



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT HOMA-BAY**  
**CRIMINAL APPEAL NO. 87 OF 2014**  
**(FORMERLY KISII HCCR APPEAL NO.74 OF 2010)**

**BETWEEN**

**SAMWEL ABUYA MBIJA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Criminal Case No. 172 of 2008 of the*

*Senior Principal Magistrates Court at Migori, Hon.Kibet Sambu, SRM dated 31<sup>st</sup> March 2010)*

**JUDGMENT**

1. The appellant **SAMUEL ABUYA MBIJA** was charged with the offence of forcible detainer contrary to **section 91** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence were that on 20<sup>th</sup> September 2007 at Koluoch Sub-location in Migori District being in possession of **KAMAGAMBO/KOLUOCH/410** (“the property”) of **WILLIS ONYANGO SAMO** without colour of right held possession of the said land in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of peace against **WILLIS ONYANGO SAMO** who was entitled by law to the possession of the said parcel of land by building a house on it.

2. The appellant was convicted and sentence to pay a fine of Kshs. 20,000/- and in default to serve 6 months imprisonment. Mr Kisera, learned counsel for the appellant, summarized the grounds on of appeal as follows; that the case of the prosecution was not proved beyond reasonable doubt as the prosecution did not prove through expert evidence that the appellant had constructed land on the property which the complainant was alleged was his. That the charge of forcible detainer was inappropriate in the circumstances as there was nothing detained which was capable of escape and the issue was really one of trespass. Finally that the learned magistrate dealt with the matter as if it a determination of property rights and that the he failed to consider that the appellant had reasonable grounds to remain on his land.

3. Ms Owenga, learned counsel for the State, supported the conviction and left the issue for the court’s determination.

4. This being a first appeal, it is the duty of this court to re-consider and to re-evaluate the evidence adduced before the trial court, in light of the submission made in this appeal, and reach its own

independent determination whether or not to uphold the conviction of the appellant having regard to the fact that it neither saw nor heard witnesses (see **Okeno v Republic [1972] E.A 32**).

5. The prosecution called three witnesses to prove its case. The complainant, PW 1, testified that on 19<sup>th</sup> September 2007 he received information that some people were constructing a house on his property. He produced the title to the property and the search certificate. He stated the appellant occupied the property and effectively denied him of access to his property. The PW 1 further testified that there was land dispute between him and the appellant being **Kisii High Court Civil Case No. 382 of 1997** which was determined in his favour.

6. PW 2, the Land Registrar, testified that PW 1 was the owner of the property, having been registered as proprietor on 2<sup>nd</sup> February 1988 and a title issued on 8<sup>th</sup> February 1988. PW 3, the investigating officer, received the complaint and investigated the matter. She received a copy of the title and search certificate for the property which confirmed that PW 1 was the owner of the property. He also organized for photographs to be taken of the property which showed that the appellant was living there, had erected buildings and had planted maize.

7. The appellant was put on his defence. He made an unsworn statement where he stated that the property belonged to his father who is now deceased and that the title deed was stolen. He stated that he had been in occupation since 1986 and he put up his house where his father pointed out to him. He stated he took out a succession cause for his father's estate. He also claimed that the court awarded him the land in **Kisii High Court Civil Case No. 382 of 1997**. The appellant called DW 2, his uncle, DW 3, his brother and DW 4, his sister, as witnesses. They all testified that the appellant was the owner of the property and was occupying it and that it is his father who pointed out to him where he should build.

8. The issue for determination in this appeal is whether the prosecution established its case against the appellant on the charge of **forcible detainer** contrary to **section 91** of the **Penal Code** which states;

*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.*

9. The offence is clearly defined in the statute and while the term forcible detainer may be misleading or connote, as the appellant argues, something that can be moved, the ingredients of the offence are clear and are defined by the statute. In **Albert Ouma Matiya v Republic Busia HCCR Appeal No. 8 of 2012 [2012]eKLR**, Kimaru J., stated as follows;

*The ingredients required to establish the charge of forcible detainer under Section 91 of the Penal Code are as follows: the prosecution must establish that the accused is in actual possession of the parcel of land which he has no right to hold possession of. The prosecution will establish this if it adduces evidence which proves that the accused has no title or legal right to occupy the land. Secondly, the accused must be in occupation of the parcel of land in a manner that is likely or causes reasonable apprehension that there will be breach of peace against the person entitled by law to the possession of the land.*

10. I have reviewed the evidence and I find that the prosecution proved that the land belonged to PW 1. He had a title deed to the land and his position as the registered owner of the property was confirmed by the custodian of titles, PW 2. It is well established that registration of a person as the owner of a property confers indefeasibility. **Section 27(a)** of the **Registration of Land Act (Repealed)** applicable at the material time provides as follows;

27. Subject to this Act-

*(a) the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant*

thereto;

11. It is common ground that there was dispute between the appellant and PW 1 which culminated in the appellant filing ***Kisii HCCC No. 382 of 1997 Samuel Abuya Mbija v Willy Onyango Samo***. The suit was filed by the appellant who sought revocation of the title on the ground that PW 1 had fraudulently acquired it. Initially the matter was heard by a panel of elders who issued an award. The award was set aside on 26<sup>th</sup> June 2001 by Wambilyangah J. A final decree was issued by the court on 6<sup>th</sup> June 2003 which confirmed an arbitration award of the DO Rongo. The decree awarded the property to PW 1 absolutely. The appellant's claims could therefore not override the proprietary rights of PW 1.

12. Mr Kisera argued that the magistrate erred by attempting to determine the title to the property. I reject this argument. The learned magistrate was bound to ascertain who had the title to the property as an ingredient of the offence. He properly concluded that PW 1 was the legal owner of the property.

13. The occupation of the land by the appellant was proved by the prosecution witnesses. Furthermore, the appellant and his witnesses were all clear that that the appellant was in occupation of the property which he was given by his deceased father. He was asserting a right which is inconsistent with the title held by PW 1. It was therefore not necessary to call a surveyor or other expert to confirm that the appellant was in occupation of the property.

14. The fact that the appellant was in occupation of the PW 1's property and was refusing to vacate it in the face of clear evidence of the PW 1's ownership provides a reasonable apprehension that there will be breach of peace against the person entitled by law to the possession of the land.

15. **Section 8** of the ***Penal Code*** provides a full defence for a person asserting a *bona fide* claim of right. It states;

*A person is not criminally responsible in respect of an offence relating to property, if 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.*

In light of the title by the issued in favour of PW 1 and the final decree issued in ***Kisii HCCC No. 382 of 1997 Samuel Abuya Mbija v Willy Onyango Samo***, the appellant could not be exercising a *bona fide* claim of right.

16. Having evaluated the evidence, I am satisfied that the conviction was justified. I do not find any error in the sentence imposed.

17. I affirm the conviction and sentence. The appeal is dismissed.

**DATED and DELIVERED at MIGORI this 21<sup>st</sup> day of November 2014**

**D.S. MAJANJA**

**JUDGE**

Mr Kisera instructed by Omonde Kisera and Company Advocates for the appellant.

Ms Owenga, Senior Prosecuting Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.