

IN THE HIGH COURT OF TANZANIA
DAR- ES -SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM

CIVIL CASE NO 95 OF 2017

ANITHA MUHIDINI MBOYA..... PLAINTIFF

VERSUS

JOSEPH NEMES MAKOI.....1st DEFENDANT

STANDARD CHARTERED BANK TANZANIA LTD.....2nd DEFENDANT

YONO AUCTION MART & CO LTD.....3rd DEFENDANT

JUDGEMENT

14th December 2020 & 11th February 2021

A.K Rwizile. J

At the center of the dispute in this case is Joseph Nemes Makoi. He was previously as shown above sued among other defendants for the title deed C.T 85482 plot No. 1289, Block B located at Ubungo Kibamba which was mortgaged by him to the 2nd defendant while it is a matrimonial property. It is tragic that despite being the husband of the plaintiff, living under the same roof, by design or by accident, the plaintiff did not prove service of the summons on him for over 7 months. To unstuck, the otherwise stuck case, this court on 19th June 2018 had to dismiss claims against him under order IX Rule 5 of the CPC (Mwandambo J as he then was).

Pleadings however, were not amended to expunge his name; he is in actual sense cosmetically appearing as the 1st defendant.

Unlike, in the submission of the counsel, who referred him as the 1st defendant, he will be referred by his name or as a mortgagor throughout this judgement. It is the fact that Joseph Nemes Makoi who later testified as Pw2, was a good customer of the 2nd defendant. He used to take terms loans for the family business going by the name of EKARUA GENERAL SUPPLIES.

In 2012 he was advanced a term loan 220,000,000/=. He mortgaged the Certificate of title No. 85482, Plot 1289, Block B at Kibangu area which is a family property. This was on 14th May 2012. The loan was on similar terms extended on 28th October 2013, to the sum of 272,000,000/=. When the business went sour, he defaulted payment. The 2nd defendant instructed the 3rd respondent to dispose of the mortgaged property. The plaintiff, in retaliation, filed this action on ground that, as wife of the mortgagor, she did not give her consent, before the mortgage was created. She therefore prayed for following orders;

- a. A declaration that the title deed, Certificate of title No. 85482, Plot 1289, Block B at Kibangu Ubungo is a matrimonial property.
- b. An order that the 1st defendant (Joseph Nemes Makoi) and the 2nd defendant find other means of repaying the loan facility
- c. An order for permanent injunction to restrain both the defendants to evict the plaintiff from the matrimonial property
- d. Costs of the suit and
- e. Any other relief that this court may deem fit and just to grant.

Mr. Seleman Matauka and Edward Nelson Mwakingwe learned counsel represented the plaintiff and defendants respectively. This case was heard

by affidavit of witnesses as per order XIX. Rule (1) and (2) of the CPC. Witnesses were all subjected to cross-examination. After a full trial, written closing submissions were made.

For the plaintiff's case, it was Anitha Muhidini Mboya (Pw1) and her husband Joseph Nemes Makoi (Pw2) who testified. The defence case was mannered by one witness. He is called Rajab Sarumbo (Dw1), the Relationship Manager with the 3rd defendant. The plaintiff's case was mannered by Pw1 and Pw2 who are husband and wife. Pw1 testified that the house subject of the mortgage created by Joseph Nemes is a matrimonial property which was jointly acquired. She said, she has never consented to its mortgage, she does not in any case admit to have signed and advanced any pictures that appear in the same documents. She said, she was surprised to see her duly signed consent in the Statement of Defence by the 2nd and 3rd defendants. She tendered among other things, the marriage certificate (P1) showing when she was married to Joseph Nemes. As well, she tendered a copy of the certificate of title mortgaged (P2). She also proved that their house was about to be sold by auction by the 3rd defendant as shown in the Nipashe newspaper (P3).

Her evidence was supported by her husband. Pw2 was of the evidence that he is a long-time borrower and has been in good relationship with the 2nd defendant because he has taken loans. He said, he has never known or be informed that the consent is needed before mortgaging any property.

He too, was surprised to see, a duly signed consent from his wife in the bank documents. He does not know how it got there because he has never done

that. According to his evidence he mortgaged a matrimonial property without the consent of his wife. He asked this court to investigate who brought in record of the mortgage facility the consent of his wife. He was of the evidence that the authenticity of the consent is questionable and that Dw1 must be in the position to know where he got it.

By the evidence of Dw1, it was stated that Joseph Nemes Makoi took from the 2nd defendant term loans facilities in different occasions. He tendered two terms loan facilities dated 11th May 2012 and the first deed of variation dated 28th October 2013. The two documents were admitted and marked D1 and D2 respectively. He as well tendered a bank facility letter dated 10th December 2014. According to his evidence, the amount of 310,000,000/= was approved to Joseph at different time. He said, the facilities mortgaged were at Arusha and Kibangu Dar-es salaam, while personal guarantee of the property at Arusha was issued by Mariana Joseph Makoi. According to his evidence when the demand notice was issued to Joseph, the amount of 200,944,029.92 was due. He further testified that the property at Kibangu with the certificate of title subject of this case, is a matrimonial property and the consent was duly obtained from the plaintiff as it is exhibited in D1 and D2. Upon hearing the evidence, issues that have to be determined include the following;

- a. Whether there was a consent of the spouse before the mortgage was created over the suit premises.
- b. If issue No. 1 is in the affirmative, whether there was a valid mortgage over the suit land
- c. To what reliefs are the parties entitled to.

To answer the issues, the plaintiff submitted that there was no valid consent. According to her submission, the spouse consent is a legal requirement that cannot be dispensed with. Further, it was submitted that the same purported consents of the spouse were not issued neither by the plaintiff nor her husband and the same should be investigated. To substantiate this, it was submitted that they were signed in different dates after the loan was taken which shows how they were not genuine. This court is therefore asked to hold that the requirement of the law, that is section 114(1)(a) and (b) of the Land Act and section 59(1) of the Law of Marriage Act are good to that effect. I was also asked to refer to the case of **National Bank of Commerce Limited vs Nurbano Abdallahmulla**, Civil Appeal No. 283 of 2017

When responding to the plaintiff's submission on the issues. The defence was of the submission that the mortgage created on suit land was out of the term facility of 220,000,000/=. It was signed on 10th April 2012. The variations of the same was on 28th October 2013 and signed as well on 10th October 2014. According to the submission, exhibit D1 and D2 are clear to that effect. It was stated that the spouse consent was duly obtained and the dictates of the law complied with as per section 114 of the Land Act as amended by section 8 of the Mortgage Financing Act. According to the defence the duty stated under section 8(3) of the Mortgaging Financing Act was complied with. It was therefore the duty of the plaintiff to prove that the same was not complied which has not been done.

I agree with both sides that a spouse consent is a mandatory legal requirement that cannot be dispensed with when such a mortgage, like the

one created in this case. As submitted, section 114 of the land Act is in effect. The import of this section is clarity and transparency in a mortgage that involves a matrimonial property. It does not only create obligations to the mortgagor, but also the mortgagee. It also creates offences in case of breach. The law states as hereunder;

114.-(1) A mortgage of a matrimonial home including a customary mortgage of a matrimonial home shall be valid only if-

(a) any document or form used in applying for such a mortgage is signed by, or there is evidence from the document that it has been assented to by the mortgagor and the spouses or spouses of the mortgagor living in that matrimonial home; or

(b) any document or form used to grant the mortgage is signed by or there is evidence that it has been assented to by the mortgagor and the spouse or spouses living in that matrimonial home.

(2) For the purpose of subsection (1), it shall be the responsibility of a mortgagor to disclose that he has a spouse or not and upon such disclosure the mortgagee shall be under the responsibility to take reasonable steps to verify whether the applicant for a mortgage has or does not have a spouse.

(3) A mortgagee shall be deemed to have discharged the responsibility for ascertaining the marital status of the applicant and any spouse identified by the applicant if, by an affidavit or written and witnessed document, the applicant declares that there were spouse or any other third party holding interest in the mortgaged land.

(4) An applicant commits an offence who, by an affidavit or a written and witnessed document, knowingly gives false information to the mortgagee in relation to existence of a spouse or any other third party and, upon conviction shall be liable to a fine of not less than one half of the value of the loan money or to imprisonment for a term of not less than twelve months.

It is therefore trite that the law imposes a duty to the mortgagor to disclose that the property subject of mortgage is matrimonial or some other person have interest in it. It also imposes a duty to the mortgagee to do some kind of due diligence in order to know that the land subject of the mortgage is not with shared interest. It has been submitted by the plaintiff that there is no dispute that the plaintiff is married to Joseph. The marriage was subsisted when mortgage was created. The plaintiff testified so. She told this court she did not take part and was not informed about the same. This is also as stated by Pw2 Joseph himself. He wondered how could such a thing have happened without his knowledge.

I have examined exhibits D1 and D2, they have the plaintiff's consent. The first was alleged issued on 2012 and later 2013. They have, however, been denied by the plaintiff and her husband Joseph. What is surprising is that none of the two claims the same were sent to the bank. They have testified and also have submitted that the same be investigated.

According to the plaintiff's case, the blame is on the bank officers especially Dw1 for attending the same. It means, Dw1 before advancing or approving the loan facility forged the documents. It is tragic that the photos and

signatures of the spouse consent present in the record are similar. They were verified by the notary public and bear the stamp of two different advocates. The first was attested before advocate Salim. H Msemo and the second one before advocate N. I Washokera. The signatures have been denied by the plaintiff and so the alleged attestations by advocates who have not been called to testify.

In law, in such a situation, the court may if it thinks fit compare the signatures in dispute with those not disputed. Section 75 (1) of the Evidence Act provides so. For clarity, it states thus;

75.-(1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose

In my comparison, the disputed signatures in the documents look very similar even though they were executed years after each other. I also compared the same signatures with the one that appears in the plaint signed by the plaintiff. There are similarities with the disputed ones. But still, I found a great variation between the disputed signature and that which appears in the marriage certificate (P1). This variation of the compared signatures, confirms the statement by the plaintiff that she has two types of signatures used in tandem.

I think, there is no reason to suppose that the two consents available in D1 and D2 were forged. I am also tempted to believe that if indeed the plaintiff did not send the same to the bank, then her husband did. There is therefore no evidence she was not aware of the transactions.

I do not see the possibility, in this case for Dw1 who has been in constant business of banking for about 14 years to move on his own, forge plaintiff's signature, crop her photos and attest the same before the lawyer, who also without question attests the same, then place it in the mortgage deed, bind the same, approve it in order to advance the loan to Joseph without Joseph's knowledge or his wife . This in my view does not appeal in the normal course of doing things. It is also not true that the plaintiff was not aware of the deal. To prove so, I have shown previously that the plaintiff failed to trace the address of his husband for the purpose of service, until the case against him was dismissed, that is when he surfaced.

In his testimony, Joseph who testified for the plaintiff said he was not served with a summons by his wife because they were not in good terms and had relocated to Moshi. All this in my view is not the truth. The plaintiff and Joseph have been by looking at the trend of borrowing and the fact that they worked together at kariakoo, the same was well informed of the mortgaged and the same documents were not forged. That level of forgery, alleged, is not likely to have occurred in the circumstances of this case.

Having said what I have said, it is important to note that the plaintiff was required under the law to prove that the same were not her signatures as under section 110 of the Evidence Act.

She could have attempt to call the lawyers alleged attested her consent. For the foregoing reasons, I am confident that the firs issue has been answered in the affirmative.

Having answered the same in the way I have done, let me now go to the second issue, which is to the effect that if there was a spouse consent was it valid? The important thing to note here is that the key thing in this case is not the loan facility, but whether there was valid spouse consent or not. This stems from the submission that the spouse consent was signed after signing of the loan facilities. It was testified by Dw1. He said that is the position and it what the procedure entails. Dw1 stated on cross examination that the spouse consent is the last thing to do upon having verified the rest of the terms of the loan. Before that stage, is the process of valuation. If the same meets the terms of the requested loan, then a spouse consent comes. I think Dw1 is right. It is not important to deal with the spouse consent when in fact one has not visited and evaluated the property itself.

In this case, Joseph admitted that all that procedure was followed. What he does not accept is that his wife did not issue the consent. He further said, he did not even know if there was such a requirement. I believe as I said before, Joseph is not, like his wife, a witness of truth. His evidence does not in any way attempt to answer key questions that this court asked them to answer. I have no reason therefore to answer this second issues in the negative. I hold that the consent was validly issued by the plaintiff.

Since, I have answered the first two issues in favour of the 2nd and 3rd defendants. It follows therefore that the plaintiff has failed to prove her case.

Judgement is entered in the favour of the 2nd and 3rd defendants. The plaintiff is also to pay costs of this case.

Ak. Rwizile
JUDGE
11.02.2021

Judgement delivered in the presence of the plaintiff. The defendants and their lawyers are absent.

Ak. Rwizile
JUDGE
11.02.2021

 Recoverable Signature

X 

Signed by: A.K.RWIZILE

