THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

selected 28/9/2006

(CORAM: RAMADHANI, J. A.; NSEKELA, J. A.; And KAJI, J. A.)

CIVIL APPEAL NO. 25 OF 2002

BETWEEN

NELI MANASE FOYA.....APPELANT

AND

DAMIAN MLINGA.....RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania at Moshi)

(Mchome, J.)

dated the 15th day of Febuary , 2000

in

Misc. Civil Appeal No. 19 of 1999

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JUDGMENT OF THE COURT

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27 October 2004

NSEKELA, J. A.:

This appeal concerns a dispute on a boundary over a piece of land and the uprooting of trees thus causing the alteration of the

boundary in a plot situate at Old Moshi, Mbokomu. The value of the said trees was not pleaded. The suit started in Moshi Urban Primary Court, Civil Case No. 63 of 1997 in which one Damian Mlinga, now respondent, was the plaintiff and one Neli Manase Foya, now appellant, was the defendant. The respondent Mlinga was the successful party in the Primary Court and so the appellant appealed to the District Court where she lost. Still aggrieved by this decision, the appellant unsuccessfully appealed to the High Court, hence this appeal. //Section 5 (2) (c) of the Appellate Jurisdiction Act, 1979 provides –

> "No appeal shall lie against any decision or order of the High Court in any proceedings under Head (c) of Part III of the Magistrate's Courts Act, 1963, unless the High Court certifies that a point of law is involved in the decision or order."

Under this provision of the law, the High Court was required to certify that a point/s of law were involved before an appeal could be entertained by this Court. This certificate was duly given by the High Court, (Munuo, J.) as she then was, who certified three points of law, namely –

(i) Whether the trial court had jurisdiction to determine the suit;

(ii) Whether the assessors gave their opinions;

(iii) Whether the second appeal was rightly determined.

At the hearing of the appeal, the appellant appeared in person, unrepresented. The respondent, who was duly served with notice of the hearing date, was absent and so the Court proceeded on to hear the appeal in terms of Rule 105 (2) of the Court Rules. In her brief oral submission, the appellant stated that she had nothing to add apart from the contents of the memorandum of appeal.

We propose to start with the question of the jurisdiction of the Urban Primary Court, Moshi to determine the suit.

The respondent in the Urban Primary Court had alleged that the appellant had encroached upon his land and uprooted trees thus altering the boundaries of their respective plots of land. The number of trees so uprooted and the value thereof was not disclosed in the plaint. The essence of the respondent's claim was the repossession of the land that had been encroached upon by the appellant. On page 10 of the record of appeal, the appellant filed a document which reads in part –

> "JURISDICTION
>
> The land in dispute is traditional land under customary law. Not registered. Located Kijiji cha Korini Kusini, Mbokomu Ward, Moshi District Council, Moshi Rural.
>
> Jurisdiction: Old Moshi Primary Court, Moshi Rural."

Section 3 (1) and (2) of the Magistrates Courts' Act, 1984 provides as follows –

"3 (1) There is hereby established in every district a primary court which shall, subject to the provisions of any law for the time being in force, exercise jurisdiction within the district in which it is established.

(2) The designation of a primary court shall be for the primary court in which it is established."

The suit was instituted in a Primary Court in Moshi District. The Primary Court therefore had jurisdiction to hear and determine the suit. We are further fortified in this view by Section 19 (1) of the Magistrates Courts Act read together with paragraph 1 (a) of the Fourth Schedule to the Act. Paragraph 1 (a) provides –

"1. Subject to the provisions of this Act, proceedings of a civil nature shall be heard and determined:-

(a) if they relate to immovable property, by a court within the local jurisdiction of which the property is situated."

The trial court therefore had the jurisdiction to try the suit.

The second point of law certified by the learned judge concerned the necessity of giving their opinions by the assessors. The learned judge who heard and determined the second appeal had this to say –

"I have gone through the trial court's record and found that the hearing of this case was throughout with two assessors, Raymond and Rose. The only time there was a different assessor was at mention date.

As for the assessors opinions it is nowadays not necessary to write assessors opinions provided they sign the judgment of the court to certify that they agree with it. So the primary court judgment is not defective."

We think that the answer to the issue as certified lies in Rule 3 (1) and (2) of the Magistrate's Court's (Primary Courts) (Judgment of Court) Rules, 1987 GN No. 2 of 1988. It provides as follows –

"3 (1) Where in any proceedings the court has heard all the evidence or matters pertaining to the issue to be determined by the court, the magistrate shall proceed to consult with the assessors present, with the view of reaching a decision of the court.

(2) If all the members of the court agree on one decision, the magistrate shall proceed to record the decision or judgment of the court which shall be signed by all the members." *(emphasis supplied)*

(3) For the avoidance of doubt a magistrate shall not, in lieu of or in addition to, the consultations referred to in sub-rule (1) of this Rule, be entitled to sum up to the other members of the court."

We do not read anything in Rule 3 (1), (2) and (3) above which demands the assessors to give their opinions on an issue before the court. Under Rule2 assessors are members of the court which include the magistrate. It is evident from sub rule (2) above that all members of the court are required to participate in the decision making process of the court. Assessors are members of the court, co – equal with the magistrate. After they have completed hearing the

evidence from the parties, the stage is then set for the magistrate to consult with them in order to reach a decision of the court. This presupposes that before the court reaches a decision, there will be a conference of the members of the court to deliberate on the issues before them and reach a decision. In such a case, the magistrate will write down the decision, which will then be signed by all members of the court. It will be recalled that Mchome, J. said that –

> "they (assessors) sign the judgment of the court to certify that they agree with it."

With all due respect to the learned High Court judge, this is not what Rule 3 (2) provides. The assessors are members of the court and sign the judgment as such, and not for the purpose of authenticating it or confirming it. In answer to the second point of law, assessors are neither required to give their opinions, nor to have their opinions recorded by the magisrate.

We now proceed on to the third point of law, namely, whether the second appeal was rightly determined. The essence of the learned appellate judge's decision is to be found in the following extract which reads –

> "Both lower courts decided against the appellant on point of fact. The only points of law raised on this second appeal are that the court tried the case with a different set of assessors, and that the assessor's opinions were not given. The other grounds of appeal are on purely factual issues, which are none of my concern at this second appeal.

And he continued –

> "As there is no valid point of law raised in this second appeal, I find no reason to differ from both lower courts' findings of fact."

It has often been stated that a second appellate court should be reluctant to interfere with a finding of fact by a trial court, more so where a first appellate court has concurred with such a finding of fact. The District Court, which was the first appellate court, concurred with the findings of fact by the Primary Court. So did the High Court itself, which considered and evaluated the evidence before it and was satisfied that there was evidence upon which both the lower courts could make concurrent findings of fact. As was said by Sir Kenneth O'Connor, P. of the defunct Court of Appeal for Eastern Africa in the case of Peters v. Sunday Post Limited (1958) EA 424 at page 429 –

> "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to

> determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion." (see also: Watt or Thomas v. Thomas (1947 AC 484)

In all the circumstances, we are satisfied that the second appeal was rightly determined. In the result, we dismiss the appeal in its entirety. Since the respondent did not appear before us, we make no order as to costs.

DATED at ARUSHA this 27th day of October, 2004.

A. S. L. RAMADHANI
JUSTICE OF APPEAL

H. R. NSEKELA
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

I certify that this is true copy of the original.



S. M. RUMANYIKA
DEPUTY REGISTRAR