

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

LAND CASE NO. 104 OF 2015

CALVIN PAULO TARIMO.....1ST PLAINTIFF

WITNESS PAULO TARIMO.....2ND PLAINTIFF

VERSUS

ACCESS BANK TANZANIA LIMITED.....1ST DEFENDANT

PRISILA PAULO TARIMO.....2ND DEFENDANT

JUDGMENT

MASABO, J.L.:-

In this suit, the Plaintiffs are jointly praying for a declaratory order that they are the lawful owners of the suit properties described as Ardhi No. KND/NGB/MPA18/20 with Residence Licence No. KND 8225 located at Ndugumbi Ward then in Kinondoni municipality and Ardhi No. KND/TND/PKC10/38 with Residence License No. KND 007709 located at Pakacha street, Tandale Ward, Kinondoni Municipality in Dar es Salaam. They are also praying for nullification of the mortgage created over the premised suit; an order for surrender of the original residence licenses of the suit premises to the Plaintiff, and a permanent injunctive orders barring the 1st Defendant from entering possession, evicting, interfering or tempering in any other way with the ownership/use of the suit premise and a general damages at a tune of Tshs 50,000,000/=

In a nutshell, this suit has its genesis in demise of the one Paulo Tarimo, the father to the plaintiff and the original owner of the suit properties above described. Following his death in 1997, the ownership of the suit properties devolved to the plaintiff. At this time the both the plaintiffs were of minor age hence the custodianship of the said properties and the documentations thereto vested in the 2nd Defendant, their mother. It is alleged that, on 18th July 2014 the 2nd Defendant fraudulently obtained a loan from the 1st Defendant to which she created mortgage charges over the two premises without notification or consent of the 1st and 2nd Plaintiffs. That, having obtained the loan, the 2nd defendant defaulted payment as a result the 1st Defendant sought to enforce its legal rights over the suit premises hence this suit.

During the hearing the plaintiffs enjoyed the *probono* service of the Mr. Seuye, holding brief from the Tanganyika Law Society whereas on the other hand the 1st Defendant was ably represented by Mr. Deus Mallya. The 2nd Defendant defaulted appearance and an order for exparte proof against her was issued on 14TH August 2017.

The Court framed three of issues for determination:

- i. Who is the lawful owner of the suit premises?
- ii. Whether there was a valid mortgage contract over the suit premise between the 1st Defendant and the 2nd Defendant
- iii. To what reliefs are the parties entitled to?

In support of their case, the plaintiffs brought no other witness than themselves: **PW1**, Calvin Paul Tarimo (the 1st plaintiff herein) and **PW2**, Witness Paul Tarimo (the 2nd defendants herein). Their account was more or less similar and can be summarized as follows. Both are children of the 2nd Defendant and one Paulo Tarimo who died in 1997 who left behind, among other properties, the two suit premises whose ownership devolved to PW1 and PW2 through a testamentary will. At this time, they were of minor age hence they could not immediately assume ownership of the two premises as a result, they were vested in the 2nd Defendant herein who held the same in trust. Acting beyond her powers and without notifying PW1 and PW2 or seeking their consent, the 2nd defendant fraudulently obtained a loan from the 1st defendant and mortgaged the two houses without PW1 and PW2's consent. None of the two had information pertaining to the loan until in November 2015 when they were served with a default notice requiring the 2nd Defendant to repay her outstanding loan of Tshs 94, 528, 815/82. Further the notice indicated the bank's intention to exercise its right of sale of the of the mortgage premises should the 1st Defendant fail to repay her loan within 60 days. That upon follow-up they discovered that indeed the 2nd Defendant fraudulently created a mortgage and that all the documentations for the suit premises were under the custody of the 1st Defendant Bank. In addition, the following exhibits were tendered and administered '*Leseni ya Makazi*' No. *KND 8225, Ardhi No. KND/NGB/MPA18/20* dated 18th March 2006 (**Exhibit P1**); '*Leseni ya Makazi Namba KND007709, Ardhi Namba KND/TND/PKC/10/38* dated 7th march 2007 (**Exhibit P2**); and a default notice dated July 2015 (**Exhibit P3**).

On its party the 1st Defendant paraded only one witness Safinia Daudi, 32 years, a Recoveries Officer for the 1st Defendant who testified that, the 2nd Defendant was a long-term customer of the 1st defendant's bank having obtained six loans. That on 18th July 2014 the 2nd Defendant obtained a loan worth Tshs 100,000,000/= and she secured the same with business chattel and a mortgage deed created over the suit premises. That, DW1 who was at the material time working at the 1st Defendant's back office personally processed the loan file and all documents submitted by the 2nd Defendant to secure the loan. That, in addition to the loan form, the 2nd Defendant submitted two residence licenses bearing her name, a letter from Makuburi Ward which introduced the 2nd Defendant's son one Kelvin as guarantor of the loan. That, upon being advanced the loan, the 2nd defendant deposited the first 10 installments after which she defaulted payment. In support of her testimony, DW1 tendered the loan agreement (**Exhibit D1**); and the letter from Makuburi Ward (**Exhibit D2**).

Both parties had the opportunity to make final submissions. In his submission, the plaintiffs counsel argued that, the 2nd Defendant is not the owners of the two premises and that she only held the same as a custodian of the plaintiffs who are the true legal owners of the suit premises as it vividly appears from the residence licenses. He further argued that the mortgage agreement between the 1st defendant and the 2nd defendant is invalid as the 2nd defendant could not legally enter into contract over a property to which she was not the legal owner. On his part, Mr. Amedeus Mallya for the Respondent, focused on the credibility of the testimony of

PW1 and PW2, he questioned the reliability of their testimony on two grounds. First, that they inherited the same as they produced no letter of administration of the estate of Tarimo Paulo, and second, that, there is no reason why upon attaining the age of majority they did not reclaim their residence licenses from their mother.

I have carefully considered the testimonies before me and the submissions, thereto. I need not to restate that, under the law, the burden of proof lies on the party asserting the existence of a certain fact (Section 110 of the Law of Evidence Act, Cap 6 RE 2002). In this case, the plaintiffs being the ones alleging that they are the true legal owners of the suit property and that the mortgage deed was signed on their back, they have a legal duty to prove that, indeed they are the legal owners of the suit premises and that the mortgage created over the suit property is unlawful as it was created fraudulently without notification or their consent.

On the first issue as to who is the legal owner of the suit property, the vital evidence is the testimony of PW1, PW2 which all converge on the fact that the plaintiffs are the legal owners of the suit premises and that the 2nd Defendant was only the custodian of the properties. Also vital is the evidence of **Exhibit P1** and **Exhibit P2** which corroborate perfectly well the Plaintiff's story. **Exhibit P1** bears the following words:

'HALMASHAURI YA MANISPAA YA KINONDONI KWA LESENI
HII IMETOA KIBALI CHA MAKAZI KWA: **PRISCILLA PETER
TESHA (MSIMAMIZI WA CALVIN PAULO TARIMO)**'
[Emphasis added].

Equally, in Exhibit P2 it is stated that:

"HALMASHAURI YA MANISPAA YA KINONDONI KWA LESENI
HII IMETOA KIBALI CHA MAKAZI KWA: **PRISCILLA PETER
TESHA (MSIMAMIZI WA WITNESS PAULO TARIMO).**"
[Emphasis added].

The wordings above are very clear and incapable of any interpretation other than the fact that ownership of the suit premises vested in the 1st and 2nd Plaintiff and that the 2nd defendant was only the custodian. As this evidence was not controverted by any evidence showing that the ownership of the suit premises devolved to the 2nd Defendant, the answer to the first issue is certainly in the affirmative.

Regarding the second issue as to whether there was a valid mortgage contract over the suit premise between the 1st Defendant and the 2nd Defendant, it is not disputed that the 2nd Defendant is indebted to the 1st Defendant having obtained a loan of Tshs 100,000,000 on 18th July 2014. It is also undisputed that to secure the said loan the 2nd Defendant pledged the disputed premises as security and vested in the 1st defendant the documents pertaining to the two premises. The loan agreement and collateral agreement executed by the parties (**Exhibit D1**) attests to this. The dispute rests on the validity of contract and this draws us back to the finding in the first issue and the question that comes to mind whether the 2nd Defendant being the guardian/next friend of the plaintiffs could legally enter into the collateral agreement?

Under the Law of Contract Act, Cap 345 RE 2002 minors cannot enter into contract as they lack the necessary legal capacity (See section 11(1)). A guardian, may pursuant to section 68 of the Law of Contract Act, only enter into contract for necessities, broadly defined as those things which the minor actually needs and without which an individual cannot reasonably exist. In the instant case it is to be noted that at the time the collateral agreement was concluded the plaintiff had attained the age of 18. The first Plaintiff (PW1) who is now 26 years old was at the material time 21 years old and the 2nd Plaintiff and PW2 who is now 25 years old had 20 years at the material time. Accordingly, the issue of minority does not arise and hence the need for consent to which both parties have alluded to.

On the plaintiff's part, it was pleaded and testified that their consent was neither sought nor granted while on the 1st Defendant side, it is stated that consent was sought and obtained. The court have carefully examined the purported consent as contained in **Exhibit D2**. Three major irregularities have been noted in this exhibit. First, the letter is a merely introductory letter through which the local government office for Makuburi Ward Kinondoni Municipality introduced the persons named therein to the 1st Defendant Bank. It says nothing about the consent. The title of the letter reads "Utambulisho wa ndugu Keluvini Paul Safari" and part of its content which states the aim of the letter reads as follows: "*namleta kwako aweze kumzamani mama yake kwa ajiri ya kuchukua mkopo*" [emphasis added]. Vividly, the title and the content of the letter speak for themselves. It need not be overstated that, the purported consent is not contained in this letter.

The second major irregularity is that, the name of the person introduced in this Exhibit is inconsistent with that of the 1st Plaintiff. The person in respect of whom the introduction in Exhibit D2 is given is **Keluvini Paulo Safari** which is different from the 1st Plaintiff's name of **Calvin Paulo Tarimo** and no evidence was rendered to show that the said **Keluvini Paulo Safari** is one the same person to Calvin **Paulo Tarimo**. On this note, even if I were to hold that the content of Exhibit D2 suffices as consent, it will still fail in this front. The last irregularity is that the letter is dated 31/03/2010 which suggests that it was written 4 years prior to the conclusion of the collateral agreement for which it is purported to approve. In her testimony, DW1 while conceding to this irregularity told the court that the 2nd Defendant was a seasonal customer of the bank and that she took six loans using the same documents. In sum, the three irregularities I have endeavored to demonstrate above not only shows that there was no consent but exhibits acute negligence on the party of the 1st Defendant Bank.

As regards, the third issue as to what remedies are the parties entitled to, this court is of the view that, the plaintiffs having ably proved their case against the Defendants are their prayer for nullification of the mortgage created over the suit premise and surrender of the residential permit. I am also of the view that, the plaintiff deserves to be awarded a general damages to cover for the time they have spent in attending to court for over 5 years, the apprehension of losing their premises coupled with the inability to put the premise under use as its documentations have since 2014 remained

under the custody of the 1st Defendant. To this, I will award Tshs 30,000,000/=

Accordingly, I enter judgment for the Plaintiff and subsequently make the following orders:

- (i) The mortgage created over the premised suit is declared a nullity
- (ii) The 1st Defendant is hereby ordered to surrender the original residence licenses of the suit premises to the Plaintiffs and is barring from entering possession, evicting, interfering or tempering in any other way with the ownership/use of the suit premise
- (iii) and a general damage at a tune of Tshs 30,000,000/=
- (iv) Costs on the Defendant

DATED at DAR ES SALAAM this 17th day of March 2019.



J.L. MASABO

JUDGE

Ruling delivered in open court today 17th day of March 2020 in the presence of Mr. Brian Magoma for the Plaintiffs and Mr. Bernard Maguha Representing Mr. Mallya for the Defendant.



J.L. MASABO

JUDGE