



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO.160 OF 2012

DAVID THUKU NGIGE.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Naivasha C.M. Cr. Case 394 of 2011 by Hon. E. Boke, P.M. Dated 10th August, 2012)

J U D G M E N T

1. The appellant was charged with trespass upon private land contrary to section 3(1) of the Trespass Act Cap 294 Laws of Kenya.
2. The appellant was convicted and sentenced to two months imprisonment.
3. The appellant applied for bail pending appeal and was granted cash bail of Kshs 5,000/=.
4. The Appellant being dissatisfied with the decision of Hon. E. Boke, Principal Magistrate, Naivasha preferred this appeal and listed the following grounds in his petition of appeal.

5.Grounds of appeal:

- i. That the learned Magistrate erred in law and fact when she failed to consider the appellant evidence in after.
- ii. That the learned trial Magistrate erred in law and fact when she failed to adhere to the expert evidence adduced.
- iii. That the sentence imposed was rather harsh.

(iv) That the learned Magistrate erred in law and fact when she neglected the appellant's documentary evidence.

6. At the hearing of the appeal, both counsels made oral submissions.

Prosecution's Case

7.PW1 the Complainant's wife, testified that the land in dispute Gilgil/ Karunga Block 6/125(Kikuyu)

(hereinafter referred to as plot 125) was registered in the name of her husband Francis Mara Karubia and borders the appellant's land Gilgil/ Karunga Block 6/92(hereinafter referred to as plot 92). A road cuts through part of the complainant's land on one side and the appellant's land on another side.The appellant had taken over this portion and had been cultivating it. Following the long protracted dispute, the complainant had filed a claim with the Land Disputes Tribunal which had found in his favour. The award by the tribunal was adopted by the court in 2009 as judgement and a decree issued.

The appellant was evicted from the portion he had encroached and he stayed away for two years. He returned and continued tilling the same portion. PW1 reported the matter at Gilgil Police station and the appellant was arrested and charged.

8. PW2 a Nephew to the complainant, had been cultivating the portion in dispute after the appellant was evicted from the same. He corroborated the testimony of PW1.

9. PW3 testified that he was a registered Surveyor working under G.B Obed licensed Surveyors. He had first visited the suit land six years earlier on the invitation of the liquidator to establish the boundaries. He used a map from the Provincial Government Surveyor to Carry out measurements on the land in question and establish the boundaries. He established that the portion of the complainant's land that went across the road did so by 75 meters on one side, 50 meters on the second side, 15 meters on the third side and 115 meters on the last side totaling to 1.1776 acres. The total area of the complainant's land was 6.6 acres registered under one title. He marked the beacons. He visited the suit land five years later on the invitation of the owner of plot No.125 and found that the beacons he had earlier fixed had been removed. He replaced the beacons.

10. PW4 testified that he was a Land Surveyor stationed at Ministry of Lands, Nakuru. He exhibited a map from the Nakuru Provincial Government Surveyor which revealed the marked boundaries of plots number 6/92 and 6/125 (Kikuyu) bordering each other. He produced it as exhibit 3. He further testified that there was a road which passes through parcels No. 125 and No. 92.

In cross examination he testified that there was no way the part development map could be wrong as it was the one used to place the beacons and was the same map drawn and used by the first surveyor (G.M Olweny).

11. PW5 Francis MaareKarubia testified that he was the owner of plot No 125, had lived on the said plot since 1988 and had been neighbours with the appellant for many years. He had filed a claim with the tribunal because the appellant had been cultivating his land and had refused to stop and/or move out. The tribunal found that the parcel in dispute belonged to him and he evicted the appellant from the land in 2009. The appellant stayed away for two years but went back in 2011. On 22nd January, 2011 the appellant was arrested and charged when he was found tilling the complainant's land.

12. PW6 Samuel Nguyo testified that he was the investigating officer. He received a complaint from the complainant's wife on 22nd January, 2011 that the appellant had trespassed on their land. On 7th February 2011, he visited the suit land and found the appellant tilling plot No 125. He asked both the appellant and the complainant for their documents to prove ownership. The complainant produced his but the appellant did not have any. Upon investigation, he established that a land dispute claim had been concluded and the Tribunal had found in favour of the complainant. An eviction order was issued by court and the appellant had been evicted. The appellant had gone back to the suit land and started tilling plot No. 125 again. He arrested him and charged him with trespass.

13. At the close of the prosecution's case, the trial Magistrate found that a prima facie case had been established and put the accused person on his defense.

Appellant's Defense

14. The appellant gave an unsworn statement and did not call any witnesses. He denied trespassing on the complainant's land and testified that he was tilling his own land plot No.92 on 7th February, 2011 at 3.30 P.M when PW6 accompanied by PW1 and PW2 arrested him without asking him for ownership documents. He testified that he had lived on this land with his brothers since 1993 which land had been left to them by their late father. He denied being aware of the Land Dispute Tribunal case and had only learnt that there was a court order on 15th January, 2009 when the complainant visited his land accompanied by some youth, the chief Leah Maturi and five Administration police and demolished his 3 roomed house, his sons house and a Kitchen.

15. When producing documents in support of his case, he chose to give a sworn statement.

During cross-examination the appellant was categorical that the portion in dispute belonged to him and stated, **"if I get a court order that I leave that portion in question, I cannot leave as it is my plot"**

Appellant's Counsel's Submissions:

16. Counsel for the Appellant submitted that the sentence meted on his client was too harsh bearing in mind that the complainant and the appellant were neighbours: That a non-custodial sentence would have been the best suited punishment: that the trial Magistrate erred in fact as she did not consider the documentary evidence adduced by the appellant, that she relied on the decision of the Land Disputes Tribunal which lacked jurisdiction to deal with matters of succession and title to land. Finally he submitted that the trial Magistrate had never visited the site, this being a boundary dispute and that the District Land Registrar was never called to testify.

The Appellant's counsel brought to the attention of the court that the Appellant had again been charged with a similar offence for trespass which was pending before a Naivasha Court and urged the court to stay the proceedings of the Naivasha case as it related to the same issue.

Respondent's Counsel's Submissions

17. Counsel for the state opposed the appeal. He submitted that this was a case of trespass on private land: that the tribunal's findings had never been challenged and were now a judgement of the court: that after adoption of the award of the tribunal by the court a decree was issued and eviction carried out. The appellant despite being evicted from the suit land went back in defiance and in disobedience of the court order: that the Appellant did not deserve mercy as he was totally unremorseful in mitigation. He urged court to dismiss the appeal and uphold the sentence of the trial court.

He also opposed the application for stay relating to the trespass case in Naivasha on the grounds that no formal application for stay had been filed.

I directed counsel for the Appellant to file a formal Application for stay if he so wished.

Issues for Determination

18. Upon consideration of the submissions made by both Counsels, I find the following issues for determination:

- i. Jurisdiction
- ii. Was appellant's documentary evidence considered?
- iii. Was a visit to the site necessary?
- iv. Sentence

The Law

19. Trespass is defined by Blacks Law Dictionary 9th Edition as **"An unlawful act committed against the person or property of another; wrongful entry on another's real property.**

20. Section 3 (1) of the Trespass Act Cap 294 Laws of Kenya states thus on the offence of trespass.

3. (1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits Stock to be on, private land without the consent of the occupier there of shall be guilty of an offence.

Section 11 of the same Act sets out the punishment:

Any person guilty of an offence under this Act for which no penalty is expressly provided shall be liable to a fine not exceeding five hundred shillings or to imprisonment for a term not exceeding two months, or to both such fine and imprisonment.

21. **“private land”** is defined by the same Act as:-

(a) land which is owned or occupied by any person by virtue of a freehold title, a certificate of ownership or a lease; or

(b) land in respect of which a claim to an estate in fee, or to a Short title.

(c) cultivated land or enclosed land; or

(d) any forest area; or

(e) railway land;

Analysis:

22. I am alive to the requirement that a court sitting on first appeal is under a duty to examine and evaluate afresh all the evidence adduced at the lower court with a view to arriving at its own independent conclusions whether or not to uphold the judgment of the lower court. In doing so, the court is alert to the fact that it did not have the advantage of seeing the witnesses testify as to form an opinion on their demeanor. I am guided by the case of **Okeno –vs- Republic** (1972) E.A.32.

23. Counsel for the appellant submitted that the trial Magistrate relied on the decision of the Land Disputes Tribunal which lacked jurisdiction to deal with matters of succession and title to land and whose award was subsequently adopted by the court.

24. There is no doubt that jurisdiction is everything and that no court can confer jurisdiction upon itself.

This was so held in :**The owners of the Motor Vessel ‘Lilians’ V Caltex Oil (Kenya) Ltd (1989) KLR 1**

The High court in that case held **“Jurisdiction is jurisdiction and is everything... jurisdiction is expressly conferred and cannot be inferred. It matters not that in the circumstances of this case, the applicant submitted himself to the jurisdiction of the land disputes tribunal. Jurisdiction cannot be merely because a party acquiesces to some proceedings. Estoppel as a principal of law does not apply to confer jurisdiction. It cannot be invoked to confer jurisdiction where it has been expressly ousted. Indeed jurisdiction is a matter of law and can be raised at any stage of the proceedings.”**

25. In the instant case, the Land Disputes Tribunal issued an award in favour of the complainant. This award was adopted by the Magistrate’s court and therefore became a judgement of the court. From that point onwards it ceased to be a decision of the tribunal which could be separately quashed. What has to be dealt with now is a judgement of the court. To set aside this judgement the losing party has two options. He can choose to appeal against the judgement or he can apply for it to be judicially reviewed.

26. Much as I agree that jurisdiction is everything, this is a criminal appeal. The issues before this court relate to a charge for the offence of trespass. As stated above there is a procedure to challenge the illegality of a decision. This is not the forum.

For the aforementioned reasons, I find that the ground on jurisdiction fails.

27. On the ground that the trial Magistrate did not consider the documentary evidence adduced by the appellant, I find that the trial Magistrate did actually consider the documents adduced by the appellant in

support of his case. In her judgement she stated; "**.....accused opted to give sworn testimony and Produced ownership documents including search certificate copy, copy of title deed, receipts and certificate of confirmation of grant showing that he acquired plot No. 92 from his late parent, which he owns jointly with a brother**, she further stated, "**..... it is not in dispute that the accused person owns plot no 92 and he has even produced copy of certificate of grant showing that he owns it with his brother in equal shares.....**"

After evaluating the evidence I am satisfied that the trial magistrate considered the Documentary evidence adduced by the appellant. I find that this ground of appeal also fails.

28. On the ground that the Magistrate never visited the site being a boundary dispute and the District Land Registrar was never called to give evidence, I find as follows: PW3 and PW4 are both surveyors. Pw3 is a private surveyor. He testified how he fixed the boundaries and later replaced them after finding them removed. He further testified that he used the survey maps drawn and used by the original surveyor and this was corroborated by PW4 a Government Surveyor. Both of them testified that this was the same map found at the Ministry of Lands and produced it as exhibit 3.

Among the documents produced by the appellant in support of his case, was a surveyor's receipt from Mr. Olweny, the private surveyor who first surveyed the land. He did not dispute the survey carried out by Mr. Olweny and neither did he find it faulty. The maps used by Mr. Olweny were the same maps produced by PW3 and Pw4. I do not see what value a visit to the site would have added. Expert witnesses testified during the trial and the appellant gave no indication that he would have wished the court to visit the site. I find that in the circumstances it was not necessary to visit the site. This ground of appeal also fails.

28. Finally the appellant appealed against the sentence on the grounds that the sentence was too harsh. Punishment for the offence of trespass is imprisonment for a term not exceeding two months or to a fine not exceeding five hundred shillings, or to both such imprisonment and fine.

29. The trial Magistrate having considered all the circumstances sentenced the appellant to two months imprisonment. In his defence the appellant was not remorseful. He stated "**if I get a court order that I leave that portion in question, I cannot leave as it is my plot**"

During the hearing of the appeal it was also brought to the attention of the court that the appellant had again been charged with a similar offence of trespass relating to the same suit land, which is pending before a Naivasha Court. In my view the appellant does not deserve any mercy. He seems to have made good his threat that he would not leave the suit land even if the court ordered him to do so. This ground of appeal also fails.

Findings

I find that the trial Magistrate reached a correct finding that the appellant trespassed the complainant's land and sentenced the appellant within the law. He was given the maximum prison term of two months.

Conclusion

1. On the charge of trespass the appeal has no merit and it is accordingly dismissed.

2. The bail is cancelled.

3. I uphold the conviction and confirm the sentence of two months imprisonment passed by the lower court.

It is so ordered.

Dated, signed, and Delivered at Nakuru this 4th day of November 2013.

L.N WAITHAKA

JUDGE

Present

Mr Karanja Mbugua holding brief for Mr Simiyu for the appellant

Mr Marete for the State

Emmanuel Maelo : Court Assistant

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JUDGE