



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO. 75A AND 75B OF 2017

[From the original conviction and sentence dated 3/8/2012 in Criminal Case No. 900 of 2010 in the Senior Principal Magistrate's court at Narok, R. v. 1. David Kiplangat Sitienei 2. Wilson Kiplangat Mutai)

DAVID K. SITIENEI1ST APPELLANT

WILSON K. MUTAI2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGEMENT

1. The appellants have appealed against their conviction and sentence of a fine of Sh.50,000/- or in default to serve 12 months in respect of the offence of forcible detainer contrary to section 91 of Penal Code (Cap 63) Laws of Kenya.
2. The state has supported both the conviction and sentence.
3. The appellants were convicted on the evidence of Joseph Njathi Kiai (PW 1) who was the complainant. The defence of the appellant through their sworn evidence testified that the parcels of land in issue were their property.
4. The appellants through their counsel, Mr. Morintant have raised 6 common grounds of appeal. In ground 1, they have faulted the trial court for convicting them, when the ingredients of the offence charged had not been proved. In this regard, the evidence of the complainant is that he bought 3 parcels of land Nos. Mara/Ololulunga/13139, 13135 and 13143, which he purchased from Mukuyuni Farmers Company Ltd. He had bought shares in that company and after fully paying for them, he was issued with the 3 title deeds in respect of those parcels of land.
5. Upon completion of the payments, he went to the ground and found 3 people. One of these 3 people was David Sitienei. Instead of accessing his land, he sensed danger. He then went and reported to the police station that the 2 appellants were in occupation of his land. The 2 appellants threatened to assault him and 2 of his companions. He further testified that the appellants are still in occupation of the 3 parcels of land. He denied that the appellants had bought those parcels of land from one Olosuya Kiprono Ole Tiyo. He also testified that he had bought shares from Mukuyuni Farmers Co. Ltd. The complainant produced search certificates for his parcels of land.
6. The ingredients of the offence of forcible detainer are set out in section 91 of the Penal Code [Cap 63]

Laws of Kenya. In terms the provisions of that section are as follows:

“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.”

7. The first constituent element of the offence is that there has to be evidence that the appellant is in actual possession of the land without colour of right. In the instant appeals, there is evidence from the complainant that he bought the 3 parcels of land from Mukuyuni Farmers Co. Ltd and was issued with title deeds as the owner. There is further evidence from the investigating police officer, No. 66604 PC Douglas Wambua (PW 2). The complainant reported to PW 2 that the 2 appellants were in occupation of his land and were refusing to move out. He showed him the 3 title deeds to confirm his ownership of those parcels of land. As a result, PW 2 went to the lands office, conducted a search and confirmed that the complainant was the owner of the 3 parcels of land. Additionally he went to the grounds and established that the 2 appellants were in occupation of those parcels of land. He also testified that the 2 appellants did not produce any documents of ownership of land. He also testified that the 2 appellants had built grass-thatched houses and stores on those 3 parcels of land.

8. Philip Munyoki Mengi was the Land Registrar of Narok North and South. He testified that there was a dispute of ownership in respect of land parcel Nos.13139, 13135 and 13143. He further testified that he had never gone to the ground to see those 3 parcels of land. It was also his evidence that the 3 parcels of land were as a result of sub-division of title parcel No. 157. Furthermore, it was also his testimony that the registration of the appellants' land came from parcel No. 110. It was also his evidence that there were a myriad of cases involving Mukuyuni Farmers Co. Ltd and the group of the appellants. Finally, he testified that the 3 title deeds he produced emanated from land title No. 157.

9. The defence of the appellants was that they have been on occupation of the disputed land parcels since 1996, when they were issued with the title deeds. According to the 1st appellant, the land was sold to him by Kiprony Ole Teya. It was his evidence that they have been farming, raising livestock and planted trees on the disputed land, which is land reference No. Cis-Mara/Ololulunga/3331. He produced in evidence exhibit 2(1) the original copy of the title deed. The 2nd appellant gave similar evidence that he bought the disputed land in 1996 from Kiprony Ole Tiyo. The seller had not processed a title for them because he passed on.

10. Under cross-examination, the complainant testified that he was not aware that the appellants had bought the land from one Olosuya Kiprony Ole Tiyo. He was then shown a sale agreement in respect of land parcel No. Cis-Mara/Ololulunga/3348 and another agreement in respect of Cis-Mara/Ololulunga/3331. When asked to comment about this title deeds, he answered that it was up to the court to decide.

11. The evidence of the land registrar was that there were many cases involving the company to which the complainant was a member and the group ranch of the appellants namely Enosokon group.

12. In the circumstance, I find that the ownership of these parcels of land are in dispute. I further find that the 2 appellants have been in occupation of the parcels of land in dispute for a number of years. They have done farming on it. They have livestock on it and also planted trees on it. It therefore follows that they cannot be said that they have no colour of right in respect of the disputed parcels of land. I find there is merit in ground 1, which I hereby uphold.

13. In ground 2, the appellants have faulted the trial court for failing to find that they have been in occupation on the land for over 12 years, which their counsel contends entitled them to the rights of an adverse possessor. I find this ground is meritorious and I uphold it. I ground 5, the appellant have faulted the trial court in assuming jurisdiction in respect of this case without following the provisions of section 200 of the Criminal Procedure Code (Cap 75) Laws of Kenya. I find that the 2nd succeeding magistrate took over the case for sentencing purposes only, since the 1st trial magistrate had found the appellants

guilty and convicted them on 23/3/2012. I do not find that there was a breach of section 200 since the 2nd magistrate merely proceeded to deliver the judgement of the first trial magistrate and proceeded to sentence them. I therefore find no merit in this ground and hereby dismiss it.

14. I have reassessed the entire evidence as a first appeal court according to *Okeno v. R. (1972) EA 32*. I find that the appellants were convicted in insufficient evidence. It therefore follows that their appeals are hereby allowed. Their conviction and sentence are hereby quashed. The fines, if paid should be refunded to the appellants.

Judgement delivered in open court this 9th day of November, 2017 in the presence of the appellants and Mr. Kilele holding brief for Morendat and Ms Nyaroita for the respondent.

J. M. Bwonwonga

Judge

9/11/2017