

IN THE HIGH COURT OF TANZANIA
AT TABORA.

APPELLATE JURISDICTION

(Tabora Registry)

(PC) CRIMINAL APPEAL NO. 3 OF 2005

ORIGINAL CRIMINAL CASE NO. 14 OF 2004

OF THE DISTRICT COURT OF KIBONDO DISTRICT

AT KIBONDO.

BEFORE: P.Y. MAUMBA, Esq.; RESIDENT MAGISTRATE

1. GIDION s/o BIHABANSI	}APPELLANT (Original Accused)
2. NTAMA s/o BIHABANSI		

Versus

JOHN s/o BIHABANSI..... RESPONDENT
(Original Prosecutor)

JUDGMENT

18th July, 07

MUJULIZI, J.

The Appellants herein who are brothers were arraigned before the Kibondo Urban Primary Court on a Criminal Complaint, of forceful entry to a piece of land c/s 85 of the Penal Code. (Cap. 16 R.E. 2002). The

complainant then, who is the Respondent herein, was the accused persons half brother, JOHN s/o BIHABANSI.

Upon hearing the evidence at trial, the Primary Court dismissed the charge and acquitted the accused persons on grounds that there was no evidence of forceful entry and that the accused persons had a claim of right over the land in question. The trial Primary Court was of the view that the issue of ownership was to be determined in a Civil Court.

Dissatisfied the Respondent Appealed to the District Court. In its judgment the District Court was of the opinion that the decision of the Primary Court was wrong, and therefore proceeded to reverse it and substituted it with a conviction, on the alternative offence of Criminal Trespass c/s 299(a) of the Penal Code (Cap.16. R.E. 2002) and proceeded to discharge them conditionally for twelve months under section 38(1) of the Penal Code.

Secondly the 1st Appellant was ordered "to stop from interfering with the plot and remove any of his property therein, within 60 days".

The Appellants appeal against conviction, decision and orders of the District Court. They have each raised 4

grounds, however, they both chose not to be present at the hearing of his appeal. The Respondent did not appear.

For reasons that will come out clearly in this judgment, I will not dwell on the respective grounds of Appeal as raised.

In his judgment, the learned District Magistrate held at page 1 as follows;

"In fact there is a tag of war in this case over the plot, between the parties who are brothers. The grounds raised by the Appellant have merits, and there is no doubt about it. But these grounds can only be raised in a Civil Case where 'who is the rightful owner over the plot is the main issue'. This is because this is a Criminal Case where only elements of the crime are to (sic) proved."

He then went on to hold that the lower court properly dismissed the criminal charge for insufficient evidence. However, even after holding so, the learned District Magistrate went ahead to deal with the issue of ownership, and having done so concluded as follows;

"In this case before hand, the rightful heir over the plot in dispute, as established by the evidence on record is the Appellant, John Bihabansi; and the Respondent did trespass to the land. /they unlawfully entered to land of which they do not belong (sic).

From the foregoing, I set aside, the lower court decision, and find all the Respondents GIDION BIHABANSI AND NTAMA BIHABANSI, guilty of CRIMINAL TRESPASS c/s 299(a) of the Penal Code."

In my judgment the learned District Magistrate made a very contradictory finding on both fact and law.

Having held that there was a claim of right over the land in question, and having held that the Criminal Court had no jurisdiction to investigate the issue of ownership, then he had held that he did not have jurisdiction over the matter. It is therefore surprising that in the same breath, the same Magistrate turns around to investigate the issue of ownership and comes to the conclusion that it belonged to the Respondent.

It is elementary law that, generally where in a Criminal Case, an issue of ownership is raised either as a defense or otherwise, and in a charge of Criminal trespass to land in particular, then the Criminal Proceedings must be stayed to allow for determination of the issue of ownership in a Civil Court of Competent jurisdiction. What is astonishing is that in this case the learned trial Magistrate was expressly by aware of this position of the law and that he did not have jurisdiction to deal with the issue of ownership of land. Yet he went on to do other wise.

Indeed section 4 of the Courts (Land Disputes Settlements) Act No. 2 of 2002 to which the learned Magistrates alluded to, in his judgment, the Magistrates' Court have no jurisdiction to deal with land disputes. The section provides;

" 4-(1) Unless otherwise provided by the Land Act 1999, no magistrate's court established by the Magistrate's Court Act, 1984 shall have Civil jurisdiction in any matter under the Land Act, 1999 and the Village Land Act 1999.

2) Magistrates' courts established under the Magistrates Court Act, 1984 shall have and exercise

jurisdiction in all proceedings of a criminal nature under the Land Act, 1999."

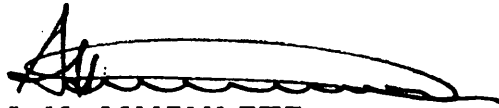
It is clear therefore that while the Criminal Complaint in the Primary Court and the Appeal in the District Court were properly commenced in courts of competent jurisdiction, when the issue for determination became an issue of ownership then as properly held by both courts, that was an issue beyond their powers.

In the premises the learned District Magistrate in appeal erred in law in reversing the decision of the lower Court.

Consequently this Appeal succeeds. The decision and orders of the District Court of Kibondo dated 01/10/2004 are hereby quashed and set aside respectively. The Appellants, GIDION s/o BIHABANSI and NTAMA s/o BIHABANSI are hereby acquitted of the offence for which they were convicted, that is Criminal trespass c/s 299(a) of the Penal Code (Cap.16 R.E 2002).

The decision of the Kibondo Urban Primary Court in Criminal Case No. 102 of 2004 is restored.

It is so ordered.

A handwritten signature in black ink, appearing to be 'A.K. Mujulizi', written over a horizontal line.

A.K. MUJULIZI

JUDGE

18/7/2007