

TANZANIA / JUDGMENT

anna claudi vs erasmus mmbando

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IN THE HIGH COURT OF TANZANIA AT ARUSHA MISC. LAND APPEAL CASE NO. 6 OF 2012 (C/F the District Land and Housing Tribunal of Arusha at Arusha in Land Appeal Case No. 110 of 2009 Originating from Mto wa Mbu Ward Tribunal in Land Application No. 116 of 2010) BETWEEN ANNA CLAUDI..... APPELLANT AND ERASMUS MMBANDO..... RESPONDENT Date of last Order: 10/12/2012 Date of Judgment: 02/5/2013

JUDGMENT

SAMBO, J. Aggrieved by the Judgment and Decree delivered on 7th day of December, 2011 by M.R. Makombe, Chairperson; the appellant herein preferred the present appeal on five (5) grounds that;

1. The appellate Tribunal erred both in law and in fact in entertaining the suit which is time barred.
2. The appellate Tribunal erred both in law and in fact in disregarding the last 'will' which bequeathed the suit land to one Clemency Raymond who then, legally; sold the same suit land to the appellant.
3. The appellate Tribunal erred both in law and in fact in holding that the transaction, that is, between the appellant and one Clemency Raymond is a nullity as there is no permission of the administrator of the estate of the late Raymond Mwambile Mmbando.
4. The appellate Tribunal erred both in law and in fact in holding in favour of the respondent in respect of the suit land which does not form part of the deceased's estate.
5. The appellate Tribunal erred both in law and in fact in dealing with new issues which were not raised at the trial Ward Tribunal. Hearing of the appeal was ordered to be by way of Written Submissions hence this Judgment. In this appeal, the appellant was represented by M/S Northern chambers Advocates & Legal Consultants whereas the respondent had services of E.M. Law Chambers. Arguing for the grounds of appeal, the appellant's learned counsel submitted for the 1st ground of appeal that; before Mto wa Mbu Ward Tribunal, the respondent herein sued the appellant vide Land Application No. 27 of 2008 in his personal

capacity and not as an administrator of the estate of the late Raymond Mwambile Mmbando claiming back the disputed piece of land sold on 29th day of August, 1993 by clemency Raymond to the appellant's father one claudius. urasa in witness of musasa. sechambo, Stanley yip iniel, issalubuva and petrokisinga (a ten cell leader). It is from the above; the appellant's learned counsel argued that, vide item 22 of the 1st schedule to the Law of Limitation Act, [CAP. 89 R.E, 2002] the law provides for 12 years period of time for one to recover land thus rendering the matter at hand time barred for over fifteen (15) years from the date the same was sold to the time when the respondent claimed title over the disputed piece of land as the said Raymond mwambile mmbando. It was added in submission by the appellant's learned counsel that; the deceased Raymond mwambile mmbando died on 3rd day of April, 1988 with the appellant's father purchasing the disputed piece of land on 29th day of August, 1993 from clemency Raymond mwambile mmbando who was bequeathed the same by his late father as evidenced by the last "will" of the late Raymond mwambile mmbando. Regarding the 2nd ground of appeal, the appellant's learned counsel argued the appellate Tribunal to have erred in disregarding the last "will" of the late Raymond mwambile mmbando adding that, the administrator of the estate of the late Raymond mwambile mmbando had no mandate to redistribute any property which had already been distributed according to the deceased's last "will". In respect of the 3rd ground of appeal; the appellant's learned counsel submitted that, the position by the appellate Tribunal that the matter was a nullity lacks merits in law as the property was already allocated to one clemency Raymond mmbando prior to the death of his father thus not falling under the estate of the late Raymond mwambile mmbando. The learned counsel added that, the sale transaction met by both the appellant's father and one clemency Raymond mwambile to be valid vide the provisions of section 10 of the Law of Contract Act, [CAP. 345 R.E, 2002], As to the 4th ground of appeal, the appellant's learned counsel submitted that, even the minutes of the meeting chaired by the respondent does not dispute ownership of the disputed piece of land as the said piece of land was already in ownership of clemency Raymond mwambile who then sold the same to the appellant's father. Regarding the 5th ground of appeal; the appellant's learned counsel submitted that, the appellate Tribunal entertained a matter that was not at issue before the trial Tribunal as the records are clear that, the respondent instituted the matter in his own capacity and not in the capacity of an administrator to the estate of the late Raymond mwambile mmbando with the appellate Tribunal allowing the respondent herein to stand as an administrator of the estate of the late Raymond mwambile mmbando at the appellate stage in contravention of the governing laws and even without leave of the appellate Tribunal as also held by the defunct East African Court of Appeal in the case of warehousing & forwarding co. of east AFRICA LTD vs. JAFFERALI & SONS LTD [1963] E.A 385 where the Court observed; "A new point ought not to have been taken on appeal where it would take the other side by surprise and mislead him as to the case his opponents were making at the first instance" In reply; the respondent's learned counsel submitted for the 1st ground of appeal that, per the Court records; the respondent was issued with a Certificate of Administration of the estate of the late Raymond Mwambile

Mmbando in which the respondent properly acted in accordance with the provisions of sections 99, 100, 101 and 108 of the Probate and Administration of Estate Act, [CAP. 352 r.e., 2002] in suing for the disputed piece of land. The respondent added in his submission that, the respondent was appointed an administrator of the estate of the late Raymond Mwambile Mmbando in 2008 arguing that; prior to that appointment, the respondent had no locus standi to institute the suit at hand and that limitation start to run from the time when one became aware of the dispute with powers to file such a suit and not the contrary. Addressing the 2nd, 3rd, 4th and 5th grounds altogether; the respondent's learned counsel argued the sale transaction void ab initio as the same was transacted by a person without legal power or authority as by then, he was not appointed an administrator of the deceased's estate. Further; it was argued by the respondent's learned counsel that, the disputed piece of land was illegally sold by Clemency Raymond Mwambile Mmbando as the same forms part of the deceased's estate. It was from the above the respondent's learned counsel prayed for the appeal to be dismissed. In rejoinder; the appellant's learned counsel submitted that, it is not disputed that the respondent was appointed an administrator of the estate of the late Raymond Mwambile Mmbando vide the Probate and Administration of Estate Case No. 2 of 2008 in which the applicable law is the Magistrates' Courts Act, [CAP. 11 r.e., 2002] unlike the referred Probate and Administration of Estates Act (supra). As to time limitation, the appellant's learned counsel referred this Court to the case of YUSUF SAME AND ANOTHER v s. HADIJA YUSUF [1996] T.L.R 347 where the Court observed; "Section 9(1) says: 'Where a person institutes a suit to recover land of a deceased person, whether under a will or intestacy and deceased person was, on the date of his death, in possession of the land and was the last person entitled to the land to be in possession of the land, the right of action shall be deemed to have accrued on the date of death. And s 35 says: 'for the purposes of the provisions of this Act relating to suits for the recovery of land, an administrator of the estate of a deceased person shall be taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration or, as the case may be, of the probate". The appellant's learned counsel added in his submission that; since the appellant had been in occupation of the disputed piece of land uninterrupted, the appellate Tribunal ought to have invoked the doctrine of adverse possession. In that regard, reference was made to the case of SHABANI NASSORO vs. RAJABU SIMBA [1967] HCD 233 where the High Court of Tanzania had the following; "The Court has been reluctant to disturb persons who occupied the land and developed it over long period. The respondent and his father have been in occupation of the land for minimum of 18 years which is quite a long time. It would be unfair to disturb their occupation It was from the above the appellant's learned counsel reiterated his stance for the appeal to be allowed with costs. Having gone through the Court records and the submissions by the parties herein, the duty of this Court finds its way with the following in disposal. It is not disputed that one Clemency Raymond Mwambile Mmbando is son to the deceased Raymond Mwambile Mmbando and per the sale agreement dated 29th day of August, 1993; the said Clemency Raymond Mwambile Mmbando sold the said disputed piece of land to one Claudy Urassa at a consideration of Tshs. 100,000/=. It is also on record that; the said Raymond Mwambile

Mmbando died on 3rd day of April, 1988 meaning that; by the time the said Clemency Raymond Mwambile Mmbando sold the disputed piece of land to the said Claudie Urassa (father to the appellant), none between the respondent and Clemency Raymond Mwambile Mmbando or else had been appointed an administrator of the deceased's estate. It follows that; if at all the respondent herein was appointed an administrator of the estate of the said Raymond Mwambile Mmbando, then; the alleged sale transaction involving the property owned by the deceased Raymond Mwambile Mmbando was effected by a person who was neither owner of the said sold landed property nor an administrator of the estate of the said Raymond Mwambile Mmbando here to mean, Clemency Raymond Mwambile Mmbando. It's also on record that, the minutes of the clan meeting dated 5th day of April, 1988 which was also attended by the seller of the deceased's estate to one Claudie Urassa that is, one Clemency Raymond Mwambile Mmbando put it clear within balance of probabilities that, the disputed piece of land fall under the estate of the deceased Raymond Mwambile Mmbando thus raising a concern and duty for the said Clemency Raymond Mwambile Mmbando to have queried in against the minutes of the said clan meeting in case he thought to have had a better title over the same property. Additionally; nothing is on record as to how the said Clemency Raymond Mwambile Mmbando acquired title over the disputed piece of land that is, an independent testimony as to how he was allocated the said piece of land by his now deceased father apart from the bare assertions which cannot stand sufficient proof. It is also important to note here that; the appellant did not show as to how ownership reverted into her if at all the said disputed piece of land was sold to her father one Claudie Urassa. Some unavoidable issues for address will always remain to be; in which capacity is she suing in respect of the disputed piece of land? Is she suing in the capacity as a lawful owner the same having been given to her by her father or else? All these remain unanswered per the records of the trial Tribunals. As to the issue of locus standi, the records of the trial Tribunal show the respondent to have stated at page 1 of the typed proceedings that; " Baada ya kubaini chanzo cha wavamizi hawa kuvamia sikuwa na sababu ya kuwabembe/eza ndipo nikaamua kufika hapa Hi waitwe waje wakanieieze aiiowapa hi/o eneo langu ninani..... Therefore; at any point of imagination, the respondent cannot claim to have acted in the capacity of an administrator of the estate of his late brother that is, Raymond Mwambile Mmbando, rather; as a sole owner of the disputed piece of land. It absurd to note here that, the same piece of land which was mentioned in the clan meeting dated 3rd day of April, 1988 to the effect that the disputed piece of land belongs to the deceased Raymond Mwambile Mmbando, is at the same time argued to be a property of the respondent herein. Under such circumstances; the respondent, in the capacity he acted to recover the disputed piece of land denies him locus standi so to claim. Reasons wherefore; the appeal succeeds in the sense that the matter was brought by a person without locus standi camouflaged by the clan meeting deeming to claim the same in the capacity of an administrator of the estate of the deceased Raymond Mwambile Mmbando. Alternatively; if at all the respondent intended to sue over the disputed piece of land in the capacity of an administrator of the estate of the deceased Raymond Mwambile Mmbando, the respondent ought to have at least clearly indicated in the land application or rather revealed in the

proceedings of the trial Tribunal. On top of the above; one should also note that; for an oral "w i l l " to stand in law, all the prerequisites including proof by the required number of witnesses as to its existence and validity has to be fulfilled prior to the same worth to be relied upon in evidence that the same can be termed an oral "w i l l " known in law. Reasons wherefore; this Court declares all the proceedings and findings by both the trial and appellate Tribunals a nullity, leaving the parties at liberty to institute proper proceedings involving proper parties in their proper capacity if at all not barred by time limitation. Order accordingly. K.M.M. SAMBO JUDGE 02/ 5/2013 Delivered in chambers this 2nd day of May, 2013 in presence of Mr. Reginald Laswai for the appellant and Mr. Haleluya Mmbando for the respondent. JUDGE 2/ 5/2013

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