



**REPUBLIC OF KENYA**

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

**ELC. APPEAL NO. 185 OF 2011**

**NDONYI MUTINDA.....APPELLANT**

**VERSUS**

**MUTUNE MALULUL.....RESPONDENT**

*(Being an Appeal from the Judgment of Principal Magistrate's Court at Kitui in Civil Case No. 141 of 2003 delivered on 25<sup>th</sup> October, 2011 by Hon. A.G. Kibiru – PM)*

**JUDGMENT**

1. The Appeal herein was filed by the Appellant in person. The Appeal is against the Judgment of Hon. A.G. Kibiru in Kitui PMCC No. 141 of 2003 that was delivered on 25<sup>th</sup> October, 2011.
2. The Plaint filed in the lower court shows that the Respondent sued the Appellant together with another individual named Musili Kimanzi. According to the Plaint, the Respondent averred that he is the registered proprietor of parcels of land known as Kisasi/Mbitini/177 and Kisasi/Kimuuni/334; that on diverse dates, the Appellant trespassed on the suit properties and that he should be restrained from trespassing on the land.
3. After hearing both parties and their witnesses, the court found in favour of the Respondent. According to the learned Magistrate, the Respondent was the registered proprietor of the suit land, and as such was entitled to the land.
4. In his Memorandum of Appeal, the Appellant averred that the learned Magistrate erred when he held that parcel of land number Kisasi/Mbitini/334 is the Respondent's land; that the learned Magistrate erred when he held that the registration of the suit land in the name of the Respondent was not fraudulent and that the learned Magistrate misdirected himself when he failed to find that he was born and brought up on the disputed parcel of land.
5. The Appellant did not file submissions. The Appellant informed the court that he would rely on the Record of Appeal. The Respondent's advocate submitted that the evidence of PW1 and PW2 on the issue of ownership of the two parcels of land was uncontroverted; that the Report and Ruling of the Land Registrar and the Surveyor settled the issue of the boundary dispute and that the Appellant admitted that he was occupying the two disputed parcels of land.
6. The Respondent's advocate finally submitted that the Record of Appeal is incomplete; that the Appellant was given numerous opportunities to follow up on the missing documents and file a Supplementary Record of Appeal which he never did and that the Record of Appeal offends the provisions of Order 42 Rule 13 (4) of the Civil Procedure Rules. According to counsel, the following documents are missing in the Record of Appeal: The Amended Plaint, Defence, List of Witnesses, List of exhibits, the Amended Defence and the Applications dated 20<sup>th</sup> January, 2005 and 27<sup>th</sup> October, 2005.
7. The Record of Appeal shows that when the matter came up for directions on 19<sup>th</sup> April, 2018, the Respondent's advocate informed the court that the Record of Appeal was incomplete. On the said date, the court made the following order:  
  
***“The Appellant is given the last chance to include all the relevant documents in a Supplementary Record of Appeal within twenty one (21) days.”***
8. When the matter was mentioned again on 22<sup>nd</sup> May, 2018, the court granted the Appellant another opportunity to file a Supplementary Record of Appeal which he never did upto 24<sup>th</sup> October, 2018 when the court gave directions on the hearing of the Appeal. Indeed, to date, the court is not seized of any Supplementary Record of Appeal.
9. I have perused the Record of Appeal and noticed that the Amended Plaint, the Defence, the Amended Defence and the copies of the

exhibits that were produced in the lower court are missing. This is contrary to the provisions of Order 42 Rule 13 (4) of the Civil Procedure Rules which provides:

***“(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:***

***(a) the memorandum of appeal;***

***(b) the pleadings;***

***(c) the notes of the trial magistrate made at the hearing;***

***(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;***

***(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;***

***(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:***

***Provided that—***

***(i) a translation into English shall be provided of any document not in that language;***

***(ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”***

10. Having failed to include all the proceedings and pleadings that were filed in the lower court and the exhibits that were produced in the Record of Appeal in a Supplementary Record of Appeal, I find that the Appeal before me is a non-starter. Indeed, this court cannot render a valid decision based on the documents contained in the Record of Appeal dated 22<sup>nd</sup> November, 2011.

11. For those reasons, I strike out the Appellant’s Appeal with costs to the Respondent.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 14<sup>TH</sup> DAY OF JUNE, 2019.**

**O.A. ANGOTE**

**JUDGE**