REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 104 OF 2009

(CONSOLIDATED APPEAL NOS. 103,106 &107 OF 2009)

MARY NJOKI MUCHIRI................................1ST APPELLANT

DAVID KINYUA MWAI..................................2ND APPELLANT

WACHIRA KARIUKI MACHARIA.............3RD APPELLANT

JOSEPHINE WANGARI MUCHIRI...........4TH APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Appeal against conviction and sentence in Nyeri Chief Magistrates

Court Criminal Case No. 4557 of 2004 (Hon. E.J. Osoro,

Senior Resident Magistrate) on 19th May, 2009)

JUDGMENT

The appellants were charged with the offence of forcible detainer contrary to section 91 of the Penal Code, cap. 63. The particulars were that on diverse dates between January, 1996 and 30th day of November, 2004 at Naromoru in Nyeri district within Central Province jointly being in possession of a parcel of land No. Naromoru/Kieni East/308 of the late Francis Magondu Githinji without colour of right, held in possession of the said land in a manner likely to cause a breach of the peace against the family of Francis Magondu who are entitled by law to the position of the said land.

The 1st and 2nd appellants were also charged with a 2nd count of obtaining registration by false pretences contrary to section 320 of the Penal Code. Here, the particulars were that on the 12th day of June, 1997 at Nyeri lands office within Nyeri district of the central province, jointly with others not before court registered parcel of land title number Naromoru block/Kieni East 556 and 557 using false land transfer documents purporting them to be genuine.

All the appellants entered a plea of not guilty; they were, however, convicted on the 1st count and fined Kshs 20,000/= each or in default to serve one year imprisonment. The 1st appellant was acquitted of the 2nd count but the 4th appellant was convicted of this particular count and fined Kshs. 10,000/= or in default to serve 8 months imprisonment. Being dissatisfied with the conviction and sentence, the appellants filed separate appeals against the learned magistrate's decision. Owing to the fact that the appellants were tried together, and since there was no objection from the appellants themselves, their appeals were consolidated and heard together.

As far as the 1st appellant is concerned, she faulted the decision on the grounds the learned trial magistrate erred in fact and in law by failing to note; that the charge sheet was defective; that the elements of the offence of forcible detainer were not proved beyond reasonable doubt; and, that the evidence presented to court was at variance with the charges preferred against the appellant. The trial magistrate was also faulted for reopening the prosecution case after the prosecution had closed its case and also for failing to adhere to the provisions of section 8 of the Penal Code. In addition, the 1st appellant assailed the decision on grounds that the learned trial magistrate erred in fact and in law in failing to adhere to the provisions of section 27 of the Registered Land Act, Cap.300 (Repealed); that she erred in fact and in law in failing to note that there were gaps, inconsistencies and material contradictions in the prosecution case; and, that she disregarded the appellant's

witnesses' evidence and her defence.

On their part, the 2nd and 3rd appellants impeached the decision of the learned magistrate on grounds that she erred in law and in fact in finding that the appellants were guilty despite the fact that the evidence before court could not support the conviction and was, in any event, way below the required standard of proof beyond reasonable doubt; that the appellants' defence was not considered; that the evidence was not properly evaluated and thus the learned magistrate reached a wrong conclusion in convicting them; and, that the learned magistrate shifted the burden of proof to the appellant. The appellants also complained that the trial magistrate relied on issues that were not placed before her in evidence or in cross-examination; that she made an expert opinion on the documentary evidence produced by the appellants and, lastly, she convicted them without considering the entire evidence on record.

The 4th appellant faulted the decision of the learned magistrate on 6 grounds of which the first three appear to be out of place because in them, the learned trial magistrate is accused of having flouted the provisions of the Traffic Act, cap. 403, in particular, sections 91 and 52(2) of that Act. The charges against the 4th appellant were not traffic related and there is nowhere in the judgment that the learned trial magistrate ever made reference to any of the provisions of the Traffic Act. In the 4th, 5th and 6th grounds of appeal, the learned magistrate's decision has been impugned for the reason that she misdirected herself by filling the gaps in the prosecution case; that she was biased against the 4th appellant and failed to record the actual proceedings including submissions by her counsel and; that the appellant's conviction was against the weight of evidence.

In order to appreciate all these grounds of appeal and whether there is any merit in them, it is necessary for this Honourable Court, being the first appellate Court, to bring out the entire evidence on record and evaluate it afresh. At the end of this evaluation exercise, the Court may very well reach the same factual conclusions as those arrived at by the learned magistrate. It is also possible that it may reach its own conclusions that are at variance with those of the learned magistrate. Should the latter be the case, the court has to bear in mind that it is only the trial court that had the advantage of seeing and hearing the witnesses and to that extent was advantaged in ways that this Court is not. If any authority is required for this position, the decision in **Okeno versus Republic (1972) EA 32** comes in handy; in that case the Court of Appeal stated as follows: -

> **An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. (See page 36).**

As the particulars of offence show, the prosecution case against the appellants revolved around the parcel of land known as Title No. Naromoru/Kieni East/308 said to have been registered in the name of Francis Magondu Githinji at the material time. According to his son, John Magondu Githinji (PW1), his father died on 15th October, 2001 and as one of the administrators of his estate, he was in custody of the original land certificate or title deed of this particular parcel of land. As a matter of fact, he produced it in court. In the course of the administration of his father's estate, and in particular on 12th June, 1997, he discovered from the lands office at Nyeri that his father's land, which I will at times refer to it as 'No.308', had purportedly been subdivided into 3 parcels of varied acreages bearing numbers 556,557 and 558 respectively. While the register in respect of 308 showed this particular land had been subdivided the survey records showed that it was still intact.

Mr Magondu (PW1) took up the matter with the Chief Land Registrar who then asked the appellants apparently in whose favour the purported excised parcels had been registered to surrender their titles. The District Lands Registrar of Nyeri also wrote to them asking them to avail the documents the basis upon which No. 308 was subdivided. When the appellants failed or declined to avail the necessary documents, the complainant lodged his complaint with the police at Nyeri police station.

The complainant then went to the land, at Naromoru, accompanied by police officers from Nyeri police station. They established that three houses had been built on the land though they do not find anybody in any of the houses. Sometimes later, he was informed that the appellants had been arrested.

The complainant denied having allowed the appellants to take possession of his father's land and that the only time he spoke to them was on 6th December, 2001 when he found them on the land. The information he got from them is that they had purchased the land and showed him documents which, according to him, showed a different parcel of land and even then, they had paid the purchase price to somebody else other than his late father. These documents, however, showed that they had bought the land from him. It was his evidence that the appellants still resided on No.308 as at 27th April, 2005 when he testified.

Agnes Muthoni Ngaga (PW2) a land registrar then based in Thika and **Emanuel Kenga (PW4),** a document examiner shed some light on the purported subdivision of No.308. According to Ngaga (PW2) she was the Land Registrar at Nyeri lands registry in 1995. She denied having signed an entry on the green card in respect of No.308 purporting to show that it had been subdivided because as of 12th of June 1997 when the entry was made and a new green card for land parcel No Naromoru/Naromoru/Kieni/556 introduced she was based at Kiambu. She disowned the signature purporting to endorse the 4th appellant as the registered owner of this particular parcel of land. Similarly, she denied having originated the green card in respect of Title No. Naromoru/Naromoru/Kieni East/557 which was registered on 12th June, 1997 and in which one Catherine Njeri Muchiri who was entered as the title owner on the same day.

The document examiner, Emmanuel Kenga (PW3), confirmed in his testimony that indeed Ngaga's (PW2's) specimen signature was inconsistent with the signatures on green cards and the certificates of title. He was of the opinion that the two sets of signatures were by different hands and his report in this regard was admitted in evidence.

Mr Joseph Njoroge Njugi (PW4) who was then the land registrar of the district land registry of Nyeri when the complainant lodged his complaint to the lands office testified that when he checked the register in respect of No. 308, he noted that it had been subdivided yet the complainant had the original title. Again, he also noted from the presentation book that no entries of any nature including subdivision or transfer had been made in respect of this particular land. According to him, any transactions relating to any parcel of land must be preceded by some payment and an entry in respect of that particular transaction must be made in the presentation book after the parties have presented their relevant documents. This was never done in this particular case and no documents in support of this transaction were ever found. The documents were also not in the survey office that ordinarily deals with the subdivisions such as the one that was in issue.

When the land registrar demanded the surrender of the title documents from the 4th appellant and Catherine Muchiri, the 4th appellant did surrender hers but Muchiri did not. He also noted that although the consent for subdivision was purportedly obtained on 26th June, 1996, the subdivision itself was done on 12th June, 1996 which, in his opinion, was irregular because the consent ought to have been obtained before the subdivision.

Grace Wandi Ngovia (PW5), a member of the Naromoru Kieni East land control board testified that according to the minutes of the board for 26th June, 1996, there was no record for any application in respect of any transaction on land parcel Nos. 308,556,557 and 558. She, however, admitted that she couldn't confirm if a special consent in respect of any of these parcels had been given. **Albert Kimanthi (PW6),** the District Officer of Kieni East and who, by virtue of his position, was the chairman of the board as from 18th September, 2004 presented the minutes of the meeting of the board on 26th June, 1996 and in them there was no application of transaction of any sort in respect of No.308.

The information on the operations of survey office was given by **George Nyakiu Macharia (PW7)** who testified that he was an officer in the Ministry of lands and settlements up to 2005 and as between 1991 and 2000 he was in the Nyeri district lands survey office and specifically in the mapping section. As far as the purported subdivisions of 308 are concerned, and in particular parcel nos. 556,558, 559-561, such particulars as the register numbering, the signature and remarks were missing from their records. Although he was recorded as the person who is supposed to have made the relevant entries the witness denied having made any record in respect of No.308.

The complaint against the appellants was investigated by Inspector **Anthony Macharia Kariuki (PW8).** He testified that he was assigned the case by the Director of Criminal Investigations after a civil society called Operation Firimbi complained that there were corrupt activities involving land parcels Nos. Kieni East Block 108,556,557 and 558. In the course of his investigations, he established that four green cards had been signed by Agnes Mureithi (PW2), in her capacity as a land registrar and effected transfers to Catherine Muchiri, the 4th Appellant and Magondu. The land registrar, however, denied having signed the green cards or effected the transfers. He also established from the land control board that no transaction involving any of these parcels had been discussed by the board. Neither was there any entry in the presentation book at the lands office of any of these parcels of land. The officer also recovered from the complainant the original title of No.308 which ought to have been destroyed before new titles were issued if at all the subdivision of this parcel was valid.

The appellants opted to give sworn evidence when they were put on their defence. The 1st appellant admitted that she resided on the late Magondu's land but that the portion she was in possession of was bought by her daughter, Catherine. This particular portion is the one indicated as No.557. When the trial court visited the scene, it noted that it had a semi-permanent house. Initially, she testified that her late husband bought the land in 1983 at the same time that the late Magondu bought his. She changed her testimony in re-examination and testified that in fact her husband bought the land from the late Magondu. While at the scene, the 1st appellant not only pointed out the parcel of land on which she has settled but she also informed the court that the neighbouring portion was what was claimed by the 4th appellant.

The 1st appellant's daughter, **Elizabeth Gathigia Iruru (DW2)** testified in defence of her mother and stated that in fact she was the one who paid for the land by cheques written in favour of Francis Magondu Githinji. The cheques were drawn before the year 1992. She, however, denied that her mother lived on the land in issue and that she had no interest in that particular parcel of land as it belonged to her sister who lived in Denmark.

The 2nd appellant admitted that he lived on the land and that as at the time he testified he had been living there for the past 12 years. It was his evidence that he purchased the land from the late Francis Magondu. It was his evidence that he entered an agreement with the late Magondu for the purchase of 3acres of land which he was selling at Kshs. 90,000/= per acre. He paid the sum of Kshs 191,000/- to one Muriithi Githinji only identified as the late Magondu's brother. According to him, the late Magondu had authorised his brother to receive the money. Whatever he paid was sufficient for only two acres. It was his evidence that the extra Kshs.11, 000/= was refunded to his wife by the late Magondu himself. He insisted the he obtained the requisite consent from the land control board after he lawfully purchased the land and therefore he was in lawful possession of it.

The 2nd appellant's wife testified in support of his case and confirmed that she received a refund of Kshs 11,000/= from the late Magondu. The witness to the payment of the refund was **Herman Njuge Irungu (DW6)** who testified that the payment was made in his presence and in the presence of Gikonyo Mureithi.

The 2nd appellant's other witness was **Silas Maina Githaiga (DW5)** who testified that he identified the land for the 2nd appellant to purchase. He, however, testified that he sourced the land from one Gikonyo who was selling it on behalf of the late Magondu.

The 3rd appellant also admitted that he had settled on the disputed land and that he had been there since 1988. According to him this land was purchased by his father who told him that he had purchased it from the late Francis Magondu Mureithi in 1997. He witnessed his father pay the sum of Kshs 60,000/= on 21st September, 1997 which, according to him was the 1st instalment of the purchase price. In total, he purchased 2 acres at the price Kshs. 180,000/=. The appellant insisted that after the purchase price was paid, the late Francis Magondu obtained the necessary consents from the land control board for subdivision and transfer of the land.

Chief Inspector of Police David Ngatia Kamau (DW8) testified that he introduced the appellant's father to the late Magondu. The 3rd

appellant's father, Kariuki Wachira (PW9) himself testified that he was introduced to the late Magondu by Kamau(8) and that he purchased the 2 acres of land at Kshs.90,000/= each. He identified the parcel he purchased as No. 308. He however paid the purchase price to one Mureithi only identified as the deceased's brother. He then settled his son, the 3rd appellant, on the farm.

The 4th appellant testified that she purchased the land from the late Magondu through her mother. In 1992 she constructed a house on the land for her brother. She produced an agreement of sale dated 3rd March 1991 and signed by one Magondu Mureithi Githaiga as the vendor. According to her, the late Francis Magondu signed the transfer documents and the land was transferred to her. Mr Magondu himself gave her the title. She stated that her brother had lived on the land since 1991 and that the subdivision was done while she was away in Denmark. The 4th appellant's mother testified that her daughter sent her the money which was used to buy the land. She paid the money directly to the late Francis Magondu.

That is as far as the evidence went.

Section 91 of the **Penal Code** which formed the basis of the charges against all the appellants states as follows:

> **91. Forcible detainer**
>
> **Any person who, being in actual possession of land without colour of right, holds possession of it, in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, against a person entitled by law to the possession of the land is guilty of the misdemeanour termed forcible detainer.**

I have had occasion to deal with this particular section in **High Court Criminal Appeal No. 430 of 2013 (Murang'a), Richard Kiptalam Biengo versus Republic**, where I noted that to sustain case for forceful detainer, the prosecution must establish the following elements beyond any reasonable doubt; that is:

a. that the accused person has the actual possession of land;

b. that he has no right over the land;

c. that the act of possession is against the interests of the legal owner or the person legally entitled to the land; and,

d. that the act of possession of the land is, therefore, likely to cause a breach of the peace or a reasonable apprehension of the breach of the peace.

On the first element of possession, the prosecution led evidence to the effect that all the appellants were in physical possession of the late Magondu's land. The complainant (PW1) testified that he found them on the land on 6th December, 2001 and that they still resided on as at the time he testified in court.

The 1st appellant admitted that she stayed on the land and that she was on this land when she was arrested. She was therefore in possession of the land and as earlier noted, she showed the extent of the land which she claimed to be hers as well as her neighbour's.

Like the 1st appellant, the 2nd appellant also admitted in no uncertain terms that he not only lived on the land in issue but that he had been there for the past 12 years, at least as at the time he testified.

Similarly, the 3rd appellant stated in his defence that he was in possession of the land since either 1988 or 1998. The record makes reference to either of these years as the year when he settled on the land. Of particular relevance is that there is no dispute that the appellant was in possession of the land at the time material to the charge against him.

Of the four appellants it is only the 4th appellant whose possession of the deceased's land was not proved to be physical. The 4th appellant herself testified in her defence that all she did was to send money from Denmark where she lived. Her mother, to whom the money was sent, purchased the land for her brother who apparently was in possession of the land. The title was, however, in her name and from her testimony, her brother was living on the land on her authority or with her permission. To be liable under the law, the 4th appellant did not have to be in physical possession of the land because the word 'possession' has wider ramifications in law; it is defined in the interpretation section of section 4 of the Penal Code as follows:

> ***(a) "be in possession of" or "have in possession"* includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;**
>
> **(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;**

Thus the 4th appellant did not have to be in physical possession of the land to be culpable. It follows therefore and I am satisfied that the learned magistrate made the correct finding that all the appellants were in possession of No. 308.

The next question is whether the appellants had any right over the subject matter.

The evidence of the document examiner **Emmanuel Kenga (PW3)** together with that of the land two registrars, that is, **Agnes Muthoni Ngaga (PW2)** and **Joseph Njoroge Njugi (PW4)** confirmed, in my humble view, beyond reasonable doubt, that the basis of the appellants' claim on the late Magondu's land was tainted with illegalities. On her part Ngaga(PW2) confirmed that the opening of the registers and the extracts of title or the green cards in respect of those parcels of land claimed by the appellants and which are claimed to have been excised from No. 308 were fraudulent to the extent that these documents were endorsed with an imitation of her signature. She denied having opened the green cards or made any entries in those cards purporting to vest ownership of those parcels of land in the appellants' names. At any rate, she could not have originated the registers or the green cards or issued certificates of title at the time they were registered and issued because she was not the district lands registrar of Nyeri district at the material time. Her evidence was corroborated by the document examiner who certified as not hers the signatures on the green cards and the certificates of title.

In addition, the other land registrar **Joseph Njoroge Njugi (PW4)** confirmed that there was no record in the day book or presentation book at the Nyeri district lands registry for any sort of transaction either of subdivision or transfer of No.308 or any portion thereof. Again, no fees had been paid for any such transaction. It was also his evidence that if at all No. 308 was validly subdivided, then the original title deed or certificate of title ought to have been surrendered to the registrar of lands for destruction before the new title documents which some of the appellants possessed could be issued. There was no way the new title documents could possibly be issued when the complainant was in custody of the title deed for No.308.

Mr George Nyakiu Macharia (PW7) who was then a government employee in the mapping section of the survey office at Nyeri lands registry also confirmed that the purported subdivisions did not have the relevant particulars such as the registered members, the signatures and the remarks, apparently of the surveyor.

Being an agricultural land, the appellants ought to have applied for and obtained the requisite consents of the land control board; However, there was no evidence that such an application for consent for subdivision or transfer of any portion of number No. 308 had been discussed or any sort of consent been issued in respect of this particular parcel of land. The chairman of the board (PW6) produced minutes of the particular date on which the board is supposed to have deliberated on the application by the late Magondu for subdivision and transfer of portion of his land; they did not show that any application or consent had been made or issued.

In the face of all this evidence, it is reasonable to conclude that the means through which the appellants purported to acquire the deceased's land or part thereof did not paint what, in the words of section 91 of the Penal Code, is a colour of right over the deceased's land. In other words, there is no legal basis upon which the appellants can claim that they have a 'colour of right' over any part of the deceased's land. I am minded that the words 'colour of right' have a concise meaning in law, and thus they must have been deliberately employed in section 91 of the Penal Code. As early as 1900, the words were defined by Edwards J in **R v Fetzer (1900) 19 N.Z.R** and adopted by Rudd J,. In **Joseph Ogola versus The Queen (1956) KLR Vo.XXIX 174 at 175** in which the meaning of these words was a pertinent issue. The learned judge said:

> **This means… an honest belief in a state of facts which, if it existed, would be a legal justification or excuse. This would be no answer to a civil action, but it is properly made an answer to a criminal charge because it takes away from the act its criminal character. Less than this…cannot be held to be colour of right. Per Edwards J., in R v Fetzer (1900) 19N.Z.R 438.**

Now, going by the testimony of the land registrars (PW2 and PW4), the document examiner (PW3), the then mapping officer (PW7) and even the complainant himself who presented the original title deed in respect of No. 308, I am not inclined for a moment to believe that the appellants harboured any honest belief in a state of facts that would justify or excuse their possession of the late Magondu's land. I say so for the simple reason that if at all their transactions with the late Magondu were genuine, there is no reason why the process of conferring them with title to their respective parcels of land should have been so vitiated. For these reasons, section 8 of the Penal Code is of no assistance to them because it is clear that a person is not criminally responsible in respect of an offence relating to property, on condition that the act done or omitted to be done by him with respect to the property was done in the exercise of an honest claim of right and without intention to defraud.

My conclusion on this question of ownership of the land is that the appellants had no right over the late Magondu's land and for this reason I am satisfied with the level of proof of this element by the prosecution.

The third element of this offence is whether the act of possession was against the interests of the legal owner or the person legally entitled to the land.

To begin with, I must point out that there was sufficient evidence that the late Francis Magondu was the absolute registered proprietor of No.308. Apart from the title document, the registration records still showed him as the owner of the particular parcel of land. His rights over the land were succeeded by his son, the complainant, who was his legal representative and the administrator of his estate.

Against this background, it cannot be doubted that the appellants' possession of the land in issue was inconsistent with the rights of the complainant. It should equally be obvious that by retaining possession of the land without any colour of right for such possession, the appellants' acts were against the interests of the complainant. At the very least, such possession was adverse to the complainant's right to property. It is true that section 27 of the repealed Registered Land Act, cap. 300, which counsel for the 1st appellant made reference to, provided that the registration of a person as the proprietor of land vested in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. But the presumption is that the registration is valid in every respect; a fraudulent registration cannot be said to vest any right in land. In my humble view, this provision entrenched and protected the late Magondu's proprietorship over his land against the appellants' rather predatory conduct.

This then leads to the final element which is whether the appellants' acts would in all likelihood cause a breach of the peace or a reasonable apprehension of the breach of the peace. This question can be adequately answered if we consider what the words 'a breach of the peace or a reasonable apprehension of the breach of the peace' entail. They are not defined in the Penal Code or in the Interpretation and General Provisions Act, cap.2. In **R versus Howell (1981) 3ALL ER 383 Watkins LJ** appreciated that these words had not been comprehensively

defined but came up with the definition that has more often than not been adopted in the subsequent cases. The learned judge said:

> **A comprehensive definition of the term "breach of the peace" has very rarely been formulated so far as we have been able, with considerable help from counsel, to discover from cases which go as far back as the eighteenth century. The older cases are of considerable interest but they are not a sure guide to what the term is understood to mean today, since keeping the peace in this country in the latter half of the twentieth century presents formidable problems which bear on the evolving process of the development of this branch of the common law. Nevertheless, even in these days when affrays, riotous behaviour and other disturbances happen all too frequently, we cannot accept that there can be a breach of the peace unless there has been an act done or threatened to be done which either actually harms a person, or in his presence his property, or is likely to cause such harm, or which puts someone in fear of such a harm being done. There is nothing more likely to arouse resentment and anger in him, and a desire to take instant revenge, than attacks or threatened attacks on a person's body or property.**

The learned judge went further to discount a statement in the **Halsbury's Laws of England, 4th Edition paragraph 108** on definition of this term because of what he thought was its failure to relate all kinds of behaviour to violence. He noted:

> **We are emboldened to say that there is a breach of the peace would whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, an unlawful assembly or other disturbance. It is for this breach of the peace when done in his presence or the reasonable apprehension of it taking place that a constable, or anyone else, may arrest an offender without warrant.**

This meaning was adopted in the Australian decision of the **State of New South Wales versus Tyszk (2008) NSWCA 107** where Campbell JA went further and noted that:

> **The notion of a 'breach of the peace' is a multifaceted one and includes a wide range of actions and threatened actions that interfere with the ordinary operation of civil society.**

In taking this course, the learned judge reviewed the observations made in the *Howell case* and observed that a wider view had been taken by Lord Denning MR in ***R versus Chief Constable of the Devon and Cornwall Constabulary, ex parte Central Electricity Generating Board (1982)QB 458*** where he stated that:

> **There is a breach of the peace whenever a person who is lawfully carrying out his work is unlawfully and physically prevented by another from doing it.**

In view of these pronouncements, it is clear that 'breach of the peace' as understood in law is not confined to any particular set of circumstances; rather, acts which would constitute a 'breach of the peace' depend on the circumstances of each particular case.

Turning back to the appellant's trial, I would say that the invasion of the complainant's land by the first three appellants, without any colour of right, was a reasonable ground for the belief in the mind of the state or the prosecution that the appellant's action was, in the words of **section 91** of the **Penal Code**, '***likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, against a person entitled by law to the possession of the land'*** and who in this case is the complainant. I would reckon, and humbly so, that a reasonable man would come to the same conclusion.

In the final analysis I am satisfied, just as the learned trial magistrate was, that the offence of forcible detainer contrary to section 91 of the Penal Code was proved beyond any reasonable doubt as against all the appellants.

On this particular count, I hold that the learned magistrate was correct in dismissing the appellants' defence because, as far as I can gather, it was not sustainable. To be specific the 1st appellant's defence was somewhat inconsistent. She stated initially that her husband bought the land in 1983 at the same time that the late Magondu bought his. She then said that it was in fact purchased from Magondu by her daughter Catherine. Yet Elizabeth Gathigia Iruru(DW2), her other daughter, stated that she was the one who drew cheques for payment of the purchase price. Despite the fact that her own mother testified that she lived on the late Magondu's land, she stated that she lived on her own parcel.

Similarly, the 2nd appellant's defence was also not persuasive enough to create any reasonable doubt in the prosecution case against him. Although he testified that he purchased the land from the late Francis Magondu, one Muriithi Gikonyo is said to have received the entire purchase price. It was not clear why the Muriithi Gikonyo should have received the purchase price when Francis Magondu himself could receive it if at all he sold the land to the 2nd appellant.

The 3rd appellant's defence was simply that he was rightfully on the land where he had settled since 1998 because his father purchased it for him and that he even witnessed his father pay the purchase price. Without any proof, he stated that the vendor applied for and obtained the requisite consents of the land control board. This defence could not, in my humble view, displace the prosecution case that the purported subdivision or transfer of parcel No. 308 or any part thereof was not only irregular but illegal as well. It is curious that though the appellant claimed that the late Magondu died before he obtained the title, there was no evidence that he had lodged any claim against his estate for this title more than three years after Magondu's demise.

As for the 4th appellant her defence was that she was not in possession of the land but her brother was; as noted, under section 8 of the Penal Code she did not have to be in physical possession herself to be liable.

In his submissions, counsel for 1st appellant cited the **Richard Kiptalam Biengo versus Republic** case (supra) for the proposition that as

long as the ownership of land is in dispute no prosecution can be sustained for an offence under section 91 of the Penal Code. I entirely agree with the learned counsel because that is exactly what I held in that case. However, that case is distinguishable from this case in one but fundamental respect. In that case there was evidence from the land registrar that according to the records in lands registry either of the contestants could lay claim on the land in dispute. The appellant was a shareholder of the land buying company whose members would ballot for land; any of the shareholders and even the company itself could lay a claim on the land. More importantly, the dispute over the ownership of the land was pending for determination before a civil court. It is against that background that I held that, in those circumstances, the criminal trial court could not proceed as if the question of ownership of the land had been resolved.

In the trial against the appellants, it was established that the late Magondu was the legally registered owner of parcel No. 308. The appellant's claim on any portion of this parcel was proved to be baseless if not fraudulent. I must add that a dispute over ownership of property does not necessarily arise when a party dispossesses its rightful owner; any acts of invasion, possession or even trespass on ones property do not diminish or cast any doubt on the true and legal owner's entitlement to such property or at any rate, defeat his title.

The final question is whether the 4th appellant was properly convicted on the 2nd count of procuring registration by false pretences contrary to **section 320** of the **Penal Code**. This section states:

> **Any person who willfully procures or attempts to procure for himself or any other person any registration licence or certificate under any law by any false pretence is guilty of a misdemeanour and is liable to imprisonment for one year.**

I have already held that based on the evidence presented at the trial, the purported sub-division of No. 308 and the opening of the registers and transfer of the parcels allegedly subdivided from No.308 were all irregular and illegal. According to the evidence of the Agnes Ngaga (PW2) the register, the green card and the title document in respect of parcel No. 556 were opened and issued illegally in favour of the 4 th appellant. Her signature was forged in the opening of the register, the green card and the issue of the title. Her evidence in this regard was corroborated by Emmanuel Kenga (PW3). It was therefore proved beyond all doubt that the subdivision and the registration of the 4th appellant's parcel, like the rest of the other parcels excised from No. 308, were procured by, among others, imitation of government officers' signatures and without the requisite consents. In my humble view, such actions would amount to procuring of registration by false pretence.

I have considered the 4th appellant's defence against this particular count. According to her she signed the transfer form, apparently to transfer the land to her, together with the late Francis Magondu. It was also her evidence that she got the title in respect of Title No. Naromoru/Naromoru/556 on the same day that she signed the transfer forms. There was no evidence of the consent of the land control board to support the transfer and as I understood the land registrars' (PW2's and PW4's) evidence there were no documents of any nature in support of the transfer or the registration of this particular parcel; none existed in the presentation book or day book.

In a nutshell, the 4th appellant's defence did not displace the prosecution case that she willfully procured her registration as the proprietor of by false pretence. I am therefore satisfied that this count was proved against her beyond any reasonable doubt.

Mr Okeyo for the state conceded the appeal but he did not offer any reason for the concession. For the reasons I have given I am not inclined to accept his concession and allow the appeal; instead I find the appellants' appeal deficient of any merit. Accordingly I uphold the learned trial magistrate's decision to convict and sentence the appellants as she did. The appellants' appeal dismissed.

Dated, signed and delivered in open court this 18th day of May, 2018

Ngaah Jairus

JUDGE