IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

(CORAM: MROSO, J.A., MSOFFE, J.A., And KAJI, J.A.)

CIVIL APPEAL NO. 100 OF 2004

BETWEEN

MAULID MAKAME ALI ..... APPELLANT

AND

KESI KHAMIS VUAI ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court for Zanzibar at Vuga)

(Kihio, J.)

dated the 3rd day of April, 2003
in
Civil Appeal No. 7 of 2003

JUDGMENT OF THE COURT

KAJI, J.A.:

In this appeal, the appellant MAULID MAKAME ALI is appealing against the decision of the High Court of Zanzibar (Kihio, J.) dated 3rd April, 2003 in Civil Appeal No. 7 of 2003. The matter originated from Mwera Primary Court where the respondent KESI KHAMIS VUAI unsuccessfully sued the appellant for recovery of a piece of land. The respondent unsuccessfully appealed to the District Court and later to the Regional Court. Still dissatisfied he successfully appealed to the High Court. The appellant was dissatisfied with the decision of the High Court; hence this appeal.

Since the matter originated from a Primary Court, an appeal can only lie to this Court with certificate by the High Court that a point of law is involved in the decision or order as provided for under Section 5 (2) (c) of the Appellate Jurisdiction Act. This provision provide as follows:

> 5. (2) (a) .....
>
> (b) .....
>
> (c) No appeal shall lie against any decision or order of the High Court in any proceedings under Head (c) of Part III of the Magistrates Courts Act 1963 (now 1984) unless the High Court certifies that a point of law is involved in the decision or order."

This prerequisite applies also in respect of appeals originating in Primary Courts in Zanzibar, as was held in the case of **Ali Vuai Ali v. Suwedi Mzee Suwedi** – Civil Appeal No. 38 of 1996 (unreported).

At the commencement of the hearing of the appeal it came to our knowledge that, the record, is not clear whether the appellant applied for certification of a point of law by the High Court, although the same was granted. We asked Mr. Mnkonje, learned counsel for

the appellant, to address us on this. Mr. Mnkonje was frank enough. He conceded outrightly that he did not apply for certification of point of law because, in his view, under section 5 (2) (c) of the Act, it is the duty of the High Court to certify that a point of law is involved in the decision or order. However, he said that since the High Court issued the required certificate even if it was not applied for, this appeal is properly before the Court. The respondent who was not represented by an advocate had nothing useful to say on this.

We have carefully considered the learned counsel's submission on this. We have also carefully gone through the record.

What is clear from the record is that the appellant applied for leave to appeal to this Court under section 5 (1) (c) of the Act. But in paragraph 4 of his affidavit accompanying his application he stated as follows:-

> "4. That there are very important points of law raised in the judgment which need determination of the Court of Appeal as follows ....."

He listed six points which in his view, through his advocate, were points of law worth consideration by the Court.

In his ruling the learned judge granted leave as applied for under section 5 (1) (c) of the Act. But he also considered the six points raised and was of the view that only two points were points of law. The learned judge had this to say:

> "I have gone through the points of law advanced by the learned counsel for the applicant, but I am not convinced points Nos 1, 2, 3 and 5 are points which fit for certification for determination by the Court of Appeal because the issues were not pleaded and tested on evidence at the trial court. I therefore find that points Nos 1, 2, 3 and 5 advanced by the learned counsel for the applicant are not fit for certification for determination by the Court of Appeal of Tanzania and I reject them.
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> However I find that two points of law are involved in the decision and they fit for certification for determination by the Court of Appeal of Tanzania. The two points of law which are certified to be determined by the Court of Appeal are:-
>
> (1) Whether there was any evidence adduced to support and justify the

decisions of the courts below that the applicant bought the "shamba" under dispute from the respondent.

(2) Whether the applicant is entitled to compensation for the improvements he effected on the "shamba" under dispute for the period he occupied it for cultivation purposes only. Leave is hereby given to the applicant on the two points as demonstrated above ....."

According to what was applied for by the applicant/appellant in his application and what was granted by the learned judge, it is apparent that the learned judge knew what he was dealing with, that is, he was dealing with an application for leave to appeal. But it appears he was also aware that leave alone was not enough, and that there must also be a certificate on point of law. That is why, we think, he granted the same, although not applied for. The crucial issue is whether it was proper for the learned judge to issue the certificate which was not specifically applied for. Generally speaking a court will only grant a relief which has been applied for. But in the peculiar circumstances of this case where the applicant who had applied for leave to appeal had also raised some points which in his

view were points of law to be considered by the Court, we are satisfied that the learned judge was not wrong in certifying the two points which he believed to be points of law, although not specifically applied for. In that respect, since there is leave and certificate, we think that the requirement of section 5 (2) (c) of the Appellate Jurisdiction Act, 1979 were complied with and, therefore, we hold that the appeal is properly before us.

We now turn to the merits of the appeal. The appellant's memorandum of appeal has the following grounds:-

1. That the learned judge erred in law in not considering whether there was any evidence adduced to support and justify the decision of the courts below that the appellant bought the "shamba" under dispute from the respondent.

2. That the learned judge erred in law in not considering whether the appellant is entitled to compensation for the improvements he effected on the "shamba" under dispute for the period he occupied it for cultivation purposes only.

3. Generally the learned judge erred in law in not satisfying himself to the propriety of the proceedings to the injury of the appellant.

In arguing the first ground of appeal Mr. Mnkonje, learned counsel for the appellant, argued that there was ample evidence at the trial that the appellant purchased the shamba in dispute from Omar Kombo Mkadam and Vuai Rajabu Pandu (DW2) in 1987. By then the respondent was away. When the respondent returned in 1990 he challenged the sale together with other clan members. The appellant had to buy it for the second time by paying the respondent shs. 250,000/=. He said that there was ample evidence to that effect at the trial from the appellant and his witnesses some of whom are the respondent's relatives. It was his submission that the learned judge should have concurred with the courts below on this.

In arguing the second ground of appeal the learned counsel stated that the learned judge erred in ordering the respondent to compensate the appellant for the improvements made basing on evaluation by a Government Valuer. He said that the learned judge should have ordered the compensation to be assessed according to market value as provided for under section 51 (1) of the Transfer of

Property Ordinance, Cap 150. He said that evaluation by a Government Valuer would result in a less amount to be paid than by market value which fluctuates according to demand.

In arguing the third ground of appeal the learned counsel stated that, since the respondent had testified that the land in dispute belonged to him and his brother jointly, under the circumstances the learned judge erred when he held that there was no necessity of having a power of attorney from his brother without giving any reason for holding so.

The learned counsel also challenged the locus standi of the respondent in instituting the suit. He said that the land in dispute belonged to the respondent's late father. After his death the respondent did not show any certificate that he was appointed the administrator of his father's estate or any cogent evidence that he inherited it. The learned counsel also challenged the procedure which was used in accepting the respondent's "Warka" whereby the record is not clear as to how it was accepted as exhibit.

On his part the respondent denied to have sold the land in dispute to the appellant. He said that, had he sold it to him he

should have issued him with a "Warka". There is none. He said further that he inherited the land from his father and that there were only two heirs, that is, himself and Vuai Khamis Vuai who later died without leaving a wife or child. The respondent conceded that the appellant had been in occupation of the land for a considerable time whereby he planted fruit trees some of which were already mature when he came back to the village around 1990. However he objected to evaluation of compensation based on market value on the ground that such evaluation is normally made by Government Valuers.

The question whether the respondent sold the land in dispute to the appellant is a matter of fact which is subject to proof by evidence. It is common ground that the appellant was the successful party in the Primary Court, District Court and Regional Court. Those courts were satisfied with the evidence available that the respondent sold the land in dispute to the appellant. It is common knowledge that a higher court will not normally interfere with a concurrent finding of fact of the courts below unless there are sufficient grounds.

In the instant case the High Court interfered with the concurrent findings of fact of the courts below. The crucial issue is whether there were sufficient grounds which justified the High Court in interfering with the findings.

The High Court interfered with the concurrent findings of fact of the courts below for the following reasons:-

One, that the sale agreement between the appellant and Omar Kombo Mkadam and Vuai Rajabu Pandu was doubtful in view of the dates shown thereat, and that the explanation on the discrepancy in dates given by the appellant was not satisfactory.

Two, that the suit by the respondent was not time barred.

Three, that the appellant failed to establish on balance of probability that he bought the shamba in dispute in view of some discrepancies in the testimony of the appellant's witnesses, especially Vuai Rajabu Pandu (DW2), Simai Kombo (DW3) and Asha Chungu Bandala (DW4).

Four, that it was wrong to hold that the respondent had no locus standi merely because he had no power of attorney from his co-owner Vuai Khamis Vuai.

We have carefully considered the reasons given by the learned judge. With due respect to the learned judge, we partly agree with him and partly disagree with him. We agree with him in the following aspects:

First that the suit by the respondent was not time barred. We take the effective date to be when the appellant recognized the respondent to be the owner of the land and paid him the purchase price of 200,000/=. This was after 1990 when the respondent returned home from where he had been for many years.

Second, that the respondent had locus standi when he instituted the suit. But even with these agreed, the same cannot justify interference with the concurrent finding of the courts below.

We do not agree with the learned judge on the other grounds in view of the evidence on record.

We now turn to the grounds of appeal raised by the appellant. It is common knowledge that this Court deals mainly with points of law. In view of the reasons stated above we are satisfied that there was ample evidence to support and justify the decision of the courts below that the appellant bought the "shamba" in dispute from the respondent. Also in instituting the suit the respondent had locus

standi as the heir of the estate (shamba) after the death of his father, and his young brother the late Vuai Khamis Vuai did not complain about it.

On whether the learned judge should have ordered the evaluation to be made by either a Government Valuer or to be made according to market value, we do not think that it is necessary to decide it in view of the decision we are proposing to make. As observed above, there were no sufficient grounds to justify the High Court to interfere with the concurrent finding of fact by the courts below.

In the event and for the reasons stated, we allow the appeal with costs.

DATED at ZANZIBAR this 26th day of November, 2004.

J. A. MROSO
JUSTICE OF APPEAL

J. H. MSOFFE
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

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

(S. M. RUMANYIKA)
DEPUTY REGISTRAR