



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MERU  
CRIMINAL APPEAL NO. 25 OF 2013

*LESIIT, J*

**FREDRICK MWORIA.....APPELLANT**

**V E R S U S**

**REPUBLIC .....RESPONDENT**

*(An appeal from judgment and conviction in Tigania Criminal case No. 1266/2012 dated April 2012)*

**JUDGMENT**

1. The Appellant was charged with Forcible Detainer contrary to section 91 of the Penal Code. The Appellant was convicted for the offence and sentenced to a fine of Ksh.10,000/- and in default 3 months in prison.
2. The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal. He has already served the sentence. The Petition of Appeal cites five grounds namely:
  - a. **The court erred in law and facts in arriving at a decision against the weight of evidence on record.**
  - b. **The court ignored the fact that the land subject matter is subject to ownership dispute in High Court and subordinate courts.**
  - c. **The trial was unfair unjust and full of irregularities.**
  - d. **The prosecution did not proof case beyond reasonable doubt.**
3. The appeal was argued by Mr. C. Kariuki on behalf of the Appellant while Mr. Moses Mungai represented the state.
4. The particulars of the charge are:

**Between 1<sup>st</sup> April 2010 and 5<sup>th</sup> September 2010 at Kimaroo Sub location, Kimachia Location in Tigania West District within Eastern Province being in possession of land P/No 253 Uringu II Adjudication Section of Timothy Mwingirwa Mutiga without colour of right held the said land in a manner likely to cause a breach or reasonable apprehension of a breach of the peace against Timothy Mwingirwa who was entitled by law to the possession of the said land.”**

5. The facts of the prosecution case were that in 2010 the mother to the complainant had a land dispute with the Appellant over parcel No. 253. It is the complainant mother who filed an objection before Land Adjudication Officer, Tigania being AR objection no. 1659 of 2010. The land at the centre of complaint measures 8.24 acres according to the complainant. The objection was resolved in the complainant's mother's favour and she transferred the land to the complainant.
6. In September, 2010 the complainant who lives in Nairobi received word that the Appellant had ploughed his land. He reported at Nchiru Police Station. Appellant was arrested after the Investigating Officer PW2 confirmed from the Land Adjudication Officer, Tigania that the land Parcel No. 253 was registered in Complainants name. The letter of confirmation was Pexh1.
7. The Appellant's defence was that he had been in occupation of the land since the 1980's. There was a dispute by complainant's mother and Appellant in 1986. It was resolved that the land be divided into two equal portions of approximate 9.6 acres. The parcel created parcel No 253 occupied by the Appellant and Parcel No. 1096 owned by Complainants mother. The objection was No. 2100 of 1986 Eexh 1.
8. The Appellant defence was that subsequently the complainant filed an objection challenging Appellants ownership of Parcel No. 253. That matter was heard ex-parte and ruled in complainant's mother's favour. Proceedings are Dexh.2. he lodged an appeal in the High Court vide Misc Application No. 51 of 2010, Dexh 4, after obtaining consent to file the appeal on 14.4.2010, Dexh3. That on the 29<sup>th</sup> March 2011 the Appellant received an injunction restraining him from occupying parcel No. 253. Eventually he was arrested and charged in this case.
9. I am a first appellate court and as such I have carefully considered this appeal and I have subjected the entire evidence adduced before the lower court to a fresh analysis and evaluation. I have drawn my own conclusions while bearing in mind I neither saw nor heard any of the witnesses and therefore cannot comment on their demeanour. I am guided by the principles set out in the case of **Okeno Vrs. Republic 1972 EA 32** where the court of Appeal set the duties of a first appellate courts as follows:

**“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vrs Sunday Post [1958] E.A 424.”**

10. The learned trial magistrate set out three issues for determination.

1. Did the accused person forcibly detain land belonging to the complainant.
2. Does the accused have a colour of right over the land?
3. By holding the land if at all, did the accused cause a breach of the peace.

11. I will start by indicating that the state through prosecution counsel Mr. Moses Mungai, did not oppose the appeal. Counsel urged that the state was conceding to the appeal for one reason only which is the issue of ownership was yet to be determined.

12. Mr. Kariuki for the Appellant urged that the ingredients for Forcible Detainer are Appellant trespassed on the complainants land. Counsel urged that ownership in this matter was based on Adjudication proceedings. Mr. Kariuki urged that those proceedings have been challenged in the High Court Meru and the appeal was pending. Counsel urged that there were also other appeals filed before Tigania court against the objection proceedings and where ownership is a main issue for determination.

13. Mr. Kariuki urged that it was wrong for the Police to charge the Appellant with the offence of Forcible Detainer since the issue of ownership was yet to be determined. Counsel urged that the prosecution did not prove that the Appellant was in the land in a manner likely to cause a breach of the peace. Counsel urged to find the charge was unjustified and allow the appeal.
14. Section 91 of the Penal Code stipulates as follows:

**91. 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.**

The prosecution had to prove that the Appellant was in actual possession of the land without colour of right. There is no dispute that the Appellant was in actual possession of the land. In fact in his defence he stated that he has been in continuous possession of that land since the 1980's. He also stated that he had a dispute with the complainant's mother and that in 1986 the land over which a dispute had arisen was divided into two, one portion which was taken over by the complainant's mother and the other portion which is the land in dispute. He stated that the complainant's mother filed a fresh objection over his portion of the land with the Land Adjudication Officer and that the matter was heard ex-parte, and determined in the complainant's mother's favour. The Appellant produced the proceedings of the objection as an exhibit.

15. The Appellant in his defence stated that he had filed an appeal from that case with the High Court in Meru and went ahead to produce the consent to file the appeal as D.Exhibit 3 he also stated in his defence that his appeal is still pending and that as it was pending he was served with an injunction.
16. I find that the learned trial magistrate did not give due consideration to the defence of the accused person and as a result came to the wrong conclusion to the effect that **“the accused was in Forcible Detainer of the land”** and **“he had no colour of right”** and that **“his possession of the land there is a high probability that physical violence may erupt between the two contesting sides”**
17. The decision of the Adjudication Officer is not final and a party aggrieved by the decision has the right to either file an appeal or to file a suit in court. The Appellant opted to file an appeal in court, and he obtained the necessary consent to do so. That appeal is still pending. Having been in possession of that land way before the objection proceedings, and having shown that he has filed an appeal before the court, the Appellant cannot be found to have had no colour of right over the land in question and neither could he have been found to cause a breach of the peace or threaten such peace. The Appellant's right to file the appeal could not have been interrupted by charging him with a criminal case as the police did in this case. The Appellants have right to appeal cannot be challenged or short circuited by dragging him to court on a criminal charge.
18. I find that the prosecution did not prove the charge of Forcible Detainer contrary to section 91 of the Penal Code. I find merit in the Appellants appeal. The conviction entered against the Appellant was unsafe and cannot be allowed to stand. I accordingly quash the conviction set aside the sentence and order that if the Appellant paid any part of the fine imposed against him by the lower court the same should be refunded.

**DATED SIGNED AND DELIVERED THIS 5<sup>TH</sup> DAY OF JUNE, 2014**

**LESIIT J**

**JUDGE.**