



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CRIMINAL APPL. NO. 124 OF 2011

PETER NJOGU NJUGUNA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant, **PETER NJOGU NJUGUNA**, was convicted for the offence of Forcible Detainer contrary to section 91 of the Penal Code. He was found to have taken possession of a parcel of land from its owner, causing a breach of peace.

The learned trial magistrate sentenced the applicant to 1 year imprisonment. She also ordered the applicant and his family to move out of the subject land within 30 days of the judgment.

Being dissatisfied with the decision, the applicant has lodged an appeal against both the conviction and the sentence.

He has now asked this court to grant him bail pending appeal. He also asks for an order that will enable his family to remain on the subject land until the appeal is heard and determined.

When canvassing the application, the applicant pointed out that unless he was granted bail, it was likely that he will finish serving the sentence before his appeal was heard.

He believes that the said appeal has overwhelming chances of success.

He also pointed out that he was a man of good character, as was demonstrated by his faithful attendance before the trial court, when he was tried whilst he was out on a KShs.50,000/- bond.

The applicant informed the court that he is an elderly man, aged 63. He said that he was also suffering from ill-health.

Meanwhile, the court was also invited to consider the fact that the offence for which the applicant was convicted was not of the kind that would normally require the removal of the convicted person from society. Furthermore, the applicant was the registered owner of the land in question, having inherited it from his late father.

Having lived on the said piece of and since 1963, when the land was still registered in his father's name, the applicant believes that if the complainant, (who owns and lives on the adjoining piece of land), had any legitimate claim over that land, he ought to have made the claim against the applicant's father. Because he did not do so, the applicant believes that this was essentially a civil dispute couched in criminality.

The applicant fears that if the court did not stop the eviction of this family from the land in issue, the appeal would be rendered nugatory. It was for that reason that he asked the court to stay the order for the eviction of his family, including himself.

In answer to the application, the respondent submitted that even if the applicant was a man of good character, he had been convicted for committing a criminal offence.

Secondly, the respondent said that age was not in itself a good ground for granting bail to an applicant.

And as regards the ill-health of the applicant, the respondent's position was that the applicant had not demonstrated to this court that he could not get the required treatment whilst he was behind bars.

Therefore, the respondent concluded that the applicant had not shown any exceptional circumstances.

Furthermore, the respondent believes that the pending appeal did not have overwhelming chances of success. The main reason for that contention was that even in a civil case that had been determined, the applicant had been ordered to vacate the land in question.

In determining this case, the court takes note of the fact that there was a civil case between the complainant in this case and the father of the applicant. The said civil dispute was instituted by the complainant after local arbitration had failed. The civil case is said to be **HCCC No. 6447 of 1991**, and was before the High Court in Nairobi.

The investigating Officer (**PW 9**) told the trial court that the court restrained the father of the applicant and his family from the land in dispute. However, the said orders were not executed.

The Investigating Officer did not explain the reasons, if any, for the failure to execute the orders issued by the court, in that civil case.

He also did not explain why he decided to stop the charge of contempt of court.

I have made specific mention of the foregoing because they help to demonstrate the fact that the dispute had its genesis in some civil litigation between the complainant and the applicant's father.

Although I did not wish to make a finding thereon at this stage, I find that it is possible, as the applicant has submitted, that the criminal case against him was the road chosen by the complainant to settle a case that was otherwise of a civil nature.

Secondly, by its own admission, the respondent confirmed that the civil dispute was between the complainant herein and the

applicant's father. If the applicant's father and his family were ordered to vacate the land in issue, yet herein only the applicant was convicted, it would appear that there was a discriminatory prosecution of only one member of the family that was allegedly ordered to vacate the land.

In the event that the applicant and his family are forced out from the land before his appeal was heard and determined, that may well render the appeal nugatory.

It is also instructive that although the applicant had been charged with two counts, including one for obtaining registration by false pretences, the learned trial magistrate did not convict him for that offence.

If the trial court confirmed that the applicant was the registered owner of the land in question, but did not convict him for obtaining the title by false pretences, is it not possible that the said court was satisfied that the applicant's title to the said land was not obtained through false pretences?

And if the applicant had obtained registration to the land legitimately, questions may well arise regarding how he could thereafter be criminally liable for the offence of being in actual possession of the same land "without any colour of right", as envisaged by **section 91 of the Penal Code**.

The point I am striving to make is that the appeal put forward by the applicant raises serious points of law which were arguable.

As the applicant is an elderly man of 63; and because he is currently suffering from ailments which require specialized treatment which may not be readily available within the prison walls; and because he has an appeal which has reasonable chances of success; and also because the applicant would not have reason to abscond, as by so doing he would have left the land which he is fighting over with the complainant; I find that the interests of justice dictate that he be granted bail pending appeal. If he continued staying in prison whilst awaiting the hearing of his appeal, there is a real possibility that he may serve the entire sentence before the appeal was heard and determined. If he thereafter succeeded in his appeal, his victory would be completely hollow.

Therefore, I do now grant the reliefs sought in the chamber summons dated 10th march 2011. In effect, there shall be a stay of execution of the order made by the trial court, for the applicant and his family to move out of "the suit land", until the appeal is heard and determined.

Secondly, the applicant shall be released on cash bail of KShs.100,000/- or a personal bond of KShs.150,000/- with two sureties of like sum.

Dated, Signed and Delivered at Nairobi, this 12th day of May, 2011

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FRED A. OCHIENG

JUDGE