

TANZANIA / JUDGMENT

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I ~ IN THE HIGH COURT OF TANZANIA AT ARUSHA CIVIL APPEAL No. 6 of 2001 (C/f. Arusha District Court Civil case No. 42 of 1997) Before: - A.A. Shakale, District Magistrate WILLIAM LESION The legal representative of the late Michael Lesion APPELLANT Versus ZELOTE MICHAEL SANAPA:• Legal representative of The Late Micha.el Sanapa RESPONDENT

JUDGMENT

SHEIKH, J. This is an appeal against the decision of ..the Arusha District 1 • ' • Court dismissing the suit instituted by the appellant herein. In 1997 the appellant Michael Lesion (the original plaintiff) had unsuccessfully sued MICHAEL SANAPA (the original defendant) in the Arusha District court in a claim for the ownership and possession of a piece of land measuring approximately four (4) acres situated at Njiro, Korongoni within th~ Arusha Municipality. The plaintiff averred that the aforesaid piece of land was previously the property of his father, the late LESION KITENGE, and that he (plaintiff) had inherited the said land from his late father who died in 1974. The plaintiff's case is that he is the owner of the suit land. The plaintiff avers that sometime before 1987 the plaintiff had gone to Nairobi, Kenya where / . he took up employment as a driver. At the time_ ; he left, he left the f disputed land in the possession and care bf the defendant. The •1 plaintiff further avers that in 1987 the plaintiff had returned and claimed the said land from the defendant but the defendant refused to hand over the land back to the plaintiff. The plaintiff personally testified at the trial and he also called three witnesses, the totality of whose evidence was to the effect that the land had once been mortgaged to one DANIEL KILESI by the plaintiff's father. In 1973 the defendant, had .redeemed the land by payment of shs.800/= to DANIEL KILESI. In 1987 •when the defendant refused to hand over the land the dispute was referred to the parties' clan elders. At the meeting of the clan elders it was decided in 1988 that the plaintiff was the lawful owner of the disputed land and that as a gesture of appreciation to the defendant for redeeming the land the plaintiff should give him a small portion, one third of the land. The plaintiff alleged that the defendant having refused to comply with the decision of the clan leaders the dispute was thereupon referred to the ward tribunal. In 1995 several joint meetings of the village authorities and clan elders were held at which it was ultimately decided to confirm the original decision of the clan elders to the effect that the disputed land belonged to the plaintiff and that the defendant was only entitled to the portion given to him as a gesture of appreciation in the decision of the• clan elders of 1988- i.e. the respondent would hand over to the plaintiff about two-thirds of the 2 ' . 3 1 /-' f" remaining one-

third portion. The defendant refused to abide by the decision of the ward Tribunal. The defendant's story was that he had purchased the suit land from the plaintiff's father in 1973 after redeeming it from one Daneil Kilesi and that the defendant has never possessed the land. The defendant had quiet undisturbed possession and enjoyment of the land until 1995 when the plaintiff started laying claims thereto and complaining to the clan elders. He alleged that he had possessed the land for over twenty years and in any case the suit was time barred. The defendant's case was corroborated by his two witnesses. DW2 said he had witnessed the sale of the land by the plaintiff to the defendant in 1973, when he was Chairman of the Village Conciliation Board. Unfortunately the defendant passed away during the trial before giving evidence in court, and was substituted by his son ZELOTE MICHAEL SANAPA as administrator of the deceased MICHAEL SANAPA'S estate. The plaintiff also passed away though after he had testified in court. The trial court found as a fact:

- (a) that the plaintiff had never possessed the disputed land, and
 - (b) that since 1973 the land was mortgaged to the defendant, (c) that when the plaintiff's father died in 1974, the defendant inherited only a right to redeem the land, and that the plaintiff had failed to redeem the land within the period stipulated by the law. The trial court decided that the plaintiff had accordingly lost his right to redeem the land and dismissed the suit. The appeal was filed by WILLIAM LESION, the son of the plaintiff, as the legal personal representative of the late MICHAEL LESION. The respondent is ZELOTE MICHAEL SANAPA, the legal personal representative of the late MICHAEL SANAPA. The appeal was argued by Mr. Maro, learned counsel, while the late Mr. C.E. Sabaya appeared for and contested the appeal on behalf of the respondent. The amended memorandum of Appeal filed by the appellant set out seven grounds of appeal. In his written submissions in support of the appeal Mr. Maro made it clear that he wished to abandon grounds 2, 3 and 7, and they are accordingly hereby marked abandoned. In addition at Mr. Maro's instance grounds 4 and 5 were consolidated and argued together. Accordingly the grounds of appeal that remain and were argued are the following:-
- 1) That the Learned District Magistrate having held that the appellant had the right to redeem the piece of land that was redeemed by the respondent erred in law and in fact in failing to order the appellant to abide by the law and redeem the suit land.
 - 4) That the Trial District Court erred in law and in fact in failing to find and/or hold that there was ample evidence which proved the ownership of the suit land to Michael Lesion.
 - 5) That the Learned Trial Magistrate erred in purporting to reframe the first issue as framed at the commencement of the trial by mixing up the issue of inheritance with the alleged failure to redeem the suit land and or possession of the suit land by the appellant.
 - 6) That in the alternative to ground number 1 herein the Learned Trial Magistrate erred in not finding and holding that the appellant by giving out 1/3 of the suit land to the respondent had effectively redeemed the suit land. Mr. Maro learned counsel for the appellant basically contended that the issue of ownership had not been considered by the District Court. He

argued that by dealing with the issue of the right to redeem rather than the issue of whether the plaintiff owned the land, the District had unjustly subjected the appellant to the law of limitation. Instead of counting the period of limitation from 1987, when the plaintiff/appellant claimed the land from the respondent, the court had counted from 1974. Mr. Maro also contended that there was no reliable evidence to prove the sale of the land to the respondent by the appellant; that the respondent's witnesses were not credible. Mr. Maro did concede however that the land had been pledged/mortgaged to the respondent upon the respondent redeeming it from one Daniel Kilosa by paying the original mortgagee shs.800/= Mr. Maro is however of the view that the only obligation of the appellant was to redeem the disputed land, which was still rightfully his, from the respondent. He was emphatic that ownership of the land remained with the late LESION KITENGE despite it being mortgaged to the respondent; upon his death in 1974, the land was inherited by the appellant. On the other hand the respondent's counsel has maintained that the judgment of the District Court cannot be faulted. The key issues to be addressed are:

- (a) whether the land was sold to the respondent
 - (b) whether the appellant has the right to redeem the land.
- I have carefully considered the evidence on record and the submissions by the respective counsel. It is undisputed that the disputed land was the property of the appellant's father, the late LESION KITENGE, who sometime before 1973 mortgaged the land to one Daniel Kileso to secure a loan of shs.800/=. It is clear on the evidence that in 1973, at the request of the late Lesion Kitenge, the defendant redeemed the land from Daniel Kileso by repaying the loan of shs.800/= to Daniel Kileso. The mortgage of the land was transferred to the respondent upon payment by the respondent of shs.800/= to the original mortgagee, and thereby the disputed land was placed in the possession of the respondent. It is undisputed that Lesion Kitenge died in 1974 before he could redeem the suit land from the respondent. It is also clear on the evidence that at the time of his father's death in 1974, the plaintiff/appellant was resident outside the country, and remained outside until 1987 when he evidently came back and started claiming the land as his property. The appellant upon cross-examination admitted that the land was put in the possession of the respondent in 1973 by the late Lesion Kitenge, at which time the appellant was in Nairobi. There is no dispute that since then i.e. 1973 the land has been in the uninterrupted possession of the respondent, for a period of fourteen years upto 1987 when the appellant started laying claims to it. The appellant has also admitted that the land was mortgaged to the respondent and up to 1987 when he returned to claim it the land had not been redeemed by him, or his father before him. It is not disputed either that the respondent has developed the land, or built a house therein. The appellant is however denies the sale of the house to the respondent. He contends that he is the lawful owner and has the right to redeem the land in accordance with the decision of the clan elders made in 1988, and later confirmed by the ward tribunal in 1995. The basis of the appellant's claim to the land is that

he had inherited the land from his father. He has denied that the land was ever sold to the respondent. On consideration of the evidence regarding the issue of ownership of the land, I find there is overwhelming evidence of the sale of the land to the respondent by the appellant's father at the price of shs.240/=, as testified by DW2 and DW3. I am satisfied that at the time the respondent had redeemed the land in 1973 he had also bought the land at the price of shs.240/= which was apparently then the value of a calf and a sheep that being the price the late Lesion Kitenge had demanded for selling the land to the respondent. 8 Thereupon both ownership and possession of the land had passed to the respondent. (See Court of Appeal of Tanzania Civil Appeal No. 7 of 1998 - LOITARE MEDUKENYA and ANNA NAVAYA). Assuming that I am wrong and that there was in 1973 a transfer of mortgage but no sale as alleged by the respondent, ' the question is does the appellant have a right to redeem the land from the respondent? . As stated earlier herein, it is undisputed that in 1973 the land in question was mortgaged to the respondent the late Michael Sanapa upon him redeeming the land from Daniel Kileso. It is clear on the evidence that the late Lesion Kitenge who died in 1974 never redeemed the land. In other words in 1974 the land was still mortgaged to the respondent. It follows that the appellant inherited the right to redeem it and this right existed until 1985. Up to 1987 when the appellant returned to claim the land, it was still in the possession of the respondent. More importantly, it is evident that by 1987, that is about fourteen years later the appellant had not redeemed the land. The disputed land having been mortgaged by the father of the appellant to the respondent in 1973, is it open to the court to allow the appellant to redeem the land as urged by learned counsel for the appellant?. According to G.N. No 311 of 29 th May 1964 item 6 thereof, the period of limitation for proceedings to recover possession of land secured on mortgage of land is twelve (12) years. Even if it is accepted as contended by the appellant that the clan elders had ruled that he is the lawful owner and had the right to redeem the land by giving to the respondent 1/3 of the land, the fact remains that until 1987, at no time had the appellant redeemed the land, and the land remained under the mortgage. By this time i.e. by 1987, the appellant was already time barred under the provisions of G.N. No 311 of 1964. The Court of Appeal of Tanzania in the case of NICHOLAUS KANUNGA and MIKA MELIYAR - Civil Appeal No. 8 of 1998 (unreported), has said " the right of redemption cannot be enjoyed in perpetuity. Any custom enshrining this right ought now to be construed in the light of existing Laws of Limitation as well as public policy " (See also (PC) High Court Civil Appeal No. 41 of [1995] (AR) ZEBEDAYO SIMON versus P. SETH. 11 As stated above in my view the appellant did inherit the right to redeem the land but it is undisputed that even by 1987 he had not redeemed the land. He had forfeited his right to redeem the land on having failed to redeem it within the 12 years period stipulated by the law. For the same reasons I find the decisions of both the clan elders made in 1988 and the ward tribunal made in 1995 declaring the appellant as the owner and giving him the right to redeem by giving the respondent 1/3 of the land to be null and void having been made well beyond the 12 years limit provided by the law. For the above reasons, I am satisfied that the appellant having failed to redeem the land within the twelve years prescribed by the law had lost his right to redeem it because of the effluxion of time. The suit itself having been filed in

1997 is hopelessly time- barred. As a result. the appeal is !Jereby dismissed with .costs. . . , I; I, .I 1, 1I I.,I• I 'i J • , ' I , " c: R. Sheikh JUDGE 26/05/2005_ 1 ! Judgment delivered this 8th day of July, 2005 in the absence of Mr. Maro Advocate for the Appellant and in the presence of the I respondent, and Kagu Court Clerk. I' i I. ,/' I ;. I : i I l .~ R. Sheikh . ' JUDGE , I I 08/07/2005 RS/hjm. 12

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