

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

LAND CASE NO. 6 OF 2012

NICKSON ZABULON (Administrator of the estate of the late ALIWELI
MWINUKA ZABULON).....PLAINTIFF

VERSUS

MENRAD MWALIWEULI MSIGALA.....1ST DEFENDANT

NATIONAL BANK OF COMMERCE.....2ND DEFENDANT

JUDGMENT

14 December, 2018 & 11 January, 2019

DYANSOBERA, J.:

This suit was filed on 5th day of October, 2012. After the disposal of the preliminary objections raised by the 2nd defendant and settlement of other preliminary matters, the suit lagged on until on 23rd day of June, 2015 when it was dismissed for non-appearance of the plaintiff. An application by the plaintiff for setting aside the dismissal order was made by the plaintiff and granted by this court vide Miscellaneous Land Application No. 42 of

2017 and the suit was thereby restored on 21st day of June, 2018. The plaintiff's claims against the two defendants are the following:

- a) A declaration that the whole mortgage transaction was null and void ab initio for want of consent from the Administrator of the estate.
- b) The second defendant to surrender back the title deed of the house on Plot 295 Block A situated at Mkuti Area, Masasi Township and any document concerning the suit plot to be surrendered to the plaintiff by the first defendant.
- c) Defendants to pay general damages to the tune of Tshs 100,000,000/=
- d) Defendants to pay interest on (c) above at the commercial rate of 15% from the date of institution of this suit to the date of judgment.
- e) Interest at court rate form the date of filing the suit to the date of judgment.
- f) Costs of the suit be borne by the defendants.

According to the amended plaint, the plaintiff sets out the pleading as follows. That he is the lawful administrator of the estate of the late Aliweli

Mwinuka Zabuloni who died on 23rd day of October, 2007. That the appointment as administrator was made by Lisekese Primary Court on 8th day of April, 2008. It is also averred that in the year 2010 the 1st defendant unlawfully and without the consent of the plaintiff who is the lawful administrator of the estate of the late Aliweli Mwinuka Zabulon took the title deed of the house of the said deceased and deposited the same as a loan security and secured a loan of Tshs. 33, 842,986.36 from the 2nd defendant at Masasi Branch. That, the 2nd defendant with the knowledge that the title deed bore the names of ALIWELI MWINUKA ZABULONI, did not take courtesy of asking for the express consent of the owner of the said title deed as the second defendant was required as a matter of law and procedure during the mortgage of the suit premises to have an express consent from the real owner of suit premises in which case they would have realised that the owner was not alive and therefore ask for the consent of the plaintiff who is the administrator of the estate of the late Aliweli Mwinuka Zabuloni. Further that without the consent of the plaintiff, the 2nd respondent proceeded to grant the loan to the 1st defendant who deposited the title deed bearing the name of Aliweli Mwinuka Zabuloni as security for the loan. The plaintiff further averred that there was no reasonable justification of the 2nd

defendant's move to realise the mortgage by selling the suit premises after the 1st defendant defaulted the repayment and that this 2nd defendant's conduct has result into the plaintiff suffering general damages to the tune of Tshs. 100,000,000 covering inconveniences, mental torture and both social and financial embarrassment.

The 2nd defendant denied any liability therefor. It has been pleaded in its defence that, first, the certificate of title on Plot No. 295 Block A Masasi does not show that the plaintiff is a personal legal representative of Aliweuli Zabuloni Mwinuka and no personal representative forms in the mortgaged property were lodged by the plaintiff to warn the public against the dealing with the property from 2007 to date. Second, that the 1st defendant was granted an overdraft facility of 30m/- by the 2nd defendant and that as a security for the loan advanced to the 1st defendant, Aliweli Zabron Mwinuka executed a first raking legal mortgage in favour of the 2nd defendant over his landed property located on Plot No. 295 Block H, Mkuti area in Masasi Urban with certificate of occupancy No. 4065-MTW guaranteeing full payment of loan obligations and liabilities associated and incidental thereto. Third, that Aliweli Zabuloni Mwinuka and Esther Raphael Dembe executed in favour of the 2nd defendant an irrevocable and unconditional guarantee of

indemnity guaranteeing full payment of credit facilities. Fourth, that the borrower took and utilized the overdraft facility but failed to repay it. Fifth, that the 2nd defendant followed the relevant procedure including authentication of documents. On issue of lack of the plaintiff's consent, it was averred by the 2nd defendant that the latter had not obligation to seek consent as the plaintiff does not have any legal or equitable interest in the mortgaged property.

Finally, it is in the 2nd defendant's written statement of defence that the mortgage deed was duly executed and registered after following the detailed procedure and, therefore, the relief and orders prayed by the plaintiff is misconceived and baseless.

The case against the 1st defendant proceeded ex parte after he failed to appear and file a written statement of defence as he could not be traced and served.

After taking into account the parties' pleadings as briefly explained hereinabove, this court on 15th day of October, 2018 framed the following issues.

1. Whether the house on Plot No. 295 Block 'A' situated at Mkuti Masasi Township was lawfully mortgaged to the 2nd defendant by Aliweli Mwinuka Zabuloni.

2. Whether the 1st defendant unlawful and without consent of the plaintiff took the Title deed of the house on Plot No. 295 Block 'A' Mkuti, Masasi Urban and deposited the same as security for loan advanced to him by the 2nd defendant.
3. Whether the 2nd defendant neglected mandatory provisions of the law to seek consent from the plaintiff as lawful administrator of the estate to use the suit premises as mortgage.
4. Whether the plaintiff suffered damages as a result of the defendants' acts.
5. To what reliefs are the parties entitled.

To prove his case, the plaintiff who was not legally represented, testified on his own and tendered his documents as will be revealed in the due course.

The 2nd defendant, on the other hand, featured two witnesses, namely Salum Bagilo (DW 1), an officer working with the National Bank of Commerce in Masasi District and Kamando N.E. (DW 2), the Records Officer with the Registrar of Titles in the Ministry of Land and Settlement Development and is stationed at Mtwara.

Some documents were also tendered on part of the 2nd defendant.

It was established through the evidence of the plaintiff that he is the personal legal representative of the late Aliweli Mwinuka Zabuloni. The former was granted letters of administration (Exhibit P 1) by Lisekese Primary on 8th day of April, 2008 in Probate and Administration Cause No. 26 of 2008; the late Aliweli Mwinuka Zabuloni having passed away on 23rd day of October, 2007. The plaintiff argued that Menrad Mweliweuli Msigala, the 1st defendant in this case was assisting the deceased in selling in the shop but at the same time he had decorations shop. It was the plaintiff further argument that the 1st defendant stole the original offer belonging to the deceased, processed it to be a certified right of occupancy, deposited it into the 2nd defendant's bank and obtained an overdraft facility to the tune of Tshs. 33, 842,986.36. According to the plaintiff, the 1st defendant feigned that it is the deceased who mortgaged the title deed while in fact, it was not true as by the time the title deed was mortgaged the deceased was already dead. The plaintiff then realised that the deceased's title deed had been mortgaged and the 1st defendant had secured an overdraft facility after the 2nd defendant sought to realise loaned money by way of sale of the mortgaged property. It is in the plaintiff's evidence supported by the

amended complaint that the title deed in question is in respect of the house on Plot No. 295 Block" A".

The plaintiff's complaint against the defendants are that the 1st defendant unlawfully and without consent of either the plaintiff or the deceased, stole the said title deed, deposited it with the 2nd defendant's bank and secured a loan but then failed to repay it. Further that 2nd defendant failed to satisfy itself that the guarantor was dead and that the 1st defendant was a fraudster. The plaintiff contends that the mortgage deed which was secured by fraudulent means was void ab initio.

In cross-examination, the plaintiff admitted that he did not report the theft of the document either to the police or the land registry. He also admitted that he, being the legal personal representative of the deceased was not registered by the Registrar of Titles as the owner in the place of the deceased which is a legal requirement under section 67 of the Land Registration Act, Cap. 334 R.E.2002.

On the identity of the deceased, the plaintiff insisted that he was Aliweli Mwinuka Zabron, a male person by the time living at Masasi but met his demise at Njombe. When pressed to explain on the contents of the death certificate of the deceased (Exhibit P 5) which he had tendered in evidence,

the plaintiff admitted that the death certificate of Aliweli Zabron Mwinuka indicated that the deceased was a female, business woman and a resident of Usalule and met her death at Usalule. In that exhibit, the informant was indicated to be Nickson Zabron Mwinuka, the present plaintiff.

On their part, as said before, DW 1 and DW 2 who testified for the 2nd defendant denied any liability on part of the 2nd defendant. Basically, DW 1 told the court that he was an operation officer with the National Bank of Commerce at Masasi and knew the 1st defendant who was their customer and to whom the 2nd defendant advanced a loan of 30m/ by means of overdraft facility. He said that the bank knows neither Aliweli Mwinuka Zabron nor Plot No. 295 Block "A", Masasi but knows that the mortgagor was Aliweli Zabron Mwinuka, the owner of Plot No. 295 Block "H" Mkuti Masasi Urban area. DW 1 argued that the deceased whose estate is being administered by the plaintiff is different from the person who mortgaged the house to the 2nd defendant. In fine, DW 1 denied the 2nd defendant's bank to have contravened any law arguing that it dealt with the owner of the property, consulted the land registry and the overdraft grant was passed through the land registry after some important documents were signed before the Magistrates.

The evidence of DW 2 established that the records in the land registry shows that the title deed was registered on 28.10.2008 at 1115 hrs No. 465 MTW signed by the Registrar one Victor Robert, the owner being Aliweli Zabron Mwinuka. DW 2 contended that as the office, they had no information about the death of Aliweli Zabron Mwinuka as it is only from the administrator of the deceased that the office could know that the deceased, the owner of the title deed is dead and that the necessary steps including involving the magistrates were taken to ensure that the owner was Aliweli Zabron Mwinuka, an adult, Christian of P.O. Box 587 Masaisi and that this is in accordance with the affidavit. DW 2 also testified on the difference between the person known as Aliweli Zabron Mwinuka and another known as Aliweli Mwinuka Zabron and the mortgaged property which is on Plot No. 295 Block "H" Mkuti area which is different from Plot No. 295 Block "A".

Learned counsel for the 2nd defendant Mr. Tarzan Mwaiteleke made his final submission in writing. He essentially contended that all legal procedures were followed in granting the overdraft facility to the 1st defendant and that the 2nd defendant through the affidavits and other documents made attested before the magistrates, was satisfied that the owner of the title deed was Aliweli Zabron Mwinuka who executed the mortgage deed. Learned counsel

insisted that the plaintiff is not the administrator of the estate of the mortgagor one Aliweli Zabron Mwinuka but he is the administrator of Aliweli Mwinuka Zabron according to the letters of administration (Exhibit P. 4). The plaintiff therefore, has no any legal or equitable interest in the mortgaged property. Further that the 2nd defendant did what was required of her by law in carrying out a search at the land register and the search report is within the Valuation Report (Exhibit D 4). Of most important, is argument that the plaintiff was not registered as the owner of the title deed as mandatorily required by section 67 of the Land Registration Act, Cap. 334 R.E.2002.

This court was referred to a plethora authorities cited by learned counsel for the 2nd defendant in his endeavour to prove that the plaintiff's claims were baseless. I have considered them.

Having summarised the evidence and the submission filed by learned counsel for the 2nd defendant, I am now in a position to determine the issues framed.

As far as the first issue is concerned, the evidence of the plaintiff seems to suggest that it should be answered in the negative. According to him, it is the 1st defendant who was assisting the deceased in selling in the shop who stole the the original title deed and mortgaged to the 2nd defendant.

The plaintiff argued that by the time the mortgage deed was concluded, Aliweli Mwinuka Zabroni was already dead and the supporting document is the certificate of death (Exhibit P. 4). The 2nd defendant through her two witnesses seems to support the plaintiff's position. It is argued on her part that the house on Plot No. 295 Block "A" situated at Mkuti , Masasi Township was not mortgaged to the 2nd defendant, rather it was the property situated on Plot No. 295 Block "H" which was mortgaged and the mortgagor was not Aliweli Mwinuka Zabron whose estate is being administered by the plaintiff but Aliweli Zabron Mwinuka who executed a mortgage deed.

I think the first issue must be answered in the negative. First, the records from the Bank and the Land Registry clearly show that the mortgagor was Aliweli Zabron Mwinuka as evidenced by the Valuation Report (Exhibit D 4) who executed the mortgage of a right of occupancy on 24th day of April, 2009 as evidenced by Exhibit D 1 by the time Aliweli Mwinuka Zabron was already dead as evidenced by the letter of appointment issued to the plaintiff on 8th day of April, 2008 (Exhibit P 1) which shows that the deceased died on 23rd day of October, 2007. It would seem the deceased shown in the death certificate is not one and the same as the owner of the estate the plaintiff was appointed to administer and also is different from the mortgagor

as according to Exhibit P 4 which is a certificate of death, the deceased was a female and a businesswoman residing at Usalule.

Besides, the suit land subject to the mortgage is a house situated on Plot No. 295 Block "H" Mkuti, Masasi Urban while the property the subject of this suit is situate on Plot 295 Block "A" Mkuti which, according to DW 1 and DW 2 are two different pieces of land.

The plaintiff sought to impress this court that the documents were not telling the truth but with respect, I cannot agree. This is partly because it is a principle of law that all facts, except the content of documents may be proved by oral evidence (section 61 of the Tanzania Evidence Act Cap. 6 R.E.2002) and, therefore, where written document exist they should be produced as being the best evidence of their own contents and no oral evidence cannot be adduced to prove as to what is wrong in the document. The document itself is a primary evidence. This principle is envisaged under section 66 of the said Act. And partly because, Exhibit P 1 which are letters of administration issued by the court on 8.4.2008, Exhibit P 4 which is a certificate of death whose informant was the plaintiff himself and Exhibit D 1 which is a mortgage of a right of occupancy between Aliweli Zabron Mwinuka and the National Bank of Commerce duly signed are documents

kept and issued by public offices. Their authenticity cannot be lightly doubted and in view of section 122 of the said Act, there is a presumption that an official act, which is proved to have been performed, has been performed regularly. In the words of Newbold J.A. in the Commissioner of Income Tax versus C.W Armstrong,

“The section authorizes the presumption that an official act, which is proved to have been performed, has been performed regularly and this is a presumption which is not lightly overridden.”

I believe that the said documents as they exist to date are genuine. The first issue is answered in the negative.

On the second issue, there is no dispute that the 1st defendant did not seek and obtain consent from the plaintiff when he took the title deed and deposited it as a security for loan advanced to him but as I pointed out when discussing the first issue, the house the subject of mortgage is not on Plot No. 295 Block “A” but it is on Plot No. 295 Block “H” which according to DW 2, are two different pieces of land.

Besides, the plaintiff, according to the evidence in the young brother and administrator of the estate of the late Aliweli Mwinuka Zabron who is not the mortgagor in this case according to the available evidence and records. This means that the the 1st defendant’s act cannot be, in the circumstances of this case, unlawful. Second issue is also answered in the negative.

On whether the 2nd defendant neglected mandatory provisions of law to seek and obtain consent of the plaintiff as the lawful administrator of the estate to use the suit premises as mortgage, the evidence is clear that the plaintiff is not the administrator of the mortgagor, he did not specify the mandatory procedures the 2nd defendant allegedly neglected and the plaintiff is not the registered owner of the houses situated either on No. 295 Block "A" or on Plot No. 295 Block "H" as required by section 67 of the Land Registration Act [Cap. 334 R.E.2002] which provides that:

"67-.... On the death of the owner of any estate or interest, his legal personal representative, on application to the Registrar in the prescribed form and on delivering to him an office copy of the probate of the will or letters of administration to the estate of the owner, or of his appointment under Part VIII of the probate and Administration of Estates Act Cap 352 or the Fourth Schedule to the Magistrates Courts Act Cap 11 shall be entitled to be registered as owner in the place of the deceased".

Indeed, this fact is supported by learned counsel for the 2nd defendant in his written final submission. The third issue is also answered in the negative.

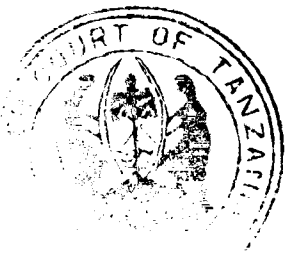
As far as the fourth issue of whether the plaintiff suffered damages as a result of the defendants' acts is concerned, the plaintiff told this court that the general damages for which he is claiming a sum of 100m/- is in respect of the costs incurred when prosecuting this case which has taken a long time. The 2nd defendant argued that the claims are baseless and that it is


her who is at the disadvantageous side for having failed to realise the overdraft facility advanced to the 1st defendant. I think the 2nd defendant is right. There is no legal nexus between the costs the plaintiff is alleged to have incurred in prosecuting this case and the involvement of the 2nd defendant in those costs. This is particularly so where the plaintiff failed to adhere to the provisions of section 67 of the Land Registration Act to show that he has any interest in the property subject to the mortgage. After all, costs of the case are awarded by the court and taxed by the taxing officer under the law. Costs of the suit cannot be claimed as general damages as the plaintiff move this court. The fourth issue is also answered in the negative.

As to the fifth issue, taking into consideration the determination made in the preceding issues, I find that the plaintiff has miserably failed to prove his case against the defendants on balance of probabilities.

I find the suit devoid of merit and dismiss it with costs to the 2nd defendant.

Dated and delivered at Mtwara this 10th day of January, 2019.




W.P. Dyansobera

JUDGE

10.1.2019