REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KILGORIS

CRIMINAL APPEAL CASE NO. E008 OF 2021

(CORAM: F.M. GIKONYO J.)

(Being an appeal from the judgment of Hon. D.K. Matutu (P.M) in KILGORIS

CR case No. 998 of 2015 on 19/5/ 2020 delivered by Hon. R.M. Oanda (P.M).

JULIUS LEPARAN KIPTINGOS.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

[1] The Appellant was charged with the offence of forcible detainer contrary to Section 91 of the Penal Code. It was alleged that the appellant on 13th May 2000 in Transmara West District Within Narok County being in possession of Transmara /Osinoni/1290 of Koidungu Ole Shira without of colour of right held possession of the said piece of land in a manner likely to cause breach of peace against Koindungu Ole Shira who was entitled to the possession of the said land.

[2] The appellant denied the charge. The prosecution in support of its case marshaled four (4) witnesses while the appellant testified and called two witnesses.

[3] The appellant was convicted and sentenced to pay a fine of Kshs. 30,000/= (thirty thousand only) and in default to serve one (1) year imprisonment.

[4] Being dissatisfied with the decision, the appellant appealed on both conviction and sentence on six grounds, as;

i. That the learned trial magistrate grossly erred in law and fact by not properly evaluating the evidence and the applicable law culminating to a total miscarriage of justice.

ii. That the learned trial magistrate grossly misdirected himself in law on the issue of standard of proof by shifting the burden to the appellant.

iii. That the learned trial magistrate grossly erred in law and fact by not appreciating the doctrine of adverse possession and the limitations of actions act in land matters

iv. That the learned trial magistrate erred in law and fact by not sufficiently considering the evidence of appellant as a bona fide purchaser for value.

v. That the learned trial magistrate erred in law and fact by reaching a conviction not supported by evidence.

vi. That the judgment by the learned trial magistrate was pre-meditated, skewed, hobbling and a total misdirection and misunderstanding of the applicable law.

RESPONDENT'S CASE

[5] DW1- Julius Leparan Kiptingos. He testified that the complainant sold him five-acre piece of land in 1997. They drafted the agreement in

June 2000. They later did an agreement for an additional five acres. The total was now 10 acres. They had not had any issues with the complainant since 1997 to 2015. The complainant had sued him in a land case which was still pending in court. He produced the plaint, defence and counter claim as **D Exh1** and as **D Exh 2** respectively. He sued the complainant in O.S. 191 OF 2015. He produced the Narok case as D Exh 3 and his statement in ELC 60 of 2018 as **D Exh 4.** He bought the land at Kshs. 15,000/= but the value now has appreciated/ he recorded as statement with the police **D Exh 5**. The complaint had never told him to leave until 2015 yet he was on the land since 1997. He denied being a forcible detainer. He lives on the land with his family.

[6] On cross examination, He stated that the complainant is a sober man not a drunkard. That some of the complainant's witnesses did not sign the agreement.

[7] DW2 – Joseph Konchellah. He witnessed the sale of the parcel of land. He confirmed the signature of the agreement was his. He was a witness in ELC 60 of 2018. He produced a copy of the agreement as **D Exh 7.**

[8] DW3- Paul Lekakeny Munge. He testified that the complainant had informed that he wanted to buy land at Emarti and he wanted to sell his land to the appellant at osinoni. The brothers to the complainant had no objection to the sell. He produced his witness statement in ELC no. 60/2018 as **D EXH 8**.

[9] On cross examination he stated that he was a witness to the sale of land in 1997 and in 2000.

APPELLANTS' SUBMISSIONS.

[10] The appellant submitted that the charge sheet is dated 24th July 2015. It had been fifteen years since the offence was alleged to have occurred.

[11] The appellant submitted that the prosecution did not at all established the two basic ingredients of the offence. The appellant was in the piece of land as a bona fide purchaser for value and hence had a colour of right. The appellant had co-existed with the complainant for over 15 years, there was no likelihood or apprehension of breach of peace at all.

[12] The appellant submitted that the trial magistrate failed to appreciate the law that required the entry into land must be '*without colour of right*'. The trial magistrate stated that '*the offence of forcible detainer requires that an accused person is living on the land of the complainant and that when asked to give vacant possession refuses'*.

[13] The appellant submitted that the learned trial magistrate erred in law by not appreciating the provisions of the Limitation of Actions Act cap 22, that a claim over land cannot be instituted after twelve (12) years as it is time barred.

[14] The appellant submitted that the learned trial magistrate ignored the answers given by the complainant on cross examination which amounted to admission of sale of the said parcel of land.

[15] In conclusion, the appellant submitted that the judgment of the learned trial magistrate was erratic, misconceived, misdirected, irregular and unfounded as it is not backed by evidence, proper legal reasoning and hence culminating in a travesty and miscarriage of justice. Therefore, the conviction should be quashed, sentence set aside and the appellant be refunded the amount of Kshs. 30,000/= he paid as fine.

[16] The appellant in support of his case relied on the following authorities;

i. **Stephen Ndungu Mburu V Republic [2012] eKLR**

ii. **Murang'a Criminal Appeal No 430 Of 2013 Richard Kiptalam Beingo Vs Republic**

iii. **Busia Criminal Appeal 8 Of 2021- Albert Ouma Matiya Vs Republic**

RESPONDENT'S CASE.

[17] **PW1-** Koindungu ole shira. He testified that he is a farmer and resides at Transmara / Osinoni/ 290 which belongs to him. He inherited the same from his parents. The said parcel of land measures 13.5 acres

[18] It was PW1'S testimony that the appellant lived near the border between the *Maasai* and *Wakuria.* The appellant sought refuge at PW1's residence. PW1 was to sell part of the land in exchange for a small amount of money. They went to the advocate and signed the agreement. He signed the agreement that he sold five acres in 2000 and five acres in 2008. He remained with three acres. Initially he had agreed to sell part of the land to the appellant but realized there was lack of transparency on the part of the appellant and his legal representative. He offered to refund the money he had received but the appellant declined to take Kshs. 240,000/=. He lives with him on the land he claimed that the appellant went to forge another agreement. He produced a title deed and search certificate and a copy of green card as **P Exh 1 (a), (b)** and ***(c)***

[19] On cross examination, he stated that he allowed the appellant to stay in his land in 2014. The clashes were in 1997. The appellant lived until 1999. In 2000 they did a sale agreement selling to the appellant five acres. He later sold him another five acres. Making the total to ten acres. The appellant currently lives in the boma that the complainant used to live. The appellant moved in in 2014. He admitted having a land case ELC NO 163 OF 2015 AT KISII high court when he was referred to the plaint therein and the verifying affidavit sworn by him. That he had placed an application before the ELC court to bar the appellant from cutting tree because he had not planted the same. That the father of

the appellant had admitted him when he was shot in the stomach in return for the land. He admitted therefore selling the land. He stated that he refused to transfer the land because the agreement was forged. He denied declining the agreement because of the appreciation.

[20] It was the evidence of PW1, PW2 and PW3 that the appellant was accommodated at the said land due to clashes that had occurred at the border of two communities. That later the appellant claimed he had bought the said land.

[21] PW2 and PW3 both are wives of the complainant pw1 stated that they were not aware of the sale to the appellant. They admitted that their husband was a drunkard and that he was cheated by the appellant while he was drunk.

RESPONDENT'S SUBMISSIONS.

[22] The respondent submitted that the appellant has not placed any evidence before this court to dispute the fact of ownership of the said land.

[23] The respondent submitted that the trial court came to the right conclusion when it held that the appellant had no honest/ bona fide claim of right to hold the possession.

[24] The respondent submitted that the trial court was right in holding that the possession of the said land by the appellant causes reasonable apprehension that there will be breach of peace.

[25] In conclusion, the respondent submitted that the prosecution did discharge its burden of proof. The conviction of the appellant was proper. They therefore urged this court to dismiss the appeal and enhance the sentence.

[26] The respondent relied on the following authorities in support of its case;

i. Section 107(1) of the Evidence Act

ii. Woolmington V Dpp [1935] AC 462

iii. Miller V Minister Of Pensions [1947]2 ALL ER 372

iv. Japheth Gituma Joseph & 2 Others Vs R [2016] eKLR

v. Florence Wanjiku Mwamunga & Another V Republic [2018] eKLR

ANALYSIS AND DETERMINATION

[27] I will perform the duty of first appellate court; evaluate the evidence afresh and make own conclusions; except bearing in mind that I did not have the advantage of hearing and observing the demeanor of the witnesses. See ***Okeno vs. Republic [1972] E.A 32.***

[28] The ever constant duty of the prosecution in a criminal case; proving the case against the accused beyond reasonable doubt. The discharged or otherwise of this onus constitutes the overall issue for determination in this appeal.

Proof beyond reasonable doubt

[29] The offence of forcible detainer is established in **Section 91of the Penal Code (*Chapter 63 of the Laws of Kenya*)** as follows;

"91. Forcible detainer

Any person who, being in actual 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 the misdemeanour termed forcible detainer."

[30] In ***Julius EdapalEkai v Republic [2018] eKLR, HIGH COURT CRIMINAL APPEAL NO. 31 OF 2017,*** Riechi J., stated as follows;

"A literal reading of Section 91 of the penal code shows that the prosecution will only prove an offence of forceful detainer against an accused person if it demonstrates that:-

(a) A person has actual possession of land

(b) The person has no right over the land

(c) The act of possession is against the interests of the legal owner or the person legally entitled to the land; and

(d) The act of possession of the land is, therefore, likely to cause a breach of the peace or a reasonable apprehension of the

breach of the peace."

Being in actual possession without any colour of right

[31] The first true essential of the crime of forcible detainer of land is **being in actual possession of land without colour of right.**

[32] The ***Black's Law Dictionary, 11th Ed,*** defines color of right as: -

The deliberately created false impression that title in property or goods is held by someone other than the actual owner.

[33] *Color of right* may arise in a tenancy- landlord-tenant relationship or other types of derivative possessions. The dilemma is whether in a charge for the offence of forcible detainer of land, it is material that possession of land was initially procured through a legal or contractual relationship, say, contract for sale of land or landlord tenant relationship or marriage.

[34] Unpacking a myth. Of tenancy; a tenant who wrongfully holds over the demised premises after his tenancy expires is either a tenant at sufferance or at will. The former differs from the latter because he holds over without the landlord's assent or consent. Both differ from a trespasser for their original entry into the premises was lawful. Civil remedies are available in such situations including eviction order. Nevertheless, is such continued possession *being in actual possession of land without color of right* for purposes of section 91 of the Penal Code?

[35] Of sale of land; a contract for sale of land may be repudiated or frustrated by operation of law. For instance, it is criminal offence to continue with controlled transactions in land under Land Control Act if no consent has been obtained in a given period of time. Is such continued possession *being in actual possession of land without color of right?*

[36] Of marriage; occupation of matrimonial property after divorce but before division of matrimonial property between the parties is not *being in actual possession of land without color of right* even where the property is registered in the name of or is being claimed by one of the parties to the marriage, for the law has created rebuttable presumption that such spouse holds the property in trust for the other.

[37] But, of course, possession and continued possession pursuant to a legally binding and enforceable contract or relationship is an important consideration. However, it is a kind of squirm when such possessions turn into *possession without color of right* under section 91 of the Penal Code.

[38] I will not declare any foreclosure on this subject. I will be happy to read further discriminative interrogation of these matters by eminent jurists, scholars and commentators.

[39] Be that as it may, the appellant was in actual occupation of the suit land. All the prosecution witnesses told court the appellant was in occupation of the said land. The appellant also admitted this fact except he stated that PW1 had sold 10 acres to him and he took possession of the land. PW1 also admitted having the intention of selling the land to the appellant but refused to sign the agreement after he realized it had been forged or for lack of transparency on the part of the appellant and his legal representative.

[40] A defence that initial entry was lawful or was pursuant to an enforceable contract should be given due consideration by the court in determining whether the possession was without a color of right for purposes of the offence of forcible detainer of land.

[41] I find support in Section 8 of the Penal Code which provides a full defence for a person asserting a *bona fide* claim of right. It states;

A person is not criminally responsible in respect of an offence relating to property, if the act done or omitted to be done by him with respect to the property was done in the exercise of an honest claim of right and without intention to defraud.

[42] Claims by PW1 and his family that the appellant forged an agreement, lacked transparency and cheated him of his land for he was a drunkard ought to have been supported with cogent material and evidence for purposes of forcible detainer of land. This element was not proved.

[43] Of second consideration; the prosecution should prove that the complainant is **a person entitled by law to the possession of the land**; and that the appellant's possession was against the interests of such person. I should think that the law was careful not to use ''registered owner'' in section 91 of the Penal Code as there are other different types of interests in land which are recognized in law and which may entitle a person to the possession of land.

[44] PW1 testified that the title pertaining to the suit property was in the name of the complainant; PW1. The search also showed that the complainant is the registered owner of the suit property. However, the Appellant's defence was that he bought the land but PW1 refused to transfer it to him. He referred to the agreement between him and the complainant. There was a transaction between the two. It may have aborted or breached but in the absence of strong or cogent evidence, it is always desirable that a competent court of law makes such pronouncement or declares the breach. The defence by the appellant created a doubt in the prosecution's case which should be resolved in his favour in a criminal case.

[45] The last essential element is that the possession was a threat to a breach of the peace. The definition of what would constitute a breach of peace was well stated by Watkins LJ: in **R v Howell [1982] 1 QB 416; [1981] 3 All ER 383**, thus:

A comprehensive definition of the term 'breach of the peace' has very rarely been formulated so far as we have been able,

with considerable help from counsel, to discover from cases which go as far back as the eighteenth century.... [W]e cannot accept that there can be a breach of the peace unless there has been an act done or threatened to be done which either actually harms a person, or in his presence his property, or is likely to cause such harm, or which puts someone in fear of such harm being done. There is nothing more likely to arouse resentment and anger in him, and a desire to take instant revenge, than attacks or threatened attacks on a person's body or property.

[46] (See also ***Steel & others v The United Kingdom*** **[1998] ECHR 95).**

[47] The appellant stated that he had been in occupation of the suit land since 1997 to 2015 when PW1 wanted to refund the money and evict him. The occupation was peaceful. PW1 in his testimony referred to the appellant as his friend. The complainants PW2 and PW3 contended that their husband PW1 was drunkard and had been duped by the appellant into selling the land. The sale of which they were not aware. None of the witnesses testified that there was any hostility or imminent breach of peace between the PW1 and the appellant. There was no evidence that there was a threat to peace in the area. In the circumstances, I find that the prosecution failed to prove this ingredient too**.**

[48] I therefore find that the prosecution failed to discharge the burden of proof to the required standard in criminal cases.

[49] I must observe here, that the issue in the case before the trial court (and in this appeal), appears more civil than criminal. The appellant's claim that he purchased the land in question should be unraveled in a civil case where claims of forgery and need to refund the purchase price would be pleaded. Trying to resolve this issue in a criminal jurisdiction is akin to forcing settlement of a civil claim through criminal proceedings. The trial court was therefore wrong in convicting the appellant when the complainant had admitted selling the parcel to the appellant.

[50] In the circumstance, I am satisfied that the trial court was in error and this appeal must succeed. Consequently, this appeal is allowed, conviction quashed and sentence set aside. Any fines paid shall be refunded to the person who paid.

DATED, SIGNED AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS ONLINE APPLICATION. THIS 7TH DAY OF DECEMBER, 2021

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F. GIKONYO M.

JUDGE

In the presence of:

1. Bonuke holding brief for Nyariki for appellant

2. Ondimu for Respondent

3. Appellant absent (Paid fine)

4. Kasaso - CA