



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CORAM. D. S. MAJANJA J.

CRIMINAL APPEAL NO. 105 OF 2019

BETWEEN

GEORGE MACHARIA THATHI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an appeal against the original conviction and sentence of Hon. T. W. Murigi, CM dated 6<sup>th</sup> December 2018 in Criminal Case No. 4052 of 2012 at the Magistrate's Court at Thika)*

JUDGMENT

1. The appellant, **GEORGE MACHARIA THATHI**, was charged with obtaining registration by false pretence contrary to **section 320** of the **Penal Code**. The particulars of the charge were that on 24<sup>th</sup> September 2002 at Thika Land Registry in Kiambu County wilfully and unlawfully procured for himself a registration of a parcel of land No. Ruiru East/Juja East Block 2/826 pretending that he was the genuine owner of the said parcel of land.
2. He was also charged with making a document without authority contrary to **section 357(A)** of the **Penal Code**. It was alleged that on 24<sup>th</sup> September 2002 at Thika land office within Kiambu County with intent to defraud and without lawful authority made a certain document namely title land No. Ruiru East /Juja East Block 2/826 purporting to be the genuine title deed issued by Registrar of Land, Thika.
3. The appellant was convicted and sentenced to pay a fine of Kshs. 100,000.00 in default to serve one-year imprisonment on both counts. The appellant now appeals against conviction and sentence on the grounds set out in his petition of appeal filed on 29<sup>th</sup> October 2019 and the written submissions filed on 8<sup>th</sup> September 2020. The thrust of the appellant's appeal is that the prosecution failed to prove the ingredients of the charge beyond reasonable doubt. He contends that the trial court misconstrued evidence against and shifted the burden of proof arriving at the wrong conclusion. The appellant also contended that the trial court failed to consider his defence.
4. The respondent filed written submissions. It opposed the appeal on the grounds that there was sufficient evidence to prove the case beyond reasonable doubt and that the appellant's defence was wanting as he failed to prove that he owned the suit property at any one time.
5. As this is a first appeal, I am required to review all the evidence and come to my own conclusion as to whether to uphold the conviction and sentence bearing in mind that I neither heard nor saw the witnesses testify in order to assess their demeanour (see **Okeno v Republic [1972] EA 32, Kiilu and Another v Republic [2005] 1 KLR 174**). In order to proceed with this task, it is necessary to outline the evidence emerging before the trial court.
6. Peter Njogu Kariga (PW 1) told the court his mother, Teresia Wanjiku, had died and left the subject property to himself, his brother, Stephen Muhoho Karani (PW 2) and his deceased sister. He told the court that a woman took her to the appellant who told him that the property had been subdivided and he wanted to assist him get a piece of the subject property. He proceeded to the Thika Land Registry with the appellant. He remained outside while the appellant went to office, came back, took his Identity card and went back to the office. PW 1 recalled that the appellant informed him that the plot was available but that it had outstanding rates. PW 1 denied that he sold the subject property to the appellant or that he participated in filing the succession case. In cross-examination, PW 1 told the court that he recalled going to an advocate's office but denied signing any documents or receiving any money though he admitted that the Identification Card number on the sale agreement belonged to him. He also denied signing any documents relating to or attending any meeting of the Land Control Board (LCB).
7. PW 2 confirmed that his mother left a plot to his deceased sister and himself. He went to the Thika Land Registry with his niece, Mary Wanjiku, PW 4, to check on its status. They were informed that they were required to file a succession case. He further testified that on

conducting a search, they were informed that the subject property was not in his deceased mother's name. When they went to the property, they found a house being put up. That they then reported the matter to Juja Police Station.

8. Peter Ngugi Mwitha, PW 3, a brother to PW 1 and PW 2 recalled that their mother was buried on the subject property. When they returned to the property after three years, they did not find their deceased's mother's house. They decided to institute a succession case but when they carried out a search, they discovered that the property had been registered in the appellant's name. PW 4 confirmed that she filed a Succession Cause No. 246 of 2011 and obtained letters of administration jointly with PW 2 and PW 3. PW 4 told the court that when she went to follow up the registration at the Lands Registry, she was informed that the land was in the name of the appellant.

9. An advocate practising in Thika, Njoroge Kugwa, PW 5, testified that on 24<sup>th</sup> September 2002, the appellant and PW 1 visited his office and requested him to draw a sale agreement over Ruiru East/ Juja East Block 2/826. He stated that they both had their identification cards while PW 1 was in possession of the title deed. PW 5 ushered them to a colleague who drafted the agreement which was signed by the appellant and PW1 and attested in his office. He told the court that the purchase price was Kshs. 200,000.00 and that the appellant paid a deposit of Kshs. 130,000/- while the balance of Kshs. 70,000.00 was paid on 3<sup>rd</sup> October 2002 after attending the LCB. PW 5 produced the sale agreement and the acknowledgment.

10. The investigating officer, PC Jim Kariuki, PW 6, recalled that he went to the Thika Land Registry and requested for the transaction but he did not receive any response. He therefore concluded that there was no transaction. At PW5's office he was given a title deed with no details. PW 7 produced the following documents

- a. Death certificate of Teresia Wanjiku Karanja
- b. Share certificate No. 1545 Juja Farms in the name of Teresia Wanjiku Karinga
- c. Ballot Card No. 826 in the name of Teresia Wanjiku Karinga from Juja Farms
- d. Receipt No. 1554 in the name of Teresia Wanjiku Karinga from Settlement Harambee Water project
- e. Copy of the green card over Ruiru East/Juja East block 2
- f. Copy of Kenya Gazette dated 12<sup>th</sup> November 2010 page 4138
- g. Copy of certificate of official search over Ruiru East Juja East Block 2/826 dated 9<sup>th</sup> February 2010.
- h. Copy of pleadings and certificate of confirmation of grant in Succession 246 of 2010 in the Chief Magistrate's Court at Kiambu

11. In his sworn statement, the appellant denied the offence. He told the court that on 15<sup>th</sup> September 2002, PW 1 approached him and informed him that he wanted to sell his land. He testified that PW 1 took him to the land and pointed out the beacons and later gave him a copy of the title to enable him to carry out a search. On 24<sup>th</sup> September 2002 in the company of DW 2, he met PW 1 and his wife and they proceeded to PW 5's office where the sale agreement was prepared. PW 1 and himself executed the agreement in the presence of PW 5 and that he paid a deposit of Ksh. 130,000/-. On the same day they went to the D.O's office and made an application for LCB consent. The appellant testified that they went for the LCB meeting on 3<sup>rd</sup> October 2002 where they were granted the consent. He produced the sale agreement, acknowledgement, LCB application and the LCB consent.

12. Geoffrey Ngwiri, DW 2, testified that in September 2002 the appellant requested him to a sale agreement. On the material day, the met with PW 1 and proceeded to PW 5's office where they all signed the agreement and the appellant made a down payment of Kshs. 130,000.00. He recalled that PW 1 produced the title deed registered in his name.

13. The undisputed facts of the case are that the late Teresia Wanjiku was the owner of plot no. 826 in Juja Farms and was the mother of PW1 and PW2 and the grandmother of PW3 and PW4. Furthermore, that the appellant obtained registration over the suit property in his name.

14. On the first charge of obtaining registration by false pretences, **section 320** of the *Penal Code* provides as follows:

320. Any person who wilfully procures or attempts to procure for himself or any other person any registration, licence or certificate under any law by any false pretence is guilty of a misdemeanour and is liable to imprisonment for one year.

15. On the other hand, **section 312** of the same Code defines "*false pretence*" thus:

312. Any representation, made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence."

16. In order for the prosecution to prove the charge against the appellant, it must prove that the appellant obtained the registration of the subject property knowing that he was not the beneficial owner of the property. From the evidence I have adverted to above there is no doubt that PW 1 at an undisclosed date in the past met with the appellant and visited PW 5's office giving credence to the appellant's defence. This was further corroborated by the evidence of PW 5, who met both the appellant and PW 1 and attested the sale agreement. However, PW 1 denied selling the land to the appellant and signing any documents implying that the documents were a forgery. In the absence of evidence

showing that the signature on the sale agreement was a forgery, the direct evidence tends to cast doubt on the prosecution case that the PW 1 did not sell the subject to the appellant.

17. Additionally, there is no evidence adduced by the prosecution to indicate that the appellant knew that PW 1 was not the owner of the suit property and therefore could not pass title to him. Failure of the prosecution to call the Registrar from Thika Land undermined the prosecution case as a witness from the Registry who would have shed light on how and under what circumstances the appellant came to be registered as the owner of the subject property.

18. On the charge of making a document without authority, **section 357A** of the **Penal Code** state as follows:

*Any person who, with intent to defraud or to deceive—*

*(a) without lawful authority or excuse makes, signs or executes for or in the name or on account of another person, whether by procuration or otherwise, any document or electronic record or writing;*

19. The thrust of the prosecution's case is that the appellant made the title deed and that it did not bear a stamp or a seal. I have gone through the record and there is no indication that the fraudulent title deed was produced by the prosecution. In the absence of the title document, the charge that the appellant made a title document cannot stand.

20. In the end, having considered the evidence I have come to the conclusion that the appellant's conviction is not safe. I allow the appeal, quash the conviction and sentence. Any fine paid by the appellant shall be refunded to him.

**SIGNED AT NAIROBI**

**D.S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at KIAMBU this 9<sup>th</sup> day of MARCH 2021.**

**M. KASANGO**

**JUDGE**

Ms Njoroge instructed by Mbiyu Kamau and Company Advocates for the Appellant.

Ms Mbese instructed by the Office of the Director of Public Prosecutions for the respondent.