



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**HCCRA NO. 82 OF 2018**

**JOEL OMINO ONYANGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***[Being an Appeal from the Judgment of the Senior Resident Magistrate's Court***

***at Maseno (Hon. B.K. Kiptoo) given on the 1<sup>st</sup> March 2018***

***in Maseno Criminal Case No. 847 of 2014]***

**JUDGMENT**

The Appellant, **JOEL OMINO ONYANGO**, was convicted for the offences of **FORCIBLE ENTRY** Contrary to **Section 90** of the **Penal Code** and **MALICIOUS DAMAGE TO PROPERTY** Contrary to **Section 339(1)** of the **Penal Code**.

1. For each offence he was sentenced to a fine of Kshs 20,000/= or in default One Year imprisonment.
2. The trial court ordered that the sentences would run consecutively.
3. In his appeal, the Appellant faulted the learned trial magistrate for convicting for forcible entry yet there was no conclusive proof that the Complainant was the owner of the disputed land.
4. In the event, the trial court is presumed to have decided that the Complainant was the owner of the land in issue. However, the Appellant submitted that the trial court lacked jurisdiction to make a determination on the issue concerning the ownership of the land in issue.
5. As regards the conviction for malicious destruction of property, the Appellant expressed the view that the trial court failed to ascertain the existence of the property that was allegedly destroyed.
6. It is common ground that the land that the Appellant is said to have entered forcibly is registered in the name of the Complainant's father.
7. It is further common ground that the Complainant, **JOSHUA OMONDI RAJWAYI**, is the Administrator of the Estate of his late father, **JONATHAN RAJWAYI AKINYI**.

8. I pause at that stage to point out that a person who was appointed as the Administrator of the Estate of a deceased person does not, by virtue of such appointment, assume absolute ownership of the property registered in the name of the deceased.
9. An Administrator does not have the right or authority to transfer property to any person.
10. Nonetheless, an Administrator is deemed to be a “*Special Owner*” of the assets constituting the estate, and he can therefore be cited as the owner of such property in matters such as the one which gave rise to the criminal case against the Appellant.
11. The Appellant’s case was that there was no conclusive proof that the Complainant was the owner of the parcel of land in issue.
12. His contention was not based upon the fact that the Complainant was an Administrator of the Estate of the registered proprietor.
13. If that had been his contention, I would have found against him.
14. The submission before me is that the land in question had been the subject matter of protracted disputes, which had not yet been resolved by any authority that had requisite jurisdiction.
15. On the one hand, **PW4, JULIUS ADOYO RAJWAYI**, who is a brother to the Complainant, said that there had never been any dispute over the land in question.
16. He testified that the Appellant had relocated to the land in issue, shortly before the events which gave rise to the case.
17. However, the witness also said that prior to the Appellant’s said relocation;

***“..... The accused’s brother Olango Omango had had issues with our family concerning his boundary.”***
18. It is not clear to me whether or not those issues were in relation to the parcel of land which gave rise to this case. I will therefore assume that Olango Omango had issues concerning a boundary which was different from the one in issue in this case.
19. **PW5, MARTIN OINDO**, was the Assistant Chief of West Karateng Sub-location.
20. The land in issue is within his jurisdiction.
21. He testified that the father of the Appellant was a cousin of the Complainant’s father.
22. **PW5** said that;

***“There has been a long term land tussle. They believe that the land was not sub-divided properly,”***
23. In his capacity as the Assistant Chief, **PW5** intervened.
24. It was the verdict of the Assistant Chief that the land be awarded to the Appellant; and that was as at 2<sup>nd</sup> of November 2013.
25. However, the Complainant was not happy about that verdict, and he therefore proceeded to lay claim to the said parcel of land.
26. When determining the case the learned trial magistrate cautioned himself that it was not the function

of the trial court to decide on the issue of the ownership of the land in question.

27. The reason advanced by the trial court for not deciding the question of ownership was that it lacked the requisite jurisdiction to do so.

28. In similar vein the Assistant Chief was also held to lack the requisite jurisdiction to determine the issue of ownership.

29. Learned State Counsel, Miss Barasa conceded that the trial court lacked jurisdiction to determine the issue of the ownership of the land.

30. Notwithstanding that position, the Respondent alluded to the fact that the Complainant had stayed on the parcel of land for over 46 years.

31. The fact that a person had stayed on a piece of land for a long period of time, did not, of itself confer ownership of that parcel of land on him.

32. Longevity of stay on a parcel of land may be the basis for laying claim to ownership, say through a claim for Adverse Possession.

33. In this case, there was no claim for adverse possession.

34. The Complainant's claim to ownership was through succession, as the title of land was registered in the name of his late father.

35. The portion of land in issue was on the same side of a public road as was **Parcel No. 172**. Meanwhile **Parcel No. 1275** was on the other side of the said public road.

36. But both parcels of land had their respective edges touching the public road.

37. Whilst one prosecution witness said that the parcel of land belonged to the Appellant, the others said that it belonged to the Complainant.

38. In my considered view, none of the prosecution witnesses gave evidence that conclusively led to the conclusion that the parcel of land belonged to the Complainant.

39. And because the trial court acknowledged that it did not have the requisite jurisdiction to make a determination on the issue of ownership, I find that that issue was not determined conclusively.

40. In the absence of definitive determination, by a court of competent jurisdiction, I hold the considered view that the learned trial magistrate erred by stating that;

***“..... the disputed parcel belonged to the Complainant.”***

41. The trial court then proceeded to pronounce itself thus;

***“After the issue of who owns the disputed parcel have been ascertained as opposed to being decided .....*”**

42. I find myself unable to appreciate the distinction between ascertainment and decision-making.

43. But if by making an ascertainment the trial court was not making a decision, it would follow that there was still no decision on the issue concerning the ownership of the parcel of land in question.

44. If the question of ownership had not yet been determined, it was premature for the prosecution to state that the land upon which the Appellant is said to have committed the offence of forcible entry was not

proved, conclusively, to belong to the Complainant.

45. In my considered opinion, the fact that ownership had not been determined conclusively meant that there was still a possibility that a court of competent jurisdiction could determine that the parcel of land belonged to the Appellant. Until the issue of ownership was determined in favour of the Complainant, the conviction of the Appellant does not stand upon firm ground.

46. A conviction founded upon a shaky ground cannot be permitted to stand.

47. Therefore, the conviction for the offence of forcible entry onto the Complainant's parcel of land is hereby quashed.

48. Meanwhile, whether or not the Complainant is eventually proved to be the owner of the parcel of land in issue, I find that the trees and the crops he had planted on that land belonged to him.

49. If the Appellant was convinced that the parcel of land belonged to him, he ought to have, first sought and obtained a determination by a court of competent jurisdiction.

50. He could, thereafter, have sought appropriate orders to compel the Complainant to vacate the parcel of land.

51. There was no justification for the use of brute force in taking over the parcel of land, even if it did belong to the Appellant.

52. There was no justification for the destruction of the trees, crops and fence which were upon the parcel of land claimed by the Appellant.

53. I am in agreement with the trial court, that the issue for determination by the court which was handling the criminal case, was about whether or not there was proof of destruction to trees and crops. In effect, it was not for that court to make a determination on the value of the destroyed trees and crops.

54. Regardless of the value of the destroyed trees and crops, if the Appellant was involved in the said destruction, that was sufficient basis for a conviction.

55. The said destruction was done wilfully and without any lawful justification.

56. In the event, the prosecution proved beyond any reasonable doubt that the Appellant had committed the offence of **Malicious Damage to Property** Contrary to **Section 339(1)** of the **Penal Code**.

57. Therefore, I uphold the conviction for that offence.

**DATED, SIGNED AND DELIVERED AT KISUMU**

This 5<sup>th</sup> day of **March** 2019

**FRED A. OCHIENG**

**JUDGE**