



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. APPEAL NO. 102B OF 2015**

**DAVID NGULA MBILO .....APPELLANT**

**VERSUS**

**PATRICK NZULA MBILO.....RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Chief Magistrate's Court*

*at Kitui in Civil Case No. 159 of 2010 delivered on 5<sup>th</sup> March, 2015 by*

*Hon. B.M. Kimemia, Principal Magistrate)*

**JUDGMENT**

1. On 5<sup>th</sup> March, 2015, the lower court dismissed the Appellant's suit in Kitui CMCC No. 159 of 2010. The Appellant was dissatisfied with the decision of the court and filed the current Appeal.
2. In the Memorandum of Appeal, the Appellant averred that the Judgment of the court is contrary to the provisions of the law; that the learned Magistrate committed an error when he held that the Appellant did not attach the Title Deed of parcel of land known as Kyangwithya/Kaveta/784; that the Appellant produced the said document on 27<sup>th</sup> July, 2010 and that the said title document was missing from the court record.
3. This being a first Appeal, this court is required to evaluate the evidence on record and come up with its own findings.
4. The record shows that via a Complaint dated 14<sup>th</sup> May, 2010 and filed on the same day by the Appellant, the Appellant averred that he is the absolute registered proprietor of land known as Kyangwithya/Kaveta/784 (*the suit property*); that on or about the month of March, 1994, the Defendant declined to remove his house from the suit property and that the Defendant should be evicted from the said land.
5. The Respondent filed a Defence in which he averred that parcels of land known as Kyangwithya/Kaveta/784 and 506 were registered in the name of the Plaintiff through fraud; that him, his mother Nduku Mbiilo, his sister Ndumi Mbiilo and the Plaintiff have lived on the suit property since 1948 and that the two parcels of land belonged to the entire family.
6. In the Amended Defence, the Respondent averred that parcels of land known as Kyangwithya/Kaveta/784 and 506 are family properties and were originally owned by their father and that the Appellant fraudulently caused the two parcels of land to be registered in his favour.
7. In his evidence, the Appellant, PW1, informed the court that he works at the Ministry of Lands; that the Respondent is his elder brother; that he is the registered proprietor of parcel of land number Kyangwithya/Kaveta/784 and that the Title Deed to the said land was issued to him on 8<sup>th</sup> March, 1994. The Appellant produced a copy of the Title Deed which was marked for identification as "MFI 1".
8. PW1 informed the court that when their father died, their mother sub-divided the land between them; that the Defendant was given his portion of land and that the Defendant should be evicted from the suit property.
9. In cross-examination, PW1 stated that he did not know the parcel of land that the Defendant was allocated; that their father had two wives and that all the members of the family were satisfied on how the family land was sub-divided except the Respondent.
10. The mother to the Appellant and the Respondent, PW2, informed the court that her husband died many years ago; that she settled on the suit property when she got married; that the said land is next to her co-wife's land and that she gave to the Appellant the suit property.
11. PW2 informed the trial court that the Respondent sold the portion of land that he was given and that the Respondent had put up a house

on the suit property.

12. According to PW2, she transferred the suit property to the Appellant and that the Respondent sold the land that she transferred to him. In cross-examination, PW2 stated that the Respondent's child was buried where she has settled.

13. On his part, the Respondent, DW1, informed the court that he has lived on the suit property with his brother and four sisters since the year 1998; that the Akitondo clan sub-divided the suit property between himself and the Appellant and that their mother transferred the entire land to the Plaintiff.

14. The Divisional Treasurer of the Akitondo clan, DW2, informed the court that in the year 2008, the clan sub-divided parcel number 784 between the Appellant and the Respondent; that the suit property belongs to the family of the Appellant and the Respondent and that the land was sub-divided between the two equally.

15. Although the Appellant informed the court that the suit property was registered in his name, the Title Deed for Kyangwithya/Kaveta/784 was never produced as an exhibit. The copy of the Title Deed that was marked as MFI 1 does not amount to a Title Deed or an exhibit.

16. Even if it is assumed that parcel of land number Kyangwithya/Kaveta/784 was registered in the name of the Appellant, the circumstances under which his mother transferred the whole land to him, leaving out the Respondent, who is his brother, was not explained at all.

17. Indeed, the Appellant has not denied that the suit property is family land, which belonged to their deceased father. That being so, their mother could only have held the title under customary law, as a trustee for the entire family.

18. The mother having transferred the entire family land to the Appellant, leaving out the Respondent, corroborates the Respondent's evidence that the said title was registered in the name of the Appellant fraudulently.

19. In the absence of evidence to show that the Respondent was allocated an alternative parcel of land by his mother, and in view of the evidence by PW2 that the clan sub-divided the suit property, which is family land, between the Appellant and the Respondent equally, I find and hold that the Appeal has no merit.

20. For those reasons, the Appellant's Appeal is dismissed with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31<sup>ST</sup> DAY OF JANUARY, 2020.**

**O.A. ANGOTE**

**JUDGE**