



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. 4 OF 2017

(CONSOLIDATED WITH HCCRA NO. 3 OF 2017)

GEORGE GACHICHI.....1ST APPELLANT

JOHN NYAMBOGO NDEGE.....2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

[An appeal against the Conviction in Anti-Corruption Case No. 2 of 2014 in a Judgment by the Hon. (Mrs) Lucy Gitari (CM) as she then was and sentence by the Hon. Mr. Ng'arng'ar (CM) at Kisumu delivered on 20th January 2017]

JUDGMENT

The Appellants, **GEORGE GACHICHI** and **JOHN NYAMBOGO NDEGE** were the 1st and 5th accused persons during their trial.

1. Gachichi was convicted on 3 counts and was sentenced as follows;

(i) Abuse of Office contrary to Section 101 (1) as read with Section 102 of the Penal Code. He was sentenced to a fine of Kshs 50,000/= or in default 6 months imprisonment.

(ii) Concealing documents from the Register contrary to section 103 (1) (d) of Land Registration Act. For that offence, he was sentenced to a fine of Kshs 100,000/= or in default 6 months imprisonment.

(iii) Cancellation of the document in the Land Register contrary to Section 103 (1) (c) (iii) of the Land Registration Act.

He was sentenced to a fine of Kshs 100,000/= or in default 6 months imprisonment.

2. Meanwhile, Ndege was convicted and sentenced as follows;

(a) Permitting falsification of the Register contrary to Section 361 of the Penal Code.

He was sentenced to a fine of Kshs 200,000/=, or in default One Year imprisonment;

(b) Knowingly making a false statement orally or in writing in connection with a disposition or other transaction affecting land contrary to Section 103 (1) (b) of the Land Registration Act;

He was sentenced to a fine of Kshs 100,000/= or in default, 6 Months imprisonment;

(c) Forgery of Documents of Title of Land contrary to Section 350 (1) of the Penal Code. He was sentenced to a fine of Kshs 50,000/= or in default, 6 Months imprisonment.

3. In their appeals, the Appellants challenged their respective convictions, based on grounds which can be summarized as follows;

- 1. The trial court failed to subject the evidence on record to a proper analysis and evaluation, but introduced illogical theories thereby leading to the wrong decision.*
- 2. Conviction was against the weight of the evidence on record.*
- 3. The Appellant did not conceal documents from the register.*
- 4. The purported cancellation of a document was not in issue; and in any event, it was not proved by the evidence produced in court.*
- 5. The trial court made assumptions which appear to have been pre-conceived, thereby denying the appellants a fair and honest hearing.*
- 6. The trial court completely disregarded the Defence evidence.*
- 7. The trial court erred by finding that the accused persons were involved in a conspiracy, when no such theory was proved.*
- 8. There was no evidence that Ndege knowingly made a false statement.*
- 9. The prosecution failed to prove the alleged forgery of documents.*
- 10. As he worked as a driver, Ndege had no authority to permit the registration of documents or the falsification of the register.*

4. Being the first appellate court, I am obliged to re-evaluate all the evidence on record; and to draw my own conclusions therefrom.
5. **PW1, NARESH KUMAR RAMBAI PATEL**, was the Complainant. He testified that he bought a parcel of land, **L.R. NO. KISUMU/KONYA/2836**, from **SAMUEL OKOTH OLUOCH**. The total purchase price was Kshs 10,500,000/=.
6. It later transpired that the said parcel of land belonged to **JOSEPH HANNINGTON OLUOCH**.
7. At the time of purchase **PW1** saw a Green Card which showed that the land belonged to Samuel Okoth Oluoch. However, the 1st Appellant herein later produced another Green Card which indicated that the real owner of the land was Hannington.
8. On the strength of the second green card, the 1st Appellant cancelled the title which had been issued to **PW1**.
9. **PW3, JACINTA ACHIENG OGANGA**, worked as a Clerical Officer at the Kisumu Land Registry. She testified that the Transfer documents for **L.R. No. Kisumu/Konya/2836** was booked by her, in the presentation book. The transfer in issue was from Samuel Okoth Oluoch to Naresh Kumar Patel.
10. During cross-examination **PW3** said that Ndege was one of the persons who handled the key to the archives.
11. She also said that the archives were a restricted area, which could not be accessed by members of the public. Therefore, it was only the registry staff and Heads of Departments who had access to the archives.
12. **PW4, WILLY KIMUTAI CHEBOI** was the District Commissioner, Kisumu, at the material time. He testified that he chaired the Land Control Board meeting with gave the Consent for the transfer of Parcel No. **2836** from Samuel Okoth Oluoch to Naresh Patel.
13. In his understanding, each parcel of land can have only one green card.
14. **PW5, DR. JOSEPH HANNINGTON OLUOCH** was the owner of the parcel of land which was sold by Samuel Okoth Oluoch to Naresh Patel.
15. **PW6, DOROTHY LETING**, was the Land Registrar who was on duty at the time the officers at the Land Registry issued a Title document to the Complainant, indicating that he was the registered owner of Parcel No. **2836**. She had been posted to the Kisumu office shortly before the incidents which gave rise to the case.
16. **PW6** testified that she did not have access to the safe.
17. However, Mr. Ndege had the keys to the office of Mr. George Gachichi.
18. **PW6** testified that information concerning ownership of any parcels of land, are contained in the green card. Therefore, when any person conducts a search, the requisite information would be obtained from the green card, which is ordinarily kept in a binder.
19. In this case, there was a green card, and it is the one that was used to provide information to the Complainant. However, it later transpired that the said green card contained wrong information.

20. It is common ground that the authentic green card was in the custody of the 1st Appellant.

21. During cross-examination **PW6** said;

“All the requisite procedures were followed and documents issued without knowledge of the parallel green card.”

22. And **PW6** also testified that Ndege kept the keys which could be used to access

“the titles or any form that are required....”

23. **PW7, ELIZABETH ROSE MAGONGO** worked at the Ministry of Lands, Kisumu. She dispatched to Naresh Patel, the title deed in respect of Parcel No. **2836**.

24. **PW7** reiterated that when a search was being conducted, information is obtained from the green card, which is usually in the archives. The said card would ordinarily be in a binder.

25. However, if the card was not in the binder, the said binder would have a note that would indicate if the card was in safe custody.

26. **PW8, JOSHUA MUGU MUTUA** was a Valuer working with the Ministry of Lands, Housing and Urban Development. He explained that the value of the property in issue could vary depending on factors such as the purpose or even whether or not the property was intended to be used as a security for a loan.

27. **PW9, OKUMU ODIDA**, was the Chief of West Kajulu Location. He wrote a letter introducing the 2 sons of Nicholas Bongu. The said sons were Samuel Okoth Oluoch and Benson Ochieng Oluoch.

28. **PW9** testified that when he was in court, giving evidence, neither of the sons of Nicholas Bongu were present.

29. **PW10, JOYCE ATIENO ODHIAMBO**, worked with **RUCHA ENTERPRISES**. She testified that Samuel Okoth encashed several cheques at Rucha Enterprises. The cheques in issue were those that **PW1** had issued to Samuel, towards the payment of the purchase price.

30. **PW11, DENROSE AKINYI DUDE**, was a Clerical Officer at the Ministry of Lands, Kisumu. Her job entailed the booking of documents, presentation of books, registration of documents and sorting out documents.

31. **PW11** testified that the search in relation to parcel **2836** was completed by John Ndege.

32. It was her evidence that it was the District Land Registrar who had custody of documents in safe custody. And in respect to the material time, **PW11** said that George Gachihi was the District Land Registrar.

33. **PW12, SENIOR SERGEANT SAMSON CHEPOTIPIN** carried out investigations concerning land fraud. Thereafter, he arrested both the Appellants herein.

34. **PW12** prepared a Charge Sheet which had 7 accused persons. However, the **DPP** removed the name of Dorothy Leting, and she became a prosecution witness.

35. **PW13, PATRICK J. O. OTIENO**, was then an advocate practicing at the Law Firm of Otieno, Ojuro, Yogo Advocates. He drafted the Sale Agreement between Naresh Patel and Samuel Okoth Oluoch.

36. After the purchase price of Kshs 10,500,000/= was paid to the Seller, the parcel of land was transferred to Naresh Patel.

37. However, it later transpired that Samuel Okoth Oluoch was not the owner of the land in question, and also that the green card used to persuade **PW13** and Patel that Samuel owned the land, was not genuine.

38. **PW14, JOHN MUINDE**, was a professional Forensic Document Examiner. He testified that the handwriting allegedly made by William Sitati, were actually not written by him.

39. **PW15, FAITH MALIMO**, worked as an advocate at the offices of Otieno Yogo & Company Advocates, at the material time. She corroborated the evidence of **PW13**, concerning the drafting of the Sale Agreement between Patel and Samuel Okoth Oluoch.

40. **PW16, BAKARI ODHIAMBO ACHIEL**, was an Assistant Manager Operations, at Giro Commercial Bank. He testified about cheques which were in favour of Samuel Okoth Oluoch, but which the payee banked through Rucha

Co-operative Society.

41. According to **PW16**, Samuel was probably a member of the Sacco.

42. **PW17. IBRAHIM MOHAMED ALI**, was a Manager at Prime Bank Limited, Kisumu. He said that Naresh Patel, who was a customer of Prime Bank, introduced Samuel Okoth Oluoch to the said bank. After Samuel opened an account at Prime Bank, Naresh Patel purchased some Banker's Cheques in favour of Samuel.

43. At the time when funds were being deposited into the account of Samuel, he declared that the said funds were proceeds from the sale of properties.

44. **PW18. AOKO OGUTTA**, worked at the National Identification Bureau, Kisumu. He was a finger-prints officer. He testified that the Identity Card No, **22283893** belonged to Samuel Okoth Oluoch.

45. The said Identity Card was issued to Samuel when he was already 31 years old.

46. **PW19. PC ANTHONY EGESA**, was a Police Officer, attached to the Crime Scenes Office, Kisumu. He took six photographs of the parcel of land in question.

47. He also took another 5 photographs of some semi-permanent structures on the said parcel of land.

48. **PW20. VICTOR BARAZA** worked at the Ministry of Lands, Kisumu, at the material time. His duties included the writing of searches, as instructed by the Land Registrar.

49. He said that the Land Registrar, M. Nandwa, instructed him to write a search for **KISUMU/KONYA/2836**. He did as instructed, and the search showed that the owner was Samuel Okoth Oluoch.

50. **PW20** testified that the Register was kept in the archives, and that it was under the "*custody of the District Registrar.*"

51. He explained that a search would ordinarily be carried out in the archives, where the person doing the search looked for the binder.

52. However, if the person did not get the binder, he/she would refer to the registrar who had instructed the person to do the search.

53. In this instance, **PW20** got the information on the binder; and he wrote out the results of the search in accordance with the information on the green card.

54. **PW20** said that the Safe Custody Register was under the District Land Registrar, George Gachihi. He also said that when George Gachihi was away, he would leave the key with Mr. Ndege.

55. When being cross-examined by Mr. Oguso, the learned advocate for the 1st Appellant herein, **PW20** noted that even though Mr. Ndege was a driver, the key would normally be handed over to him, by the 1st Appellant.

56. **PW21. IP RICHARD CHEMWENO**, was the Investigating Officer. He testified that the signature on the title deed which was issued to the Complainant, (**PW1**) was a forgery. It had allegedly been signed by William Sitati (**PW2**), but the document examiner verified that **PW2** never signed the same.

57. At that stage we are talking about the title deed which cited Samuel Okoth Oluoch as the proprietor of the land in question.

58. It was on the basis of the forged title deed that a parallel green card was created.

59. **PW21** testified that the person responsible for the safe custody of the green card was the 1st Appellant.

60. As the said Appellant kept away the genuine green card, that facilitated the use of the parallel green card.

61. The 1st Appellant testified as **DW1**. He said that at the material time, he was away from the office as he was on leave.

62. Upon his return to the office, **PW5** confronted him because his property had been irregularly transferred to **PW1**.

63. He learnt that **PW6** had issued the title deed to **PW1**, based on the forged green card. At that time, **DW1** had kept the genuine green card in the safe.

64. His evidence was that he placed a tag on the binder, so that anybody checking the binder would be alerted that the green card was in the safe.

65. **DW1** said;

"On the same day I wrote a letter to Mr. Naresh Kumar that he had been cheated and that he needed to present his title deed for cancellation, as the person who had sold the land to him, one Samuel Okoth, was not the owner of the land."

66. During cross-examination **DW1** said that when a search was being conducted, the clerk performing that task would have no reason to look for another card elsewhere, if he had already found a green card in the binder.

67. During cross-examination, **DW1** said that he proceeded to cancel the entries which named **PW1** as the owner of the land, because the dates shown on the green card were not present in the presentation register.

68. **DW1** confirmed that he used to keep the key with “one officer, Mr. Ndege.” He went on to make it clear that the said Mr. Ndege was his driver at the material time. He said;

“Even when I was there, 4th Accused had the key and would open the office and clean or any other work I assign him, as I had not assigned him work of a driver.”

69. But in the same breadth, **DW1** said that Dorothy (**PW6**) was accessing the documents, because work was going on.

70. **DW2, FRED OKOTH NANDWA**, said that when the search was done on 31st May 2013, the information was obtained from the green card, which was in the binder.

71. The information indicated that the parcel of land No. **2836** belonged to Samuel Okoth Oluoch.

72. He also said that there was no tag in the binder.

73. He conceded that it was on the strength of the information provided by him and Victor Baraza, that Dorothy Leting issued the title to Naresh Patel.

74. He also said that;

“The search is important and is the very document before a transaction.

The book MFI-D2 is not where the search is done; you look for the binder and the card. If the card is not in the binder is when you look for black book. If Dorothy was convinced the green card was there she did not need to go to the book MFI-D2.”

75. He further stated that because the green card was found in the binder, Dorothy can be said to have done due diligence.

76. **DW3, FRANCIS BICHANG’A OMBONYA**, worked at the Ministry of Lands, Kisumu, at the material time. He was the Secretary to the Land Control Board, and it is he who wrote the consent which enabled the land to be transferred.

77. **DW3** also registered the transfer from Samuel Okoth Oluoch to Naresh Kumar Rambhai Patel, on the green card.

78. However, he denied making entries into the register.

79. **DW4, JOHN NYAMBOGA NDEGE**, was employed as a “Government Driver.” However, there was a meeting which was convened after the 2007-2008 Post-Election Violence, at which it was resolved that **DW4** be given the keys to the office.

80. Even when the 1st Appellant was posted to the Ministry of Lands, Kisumu **DW4** continued to keep the said keys.

81. He emphasized that his role was to open the office in the morning, for cleaning; and later in the evening, he would lock the office.

82. He denied any involvement in the writing on the green card; the issuance of the search or the registration of any transaction.

83. **DW5, SAMUEL OKOTH OLUOCH**, testified that he acquired parcel No. **2836** from his father, **NICHOLAS BOIG OLUOCH**, in the year 2002.

84. He said that the sale of that parcel of land to Naresh Patel was lawful.

85. **DW5** denied the claims by Dr. Hannington Oluoch (**PW5**) that he was the legitimate owner of the land.

86. **DW6, GEORGE OLUOCH OGUTU**, was an Adjudication Officer working with the Ministry of Lands, Kisumu County. He produced the **KONYA ADJUDICATION SECTION** dated 1979, together with a certified copy of the Adjudication Record dated 1st July 1981.

87. The documents show that the registered proprietor of parcel No. **2836** was Joseph Hannington Oluoch.

88. **DW7, GEORGE OLWALU NYANGWESO**, was the Land Registrar at the Kisumu Lands Office.

89. He testified that a Registrar has power to expunge entries if his own investigations revealed that such entries were anomalies.

90. Indeed, **DW7** said that it was not necessary for the registrar to inform the person whose name was to be expunged, prior to the said registrar taking action.
91. **DW7** also testified that the registrar who signed the green card for Naresh Kumar should be held accountable for the transaction.
92. However, during cross-examination **DW7** said that if the “*forged*” green card was the one in the binder, then Dorothy was not wrong if her actions were based upon it.
93. The foregoing is the totality of the evidence on record.
94. In my analysis of the evidence, I find that the 2nd Appellant was employed as a driver, but he was not performing the functions of a driver.
95. The evidence unanimously demonstrates that the 2nd Appellant was the custodian of the keys to, inter alia, the office of the 1st Appellant.
96. Secondly, I find that the original and authentic green card was in the custody of the 1st Appellant, in his capacity as the Registrar.
97. Although the 1st Appellant was on leave at the material time, he had left the keys to his office, with the 2nd Appellant.
98. When the Complainant wanted to purchase the parcel of land in issue, he conducted a search. At the time the search was conducted at the Lands office, the original authentic green card was not on the binder. The said green card was inside the office of Gachihi.
99. However, on the binder there was a green card which showed that the owner of the parcel of land was **DW5**, Samuel Okoth Oluoch.
100. All the witnesses, including the Appellants made it clear that once there was a green card on the binder, there was no need for the registrar to look for another green card, as each property usually has only one such card.
101. Therefore, when the genuine green card was kept away, “*safely*”, in Gachihi’s office, at a time when Gachihi was on leave; and when Gachihi left the keys with Ndege, that meant that Gachihi had no intention of making the said green card readily accessible. In other words, Gachihi concealed the said green card.
102. My said finding is informed by the fact that no explanation has been forthcoming for the removal of the green card from the binder where it would ordinarily have been.
103. Secondly, no tag was placed on the binder, so as to inform any person who was doing a search, that the green card had been safely kept at a different, specified place.
104. Therefore, the conviction on Count 4 was well founded.
105. Upon the return from leave, Gachihi learnt that Dorothy had issued a title deed to the Complainant, based on a forged green card. Therefore, Gachihi cancelled the entries which had cited the Complainant as the owner of the land in question.
106. It is common ground that pursuant to **Section 79** of the **Land Registration Act** the Registrar has authority to rectify the register or any instrument presented for registration, if there were forgeries.
107. The Appellants submitted that when the investigations done by the Registrar had revealed anomalies, the Registrar is permitted to expunge the documents.
108. Pursuant to **Section 79 (2)** of the **Land Registration Act**;

“No alteration affecting the title of the proprietor may be made pursuant to section (1) without the proprietor’s consent unless –

(a) the proprietor has by fraud or lack of proper care caused or substantially contributed to the error, mistake or omission;

or

(b) it would for any other reason be unjust for the alteration not to be made. Provided that a written notice of ninety days shall be given to the proprietor of such intention to make the alteration.”

109. In this case, the registrar did not demonstrate to the trial court that he had given to **PW1**, a written Notice of 90 days.

110. The Appellant has pointed out that when he wrote the letter dated 30th September 2014, to the DCI;

“..... one can see that the same was not calling for investigations but rather apprehension and prosecution of culprits,

since on the face of it, it was clear and evident that a fraud and hence an offence had been committed.”

111. Not only had the 1st Appellant failed to give Notice to the Complainant, he also made determinations concerning the culpability of persons whom he considered to be culprits!

112. Ideally, the 1st Appellant ought to have called upon the Director of Criminal Investigations to conduct investigations, and to take such further actions as would be deemed necessary after investigations were concluded.

113. It must always be borne in mind that even when the person carrying out investigations is convinced that there was overwhelming evidence against a suspect, the said investigators cannot declare the suspect as guilty. The constitution vests Judicial Authority in the Courts and Tribunals established by or under the said constitution.

114. Pursuant to **Section 101 (1)** of the **Penal Code**;

“Any person who, being employed in the public service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another is guilty of a felony.”

115. I find that the 1st Appellant acted arbitrarily when he cancelled and expunged the green card of parcel No. **KISUMU/KONYA/2836**, which had cited Naresh Patel as the owner of the said parcel of land.

116. The conviction on **Count I** was thus properly founded.

117. I am obliged to add that by upholding the conviction, I am not making a determination on the validity of the title deed which had been granted to the Complainant: That is not an issue for determination in this appeal.

118. It may very well be that the title deed of the Complainant might be found to have been granted irregularly, as it does appear that the person who sold the land to him did not hold a valid title.

119. But such a determination can only be made when the issue of ownership comes up for determination, before an appropriate judicial forum, and after the said forum will have given a hearing to the parties.

120. As the 1st Appellant lacked the requisite judicial authority, and because he took action without Notice to the Complainant, he acted in an arbitrary manner.

121. Similarly, as the 1st Appellant cancelled and expunged the green card without following the appropriate procedure, I find that he acted arbitrarily.

122. However, I find that the prosecution did not prove that the 1st Appellant’s action were fraudulent.

123. Accordingly, the conviction on **Count IV** cannot be sustained. I therefore quash the said conviction, and I also set aside the sentence. If the 1st Appellant had paid the fine, the same should be refunded to him.

124. Meanwhile, as regards the 2nd Appellant, I find that there was no evidence to prove that he permitted the falsification of the register.

125. Whilst it is crystal clear that the 2nd Appellant had custody of the keys to the office of the 1st Appellant, it was not demonstrated how he permitted an entry to be made in the land register which was kept inside the registrar’s office.

126. I also find no evidence that the 2nd Appellant issued a certificate of official search in connection with the disposition or other transaction affecting the transfer of **L.R. KISUMU/KONYA/2836** to Naresh Kumar Patel.

127. And as regards **Count VI**, I find no evidence that the 2nd Appellant forged an official document, purporting it to be what it was not.

128. Accordingly, the conviction of the 2nd Appellant is quashed in respect of all the 3 counts; and the sentences relating to each of them are set aside.

129. If the 2nd Appellant had paid any fines, the same should be refunded to him.

DATED, SIGNED and DELIVERED at KISUMU This 5th day of October 2021

FRED A. OCHIENG

JUDGE