IN THE HIGH COURT OF TANZANIA

AT MBEYA

PC. CIVIL APPEAL NO. 5 OF 2002

(From Rungwe District Court at Tukuyu Civil Appeal No. 18 of 2001 - Original Masebe Primary Court Civil Case No. 31 of 2001)

SAMWEL KATULILE ..... APPELLANT

VERSUS

NGEMELA KATULILE ..... RESPONDENT

JUDGEMENT

MREMA, J.

This is a second appeal. In the Primary Court the Appellant SAMWEL KATULILE sued the Late NGEMELA KATULILE for ownership of a piece of clan's Land. At the trial court it was not ascertained the size of the Land under dispute but at the hearing of this appeal the Appellant Samwel Katulile informed the court that the piece of Land is measuring about one acre. Both the Appellant and the Late Respondent, no doubt, are half brothers, born of the same father - one Katulile. But before the Appellant was born his mother Meli Mwakasaka (PW2) was married to the late Samwel Mwakwipalatula, who was the young brother of the father of PW1 and DW1 (Appellant and Respondent). After Samwel's death the parties's father Katulile re-married his late brother's wife (the Late Samwel's widow) and soon after marriage the Late Katulile moved the Appellant's mother to Katulile's Landed property where he gave her (PW2) a piece of Land on which to grow traditional food for her livelihood. During their stay, also on the same piece of Land, the Appellant's mother (Meli - PW2) managed to have three children with Katulile (the parties's father), one of them being the present Appellant.

It was in full agreement at the trial court that the three children born on the disputed shamba by PW2 and the Late Katulile share the same father with the Respondent - the Late Ngemela Katulile (DW1) and Katelina Katulile (DW2). But then it would appear that when their father Katulile died the Respondent

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Ngemela (deceased) inherited the piece of shamba on which the Appellant (PW1) and the other Children of PW2 and the Late Katulile were born. It would also appear as a common ground that before the Late Ngemela decided to inherit the piece of shamba in dispute to the sons of his brother there was no dispute between the Appellant and Respondent, or among the Katulile clan members.

The Appellant Samwel (PW1) agitated at the primary court of Masebe to the effect that his brother, the Late Ngemela, was not entitled in Law to disinherit him (PW1) and those who were born on the piece of land because they, too, as the children of the Respondent's father were entitled in Law to inherit part of their father's property, and especially the Land on which their mother tilled it, bore them and grew them there on the same piece of Land. PW1 further refused to agree that their piece of Land was at Makete Village where their half brothers born by their mother and their paternal uncle the Late Samwel brother of the Late Katulile, had moved to settle thereon. That they were not the children of the Late Samwel but of the Late Katulile.

In its decision the Primary Court observed as follows, inter alia:

> "2. Ukweli kabisa Mdai amezaliwa katika mji wa mzozo pamoja na wengine wawili, Lakini Samwel Mwakwipalatula aliomba aende kwenye mji wa baba-ye amefanya vizuri. Shughuli zao kiongozi wao ni Samwel Mwakwipalatula". (underlined by me to provide emphasise).

With respect, the words underlined above are nowhere found in the evident record of the Primary Court. The trial primary court was extremely wrong to import in its judgement material facts, but irrelevant to the case, which were never adduced in evidence. Besides, that was an absolute misconception of the evidence on record. Samwel Mwakwipalatula was no longer alive when the Appellants mother (PW2) re-married to PW1's and DW1's father Katulile. In otherwords if the Late Samwel Mwakwipalatula

was alive the Appellant's mother (PW2) would definately not have been re-married to the Late Samwel's brother Katulile. Therefore the alleged words that Samwel requested the Appellant to go to settle to Samwel's Land could not have then been uttered by the deceased Samwel.

Even if for argument sake it is admitted that one Samwel being spoken of here is the half brother of the Appellant born of the same mother but different fathers, such a request could not compel the Appellant to comply. He had the option to remain on the Land belonging to his real father on which he was born, or could only just exercise his discretion to do so. In this, if it was true that there was such an offer, but which I have refused to agree because there is no such evidence on record at the trial court, the Appellant insisted on remaining on the portion of Land that was put under unexhausted improvement by his mother.

Finally the trial primary court was satisfied on the evidence that the Appellant Samwel Katulile failed to prove his suit on the balance of probabilities and in the result it declared the shamba in dispute as being the property of the Respondent Ngemela Katulile holding it jointly and together with his young brothers. This holding enraged the Appellant who appealed to the District Court of Kungwe District, at Tukuyu.

The District Court dismissed the appeal but on different footing from the decision of the primary court. For ease of reference I append hereunder the decision of the District Court, citing the relevant portion only:-

> "The appellant and respondents are relatives. The Land is the clan Land, <u>that means every body as the clan members have (sic) the right to use it</u>. Due to the fact that the dispute arose when Ngemela was intending to allocate Asomile Fyela with that Land, the intention was not complied with, then there is nothing to worry anybody" (sic)(underscored by me).

I have underlined the words above to provide emphasise to show that the District Court was of the openion that neither the Appellant nor the Respondent has the

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first title to the Land because it is a clan Land the title of which can only pass according to the customary Law of the parties. But the Magistrate did not go further to ascertain what Law was applicable in the circumstances of the case.

Be that as it may, the Magistrate having observed that the piece of the Land in dispute was Katulile's clan property then the judgement of the primary court which was determined in favour of the Late Respondent could not have been sustained. The Learned appellate Magistrate ought to have quashed the judgement of the trial primary court and directed that the Katulile clan members should meet and decide over the ownership of the disputed properly according to their Law of customary inheritance.

In the light of the two judgements what this court should do in the interest of justice between the parties?

It is not in dispute that Ngemela Katulile is dead. At the District Court he was unable to appear and defend the appeal because of illness. The appellate district court, however, allowed his son Abraham Akomiligwe to appear and represent him.

It was in that appellate district court it was revealed that the Appellant (PW1) has his own piece of Land and his own homestead - away from the Land where he was born.

Unfortunately the proceedings in the district court were made complicated when the Learned appellate Magistrate purportedly recorded the statement of ABRAHAM AKOMILIGWE as if he was recording additional evidence in terms of section 21 -(1)(a) of the L.C.A, 1987. Abraham never gave evidence either at the trial or appellate district court and so that statemer was never on oath or affirmation, nor was it subjected to cross-examination by the Appellant. The following is what he told the court (at pg 4 of the typed proceedings):

> XD CT. Respondent "It is not true that Ngemela Katulile was intending to allocate Asomile Fyala

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that Land. After the death of Manyamula Katulile that Land was occupied by Fyala Katulile. After Fyala Katulile, Ngemela Katulile came to occupy who is my father (sic).

Manyamula Katulile had a child born at that Land who is living to (sic) that Land todate. The child is Dorthina Manyamula who was divorced. Ngemela Katulile had his homestead at Kisindile Village".

That quoted statement was never alluded to the testimony of the Respondent Ngemela Akomiligwe (DW1) in the primary court. If the Appellate Magistrate wanted to clarify certain material facts of the case then he should have proceeded by calling for additional evidence u/s 21 -(1)(a) of the M.C.A, 1984. As the Law was not complied with the appellate Magistrate was wrong to rely on facts which were not based on evidence. Thus I find that the proceedings in the district court cannot be sustained because they proceeded on an irregular procedure occasioning injustice. In the result they are hereby quashed and any order incidental or consequential thereto is hereby set aside.

The judgement of the district court having been set aside it automatically follows that the judgement of the trial primary court retains its status quo as if no appeal to the district court had been preferred.

But suppose the appeal to the district court was dismissed on merit, though that is not the case, is the judgement of the primary court sound in Law, hence sustainable under the circumstances of the case? Straight away I would answer in the negative. This is because the trial primary court did not give reasons why it had to give judgement in favour of the Respondent. It is an open secret that the Appellant and Respondent shared common father. It is not also in dispute that the parcel of Land in dispute was unexhaustedly improved by the mother of the Appellant (PW2). It was also not denied that the Appellant was born on the piece of Land in question and he grew up there.

There is nothing in evidence suggesting that the Respondent's mother ever lived or tilled the piece of land in dispute. The Respondent never produced any will to establish that his late father bequethed the piece of Land in dispute to him; nor is there any testimony from any witness confirming that the father of the Appellant and Respondent intended to inherit the piece of Land to DW1 or to some other clan members other than the children of PW2 who were born on the said piece of Land.

The trial primary court did not even take evidence to establish the norms and customs obtaining among the parties's clan members. It is in evidence that the parties in this case belong to a polygamons marriage and, therefore, it was necessary to consider and decide on the Customary Law of inheritance pertaining to polygamons marriage and not to assume things the way DW1 purportedly did. The District Court did not as well examine the Law or custom governing the parties on matters relating to inheritance in a polygamons marriage.

Since the District Court's judgement has been quashed it is legitimately safe, in my considered view, to order the trial primary court to re-open the proceedings by calling additional evidence from the local leaders of the area, including the parties elderly people, to establish in evidence the norms or customs relating to inheritance of a Landed property in a case such as this one. That evidence must be recorded by another Magistrate of competent jurisdiction sitting with new assessors. The same Magistrate sitting with new assessors should then write judgement in the light of the former evidence on record plus the additional evidence as if no judgement had been written before. Then on the basis of that judgement should any of the parties feel aggrieved, the right of appeal would lie to the District Court.

For the avoidance of doubt, the judgement of the primary court is hereby quashed and any consequential order thereto is hereby set aside. In other words the parties status quo are restored as if their suit in the primary court of Masebe is yet to be determined and no appeal preferred against.

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To that extent this appeal is allowed but I make no order as to costs. Each party to bear his own costs.

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

Delivered in the presence of
both the parties. Right of
Appeal explained.

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

Order

The records of the Lower court be returned to the respective courts as soon as this judgement is typed and certified.

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