

TANZANIA / JUDGMENT

19710324 TZHC Mwanza2

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TZHCDECIDED
24 March 1971

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- .; : 11Y THE IGH CuORT CPTiNL f UiiNZ. ppc11atc Jurisdiction0 (pc) CIVIL APPEAL 1\7 0125 OF 1970 (Prom the decision of the District Court of igoma at Kigoma in Civil Jppeal No.21.o 199. Original Civil Case 170,76 o± 1969 of the Primarc,r Court of Mwandigao) SIDI THU.IH-' 0 . Pi::JLLNT(Origin a l Defendant) versus TTU 4THUih11 , .1:1 iFJP01,TDiNT(Original Proscicuto:, JUDGME:NT. EL—KINDY, In the Primary Court at Mwandiga the respondent successfully sued the appellant foi3 shambas (one of palm rco, one of cassava and one of banana trees,, a bed, two cushiona a hat, a knife, 3 hens and a watch0 These were asessed at shs.372/-4 The appellant, to the extent it could be seen, admitted that he took possession of those iteme, but he said that he sold them With the Iermission of the respondents after a trial, the court ordered that the appellant restore the banana and banana shambas subject to their being in existence, and pay the aquiylont value of the rest of the items, as the court was satisfied h.at the appellant had, no autorittj to soil these items. There was eidcnce which showed that thosc items ierc worth of shs.137/— He was to pay this amount plus shs017/— costs, thereby making a total of shs.204/—. On enieal to tie District Court, the apollant alleged that he was not heard, and therefore not given the opportunity to prove his allegation that he was entitled, as of right c to sell the things in dispute0 s the re 1 ord clearly sr.owed thac ixo appellant did no appear on subsequent dte fixed for hearing, the appellate court permitted the appellant to lead ovidonco on this issue0 Lc told the appellate court that ho was the brother of the respondent, but of different mothers, and 'hat their father was thurnani tbhnya0 He claimed tit after the death of thoLr father, they (appellant and the respondent) inherited the estate of their father, but the rosnondent sued him to recover those things oi the ground that he was not the son of f thurani Ifunya. The iespondent admitted that the appellant was a step—son of her father, but she alleged that the appellant went to live with her father a'tu' her late father married the o ,p c ll an t s wife as a second wife. however, erie said, the appc1lan'tj could not inherit frore the estate. In other "ords, she said the 5pp11a11t 'as not an issue of her father so as to make him an heir - hence her use of the word step—son -are the appellant came to live in their house by virtue o' the fact that the appellant s mother was married to the esponent s father and no more. Slao aittad that the appellant was brought ur , in 0 • - :2: the householi:. as p1srt of the family In ifrica:i way of life, it is not cuicoiamon or such a child to be brought up in a household where the moth:r is subsequently married, but the issue is whether the appellant as as stated by the rcspon cn or as claimed by the appellant i;alf, In sta - .ort of the

appellant, Kasomc i:wanga, who claimed to be a neighbour, claimed that ho knew both ear tics, and that their father first weie t to liv in his village taking with him the appellant's ! eohtar and the appellant who was nen a young boy0 And that subsequently thumani 1Ifimya, married the respondent's mother and the Ls born0 If this witness 'a evidence is accepted it would indicate that ha did not in fact :itnes the birth of the appellant ut e only saw 'rthumani omigratin into his area from Burundi, as he caid with the apollant and the appellant's mother0 It would also show that the respondent was junior to the appellant, i different :sio is .ivcn by Manyota Kao;o a village xecutive officer0 Jcooeding to Kanyota, in 1955 ha oas C. vi lage eacutivc officer of ii:abilo villae, and that he was a ii'icnd of !thurnani lifunya. Sub_oc,tLcntly, ho said, Atkiumani moved eo anza village horc he livod T ,t ithumani took the appellant and kept him with his friend Gooa because he (ithumani) was going to the coast0 It is on this basis that he claimed that he came to know that the appellant was the son of Sthumani. L:in, if one accepted the evidance o' this witness, it does not sufficiently prove that the a - .pellant;as t o natural son of Pthumani. Hardy seeing the lata fthumani give 11tho appellant to the care of a friend does not infer in much0 In act, he admitted in the eric', that he did not in fact know ithather the appellant was a natural son of late Athumani. no -ther witass was Kibanyakua d/o i:tf'unya, the sister of late Athiwnani ilfuna. She is definite that. the appellant was the son of her lots brother, by the first wife, and the respondent was the daughter of her late brother by the second wife0 She is firm that the aDpellant was the natural son of her brother0 On another date, the respondent led evidence to meet his claim0 Kuaeba wasa claimed that the appellant was a son of his junior brother Kamoge who, he alleged, was daac10 He said that the respondent was the daughter of late Pithiani who married, also, the appallant' nothor after death of his brother. Ho bases iis claim to this knowlod,'c on t1hc fact that Kamoge was ..ic his junior brother0 In coming to the concljusion that the appellant was riot the son of thumani, he relied entirely on the evidence ci Kamoga0 He does not appear to have oonidered any of the appellant's evidence0 Lnd the appellant took to task the learned magistrate, sa;ing that if the he would not have Jomc learned ma?;ictrate had taken into considoration tao evidence ho lcd, into conclusion that na was not the natural -0 - :3: SS)fl Of Ataumani. In ernorandum of appeal, the appellant denied that he was the son L.amoe Looking at -Lhe evidence as a whole, one cannot ovoid asking this question0 If the a:epellant was really the son of iamoga, why Gwasa, who claims to be the elVor brother of Kamoge, did not claim custody of the appellant at a ny time. It is inconceivable that he would have remained silent whil hi oi nephew was being carried away by a atanger, as Athumanil,uoidlbe in such a case. On the other hand, I do not see how Kibancchwa d/o 1'fungwa would claim that the appellant as well as the respoideit were the natuial children of her late brother, thumani. She would havo been the first to defend the claim of the respondent if her cliei was valid0 Istead she called in an outsider i.e. out of her familr, while tnose who testified in support of the appellant's claim incluced the respondent's paternal aunt. On the preponderance of probabilities, I am satisfied that the learned magistrates would not have failed to come to the conclusion that the a?ellant was the nati.rcl son of the late Athumani had he taken into consideration the oth r evidence which was on record. I am satisfied that the appellant wa the natural son of Athumani and would

therefore be entitled to inherit the deceased estate together with the respondent. In the circumstances, I set aside the decisions of the District and Primary Courts. It is clearly, the appellant disposed of the property of As the it was left in his hands without consulting with the respondent, late who is entitled to a share in it. It is not in dispute that the appellant sold three beds, two cushions, a hat, a knife, 3 shams and a watch. The Primary Court rightly pointed out some of these items cannot be restored in their original state, and even on this point the trial court was not tortain whether the shambas could be restored. The appellant could not have all this estate to himself as he did. The respondent, too, is entitled to a share. In the circumstances, the estate ought to be administered so that each claimant gets a share of it. The appeal is accordingly allowed. Each party to bear his own costs on costs. Delivered 24th March, 1971. JUDGE.

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