IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: RAMADHANI, J.A., MROSO, J.A., AND NSEKELA, J.A.)

CIVIL APPEAL NO. 84 OF 2004

JACKSON REUBEN MARO..... APPELLANT
VERSUS
HUBERT SEBASTIAN..... RESPONDENT

(Appeal from the judgment of the High Court
Of Tanzania at Moshi)

(Mrema, J.)

dated the 3rd day of December, 1999
in
(PC) Civil Appeal No. 34 of 1998

JUDGMENT OF THE COURT

MROSO, J.A.:-

The respondent brought action against the appellant and one Stanley Reuben Maro in 1995 in the Urban Primary Court at Moshi claiming ownership of a two-acre piece of land valued at shillings two million. He lost but appealed successfully to the District Court at Moshi. This time round the appellant who was the losing party, Stanley having conceded to the claim, was aggrieved and appealed to the High Court at Moshi where he lost. Undaunted he has appealed to this Court.

The background to the appeal is that the parties are blood relatives, Sebastian Maro, now deceased, was a cousin of the appellant and Stanley a half-brother of the appellant. One Saul and his brother Sebastian Maro were the owners of the disputed piece of land. Prior to 1974 they are said to have allowed the appellant and Stanley to look after the subject land. From 1974 onwards versions of the appellant and the respondent differ whether the appellant remained a caretaker of the disputed piece of land or he bought it.

According to the respondent, on 23 May, 1974 Saul and Sebastian agreed in writing – Exhibit 'A' – to leave the disputed land in the care and use of the appellant and Stanley on payment of shillings 2,500/= annually as compensation for the use of it. Subsequently Sebastian, the father of the respondent, died and the annual payments ceased. In 1988 the respondent tried to take the matter to a clan meeting but the appellant refused to attend that meeting. In 1995 he filed the court case to assert his inherited ownership of the shamba after Saul who survived Sebastian made a will in 1986 reiterating that the appellant and Stanley were mere caretakers of the shamba. The document of 23 May, 1974 and the

alleged will, Exhibit "B", by Saul were tendered in evidence by the respondent.

The appellant has a different story. According to him, the document – Exhibit 'A' – of 23 May, 1974 evidenced the sale by Saul of the disputed shamba to the appellant for shillings 2,500/=. He paid the purchase price in installments from 23rd May, 1974 till 8th November, 1975 when he completed payment of shillings 2,500/= and the shamba became his property from then onwards. He disputed the validity of the alleged will (Exhibit 'B').

The High Court, Mrema, J. found that the appellant and Stanley Ruben Maro were only allowed the use of the shamba upon making an annual payment known in Kichaga as "masiro". The High Court also found that there was a valid will, Exhibit 'B', by Saul in which it was again emphasized that the appellant and Stanley were caretakers of the shamba and were only allowed the use of it on payment of the annual "masiro". The High Court further found that the document – Exhibit 'A' – contradicted Exhibit 'B' – the alleged will

and doubted its authenticity because, according to him, the installments amounted to 2,800/= instead of Tshs. 2,500/=

The appellant through Mr. Jonathan, learned advocate, filed four grounds of appeal and Mr. Jonathan urged them at the hearing. The respondent, a layman, appeared in person and unrepresented. He filed a notice of grounds for affirming the decision but he did not argue the grounds but merely responded to the grounds of appeal.

In the first ground of appeal Mr. Jonathan criticized the High Court for dismissing the document, Exhibit 'A', for the reason that the total of installments was shillings 2,800/= instead of shillings 2,500/= which should have been the correct total.

We are satisfied that the learned High Court judge erred in his additions. According to the document, on 23/5/1974 shillings 300/= was paid; shillings 700/= on 8/11/1974, shillings 500/= on 19/3/1975 and, finally, shillings 1,000/= on 8/11/1975. The total payment according to our arithmetics, is shillings 2,500/=, not shillings 2,800/= as computed by the learned judge. Exhibit 'A' could

not be faulted on that score, therefore. Furthermore, although the first part of the document which was written on 23rd May, 1974 stated that the shamba would continue to be under the care of the appellant and Stanley as had been the case in the past, when the last installment of shillings 1,000/= was paid the document says –

> "sasa aendelee kuotesha migomba na mengineyo"

The reason was given thus –

> "Bwana Jasson amemaliza deni lake la shilingi 1,000/= ... katika 2,500/= ..."

That is to say, the appellant could then grow permanent crops on the shamba because he no longer owed any money to Saul. It is common sense that a mere caretaker cannot be free to grow permanent crops in a shamba. It is a person who claims ownership who can be free to grow any lawful plant in a shamba. The appellant claims that the Tshs. 2,500/= which he had paid to Saul was the sale price for the shamba. Before he completed payment ownership had

not passed to him, according to the document. He and Stanley remained as caretakers until full payment was made, hence the right to grow whatever plant or crop he wished. We are satisfied that indeed Exhibit 'A' was evidence that the shamba had been sold to the appellant and he now owns it. Since Exhibit 'A' was tendered in evidence by the respondent he could not be heard to disown it or to persuade the Court to doubt its authenticity, had he tried to do so. The learned High Court judge, therefore, had no cause to reject the document.

The High Court held that the appellant had conceded that the alleged "will" – Exh. "B" – was a valid 'will' which was made by late Sauli. The judge referred to the following words of the appellant in his evidence as indication that he accepted there was a valid "will". The appellant is recorded as having said –

> "Katika wosia huo nimetekeleza maagizo kadhaa kama shamba la Mkonga nimeligawanya kama ilivyotakiwa. Hata hilo shamba la Emmanuel nimempa hilo shamba kama Sauli alivyosema; Mimi ni mwenyekiti

wa ukoo; pia Sauli aliniachia mji wake niwatazame mjane.

Hayo mambo yote niliyatekeleza."

The disputed will – Exhibit B – among other things said:-

"--- Shamba la babu yenu lililoko Mwika liendelee kuangaliwa na baba zenu Jackson and Stanley wawe wanawapa fidia ya kile wanacholima hapo. Shamba lililoko Mkinga Bariki wagawane kati na mama yake Matowo. ---Jackson Maro ndie atakayekuwa mwangalizi huku nyumbani ---."

It appears, therefore, that indeed the appellant by his own admission carried out the instructions in the disputed will which is dated 26th August, 1986, a legitimate inference, despite the attempt by Mr. Jonathan to explain it away, being that Jackson accepted it as a valid will. The question, however, is whether that will was valid in law.

Wills under customary law, and that applies to Kilimanjaro Region, are governed by Government Notice No. 436 of 1963, the

Third Schedule which contains – "Sheria za Wosia". We will cite some of the pertinent provisions which are relevant to this appeal and to which Mr. Jonathan referred:-

(1) – (2) not relevant

(3) Wosia ushuhudiwe na mashahidi maalum ambao lazima wawepo wakati mmoja.

(4) – (5) not relevant

(5) Zaidi ya mashahidi maalum, mkewe (mwenyekutoa wosia) au wake zake waliopo nyumbani lazima washuhudie vile vile.

(6) to (18) – not relevant.

(19) Wosia ulioandikwa ushuhudiwe na mashahidi wanaojua kusoma na kuandika yaani mashahidi wasiopungua wawili (mmoja wa ukoo na mmoja mtu baki) ikiwa

mwenye wosia anajua kusoma na kuandika, na wasipungue wanne(wawili wa ukoo na wawili watu baki) ikiwa mwenyewe hajui kusoma na kuandika.

(20) ..... not relevant

(21) Mashahidi washuhudie sahihi au alama ya mwenye kutoa wosia, na wenyewe waweke sahihi zao katika wosia.

Now, all that there is in the disputed will a fingerprint of Sauli and the date. It mentions that several people were present but not the wife of Sauli and none of them signed the document. All the requirements cited above were not fulfilled. It was said that the wife of Sauli was no longer living with him and, therefore, she could not be expected to be present at the making of will. It is true the wife of Sauli with whom he had children had left him but he had another wife – Eliaichi w/o Sauli. She gave evidence as the second defence witness (SU2) at the trial. She said in her evidence that she was married to Sauli but had no children with him: –

"Sijazaa naye watoto. Ni mume wangu wa ndoa".

The document – Exhibit – 'B' is clear that Eliaichi w/o Sauli was not present when Sauli was making the purported will. It is apparent, therefore, that since the conditions (as cited) for making a valid will were not complied with, no valid will was made by Sauli and his purported will was of no legal effect. The High Court, therefore, erred in considering it to be valid.

The third ground of appeal is that the High Court erred in law in not holding that the doctrine of adverse possession did not apply to the case and that the suit was not barred by limitation.

Mr. Jonathan argued that adverse possession would be reckoned from 1975 when as per Exhibit 'A' Sauli said "sasa aendelee kuotesha migomba na mengineyo" and that indeed Jackson proceeded to plant permanent crops on the disputed shamba. But with respect, that would not be evidence of adverse possession. In

adverse possession there must be an act or conduct on or relating to the property which is inconsistent with the rights of the owner and which is not authorized by the owner. The words cited by the learned advocate are to the effect that the owner authorized the planting of permanent crops for the reasons already explained earlier in this judgment. As for the failure by the appellant to pay the "masiro", no specific date is given as to when that stopped although if, according to the respondent, he querried the appellant in 1987 or 1988, by 1995 when he filed the case in court only 7 years had elapsed, so the respondent could not be said to be time barred. We dismiss that ground of appeal.

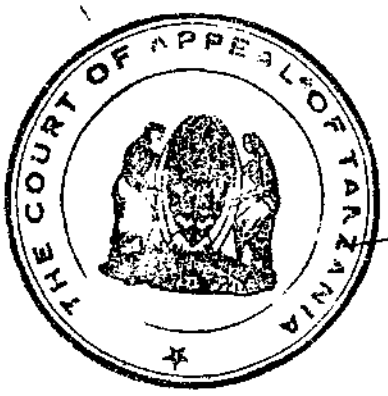
Finally, there was the issue about the payment of rent – "masiro" for use of the suit land. It was the evidence of the respondent that both the appellant and Stanley were required to pay "asante" annually for the use of the shamba and that payment stopped after the death of his father.

Under section 4 of the Customary Leaseholds (Enfranchisement) Act, No. 47 of 1968 and as subsequently

amended, all land which was held by a tenant was enfranchised on the effective date, that is to say on the date the Act came to effect in the case of what was then known as the West Lake Region, which was 1st August, 1969, and in the case of Moshi District, according to GN. No. 263 of 1969, on 17th October, 1969. Under section 5 of Act No. 47 of 1968 "enfranchised land shall vest in the person who, immediately before the effective date, held the land as tenant ...". The question to be answered now is whether the suit land in Moshi District was held by the appellant as a tenant immediately before the effective date, that is to say, before 17th October, 1969.

The evidence in the record does not disclose the exact date when the appellant started to hold the shamba as a tenant. We are therefore unable to say if section 5 of Act No. 47 of 1968 applied to the shamba with regard to the appellant. We would dismiss the fourth ground of appeal. But considering that we have already found that the appellant bought the suit land by 8th November, 1975 we hold that the disputed shamba is owned by the appellant. We allow the appeal with costs on that ground.

GIVEN AT ARUSHA this 15th day of July, 2005.



A.S.L. RAMADHANI
JUSTICE OF APPEAL

J.A. MROSO
JUSTICE OF APPEAL

H.R. NSEKELA
JUSTICE OF APPEAL

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

(S.M. RUMANYIKA)
DEPUTY REGISTRAR