



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(MARAGA, MWERA & MWILU, J.J.A)
CIVIL APPEAL NO. 68 OF 2013

BETWEEN

JULIUS KANGARA NDEGWA.....APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

(Being an appeal from the judgment of Honourable Justice David

Majanja delivered on 4th February, 2013 in PETITION NO. 415 OF 2012)

JUDGMENT OF THE COURT

1. **JULIUS KANGARA NDEGWA**, the appellant, is a former Police Officer. He retired at the rank of Senior Deputy Commissioner of Police. On 2nd July 2001 he entered into a written sale agreement with Virginia Muthoni Kabuu (the vendor) by which he bought from her **ALL THAT** piece of land situate at Jamhuri Phase II Estate in Nairobi and known as **Title No. Nairobi/Block 63/591** (the suit land) for Kshs.800,000/=. The vendor thereafter executed the transfer and the suit land was transferred to him.
2. After purchasing the suit land, the appellant started assembling building materials and in 2010 he erected a four storey block of flats on it. On or about the 30th September 2011, he was shocked to learn that police were investigating how he had acquired the piece of land. Upon his own enquiry to trace the vendor, who used to work at the lands office in Nairobi, he discovered that she died sometime in 2002. He also learnt that even Victor Wachira Muriuki, the advocate who acted for them in the land transaction and who had attested to the execution by the vendor of the agreement and the transfer, had also died in November 2008.
3. Upon completing their investigations, the police claimed that the piece of land belonged to the late D-Iby and that the appellant had fraudulently obtained it. They therefore charged him with four counts of forgery contrary to **Section 350** of the **Penal Code** on or about 14th September 2012. On 20th September 2012, the appellant filed a constitutional petition in the High Court and sought declarations that the charges brought against him after a period of about 12 years were null and void as they were unfair, unjust and violated his constitutional rights to a fair trial. After hearing the petition, Majanja J dismissed it thus provoking this appeal.

4. In his submissions before us, Mr. Kabue, learned counsel for the appellant cited **Articles 25 and 50** of the Constitution and argued that the appellant will not obtain a fair trial in the forgery charges brought against him. Besides the unreasonable delay of about 12 years, he said the appellants major witnesses, that is, the vendor and the advocate who had acted for them, had both died. Relying on the decisions in the cases of **Githunguri v Republic [1985] KLR 91** and **Republic v Pattni [2005] eKLR** counsel urged us to find that the appellant’s prosecution after such inordinate delay is oppressive and a gross abuse of the court process. He therefore urged us to allow this appeal and order the termination of the charges against the appellant.
5. For the State, Ms Oundo, learned Assistant Director of Public Prosecutions, dismissed this appeal as frivolous. She said that the complainant, who is the widower of the original owner of the suit land, was all along and still is in possession of the original Title Deeds for the land. He never knew of the fraud until 2011 when he went to inspect the piece of land only to find a building on it and immediately reported the matter to police. Counsel said that the authorities cited are distinguishable and urged us to dismiss this appeal and let the case against the appellant be heard and determined on merit.
6. We have considered the matter. There is no limitation period set for the prosecution of any crimes. Although inordinate delay in mounting prosecutions can in some cases be the basis for termination of criminal cases on the grounds of malice or that the accused person will not have a fair trial, each case must be considered on its own facts.
7. In this case we concur with the learned Judge that the cases of **Githunguri** and **Pattni** are distinguishable. In the Githunguri Case, the Attorney General had decided not to prosecute but after several years, he back-trucked on that. In the Pattni case, the Attorney General sat on evidence availed to him for nine years. In both cases the courts read mischief to the attempted prosecutions and terminated them.
8. In this case, the alleged fraudulent transfer of the suit land was discovered in 2011 and as soon as the police completed their investigations, they preferred charges against the appellant. So the issue of inordinate delay does not arise.
9. True, both the lady who allegedly sold the piece of land to the appellant and the advocate who acted for them are both dead. If they were alive, perhaps the police would have charged them along with the appellant because the prosecution is on the alleged forgery of the original owner’s signature and that of the Land Registrar who allegedly registered the transfer of the land from the vendor to the appellant.
10. Bearing in mind that the prosecution has the burden of proving beyond reasonable doubt that the appellant is the one who forged those signatures, we do not think that the appellant will not be accorded a fair trial despite the delay. Consequently we dismiss this appeal and direct that the subordinate court do expeditiously hear and determine the case against the appellant. We wish to apologize to the parties for the delay in determining this appeal which was caused by the pressure this Court was under to dispose of election petition appeals within the statutory time lines.

DATED and delivered this 6th day of June 2014.

D.K. MARAGA

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JUDGE OF APPEAL

J.W. MWERA

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JUDGE OF APPEAL

P.M. MWILU

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JUDGE OF APPEAL

I certify that this is a true

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DEPUTY REGISTRAR