IN THE HIGH COURT OF TANZANIA

AT MBEYA

(PC) CIVIL APPEAL NO. 18 OF 1978

(From the decision of the District Court of Mbeya at Mbeya in Civil Appeal No. 7 of 1978 and Ilembo Primary Court Civil Case No.71 of 1977)

BEFORE T.M.M. KISUGUJILA ESQ., SENIOR MAGISTRATE

GEORGE MWAMBOSI ... ... APPELLANT
(Original Respondent)

v e r s u s

ACKSON SHEYO ... ... RESPONDENT
(Original Defendant)

JUDGMENT

SAMATTA, J., - Ilembo is a village in Mbeya District. There is a plot of land in the village whose ownership is in dispute. The appellant claims to be the owner. So does the respondent. The former asked the Primary Court of Ilembo to declare him the owner of the plot. That court did so. The respondent did not believe that that decision was a triumph for justice. He appealed against it to the district court of Mbeya. That court shared the respondent's belief. It set aside the primary court's decision and declared the respondent as the owner of the plot in dispute. The appellant believes that the primary court was right and the district court was wrong. Hence the present appeal.

What was the evidence which was laid before the primary court? Briefly, it was this. The appellant claimed that he moved to the area in which the plot in dispute is situate sometime before 1969. He was attracted by the plot in dispute and decided to erect his residence there. Later, some other people shifted into the area. These included one Mkesa Mwahalende, Salimini Soli, Gerevas Mbonile and the respondent. The appellant went on to claim that he built a backyard house on the plot now in dispute, with the intention of constructing the main house sometime later. He did not achieve that desire; the respondent and his sons wrongfully assumed the ownership of the plot.

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The appellant's testimony was substantially supported by his witnesses, Mkesa Mwahalende, Salimini Soli and Gerevas Mbonile. All the three witnesses are, according to the trial court, fairly old people. The respondent's evidence was to this effect. The plot in dispute has been his since 1963. He built a house on it, and so did his son, who later established a garden on the plot. According to the respondent, at no time before the institution of the proceedings which have now given rise to the present appeal did the appellant protest to him about his treatment of the plot as his. The respondent adduced evidence from his twenty-six-year old son and his thirty-two-year old nephew. The former supported his evidence, but the later did not champion his case. The nephew admitted that it was the appellant who had started building a house on the plot in dispute. Later, according to the witness, the respondent started building his own house on the plot.

The Primary Court Magistrate and the two assessors who sat with him in hearing the case were favourably impressed by the evidence of the appellant and his witnesses. One of the assessors described the respondent as a trouble-maker. The learned Senior Magistrate who heard the appeal in the district court did not share that view. He said: "I have carefully considered the facts in this case. It is very obvious that the appellant has been in possession of the disputed land for a very long time. There is ample evidence to support that fact. The respondent has given no satisfactory explanation why he kept quiet for such a long time. The truth is that the appellant moved on the land when it was in a state of abandonment." With unfeigned respect to the learned Senior Magistrate, there is no ample evidence on record which demonstrates that the respondent had been in possession of the disputed plot for a very long time. In my view the outcome of this case depended heavily on the credibility of the witnesses. The primary court, which enjoyed the enviable advantage of watching the port of the witnesses, was of the unanimous opinion that justice was on the side of the appellant. Unless there is something on the record of the case which shows that the primary court had not used properly the advantage it enjoyed, it is right, I think, that the primary court's decision should be given great weight.

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I have not discovered anything of the kind. Is it not strange, if it was true that the respondent had been in possession of the plot in dispute since 1963, that the only witnesses he could produce to support his case were close relatives? I think it is. I am not surprised that his nephew was constrained to admit that the appellant was the first person to start constructing a building on the plot in dispute. The respondent himself, for obvious reasons, withheld that information from the trial court. On the whole I am of the view that the learned Senior Magistrate was not entitled to disturb the primary court's findings.

For the reasons I have given I have reached the conclusion that this appeal must be allowed. Accordingly, the district court's decision is recalled and the primary court's decision is restored. The appellant will have his costs of this appeal as well as his costs of the proceedings in the district court.

B.A. SAMATTA
JUDGE.

Delivered in court this 11th day of May, 1979, in the presence of both the appellant and the respondent.

B.A. SAMATTA
JUDGE.