



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT ELDORET  
CRIMINAL APPEAL 93 OF 2007**

1. Criminal Law
2. Criminal Appeal under Section 342(2) Criminal Procedure Code
3. Subject of Criminal case/Subordinate Court

**(a) Forcible Detainer**  
**Contrary to Section 91 of the Penal Code.**

**Particulars of Offence.**

That on 5<sup>th</sup> July 2003 at Chayale plot Uasin Gishu District within the Rift Valley Province being in possession of 1/16 acreage of Khadija Yusuf this without color 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 Khadija Yusuf who was entitled by law to the possession of the said land.

**(b) Plea not guilty.**

**(c) Facts**

- (i) Appellant claimed to have bought land from another not before Court
- (ii) Complainant alleged land was his and had proof to show this
- (iii) Self help group confirmed the alleged seller and the Appellant not known to them.

**In reply**

Accused claim he bought land from one B. Mate.

4. Trial Court held

That the Appellant was guilty as charged.  
The Appellant appeals to High Court  
(a) He was a purchaser for value  
(b) Sentence excessive

5. Held

a). That Appellant was correctly convicted and sentenced for offence as charged  
b). Appeal dismissed.

6. Case Law - nil

7. Advocate:

(i) V.I. Kabaka , State Counsel, holding brief for A.O. Oluoch,  
Senior Deputy Prosecution Counsel instructed by the office of the Attorney General for the  
State - Present

(ii) Tom Madanga Hamisi (Appellant in Person) - Present

MADANGA HAMISI ..... APPELLANT  
=VERSUS=  
REPUBLIC ..... RESPONDENT

*(An Appeal from the conviction and sentence of B.N. Mosiria Esq. Resident Magistrate at Eldoret delivered on 19th October 2007 in CM.CR. CASE NO. 5553 OF 2003)*

### JUDGMENT

#### I. Introduction

1. This Appeal on Criminal Law is being determined under Section 354(2) of the Criminal procedure Code.

**“The Court “May” write to the Appellant or his Advocate to reply upon any matters of law or fact raised by the Respondent or his Advocate in his address”.**

2. It is therefore not compulsory for an Appellant or their Advocate to be present in Court save if the Court invites them to attend.
3. The Appellant, herein having been looked for in prison, has not appeared. The probability is that he may have served and completed his sentence and or paid the fine.
4. Tom Madaga Hamisi was charged with the offence of **Forcible Detainer**.

**Contrary to Section 91 of the Penal Code.**

#### **The Particulars of offence being**

That on 5<sup>th</sup> July 2003 at Chagale plot Uasin Gishu District within the Rift Valley Province being in possession of 1/16 acreage of (Land) (belonging to Khadija Yusuf this without color 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 Khadija Yusuf who was entitled by law to the possession of the said land.

5. Plea of not guilty was entered.

#### II. Facts

6. The Complainant bought two parcels of land. This she did at a purchase price of Kshs.15,000/= from a Self Help Group. Unfortunately she found a stranger on the land a plot, where by construction was taking place. After the administration had in fact investigated the matter it transpired one Benard Mate claim the land was his. He was not able to prove ownership. A defense witness came to say the District Officer gave the said Bernard Mate the land.
7. When the Original Self Help Group and owner of the land came to Court, they were surprised to find the Appellant and not Bernard Mate in Court.
8. In his defence the Appellant claimed to

be a purchase of land for value. The said Appellant denied the offence. He was nonetheless fined Kshs.10,000/= in default 6 months imprisonment.

Being dissatisfied with the conviction and sentence, he appealed to this High Court on 31<sup>st</sup> October 2007.

### III. Appeal

10. That he was a purchase for value. The trial Magistrate erred in convicting him.
11. That the sentence of Kshs10,000/= in default 6 months imprisonment was excessive.
12. The Appeal be accordingly allowed.

### IV. Opinion

13. The Appellant had no right or color on the said property. By being on it, it was likely to cause a breach of the peace.
14. Though entered into a sales agreement with one Bernard Mate, that said seller held no ownership over the said land. The 500 years old maxim "Buyer Beware" applied to the Appellant.
15. On being notified he was unlawfully on the property, he should have immediately left the property and sued the Seller in damages. By holding onto the possession of land he indeed became a forcible detainer.
16. I reject the arguments on the appeal.
17. As to the Sentence, hereby hold that the offence is a misdemeanor. This means a trial Magistrate is permitted to impose a fine which was accordingly done. The fine is not excessive one. The findings on conviction and sentence is accordingly upheld.
18. This Appeal is dismissed.

**Dated this 6<sup>th</sup> day of July 2010 at Eldoret**

**M.A. ANG'AWA**  
**JUDGE**

#### **Advocate:**

(iii) V.I. Kabaka , State Counsel, holding brief for A.O. Oluoch,  
Senior Deputy Prosecution Counsel instructed by the office of the Attorney General for the  
State - Present

(iv) Tom Madanga Hamisi (Appellant in Person) - Present