



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

**Criminal Appeal 86 of 2010**

**GEORGE WAWERU MBOGO .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From original conviction and sentence in Criminal Case Number 1662 of 2006 in the Chief Magistrate's Court at Nairobi – Mrs. T. N. Ngugi (SRM) on 4<sup>th</sup> February 2010)*

**JUDGMENT**

1. The Appellant herein **George Waweru Mbogo** was charged jointly with other persons not before court, in **Nairobi C.M.Cr. Case No. 1662 of 2006**. In the said case the appellant faced a single count of forcible detainer contrary to **Section 91** of the **Penal Code**.

2. The particulars of the charge were that on the 25<sup>th</sup> day of July 1999 at Mwiki area of Nairobi Province being in possession of Plot No. 4A (**L.R. 8479/8469/4**), of James Martin Juma without colour of right, held possession of the said plot in a manner likely to cause a breach of peace against James Martin Juma who was entitled by law to the possession of the said plot.

3. The appellant was convicted of the said charge and fined Kshs.50,000/= in default to serve one year imprisonment. The appellant was aggrieved by the said conviction and sentence and has now brought this appeal.

4. In his appeal dated 4<sup>th</sup> April 2012, the appellant has presented the following 11 grounds of appeal:

That the learned trial magistrate erred in law and in fact:

1. In finding that the evidence adduced by the prosecution was capable of sustaining a charge of forcible detainer contrary to **Section 91** of the **Penal Code**.
2. By failing to recognize the appellant's proprietary rights over the parcel of land in issue which were superior to the complainant.
3. In failing to uphold the sanctity of the title under the doctrine of first registration under the **Registered Lands Act Cap 300 Laws** of Kenya.
4. In considering what was statutorily beyond her scope and was not materially before her;

5. By ignoring and/or failing to consider the evidence of **PW3** and **PW7** who both concurred that the appellant was not in possession of the property without colour of right;
6. By finding the appellant guilty where no ingredients of the charge were proved;
7. By ignoring the appellant's defence and submissions of an innocent purchaser for value;
8. By failing to recognize that the appellant could not forcibly detain without colour of right what was already regally his;
9. In ignoring the fact of the existence of civil suit **CMCC 1045 of 2006** between the complainant and appellant on the proprietary rights of the suit premises;

That therefore the conviction was against the weight of the evidence and was not backed by legal reasoning. He referred me to **Nairobi Appeal Case, Godgrey Kariuki Gathura –vs- Republic** (unreported).

5. Upon re-evaluation of the record, the question for determination is whether the prosecution proved that the accused entered into the parcel of land without title thereto, and remained on the said parcel of land against the wishes of the owner of the said parcel of land.
6. **On grounds No. 2, 3 & 8:** the evidence shows that the complainant in this case, to prove his right of possession, relied on a share certificate that had been issued earlier by the Holding Company, while the appellant had a Certificate of Lease to the said parcel of land. The appellant therefore had a registered right of possession of the said parcel of land, which right of possession was superior to that of the complainant.
7. The appellant relied on the holding in ***Peter Kinuthia Waitthaka -vs- Tom Ochieng t/a M'Oketchy Auctioneers & 3 others 2005 (unreported)***.
8. **On ground No. 4A (as amended):** the appellant stated that the learned trial magistrate embarked on a frolic of her own to consider what was statutorily beyond her scope and what was not materially before her to consider, when she proceeded to find that the Certificate of Lease No. L.R. 8479/8469/4 issued to the appellant was founded on fraud. I note that the appellant was not faced with a charge of fraud or obtaining by false pretences and indeed, none of the evidence before the learned trial magistrate pointed to the appellant having perpetrated fraud.
9. Once a title had been issued under the then **Registered Lands Act** it is indeed only the High Court, under **Section 144** of the said **Act**, that could question the proprietary rights thereof. Thus I respectfully agree with the learned counsel for the appellant that the learned trial magistrate went beyond her jurisdiction in holding as she did that the said title was fraudulent.
10. **On grounds No. 5 (amended), 6 & 9:** The record reflects that **PW3**, Mr. Stanley Wandeto was a company director and also the company secretary of Karura Farmers Ltd, a land buying company. He was in charge of book keeping, land transfers, the monthly membership register and also the share certificates.
11. In his testimony, the persons charged with the appellant in the subordinate court as accuseds number 1, 2 and 3 were known to him as a broker, a share holder, and a committee member respectively, in the land buying company.
12. According to **PW3** the 1<sup>st</sup> accused introduced a Mr. Martin Juma to him as a member of the company. The said Mr. Juma was allowed to transfer his plot to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused persons, on the strength of an old generation ID card and a photocopy of the share certificate, because he stated that the original share certificate was misplaced. A transfer of the plot was effected into the names of the three accused persons as the buyers.

13. His further testimony was that the appellant who was also a shareholder at Kurura land buying company Ltd, subsequently inquired about the genuineness of the plot when he learnt that it was up for sale. He purchased the plot when it was confirmed to him that it was genuine, and that it was for sale. According to **PW3** the appellant was duly issued with a Certificate of Lease.

14. **On Ground No. 7A** (as amended): According to **PW3**, the three individuals from whom the appellant purchased the property, had acquired it from a person who had presented himself as the original owner thereof. Hence at all material time, the appellant was an innocent purchaser for value of the property, and who until the court orders otherwise acquired a good title, and thus was on the property rightfully.

15. **Ground No. 10:** Evidence was adduced that there was a suit pending before another court being **CMCC No. 1045 of 2006**, which suit was between the complainant, **PW1** and the appellant to determine the proprietary rights of the parties. Thus on whether the complainant, James martin Juma was the one in possession of the parcel of land, or whether the appellant was on the said parcel of land without colour of right this was a matter already subjudice before another court. It was thus not open to the learned trial magistrate to hold that the appellant acquired the parcel of land fraudulently and found her conviction of him for the offence of forcible detainer upon that basis.

16. **PW4**, one Tom Owuor Apamo, the Accountant for the holding company also confirmed that the appellant was the correct registered owner of the property according to the Holding Company's records.

17. Upon analysing the evidence and the submissions of counsels on record, I respectfully agree with the leaned counsel Mr. Wanganjo's submissions on behalf of the appellant, that the conviction of the appellant was against the weight of the evidence adduced. The learned state counsel, Miss Mwanza did concede the appeal in her replying submissions without expressly stating so.

For the foregoing reasons I find that the appeal has merit and I allow it.

**SIGNED DATED** and **DELIVERED** in open court this **10<sup>th</sup>** day of **October 2012**.

**L. A. ACHODE**  
**JUDGE**