

**IN THE HIGH COURT OF TANZANIA**  
**AT SONGEA**  
**PC. CIVIL APPEAL NO. 4 OF 2007**  
**MBINGA DISTRICT COURT CIVIL CASE NO. 67 OF 2003**  
**ORIGINAL LANGIRO PRIMARY COURT CIVIL**  
**CASE NO. 8 OF 2003**  
**WENSISLAUS NDUNDURU ..... APPELLANT**  
**VERSUS:**  
**PHILIPO FOLKWART ..... RESPONDENT**  
**05/06/2007 HEARING CONCLUDED**  
**14/08/2007 JUDGMENT DELIVERED**

**J U D G M E N T :**

**KAGANDA, J.**

This is a second appeal, the suit originates from Langiro Primary Court in Mbinga District. The parties dispute was over a piece of Land, the trial Court entered judgment infavour of Wensislaus Ndunguru who is the appellant before this Court.

Before I proceed to the merits of the appeal, I have to solve the issue raised by the respondent as a preliminary objection. The respondent claims that the appeal was filed out of time as such it should be dismissed. On record, the District Courts judgment show that it was delivered on 25<sup>th</sup> March, 2004. The appellant disputed to those claims, affirming that the appeal was filed within time. He pleaded that there were some delays on getting copies of judgment and that the memorandum of appeal was first filed in Swahili language and the court ordered for amendment into English language. I have examined the record to the District Court proceedings and

I found that the judgment is dated 25<sup>th</sup> March 2004, the date it was delivered before the parties. The receipt to the appeal is dated 20<sup>th</sup> April 2004 and is numbered ERV. 18302975 – 5600. I believe my computation is correct for I find that it was filed within time, that is less than 30 days. That being my finding, then the respondents preliminary objection must be dismissed for lack of merit. It is so dismissed.

Having disposed of the Preliminary Objection, I now go to the merits of the appeal. The evidence adduced before the trial Court was that, the land in dispute was issued to the respondent one, Wensislaus Ndunguru through his father. It was alleged that there was a natural boarder between the farms which was a water channel. The appellant is said to have filled in and diverted the water- channel to another area other than the original way. SM2, Folkwati Mateso testified to the effect that, the land in dispuste was issued by him to one Philipo Ndunguru, who was the plaintiff SMI, before the Primary Court. That name doesn't appear in the M/appeal because the appellants name is registered as Wensilaus Ndunguru and the Respondent Philipo Folkwart. The later has not declared change of name as such he appears to be a stranger to this appeal because he was not a party to the proceedings.

SM2, Folkwart Mateso and SM3, Severin Mapunda testified in support of the plaintiff on that the water channel was diverted by the appellant. On the other hand the Respondent/Appellant claimed to have been issued the land in dispute by his grandfather. There was no further description to that event nor detailed information, but he admitted that there were banana plantation near the water channel which had been planted by the Plaintiff/Respondents father. SU2 testified contrary to SMI and SUI, On that the land in dispute is a clan land but he did not mention the name of that clan or mention on whose clan between the contesting parties. Likewise

SU3, had a different story, according to him the land in dispute was held by Mr. Milinga's father but the said person was not summoned to testify before the Court.

The trial Court framed three issues which were:-

- (a) whether it was true that the respondent had filled in the water-channel with gabbage.
- (b) Whether it is true that the plaintiffs father planted Some Banana plantations near the boarder.
- (c) Whether the water-channel was a natural boarder.

The trial magistrate did not solve those issues but went on to make a decision in favour of the Respondent/Appellant. The law is clear on the mode of judgment writing on that, judgments should indicate the point or points for determination. Those points should be in line with issues which the Magistrate had identified or framed. They should also be supported by the testimony of witnesses to the case. I therefore believe that had the trial magistrate looked into the evidence through the issues, he could have decided the matter in a better and precise way.

The appellants grounds of appeal were that, the trial Magistrate failed to evaluate the evidence adduced on balance of probabilities. Second that, the court of first instant was a better one and that its decision shouldn't have been reversed because it had a chance to see the witnesses testify and had visited the seen. I have already salved on the issue of limitation of time as to the appeal but it was presented as an issue on the filing of the suit for recovery of the land. The evidence adduced was that the land was issued to appellants' father in 1993 and the suit was f.iled in 2003, that was a lapse of about ten (10) years as such the issue of limitation of time for a period of twelve (12) years is not relevant. I do agree with the principle that the court of first instant stands a better chance on entering the right decision because it

has an opportunity of observing the witnesses demeanor and sometimes visit the disputed area. But those factors are not sufficient for the court to make a decision because what is required is for the magistrate to evaluate the whole evidence which may include exhibits as well. The trial Magistrate like the first appellate court observed those requirements I believe. On the issue of standard of proof, I do agree with the principle on that IN civil cases, the suit has to be proved on the balance of probabilities. In the case at hand it was Philipo Ndunguru the plaintiff who had adduced some evidence reasonably supported by his two witnesses. The appellant's evidence was not actually supported by his two witnesses SU 2 and SU 3, infact it was rather <sup>di</sup>contracting as I have observed herein this judgment. Further more, the evidence of Philipo Ndunguru was supported by the sketch-map to the seen drawn by the trial magistrate. My finding is that the land in dispute was made to exchange hands by oral agreements hence the two witnesses were sufficient to prove it.

In the event I find that the District Courts judgment was legal and sounding. The said Philipo ndunguru had proved his case on the balance of probabilities. The appeal is hereby dismissed for want of merit. The disputed land is hereby declared to belong to one Philipo Ndunguru who stood as the plaintiff before the trial Court. This court does not know of Philipo Folkwart, as he was not a party to the proceedings. Costs follow the event.

Right of appeal explained.

  
**S.S. KAGANDA**

**JUDGE**

**13/8/2007**

**Court:** Judgment read over and delivered this 14/08/2007 in the presence of both parties.

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**S.S. KAGANDA**

**JUDGE**

**14/08/2007**

**SSK/PJL.**