

**IN THE HIGH COURT OF TANZANIA
AT TABORA**

**PC.CIVI APPEAL NO. 77/2004
(Original Civil Case No. 107/2005 at Mbogwe Primary Court and
Civil Appeal No. 46/2003 at Kahama District Court)**

1. SHIKOMBE s/o MAGUNILA }
2. MISALABA s/o IYANGAMBA }APPELLANT
3. FULA s/o MISALABA }

Versus

ISHELI s/o NTOBIRESPONDENT

REVISIONAL ORDER

MUJULIZI, J.

This matter was fixed today for mention with a view to finding out whether an Administrator of the Deceased 2nd Appellant would have made an application to be substituted for the 2nd Appellant. However, neither the surviving Appellant nor administrator of the deceased Appellant were present when the matter was called for mention before me.

However, I have moved my self suo motto to determine the issue whether both lower Courts had jurisdiction to determine the dispute subject of the Appeal now pending before the Court, and whether this Court has jurisdiction in the matter.

Secondly, in Civil case No. 107/2002, and the judgment of the Mbogwe Primary Court dated 2/5/2003, there was only one Plaintiff Isheli Ntobi and one Defendant Shikombe s/o Magunila. In that judgment the

Plaintiff's claim was dismissed. Dissatisfied he appealed to the District Court in Civil Appeal No. 46/2003. But, what is surprising to this court is the fact that both the record of proceedings and the judgment by the District Court of Kahama (C.F. Kipilimba SDM) name and include additional parties that is; the 2nd Respondent Misalaba Iyagamba and 3rd Respondent Fula Misalaba.

On perusing the record I have discovered that in his "sababu za Rufaa" the Appellant in Civil Appeal No. 46/2003 wrongly joined three other Respondents; Misalaba s/o Iyagamba, Ngekela s/o Bunge and Fula s/o Msalaba. Later on, Ngekela s/o Bunge wrote to the Court intimating his "withdrawal from the case." The two additional respondents filed protestations to the District Court expressing their surprise to be joined at the Appeal stage without being parties to the original suit.

Surprisingly the District Court did not address this issue at all, but proceeded to require the "respondents" to appear at the hearing of the appeal.

According to the typed record of the proceedings before the District Court, at page 2, on 30/9/2003 the Court record goes as follows;

"Court: Parties to are addressed in terms of the provisions of G.N. 312 of 1964 and each respectively responds.

Appellant I have nothing to add to my reply.

1st respondent: I have nothing to add to my reply

2nd respondent: I am not concerned on this case as I was just a witness to the quarrel over the shamba between the appellant and this 1st respondent 3rd respondent: Absent.

4th respondent: I am not involved in this case as I was not in that case at the primary court.

Order: 1. Judgment on 27/10/2003

2. Parties to attend.”

As observed earlier on, the District Magistrate did not bother to address this issue of misjoinder of parties at all. As a result this occasioned an injustice. Innocent bystanders are bound by a decree in appeal to which they were not properly parties.

This was a gross error on the part of the District Magistrate. He ought to have struck their names; of Misalaba Iyagamba and Fula Misalaba, from the appeal.

I therefore hereby strike them off and order that the Respondent herein, and the Appellant /decree holder Isheli s/o Ntobi pay their costs. Orders made against them are set aside.

I now return to the issue of jurisdiction. As it is, this Appeal in reality ought to have been by Shikombe Magunila. He is the only proper party. As held above it is only his presence that would have been required for purposes of hearing the appeal. For, as it turns out, the Respondent Ishelli Ntobi refused to acknowledge summons of this Court when they were served on him on 30/5/2005 on grounds that he had no case. This was a clear case of contempt. However, it should not detain us further. Suffice it to say that by his actions he has since permitted this court to proceed against him in his absence.

But since I have decided to revise the Proceedings of the lower court, I am entitled to proceed in the absence of the parties. The matter I have raised can be raised by the Court at any time. The suit leading to the Appeal was filed on 15/10/2002 and judgment delivered on 2/5/2003. the matter related to a land dispute. These are disputes regulated by the Land Act Cap 113 and the Village Land Act-Cap. 114 R.E. 2002.

Section 167,-(1) of the Land Act (Cap. 113) and section 62-(2) of the Village Land Act, (Cap.114), vest exclusive jurisdiction to hear and determine all manner of disputes, actions and proceedings concerning land, in the following Courts;

- a) The Court of Appeal;
- b) The Land Division of the High Court;
- c) The District Land and Housing Tribunals;
- d) Ward Tribunals;
- e) Village Land Councils.

Both Acts came into effect on the 1st October, 2003.

Section 3 of the Courts (Land Disputes Settlements) Act No. 2 of 2002 provides;

“3-(1) Subject to section 167 of the Land Act, 1999, and section 62 of the Village Land Act, 1999, every dispute or complainant concerning land shall be instituted in the Court having jurisdiction to determine land disputes in a given area.

(2) The court of jurisdiction under subsection (1) include;

- a) The Village Land Council;***
- b) The Ward Tribunal;***
- c) The District Land and Housing Tribunal;***
- d) The High Court (Land Division);***
- e) The Court of Appeal of Tanzania.”***

Section 4 of the same Act provides;

“4-(1) Unless otherwise provided by the Land Act, 1999, no Magistrate’s Court established by the Magistrates’ Courts Act, 1984 shall have civil jurisdiction in any matter under the Land Act, 1999 and the Village Land Act,1999.

(2) Magistrate’s Court established under the Magistrate’s Courts Act, 1984 shall have and exercise jurisdiction in all proceedings of a criminal nature under the Land Act, 1999 and the Village Land Act, 1999.”

It is clear that the Magistrates’ Courts of all levels were by the above Acts, divested of jurisdiction to hear, deal with and determine all land disputes of a civil nature. S. 54 of Act No. 2 of 2002 saved proceedings before the other Courts, which were pending at the commencement date of the Act, subject to their being concluded within a period of two years from the date of commencement of Act No. 2 of 2002.

The Act commenced on 01/10/2003. Civil Appeal No.46/2003 was admitted by the District Magistrate on 26/5/2003. The Judgment was delivered on 1/2/2004.

In section 54 the Act provides; “section 54 – (1) Notwithstanding the proceedings or appeals commenced in the High Court, the Magistrate’s Courts, Regional Housing Tribunal, Housing Appeals Tribunal, Customary Land Tribunal and the Customary Land Appeals Tribunal which are pending on the date of commencement of this Act shall be continued, concluded and decisions and orders made thereon shall be executed accordingly as if this Act had not been passed.

(2) *Every decision or order of the High Court, the Magistrate’s Court, Regional Housing Tribunal, Housing Appeals Tribunal, or Customary Land Tribunal or Customary Land Appeal Tribunal, which shall not have been fully executed or enforced before the date of commencement of this Act, may be executed and enforced after that day as if this Act had not been passed.*

(3) *All proceedings or appeals under this section shall be Concluded within the period of two years from the date of commencement of this Act.*

(4) *Where the High Court or the Magistrate’s Court fails to hear and conclude the proceedings or appeals within the period specified in subsection (3), the Chief Justice may, upon application by the Registrar extend the time to such other time as he may determine.*

(5) Where the tribunal fails to hear and conclude the proceedings on appeals within the period specified in subsection (3), the Minister may upon application by the relevant Registrar, extend the time to such other time as he may determine.”

By section 2 of Act No. 2/2002, “registrar” means the Registrar or Deputy Registrar of the High Court (Land Division) and includes the Registrar or Assistant Registrar appointed under section 28 and the Registrar of Villages appointed under the Local Government (District Authorities Act, 1982.”

This brings me to the issue whether this court had jurisdiction to hear the appeal when it was filed on 20/3/2004.

By the way, although the Memorandum of Appeal names three Appellants, the Appeal was filed by only one Appellant Shikombe Magunila. There was therefore one Appellant the other were served and included out of the error carried on by the failure by the District Court to rectify the record.

The Appellant paid the filing fees on 11/10/2004 but the appeal was formerly admitted by this Court on 30/12/2004.

From the regime of the Land Laws as set out by the Land Acts, of 1999 and Act No. 2 of 2002, this Court did not have jurisdiction to hear the Appeal, as the appeal was filed after commencement of Act No. 2 of 2002.

What then is the effect of this on the Appeal?

Under the High Court Registries, Rules; G.N. 96/2005, made under the Judicature and Application of Laws Ordinance- Cap. (453), section 5 E, there is established a Land Division of this court.

The Rule provides:

“5 E. There shall be a land division of the High Court within the Registry at Dar es Salaam and at any other registry or subregistry as may be determined by the Chief Justice in which, subject to the provisions of any relevant law appellate proceedings or original proceedings concerning land may be instituted.”

By Rule 7(1), Original proceedings in the Court may be instituted either in the Registry at Dar es Salaam or in the District Registry (if any) for the area in which the cause of action arose.

As it is the District Registry of this Court also serves as a registry for the Land Division, of this Court. Can the appeal, although filed under the registry of this court be considered to be incompetent by reason of titling it to be in this court?

In the interest of justice I am of the considered opinion that, it was the duty of the Registry officers to alert the parties intending to appeal in matter arising out of land disputes after commencement of the new Land Acts, to file the same in the appropriate registry of the Land Division.

In this case I believe the Appeal merits hearing, before a Court vested with jurisdiction.

In the foregoing premises I hereby order that the matter be transferred to the Land Division of this Court, and be given a new Land Registry number, and the matter be notified to the Registrar of the Land Division for further action.

Let the appellant be notified of this order in order to follow up determination of his appeal.



A.K. MUJULIZI

JUDGE

12/4/2007

ORDER:

DR. Effect the Order as specified herein. Certify it to the District Court.



A.K. MUJULIZI

JUDGE

12/4/2007