

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO.67 OF 2022

(Arising from the District Land and Housing Tribunal for Mkuranga in Land
Application No.40 of 2014)

SALIMA HUSSEIN NNENDENDO APPELLANT

VERSUS

MOSHI HUSSEIN NNENDENDO (Administratrix of

The Estate of HUSSEIN ABDALLA) **RESPONDENT**

JUDGMENT

Date of last order: 114.06.2022

Date of Judgment: 24.06.2022

A.Z.MGEYEKWA, J

The matter of controversy between the parties to this appeal is on the landed property. The material background facts to the dispute are briefly as follows; the appellant filed a case at the District Land and Housing Tribunal in Land Application No. 40 of 2014 claiming ownership of a piece of land located at Mkuranga. The appellant testified to the effect that she

paid Tshs. 200,000 to buy a piece of land and her late husband had to sign the agreement.

On their side, the respondent refuted the appellant's claims. He claimed that the suit land belonged to their late father who had 30 acres and he is the administrator of the estate of his late father. Therefore, they claimed that the appellant is not the lawful owner of the suit land. The District Land and Housing Tribunal decided the matter in the favour of the respondent.

In this appeal, the appellant has accessed the Court seeking to impugn the District Land and Housing Tribunal decision through a memorandum of appeal premised on two grounds of grievance, namely:-

- 1. That, the trial tribunal erred in law and facts by determining the dispute in favour of the respondent without evaluating the evidence adduced by the appellant.*
- 2. That, the tribunal erred in law and fact by failing to realize that the land in dispute was not forming part of the deceased estate.*

When the appeal was placed before me for hearing on 18th May, 2022, the appellant appeared in person and the respondent had the legal service

of Ms. Kabibi Kamugisha, learned counsel. Hearing of the appeal took the form of written submissions, preferred consistent with the schedule drawn by the Court whereas, the appellant filed her submission in chief on 31st May, 2021, and the respondent was ordered to file his reply on or before 9th June, 2022 but he did not comply with the court order. On 14th June, the learned counsel for the respondent prayed for an extension of time to file his reply whereas this Court acceded to the appellant's prayers. Pursuant thereto, a schedule for filing the reply and rejoinder was duly conformed to.

In prosecuting this appeal, the appellant started with a brief background of the facts which led to the instant appeal which I am not going to reproduce in this appeal. On the first ground, the appellant was brief and focused. She contended that On 23rd September, 2003 she purchased the disputed and from Abdallah Mandai to a tune of Tshs. 200,000/= through the assistance of her late husband due to her pregnancy she asked her husband to witness the sale agreement and endorsed the appellant's name on the sale agreement. The appellant went on to submit that at the trial tribunal she adduced her evidence and tendered a sale agreement (Exh.P1). The appellant argued that surprisingly the trial tribunal did not

consider her evidence as sufficient evidence to prove that she was the lawful owner.

Supporting her submission, the appellant cited section 110 of the Evidence Act, cap. 6, and stated that the tribunal was supposed to decide in favour of anyone who proves the existence of the facts. She added that she had the burden of proving her allegations and she confidently submitted that she proved her case. The appellant added that the respondent's evidence was weak and contrary to the position of the law. Fortifying her submission, she cited the case of **Hemed Said v Mohamed Mbilu** (1984) TLR 113.

Arguing for the second ground, the learned counsel for the appellant contended that the suit land was acquired under her name and his late husband facilitated the procedure by endorsing the names of the appellant, thus, in her view, the suit land was not supposed to be included or listed as the properties of his late husband. To bolster her submission she cited the case of *Kezirahabi of Dar es Salaam v Benedict Museso Kezirahabi*, Probate, and Administration Cause No. 4 of 2010 HC.

In her conclusion, the appellant beckoned upon this court to allow the appeal with costs.

Opposing the appeal, the respondent' Advocate forcefully argued that the appellant's contention is baseless and exasperating. The learned counsel contended that the appellant is trying to deviate from the phraseology of the judgment of the District Land and Housing Tribunal since it is clear that evidence was tendered, evaluated and both parties brought their witnesses to testify at the tribunal. Mr. Sweya went on to argue that the tribunal after evaluating of evidence held that there were irregularities in the appellant's statement and evidence tendered at the trial tribunal. Supporting his submission he referred this court to page 8 of the appellate tribunal judgment.

The learned counsel for the respondent continued to submit that the issue of evaluation of evidence as a matter of legal principle was established in the case of **Watt v Thomas** (1947) AC and the case of **Tanzania Sewing Machine Co. Ltd v Niake Enterprises Ltd**, Civil Appeal No.15 of 2016. He added that the evidence on record and exhibits tendered at the trial tribunal supports the respondent's case.

On the second ground, Mr. Sweya argued that this ground is baseless. He claimed that the appellant is the one who alleges thus she had a duty to prove her allegations. Supporting his position he cited section 110 of the Evidence Act, Cap. 33 [R.E 2019] and the case of **Miller v Minister of Pensions** [1937] 2 All ER 340. Stressing on the point of evidence, he contended that the appellant did not avail to the tribunal any proof such as Title to prove that the piece of land belonged to her. He claimed that the appellant's husband passed away and left behind the disputed land.

On the strength of the above submission, Mr. Sweya urged this court to find that the appellant has not sufficient cause to move this court to allow the instant appeal. He humbly submits for this court to dismiss the appeal with costs.

In her brief rejoinder, the appellant reiterated her submission in chief. The appellant insisted that her evidence was heavier than the respondent's evidence. Ending, the respondent urged this court to allow her appeal with costs.

After a careful perusal of the record of the case and the final submissions submitted by both parties, I should state at the outset that,

in the course of determining this case I will be guided by the principle set forth in the case of **Hemedi Said** (supra), which requires, "*the person whose evidence is heavier than that of the other is the one who must win*". In determining the appeal, the central issue is whether the appellant had sufficient advanced reasons to warrant this court to overrule the findings of the District Land and Housing Tribunal for Mkuranga.

In my determination, I will consolidate the two grounds of appeal because they are intertwined. The appellant is complaining that the trial tribunal decided in favour of the respondent without evaluating the evidence adduced by the appellant and that the suit land was not part of the deceased estate. In accordance with the circumstance of the case, facts, and evidence, I think the matter will not detain me.

It is in the record that the dispute between the parties originated from Mkuranga DLHT Tribunal where both parties had an opportunity to summon witnesses to testify before the trial tribunal. The records reveal the appellant claimed that he bought five acres to a tune of Tshs. 200,000/= from Abdallah, the tencell leader. To substantiate her testimony she tendered a sale agreement (Exh.P1 collectively). She

claimed that the piece of land was mistakenly included in the estate of her husband.

PW2, Ahamed Mpula, hamlet Chainman testified to the effect that he witnessed the sale agreement whereas the appellant's husband bought the suit land for her wife. He contradicted himself by stating that the appellant signed the document on behalf of her late husband and on the date of sale the appellant was absent. In my considered view, PW2 was not an honest witness. PW3, Juma Hussein Nnendendo, and PW4, Rashid Hemed testified in favour of the appellant that she bought the suit land in 2003. Exhibit P1

On his side, the respondent testified to the effect that the suit land belonged to her late father and he was appointed to administer the estate of his father. DW2 testified to the effect that the late Hussein Nnendendo bought the suit land from Mzee Mandai and he wrote the sale agreement. He denied having appended his signature in exhibit P1. DW3 testified in favour of the respondent claiming that the suit land belonged to their late father.

I have scrutinized the sale agreement (Exh.P1) and from the outset, I have to say that the appellant's and her witnesses' evidence was weak. The appellant testified to the effect that she bought the suit land in 2003 while PW2 testified that in 2003, the late Hussein Nnendendo bought the suit land for his wife. Again, exhibit P1 bears two different sale agreements, however, the same are quite different. I noted that the sale agreement of 2005 was not signed by the vendor and he did not append his signature. In short, the vendor did not endorse the sale. Worse enough, the sale agreement dated 23rd September, 2005 while the appellant alleged that she bought the suit land in 2003. Thus, this sale agreement is not valid.

The handwritten sale agreement is not clear, the vendor Abdallah Mandai's signature is missing which means he did not endorse the sale agreement. The vendor claimed that he sold the suit to Mr. Salima Nnendendo. In her testimony, the appellant claimed that she bought the suit and land and paid Tshs. 200,000/=, I expected the buyer's name to read Salima Hussein Nnendendo but the buyer's name reads Hussein Nndendendo. The appellant while tendering the sale agreement did not differentiate the two sale agreements. The appellant tendered two sale

agreements related to the same plot bearing different years and the names of witnesses are quite different and still wants the court to believe her story to be true? PW2 claimed that he signed the sale agreement dated 23rd September, 2003 but his signature is not seen.

It is a cardinal principle of the law that in civil cases, the burden of proof lies on the plaintiff and the standard of proof is on the balance of probabilities. This simply means that he who alleges must prove as indicated under section 112 of the Law of Evidence Act, Cap 6 [R.E2002], which provides that:

"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by law that the proof of that fact shall lie on any other person."

The standard of proof was elaborated in length in the case of **Barelia Karangirangi v Asteria Nyalwambwa, Civil Appeal No. 237 of 2017 (Unreported)**

"If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates in a binary system in which the only values are 0 and 1. The fact either happened

or did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned to and the fact is treated as having happened.”

Applying the above authority in the matter at hand, the appellant who bears the burden of proof failed to discharge it thus it is treated as not having happened. Therefore, the appellant cannot claim that the suit land was not part of the deceased's estate without proofing the same.

For those findings, I find the position taken by the District Land and Housing Tribunal was quite appropriate and thus implored me to dismiss the appeal with costs.

Order accordingly.

Dated at Dar es Salaam this date 24th June, 2022.



Z.MGEYEKWA

JUDGE

24.06.2022

Judgment delivered on 24th June, 2022 via video conferencing and audio teleconference whereby the appellant and Mr. Sweya, the learned counsel for the respondent were remotely present.




Z.MGEYEKWA

JUDGE

24.06.2022

Right of Appeal fully explained.