



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

Civil Appeal 103 of 2003

RICHARD DEDE
APPELLANT

VERSUS

**OWUOR CHWAYA-
DECEASED)
MAURICE OTIENO OWUORA)**
RESPONDENTS

JUDGMENT

The appellant filed civil suit No.131 of 2002 before Homa Bay Senior Resident Magistrate's Court against the Respondent claiming ownership of half portion of land No.KANYADA/KANYABALA/454. He sought court to issue an order directing the Respondent to sign all the necessary documents to effect transfer of 2.7 acres from that parcel of land to him. He also prayed for costs. The appellant's evidence is contained in four typed lines. He said the Respondent was his elder brother and that he was praying he be ordered to subdivide land parcel No.KANYADA/KANYABALA/454 and transfer the same to him. He said the land was given to him jointly and Respondent refused to give him his portion.

The Respondent denied the claim. He said the land was given to him by his father in 1952 and he has lived there since. His children are settled there and he have sold a portion of it.

DW2 SAMUEL KIDEW CHWANYA stated that the land in dispute belonged to the Respondent. It was given to him in 1957.

The learned trial Magistrate after evaluating the evidence found the appellant had not proved his claim and dismissed the suit with costs. The appellant being dissatisfied with the judgment filed this appeal.

In the appeal the appellant states that the magistrate erred in law in failing to allow him to call witnesses; that he failed to go through documentary evidence from the land's office, erred in believing the Respondents evidence and failing to find that the land was registered in their joint names and that he is entitled to 2.7 acres. The appeal was opposed.

I have carefully considered the appeal and find that the trial magistrate reached a proper conclusion. The appellant on Par.4 of the plaint had stated that the land in dispute was registered in his name and that of the Respondent. However when he gave evidence there was no proof of that. It is trite law that he who alleges must prove. It was upon him to prove that the land was registered in their joint name. He could have gotten a Search Certificate to show that. He never produced any such evidence.

He did not produce a single document yet in grounds of appeal he alleges that the trial magistrate did not

go through documentary evidence from the land's office. It was not for trial magistrate to go and look for those documents in the lands office.

In ground 1 the appellant alleges he was not allowed to call his witnesses. However the records of proceedings show that after he gave evidence and was crossexamined he told the court

“That is close of my case.”

There is no record he told the court that he had any witnesses or he asked for adjournment to call them if they were not present. This court can only go by the record.

There was nothing wrong for the magistrate to believe the Respondents side of story and disbelieve the appellant. The Respondent's claim was supported by evidence of DW2 who said the land belonged to the Respondent. Appellant had been given land elsewhere. The magistrate was therefore right to find that the appellant did not even attempt to prove his claim.

All in all I find the appeal has no merit. I uphold the lower court's decision and dismiss the appeal with costs to the Respondent.

Dated 24th May 2005.

KABURU BAUNI

JUDGE

cc. Mobisa

Mr. Omondi for the appellant

Respondent present.