



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIVASHA**

**(CORAM: R. MWONGO, J.)**

**CRIMINAL APPEAL NO. 2 OF 2017**

**VERONICA NYAMBURA WAHOME.....1<sup>ST</sup> APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

*(Being an appeal from the judgment delivered on 26<sup>th</sup> January, 2017, in CMCC No 1242 of 2014 Naivasha by Hon P Gesora, CM).*

**JUDGMENT**

**Background**

1. The appellant was charged and convicted for the offence of forcible detainer contrary to **section 91** as read with **section 36** of the **Penal Code**. She was convicted and sentenced to a fine of Kshs 50,000/- or in default to imprisonment for three months. The particulars of the offence were that on or about 19<sup>th</sup> December 2012 in Gilgil, Nakuru County, without any colour of right she held possession of land parcel No Gilgil/Gilgil Block1/162 in a manner that was likely to cause a breach of the peace against Kathleen Nyambura Njoroge who is entitled in law to be in possession of the said land

2. In a nutshell, this matter arose from a dispute between the appellant and Kathleen Njoroge, the complainant, over the said piece of land with both claiming ownership. According to the appellant, her mother had bought the land by way of share allocation in GEMA Holdings Limited in 1977. Around 1997 when she was in Denmark, she says, the land then known as Plot No E3 No 15, was allocated to her. In 1998 she returned from Denmark and was shown its location by some company officials. She authorized a neighbor to look after it. She was in and out of the country in 2006, and in 2010 came back and started cultivating and developing the land.

3. Around 2012, Kathleen Njoroge showed up claiming the land. The appellant then sought out a director of the company, who connected her to one Maina, an employee of the company. Eventually she was asked to pay for the title to the land. She paid Kshs 8,575/- and was issued a receipt. The land ownership remained unsolved with Kathleen, and the two met in 2013 at the Gema offices to resolve the issue. It was suggested that a valuation be done of the land and developments, and she would be moved to another piece of land. The Appellant gave a figure of Kshs 1,800,000/-. No payment was made to her.

4. The story narrated to the court by Kathleen and the prosecution witnesses is that: she purchased the land from Gema Holdings Ltd in 1976 upon purchasing a share for Kshs 7,000/- in the company. She exhibited documents on proof of this. Thereafter, she was issued with an allotment letter and was shown the land. In 1981 and in 1982, Kathleen visited the land, then again in 2012. During the latter visit she found the land occupied by the appellant's brother who had fenced and cultivated it. She complained to the Gema offices, whereupon the appellant was summoned to explain the occupation. The company was able to show through its officers – who testified in the proceedings – and availed documentation that Kathleen was the rightful owner and offered to her an alternative parcel of land. The appellant agreed on condition that she be compensated her development costs. No compensation was, however, paid.

**Appeal**

5. Aggrieved by the trial court's decision, the appellant seeks that the judgment be set aside and the fine be refunded. The appeal is on the following grounds:

1. The trial Magistrate failed to appreciate and consider the evidence by the prosecution and the sworn statement by the accused in respect of the charge of forcible detainer c/s 91 of the penal code.
2. The trial magistrate ignored the sworn statement of the accused and exhibits by the accused in that the accused/appellant claim ownership/proprietorship of the subject property.

3. The trial Magistrate condemned the accused/ appellant for the incompetence and/or poor membership records of Agricultural and Industrial Holdings Limited (formerly GEMA) the land buying Company that from its conduct treated the complainant and appellant as its members and allocating them the same parcel and causing the accused/ appellant to occupy and develop its subject property.

4. The ingredients of section 91 were not met as the accused claims ownership of the property by occupation, development and did pay the land buying company agricultural and industrial Holdings Limited survey fees and title deed fee, which evidence and exhibits were ignored by the trial court leading to a prejudiced conviction and sentence.

5. Forcible detainer as defined by sec 91 cannot be the basis of a criminal process where the suspect claims ownership.

6. The conviction and sentence by the trial Magistrate amounts to a civil conclusion through a criminal process

6. **Section 91** of the **Penal Code** sets out the offence and provides that:

***“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.”*** (Emphasis supplied)

7. A misdemeanour is punishable, pursuant to **section 36** of the **Penal Code**, by imprisonment for a term not exceeding two years or with a fine, or with both.

8. As this is a first appeal, it is trite law that this court is called upon to evaluate the evidence afresh and come at its own conclusion but keeping in mind that it did not have the advantage of seeing the demeanour of witnesses.

9. In my view, only two issues arise for determination:

a. Whether the ingredients of the offence set out in **section 91** were met.

b. Whether the conviction and sentence was proper.

#### **Analysis and determination**

10. The courts have determined the ingredients of the offence of forcible detainer and what the prosecution must establish. This was well expressed in **Albert Ouma Matiya v Republic, Busia HCCR Appeal No. 8 of 2012 [2012] eKLR**, where Kimaru J, stated as follows:

***“The ingredients required to establish the charge of forcible detainer under Section 91 of the Penal Code are as follows: the prosecution must establish that the accused is in actual possession of the parcel of land which he has no right to hold possession of. The prosecution will establish this if it adduces evidence which proves that the accused has no title or legal right to occupy the land. Secondly, the accused must be in occupation of the parcel of land in a manner that is likely or causes reasonable apprehension that there will be breach of peace against the person entitled by law to the possession of the land.”***

11. What is the meaning of colour of right? In **R v Fetzer (1900) 19 N.Z.R** Edwards J expressed the meaning of the archaic phrase, and his definition was adopted by Rudd J. In **Joseph Ogola v The Queen (1956) KLR Vol.XXIX 174 at 175**. . The learned judge said of ‘colour of right’:

***“This means... an honest belief in a state of facts which, if it existed, would be a legal justification or excuse. This would be no answer to a civil action, but it is properly made an answer to a criminal charge because it takes away from the act its criminal character. Less than this...cannot be held to be colour of right. Per Edwards J., in R v Fetzer (1900) 19N.Z.R 438.”*** (emphasis supplied).

12. In **Black’s Law Dictionary Tenth Edition, 2009**, the phrase “color of right” is ascribed the following meaning:

***“The deliberately created false impression that title in property or goods is held by someone other than the actual owner”***

13. The question is whether the appellant created this false impression. The evidence of the appellant clearly shows that she had a genuinely held claim to the land and her belief was neither based on a falsehood or intent to create a false impression. The trial court found when the appellant and complainant together with officials of Gema Holdings Ltd went on a scene visit to the land there were discussions culminating in an agreement to the effect that the appellant would vacate the land and be given alternative land by the company. The appellant’s condition was that she be compensated for her developments. She estimated her compensation at about Kshs 1,000,000/-. The evidence on record shows the appellant had fenced the land and built two houses on it.

14. In his judgment, the trial Magistrate stated:

***“The whole group walked around the land and accused was asked to tabulate what developments she had undertaken thereon and parties were directed to appear before the company officials for further discussion. They did so and accused produced a list.”***

15. In coming to his conclusions, the trial magistrate then made a finding that:

***“...there have been a series of pleadings to resolve [the dispute] but to no avail. Accused seems to agree that indeed the land belongs to the complainant but places a condition that she be compensated before she can move. ....”***

***The court concluded:***

***“Even after being offered an alternative piece of land she (accused) stayed put and to me this is where the criminal intent crept in. She has continued to hold the land even with the evidence shown to her before the charges were instituted”***

16. I think the magistrate made the correct findings based on the evidence on record. He properly found that the prosecution demonstrated that the appellant had taken actual possession and occupation of the parcel of land; that the appellant had no title or legal right to occupy the land; that the accused had title to the land.

17. However, the trial magistrate misdirected himself in his conclusion as to the creeping in of criminal intent. The matter was in fact a civil claim on the appellant's part – a claim that she had a right to the land or compensation before being moved to another piece of land which the company is, and has admittedly been, prepared to substitute to the appellant. It is clear that the company tacitly and intrinsically admits that the appellant is owed a substitute piece of land as an alternative.

18. PW2, Onesmus Muchiri, who had been the clerk in charge of records for Gema Holdings Ltd confirmed that the appellant had a receipt issued by the office for survey work and title deed for the said parcel. He said he could not tell on what basis the money was received and could not recall whether he had topped up the money for the appellant. he also testified that there are usually problems in allocation of land in respect of the company, and that :

***“We tried to resolve the matter by giving the complainant an alternative parcel”***

19. Further, PW2 said:

***“The company is to blame for the wrong allocation misleading the appellant and now wants to offer her an alternative piece of land.”***

20. In my view, the trial magistrate did not consider the legal principle in the **Joseph Ogola case** (supra) that, ‘colour of right’:

***“means an honest belief in a state of facts which, if it existed, would be a legal justification or excuse. This would be no answer to a civil action, but it is properly made an answer to a criminal charge because it takes away from the act its criminal character.***

21. If the trial court had applied that definition to the fact, he would have found that the appellant was operating under a colour of right not without it. That colour of right was an answer against criminal liability, although not civil liability. The complainant was claiming ownership just as much as the appellant was. Both produced documentation to show that they laid claim on the said piece of land.

### **Disposition**

22. In conclusion agree with the appellant that this was a matter for resolution through civil proceedings and not through a criminal case. Further, **Section 8 of the Penal Code** is clear that “a person is not criminally responsible in respect of an offence relating to property, if the act done or omitted to be done by him with respect to the property was done in the exercise of an honest claim of right and without intention to defraud.” This provision protects persons with honest or bona fide claims, however misguided, from criminal liability merely on account that their claim is found to have been legally unfounded.

23. I find that the claim of ownership by the appellant was not dishonest or made without colour of right. As such, no criminal liability ought to have attached to the appellant in the circumstances of this case.

24. Accordingly, the appeal succeeds, the conviction and sentence of the appellant is hereby set aside, and the appellant is acquitted. Any fines paid by the appellant shall be refunded forthwith.

25. Orders accordingly.

**Dated and Delivered at Naivasha this 16<sup>th</sup> Day of July, 2019**

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**RICHARD MWONGO**

**JUDGE**

Delivered in the presence of:

1. Mr. Mburu F. I. for the Appellant

2. Mr. Koima for the Respondent

Court Clerk - Quinter Ogutu