

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 1 OF 2017

SOLOMON KIEMAAPPELLANT

VERSUS

MARY NDANU MATI *alias* MARY NDANU KIMANZI ...RESPONDENT

(Being an appeal from the Judgment of Senior Principal Magistrate's Court at Kitui in Civil Case No. 125 of 2008 delivered on 21st June, 2012 by Hon. B.M. Kimemia (Mrs) – P.M)

JUDGMENT

1. In his Judgment of 21st June, 2012, the learned Magistrate held that the Appellant was not entitled to a parcel of land known as Plot C Block II/90. In the Memorandum of Appeal, the Appellant has averred that the learned Magistrate erred by not considering the fact that he was allocated the suit land in 1997 while the Respondent was allocated the same land in the year 1998.
2. According to the Appellant, the court did not appreciate and record vital evidence and that in any event, the learned Magistrate did not have jurisdiction to hear and determine the matter.
3. This Appeal proceeded by way of written submissions. The Appellant's advocate submitted that the learned Magistrate failed to appreciate the fact that no other letter of allotment could have been issued in 1998 because the Appellant had already been issued with a letter of allotment for the same land in 1997; that the Part Development Plan (PDP) that was issued to the Respondent was not signed by the author and that the value of the suit land was Kshs. 600,000. Consequently, it was submitted, the lower court did not have jurisdiction to determine the matter.
4. In his submissions, the Respondent's counsel submitted that the Record of Appeal does not have crucial documents like the exhibits that were produced in the lower court.
5. The Respondent's counsel submitted that the letter of allotment that was issued to the late Moses Musembi Kiema was issued after the signing of the purported Sale Agreement and that a Part Development Plan (PDP) always precedes the letter of allotment and not vice versa. Counsel submitted that the Respondent produced genuine documents which confirmed that she was the proprietor of unsurveyed plot number 11B in Kitui Municipality.
6. On the issue of jurisdiction, counsel submitted that the Appellant had conceded to the jurisdiction of the Magistrate and that the value of the suit was never pleaded.
7. The first issue that I should determine is whether the Record of Appeal as filed is competent. The Respondent's counsel has submitted that the Record of Appeal does not have the copies of the exhibits that were produced in the lower court and that on that basis, the Appeal should be struck out.
8. The typed proceedings of the lower court shows that both the Appellant and the Respondent produced in evidence several documents in support of their respective claims. Some of the documents that the Appellant in the lower court produced as exhibits included the letter of allotment and the Sale Agreement. The proceedings shows that the Respondent produced several documents including the letter of allotment, the Part Development Plan (PDP) and several letters in support of his case. These exhibits were however not included in the Record of Appeal that was filed on 18th April, 2017.

9. Order 42 Rule 13(4) of the Civil Procedure Rules provides the document that should be included in the Record of Appeal. The documents include: the Memorandum of Appeal, the pleadings, the notes of the trial Magistrate, all the Affidavits, maps and other documents put in evidence before the Magistrate and the Judgment, Order or Decree appealed from. Although Order 42 Rule 13(4) (ii) provides that a Judge may dispense with the production of any document which is not relevant, except the Memorandum of Appeal, the pleadings and the Judgment, the exhibits that were produced during trial cannot be termed as not being relevant documents for the purpose of the current Appeal.

10. Indeed, the Judgment of the trial court is based on the documents that were produced by both the Appellant and the Respondent. Consequently, this court cannot arrive at a decision without looking at all the exhibits that were produced in the lower court.

11. In view of the fact that the record of this court is the “*Record of Appeal*”, the failure by the Appellant to include in the Record of Appeal the exhibits that were produced in the lower court renders the Record of Appeal and the appeal incompetent.

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

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 13TH DAY OF APRIL, 2018.

O.A. ANGOTE

JUDGE