

IN THE COURT OF APPEAL OF TANZANIA  
AT MBEYA

CORAM: MUSTAFA, AG. C.J.; MAKAME, J.A. AND OMAR, J.A.

CIVIL APPEAL NO 17 OF 1986

THOMSON K. MWAIKAMILA ..... APPELLANT

And

ANYEGILE MWAKYUSA ..... RESPONDENT

(Appeal from the judgment of the High  
Court of Tanzania at Mbeya) (Mroso, J.)  
dated 25th June, 1982

in

(PC) Civil Appeal No. 65 of 1981

JUDGEMENT OF THE COURT

MAKAME, J.A.

This appeal arises out of a dispute over some land. The respondent is the appellant's paternal uncle. The appellant's deceased father was KAPTENI, the respondent's elder brother. Kapteni was holding two groups of pieces of land: those he had acquired on his own; and clan lands he had inherited from his father MWAIBABU, after the same had been held by a younger brother of Mwaibabu, MWAKYUSA, upon Mwaibabu's death, in accordance with Kinyakyusa law of inheritance. Mwaibabu had inherited the said clan lands from the appellant's paternal great grandfather, a man called KIBBAGA.

The appellant sued in the Primary Court, Kyela Urban, for all the pieces of land his father had held, and the present respondent was dissatisfied with the decision therein which gave some of the pieces to the present appellant. The respondent appealed to the District Court, Kyela, which overturned the Primary Court's decision and found that "All the disputed 'shambas' in this case are the properties of the appellant Anyengile Mwakyusa. Judgement of the lower court is set aside".

Thomson in turn took an appeal to the High Court where Mroso, J. made things quite clear in his judgement. The learned judge distinguished between the two groups of land and said:

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I am satisfied on the evidence adduced originally in the Primary Court that the appellant is not entitled to the "mashamba ya mpunga" which he had been claiming. Those shambas were originally owned by his grandfather Mwaibabu and are now clan property. They were not the personal property of his father Kapiteni. From 1979 the appellant regained from the respondent his legitimate inheritance of his late father's personal estate. The respondent, with the consent of the clan, way back in 1973, inherited the clan lands comprising the disputed "mashamba ya mpunga." I therefore dismiss this appeal with costs".

This is therefore a third appeal and the issue before us is within a narrow compass. The appellant could not come to us without a certificate, in accordance with Section 4(2)(c) of the Appellate Jurisdiction Act 1979 - that a point of law is involved. The appellant got such certificate, from Katiti, J. who, with great respect misread Mroso J's views quoted above. The learned judge said of Mroso J's views:

"First, I find disturbing contradictions in that material excerpt, if I read the above excerpt right. That is, if the "mashamba ya mpunga" that were originally being under use by the applicant's grand father, were the same that the applicant gained in 1979, they must still be clan property, and not the applicant's "father's personal estate". And if they were not personal property of the applicant's father Kapiteni, as the learned judge seemed to think, the same property could not be said to be the applicant's "father's personal estate" said to have been legitimately inherited by the applicant, way back from 1979."

The learned judge wondered if he had read the excerpt from judge Mroso's judgement right. With respect, we are of the view that he did not and that, proceeding from that error, and basing himself on it, he wrongly certified thus:

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"Whether where immovable property has not fallen 'bona vacantia' - i.e. where the intestator is outlived by an heir or heirs, the clan council is legally competent to disinherit such heir or heirs, in particular in view of the provisions of paras (19), (21) to mention a few, of the law of inheritance, 2nd Schedule to Cap. 333, applicable to the place of origin of this case, vide Government Notice No. 436/1963."

That issue cannot arise. The personal property regained in 1979 was the appellant's father's personal property, by the appellant in the appeal before the High Court, who was Thomson Mwaikamila. This did not involve "clan lands comprising the disputed mashamba ya mpunga" mentioned in Mroso J's judgement. We are unable to discern the 'disturbing contradictions' found by Katiti J and we fail to understand how the question of 'Bone Vacantia' comes in. When Mwaibabu died the clan lands did not devolve on Kapteni, his son, but went to Mwakyusa, Mwaibabu's brother, before it finally reached Kapteni's hands. It is these same clan lands Anyegile, the present respondent, got from the clan members and which the appellant could not get directly from his father, and cannot now divest the respondent, his deceased's father's brother, of the same.

We are of the considered view that the learned certifying judge erred in issuing the certificate, because no point of law is involved. When the parties appeared before us we indicated our views and the appellant said he understood the point raised and appreciated it. He, however, expressed another grievance - that the respondent was right now alienating the clan lands to people who do not belong to the clan. To this the respondent retorted that if that was the case the clan members can always sue him. The respondent is right.

In the last analysis the parties should not have been permitted to come to this Court. The appeal is accordingly rejected with costs.

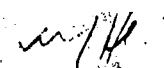
DATED at MBEYA this 7th day of May, 1987.

A. MUSTAFA  
AG. CHIEF JUSTICE

L.M. MAKANE  
JUSTICE OF APPEAL

A.M.A. OMAR  
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

  
(J.H. Msoffe)  
DEPUTY REGISTRAR