

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

LAND APPEAL NO.17 OF 2022

*(Originating from the District Land and Housing Tribunal for Lindi at Lindi
in Land Application No.12 of 2021)*

FATUMA SWALEHE NJOZI (An administratrix of the estates of the
late SWALEHE HASSAN NJOZI).....**APPELLANT**

VERSUS

THABIT HASSAN KAZUMARI.....**1ST RESPONDENT**

WERNER TARASISI CHIWEMI.....**2ND RESPONDENT**

JUDGMENT

13/6/2023 & 27/7/2023

LALTAIKA, J.

The appellant herein **FATUMA SWALEHE NJOZI** suing as an administratrix of the estate of her late father SWALEHE HASSAN NJOZI is dissatisfied with the decision of the District Land and Housing Tribunal for Lindi at Lindi in Land Application No.12 of 2021. She has appealed to this Court on the following grounds:

1. *That the learned trial Chairman erred in law and fact by holding that the disputed land belonged to the 1st Respondent without considering that the 1st respondent was customary administrator of the disputed property who refuses to distribute the same to the heirs.*

2. *That the learned Chairman erred in law and facts when holding that the disputed property belongs to the 1st respondent in which he is residing in deceased house with heirs in since death of his brother, cultivate disputed land and now deprive the same.*
3. *That the learned trial chairman erred in law and fact by giving right to the 2nd respondent basing on a defective sale agreement.*

When the appeal was called on for hearing, parties appeared in person unrepresented. They opted to argue the appeal orally. The next part of this judgment summarizes their arguments.

The appellant stated that it was true that her late father passed away in 2002. She mentioned that her father had left the suit land to his younger brother (1st respondent), who took on the role of a caretaker on behalf of their father. The appellant noted that they were fourteen siblings, with the youngest being seven years old, and their mother was still alive. They had come to court with their mother when they asked their uncle (referred to as "baba mdogo") to return their land, and he responded aggressively, threatening anyone who went to the farm with harm.

The appellant shared that she decided to seek help from other elders who tried to mediate three times, but the 1st respondent refused to cooperate. She then decided to **go to court and approached the Ward Tribunal at Mtama**. Despite reconciliation efforts, the 1st respondent remained unyielding. The appellant proceeded to complain to the Primary Court about being chased away from the land, and the court suggested instituting a probate case. However, the respondent failed to appear in court, and the magistrate heard their case in their absence, declaring that

10 acres of cashew farm, one acre of wheat farm, one house, and one plot belonged to her.

Regarding the 4 acres that the 1st respondent had sold to the 2nd respondent in 2017, the appellant was instructed to collect summons from the Ward Tribunal to address the issue. When she went to the tribunal, she was informed that her uncle (the 1st respondent) had sued her for allegedly taking his household items. The Ward Tribunal asked her to show the farm that the 2nd respondent had purchased, and both parties presented their respective places. However, the Ward Tribunal ruled that out of the 10 acres that belonged to her father, only one acre was given to the appellant, while the remaining nine acres were awarded to the 1st respondent.

Dissatisfied with the decision, the **appellant appealed to the District Land and Housing Tribunal (DLHT)**, which ordered them to return to the Ward Tribunal, but the DLHT's decision favored the 1st respondent even more, awarding him the entire 10 acres and the additional 4 acres.

The appellant expressed her frustration that the land was still in the hands of the respondents. She recounted an incident when she went to harvest cashews on the 10-acre land that belonged to her late father, and she was accused of theft. This led to her being sentenced to a four-month conditional sentence, but later the sentence was changed to a fine of 50,000/= (Tanzanian Shillings).

The 1st respondent, on his part, responded to the appellant's submission by stating that his father **originally came from Mozambique**

and arrived in Tanganyika in 1936. He settled in Nyangamala, and his younger brother, referred to as "Bwana Mdogo" (the appellant's father) who was living in the forest, bought him a piece of land in Nang'aka village. The 1st respondent was born in 1939, and his mother was from the same area. Although they were initially placed under their mother's care, their father later took them back. In 1975, their father passed away, leaving three sons: the first born Athumani Hassan Kazumari, the second born Swalehe Hassan Kazumari, and the last born Thabit Hassan Kazumari.

When Swalehe passed away, uncles from their father's side asked them to divide the property in their presence, but the 1st respondent expressed that his mind was not settled on the matter. He shared that he went to Mozambique to get married and brought his wife back to Nangaka, where they had two children, which prevented him from acquiring additional property. The 1st respondent acknowledged that Swalehe was the first to sell some of the inherited land, specifically 4 acres sold to the 2nd respondent before Swalehe's death. The 1st respondent also sold 2.5 acres of the land after Swalehe's passing, making sure to exclude the 4 acres already sold by Swalehe.

He continued, explaining that the deceased (Swalehe) **had gone to Mkuranga and purchased 40 acres of land**, and when he fell sick, the 1st respondent asked him to return to Mtama. The deceased revealed the deceased requested not to be taken to the hospital. The 1st respondent cared for his brother until he passed away, burying him in the area.

In rejoinder the appellant argued that there was an agreement presented in the DLHT concerning 4 acres of land. She emphasized that the land sold by her father to the 2nd respondent was not in question. According to her, her father sold 4 acres, but the dispute lies in the sale to Werner, as she believed that the seller had no authority to sell the property that belonged to her late father.

The 2nd respondent addressed the court, stating that he was a young man at the time. The appellant's husband invited him to meet her father (the father of the appellant) and expressed his intention to sell a piece of land to the 2nd respondent. At the age of around 21, the 2nd respondent mentioned that he was unaware of the process of buying land. Both parties had witnesses present, and they visited the location in question. The appellant's father informed the 2nd respondent that he could only sell his own portion of the land and not his brother's part. In 2002, they signed the agreement. The 2nd respondent claimed that the late Njozi was not seriously ill during that time.

The 2nd respondent continued, explaining that during the process at the village office, the Village Executive Officer (VEO) inquired if the late Njozi had the authority to sell the land. The late Njozi responded that he had already sold 5 acres to Fatuma Supetu and was now selling 4 acres to the 2nd respondent, which he did. The 2nd respondent stated that he resided on the land until 2007. At one point, the 1st respondent, and his witness (who had also been a witness for the late Njozi) sold him an additional piece of land while he was working on his other farm.

The 2nd respondent expressed regret that everyone involved in the farm he purchased from Mzee Njozi had passed away. The land he bought from the 1st respondent measured 2.5 acres, and he had worked on it from 2007 to 2020 without any interference. He further opined that the appellant had been living in Dar es Salaam and had squandered all their property there. Now, she returned to claim from them, accusing her of robbing her uncle and attempting to rob from him as well.

The 2nd respondent recounted the legal proceedings, mentioning that they went to the Ward Tribunal first, which decided partly in the appellant's favor, asking her to give 8 acres out of the 10 acres to her *baba mdogo*. However, she was told she wasn't a proper party as she was not the administrator of the estate.

After that, the case restarted at the DLHT due to pecuniary jurisdiction issues. Ultimately, the whole land was granted to the 1st respondent and the 2nd respondent. The chairman of the DLHT argued that it was not reasonable to demand the land after 12 years, considering that the 2nd respondent had possessed it for over 14 years.

The 2nd respondent stood by the decision of the DLHT and expressed surprise that the appellant was now denying her own evidence. He claimed that there were attempts to work against the court's decision, mentioning that the appellant even called bouncers into the matter.

I have **dispassionately considered the** rival submissions and thoroughly examined the court record. In determining this appeal, this court shall pay attention to the three grounds of appeal raised by the

appellant severally or jointly. Generally, the issue is whether the Tribunal properly analysed the evidence gathered in declaring the first and second respondents the lawful owners of the suit land or not. Apart from the general issue, I think it will be imperative to analyse issue of ownership of the suit land before late Mzee SWALEHE HASSANI NJOZI and the first respondent had sold it to second respondent.

As I had stated earlier that the in this matter the suit land has two faces. The first face is the one which the first respondent is still in occupation while the second face of the suit land is that which the first respondent had sold part of the suit land to the second respondent. More so, at the very outset I should make clear that the appellant does not deny the fact that his late father had sold a total of eight acres to the second respondent and Fatuma Sepetu.

Without wasting time, the appellant is claiming 14 acres of land (suit land) which belonged to her late father and asserts that the same have been trespassed by the respondents. Now, the issue is whether the appellant has proved before the Tribunal that her late father owned the same. In answering this issue I will be guided by a settled principle of law that the one who alleges must prove his/her allegation. More so, 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, 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) Court of Appeal

of Tanzania 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 whereby the Court at page 15 stated:

"...the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. ...The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party...."

Again, in 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."

Going through the record availed to me from the Tribunal, the appellant (PW1) only testified that in 1998 was told by her late father how he acquired the suit land. The evidence of PW1 went further and stated

that the late SWELEHE HASSANI NJOZI started by purchasing two acres and had paid TZS.40/ while he was residing at Ndanda. PW1 also testified that her late father continued purchasing two (2) to three (3) acres until it attained to twenty-four (24) acres of land. The evidence of PW1 was supported by the evidence of PW2. The evidence of PW2 is to the effect that she was married by the late SWELEHE HASSANI NJOZI in 1972 and they were shown them the two acre farm which had some bushes and cashew trees. They continued cultivating and planting the groundnuts and bambara nuts (njugu mawe).

PW2 testified that her late husband had purchased other pieces of land from several persons like Mzee Atobo, Binti Yohana, Sofia Jaliwahi, Mama Nandoa, Mzee Muungano, Mzee Lichenga, Mzee Liekela, Binti Basha, Mzee Mussa Akule, Esha binti Seif, Binti Mpenyu and Khamis Ndembo. PW2 testified further that four other acres were obtained when she and her co-wife decided to exchange with rice with Somoe.

Looking the evidence of PW1 and PW2 curiously it creates an element of sale of land. If that is case, from PW1's evidence who sold the two acres of land to the late SWALEHE HASSANI NJOZI and when? The next question is, where is the allegedly sale agreement between the late SWALEHE HASSANI NJOZI and the undisclosed seller. Furthermore, who were the witnesses of the sale agreement?

Apart from those questions on the sale of the first two acres of land acquired by sale by the late Mzee SWALEHE HASSANI NJOZI, the appellant was required also to prove through her evidence on the information she

was told by her late father on how he had acquired the suit farm. I am saying so, because on her evidence she testified that the late Mzee SWALEHE HASSANI NJOZI had fourteen children. Now, the question is where are those other thirteen children of the late SWALEHE HASSANI NJOZI? The evidence of PW1 is silent if what she was told by her late father was also availed to the other children of the late SWALEHE HASSANI NJOZI. Failure to call her co-children of the late SWALEHE HASSANI NJOZI makes her evidence incredible and unreliable to prove that fact that her late father had initially bought two acres and later used to buy between two to three acres until it reached 24 acres.

On the other hand, the evidence of PW2 was well adduced but it misses evidence of proof from those persons she had mentioned as the sellers of the pieces of land which features the suit land. More so, the evidence of PW2 needed documentary evidence to prove purchase of the same plots between the late SWALEHE HASSANI NJOZI and those mentioned sellers. The sale agreements could have been tendered by PW1, PW2 or the mentioned sellers. Thus, remaining with the oral evidence of PW1 and PW2 without disclosing the name of the first seller of land acquired by late SWALEHE HASSANI NJOZI or calling the above-mentioned persons or tendering documentary exhibits to prove sale and purchase of the suit land affects the quality and weight of her evidence which support her case.

More ever, the evidence of DW1, DW2 and DW3 has proved that the suit land belonged to the late father of first respondent and the late SWALEHE HASSANI NJOZI. DW2 and DW3 are the grandchildren of Mzee Hassani Kazumari, the father of the late SWALEHE HASSANI NJOZI and

first respondent. DW2 stated that he knew that the suit belonged to his late grandfather since 1957 when he was ceremonized Unyago. While DW3 knew about the suit land since 1966 and visited the same with his father (the son of Mzee Hassani Kazumari) in 1972 and picked up the cashews. DW3 also testified that in 1976 the late Mzee SWALEHE HASSANI NJOZI shifted from Ndanda due to sickness and requested his late father to use the suit land. The evidence of DW1 shows the suit land belonged to his late father (Mzee Hassani Kazumari) who passed away in 1977.

That after the death of their father the suit land became under control of his two older brothers who are all deceased persons and it include the late SWALEHE HASSANI NJOZI. The evidence of DW1, DW2 and DW3 shows that the late SWALEHE HASSANI NJOZI and DW1 had divided the land left by their father which includes the suit land under customary law governing the community to which DW1 and the late SWALEHE HASSANI NJOZI belong. The evidence of DW1 shows that his late brother SWALEHE HASSANI NJOZI sold his part of land they had divided and some of the proceeds were used to buy 40 acres at Mkuranga and erected a dwelling house at Yombo Vituka in Dar es Salaam. The evidence of both PW1 and DW1 and DW4 shows that the late SWALEHE HASSANI NJOZI sold his land to the second respondent and Fatuma Sepetu while he was alive.

On the light of the above observation, I am of the fortified that the sale agreements tendered by DW4 and admitted by the Tribunal as exhibit D1 and D2, respectively were neither objected nor cross examined by the appellant on its validity. Therefore, the appellant's complaint that the sale

agreements were defective is devoid of merit. I have taken my ample time to go through exhibit D1 and D2 and I am fortified that the sale agreements have no legal problems since were executed by the persons who had capacity to contract.

On top of that, the evidence of DW1, DW2 and DW3, respectively, has proved that DW1 is legally occupying the suit land which was the property of his late father Mzee Hassani Kazumari and which he acquired after they had divided the same with late brother. In addition, I am fortified that the sale of two and half acres to the second respondents from the first respondent was lawfully done and the good title had passed to the second respondent.

Said and done, I am convinced that the Tribunal properly analyzed the evidence adduced by both parties to this matter and arrived to proper decision of declaring the respondents the rightful owners of the suit land to the extent each one occupies it. Consequently, the appeal is dismissed in its entirety with no order as to costs.

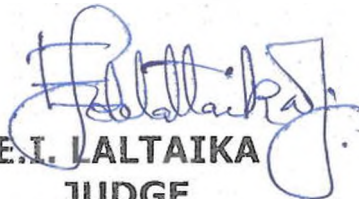
It is so ordered.




E.I. LALTAIKA
JUDGE
27/7/2023

Judgement delivered under my own hands and the seal of this Court on this 27th day of July 2023 in the presence of both parties who have appeared in person, unrepresented.




E.I. LALTAIKA
JUDGE
27/7/2023

Court

The right to appeal to the Court of Appeal of Tanzania fully explained.




E.I. LALTAIKA
JUDGE
27/7/2023