REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 210 OF 2010

GERISHON GIOCHE MACHARIA Alias

GERISHON GEUCHE MACHARIA.....APPELLANT

VERSUS

REPUBLIC .....STATE

(Appeal from the Sentence of the Principal Magistrate's Court at Nakuru Hon. W. Juma – Chief Magistrate delivered on the 24th June, 2010 in CMCR Case No. 2956 of 2006)

JUDGMENT

The appellant **GERISHON GIOCHE MACHARIA alias GERISHON GEUCHE MACHARIA** has filed this appeal challenging his conviction and sentence by the learned Chief Magistrate sitting at the Nakuru Law Courts. The appellant had been charged with the offence of **OBTAINING EXECUTION OF SECURITY BY FALSE PRETENCE CONTRARY TO SECTION 314 OF THE PENAL CODE**. The particulars of the charge were stated as follows

> ***"On the 6th day of March 2002 at Nakuru Lands Office in Nakuru town of the Rift Valley Province, by false pretence and with intent to defraud obtained from Mr. J. M. Munguti a land registrar in Nakuru District Lands Office obtained Title Number Mau Narok/Siapei Block 3 (Mutukanio 'A') parcel No 520 and made same Mr. J. M. Munguti to endorse and make [the] above title in his name and affix a seal in order that it may be afterwards made or converted into use or used as a valuable security namely a land title deed for above parcel of land".***

The appellant pleaded **'Not Guilty'** to the charge and his trial commenced on 22/8/2008. The prosecution called a total of six (6) witnesses in support of their case.

The genesis of this charge is the Title for Plot No. 520, Mau Narok which had been issued and registered by the Nakuru Land Registrar in the name of **'Wairimu Gioche'** who was the grand-mother of the appellant. **PW1 EUNICE WAMBOI KIBUNJA**, claimed that this Plot 520 had been fraudulently illegally and unlawfully hived out of her parcel being Plot No 485. In her evidence **PW1** testified that sometime in 1986 she purchased Plot 485 from one Mwagamu and his wife Wambui. She paid a sum of Ksh 75,000/= for the land and was issued with receipts. **PW1** claims that several years later a chief called **'Maina'** sold her land to **'Wairimu Gioche'** who was the appellant's grandmother.

PW2 HUMPHREY MWAGERU NJAU confirmed to the court that in the year 1986 he sold his Plot

No. 485 to **PW1** for Ksh 75,000/=. **PW2** states that he handed over to **PW1** all the relevant documents for the plot. He later came to learn that one **'Chief Maina'** had sold the same plot to the appellant's grandmother and a new title for Plot No 520 was prepared and registered.

PW4 JOSEPH KANGETHE KIBUNJA is the son of **PW1**. He confirms that his mother purchased Plot No. 485 from **PW2** and paid for it in full. Sometime in 1992 a village elder came to the plot with a surveyor seeking to demarcate the land **PW4** filed a case being Nakuru High Court Civil Suit **No. 22/1992 EUNICE WAMBOI Vs WAIRIMU MACHARIA GIOCHE** in respect to the matter. This suit was determined in favour of **'Wairimu Gioche'**, the appellant's grandmother.

PW6 JOSEPH MULINGE MUNGUTI a Land Registrar was the person named in the charge sheet as the complainant. He told the court that Plot No. 520 was carved out of Plot 485 and a title issued in the name of the appellant's grandmother. **PW6** told the court that he had advised the parties to go before the Land Tribunal in order to have the matter settled. He prepared his report which he produced as **P.exb 6**.

The matter was eventually reported to the police whereupon the appellant was arrested and charged with the present offence.

At the close of the prosecution case the appellant was found to have a case to answer and was placed on his defence. The appellant gave an unsworn defence in which he explained that he inherited Plot 520 from his late grandmother who initiated the process of demarcating the land and obtaining the Title Deed.

On 24/6/2010 the learned trial magistrate delivered her judgment in which she convicted the appellant as charged. The court then proceeded to impose upon the appellant a fine of Ksh 100,000/= in default one (1) year imprisonment. The appellant paid the fine but being aggrieved by both his conviction and sentence he has filed this appeal in an attempt to clear his name. **MR. WAIGANJO** Advocate urged the appeal on behalf of the appellant whilst **MR. CHIGITI** learned State Counsel opposed the same.

From the narration of the facts given above it is quite clear that this matter is in essence a land dispute between **PW2** on the one hand who claims to be the original and genuine owner of Plot 485 and the appellant grandmother on the other hand who is the proprietor of Plot 520 which was allegedly carved out of Plot 485. That being the case the proper forum for this dispute would have been by way of a Civil Suit before a Civil court.

Indeed through his defence the appellant adduced evidence of the existence of such a Civil Suit being **Nakuru HCCC No. 22 of 1992** where **PW1** sued his late grandmother. This suit was decided in favour of the appellant's grandmother and the High Court ordered that Title to Plot 520 was properly issued to the appellant's grandmother. **PW1** filed another suit against **'Wairimu Gioche'** the appellant's grandmother and on 6/2/2001 the court again ruled against **PW1**.

It is curious why the police would proceed to charge the appellant who was not the original allotee or purchaser of Plot 520. He merely inherited the land from his grandmother. Secondly why would police lay criminal charges over a matter which the high Court had already sat and adjudicated upon and rendered a decision.

The existence of the Civil Suit was brought to the attention of the trial magistrate. Indeed in her judgment at page 24 line 11 the magistrate notes that

> ***"In 1992 her neighbour (PW1) filed a case in court No. 22 of 1992. The application by PW1 that the grandmother should not get title was dismissed"***

Having observed and noted the existences of a High Court case in which the claim of **PW1** was dismissed why then did the court proceed to convict the appellant of this offence.

Given that her court was of a lower jurisdiction that the High Court, the trial magistrate ought not to have proceeded to entertain the matter and convict the appellant. This is tantamount to sitting in appeal over a

decision of the High Court.

The appellant was charged with contravening Section 314 of the Penal code. Section 314 provides as follows

> ***"314 Any person who by any false pretence and with intent to defraud, induces any person to execute, make, accept, endorse, alter or destroy the whole or any part of any valuable security, or to write any name or impress or affix any seal upon or to any paper or parchment in order that it may be afterwards made converted into or used or dealt with as a valuable security is guilty of a misdemeanour and is liable to imprisonment for three years"***

The allegation against the appellant is that he falsely and with intent to defraud induced or otherwise compelled the land registrar to make the title deed to Plot 520. The land Registrar in question was named in the charge sheet as **'Joseph Munguti'**. He testified as **PW6** in this case. Surprisingly **PW6** had no issue or complaint against the appellant. **PW6** made no allegation of Fraud against the appellant neither did he allege that the appellant sought to influence or mislead him any way into issuing the Title Deed to the plot in question.

In his evidence **PW6** stated that title for Plot No. 520 could not be hived out of Plot 485 as they were not in sequence. However at no point in his testimony did **PW6** finger the appellant for blame or suspicion in the manner in which the land was demarcated or the title deed issued. Indeed none of the witnesses placed any blame on the appellant for influencing the issuance of that title. They all confirm that he original holder of that title to Plot 520 was one **'Wairimu Gioche'** who was the appellant's grandmother. The applicant was only charged because his grandmother was deceased and he had inherited the plot from her.

Under cross-examination **PW6** states that he does not recall when he visited Plot 520 and he confirms that he received all the relevant documentation from **'Wairimu'** and not from the appellant. There is no vicarious liability in criminal law. The appellant cannot be blamed for the actions of his grandmother.

I have perused at the judgment prepared by the trial magistrate. In it the learned trial magistrate observed as follows at Page 25 line 4

> ***"..... the accused was a beneficiary to the land parcel in question. He obtained it from his grandmother who is now deceased. The grandmother would have been well placed to say how she obtained the land in question which is said to have been hived off from the complainant's land. That grandmother would have given an alpha and omega account of how she got the parcel registered to her persons but neither she nor her grandson who is the accused could have forced the land registrar to create title for them on land whose formation cannot be explained...."***

Further down the same page at line 20 the trial magistrate went on to state that

> ***"The land registrar cannot explain if he is so powerless that a party on the ground stops him from doing his work and he stops at that taking no action at all to seek ways of completing the work he intended to do. There was a civil suit in court which was decided by the High Court what is in court today is a criminal case, a case of mere theft by the accused.***

In the above the trial magistrate blames the land registrar for failing in his duties and acknowledging that the appellant was merely a beneficiary who played no role in the acquisition of the land or in obtaining title to the same. Having so observed there would be no basis to proceed to render a conviction against the appellant in this case.

The trial magistrate goes on to find that

> ***"There was the civil case but its decision had nothing much to do with the criminal act committed in this case....."***

With respect I must disagree. The civil case had **<u>everything</u>** to do with this case. Once the High Court found that the appellants grandmother held good title to Plot 520, then an inferior court purporting to decide in a criminal case could not make an opposite finding that title to Plot 520 had been fraudulently obtained.

The trial magistrate further found that

> ***"The accused on his part is hiding behind the acts of his late grandmother who transferred the land to him..."***

The appellant cannot be held liable for the criminal actions (which have neither been alleged or proved) of his grandmother. From the observations and findings of the learned trial magistrate she erred in finding the appellants guilty of the offence charged. Clearly the trial magistrate mis-apprehended the facts as well as the law in this matter. There is no evidence of any fraud or illegal act by the appellant leading to the issuance of title to Plot 520.

In my view no offence was proved as against the appellant and he ought not to have been convicted. The appellant's conviction has no basis whatsoever. I do hereby quash that conviction. Since the appellant already paid the fine of Ksh 100,000/= way back in 2010 I will not interfere with the sentence as it had been overtaken by events. This appeal therefore succeeds.

Dated and Delivered in Nakuru this 24th day of February, 2017.

Mr. Waiganjo for Accused

Maureen A. Odero

<u>Judge</u>