



**REPUBLIC OF KENYA**

**High Court at Kitale**

**Criminal Appeal 91 of 2012**

**ABRAHAM LONYANGAT**

**JOHN LONYANGAT.....APPELLANTS.**

**VERSUS**

**REPUBLIC.....RESPONDENT.**

*(Being an appeal from the original conviction and sentence of R.M. Washika – SRM in Criminal case No. 583 of 2009 delivered on 17th July, 2012 at Kapenguria).*

**J U D G M E N T.**

This appeal arises from the decision and judgment of the Resident Magistrate at Kapenguria in **Criminal Case No. 583 of 2009**, in which the appellants, **Abraham Lonyangat** and **John Lonyangat**, were convicted and sentenced to a term of six (6) months imprisonment each for the offence of forcible detainer contrary to section 91 of the penal code.

It was alleged that on the 26th July, 2008 at Adurhoit sub-location, West Pokot District, being in possession of unregistered land parcel within Kongelai Group Ranch of Lonyangole Nguranyang without colour of right, the two appellant held in possession the said land in a manner likely to cause a breach of the peace against Lonyangole Nguranyang who was entitled by law to the said land.

Both appellants denied the charge. They were tried, convicted and sentenced accordingly. However, being dissatisfied with the conviction and sentence, they preferred the present appeal on the basis of the grounds contained in the petition of appeal dated 27th July, 2012, filed herein on their behalf by **Messer Katina & Co. Advocates**.

At the hearing of the appeal, **Mr. Katina**, learned counsel, combined the grounds of appeal into three broad grounds and submitted firstly, that the subject land belonged to a group ranch in which the appellants are members and therefore entitled to a portion of the land which is registered in the name of the group consisting of about 412 members. In that regard, the appellants were allocated a portion known as plot No. 315 while the complainant was allocated plot No. 167. it is the appellants' contention that the two plots are far from each other and do not share a common border. The appellants contended that the portion occupied by themselves was invaded by the complainant in the year 2006 who then went ahead to claim ownership therefore thereby commencing a protracted dispute over the land which dispute had actually been in existence since 1998.

the appellants further contend that it was the complainant's claim to title respecting the subject land which occasioned the present charge.

The appellants submitted secondly, that on realizing that their portion of the land had been invaded by the complainant, they sought assistance of the police but instead of being assisted, they were charged with the present offence.

The appellants contended that the court visited the scene and was able to determine the actual owner of the land but prior to the hearing of the matter at the scene, the court observed that the appellants had encroached into the complainant's land thereby prejudging them before being heard.

Thirdly, the appellants submitted that group ranches in their area own portions of land yet to be sub-divided for ascertainment of boundaries and for individual ownership by members. As a result, the registry index map (R.I.M.) is non-existent thereby leaving the determination of boundaries to conjecture though at times trees are used to mark unstructured boundaries. Further, the charge indicated that the appellants were holding onto unregistered land yet the entire subject land was registered for the entire membership of the group ranch thereby rendering the charge defective. The appellants urged this court to allow the appeal and relied on the case of **Michael Rotich vs. Rep. Criminal Appeal No. 73 of 2004 at Kitale**, to augment their submissions in support of the appeal.

The state respondent did not oppose the appeal and submitted through the learned prosecution counsel, **Mr. Chelashow**, that there was uncertainty with regard to the ownership of the land and that the trial court proceeded to determine ownership instead of the issue pertaining to forcible detainer.

This being a first appeal, the court is required to re-consider the evidence adduced at the trial with a view to arriving at its own conclusion. Of course, bearing in mind that the trial court had the advantage of seeing and hearing the witness.

In brief, the prosecution case was largely based on the evidence of the complainant **Lonyangole Nguranyang (PW1)**, who stated that he was a farmer at Kongelai group ranch and member No. 167 of the group. He arrived at the farm together with one Mike Losiakemer (now deceased), father to the first appellant and grandfather to the second appellant who is son to the first appellant. The deceased lived on adjacent land known as Konyang.

Nguranyang (PW1) said that he never left the land occupied by himself and was found there by the two appellants. He also said that at one particular period he was forced to leave the land due to prevailing insecurity occasioned by Karamajong raiders. He returned later and found the land intact and continued occupation thereof. However, the appellants entered the land and refused to vacate. This action prompted a dispute between themselves and Nguranyang which was never resolved and which took a new dimension by reference of the matter to the police.

**Samuel Manga (PW2)**, a member of Kongeloi Group Ranch indicated that the group was started in 1973 and in 1994, the land was divided. However, people later left the area following a state of insecurity created by Karamajong raiders. The people returned when peace was restored but instead of occupying the portion of land where their father was a member, the appellants encroached into the complainant's portion and refused to vacate.

Manga (PW2) stated that his membership number is No. 297 while that of the complainant (PW1) is No. 167 and that of the appellant's late father No. 315.

The chairman of the group ranch from 1982 was **Samuel Loteiywah (PW3)**. He stated that the group was comprised of 421 members and confirmed that the late father of the appellants was member No. 315 whose land was situated a kilometer away from the complainant's land. He (PW3) stated that the complainant started living in his portion in 1974 but pointed out that members occupied any part of the land prior to sub-division.

Loteiywah (PW3) said that upon sub-division of the land, a member was allowed to permanently occupy own portion and in 1977, a title-deed was issued for the land. However, due to insecurity in the year 1980, the title deed and a file were burnt. Loteiywah, further stated that he was elected chairman of the group in

1982. Thereafter, he managed to trace the original register and the title-deed and after the resumption of peace in the area, people returned to the land even though rampant “grabbing” the portion belonging to the complainant and refused to vacate.

**Joel Lodiarakou Atukuleng (PW4)**, a member of the group ranch also stated that the appellants went into occupation of the land occupied by the complainant, after peace was restored in the area following a period of insecurity. He (PW4) also said that the appellants' late father occupied land which was a kilometre away from that of the complainant.

**Josiah Lesan (PW5)**, the District Land Officer in **West Pokot** in the year 2003 indicated that a complaint was received from Nguronyang (PW1) against the first appellant. It was then resolved that the first appellant would occupy the land given to his parent by the group ranch management committee.

**P.C. George Ngumu (PW6)**, of Kacheliba Police Station, indicated that he received a complaint from the first appellant against the complainant (PW1) over the land belonging to Kongelai group ranch. His investigations revealed that possession of the land was the issue at hand and that the dispute had been resolved severally but without success. He therefore preferred the present charge against the appellants.

In his defence, the appellant one (**Abraham**) stated that he stays in his father's land where he was born. His father gave him the land which belongs to a group ranch and has a single title deed. He contends that he took possession of the land in 1987 but it was invaded by the complainant in 2006 leading to a fight. He further stated that he lives in the land together with his son, the second appellant; and that the complainant left his own portion and came to live in his (first appellant's) portion which is neither fenced nor surveyed and it's size remains unknown.

As for the second appellant (**John**), he stated that the complainant moved into their land in the year 2006 and forcefully erected structures thereon before asking them (appellants) to move out. He (second appellant) also stated that the complainant moved from a place called Kamito into that land for which they do not have a title. He said that the chairman of the group informed them that the land belonged to his (second appellant's) grandfather, Losiekemer and that each person was to get an allotment letter which they did from the said chairman who however, refused to hand it over despite being asked to do so by the local land office. The second appellant contended that the land belongs to them even though the complainant has moved therein and occupied part thereof.

The defence raised by both appellants was supported by the evidence of their two witnesses **i.e. Lokwara Longoluk (DW1)** and **Christopher Changorei (DW2)**.

Basically, after having considered the foregoing, evidence in the light of the appellants' submissions in support of the appeal and the respondent's concession thereto, it is apparent to this court that the dispute revolving around the appellants and the complainant was all along over a parcel of land belonging to and registered in the name of Kongelai Group Ranch. A title deed dated 1st December, 1997 was produced to establish the fact. It was further established that the land was acquired for the benefit of the members of the said group such that each one of them was to be allocated respective portions of the land for purposes of individual ownership and permanent occupation. The appellants were therefore entitled to a portion thereof as was the complainant. However, it was evident that the group through its management committee had not effectively commenced or computed the process of sub-dividing the land into individual portions for its members including the complainant and the appellant's through the membership of the first appellant's father, grandfather to the second appellant. Consequently, conflicts regarding individual entitlements of the land emerged between the members of the group.

It was such conflicts that led to the present charge being preferred against the appellants. The complainant lay a claim of right over the portion or part thereof occupied by the appellants and vice-versa. Several attempts to resolve the dispute proved unsuccessful. The complainant therefore resorted to law enforcers who treated the matter as criminal and preferred a charge of forcible detainer against the appellants on allegation that without colour of right they held in possession the subject land, described as an unregistered parcel of land, in a manner likely to cause a breach of the peace against the complainant

who was considered to be the lawful occupant of the land. It was obvious that the land was treated as belong to the complainant though there was no individual title in favour of the complainant to prove and affirm his alleged ownership of the land. To the contrary, the evidence clearly showed that the entire portion of land is the registered in the name of the material group ranch.

The group is the lawful proprietor of the land and not the complainant or the appellant who are merely members of the group entitled to portions lawfully allocated to them for issuance of individual title deeds. As it were, the land had not been sub-divided for individual ownership by each of the members. Therefore, neither the complainant nor the appellants could accused one another of interfering with each other's lawful possession of part of the land. None of them has acquired lawful ownership of the portion they both claim as against the other.

The solution to their dispute regarding the land lies at most with the registered owners i.e. the Kongelai Group Ranch or at the very least with the Civil Courts and not certainly the criminal courts.

The charge against the appellant was therefore misconceived and defective such that no quantity of evidence from the prosecution could cure it.

In any event, section 91 of the penal code presupposes that the complainant is the lawful owner of the land in dispute which was not the case herein. The appellants could not be said to be guilty of forcible detainer yet the land is not registered in the name of the complainant or lawfully possessed by himself thereby giving him the colour of right thereof to the exclusion of the appellants or any other person.

For all the foregoing reasons, it would follow that the appellants' conviction by the learned trial magistrate was against the weight of the evidence and therefore unsafe.

Consequently, this appeal is allowed to the extent that the conviction of both appellants is hereby quashed and the sentence set aside.

Both appellants be set at liberty unless otherwise lawfully held.

**[Delivered and signed this 8th day of November, 2012.]**

**J.R. KARANJA.**

**JUDGE.**