



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO. 1 OF 2011

(From original conviction and sentence in Criminal Case No. 5102 of 2007 of the Chief Magistrate's Court at Nakuru – W. Kagendo, PM)

STEPHEN NDUNGU MBURU.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

JUDGMENT

Stephen Ndungu Mburu was charged with the offence of forcible detainer contrary to Section 91 of the Penal Code. The particulars of the charge were that on diverse dates between 19th January 1999 to date, at Kabatini in Nakuru District, being in possession of Land Title No. Bahati/Kabatini Block 1/1634 of Erastus Chomba Wahome 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 the peace against Erastus Chomba Wahome who was entitled by the law to the possession to the said land. The prosecution called a total of 6 witnesses while the defence called 3 witnesses. The appellant was found guilty of the offence and sentenced to one year imprisonment. He is aggrieved by both conviction and sentence and preferred this appeal citing five grounds. He was given bond pending appeal.

Mr. Mongeri, Counsel for the appellant urged two grounds that this is a civil dispute between the appellant and the complainant because both the appellant and complainant have titles in respect of the same piece of land; that in 1988, the complainant was charged with malicious damage to the appellant's house which stands in the same plot and was fined. He further submitted that there are civil proceedings pending in CMCC No. 241/09 in respect of the said piece of land. Counsel urged that the one year imprisonment is erroneous and should be quashed.

Mr. Nyakundi, learned Counsel for the State conceded the appeal for reasons that this is a civil case that has been criminalized; that the Land Registrar confirmed that both titles are genuine and the only issue is whose land is it; that the land is in same block but different registrations.

PW1, Erastus Chomba Wahome, the complainant in the trial court testified that he joined Ndeffo Company in 1978. He was issued with Membership Certificate after he paid Kshs.1,360/- membership fees. He was given Bahati/Kabatini Block 1/1634 and issued with Title in 1984 (Ex.1). The shamba was shown to him by a person from the company. He started cultivating it but it proved expensive and so he got a loan from Barclays Bank using the title as security (PEXh.2). In 2007, he went to the shamba and found somebody had constructed on it. He complained to Ndeffo Company and the person was summoned but never showed up. He visited the Lands office and was shown another title in the name of

the appellant, Bahati/Engarusha/1634 (PEX.4). He was told to report to police. The map of Ndeffo land was produced in evidence and the complainant pointed out his plot and it is the same plot claimed by the appellant. After police investigations they charged the accused for this offence. PW1 admitted that he had been charged in CRC No. 1667/1988 for malicious damage to property and was fined Kshs.4,000/-. When shown the Share Certificate of ownership issued to the appellant by Ndeffo Co. Ltd he did admit that they all looked alike.

PW2, Charles Cira Wachira a director of Ndeffo Company Ltd said that he is the one who ensures that each member gets what is due to them the Company. He was aware that the complainant had 68 shares with the company and was given land in Kabatini Block 1 and that he knew the land in issue to belong to the complainant. He confirmed that the certificate issued by Ndeffo to the accused's brother was signed by the same directors of the Company as those who signed the complainant's certificate. He was not able to confirm whether the appellant lived on the disputed land.

PW3, Martin Wangombe Chomba the son of the complainant recalled having gone to work on the land in 1984 and 1985 as a child and he has never gone back there till 2007 when he heard of a case over the said land.

John Mwaura (PW4), the Land Registrar, Nakuru District confirmed that his duty includes issuance of titles to land. He was not working in Nakuru when the two titles in dispute were issued. He said that Bahati/Kabatini Block 1/1634 and Bahati/Engarusha Block 1/1634 are in same Block but different registration sections. He noted that the complainant was registered on 26/9/1984; Land Certificate issued on 27/9/1984 and he took a loan on the certificate on 13/8/1985. A caution was then registered on the land on 16/10/1986 in favour of John Nganga Mburu, claiming ownership interest. He said that registration block means they are in the same location. He confirmed that the title issued to the accused and the green cards are genuine and so is the complainant's title.

Although the Investigating Officer, Ali Abdallah (PW5) found that both titles issued to both the complainant and the appellant were genuine, he found that Bahati/Engarusha did not extend to Block Kabatini, and decided that the appellant must have invaded the complainant's land and charged him for the offence he was convicted of.

The Nakuru District Surveyor, Jaffney Kibome told the court that from their maps, Bahati/Engarusha 1634 does not exist because the highest number given by their office is 1206, but that Bahati/Kabatini has 1634. He confirmed that before the Land Registrar issues titles he relies on the company registry and map of the company. He could not tell where the surveyor got the number Bahati/Engarusha 1634.

In his sworn defence, the appellant produced the original title for Bahati/Engarusha 1634 which he said was given to him by his brother George Nganga Mburu who is now deceased. He also produced a copy of the share certificate 1451 dated 11/5/1984 and that the land was given in 1983. He took possession in 1984. In 1986 when he was away, he found his house broken into and everything taken and the complainant was charged with malicious damage to property and convicted for the offence. That the complainant went away and never returned till 2007.

Mburu Nganga (DW1), the appellant's father told the court that in fact it is him who bought the disputed land from Ndeffo Company and registered it in George's name but that it was initially registered in his name.

DW2, Stephen Ndungu Kinuthia, said that he is a neighbour of the appellant. He occupied his land in 1974 while the appellant moved into the land in 1983 where he lives today.

As the first appellate court, I have the duty to re-evaluate the evidence afresh, and arrive at my own conclusion irrespective of the fact that the prosecution concedes the appeal.

It is common ground that there are two title deeds and two green cards in respect of the suit land; the complainant's title is Bahati/Kabatini Block 1/1634 and the appellant's is Bahati/Engarusha Block

1/1634. It is also not in doubt that these titles were issued as a result of membership of Ndeffo Company Ltd. The Nakuru District Land Registrar confirmed that both titles are genuine, issued by the Lands Registry, so were there green cards. It was also conceded by PW2, a director of Ndeffo Ltd that the documents issued to the appellant seemed to be a genuine certificate issued by Ndeffo Company. The Nakuru District Surveyor (PW6) told this court that for registration, one needs the certificate from the company and the Registrar then issues title deeds. The Registrar said that the location of the two plots is one. It means that two titles have been issued in respect of one piece of land. The ultimate question will then be, who is the owner of that plot. That can only be answered by Ndeffo Company which issued the certificates to its members and then the Nakuru Land Registrar to show how come two titles were issued in respect of one plot.

The appellant claims to have been in possession of the land since 1983. Indeed the Land Registrar said that as early as 16/10/1986, the appellant had registered a caution on the said land. Further to that, in 1988, the complainant was charged with the offence of malicious damage to the appellant's property in CRC No. 1667/1988. The complainant was charged with damaging the appellant's house and property which he had built on the said land.

With all these facts in mind, it is evident that the complainant and appellant have had a claim over the said plot since the 1980s which dispute has not been resolved. There was therefore no basis for the respondent to charge the appellant with an offence of forcible detainer when in 1988, the appellant was deemed to be the owner of the land. This is a civil claim over who is the owner of the suit property and it is not in the domain of the police to decide on ownership. It is only a civil court which can determine ownership once the parties present their evidence before it. The appellant had not been charged with the offence of forgery of the title deed. The titles are said to be genuine documents and the court in its judgment went on to question how the appellant obtained it. As noted above, it seems that only Ndeffo Company Ltd and the Land Registrar are able to answer the question of who owns the land and how the two titles came about. That was not for the police to take sides and allege that one of the holders of the title deeds was doing so unlawfully.

For the above reasons, I am satisfied that the conviction herein is unsafe. The appeal is allowed, conviction is quashed and sentence set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

DATED and DELIVERED this 20th day of December, 2011.

R.P.V. WENDOH
JUDGE
PRESENT:

Mr. Kairu holding brief for Mr. Mongeri for the appellant.

Mr. Omari for the respondent.
Kennedy – Court Clerk.