

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

LAND APPEAL NO.2 OF 2022

*(Originating from the District Land and Housing Tribunal for Mtwara in
Land Application No.14 of 2022)*

FATUMA USI LUHEMBA.....APPELLANT

VERSUS

MUSA ABDALA NGANDULE.....RESPONDENT

JUDGMENT

5th and 30th June 2023

LALTAIKA, J.

The appellant herein **FATUMA USI LUHEMBA** is dissatisfied with the decision of the District Land and Housing Tribunal for Mtwara in Land Application No.14 of 2022. The controversy between the parties is over the suit land measuring six acres situated at Nachunyu Village within Nambahu Ward and in Tandahimba District.

The genesis of the matter is that the suit land is allegedly to have been owned by the appellant's father (Ausi Luhemba). When the appellant's father

passed away, he left his estates and children including the appellant in the hands of Mr. Abdallah Ngandule (the respondent's father). During the lifetime of Mr. Abdallah Ngandule it is allegedly that he did not give the appellant and other beneficiaries their estates including the suit land left by their late father. It is also allegedly that in 2014 Mr. Abdallah Ngandule passed away while he had given the suit land to the respondent since 2011. It is further allegedly that the respondent took control of the same which is the bush although he was not working on it because he has other areas.

After the death of the respondent's father Mr. Rashidi Mohamed Likoko took over the position which was under the control of the respondent's father. Soon after taking the lead, Mr. Likoko stated that the respondent and his relative had already taken their inheritance such as the cashews farm and the house. He went further and stated that the appellant has not obtained her inheritance which is the bush land which had not been divided to them since at the tenure of the respondent's father.

Mr. Likoko stated that he told the respondent that the appellant and her relatives have not obtained their estate which is the bush land. He advised the respondent that he would not interfere with the previous division of the properties, but he stressed that the bush land should go the appellant and her relatives. He also insisted that the piece of land they are using were all given to them and respondent's father by the appellant's father. Surprisingly, in 2021 the respondent allegedly that the appellant encroached the suit land while it his property.

It seems that the matter initially had gone at the Village Land Council of Nachunya and Ward Tribunal of Nambahu and the appellant won the matter. However, the respondent decided to lodge the matter at the Tribunal and claimed ownership over the suit land.

During trial the respondent testified without calling any witness and tendering any document to prove his ownership over the suit land. The respondent simply testified that he was given the suit land by his late father when he was alive in 2000. From when he was given, he has never used the same. However, in 2021 the appellant claimed that the suit land is belonged to his late father.

The appellant and her witness (Mr. Rashidi Mohamed Likoko) stated that the appellant's father left his assets which were not distributed to the beneficiaries of the late Ausi Luhemba.

After trial the Tribunal was satisfied that the appellant had proved his claim that he owns the suit land because he was given by his late father before his death. However, the major reason for declaring the respondent the rightful owner of the suit land is the failure for the Mr. Rashidi Mohamed Likoko to prove his appointment as the administrator of the estate of the late Ausi Luhemba when he divided the suit land to the appellant.

Having dispassionately considered the rival submissions and the lower court records, the issue for my determination is whether the Tribunal analyzed well the evidence it gathered and considered it on the standard of proof of a civil case by declaring the respondent the rightful owner of the suit land.

As I have gone through the impugned judgement, and I am fortified that the learned Chairman misdirected himself by declaring the respondent the rightful owner of the suit land whose proof of ownership was in fact not proved by his mere words that he was given the same by his late father during his lifetime. The learned Chairman ought to have gone far and not by stating that DW2 failed to prove his power to administer the estates of the late father of the appellant. If that is the case, there is no evidence which was brought by the respondent that his late father gave him the suit land while he was not the administrator of the estate of Ausi Luhemba.

The evidence of DW1 and DW2 shows that the late father of the respondent inherited the estates and family of the Ausi Luhemba under customary law governing the community to which they belonged.

Furthermore, it is a settled principle of law that the one who alleges must prove his allegation. Furthermore, it is a trite law that in civil cases, the burden of proof is on the one who alleges, and the standard of proof is on the balance of probability. This implies that a party who has a legal burden bears the evidential burden. For instance, the Court of Appeal of Tanzania in the case of **CHARLES CHRISTOPHER HUMPHREY RICHARD KOMBE T/A HUMPHREY BUILDING MATERIALS VS KINONDONI MUNICIPAL COUNCIL** (Civil Appeal No. 125 of 2016) [2021] TZCA 337 (2 August 2021) discussed this issue extensively by referring to the commentaries from the selected cases in India by the learned authors of Sarkar's Laws of Evidence, 18th Edition, M.C. Sarkar, S.C. Sarkar and P. C. Sarkar, published by Lexis Nexis at page 1896

See also the case of **Abdul-Karim Haji v. Raymond Nchimbi Alois and Joseph Sita Joseph** [2006] TLR it was held that: "It is an elementary principle that he who alleges is the one responsible to prove the allegations."

More importantly, sections 110(1) and 111 of the Evidence Act [Cap.6 R.E. 2022] provides:-

*"110. (1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side."*

Looking at the record of the Tribunal, the respondent did not bring the weightier evidence against the appellant. The mere word that he was given by his late father does not suffice to prove his claim. It is very strange that the respondent failed even to call his fellow members from his family to prove his allegation that he was real given the suit land by his late father.

In addition, the evidence of respondent is contradictory as to when he was given the suit land. I am saying so because in his application he stated that he was given the suit land in 2011 while during trial he testified that he was given the same in 2000. This makes the respondent an incredible and unreliable witness. It also reduces the value of his evidence.

More so, the act of the respondent leaving the suit land unattended since the time he asserted to have been in occupation till when the appellant started working on it in 2021. Indeed, this makes his evidence unbelievable if he was really given the suit farm by his late father. To this end, I am

fortified that the respondent failed to prove his ownership over the suit land hence, the appellant should proceed with her occupation and ownership over the suit land.

In the upshot, I allow the appeal. I nullify the judgment of the DLHT and set aside all orders emanating therefrom. I make no orders as to costs.




E.I. LALTAIKA
JUDGE
30.06.2023

This Judgement is delivered under my hand and the seal of this court this 30th day of June 2023 in the presence of both the appellant and the respondent who have appeared without legal representation.




E.I. LALTAIKA
JUDGE
30.06.2023

The right to appeal to the court of appeal of Tanzania fully explained.




E.I. LALTAIKA
JUDGE
30.06.2023