

IN THE HIGH COURT OF TANZANIA  
AT DAR ES SALAAM

PC. CIVIL APPEAL NO. 64 OF 2000

SALUM HUSSEIN . . . . . APPLICANT  
versus  
RAPHAEL MJEMA . . . . . RESPONDENT

J U D G M E N T

Manento, J.

Salum Hussein had bought a piece of land at a place called Mbagala Kiburugwa. He bought it way back in 1994, on 16/4/94 from the late Ngaza Saidi. The measurement of the plot was not stated except the permanent crops which included six coconut trees, one "Mustafeli" and one stump of bahaba trees. That sell was purported to have been witnessed by Halfani, a police officer for the purchaser Salum Hussein who testified as PW1 at the primary court and Selemani Shabani for witnessed the sale by Ngaza Saidi Musa Magenge DW2 witnessed the sale as a ten cell leader.

Sometimes in 1999 Salum Musa, the appellant saw the respondent Raphael Mjema developing part of the area he believed he had bought. He instituted civil proceedings at Mbagala primary court for recovery of his land which had been trespassed by the respondent. On hearing the case, the court reached a unanimous decision that the land which Raphael Mjema was developing was not part of the land the appellant had bought from the late Ngaza Saidi, but Raphael Mjema had bought it from the daughters of the late Ngaza Saidi who were the beneficiaries of that land, the property of their late father. The appellant was not satisfied by the decision of the primary court and so he appealed to Temeke District Court where the appeal was dismissed with costs. The District Court had believed the evidence of Musa Magenge who was the ten cell leader who witnessed the sale of the land by Ngaza Saidi to the appellant and the person who knew the boundaries and that the area sold to the appellant never exceeded one fruit tree called "mfanesi". The respondent was declared to lawful owner of that plot, sold to him by the heirs of the said Ngaza Saidi. Then he felt again agrieved by that decision of the District Court, hence this second appeal.

The appellant in this appeal is represented by Mr. Muyovelwa learned counsel while the respondent is represented by one Julius Ndyanabo, learned counsel. The learned counsels urged this appeal by way of written submissions.

There is only one ground of appeal filed in the following words:  
"That the learned District Magistrate erred in law for upholding the judgment of the trial primary court magistrate who clearly failed to properly direct herself on the evidence adduced on the issue of ownership of the disputed land."

The main issue here is, as I see it, whether the land sold to the appellant by the late Ngaza Saidi included that piece of land sold to the respondent by the heirs of the said Ngaza Saidi. I say so because both the appellant and respondent are claiming to have bought the land, which formerly belonged to the late Ngaza Saidi, but sold by two different personalities, being Ngaza Saidi himself and his daughters after his death.

The learned counsel for the appellant urged in his first point that there was no evidence that any of the children of the late Ngaza Saidi had been granted the probate letters of administration in respect of the said late Salum Ngaza. Before I proceed, I would like first to keep the records of the learned counsel for the appellant that the name of the original owner of the land is referred to as Saidi Mgaza/or Mgaza Saidi and not Salum Mgaza/Ngaza. Secondly and more important the learned counsel is informed that there is nothing in law called probate letters of administration. There is a difference in use in law of the words probate and letters of administration. I need not go in conducting a lecture on these two words as they are not issues before me to determine. Secondly there was no issue before the District Magistrate or any other court to determine as to whether the children of the late Saidi Mgaza had the capacity to dispose of the estate left to them by this late father or not. The undisputed evidence is that the three daughters of the late Saidi Mgaza were the heirs of their father's estate and that one of them, Mariam Mgaza testified before the primary court that they had sold the part of the land (which was not sold by their father) to the respondent, Raphael Mjoma.

..../3

She testified as DW4. If there was any dispute among the beneficiaries of the late Salum Mgaza, then the issue of grant of letters of administration would be relevant, otherwise, it is irrelevant in this appeal.

The learned counsel submitted further that there was no sale agreement between the heirs of the late Salum Mgaza and the respondent solely because there is no written sale agreement. The learned counsel did not prove its fortify his argument with either statute or decided case which invalidates the disposal of land held under customary law if the sale agreement is not reduced into a written agreement. I know of no such mandatory provision of any law or decided case. However, there is clear evidence of the respondent, Raphael Mjema that the land in dispute had been sold to him by the heirs of the late Saidi Mgaza, a fact known by Musa Magege (sic) a ten cell leader of the area and the sellers as evidenced by the evidence of Mariam Mgaza SU4. Musa Magege SU2 had told the primary court magistrate that he was present when the deceased sold his land to the appellant as well as when the heirs of the said Saidi Mgaza sold the remaining part of the land to the respondent. That was a direct evidence by a witness who witnessed the two sale transactions to two different buyers on two different parts of the land, though it all originally belonged to the same person, Saidi Mgaza, before he died.

The learned counsel for the appellant has called upon this court to discredit the evidence of an eye witness for no good reason. Musa Magege had been very thorough in his evidence that the piece of land sold to the appellant ended at a "mfenasi" and that beyond that was the place sold to the respondent. This evidence was also supported by the finding of the court itself on visiting the locus in quo when it found the boundary of the appellants plot demarcated by (makuti) coconut leaves/branches made as a front fence of the appellant's house. As said earlier and repeated by the learned counsel for the respondent, Musa Magege SU2 had been a fair and neutral witness in the name of a ten cell leader so much that it cannot be prudent to discredit his evidence on oath before the trial court.

..../4

The whole evidence before the trial court showed that the land sold to the appellant is not the same which was sold to the respondent. The respondent's land ended at the road and it borders that of the appellant at a place where there was a tree called mfenesi. The land sold to the appellant was behind or it ended at the "mfenesi" and not more than that. This leads me to the following conclusion.

That the respondent lawfully bought a piece of land sold to him by the heirs of the late Saidi Mgaza, that Saidi Mgaza had sold land to the appellant not beyond the "mfenesi" tree and thirdly that the heirs of the said Saidi Mgaza had the capacity to sell the estate of their late father as they were the beneficiaries. Both the primary Court and the District Court were correct in dismissing the plaint and appeal respectively. I also dismiss the appeal before me as it has no merit at all. It is therefore dismissed with costs.

A.R. Manento

JUDGE

1/3/2001

Coram: Mutungi, DR

For the Appellant - Mr. Myovela

For the Respondent - Present in person

Manumbu (Mrs)

Court: Judgment read this 1/3/2001 in court in the presence of counsel Myovela for the appellant and the respondent in person read before F.S.K. Mutungi, DRIC.

F.S.K. Mutungi

DEPUTY REGISTRAR

1/3/2001