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IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

PC. CIVIL APPEAL NO.2 OF 2002.

HUMBALO FEDINANDI ..... APPLICANT

VERSUS

MARICK JOSEPH MAGUBIKA ..... RESPONDENT

Date of last Order:

Date of Judgment :

JUDGMENT

Mlay, J.

This is an appeal from the decision of the District Court of Kilosa exercising its appellate jurisdiction, over proceedings originating from the Primary Court of Ruaha, later Kidodi in Civil Case No.31 of 2000. The appellant in this appeal HUMBALO FEDINANDI sued the respondent MARICK JOSEPH MAGUBIKE for ownership of a plot of land, which was allegedly sold by the respondent. The appellant claimed to have purchased the land in dispute from one Mzee Kawele for Shs.400/= in 1973

and built two houses on it and moved to Dar es Salaam in 1988. The Appellant gave evidence that in 1998 one of his three houses was damaged by ELNINO RAINS and when he came back to the land in 1999 he found the land had been sold by the Respondent. The Appellant called 3 witnesses to support his claim. The Respondent in his defence claimed that he owned the land in dispute since 1968 and in 1973 he allowed one KAMILUS to live on part of that land on temporary terms on condition when leaves, the land will revert to Respondent and the Appellant who was brought by the said KAMILUS was given land by the appellant on the same terms. The appellant further claimed that KAMILUS subsequently purchased his part of the land for Shs.45,000/= while the Appellant refused to purchase his portion and later decided to leave the area and at the time the appellant left, his two houses had collapsed and the appellant took away the roofing iron sheets leaving the respondent's land vacant.

The Primary Court rejected the appellant's claim that he had purchased the land from Mzee Kawele for Shs.400/= and accepted the Respondents defence that he had allowed the appellant to occupy the land temporarily. The Primary Court however decided that, although the

Respondent had a customary right occupancy of over the disputed land the limitation period of a customary land right is 12 years. The Primary Court found that the appellant had occupied the land in dispute for over 12 years and for that reason, the land was still the property of the appellant. The Primary Court further found that part of that land in dispute which had not been occupied by the appellant should remain the property of the Respondent.

Being aggrieved by the decision of the Primary Court the Respondent MARICK JOSEPH MAGUBIKE appealed to the District Court of Kilosa, in Civil Appeal No. 15 of 2001, on three grounds, which can be restated as follows:-

1. *The appellant has no written document for the purchase of the land in dispute and was not able to produce it at the hearing of the suit.*

2. *The dispute was first heard as a criminal case and the appellant's evidence was found to be weak and the defendant who is the*

appellant (in the District Court) was given judgement and the court record of the criminal case is before the District Court of Kilosa.

3. *From the decision in this case dividing the land in two portions I am not satisfied with the decisions because the Plaintiff has no right to occupy the land. The evidence shows the land in dispute is the right property of the appellant.*

In the judgement of the District Court, the Appellate District Magistrate Hon. A. N. B Ndimubenya having stated the origin of the appeal, the parties and the fact that the trial court gave judgement in favour of the defendant and the plaintiff being aggrieved had appeal against the judgment of the lower court, stated;

"Thus he decided to appeal before this District Court by lodging 3 grounds of Appeal. Also the respondents produced 3 grounds (sic) of defence. I passed through the lower court proceedings and I paaaaes (sic) through the grounds of appeal end (sic) grounds defence what observed is the grounds of appeal has merit which

supported (sic) by the evidence adduced (sic) before the lower court during the hearing of the case.

Thus I through (sic) a way the grounds of defence.

THE APPEAL IS ALLOWED WITH COSTS"

That was the judgement and order of the District Court of Kilosa. Being aggrieved being that decision, the appellant mounted the present appeal to this court, on the following grounds:

1. *That I was not satisfied with the decision to give judgement (to the Respondent) in Civil Appeal No.15/01.*
2. *That as the evidence sufficiently should in the land in dispute there is my house and I have grown trees around the land since 1973.*
3. *That this appellate magistrate failed to take into consideration the decision of the Primary Court of Kidodi in Civil Case No. 31/2001.*
4. *That the Primary Court of Kidodi decided to give each party half of the plot in dispute but surprisingly the District Court has given the Respondent the right to own all the land which includes my house which is in the land in dispute.*

The Respondent having been served with to copy of the petition of appeal, filed a written reply to, the grounds of appeal which is a repetition of his claim in the trial court.

At the hearing of the appeal, the Appellant decided to adopt the grounds of appeal as they are and the Respondent adopted his written reply to them.

Before considering the substantive grounds of appeal and the Respondents written statement of arguments, something needs to be said about the judgement of the District Court, the substance of which has been quoted in full at the beginning of this judgement. Rule 16 of the Civil procedure (Appeals in Proceedings Originating in Primary Courts) Rules GN.312 of 1964, provides as follows:

"16. The judgment of the appellate court shall be in writing, and shall state-

a) The points for determination

b) The decision thereon,

c) Reasons for the decision, and

d) *Where the decision appealed from is reversed or varied, the relief which any of the parties may be entitled shall be pronounced in open court".*

In the judgement of the District appellate court the District Magistrate decided that "*the grounds of the appeal has merit which supported by the evidence adduced before the lower court".*

The District Magistrate did not give any reasons why he found that the grounds of appeal has merit or state what the *"merits"* of the grounds were. The District Magistrate did out even show which "*evidence*" he considered and found to "support" the said grounds of appeal.

Secondly, although the District Magistrate reversed the decision of the Primary Court, he did not state in the judgement "*the relief to which the parties may be entitled".* This appears to have prompted the appellant to complain in the 4th ground of appeal, that the appellate court gave all the land including the land in which the appellant house is situated to the Respondent, when the Primary court had given half of the land to each party.

Upon proper consideration of Rule 16 of GN.312/1964 on what the judgement on appeal should contain, the judgment of the District court of Kilosa in Civil Appeal No.15/2001, is not a judgement but a traversity of judgment. This would be sufficient ground to allow the appeal and to order a hearing of the appeal before another District Magistrate.

However, in circumstances like this, where the first appeal court has abdicated its responsibility of analysing the evidence and reaching a reasoned decision, this court as a second appellate court has the power to review the evidence before the Primary Court and reach its own conclusions on it. For this reason the court with proceed to consider the grounds of appeal and the written arguments by the respondent, and make its own conclusions, based on the evidence before the primary Court.

The first ground of appeal is a mere statement of dissatisfaction with the decision of the District court. The substantive grounds are therefore three. Starting with the second grounds, the appellant alleges that the evidence sufficiently proved that the land in dispute is his as there is his house on it and trees he planted in 1973. As stated earlier on, during trial the appellant had claimed to have purchased the land for shs.400/= from Mzee Kawele. His claim was supported by three witnesses, SALUM

MGWALE SM II, MUSTAFA LIGOMA SM III and KANILIUS NGONYANI SM IV. The three witnesses confirmed that the land in dispute had belonged to Kassim Kawele who sold it to the appellant in 1973. The Respondent who was the Defendant during trial, claimed he acquired the land in dispute in 1968 having purchased two houses situated on that land from one RASHID KILIMILA. He further claimed to have allowed one KIMILUSA and then the Appellant to live on part of that land on condition that when they leave, the land would revert to the Respondent. The Respondent also called three witnesses. SIMON MAKAYULA SU II stated he did not know the conditions upon which the Respondent gave the land to the appellant but that he found the Respondent to have constructed a house on it and later the Respondents told SU II that he had given ¼ acres to the Appellant. SU II claimed his father had sold a house to the Respondent to cultivate vegetables. SU III Elizabeth Kyando gave evidence that she purchased a house in the area from SET MWABULANYA and when she had moved into the house she saw the Appellant who told her that the Respondent had given him land free of charge on condition that the appellant builds temporary house as the land could be taken back, anytime.

SU IV was WILFRED MWAVIHAND who told the trial court that when he arrived in that area in 1969, he found the Respondent as his neighbour and two others and later he built a house in the area after purchasing land from MASHEKE MNGONI. SU IV said later he saw the Appellant arrive at the respondents house and was given land on which he built a structure with one room and a verandah but later left the area and the structure was still there at the time he was giving evidence.

In deciding on whether or not the Appellant purchased the land from Kasim Kawele for shs.400/- the trial court rejected the appellants claim on grounds that in law such evidence is unacceptable without a written sale agreement. The trial court stated:

> *".... Jibu ni kwamba maelezo hayo ya mdai kwamba amenunua eneo hilo kwa Mzee Kassim Kawelle bila maandishi yoyote kisheria maelezo ya ushahidi huo hayakubaliki, kwani ndani yake yab(sic) mashaka ushahidi ambao hauko wazi".*

In considering the respondents claim that he had given the land temporarily to the Appellant the trial Court found that claim acceptable. The court stated on this:

> *"Hivyo ukichunguza ushahidi wa mdaiwa kuwa hali Fulani ya kukubalika kwamba ni kweli mdai alipewa hilo na mdaiwa hilo ndilo jibu halisi".*

The trial Court went on to consider the nature of the respondents land tenure, and determined that he had a customary right of occupancy. The trial court stated:

> *"Mdaiwa hana hati ya kumiliki eneo hilo kwa hiyo mdaiwa alikuwa akimiliki eneo hilo katika maana ya pili ya kumiliki ardhi kienyeji ambapo umiliki wake haupo katika misingi ya kisheria umiliki wa namna hii kikomo cha miaka (12) utakapofikia mmiliki huyo eneo hilo ulilompa linakuwa mali yake.*
>
> *Hivyo kutokana na ufafanuzi huo, na baada ya mahakama kufikia katika eneo linalogombaniwa imejionea yenyewe kwa macho yake banda la mdai*

lililobaki ni ushahidi tosha eneo hilo bado mali yake. Kuhusu eneo lingine ambalo Mahakama ililikuta wazi sio mali yake mdai".

By the above decision, the trial court wrongly decided that a customary right of occupancy expires after the lapse of 12 years. This was a misinterpretation of the Magistrates Courts (Limitation of Proceedings under customary Law) Rules GN.311 of 1964. Rule 2 of the said rules provides:

"2. No Proceedings for the enforcement of a claim under customary law of a nature shown in the second column of the schedule hereto shall be instituted after the expiration of the corresponding period shown in the third column of that schedule, such period being deemed to have commenced on the day when the right to bring such proceedings first accrued or on the day when these rules came into operation, whichever is the later".

Item 6 of the Schedule provides that, the period of limitation in "*Proceedings to recover possession of land or money secured on mortgage of land, is 12 years*".

The proceedings instituted by the Appellant in the Primary Court, were for the recovey of land from the Respondent. It was not the Respondent who had instituted proceedings to recover land from the appellant so the question of limitation did not arise.

The issue which was for determination by the Primary Court was, who was the rightful owner of the land in dispute, based on the evidence adduced by both parties. The trial court rejected the Appellants claim and evidence that he purchased the land from Kassim Kiwale for Shs400/-, simply because there was no documentary evidence. There is no law which requires that purchase of land must be in writing. An agreement for the sale or purchased of land, like any contract, can be made orally. On the evidence adduced by the Appellant and supported by SM II, SM III and SM IV, as against the evidence adduced by the Respondent and SU II, SU III and SU IV, on the balance, the appellants evidence carried more weight than the Respondent claim. The Appellant proved that he purchased land from Kassim Kwale. The trial court had rejected the Appellants evidence for

wrong reasons that there was no documentary evidence while he accepted the Respondents claims that he gave the land to the Appellant, without first determining how the Respondent had acquired the land. The Respondent had claimed to have purchased two houses situated on the land from RASHID KILIMA but like the Appellant, he did not produced a document to prove it. The only witness on the alleged sale is SU II Simon Makayula who stated:

> *".....Baba yangu Mzazi ndie aliyemuuzia nyumba mdaiwa na kisha mimi nilimpatia mdaiwa eneo la kulima mbogamboga".*

SU II did not state that his father was RASHID KILIMLA from whom the Respondent alleged to have purchased the houses or that he was present during the sale. On the face of the evidence of SU II, there doesnot appear to be any relationship between the respondents claim of purchasing the house and the house which the father of SU II allegedly sold to the Respondent. The remaining two witnesses for the Respondent gave no evidence relating to the alleged purchase of land from RASHID KILIMLA by the Respondent. On the evidence adduced, there was sufficient evidence for the trial court to have found that the Appellants claim that he purchased

the land from KASSIM Kiwelo carried more weight than the evidence adduced by the Respondent that he purchased the land from RASHID KILIMLA and then allowed the Appellant to live on it on temporary basis. Although the trial court found that the land belonged to the Appellant on grounds of limitation, it did so for the wrong reason that limitation of customary land right is 12 years. There was however evidence as demonstrated here, upon which the court could have found that the Appellant had acquired the land through purchase from Kiwale.

For the reasons given above, this court finds that the second ground of appeal has merit and it is accordingly allowed. The third ground of appeal is that the District Appellant court, failed to properly consider the judgement given in favour of the appellant by the trial court in Civil Case No. 31 of 2001. The Respondents written argument on all the grounds of appeal as stated earlier on, are a repetition of this claims that he purchased two houses on the land from Rashid Kilimla and allowed the Appellant to live temporarily on part of the land and that the appellant subsequently moved out leaving the land vacant. From what this court has stated when dealing with the second ground of appeal, and also from the observation and finding of the court on the judgement of the District Court, it is clear

that the District Court completely failed to consider the decision of the Primary Court and arbitrarily without reasons, reversed it. We therefore allow the third ground of appeal as it appears on the petition of appeal.

The fourth and last ground of appeal challenges the decision of the District Court which by reversing the decision of the Primary Court, in effect, gave the right of ownership of the whole area to the Respondent, including the area in which the trial court found there was the Appellants house.

From the finding of this court on the second ground of appeal that the Appellant purchased the land in dispute from Kassim Kiwele, and also based on the finding of the trial court that there was the appellants house still standing on the land in dispute, it is the decision of this court that, that part of land as shown in the sketch map drawn by the Primary Court and on which the Appellants house was found standing, is the property of the Appellant. Since the trial court found that there was upon land unoccupied by the Appellant which belonged to the Respondent, this court confirms the decision of the Primary Court that the land in dispute belongs to the Appellant and the rest as found by the Primary Court, is the property of the Respondent.

In the final analysis this appeal is allowed and the judgement and decree of the District court are set aside and the judgement and decree of the Primary court is restored, although for different reasons. The appellant with have the costs of this appeal and in the District Court.

J. I. Mlay,

JUDGE

Dated and delivered this 28th day of April, 2008 in presence of the Appellant and absence of Respondent.

J. I. Mlay,

JUDGE

28/04/2009.

Any party dissatisfied with this decision has the right of appeal to the Court of Appeal of Tanzania upon giving notice within 14 days and upon obtaining a certificate of a point of law for determination by the Court of Appeal Tanzania.

J. I. Mlay,

JUDGE

28/04/2009.