IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM
PC CIVIL APPEAL CASE NO 41 OF 2003

WILFRED K. MWANGAMBA .....APPELLANT

VERSUS

SELINA MESHACK SOLOMON.....RESPONDENT

JUDGMENT

MASSATI, J

The facts giving rise to the present appeal can be summarised as follows. One person called SAMSON SIWALE had decided to settle at Mikumi Minor Settlement, Kilosa district since the early 1960's He managed to acquire two houses one at the nearly suburb of Kitoma and another at Mikumi Township and also several plots of land within Mikumi area.

SAMSON SIWALE (herein after referred to as "the decessed") had no sibling of his own, but was living with his sister's sons, MESHACK SIWALE and ANDERSON SIWALE. MESHACK is the father of SELINA, the Respondent SAMSON SIWALE died intestate sometime in 1974. Before his death however he had received a guest from their home called LACKSON MWANGAMBA his tribesmate; and a brother of the Appellant. The deceased showed him a place where he rented for his carpentry workshop.

Upon his death one GASPAR NJOVU was elected as a caretaker of the deceased's properties on behalf of SELINA (the Respondent) who according to the records, the deceased had nominated as the heir) and apparently also because MESHACK and ANDERSON were living far away from Mikumi. The said GASPER NJOVU also expired in 1987 and when MESHACK and ANDERSON could not also surface the properties of the deceased were left in the hands of NJOVU's son CLEMENT NJOVU who was later ordered by the Mikumi Primary Court to hand over the functions of a care taker to LACKSON MWANGAMBA who was to take care of the house pending an appointment of an administrator of the estate of the deceased. This was shown in a joint memorandum in writting signed before the primary court magistrate of Mikumi on 5/3/79.

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On 18/3/96 an application for letters of administration of the deceased's estate was filed by one ILLUMINATA CHALE the mother of the Respondent. It was Civil Case no 2 of 1996. The application was not opposed but the primary Court took a total of 4 witnesses for the applicant. On 14/3/2000 the Court appointed ILLUMINATA CHALLE as the administratix of the deceased's estate. This marked the end of the application for the administration of the estate of SAMSON SIWALE.

On 30/7/2001, SELINA MESHACK Solomon filed a suit Civil case No 1/2001 against the Appellant for his eviction from one of the houses belonging to the estate of the deceased; in which the Respondent was the beneficiary/heir. When he was called upon to sign against his plea in the Court file the Appellant refused to do so. He was therefore ordered to be kept in custody until 2/8/2001 when he was summarily charged with contempt of court contrary to section 114(f) of the penal code. He was convicted and sentenced to pay a fine of shs 10,000/= or suffer 6 months imprisonment. As he had already indicated his mistrust to the trial magistrate, a new magistrate was appointed and proceeded to hear the civil case. Apparently the appellant was resisting the eviction because he also claimed some inheritance rights over the dispute house tracing his title from LACKSON MWANGAMBA his brother. The trial Court found for the Respondent on 10/8/2001.

The Appellant filed an appeal to the District Court against that decision. It was civil appeal No 1 of 2001. That appeal was dismissedby the District Court on 3/7/2002. Aggrieved he has come to this Court with 14 grounds of appeal. Apparently the Respondent was duly served through Mikumi Primary Court on 10/5/2003 ordering her to appear on 18/9/2003. She did not appear. So I allowed the Appellant to present his appeal exparte. In his submission the Appellant said he had nothing to add over his grounds of appeal, but wished to emphasise that the deceased's clan, and the clan had never met to choose an administrator of the estate of his grandfather SAMSON SIWALE.

Of the 14 grounds of appeal, I find that only the 13th and the 14th grounds touch on civil case no 1 of 2001 and Civil Appeal No 1 of 2001. The rest are based on the decision of the Primary Court in Civil Case No 2 of 1996.

He had also sought to appeal against that decision in his consolidated memorandum of appeal to the district Court and has done the same in his present memorandum of appeal before this court.

After carefully looking at the records of the lower courts, I have come to the firm opinion that the Appellants appeal emanating from the decision of the primary court in Civil Case No 2/96 must fail because the Appellant had never been a party to those procedings and under section 25 (1) (b) of the Magistrates' Courts Act 1984 only a party to the proceedings has a right of appeal. I am fortified on this view by the decision of this Court in BARTHOLOMEO ALBERT MUTAGUBWA (1970) HCD 102. The appeal to challenge the decision of the primary court in Civil Case no 2 of 1996 is therefore in competent and those grounds are therefore accordingly struck out. If the Appellant had some grievances in the appointment or administration of the deceased's estate his remedy lay in applying to the same court for revocation under paragraph 2(c) of the fifth Schedule to the Magistrates Courts Act 1984 and not to appeal.

Against the decision of the trial Court in Civil Case No 1 of 2001 a complaint was made before the district court that the Appellant was illegally convicted and sentenced to a fine of 10,000/= The second complaint is that one of the assessors ie one RASHID MANEPA had given evidence for the Respondent and then sat and deliberated as an assessor. The learned District Magistrate ignored those complaints on appeal. I think the learned magistrate misdirected himself in law. In the first place the Appellant was charged with and convicted of the offence contrary to section 114 (1) (f). That section reads:

> Any person who:
> (f) attempts wrongfully to interfere with or influence a witness in a judicial proceeding either before or after he has given evidence in connection with such evidence:

The main ingredient in this offence is interference with a witness. In thepresent case the trial court found him so guilty because the Appellant had refused tosign his plea. That had nothing to do with interference with a witness. Therefore the ingredients of that offence were not proved and I agree with the Appellant that his conviction and sentence were illegal. The first appellate court should have reversed this decision.

The complaint against the same person appearing as a witness for the Respondent and sitting as an assessor is founded on principles of natural justice. The assessor RASHID MANEPA could not have acted as he did both a witness and an assessor. By doing so, the assesor, himself now being part of the Court violated the rules that no one should sit in judgment in his own cause and that against bias. These are very basic rules of natural justice, and their breach has always been held to have led to a miscarrage of justice. If I were required to cite any authority on this point I would call in aid the case of V BARNSLEY METROPOLITAN BOROUGH COUNCIL EXPARTE HOOK (1976) 3 All ER 452 cited with approval in the decision of this court in JIMMY DAVID NGONYA v NATIONAL INSURANCE CORPORATION LTD (1994) TLR 28. The trial and decision of the trial court in civil case no 1 of 2001 was therefore vitiated by bias.

In the result this appeal is partly dismissed and partly allowed. That part of appeal originating from Civil Case no 2/96 is dismissed with the consequence that the decision of the trial court remains intact. However that part of appeal arising from civil case no 1/2001 is allowed as the trial and decision of that court is vitiated by bias (following one of the assessors appearing both as an assessor and as a witness). There was no decision in law which could properly found an appeal in the District Court. The District Court should not therefore have confirmed that decision. It should have upheld the Appellant's appeal on that ground as I hereby do. The decisions of the trial court in that case and that of the District court are therefore quashed and the Appellant is to be refunded his shs 10,000/= he paid as a fine.

The order of eviction is also quashed, but the Respondent is at liberty to start de novo before another magistrate and another set of assessors.

There shall be no order as to costs.

Order accordingly.

S.A. MASSATI

JUDGE

4/11/2003.

Judgment delivered in chambers on the 4th day of November 2003 in the presence of the Appellant and Mr Morema on intern from Mkali & Co, Advocates for the Respondent.

S.A. MASSATI

JUDGE

4/11/2003.