

IN THE HIGH COURT OF TANZANIA

AT MOSHI

LAND CASE NO. 08 OF 2018

1. MARTINA MARTIN SILAYO

2. EMILIA MARTIN LYAKITURU PLAINTIFFS

aka AMEN MARTIN SHAO

VERSUS

1. GODFREY MARTIN SILAYO

2. GODFREY MARTIN SILAYO

(As administrator of the estate of the late Martin Alex Silayo)

3. JAMES MARTIN SHAO

(As administrator of the estate of the late Martin Alex Silayo)

4. ALBAN MARTIN SHAO

5. ALBAN MARTIN SHAO

(As administrator of the estate of the late Martin Alex Silayo) DEFENDANTS

6. PRISCUSS MARTIN SHAO

7. ABDUL ABDUL

8. GASTO SWAI

9. FRANK KOMBE

10. SISTI CHUWA

11. ROBERT MUSHI

12. ABDALAH KARIGO

13. MARTIN & SONS COMPANY LIMITED

JUDGMENT

06/10/2020 & 23/12/2020

MKAPA, J;

The plaintiffs are the widows of the late Martin Alex Silayo a.k.a Martin Lyakitaru. They are suing and filed this suit against the defendants, whom among them are their children seeking for the following reliefs: -



1. Declaration that the plaintiffs are owners of the suit premise on Plot No. 6 Block I section III Market Street Moshi Municipality, with certificate of title No. 056041/54, Kilimanjaro region.
2. Declaratory order that the 1st to 6th defendants to pay the plaintiffs mesne profit in relation to the suit premises since April 2017 at the rate of Tshs. 25,000,000/= per month until the date of final payment.
3. Declaratory order that the defendants to pay the plaintiffs general damages.
4. Declaratory order that each of the 8th, 9th, 10th, 11th and 12th defendants to pay the plaintiffs mesne profits relating to the suit premises at the rate of Tshs. 2,500,000/= per month from April 2017 when they occupied the suit premises to the date of determination of this suit.
5. Declaratory order that the motor vehicle Toyota Prado with registration number T 323 BET belongs to the plaintiffs.
6. Declaratory order that the 1st, 2nd, 3rd, 4th, 5th, and 6th defendant to surrender all the monies withdrawn from Bank Account number 6406010579 Finca Bank Moshi Branch from April 2017.
7. Declaratory Order that the 1st, 2nd, 3rd, 4th, 5th, and 6th defendant to surrender all the monies withdrawn from Bank Account number 01J2040735000 CRDB Bank Moshi Branch from April 2017.
8. Declaration that the plaintiffs are owners of the Bank Account number 6406010579 Finca Bank Moshi Branch and Bank Account Number 01J2040735000 CRDB Bank Moshi Branch.
9. Cost of the suit and interests on the decretal amount.



At the commencement of the trial, the plaintiffs had the services of Mr. Kipoko, learned advocate while Mr. Sindato also learned advocate appeared for the defendants. The proposed issues agreed by the parties for determination of this suit were: -

- 1. Whether the property situated at Plot No. 6 Section III Market Street in Moshi Municipality with certificate of Title No. 056041/54 is a matrimonial property?*
- 2. Whether the bank Account number 6406010579 at Finca Bank Moshi Branch and Account No. 01J2040735000 CRDB Bank Moshi Branch and motor vehicle Toyota Prado with registration No. T 323 BET are matrimonial properties?*
- 3. What relief(s) are parties entitled?*

The plaintiff's side called four witnesses and tendered two exhibits. The evidence for the plaintiffs as told by their witnesses are that, Rogathe Lema (PW1) testified that he happened to know the late Martin Silayo as his brother in-law. That he married his elder sister Aminiel Martin Silayo (2nd Plaintiff) since 1970 and they have been blessed with six children. That the deceased had two wives by then and they were engaged in business at Arusha where they owned a house at Kilombero and a shop in Arusha town. It was his further testimony that after 1970 they shifted to Rombo where they were residing todate that, in Moshi they owned a flat at Sokoni Moshi Town. He said the suit property belonged to the late Martin Silayo but now belongs to the family. Amen Martin Shayo (PW2) testified that she was baptised and known as Emiliana Martin Shao. She had known the deceased for the past 53 years as her husband and her name also appeared in the pending case (Probate Cause-Exhibit P.1) among the beneficiaries of the deceased. She claimed that she was a


business partner with the deceased and they had jointly constructed a house at Sokoni area from the proceeds of the sale of the other houses. She testified that they acquired a loan from CRDB and the suit property was pledged as a security and she consented vide (spouse consent) (Exhibit P.2). She maintained that the suit property belongs to her and her co-wives. It was her further testimony that following the demise of their deceased husband a family meeting was held and she demanded to be paid together with her co-wives rent collected from the tenants of the suit property but the 1st defendant informed her that the suit property had since been transferred to the 13th defendant hence the same belonged to the company. She complained that they were not aware of the transfer as they did not consent to the transfer and that they were not even shareholders of the Company. She complained further that, they were yet to be paid their monies as beneficiaries in the probate cause which is pending before this Court. She further testified the fact that they also demand a motor vehicle make Toyota Prado to be returned to them and rent due for four years from the tenants amounting shillings forty eight million (Tshs.48,000,000/=). She further informed the court that she decided to sue the tenants of the suit property so as to refrain them from paying rents to the administrators of the estate of the deceased because the suit property belongs to the wives of the deceased as matrimonial property. She therefore prayed for this court to declare the suit property belongs to the late Martin's wives. Another witness Eugen Kalula Masashua (PW3) a clan brother of the deceased testified that, he had known the plaintiffs as wives of the deceased and the late Martin had some assets including the storey building at Sokoni area within Moshi Municipality. That previously, at the site of the suit property there existed



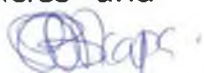
a shop known as Mkoba Shop which the late Martin demolished and built the said storey building. It was PW3's further testimony that he was a brick maker and he used to collect monies from the deceased at Rombo for brick laying and also for paying casual labourers at the site. He explained further that, whenever he went to Rombo to collect the monies he always met PW2 who handed him the cash. On cross examination it was his evidence that the late Martin had told him that PW2 was his wife and they were living together.

(PW4) Martina Martin, testified the fact that she was the wife of the deceased and a mother to the first defendant. It was her further testimony that the suit property belonged to their late husband and their late husband never informed his wives on the fact that he had transferred the suit property to the company neither did he sought consent from them on the said transfer.

In his defence the 1st defendant Godfrey Martin Silayo who appeared as DW1 denied the plaintiffs' claims. It was DW1's further testimony that the suit property with a Certificate of Title C.T No. 056041/54 is owned by the 13th defendant. That the deceased was his father and also a Managing Director and chairman of Martin and Sons Company. He went on explaining the fact that the company was registered with the Registrar of Companies and incorporated on 27th February 2013 (exhibit D.1, D.2 and D.3) with four directors who were also the shareholders. He further stated that the company owns the suit property with its certificate of title (exhibit D.4) stating that Martin and Sons Company are the owners. He asserted that the certificate of title states that the suit property was previously owned by Moshi-Trading Company Ltd in 1959 till 1980 when was transferred to the late Martin Lyakituru and on 27/08/2013 it was



transferred to Martin and Sons Company Ltd. The certificate of title also shows the loan acquired from CRDB and lease agreement with African Bank Corporation. He went on testifying that the suit property was transferred to the 13th defendant at a consideration of one shilling. DW1 further testified that the suit property had been renovated by the company since then. That the transfer between the deceased to the 13th defendant was effected between the late Martin Alex Silayo a.k.a Martin Lyakituru and Martin and Sons Limited. DW1 contended that the existing dispute is a result of misunderstanding between family members in particular the plaintiffs, due to their failure to accept the fact that the suit property was transferred to Martin and Sons Company Ltd by the late Martin Silayo. He explained further that the family held number of meetings but they all proved fruitless. That after the death of the deceased they held a family clan meeting (exhibit P.6) and identified the deceased properties and existence of Martin and Sons Company as shareholder of the suit property. The meeting appointed him, Alban Martin Shao and James Martin Shao as administrators of the deceased's estate. Thereafter they petitioned before this court (exhibit P.7) for letters of administration via a Probate Cause No. 02 of 2017. It was his further assertion that as administrators they had requested this court to instruct CRDB bank and Finca Bank to close the deceased's accounts and transfer the account balances to the Judiciary Mirathi account and later filed an inventory indicating true account of the properties and credits. DW1 contended that the suit property is not a matrimonial property as the same was bought by the deceased himself in his name without disclosing the names of his wives. That the suit property was meant for commercial (business) purposes and not for residential. On the issue of deceased's motor vehicles and



accounts, it was DW1's testimony that these were the creatures of a Probate and Administration Cause No. 02 of 2017 and the same had been dealt with in the inventory filed before the Deputy Registrar of this court. DW1 went on explaining that it was not their intention to quarrel with their mothers (deceased's wives) as they do not intend to cause damage to the company since the directors of the company are children (sons) from both families and they live a happy life.

Alban Martin Shao (**DW2**) testified that the plaintiffs and one Redegunda Martin Silayo (who is not party to this suit) are wives (now widows) of the deceased and that the suit property was transferred to the Company of which he is one of the directors. He went on explaining that the deceased also owned others assets namely, motor vehicles make Toyota Prado and Toyota pickup which were sold to some family members and proceeds from the sale were distributed to the wives. It was (DW3)'s testimony through James Martin Shayo that the suit property in Moshi town was used as a business centre and the plaintiffs resided at Rombo but in different compounds. Priscuss Martin Shao (DW4) testified that the suit in property is owned by Martin and Sons Company and was incorporated by the late Martin Silayo in 2013. DW4 asserted that the proceeds from the suit property prior to the transfer were used by the deceased and his family and after his death the proceeds were deposited into the Company's account for renovation of the suit property. That there is pending probate case before this court and the inventory is yet to be closed because of the caveat. DW4 asserted further that, to his understanding the suit property belonged to the Company.



At the closure of the proceedings both counsels were granted leave to file their final submissions which I will consider them in the course of this judgment.

Having elaborated testimonies from the witnesses the exhibits and summary facts, I now turn to consider the framed issues starting with the first issue as to whether the suit property is a matrimonial property. The law is settled to the effect that whoever alleges must prove. Section 110 (1) of the law of evidence Act provides that;

"110(1) Who ever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists"

The above position was underscored in the case of **Abdul-Karim Haji V. Raymond Nchimbi Alois and Joseph Sita Joseph (2006) TLR 420** where the court held that; -

"It is an elementary principle that he who alleges is the one responsible to prove his allegation."

As per the evidence on record, it is not disputed the fact that the plaintiffs and one Adenguda Martin Silayo are widows of a polygamous marriage of the late Martin Silayo. Also, not in dispute is the fact that the suit property was registered in the name of the deceased and later transferred to the 13th defendant. Further it is not disputed that none of the wives of the deceased ever resided in the suit property. As per the pleadings and testimonies of the plaintiffs they claimed that the suit property was a matrimonial property. In supporting their claims PW2 tendered a spouse consent form dated 24th October 2007 (Exhibit P.2) which states that in the year 2007 the deceased obtained a consent from 2nd plaintiff to secure



a loan from CRDB bank. It is opportune for me to first revisit the definition of matrimonial property. In the case of **Afred Kinunda V. Maria Kumburu (Matrimonial Appeal No. 2 of 2019) [2020] TZHC 1673**, the court quoted the definition from *www.nsfamily.ca* to mean: -


"Matrimonial property owned or obtained by either or both married spouses before or during their marriage. It is sometimes called matrimonial assets. Matrimonial property includes matrimonial home- the home that the coupled lived during their marriage"

Also in the **National Bank of Commerce Ltd vs Nurbano Abdallah Mulla (Civil Appeal No.283 of 2017) [2020] TZCA 238; (08 April 2020)**, the CAT made a distinction between matrimonial home and matrimonial property as follows:-

The phrase matrimonial home is defined under section 2 of the Law of Marriage Act, Cap. 29, R.E. 2002 and the said section is in pari material with section 112 (2) of the Land Act, which provides that;

"matrimonial home means the building or part of a building in which the husband and wife ordinarily resides together..."

From the above provision, we are of the considered view that a property will be termed a matrimonial home when the spouses ordinarily occupied it as their family residence. On the other hand, the phrase matrimonial property has a similar meaning to what is referred as matrimonial asset and it includes a matrimonial home or homes and all other real and personal property acquired by either or both spouses



before or during their marriage. (See Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo, Civil Appeal No. 102 of 2018 (unreported)."

A reading from the above legal authorities makes it clear that the suit property in the instant case is the matrimonial property which was acquired by the deceased during the subsistence of his polygamous marriage. The same is supported by the spouse consent (Exhibit P.2) which states that the suit property was their matrimonial home which is inclusive of a matrimonial property. More so, the fact that the suit property was registered under the name of deceased alone does not mean that the deceased was the sole and absolute owner of the suit property. Furthermore, section 59(1) of the Law of Marriage Act (Cap. 29 R.E 2019) provides the following: -

"Where any estate or interest in the matrimonial home is owned by the husband or the wife, he or she shall not, while the marriage subsists and without the consent of the other spouse, alienate it by way of sale, gift, lease, mortgage or otherwise, and the other spouse shall be deemed to have an interest therein capable of being protected by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds."

Reverting back to the facts of the instant case my view is, plaintiffs consent was mandatory prior to the transfer of the suit property in question short of which amounts to alienation of matrimonial property by transfer of ownership to the 13th defendant (Martin and Sons Company). The submission made by the defendants that since the suit property was already transferred to 13th defendant then such property does not form part of the deceased's estate is a misconception aimed at leading to chaos

within the family. This court will not bless the wrongful act to deprive the rights of the deceased's wives over the suit property. Having said so, since the transfer transaction was effected without obtaining spouse consent, the transfer of the suit property was a nullity in the law. It is pertinent for the defendants to understand that deceased's shares in the company and his rights over suit property are two different things. Having regard to the facts and circumstances of the case I am of the opinion that the suit property was acquired by the deceased during the subsistence of his polygamous marriage hence a matrimonial property. To this end the first issue is answered in affirmative.

On the second issue as to whether the bank accounts and the motor vehicles are matrimonial properties this issue should not detain me much as the case before this court concerns a land matter and this court is confined to only determine land issues, thus the issue is misplaced and dismissed accordingly. Plaintiffs are advised if they so wish to seek such remedy in other avenue of this court or the court below.

As to the last issue of reliefs, the plaintiffs have been able to prove that the suit property is a matrimonial property and since they are surviving spouses, they have a right over it. With regard to other reliefs claimed from claim number II to X as reflected in their amended plaint there is no material evidence adduced by the plaintiffs to prove other than mere allegation. In view of the above discussion I make the following order: -

a) That the transfer of the suit property to 13th defendant was null and void and the suit property is declared a matrimonial property between the late Martin Alex Silayo (deceased) and his three wives (widows) **which is subject to probate.**

b) The other claims are dismissed.



c) This being a family matter, each party to bear own costs.



A handwritten signature in blue ink, which appears to be "S.B. Mkapa", written over a circular stamp or seal.

S.B MKAPA,

JUDGE

23/12/2020