REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 10 OF 2009

(From original conviction and sentence in Criminal Case No. 1287 of 2004 of the Chief Magistrate's Court at Nakuru - W. Kagendo (SRM)

CAROLINE CHERONO KURGAT……..APPELLANT

VERSUS

REPUBLIC……...……..RESPONDENT

JUDGMENT

The Appellant was charged and convicted of the offence of forcible detainer contrary to **section 91** of the **Penal Code** (Cap 63, Laws of Kenya) and was sentenced to a fine of Ksh 40,000/= or in default to serve 24 months imprisonment.

The appellant appealed both against her conviction and sentence on four grounds set out in the Petition of Appeal dated and filed on 29th April 2009. However as fate would have it the Appellant was released on 20th October 2009 on Presidential Amnesty as per Production Order dated 31st May 2010. She however pursued her appeal through her counsel Mr. Karanja Mbugua, who urged the appeal on 27th September 2010.

Section 91 of the **Penal Code** reads as follows -

91. "Any person who, being in 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 a misdemeanor termed forcible detainer."

Mr. Nyakundi, learned State Counsel, did not support the appellant's conviction, and therefore sentence. He submitted that the evidence did not support the ingredients of the offence of forcible detainer. Mr. Karanja Mbugua Counsel for the Appellant agreed and was of the same view. He cited the decision of my brother Hon. W. Ouko in the case of **RICHARD MWANGI NDORO vs. REPUBLIC [2005] eKLR** where the learned judge summarized succinctly the ingredients of the offence of forcible detainer as -

(i) a person is in possession of land without colour of right;
(ii) that the person holds on to possession in a manner likely to cause a breach of the peace or

reasonable apprehension of a breach of the peace;

(iii) the breach in question must be directed at the person entitled by law to possession.

I agree with, and adopt the said statement of the law in this matter.

The evidence on record shows that the complainant, PW1 obtained title to Plot Number Nakuru/Sururu/2217 which parcel of land was already occupied by the Appellant pursuant to a similar allotment given to her by the Government in 1992, and she occupied it in 1996, erected three houses and dug a well for water. The complainant, PW1, on his part testified that he was given land by government in 1999 while he was a student in Standard 7! He has never entered the land, and his father never claimed the land as he has other land.

Although Section 193A of the Criminal Procedure Code (Cap. 75, Laws of Kenya) allows the simultaneous conduct of civil and criminal proceedings, in this case, the prosecution of the appellant for forcible detainer was uncalled for. It seems to me that where one party has obtained title to a property which title is, or may be, subject to challenge on legal or equitable grounds, by another person who has or claims a prior interest, or as in this case, is in occupation of the property, the proper steps to take is to initiate an action by way of a civil suit for the eviction of, and mesne profits *(if any)* from the occupier of the land.

To gain entry into the land by way of forcible detainer prosecution is in my view an abuse of the criminal law process, and Mr. Nyakundi was quite right and proper in conceding to the appeal.

For those reasons, the appellant's Petition of Appeal dated 9th January 2009 and filed on 29th April 2009 succeeds. The conviction of the appellant is quashed and the sentence is set aside. As the Appellant was freed on Presidential Amnesty there is no need to make an order for her release.

There shall otherwise be orders as stated.

Dated, signed and delivered at Nakuru this 19th day of November 2010

M. J. ANYARA EMUKULE
JUDGE