

IN THE HIGH COURT OF TANZANIA

AT MBEYA

(PC) CIVIL APPEAL NO. 22 OF 2002

(From Civil Appeal No. 47 of 2001 of Mbeya
District Court - Original Civil Case No. 60 of
Mbeya Urban Primary Court)

FIKIRI TANGANYIKA APPELLANT

Versus

RECTON MWANANGWA RESPONDENT

JUDGEMENT

MREMA, J.

Fikiri Tanganyika and Recton Mwanangwa are the Appellant and Respondent in this appeal, respectively. Recton (Respondent) instituted Civil Case No. 60/2000 in the Urban Primary Court of Mbeya, at Mbeya, against Fikiri (Appellant) for recovery of 18 acres of Land which the Appellant is alleged to have seized illegally from the Respondent. The Respondent's complaint further alleged that the Appellant after trespassing into the said Land uprooted the trees planted thereon and then new boundaries were demarcated in the absence of the Respondent. Recton lost the suit but on appeal to the District Court of Mbeya, at Mbeya, the decision of the Primary Court was upset. In turn, Fikiri did not agree with the findings and Order of the appellate district court, hence this appeal.

Two grounds of appeal by Fikiri are the bone of contentions before this court. These grounds assert as follows:

- (1) That the Learned Resident Magistrate erred in law and fact for disregarding the evidence of the chairman of Mwabowo and other witnesses who testified that the land in dispute and the trees planted therein were the properties of the village.
- (2) That the Learned Resident Magistrate erred in law and fact when he decided for the respondent in that the appellant appeared as a party in the matter wrongly while the defect is curable.

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Both the parties are legally unrepresented. The learned appellate Resident Magistrate was satisfied on the evidence of the Respondent (Plaintiff) and his witnesses that the trial primary court's judgement is against the weight of evidence on record on the question as who is the legitimate owner of the shamba in dispute. At pages 1 and 2 of the typed judgement the learned Resident Magistrate made the following observation, and I quote ipsi ssima verba, as follows:-

“The evidence of the appellant was clear that he had inherited that piece of Land from his father Mwanangwa Sangawale and has been using it from 1988 until 2000 when the respondent trespassed it. The appellant explained how the respondent seized it, uprooted the trees and demarcated boundaries and that such an exercise was done after the appellant was locked up by order of the Ward Tribunal at the instance of the respondent who had sent the militiaman to apprehend the appellant and have him locked up.”

It was not disputed in evidence that when this case started the Appellant (Defendant) was the Chairman of Mwabowo village within which the disputed shamba situates. The observation quoted above is supported by the testimony of one of the villagers Inohamed s/o Tentema (PW4). The Appellant Fikiri did not deny that asserted fact of arresting the Respondent, locking him in the Ward Lock-up. While he (PW1) was behind the bars DW1 (Appellant) and his group went into the said Land, uprooted trees already grown on the land and also disturbed the boundaries by putting new ones.

Now, the question is, if DW1's intervention was with clean hands why did he assert his powers as the village chairman to lock-in the Respondent instead of taking appropriate legal action? If the land belongs to the villagers why DW1 did not convene the Village Council to address the complaint. of PW1 in the latter's presence? Or, alternatively, if it was PW1 who had criminally trespassed into the said Land against the interests of the villagers why was the Respondent not criminally prosecuted, if civil action by the villagers was not their priority? Thus, in my opinion, the

conduct of the Appellant tends to point some guilt suspicion around his personality as the village chairman. It is in the same vein Mr. Dyansobera, Learned Magistrate, doubted the credibility and integrity of the village chairman Fikiri Tanganyika, whether his apparent forceful act was for the interest of himself or for the Mwabowo Village, also whether he had the authority or sanction of the village to take the action he did. DW1's testimony and the evidence of Wachawaseme Sikumalike (DW2), Samson Mlangalila (DW3), Elia Mwasanga (DW4) and Asumani Chelewa (DW5) is absolutely silent as to what happened on 4/5/1999.

But to the contrary PW2, PW3, PW4 and PW5 who testified strongly in support of the Respondent's case are also the villagers of Mwabowo. Samson s/o Ndegeulaya (PW5) was once "balози na Mwenyekiti wa kijiji". But all these witnesses who were part and parcel of the village had a unison stand and testified in both examination in chief and cross-examination to the effect that the suit Land is the property of the respondent, the latter having inherited it from his late father.

Coming to the first ground of complaint in the Appellant's Memorandum of Appeal, on the strength of the evidence on record can it be answered positively that the district court ~~disregarded~~ the testimonies of DW1, DW2, DW3, DW4 and DW5 and gave judgement against that weight of evidence? A thorough examination of that evidence is necessary.

The Respondent (PW1) and his witnesses did not dispute the fact that on the disputed Land there is a small portion of Land which his father had allowed the villagers through the retired Chairman, one Samson, to plant trees. It is also in evidence by PW1 and his witnesses that Samson was warned by PW1's father not to plant trees beyond the village road (as shown in the sketch map) and that the villagers were not to own the parcel of Land but their entitlement was only to harvest the trees. It is not also disputed that the village built a school to conduct adult literacy.

The case for the Appellant at the trial court was that the village handed over the shamba in dispute to him to supervise its use and cultivation. They grew pyrethrum thereon as property of the village. They also constructed a canal from river Mawilazuru to the said shamba. He went on to testify:-

"Kazi hiyo alinipa meneja Mbeyela wa pareto pamoja na Mwenyekiti wa Kijiji aliyesimamia kazi. Baada ya kuacha kulima pareto tukaanza kupanda miti. Mwaka 1981 miti ililiwa na panya. Mwaka 1982 tuka-panda miti mingine".

As stated above, PW1 did not object to the fact that some trees belong to the Village because they were grown by the former village chairman on compromise with PW1's father. Although DW1 (the appellant) testified as the Village chairman, nothing came out from his mouth as to how much acreage of Land is owned by the village and how much of that land is planted with trees belonging to the village. There is more evidence by the appellant, upon cross-examination by PW1, to the effect that PW1 was sued to the WARD TRIBUNAL in 1989 when the respondent, ^{allegedly} trespassed into the Land and tilled it. But the appellant did not go further to tell the trial court what were the results of the complaint to "BARAZA LA KATA". I would then ask if there was such complaint to the Ward Tribunal by the village against the respondent in 1989, why that decision of the Tribunal not referred to in the trial court? Or, why the dispute should crop up again in 1999 after 10 years of the alleged complaint to the Tribunal?

I have attempted to read the evidence of WACHIAWASEME SIKUMALIKE (DW2) quite meticulously to see if there is any tangible corroboration to DW1's testimony. This witness simply gave a general statement as follows:-

"Nakumbuka eneo hilo lilijengwa jengo la elimu ya watu wazima. Tumesomea pale. Baadaye tukahama tukaenda operesheni Vijiji."
(emphased by me).

The underlined words are to show that the villagers moved out of the area.

because they knew that the Land was not theirs. It is not also tangible evidence for DW2's statement that "Hatukupata taarifa yoyote ya kuwa eneo lile lina mtu yeyote". Also the testimony of Danson Mlangalila (DW3) appears to be guess work. He denied in cross-examination as follows:-

"Sijui kama unalima pale. Miaka mingi sijui kama una shamba".

That quoted piece of testimony contradicts DW1's testimony who told the trial court that in 1989 PW1 entered into the said disputed shamba and the village referred the matter to the Ward Tribunal. If the shamba really belongs to the villagers how then PW1 could till the Land from 1988 when his father died to 1999 when the trouble started without the villagers noting their trespasser for a period of ten years? As these questions remain unanswered, the only inference is that DW2 and DW3 are not witnesses of truth but tailored witnesses to accommodate DW1's interests. The evidence of Asumani Chelewa (DW5) does not assist the Defendant's case either because if the disputed land was set aside exclusively as the property of the village since 1982, it was not explained in evidence as to why there was no action taken against the respondent (PW1) when he started making use of the Land since 1988 when his father died to 1999 when this problem arose. He claimed that the whole village was involved regarding the allotment of the disputed shamba to the village. This remains a bare statement because the purported document headed: "MHUTASARI WA MAKABIZIANO KWENYE MKUTANO WA SERIKALI YA KIJILJI NA MABAROZI WA MASHINA ULIOFANYIKA 20/7/1992 KATIKA JENGO LA C.C.M. TAWI LA MWABOWO KATI YA MWENYENITI MPYA NA WA ZAMANI" (SIC), does not talk anything concerning the disputed shamba. The said document therefore, is a useless document as far as this case is concerned.

Having considered the grounds of appeal generally the way I have done, it only boils down to the effect that there is no material and justifiable ground to upset the judgement of the appellate district court. The Learned appellate Resident Magistrate properly reviewed the evidence adduced before the court of first instance and came to a correct and sound conclusion that

the disputed piece of land is the Legitimate property of the respondent, hence its allocation to a third party, namely, the Mwabowo Village, who was not a party to the proceedings in the primary court was not according to Law and, therefore, unlawful. I hereby confirm the judgement of the District Court and the decision of the primary court stands quashed. The Order of the district court setting aside the primary court's decree and any ancillary order consequent thereto is also re-affirmed. Costs of this appeal and in both the courts below to be borne by the appellant FIKIRI TANGANYIKA. Accordingly it is so ordered.



A.C. MREMA

JUDGE.

07/08/2003.

At Mbeya in the
absence of the parties.

A.C. MREMA

JUDGE

07/08/2003.