

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

LAND APPEAL NO. 4 OF 2022

*(Originating from The District Land and Housing Tribunal for Mtwara in
Land Application No.44 of 2019)*

MAHMOUD MOHAMED MNEKANO.....APPELLANT

VERSUS

MARIAM ABDALLAH NDINDARESPONDENT

JUDGEMENT

2/5/2023 & 25/7/2023

LALTAIKA, J.

The appellant herein **MAHMOUD MOHAMED MNEKANO**, is dissatisfied with the decision of the District Land and Housing Tribunal for Mtwara (the DLHT) in in Land Application No.44 of 2019 dated the 18th of January 2022.

He has appealed to this court on fifteen grounds. As will be clear shortly, only some of these grounds were ultimately argued for. To this end, I choose not to reproduce the fifteen grounds of appeal.

When the appeal was called on for hearing on the 2/5/2023, the appellant appeared in person unrepresented. The respondent, on her part, enjoyed legal services of **Mr. Jackson Wilbert**, learned Advocate.

At this juncture, a brief historical and factual backdrop is warranted. The parties involved in this matter are both administrators of the estates of the deceased persons. The appellant is the administrator of the estates of the late **Bakari Mussa Ndinda**, while the respondent is the administratrix of the estates of the late **Abdallah Bakari Ndinda**. The late Bakari Mussa Ndinda was father of the late Abdallah Bakari Ndinda. The appellant and respondents are both grandchildren of the late **Bakari Mussa Ndinda**. Specifically, the respondent is daughter of the late **Abdallah Bakari Ndinda**.

On 21/07/2007, the late Bakari Mussa Ndinda passed away. A month or so later, the 31/08/2007 to be exact, a family meeting allegedly took place where it was proposed that the appellant be appointed by the court as the administrator of estate of the late Bakari Mussa Ndinda.

Subsequently, on 4/12/2007, the Primary Court of Lisekese appointed the appellant as the administrator of the estate of the late Bakari Mussa Ndinda. Form IV-Usimamizi wa Mirathi (later admitted at the DLHT as Exhibit D1) was executed by Mahamoud Mahamed Mnekano and handed to him. On 05/12/2007, the office of the Primary Court Magistrate Incharge of Lisekese Primary Court issued a letter with Kumb.Mirathi.83/2007 (Exhibit D2) to the District Executive Director of Masasi District Council, instructing the DED to issue the permit to claim compensation for the house marked with a mark

of X during the lifetime of the late Bakari Mussa Ndinda (the grandfather of the appellant).

On the other hand, the respondent, Mariam Abdallah Ndinda (Administrator of the late Abdallah Bakari Ndinda), is alleged to be born out of wedlock of the late Abdallah Bakari Ndinda. The Probate and Administration Cause No.56 of 2017 was filed by the respondent at Lisekese Primary Court, applying for the letters of administration of the late Abdallah Bakari Ndinda, who died intestate on 27/7/2013. The respondent was appointed on 12/7/2017 as the administratrix of the estate of her late father Abdallah Bakari Ndinda.

It is alleged that the late Abdallah Bakari Ndinda had purchased the suit land and permitted his sister, Zainabu Bakari, to erect her residential banda and live therein up to date. The purchase documents were reportedly in the possession of Mwanaharusi Bakari, who was not willing to hand over the said documents to the respondent despite several demands.

The respondent then filed Criminal Case No. 350 of 2017 (Exhibit P5) against Zainabu Bakari and Mwanaharusi Bakari before Lisekese Primary Court, charging them with the offence of concealing documents, contrary to section 278 of the Penal Code [Cap. 16 R.E. 2002]. After a full trial, the Lisekese Primary Court found Mwanaharusi Bakari guilty and convicted her with the offence.

However, the District Court of Masasi, in Criminal Appeal No.10 of 2017 (Exhibit P4), quashed the conviction and judgment, setting aside the

sentence, as it found the evidence gathered by the Lisekese Primary Court to be insufficient for the conviction.

The respondent then affirmed an affidavit on the loss of the said documents and reported at the Office Commanding Station Masasi, on the loss of the Certificate of Occupancy of Plot No.43 Block "H" Mkuti.

The respondent made payments on Plot No.43 Block "H" for issuance of Certificate of Occupancy and was issued with the Certificate in her name as the legal representative of the late Abdallah Bakari Ndinda. The appellant went to the DLHT where the DLHT adjudge in favour of the respondent. It declared that the late Abdallah Bakari Ndinda is the owner of the suit land. The appellant is strongly dissatisfied hence this appeal.

The appellant stated that there were several grounds on which he believed the District Land and Housing Tribunal (DLHT) had erred in its decision regarding **Plot No. 43 in Block H Mkuti**. He pointed out that the DLHT incorrectly ruled that the plot **belonged to Abdallah Bakari Ndinda**, while, the appellant asserted, the suit plot was the property of **Bakari Mussa Ndinda**. He referenced the respondent's written submission, where she admitted that Bakari Mussa Ndinda had purchased the plot in 1990 in the **presence of Mzee Abdallah Makasi**.

The appellant questioned how the respondent later claimed that the plot belonged to her late father, Abdallah Bakari Ndinda, despite her earlier acknowledgment that Bakari Mussa Ndinda was the buyer. He further informed the DLHT that he, as the administrator of Bakari Mussa Ndinda's estate, had no issue with the respondent's claim of ownership.

The appellant highlighted that between 1990 (the year of purchase) and 2007 (when Bakari Mussa Ndinda passed away), he had been appointed as the administrator of the estate. He emphasized that Abdallah Bakari Ndinda, who was alive from 2007 until 2013 when he passed away, **never asserted ownership of Plot No. 43** during those six years.

On the **third ground**, the appellant pointed out contradictions among the witnesses regarding the plot's purchase. He mentioned the testimonies of SM1 (current respondent), SM2 (Abdallah Makasi), SM3 (Hamza Twalibu Athumani), and SM4, which made it difficult to determine the true details of the sale.

Moving to the fourth ground, the appellant highlighted that throughout Abdallah Ndinda's life, including after his father's passing, he never claimed ownership of Plot No. 43. The appellant stated that the respondent had not presented any documents to prove her purchase of the plot from the three individuals mentioned. He referred to a **previous criminal case (No. 350 of 2017)** involving Mzee Abdallah Makasi, who claimed that the documents for the plot's purchase were stolen.

On his part, Mr. Wilbert, counsel for the respondent, stated that he had "only a few things to convey" to the court. He pointed out that this being the 1st appellate court, it had the responsibility to carefully analyze the evidence. Mr. Wilbert emphasized that all the grounds raised in the appeal were supported by documents. He wished to emphasize the following points:

The respondent had admitted in her application that Plot No. 43 in Block H Mkuti was purchased by Bakari Mussa Ndinda. However, the appellant failed to mention whether Bakari Mussa Ndinda bought the plot for himself or on behalf of someone else.

The evidence presented, asserted Mr. Wilbert, indicated that **Bakari Mussa Ndinda** had bought the plot **on behalf of his son, Abdallah Bakari Ndinda**. Both parties recognized Abdallah Makasi, who testified that the land was purchased by Bakari Mussa Ndinda for his son Abdallah Bakari Ndinda.

Mr. Wilbert addressed another ground related to contradictions among witnesses regarding who sold the plot. He clarified that Twalibu Athumani, Abdallah Makasi, and Hamza Twalibu Athumani did not all sell the same plot. Instead, the rightful owner, Twalibu Athumani, **sold the plot to Abdallah Bakari Ndinda through Bakari Issa Ndinda (Father and son)**. Hamza Twalibu Athumani was the one involved in the sale, and Abdallah Makasi only acted as the caretaker of the plot.

Regarding the Criminal Case and the family meeting, Mr. Wilbert insisted that the family meeting did not discuss the conflict over the suit land, and the submitted minutes did not mention the deceased's property.

Mr. Wilbert refuted the claim that Mzee Makasi had reported the loss of sale documents. He clarified that the issue of lost documents was raised **by Mwanaharusi Bakari Ndinda (SU2)**, who claimed the documents got lost in 1994. However, the lost report presented in court was dated 2018

instead of 1994, and it was made by Bakari Mussa Ndinda, who had passed away since 2007.

In conclusion, Mr. Wilbert prayed for the court to dismiss the appeal and uphold the decision of the DLHT, with costs.

In rejoinder, the appellant expressed doubts about the involvement of three individuals in the sale of the suit land. He questioned the credibility of the claim that Mzee Twalibu Athumani sold the land in 1996, while his son, Hamza Twalibu Athumani, asserted that he sold it in 1994. He found it implausible for a father and son to make contradictory claims about the sale.

Regarding Mzee Makasi, the appellant agreed that he was a witness when the late Bakari Mussa Ndinda purchased Plot No. 43. However, he questioned the idea of Mzee Makasi that it on behalf of his son. It seemed incongruous to the appellant.

Regarding the loss report, the appellant clarified that he was the one who mentioned the name Bakari Mussa Ndinda because he was the owner of the suit land. The appellant emphasized that the year mentioned in the report was when he went there to report, exercising his authority as the administrator of the estate. He pointed out that he did not possess other documents listing the deceased's property. In conclusion, the appellant praised that his appeal is accepted by the court.

I have dispassionately considered the rival submissions and carefully examined the court records. In the matter at hand, this court is the first appellate court. It is well-established law that the first appellate court bears the duty of re-hearing the evidence available on record. This means that the

court essentially treats the case as if it were hearing it for the first time, except for the fact that it cannot observe the demeanor of the witnesses, as this falls within the domain of the trial court. As a result, the first appellate court may arrive at a decision different from that of the trial court or concur with the trial court's decision.

This principle has been consistently upheld in various decisions of the Court of Appeal of Tanzania, including the case of **GAUDENCE SANGU VS. REPUBLIC** (Criminal Appeal No. 88 of 2020) [2022] TZCA 784 (7 December 2022) See also Shabani **DAUDI V. REPUBLIC**, Criminal Appeal No. 28 Of 2000 (unreported).

Regarding the issue of the rightful owner of the suit land, the District Land and Housing Tribunal (DLHT) for Mtwara concluded that the respondent is the rightful owner of the suit land. The DLHT based its decision on the evaluation of the evidence presented by the **respondent (SM1), Abdallah Makasi (SM2)**, Hamza Twalib Athumani (SM3), and Zainabu Bakari Ndinda (SM4). However, the DLHT discredited the evidence of Zena Hussein Sokoni (SU3), the wife of the late Bakari Mussa Ndinda and the mother of Abdallah Bakari Ndinda.

I have carefully examined the evidence as required by law. Based on the settled principle of law that **the burden of proof lies with the party making** the allegations, the court must determine who the rightful owner of the suit land is. See **ANTONY M. MASANGA V. (1) PENINA (MAMA MGESI) (2) LUCIA (MAMA ANNA)**, Civil Appeal No. 118 of 2014, CAT (unreported). It is important to note that the burden of proof in civil cases

rests on the party asserting the affirmative of the issue. Nevertheless, the court has a duty of weighing the evidence of both parties and the party whose evidence is heavier takes the win.

In this case, the appellant claims that the suit land belonged to his grandfather. The respondent, on her part, claims that the same belongs to her father and not her grandfather. The trial tribunal ruled in favour of the respondent. I have tried to follow the reasoning of the learned Chairman and I must say that I am totally in agreement with his finding. The appellant's grandfather had retired as a driver. He was at home while the respondent's father was a young man working far from home. The testimony of witnesses that the grandfather received money from his son and bought the land on behalf of his son, the respondent's father, makes perfect sense to me.

I need to add a few lines here. After examining the entire record, I must admit that the respondent's story is that of courage, enthusiasm, and amazing strength of a young woman. She is a young lady, much younger than the appellant. Her father passed away when she was still a secondary school student. She managed to go through a myriad of bureaucracies to reclaim her late father's property.

It is interesting to me to learn from testimonies of the witnesses of both parties that the same family was divided into two. Some saying that the property belonged to the grandfather, in support of the appellant and others choosing to support the respondent. I am alive to the position of the law that every witness deserves credence. See **Goodluck Kyando v. Republic [2006] TLR 363**. Nevertheless, like the learned Chairman, I

have been impressed by the evidence of those that support the respondent's position. In the tribunal, parties had no legal representation. At this level, the respondent has enjoyed skillful services of Mr. Wilbert. I commend his unwavering stand and a balanced approach to advice this court on the correct legal position.

Truth be told, I see absolutely no reason for the appellant's enthusiasm in pursuing this matter so vigorously simply because he was appointed administrator of estate of his late grandfather. The respondent has made her case clearly and justice demands that she is left to enjoy the fruits of her late father's work. No unnecessary bureaucracies should be entertained anymore. I say so because it is on record that the appellant has been moving from office to office, ministry to ministry including filing caveats causing so much trouble to the respondent.

Premised on the above, the appeal is hereby dismissed in its entirety for lack of merit. The Judgement and Decree of the District Land and Housing Tribunal for Mtwara and all orders emanating therefrom is hereby upheld. Since, as I have indicated, parties are from the same family, I make no orders as to costs.

It is so ordered.




E.I. LALTAIKA
JUDGE
25/7/2023

Court

Judgement delivered under my own hand and the seal of this Court this 25th day of July 2023 in the presence of the appellant who has appeared in person, unrepresented.



E.I. LALTAIKA

JUDGE

25/7/2023

Court

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



E.I. LALTAIKA

JUDGE

25/7/2023