

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND CASE NO. 7 OF 2018

SIKUDHANI RAJABU @ SIKUDHANI

ABDALLAH MSHANA PLAINTIFF

VERSUS

ECOBANK TANZANIA LIMITED 1ST DEFENDANT

SHANA GENERAL STORE LIMITED 2ND DEFENDANT

ABDALLAH IDDI MSHANA 3RD DEFENDANT

ALBERT GASPER MSANDO 4TH DEFENDANT

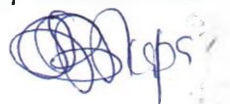
JOSEPH NUWAMANYA 5TH DEFENDANT

10th December, 2020 & 18th February, 2021

JUDGMENT

MKAPA, J:

The Plaintiff and the 3rd defendant are spouse. They contracted an Islamic marriage on 13th April, 1993. It was alleged that the plaintiff is a majority shareholder of the 2nd defendant while the 4th and 5th defendants were appointed as joint receivers and managers of the 2nd defendant from 23rd April, 2013. That, on 6th June, 2011 the 1st defendant did extend the 2nd defendant a loan facility amounting shillings 1,500,000,000/= for the period of six months after disbursement. Further that, on 12th July, 2012 the



1st defendant enhanced the loan facility to shillings 2,400,000,000/= for 12 months and among the properties mortgaged as securities were; Plot No. 133, Block "A" Farm 181/82 under Certificate of Title No. 4612 and Plot No. 134 Block "A" Farm 181/82 under Certificate of Title No. 4709. The plaintiff now sues the defendants claiming not to have issued consent to the creation of the mortgage of the said properties while the same being matrimonial properties hence she prays for the court to declare the mortgage agreement between the 1st and 2nd defendants *void ab initio*. She further prays for the following reliefs and orders;

1. An order that the mortgaged properties situated in Plot Number 133, Block "A" Farm 181/82 Moshi Municipality and Plot Number 134, Block A, farm 181/82 Moshi Municipality under Certificate of Titles Number 4612 and 4709 respectively, be declared null and void *ab initio* for want of plaintiff's spousal consent, thus the properties be redeemed from mortgage encumbrances.
2. Costs of the suit.
3. Any other relief (s) as the court may deem fit in the circumstances of the case.

Before commencement of the trial, the following issues for determination were framed;



1. Whether the plaintiff issued a spouse consent to the creation of the purported mortgage.
2. Whether the mortgage between the 1st and 2nd defendant is void *ab initio*.
3. To what relief (s) are parties entitled.

During hearing, the plaintiff had the legal services of Mr. Issa Mavura while the 1st 4th and 5th defendants were represented by Mr. Wilbard Massawe, the 2nd defendant was represented by Mr. Martin Kilasara and the 3rd Defendant was represented by Ms. Regina Mwanri, all learned advocates. The plaintiff summoned two witnesses while the defendants paraded five witnesses.

Testifying in court **PW1** Sikudhani Rajab, informed the court that, she is a business woman married to the third defendant (Abdallah Iddi Mshana) in 1993. To prove their marriage, a copy of marriage certificate from Baraza Kuu la Waislamu Tanzania No. 01154 issued on 13/04/1993 was admitted as Exhibit P.1. She went on explaining the fact that she is the shareholder and director of the second defendant (Shana General Stores Limited Company) as she owns 20% of the shares and further that, she happened to know the first defendant on 1/5/2013 when they visited her shop and godowns and informed her that the Company was indebted to the bank. It was her further testimony that on that date the first defendant came along with some bank



documents with various dates and subject matter evidencing the debt and a Board Resolution. That, the said documents included facility letters dated 06/06/2011, 12/07/2012, 10/07/2011 and 17/6/2011 and copies of specific debentures dated 28/6/2011, 18/7/2011, 16/11/2012 which were collectively admitted as Exhibit P2. PW1 also tendered her Passport No. AB 175810 and Voters Registration No. T. 1006-7454-546-5 in respect of Sikuzani Rajab which were collectively admitted as Exhibit P3.

PW1 went on testifying that, after closure of the business premises by the first defendant, she discovered that title deed for plots Nos. 133 and 134 respectively, for the properties situated at Moshi Municipality were missing and when she asked the 3rd defendant he disclosed the fact that the title deeds were mortgaged for the loan facility which he had acquired. She stated that the title deeds to the mortgaged properties bear the names of Abdallah Iddi Mshana (her husband), the 3rd defendant. PW1 went on narrating that when they got married, they started their married life with small kiosk business at Moshi bus stand selling biscuits soft drinks and some small merchandise until 2008 when they jointly acquired the two properties. She went on testifying that, after she had discovered that the two properties have been mortgaged without her and consent, she convened a family meeting on 05/05/2013 which was attended by relatives including her father in law Athuman Iddi Mkwayu, her mother



Mwantumu and her sons Rajabu Abdallah, Hassan Abdallah and Wadi Abdallah. The 3rd defendant conceded to have acquired the loan facility without involving her, but assured the meeting that he had already repaid the loan facility. Minutes of the family meeting titled "KIKAO CHA FAMILIA KUHUSIANA NA BI SIKUDHANI ABDALLAH MSHANA KUMLALAMIKIA BW ABDALLAH IDD MSHANA KUWEKA REHANI NYUMBA/ VIWANJA MAGARI BILA RIDHAA YAKE DATED 5/5/2013 were admitted as Exhibit P4. That, after the said family meeting, on 07/11/2017 PW1 entered caveat in respect of CT No. 133 block "A" Farm No. 181/82 objecting the creation of the mortgage without her consent. The caveat on CT No. 4612 in respect of Plot No. 133 Block A, Farm No. 181/82 Moshi town, were admitted as Exhibit P.5. PW1 finally stated that, as a director of the 2nd defendant and legal wife of Abdallah Iddi Mshana, she prayed for this court to declare the mortgage unenforceable for lack of spouse consent.

When cross examined, PW1 stated that, on 01/05/2013 when the 1st defendant's officials invaded her business premises, she was not aware that the third defendant had acquired a loan from them. That, though she did not report the matter to Police, she entered a caveat in 2017 but it was until 12/09/2018 when she decided to institute this case. Further that, although she was the custodian of the title deeds, the same were in the name of the

3rd defendant since it is normal in African culture for assets to bear the name of a husband.

PW2 Salim Hassan Salim testified that the plaintiff is his sister in law and he knew the second defendant as a company owned by the 3rd defendant and the plaintiff. That, on 5/5/2013 he chaired a family meeting in which PW1 was complaining the fact that as a spouse she did not consent to mortgage the matrimonial assets for the loan facility acquired from the 1st defendant. Further that, the 3rd defendant had admitted to have acquired the loan facility and mortgaged the said properties without involving his wife (the plaintiff) though he had already repaid the said loan facility.

It was defence's case through **DW1** Benedicto Maziku that, he is currently an employee of Mkombozi Bank but before, he was employed by the 1st defendant as a litigation officer responsible for advising management on legal issues and loan recovery from 02/01/2012 to 23/07/2020. He went on explaining that the plaintiff was a Managing Director of the second defendant and guarantor to the loan facility amounting shillings one Billion and one Million five hundred thousand as first instalment extended to them by the first defendant. That, the 2nd instalment increased the loan amount to two billion shillings and four hundred thousand and the same was later on restructured to the tune of shillings two billion three hundred thousand.



DW1 went on testifying that, the 2nd defendant did acquire the loan and one of the terms of the loan was that the loan had to be guaranteed and the first loan facility had to be repaid within six months since it was an overdraft facility. Other terms of the loan included mortgaged properties as collateral namely plot No. 133A, Farm No, 181/82 with CT No. 4709 and Plot No. 134A Farm 181/82 CT No. 4612 all in the same name of the 3rd defendant. It was DW1's further testimony that there were other documents evidencing the loan facility including 1st facility letter dated 6/6/2011, the second one issued on 12/07/2011 and the 3rd issued on 6/11/2012. That, there were other annextures including, individual guarantees, Company's Board Resolution dated 17/06/2011, specific debenture dated 28/6/2011 deed of variation both dated 16/11/2011, spousal second consent to create mortgage dated 17/6/2011.

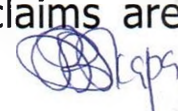
He went on explaining the fact that, one of the terms of the mortgage deed was that the same ought to have been signed by the owner of the property the 3rd defendant (Abdallah Iddi Mshana)

The mortgage deed and subsequent first and second deed of mortgage variation in respect of CT No. 4612 and CT No. 4709 were collectively admitted as exhibit **D2** and facility letter dated June, 2011 from the 1st defendant to the 3rd defendant amounting shillings 1,500,000,000 were admitted as Exhibit **D1**,

while Mortgage of Right of Occupancy CT No. 4612 LO No. 42308 LD No. 807 in respect of the 3rd defendant (Mortgagor) and the 1st defendant (mortgagee) dated June, 14 2011 were collectively admitted as **Exhibit D2**.

DW1 went on testifying that, the mortgage deed was signed by the mortgagor (3rd defendant) accompanied by a spousal consent which was obtained for both properties and issued by the plaintiff. The spouse consent form was admitted as exhibit **D3**. DW1 further informed the court on the procedure in applying for a loan facility to the effect that, after receiving an application for a loan facility the 1st defendant has to verify the financial position including capital requirement and existence of the applicant (if a Company) including shares forms, company resolution and share capital notice, all these are obtained from BRELA. The said documents namely Notice of increase in nominal capital in respect of the 2nd defendant and special Resolution were admitted for identification purposes collectively as Exhibit **ID1**. It was DW1's further argument that PW1 did sign personal guarantee, guaranteeing to pay on demand all monies and discharge all obligations and liabilities relating to the loan facility.

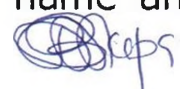
A joint and severally personal guarantee was admitted as Exhibit **D4**. DW1 finally strongly contested that, plaintiff's claims are



baseless since as a shareholder and director of the company she was fully involved in guaranteeing the loan facility.

When cross examined DW1 admitted the fact that when the 2nd Defendant acquired the loan facility from the 1st defendant he was yet to be engaged by the 1st defendant. However through the 1st defendant's records he became conversant with the procedure for loan acquisition including receiving of application and determination of the same, submission of the relevant documents by the applicant namely, cash flow projections accounts statements, MEMARTS, certificate of incorporation and a guarantee as a fall-back position in case of non-repayment of the loan. He stated further that, all of the above procedures were adhered to when the loan facility was extended to the 2nd defendant and the plaintiff did sign the spouse consent as witnessed from bank records.

DW2 Rajabu Abdallah Mshana informed the court that, he is a businessman and plaintiff's son. That, he was aware the dispute involved lack of spouse consent on the mortgaged matrimonial properties situated at Plots No. 133 and 134 relating to a loan facility acquired by the third defendant. He stated that, as a company director, he was not involved in the signing of the loan facility agreement, individual personal guarantees, and debentures. This was evident by the fact that his name and



signature were missing on the said documents. Also there was no official Company's stamp and seal as no company meeting was convened and resolved to acquire the said loan facility from the 1st defendant, further that, the document is not attested by a lawyer. It was **DW2's** observation that the second defendant Board's Resolution is dated 17/06/2011 while the loan facility is dated 06/06/2011 which is a clear evidence that the said documents were not genuine and must have been prepared by the first defendant and not the company as the same bears no Company's letter head and more so, the same has been initialled by Bank's officials. Further that, it was on 1st May 2013 when he became aware of the existence of the loan facility when the 1st defendant officials displayed notice of receivership.

DW2 also averred that he is a holder of a Tanzanian passport number AB 422666 which bears a signature different from the one appended to the loan facility documents while his signature has never changed. A copy of Tanzania Passport in respect of Rajabu Abdallah Mshana No. AB 422666 was admitted as **Exhibit D5**. He finally prayed for the court to nullify the loan facility as it was obtained fraudulently since the purported spousal consent was not genuine.

DW3 Abdallah Idd Mshana informed the court that, he is a businessman and shareholder of 2nd defendant (Shana) company



which is a family company together with his wife, (PW1) and DW2. The company was incorporated on 24/7/2001 and is dealing in selling of merchandise such as rice, flour mill and sugar. He explained that, he knew the 1st defendant in 2011 when their officials visited him. They advised him that they were interested in extending a loan for purposes of increasing business capital which he agreed and visited their offices in Dar Es Salaam with some documents including 2 title deeds for Plot No's. 133A and 134, A at Moshi Municipality. TIN number, MEMARTS and Certificate of incorporation of the second defendant. That at the first defendant's head office he signed some documents and returned back to Moshi. He further informed the court that, the 1st defendant made him open an account with them which he was the signatory. However, the account's details were in English language which he was not conversant with DW3 explained further that the 1st defendant had assured him that they were in the process of opening a branch in Moshi within nine months but surprisingly they opened a branch after four (4) and a half years. DW3 went on testifying that, he received a phone call from the 1st defendant's officials informing him that the monies had already been deposited in his account however, there was a 20% charge being transactional fees as they did not have a branch in Moshi nor in Arusha.



It was DW3's testimony that the loan facility was extended and the monies were deposited into the second defendant's account which he is the account holder. DW3 explained that, he experienced some difficulties in the repayment of the loan facility which resulted into healthy problems but he managed to repay the same through his NMB Account because the 1st defendant had no branch in Moshi. That he applied for an overdraft facility which was for the duration of six months. After the six months, the bank officials visited his business premises and forcibly closed the same. That the 1st defendant did not explain to him as to whether the loan facility was extended to him in person or to the company. Further that, he was surprised to see his wife's signature and that of his son's in some of the 1st defendant documents while they were not involved as he visited their offices in Dar es Salaam alone and signed the banks documents and that, he did not inform his wife anything about the loan even the title deeds which were surrendered to the 1st defendant. He finally explained that, he was made to understand that, the loan was extended to Abdallah Idd Mshana thus he prayed for mercy for the plaintiff as she was not involved and further prayed for the court to order the 1st defendant to return the title deeds as he had already repaid the loan through NMB.

Having considered the evidence adduced by both parties and to the great extent the arguments in the final submissions of the learned

counsels of both parties, I am not going to reproduce the same in verbatim but I will consider them in the course of composing this judgment.

On the issue as to ***whether the plaintiff did issue a spouse consent to the purported mortgage***, from the outset I find it pertinent to refresh memory on the requirement of the governing laws named **Section 59(1) and (2) of the Law of Marriage Act**, Cap. 29 R.E 2019 (LMA) and **Section 114(1) of the Land Act**, Cap. 113 R.E 2019 (Land Act).

Section 59 (1) and (2) of the LMA provides as follows;

(1) Where estate or interest in 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 a 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 of land or of deeds.

(2) Where any person alienates his or her estate or interest in matrimonial home in contravention of subsection (1), the estate or interest so transferred or created, shall be subject to the right of the other

spouse to continue to reside in the matrimonial home until-

(a) the marriage is dissolved; or

(b) the court on a decree for separation or an order for maintenance otherwise orders,

*Unless the person acquiring the estate or interest can satisfy the court that **he had no notice of the interest of the other spouse** and could not by the exercise of reasonable diligence have become aware of it.*

Meanwhile, **Section 114(1) of the Land Act** states that;

A mortgage of a matrimonial home including a customary mortgage of a matrimonial home shall be valid if-

*(a) **Any document or form is 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 spouses or spouse of a mortgagor living in that matrimonial home.*
(emphasis supplied)

From the foregoing provisions of the law, it is plain clear the fact that, spouse consent is critical when another spouse intends to create a mortgage over the matrimonial home/property and proof of the spouse consent is either by a special form of spouse consent signed by the person whose consent is being sought or mortgage

forms being signed by that person whose consent is being sought or any document signifying that the person whose consent is being sought has assented to the said mortgage.

In the instant case the mortgagor relied on Exhibit D3 (spouse consent) over the disputed properties, and Exhibit D4 (joint and several personal guarantee), which are alleged to have been signed by the plaintiff as the wife of the 3rd defendant and as a guarantor respectively. On the other hand, the plaintiff denied to have signed any document in connection with the said mortgage, hence raising the question of validity of the plaintiff's consent.

To prove the same the plaintiff denied the signatures appended to Exhibit D3 and D4 respectively, instead she tendered Exhibit P3. (Voters registration card) and a passport which bear her legal signatures. My perusal of evidence tendered before this court has revealed other documents with plaintiff's signature although the same were not tendered for the purpose of proof of signatures namely, Exhibit P1 (Marriage certificate) Exhibit P4 (minutes of the family meeting) and Exhibit P5 (plaintiff's caveat).

At this juncture I find it opportune to subscribe to the decision in the case of **Thabita Muhondwa V Mwango Ramadhani Maindo & Another**, Civil Appeal No. 28 of 2012 (CAT) which was cited by the counsel for the plaintiff relating to means of proving a signature or handwriting of a person. In this case the provision of section 75 (1)

of the Law of Evidence Act Cap 6, R.E. 2019 (the Evidence Act) were underscored as a means of proving signatures. The said section reads;

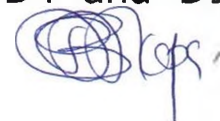
*In order to **ascertain whether a signature**, writing or seal is that of the person by whom it purports to have been written or made, **any signature**, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, **may be compared with the one which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

The Court went on observing that;

"In so doing, the 1st appellate judge applied the provisions of section 75(1) of the Evidence Act [Cap 6 RE 2002] by comparing the signature contained on the certificate”

Since the above cited authorities are binding, I have no hesitation to import the doctrine of *stare decisis*, by applying the same on the issue of the validity of the said spouse consent forms and joint and several personal guarantee form.

When comparing signatures appended to exhibits P1, P2, P3, P4 and P5 it is plain clear that, they are alike (as letter S stands for plaintiff's initial of her first name letter "S" joined with the sir name Mshana), while the signatures appended to Exhibits D3, D4 and D1 are



substantially different from the signatures of the previous exhibits. Even the counsel for the 1st, 4th, and 5th defendant conceded in his submission the fact that the signatures on exhibit P1, P2, P3, P4 and P5 differ with the signatures on Exhibit D3, D4 and D1 and various other documents in respect of the loan/mortgage.

I have also observed various documents which bear plaintiff's signatures such as Exhibit P1 (marriage certificate) issued on 1993, Exhibit P3 (a passport issued on 2006) Exhibit P3 (Voters registration card) and Exhibit P4 (minutes of the family meeting) they are replica of plaintiff's signature but the same differ with the signatures appended to the purported loan facility.

In the light of the above observations, I hold that there was no valid spouse consent to the mortgaged properties in dispute since the signatures on the form and documents required to prove spouse consent as required by the law are not plaintiff's signatures whose consent is mandatorily required.

Turning to the second issue on ***whether the mortgage between 1st and 2nd Defendant is void ab initio;***

In resolving the second issue I am resorted to ascertain whether the mortgaged properties are matrimonial home or matrimonial properties?

It is undisputed the fact that, the plaintiff and 3rd defendant are spouse. The fact which was not disputed by any of the defendants.

It is also undisputed the fact that the titles of the mortgaged properties are in the name of 3rd Defendant ABDALLAH IDD MSHANA. PW1, testified that she was married to the 3rd defendant and when they started their marriage life they used to own a kiosk at Moshi bus stand. That it was between 2007 and 2008 when they jointly acquired the houses. In her testimony she further adduced that when she discovered the 3rd defendant (her husband) had mortgaged the properties in dispute, she convened a family meeting exhibited by Exhibit P4 (minutes of family meeting) which the 3rd defendant did confessed to have acquired the loan without informing his spouse and further that he had already paid the said loan. This fact was corroborated by PW2's testimony and that of DW3.

More so, DW1 in examination in chief, cross examination and re-examination testified the fact that if the mortgaged properties were matrimonial they ought to have been accompanied by a spouse consent, and the properties in dispute are subject to spouse consent of which was obtained to both properties. The said consent were tendered as Exhibit D3. Meanwhile DW3 testified that the mortgaged properties were matrimonial properties, by referring them as "**family houses**". DW3 also testified to the effect that, the mortgaged properties are situated **where he resides with his family**, and that he mortgaged the same without informing his wife.

Paragraph 3 of the spouse consent forms in respect of mortgaged properties, reads as follows;



"That property above referenced, form part of the matrimonial assets".

Subjecting the provisions of section 59 (1) of LMA as cited above, to the instant scenario where PW1, PW2, D1 and DW3 termed the properties as matrimonial properties and at one instant DW3 averred that he lives in the said properties **with his family**, my view is, the properties are undoubtedly matrimonial home.

The above quoted provision has to be read together with **section 60** of the LMA which provides that;

Where during the subsistence of marriage, any property is acquired-

(a) *In the name of the husband or the wife, **there shall be a rebuttable presumption** that the property belongs absolutely to that person, to the exclusion of his or her spouse.*

From the foregoing provision it is plain clear that, not all assets owned or registered under the name of one spouse are deemed properties of that one spouse, there are circumstances where the property may be under the name of one spouse but interests of the other spouse does exist.

I am of the view that, the above requirement is applicable to the instant case to the effect that, section 60 of LMA can be rebutted owing to the following reasons;



Firstly, when the Plaintiff and 3rd Defendant were married, the 3rd defendant used to own a kiosk at Moshi bus station. Through their joint efforts they managed to accumulate wealth and incorporated a company named Shana General Stores Supplies owned by the Plaintiff, 3rd Defendant and DW2. **Secondly**, apart from the said family business there is no evidence to the effect that the 3rd Defendant had other separate source of income which could have enabled him to acquire the properties in dispute. **Thirdly**, the plaintiff has successfully proved the claim of ownership over the properties jointly acquired, that the same were acquired during the existence of their marriage and has managed to demonstrate her efforts in acquiring the said properties as was held in the case of **Gabriel Nimrod Kurwljila V. Theresia Hassan Matongo**, Civil Appeal No. 102 of 2018 (unreported), where the Court of Appeal while quoting its previous decision in **Yesse Mrisho V. Sania Abdu**, Civil Appeal No. 147 of 2016 (unreported) held that;

"There is no doubt that a court, when determining such contribution must also scrutinize the contribution or efforts of each party to the marriage in acquisition of matrimonial assets."

In the circumstances, my view is, even if it was to be said that the mortgaged properties do not meet the criteria for matrimonial properties, the same are matrimonial home and the Plaintiff has



interest in them. I believe, that is the rationale behind section 59 of LMA in protecting matrimonial properties, as it was underscored in the case of **Hellenah Kususya V. Deniss Mathew Mabubu and 2 Others** (Land Case No. 432 of 2017) (Unreported), where the court held that;

*"My intention is not to challenge the marriage between the 2nd defendant and one Grace Lameck Lusesa, this is because this is a Land case not matrimonial cause. But if the 1st defendant had another marriage apart from that which he contracted with PW1 **the second marriage could not alienate PW1's right and interests over the landed properties which they jointly acquired. Thus, the need for the consent from PW1 was still prevailing. In the absence of such consent the mortgage is a nullity.** (emphasis supplied)*

In the instant case the plaintiff is asking this court to declare the mortgage of the suit properties by her husband (the 3rd defendant) to the 1st defendant is void *ab initio*, but given the circumstances explained here in above, I find that the mortgage is not void *ab initio*, instead is voidable at the option of the plaintiff, thus it is null.

Regarding the third issue as ***to what reliefs are parties entitled to***; it is evident that the Plaintiff has been able to establish her



entitlement to the reliefs sought. Thus it is hereby declared and ordered that;


1. The mortgage of the suit properties by her husband (the 3rd Defendant) to 1st Defendant on Plots Nos. 133, Block A, Farm 181/82, Moshi Municipality and Plot No. 134 A Block A, Farm 181/82 Moshi Municipality with CT Nos. 4612 and 4709 respectively, is voidable for lack of spouse consent.
2. The 1st Defendant is ordered to surrender to the 3rd defendant Certificate of Titles Nos. 4612 and 4709 in respect of Plot Number 133, Block "A" Farm 181/82 Moshi Municipality and Plot Number 134, Block A, farm 181/82 Moshi Municipality.

Considering the fact that the Plaintiff and the 3rd Defendant are spouse, each party to bear own costs.

It is so ordered

Dated and delivered at Moshi this 18th day of February, 2021




S. B. MKAPA
JUDGE
18/02/2021