

TANZANIA / JUDGMENT

20050910 TZHC Arusha

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TZHCDECIDED
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I I IN THE HIGH COURT OF TANZANIA AT ARUSHA (PC) CIV};L APPEAL NO.40 OF 2002. (C/F Babati District Court civil appeal No.59 of 2000) (Original Magugu primary court civil case No. 1 of 2000)' - JULIANA SYPRIAN ~~!~ .. ;;APPELLANT Versus BERNARD MACHA ~~ RES PO" ~ENT 13/06/2005 & 13/09/2005 ·JUDGMENT MUSSA, J., The appellant sued the respondent in the primary _court of Magugu for the recovery of a piece of land situate at Kisangaji village, Babati District. In the proceedings at the trial, the- appellant had daimed that the disputed suit land was the property of her late f~ther in law a~d, therefore, inherited family property. The respondent- had countered . ; that he lawfully purchased the suit land. ... The trial Magistrate accepted the respon'dent's claim and; accordingly, judgment was pronounced in favour of the- respondent. Dissatisfied the appellant preferred an appeal to the District court of Babati but; she again lost: 1 •• The appellant now challenges the decisions · below and is represented by Mr. Materu while the respondent appeared in person. " / Both parties were agreed to argue the appeal by way of written

submissions.

f In his written submissions, counsel fo(the appellant challenges . I an apparent impropriety of procedure resulting from·the substitution of assessors submitting, in effect, that the trial, court·was, on that score,

- ' I not properly constituted. That being so, I cannot go into the me-rits of '~ . the appeal without the determination of the points raised in learned counsel submission. At the commencement· of the appell.ant's case, that is, on the 21 st March, 2000; two assessors, namely,, D.A. Chaman·i and D.T.Tarimo sat with the magistrate. Then, on that same day; when the appellant was finished with his evidence, D.A. Chamani was replaced by A. Omari and the latter, along with D.T.Tarimo, heard _, .. the remainder of the witnesses up to the close of the ·appellant's case, The suit was adjourned and when it resumed to take the defence on the 4th April, 2000; D.A. Chamani reappeared again . and sat with ' ' .) the other assessor, that is, D.T.Tarimo, apparently,, only to hear the ••" testimony of the respondent .for: Later the same day, D.A. Chamani was, again, absent and A. Omari took over up the final stage of the proceedings and judgme17t. It is quite appar~nt from the signatures appended by the assessors at the foot of the judgment that ·all the members agreed on one decision. The issue is whether or not the proceedings were irregular and; if so

whether the irregularity is incurable, as conceived by counsel for the appellant. It seems clear from the trial court record that while assessor D.T. Tarimo attended all sittings in the proceedings; the other original assessor, namely, D.A. Chamani absented himself twice, that is, after the appellant had testified and after the respondent had testified and; 2. I, on both occasions, trial was proceeded on with an intruding assessor, namely, A. Omari who also participated in the final determination of the case although he never heard the testimony of both the appellant and the respondent. If there have been instances in primary courts when, assessors have been changed in the most irregular way, this is one such instance. Is it not interesting that in the instant case assessor D.A. Chamani was drafted in the proceedings only to hear the testimony of the appellant and the respondent? I would not wish to believe that this has been the common trend in the proceedings below. The substitution was, apparently, unexplained, unjustified and; clearly irregular. On the premises, Mr. Materu advises that, in effect, the trial court was not properly constituted the result of which the proceedings were a nullity. Section 37(2) of the Magistrates' Courts Act provides that no decision or order of a Primary Court or a District Court shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the proceedings before or during the hearing or in such decision or order unless such error, omission or irregularity has in fact occasioned a failure of justice. It is, however, common knowledge that decisions in primary courts proceed on the majority basis. Assessors in the primary court are not mere advisers as elsewhere; they rather have, equivalent and complementary powers to those of the magistrate; Indeed it is against elementary rules of natural justice that the court should allow an intruding assessor to sit in judgment over a matter he is not properly seized with. I believe that section 37(2) is not intended to cure irregularities such as the one up for my determination. The provision is, rather, aimed at technical errors, omissions and irregularities which do not touch on the jurisdiction or constitution of the court. In the instant case, the trial court destroyed its constitution the moment assessor D.A. Chamani absented himself and was replaced by an intruding assessor. The court being unlawfully constituted means, I am afraid, the proceedings were a nullity. In the final result, I am satisfied that the trial below was a nullity just as were the proceedings of the first appellate court which are hereby, accordingly, also declared a nullity. The appellant may wish to re-institute the proceedings in a competent Tribunal. I make no order as to costs. K. SA JU GE (10/09/2005) 13th day of September; 2005 Coram: K. M. MUSSA, J., For the appellant: Mr. Materu For the respondent: Present in person. Court: Judgment delivered in chambers this 13th day of September, 2005 in the presence of the respondent and counsel for the appellant. / : K.M. ~ 4

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