**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**(MTWARA DISTRICT REGISTRY)**

**AT MTWARA**

**LAND APPEAL No. 13 OF 2023**

(Originating from the District Land and Housing Tribunal for Mtwara in Land Application No.29 of 2021)

**BIRIGITA PETER KAPEYU.....APPELLANT**

**VERSUS**

**ABDALLAH NACHUNDU .....1ST RESPONDENT**

**MARIO PATRICK MARIO .....2ND RESPONDENT**

**JUDGMENT**

*24/8 & 29/9/2023*

**LALTAIKA, J.**

The appellant herein **BIRIGITA PETER KAPEYU** is dissatisfied with the decision of the District Land and Housing Tribunal for Mtwara ("the DLHT") in in Land Application No.29 of 2021. She has appealed to this Court of the following grounds:

(1) *That the District Land and Housing Tribunal erred in law and in fact in finding that the suit land doesn't belong to the appellant not taking into account the strength of the evidence adduced by the appellant vis a viz the evidence of the respondents with regard to ownership of the suit land.*

(2) *That, the District Land and Housing Tribunal erred both in law and in fact in disregarding exhibit P1 tendered by the appellant which exactly proves location, measurement, and ownership of the suit land to the appellant.*

(3) *That, the Tribunal erred in law and in fact as the Hon. Learned Chairman misdirected himself and misconceived the principal of failure of a party to cross examine a witness as he did not take into account the fact that all what was stated by the said witness by the said witness had already been denied and contradicted in her examination in chief.*

(4) *That the District Land and Housing Tribunal erred in law and in fact in failure to apply the principle of standard of proof as he didn't base his decision on balance of probabilities instead the standard applied was too high.*

The *factual* and contextual background to understand the controversy, as can be gleaned from the court records takes us to a place called Mjimwema, Magengeni Ward in Mtwara Mikindani Municipality ("the Municipality"). The appellant alleges that in the year 2002 she bought a piece of land measuring 4125 square kilometers in that area which, by then was a village. No wonder, as the appellant alleges, she used the land for cultivation of temporary crops.

Due to urbanization and the quest for expansion, the Municipality announced to the villagers eleven years later, that is in 2013, the plan to acquire the land and compensate landowners accordingly. The Municipality ordered the landowners to refrain from developing the areas pending payment of their compensation. It appears that the Municipality took longer than expected and the villagers, allegedly including the appellant, knocked the doors of this Court and the Court adjudged in their favour directing the Municipality to allow landowners to continue with their activities until such time that the Municipality would be ready to pay compensation.

After the case, the appellant went back to the village, but her land had, allegedly, been invaded by the respondents. The first respondent who is a local of that village unlike the appellant who lived elsewhere, vehemently denied the appellant's version of the story. The second respondent, on his part, claims he had purchased the land from the first respondent and that such land had never been a part of the area earmarked for acquisition by the Municipality.

The controversy was taken to the DLHT which, as alluded to above, adjudged in favour of the respondents hence this appeal. When the appeal was called for hearing, both parties appeared in person, unrepresented. The next part of this judgement is a summary of the rival oral submissions of the parties. To save time, the first respondent to allow the second respondent to proceed while reserving his right to make minor additions should conditions dictate.

Submitting in support of the first ground, the appellant stated that she was the one whose land was valuated and that she provided evidence to support this claim. She further explained that the District Land and Housing Tribunal (DLHT) did not believe that the valuation had been conducted on her land. They asked her to come to the High Court to prove her involvement in the case. She mentioned that she came to this court and requested a copy of the judgment, which she then took to the DLHT. However, they insisted on having the original copy. The DLHT checked the original judgment and did not find her name in it. She believed this to be an error because there were 700 people involved, and only the leaders were mentioned in the judgment. She also mentioned asking the 1st respondent about whether the

suit land had been valued, as she had no questions for the second respondent, who was just a buyer, and she assumed he didn't have any relevant information.

The 1st Respondent, on his part, argued that the DLHT's decision was correct. He claimed that the DLHT had considered the evidence from both parties. He pointed out that on page 8 of the judgment, it was clear that both sides had been considered. Regarding the evidence related to the valuation form, he argued that there was no connection between the suit land and that form, as it did not contain any coordinates. He also acknowledged that in the main case of the High Court, only two persons out of the 700, namely Emanuel Rushita and Salum Bakari Hamisi, were mentioned. He stated that the DLHT was unable to determine whether the appellant was indeed among the 722 people or if she had inserted herself into the case without justification. He believed that the DLHT's approach was correct in not making any findings in that regard, in his opinion.

Moving on to the second ground of appeal, the appellant claimed that the land belonged to her since it was purchased in 2001. She stated that she had provided a valuation certificate as evidence and had brought a witness who had also purchased land and testified that he had encountered the 2nd respondent. According to her witness, the 2nd respondent had indicated that he had no issues with the buyer but intended to deal with the seller, specifically the 1st respondent.

The 2nd respondent responded by addressing the second ground of the case concerning exhibit P1, which was a valuation form. He expressed

doubts about the authenticity of this document, suggesting that it appeared to be forged. He pointed out that the form contained two different numbers, 281 and, in brackets, 951 "new." Additionally, there was an inconsistency in the size of the farm, with the notation "4125 Meters squares" followed by crosses. He also noted that the handwriting on the form appeared to be that of two different individuals, with one person filling it in and another crossing it out. The 2nd respondent further argued that the local government authorities were the first ones to identify the land, and the area portion on the form was left blank. He concluded by stating his belief that the DLHT's decision to reject this evidence was justified.

On the third ground, the appellant explained her position, stating that she had not questioned the buyer and had directed her questions to the seller. She clarified that she was not trying to avoid being a witness and acknowledged her lack of knowledge regarding the law. She believed that the buyer was merely a buyer, and her focus was on the seller, whom she considered responsible.

The 2nd respondent vehemently disagreed. He expressed his opinion, arguing against the notion that he was not concerned. He emphasized that both of them were parties to the case and, as such, were obligated to respond to questions. He mentioned that the appellant had been instructed to question the 3rd witness, who provided a historical background. According to the 3rd witness, the appellant had an area but not the land in dispute. He cited some cases and agreed with the DLHT's decision in that regard, referring to page 10 for the cases cited.

On the fourth ground, the appellant voiced her confusion about why the tribunal did not believe her. She pointed out that the DLHT had not called the representative of the 723 people and had rejected a copy of the High Court judgment as lacking merit. She disagreed with this decision, stating that she was part of the list and that they should have accepted her claim as a claimant. She mentioned a photograph that was not submitted to the DLHT and explained the difficulties she faced in obtaining the HC decision. She felt that the high standard of proof required was not applied properly.

The 2nd respondent responded by stating that, in his view, the DLHT was justified in considering the evidence presented. He argued that there was no requirement for a specific number of witnesses and suggested that if the appellant had wanted the representative of the 700 claimants, she should have requested it. He also mentioned that the DLHT did not desire an excessive amount of evidence, similar to a criminal case, and generally believed the appeal was justified.

The 1st respondent interjected, expressing a desire to prove that he was the one who had sold the land to the 2nd respondent. He asserted that the appellant had forgotten about her own piece of land and explained that she used to pass by his place to reach her farm. He claimed that she had lost contact with the village leaders and suggested that her anger had hindered his ability to assist her. He also mentioned a family connection between his wife and the appellant's witness and noted that the village authorities had started selling unoccupied bush area "vichaka" and that might have included the appellant's land. Pressed further, the 1st respondent seems to be full of

blames on how the appellant lost rapport with village leaders who might have been of great assistance to her.

**I have dispassionately** considered the court records, grounds of appeal and the rival submissions. I must admit that this case has highlighted the importance of evidence in a court of law. As the first appellate court, I am duty bound to reevaluate the whole evidence and if need be, come up with my own findings.

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 rest 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...."*

In this rather straightforward appeal, I have found no fault with the decision of the DLHT It is so ordered. It is unfortunate that the appellant could not remember very basic facts about her purported land. As the DLHT has correctly observed, the evidence is weightier on the side of the respondents. Although legally speaking the appellant has not been able to prove her case, women land rights may need some more finetuning at policy and sensitization level.

It appears in the records for example that the appellant presented her marriage certificate as an attempt to prove that her husband, one Engineer Kapeyu had allegedly bought the piece of land for her. At appeal level, the appellant was accompanied by her husband, and I had to explain that in this country marital status is not a condition for owning land. The first respondent, an old man in his sixties categorically stated that had the appellant "conducted herself properly" she would have received assistance from village elders. These are all reminders that gender issues cannot be separated from land rights at least for now, in Tanzania and other developing countries.

Said and done, I dismiss the appeal for lack of merit. I make no order as to costs.

It is so ordered.

**E.I. LALTAIKA**
**JUDGE**
**29/9/2023**

Court

Judgement delivered under my hand and the seal of this Court this 29th day of September 2023 in the presence of the appellant and the respondents who have appeared in person, unrepresented.

E.I. LALTAIKA
JUDGE
29/9/2023

Court

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

E.I. LALTAIKA
JUDGE
29/9/2023