIMA/IGOKI/1836, which are yet to be challenged, this should not be allowed to impede his unlimited access and development of his plot subject to the conditions on the lease he holds.

6. The decision of the learned Judge of the superior court was against the weight of the evidence on record."

In his submissions before this Court, Mr Kiautha Arithi, learned counsel for the appellant, argued that the suit land (plot 1836) had indeed been compulsorily acquired from the respondent; that the process of acquisition was valid in law even though the gazette notice in respect of the acquisition referred to plot "1826" (instead of 1836); that the respondent had been duly compensated for the plot; and that the same had been allocated to him by the Government, and in respect of which, he had made full payment to the Government.

Mr Murango Mwenda, learned counsel for the respondent, on the other hand, argued that the suit land (plot 1836) was never compulsorily acquired by the Government; that the respondent received no notice of such acquisition; that the gazette notice relied upon by the appellant referred to the acquisition of plot 1826, and not 1836, which is the respondent's plot; that the respondent had received no compensation for the alleged acquisition of his plot; that he had continued in occupation of the suit land; and finally that the title of the suit land is still in his name.

The central issue for determination here is whether the suit land (plot 1836) was lawfully acquired by the Government from the respondent in 1977, and then lawfully allocated to the appellant.

Section 6 of the Land Acquisition Act, Cap 295, Laws of Kenya, (the Act) states as follows:-

"6 (1) Where the Minister is satisfied that any land is required for the purposes of a public body, and that-

a) the acquisition of the land is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefit; and

b) the necessity therefor is such as to afford reasonable justification for the causing of any hardship that may result to any person interested in the land,and so certifies in writing to the Commissioner, he may in writing direct the Commissioner to acquire the land compulsorily under this Part.
(2) On receiving a direction under subsection (1) the Commissioner shall cause a notice that the Government intends to acquire the land to be published in the Gazette, and shall serve a copy of the notice on every person who appears to him to be interested in the land."

It is clear from the above Act, that the Government has the power to acquire land by compulsion for a public purpose or benefit. However, it is trite law that when a person's property is forcefully acquired the Government must fully comply with the law, and follow the laid down procedure strictly and meticulously. No person's property may be acquired compulsorily without due process**.** ***Section 6(2)*** of the Act aforesaid requires that certain critical steps be taken before a person is deprived of his or her property. That section requires that a notice of intention to acquire the land **shall** be published in the Gazette, **and** be served upon every person who appears to be interested in that land. This was not done, despite its mandatory requirement. There was no notice published in the Gazette in respect of plot 1836, and certainly no notice was served on the respondent. The provisions of the ***section 6 (2)*** envisage personal service on persons with an interest in the land intended to be compulsorily acquired. The gazette notice exhibited by the appellant in the record relates to plot 1826 and not 1836. The appellant went to considerable length in attempting to persuade both the High Court and this Court that indeed the plot no.1826 in the Gazette notice was a typographical error, and actually meant plot 1836. It is not for us to speculate that. We can only go by the record, and the record showed that no gazette notice was published with regard to plot 1836, which is the disputed plot. If it was indeed a typographical error, nothing would

have been easier than to correct it at the time. We also accept the learned judge's finding of fact that the respondent was neither served with the notice of intention to acquire his land, nor was he compensated for the same.

The learned judge was also correct in concluding that the title to the suit land continued to remain in the respondent's name, and that he continued to remain in possession as the Government had not complied with ***section 19(3)*** of the Act. Here is how the learned judge expressed himself:-

"17. I should only say in passing that if the proper procedure had been followed, then under S.19(3) of the act, the Government would serve notice of possession of the land on the appellant and the Registrar and thereafter the land shall vest in the Government absolutely under S.19(4) of the Act. The reason for giving notice to the Registrar is so that register in respect of registered land would reflect both the acquisition and the fact of the land being vested in government. As regards title No. Ntima/Igoki/1836 no such notices were tendered in evidence and the register has remained unchanged to date (see extract of title – D.Exh.2)."

Accordingly, and for reasons stated, we are of the view that there is no merit in this appeal, and we dismiss the same with costs to the respondent.

Dated and delivered at Nyeri this 2nd day of December 2011.

S.E.O. BOSIRE

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL