IN THE HIGH COURT OF TANZANIA

AT MBEYA

(PC) CIVIL APPEAL NO. 72 OF 2002

(Originating from Tukuyu District Court Civil Appeal No.16/2002 Kiwira Primary Court Civil Case No. 29 of 2001.)

JOSEPH MWANSELE ..... APPELLANT

VERSUS

ASEGELILE KAMILO ..... RESPONDENT

JUDGEMENT

MREMA, J.

This is a second appeal. The present Appellant JOSEPH MWANSELE successfully sued for recovery of a parcel of land from the Respondent at Kiwira Primary Court in Civil Case No. 29/2001. But on appeal to the District Court of Rungwe, at Tukuyu, the Respondent Asegelile won the appeal, which decision embittened the Appellant, hence the present appeal.

The historical background of this case can be summarized as follows. Going by the testimony of the Appellant (Plaintiff - PW1) it is apparent that PW1 did not know the boundaries of the said parcel of shamba until 27/7/2000 when he alleged to have been shown its boundaries by his junior grandfather (babu mdogo). His direct grandfather died in 1976. Then PW1 and his brother approached the Respondent (DW1) whom he allegedly was a very close neighbour to the piece of land in dispute and requested him to show them the boundaries between their parcel of shamba and that of DW1. But the latter, according to PW1, expressed his resentment and refused to show them. It is also PW1's testimony that as PW1 and his brother had been shown the boundaries they employed workmen to work on the piece of land by uprooting the stones. This action angered DW1 who intervened and told PW1 that the land was his property. The matter was referred to the village elders but reconciliation failed and PW1 had to call his junior grand-father Amani who

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resides in Mbeya. Amani, according to PW1, found DW1 to have encroached into the said disputed land and that he (Amani) warned DW1 to stop and quit the area. PW1 then planted flower plants (alama za maua) on the boundaries. But this did not solve the problem, according to PW1, because each one of them (PW1 and DW1) was claiming that the portion of land in dispute was his.

Amisisye Mwalyale (PW2) and John Masika (PW3) corroborated the testimony of PW1 to the effect that the piece of land in dispute was the property of PW1's grandfather. PW3 further confirmed that he was the one who also pointed out the correct boundaries to the parties.

On the other hand the Respondent contended that the piece of land in dispute was allotted to him by the Chairman of the ten cells one LEMS S/O KASANDA in 1970. He planted thereon bananas, baobao trees, and other big trees. He also bought a piece of plot on the south of the disputed shamba on which one Mwangetela had grown "milingoti" trees. DW1 also grew sugar canes. His son built a house on the disputed land but later he quited and went to build elsewhere. The house broke down but the foundation is still there. According to DW1, one Seleman was PW1's grandfather who owned an adjacent piece of land to that of DW1. The Respondent strongly denied that the piece of land in question belongs to PW1's grandfather (Selemani). By the time DW1 was testifying he had been on the land for 20 years without any interruption. It was just recently (in 2001) PW1 rose up and claimed that the said piece of land was his grandgather's.

In support of his case (i.e.- DW1's case) AMBILIKILE MWISENGELA (DW2) confirmed in evidence that DW1 had been in use of the said piece of land "miaka mingi sana". In cross - examination DW2, who is the ten cell leader of the area reiterated as follows:

> "SU alipewa eneo hilo na Lemsi Kasanda .....
> Lemsi alikuwa Mwenyekiti wa Kijiji. Sehemu ile
> ya upande wa juu ndiyo ya SU.1 ..... "

The trial court also visited the locus in quo and among the neighbours to the

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shamba in dispute was one ASUKENYA S/O SYABALO (CW2). Testifying as a court witness Syabalo informed the trial court that for many years in the past he saw the Respondent tilling the land.

I have taken the trouble to read both the judgements of the trial primary court and appellate district court.

I would first start with matters relating to the evidence on record. As rightly pointed out by the learned appellate district Magistrate the Appellant - Plaintiff never called his "babu mdogo" one Amani to confirm that he was the one who pointed out the boundaries to the said disputed shamba; and also whether it is true that DW1 had overstopped from his portion of his shamba on to PW1's shamba. PW1 gave no explanation why he did not call Amani whom he claimed was very much conversant with the said piece of land.

The second point relating to the facts of the case is that the trial court did not put into consideration the testimony of Ambilikile Mwaisengela (DW2) who confirmed in cross - examination to the effect that the piece of land in dispute was given to the Respondent (DW1) by the Village Chairman one LEMSI KASANDA. This latter testimony was cemented by the evidence of ASUKENYE (CW2) who undoubtedly told the court that the Respondent had been making use of the land for many years.

Even the testimony of John Masika (PW3) supports the fact that the Respondent had been on the piece of land for many years. We find this corroborative testimony in his evidence in examination in chief, as follows:-

> "Mwaka sikumbuki ulipoomba eneo kwa baba yangu. Wewe mara nyingi tulikuambia kuwa eneo hilo sio lako. Ukazidi kung'ang'ania kulitumia eneo hilo. Mdai wakati huo tunakukataza walikuwa bado wadogo" (sic).

The evidence does not show what age PW1 had attained when DW1 was allegedly stopped from tilling the said land. The evidence, however, shows that when PW1 testified on 9/01/2002 he was aged 27 years. The Respondent claimed that he stayed and worked on the suit land uninterruptedly for 20 years. PW1 then

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instituted this suit in 2001 - after a period of twenty years.

My diligent reading of the evidence on record has revealed that the Plaintiff's case is silent as when PW1's grandfather, or PW1's father left the suit land. It is only from the Defendant's case the court was told that the Defendant (Respondent) was allotted the piece of Land in 1970, which evidence was never challenged. But to the contrary most of the witnesses stated that the Respondent had been on the Land for a long time despite the fact that the parcel of land in dispute was once the property of PW1's grandfather. By simple arithmetic calculations, if we accept DW1's testimony, it would mean that DW1 stayed and made use of the land for not less than thirty (30) years.

This brings me to the doctrine of adverse possession or prescriptive right. This can best be clarified by citing the case of SHABANI NASSORO v. RAJABU SIMBA (1967) HCD, No.233, in which SAIDI, J, as he then was observed:-

> "(1) The court has been reluctant to disturb persons who have occupied land and develop it over a long period. "(T) he respondent and his father have been in occupation of the Land for a minimum of 18 years, which is quite a long time. It would be unfair to disturb their occupation ....."
>
> (2) For similar reasons, it would be unfair to give plaintiff a right to crops even if his father planted the trees" (emphasis provided by me).

From the underlined words, even if it were proved in this case, but which was not, that PW1's grandfather had planted permanent trees on the said land thirty years ago during the period DW1 had been making use of the land, he would be barred by the Law of Limitation to bring any action against the subsequent occupier.

In another similar case (BALIKULIJE MPUMAGI v. NZWILI MASHENGU (1968) HCD, No.20) Crosso, J, held:-

> "Both customary Law and equty favour the (defendant's) claim to be entitled to possession of the shamba".

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The same Learned Judge observed in MUNYAGA WAGOBYO v. MULINGAKATAMA (1968) HCD, No.7, that "Whatever the circumstances of defendant's original occupation, it would be "completely contrary to the principles of equity to deprive him of the rights which he has acquired to the (Plaintiff's) knowledge over his long period of occupation".

The circumstances of this case are distinguishable from the cases of KISEMA NDUTU Vs. MASHOLO MISHINGA (1968) HCD, No.8 and KASUNGA MWAKITALIMA Vs. KITINDISYA MAPATA (1968) HCD, No.210, whereby it was held that the doctrine of prescriptive right or adverse possession could not be invoked under the circumstances of those cases because 12 years had not passed since occupation thereof.

In the light of the above authorities, although this court is not the best forum as it was the trial court that had opportunity not only to hear the witnesses but also to watch and assess their demeanour in the witness-box, the trial court's decision cannot be sustained as it was arrived at wrong assessment of the evidence and none application of the relevant law befitting the circumstances of the case. For the reasons given in the judgement of the district court and in this court I find this appeal to have no merit and for that reason it must be dismissed with costs. Thus, the appeal is dismissed with costs in this court and in the courts down below.

The Petition of Appeal Cum Memorandum of Appeal also raises curious questions which I think must also be answered, if not clarified here.

The 1st ground is that the Learned District Magistrate erred in law and fact to hear the appeal which was filed out of time.

Answering this contentious ground, I am inclined to the view that if the Appellant was desirous to raise objection to the institution of the appeal outside the prescribed period of limitation he should have done so in the district court and not in this appellate stage. The record shows that one HENRY S/O ISSAH MWANSELE appeared for one Joseph Issah Mwansele - the present appellant. Henry Issah is the elder brother of the appellant.

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On 07/10/2002 the appellate district court directed Henry to either file Reply/Answers to the grounds of appeal, or look for his brother Joseph (appellant). The appeal in the district court was then adjourned to 15/10/2002. On this latter date Henry asked for adjournment for reason that he was suffering from stomach. But when the appeal was resumed on 21/10/2002 neither Henry nor his brother Joseph (Appellant) was present and no reason was supplied. The appeal was then heard ex-parte.

On the basis of those facts the Appellant had opportunity to object to the filing of the appeal on the account of being time barred but he did not. He therefore sat on his right and he cannot avoid the jurisdiction of that court to Challenge competency of the appeal in a higher court. Had he done so there and decision given against him then he could come on appeal if not satisfied. But he cannot deploy that Chicannery tactic. I dismiss that ground of objection on appeal.

The second ground of appeal also crumbles down. This is because the appellant's brother Henry attended court twice and then he disappeared in the thin air. For what reason did he appear if his interest was not to represent his brother Joseph (the appellant)? Since the Appellant's brother was entering appearance on his behalf and he had in fact requested the appellate district court to adjourn the proceedings because he was ill, the Appellant cannot now turn round to say that the appeal was heard without his notification. The Magistrate had even ordered Henry to look for the Appellant but instead Henry decided to appear in the place of Joseph. Thus I find this ground to hold no material substance. It is also dismissed.

The third ground is also frivolous and vexatious. It is true, as correctly viewed by the appellate Magistrate that the fact that the suit land in dispute was once the property of the appellant's grand-father that by itself did not convey title to the appellant. Evidence ought to be led to show that the shamba in dispute was inherited to the appellant either by will, or through grant of letters of administration. That is what the Magistrate opined but

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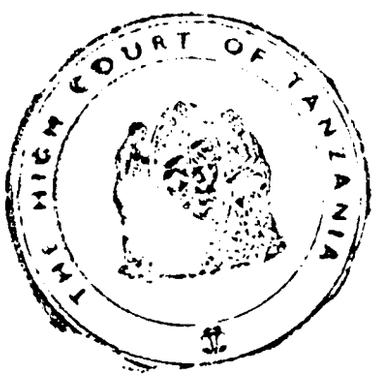
it was not a matter of evidence on record as claimed by the appellant.

In sum, this appeal is without substance and it is hereby dismissed with costs in this court and in both the courts below. Accordingly it's so ordered.



A.C. MREMA
JUDGE
20/06/2003.

Delivered at Mbeya,
in the presence of both
the parties.

Right of Appeal explained.

A.C. MREMA
JUDGE
20/06/2003.