



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL APPEAL NO. 162 OF 2011**

**(Consolidated with Criminal Appeal No.163 of 2011)**

**TITUS KIGORO MUNYI.....1<sup>ST</sup> APPELLANT**

**MARGARET KIGORO .....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**From original conviction and sentence in Cr. Case No. 727 of 2010 at the Principal Magistrate's Court at Siakago by HON. S.M. MOKUA – PM on 26/8/2011**

**J U D G M E N T**

1. **TITUS KIGORO MUNYI** (1<sup>st</sup> appellant) **MARGARET KIGORO** (2<sup>nd</sup> appellant) filed Embu HCRA NO.162/11 and 163/11 respectively. Their appeals originate from the same Judgment. They were hence consolidated on 5<sup>th</sup> June 2014 with the lead file being HCRA NO.162 OF 2011.
2. Both appellants were charged with the offence of forcible detainer contrary to section 91 as read with section 36 of the Penal Code. The facts were that on diverse dates between 2007 and 26<sup>th</sup> day of July at Kangungi village, Gachoka sub-location in Mbeere South district within Eastern Province, jointly with others not before Court being in possession of land parcel NO.MBETI/GACHOKA/473 of PETER MBURU KIMANI and TABITHA MUTHONI (deceased) the lawful owners without colour of right, held possession of such land in a manner likely to cause a breach of the peace against PETER MBURU KIMANI and deceased TABITHA MUTHONI who were entitled by law to the possession of the said land.
3. They denied the charge and the matter proceeded to full hearing as a result of which both were convicted and each sentenced to serve two (2) years on probation. Being dissatisfied with the Judgment they preferred this appeal against both conviction and sentence, citing similar grounds of appeal.
4. The broad grounds of appeal are as follows;
  - i. The Judgment was against the weight of the evidence adduced.
  - ii. The defence which was credible, plausible and reliable was not considered.
  - iii. The Judgment was illegal as it did not set out the issues for determination.

5. The prosecution's case is premised on the evidence of seven (7) witnesses. PW1 produced a title deed (EXB2) in his name and that of his deceased sister Tabitha Muthoni. A certificate of search (EXB4) and copy of the Lands Register (EXB5 & 6) were in his evidence explained how him and the late sister had bought the land L.R. MBETI/GACHOKA/473 kshs.43,000/= in 1974 from Kangangi Kivindio. A son to Kangangi testified as PW2 and supported the evidence of PW1 on the sale of the said land.
6. He mentioned that there had been an objection (EXB1) which was removed by the Minister and they were subsequently issued with a title deed in 1978. PW1 and his niece (PW3) would occasionally visit the land and it was during such visits in 2005 that PW3 discovered the appellants presence on the land. Reports were made and notices issued for the appellants to vacate the land in vain.
7. Finally the appellants were arrested and charged. The 1<sup>st</sup> appellant had by then filed suit against the complainant, in the Embu High Court in a Civil Case NO.33/05. The local administration appears to have been following up on the matter.
8. The defence case was premised on the evidence of the two appellants and five (5) witnesses. Both appellants gave sworn testimony. Generally the defence case is that the 1<sup>st</sup> appellant bought this land from Kiamburi Thigara of Komona clan in the company of Hezron Kiriamburi and Kiriamburi Kiriara the vendor's brothers. Kiriambura Thigara testified as DW5. He confirmed the 1<sup>st</sup> appellant's assertions.
9. The learned trial Magistrate analysed this evidence and came to the conclusion that the prosecution had proved its case against the appellants herein hence the conviction.
10. When the appeal came up for hearing Mr. Okwaro for the appellants submitted that the appellants who were husband and wife were charged with being in illegal occupation of land L.R. NO. MBETI/GACHOKA/473. And that the evidence was at variance with the facts in the charge sheet. The appellants had shown that they had been in occupation since 1970, and were still in occupation.
11. He further submitted that there are Civil matters in court related to this case as the 1<sup>st</sup> appellant is seeking adverse possession in respect of this land. He could not do so if he came in possession in 2007. He otherwise relied on the grounds of appeal.
12. The appeal was conceded to by the learned State Counsel Mr. Wanyonyi on the following grounds;
- i. It had not been shown that the appellants held the land with no colour of right and the occupation led to a breach of peace directed at the owner of the land.
  - ii. The evidence of PW1 – PW4 and PW7 showed that the appellants have an interest in the land.
  - iii. And that the complainant asked the appellants to leave severally but they did not, hence the report. There was no breach of peace proved.
  - iv. That inspite of the fact that the appellants established that they have been in occupation since 1970's the Court ignored this and misconstrued the evidence of law on adverse possession.
  - v. No eviction proceedings were instituted against the appellants. The complainant used the criminal process to evict the appellants which is an abuse. Mr. Wanyonyi cited two cases;
    - a. ***RICHARD MWANGI NDORO –V-S REPUBLIC MALINDI HCRA NO.86/04***
    - b. ***CAROLINE CHERONO KURGAT –V- REPUBLIC NAKUKU HCRA NO.10/09***
13. It's the duty of this Court as a 1<sup>st</sup> appeal Court to re-examine and reevaluate the evidence adduced and arrive at its own conclusion. I am also alive to the fact that unlike the trial Court I did not see or hear the witnesses testify. (Refer to ***OKENO –V- REPUBLIC [1973] EA 32, SIMIYU & ANOTHER –V- REPUBLIC [2005]1 KLR 192***)
14. Section 91 of the Penal Code defines a forcible detainer as;

***“Any person who, being in 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 a misdemeanor termed forcible detainer”.***

In the case of ***RICHARD MWANGI NDORO –V- REPUBLIC (Supra) W. OUKO JUDGE*** (as he then was) summarized the ingredients of the offence of forcible detainer which I entirely agree with. It's as follows;

- i. A person in possession of land without colour of right
- ii. A person who holds onto possession in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace.
- iii. The breach in question must be directed at the person entitled by law to the possession.

15. The evidence on record is that PW1 and his late sister obtained title to this land on 11<sup>th</sup> July 1978. PW2 in his evidence stated that his late father was sued by the 1<sup>st</sup> appellant over land LR Mbeti/Gachoka/473. He further stated that his late father sold this land to PW1 and his late sister in 1974. He confirmed that the 1<sup>st</sup> appellant has settled on the land and even sold some of the land to other parties.

16. On the other hand DW5 told the court that this land in issue was sold to the 1<sup>st</sup> appellant by himself with the approval of his brothers. And that the appellants have been in occupation since 1970's. PW1 has title while the 1<sup>st</sup> appellant doesn't have. This title is being challenged by the 1<sup>st</sup> appellant who filed an originating summons for title by virtue of his long uninterrupted stay on the land much earlier than the criminal case the origin of this appeal.

17. Before the trial court were two parties who were claiming ownership of this land. The court would then have had to determine who the owner was to establish if the 1<sup>st</sup> appellant was indeed in occupation without a colour of right and if his stay was causing or was likely to cause a breach of peace.

18. The issue of determining such rights as those claimed by the 1<sup>st</sup> appellant could not be determined by the court that heard the criminal case. That was an issue for determination by the High Court in a Civil Case. The appellants in this case were I actual fact challenging the title I the possession of PW1 and his late sister.

19. These are matters that came out clearly in the evidence of the witnesses who testified and the learned trial Magistrate ought to have considered them in his Judgment. There was no evidence adduced to show that the appellants had caused a breach of the peace or even attempted to cause any such breach. All that PW1 stated in his evidence at page 6 is that after obtaining title and after his sister's death he would visit the suit land with PW3. And every time they went they found the appellants there. Several promises of him vacating the land were made to no avail and that how PW1 decided to come and fence the land and he was chased away. One wonders who between the two provoked the other. Was it the appellants or PW1 and PW3 who came to fence the land?

20. It can therefore be seen that the legal issue of ownership of the land has not been determined. The Principal Magistrate Siakago did not have the jurisdiction to determine it. And the moment this issue became apparent from the evidence he should have advised the prosecution and the defence on what steps they should take. He failed to do so.

21. The State has conceded to this appeal and given solid grounds for doing so. The result is that the appeal is allowed and the conviction quashed. The sentence is set aside. Since the appellants were placed on probation there shall be an order for their release from the conditions of the probation.

**DATED, SIGNED AND DELIVERED AT EMBU THIS 4<sup>TH</sup> DAY OF JULY 2014.**

**H.I. ONG'UDI**

**JUDGE**

**In the presence of:-**

**Mr. Miiri for State**

**Mr. Okwaro for appellants**

**Both appellants**

**Njue – C/c**