

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

(PC) CIVIL APPEAL NO.24/1996

(FROM CIVIL APPEAL NO.13/94 OF RUFIJI DISTRICT

COURT AND ORIGINAL CIVIL CASE NO.5/94

OF IKWIRIRI PRIMARY COURT)

MALIKI SAIDI MPENDU APPELLANT

VS.

ATHUMAN SAID MPENDU.... RESPONDENT

JUDGMENT

KALIGEYA, J:

Having lost in both courts below (in the Ikwiriri Primary Court and Rufiji District court) Maliki Saidi Mpendu, appellant, tried his luck with this court. His unsuccessful suit and subsequent appeal are based on a claim for vacant possession of a house which belonged to his deceased father, and allegedly bought by him in 1974 with the consent of all the 8 surviving children (including himself) and 2 widows (including his mother). The centre of dispute seems to be a narrow one, for, both parties are agreed that after their father's death a general consensus was reached by all the beneficiaries that the house in question should be disposed off and have its proceedings defray debts left behind by the deceased and which included unpaid dowry of shs.100 for one of the widows. The controversy is centred on who bought the said house - whether it was Maliki Saidi Mpendu (Appellant)

or Athuman Said Mpendu (Respondent), who are brothers. Both courts below consistently held for the Respondent. The matter revolves around the credibility of witnesses who are all clan members.

On appeal to this court and after reassignment to me, Mr Msirikali holding brief for Capt. Sanze argued for the Respondent while Maurygo holding brief for Mr Magesa continued submission's already commenced by the latter before my brother, Kaji, J (to whom the matter was originally assigned before going on transfer) for the Appellant. The Appellants' arguments which were strongly resisted by the Respondent, among others, have it that the first appellate court erred in holding that the claims over the suit premises were time barred and also for failure to evaluate the evidence.

Unfortunately, the above notwithstanding, regard being had to the defect apparent on the primary court record the merits and demerits can not be discussed at all by this court. The trial court violated Rule 3 of the Magistrate's courts (Primary Courts) (Judgment of Court) Rules, 1987 (GN 2 of 1984). This defect escaped the attention of the 1st appellate court; the learned counsel, and even this court when the appeal was being heard. Had it been discovered earlier, great energy and time put into this matter would have been saved let alone having it expeditiously disposed of.

The typed proceedings of the trial court show that after the close of the case for the defence the trial magistrate proceeded to sum up the evidence to the assessors and clearly entitles what he did,

"Mwongozo kwa washauri".

This sum-up covers four full typed pages of full scape size paper, after which, the assessors gave their opinion individually though reaching a concurrent finding. There after the magistrate composed judgement supporting the view reached by the Assessors hence the throwing out of the present Appellants' claims.

What the trial court followed was the reigning procedure before the coming into force of GN No. 2 of 1988. Thereafter the procedure changed completely. What the law currently is, for the benefit of the trial court and all those who may care to note, can best be put by quoting Rule 3 in full. The said rule, which is mandatory, provides as follows:-

- "3 (1) Where in any proceedings the court has heard all the evidence or matters pertaining to the issue to be determined by the court, the magistrate shall proceed to consult with the assessor present, with the view of reaching a decision of the court.
- (2) If all the members of the court agree on one decision the magistrate shall proceed to record the decision or judgement of the court

which shall be signed by all the members.

(3) For the avoidance of doubt a magistrate shall not, in lieu of or in addition to, the consultations referred to in sub rule (1) of this rule, be entitled to sum up to the other members of the court".

This being an incurable irregularity the proceedings, judgment and orders of the two lower courts cannot be allowed to stand as they are a nullity. They are so declared. The matter to be heard afresh before another magistrate and another set of Assessors. As the defects were occasioned by the court no order is made as to costs.

L.B. Kalegeya

JUDGE.

Delivered on..✓

21/12/98