

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

LAND CASE NO. 26 OF 2018

NEEMA OMBENI MUSHI @ NEEMA ELIPENDA URASA ... PLAINTIFF

VERSUS

ACCESS BANK TANZANIA LTD 1ST DEFENDANT

OMBENI WANGAELI MUSHI 2ND DEFENDANT

JIN FENG ZHU 3RD DEFENDANT

JOSEPH MAGUCHI 4TH DEFENDANT

KIBOKO AUCTION MART (T) LTD 5TH DEFENDANT

JUDGMENT

19th Febr & 22th March, 2021

RUMANYIKA, J.:

With respect to house on Plot No. 19 Block "M" Pasiansi area, Mwanza city (the suit premises) according to records mortgaged to Access Bank Tanzania Limited (the 1st defendant), essentially Neema Ombeni Mushi @ Neema Elipenda Urasa (the plaintiff) prays for a declaratory order that from its inception, in favour of Joseph Maguchi (the 4th defendant) the guarantee mortgaging the matrimonial property, and on that basis by way of sale by Kiboko Auction Mart (T) Limited (the 5th defendant) the subsequent transfer of title to Jin Feng Zhu (the 3rd defendant) it was null along with the suit the 2nd defendant's counter claim

dated 16/11/2018 that the court be pleased to hold that without spousal consent of the plaintiff to the mortgage the 2nd defendant had no power of sale therefore the purported auction and sale was improper therefore if anything only the principal borrower (the 4th defendant) be held liable.

Messrs C. Mtalemwa, E. Kahangwa and Ester Peter learned counsel appeared for the plaintiff, the 2nd, and 3rd defendants respectively. Pursuant to the court (Matupa, J) ruling and order of 21/1/2019 for his failure to file defence appearance of the 1st defendant having been dispensed with and so was the case for the 4th and 5th defendants hence, only with respect to them the exparte judgment.

The issues, according to records proposed by the parties then adopted by the court on 18/2/2021 were:-

1. Whether the mortgage was adequate, legally executed and consented to by the plaintiff.
2. Whether the auction of the suit premises to the 3rd defendant was legal.
3. Whether the sale of the suit premises by the 1st defendant under power of sale to the 3rd defendant was legal.

4. Whether the disputed premises was sold at acceptable market value in accordance with the law.
5. The reliefs that the parties were entitled to.

Pw Neema OMBENI Mushi @ Neema Elipenda Urasa (41) stated that she was wife of the 2nd defendant, a resident and petty business woman of Pasiansi area, Mwanza city that the spouses having jointly owned the disputed premises but in her back purportedly mortgaged due to the guarantee's failure to discharge the house was reported auctioned and sold to the 3rd defendant (Exhibits "P1" and "P2") respectively that late in the day she found the Certificate of Title missing. That if anything, the purported spousal consent it was, for want of her signature not a genuine one (copy of the deed – Exhibit "P3") forcefully though the 2nd plaintiff having had revealed the truth of it all and she attempted to stop the sale in 2016 but failed. I pray that the court declare the sale of the suit premises null and void the plaintiff contended. That is all.

Dw1 Ombeni Wangaeli Mushi (45) stated that with respect to it the bank loan of shs. 190.0 million having had guaranteed the 4th defendant he stayed back relaxing hoping the latter would not default until such time when his wife (the plaintiff) informed him about the intended sale of the

house but he never had involved the plaintiff (copy of the Valuation Report -Exhibit "D2") that the shs. 300.0m worth house it was sold at a throw away price of shs. 90.0m him having had signed the mortgage deed and for that purposes he just released the certificate of title also without the plaintiff's knowledge he gave the 4th defendant the plaintiff's identity card and photograph that as such there hadn't been public auction.

Questioned by court for clarity, Dw1 stated that with regard to the purported spousal consent he had not been advised to report the 4th defendant for forgery.

Dw2 Musa Mittego (35) stated that he worked with the 1st defendants in the loan defaulting clients department that having guaranteed the 4th defendant, therefore accordingly with the spousal consent (Exhibit "P3") the 2nd defendant mortgaged the suit premises (Exhibit "P1" refers) then the former obtained a 24 months term bank loan but he defaulted that having served one the mandatory 60 day notice, and through the local newspaper notified the public of the intention to sell the house (copy of the cutting-exhibit "D2") indeed the house was sold to the 3rd defendant on 27/3/2018 for shs. 90.0m and accordingly handed over to the 3rd defendant (copy of the bank pay in slip, the certificate of sale and

handing over certificate-exhibits "D3", "D4" and "D5") respectively. That although initially it was advertised for auction and sale for 24/9/2017 actually the sale was carried out on 27/3/2018 because one could not have secured a competent purchaser before much as during the sale, the value of the house stood at shs.171.5m and shs. 90.0m it wasn't below 25% of it. That is all. There followed counsel's brief written submissions. I thank them for the research and useful legal arguments.

Whether or not the husband sought and he obtained the plaintiff's consent, at least it is an undeniable fact that with respect to the bank loan of shs. 190.0m, by a deed the 2nd defendant guaranteed the now defaulting 4th defendant much as although no marriage certificate or something was appended and no body questioned their marital status leave alone with respect to the suit premises non-attachment of copy of the respective Certificate of Right of Occupancy notwithstanding the copies of mortgage deed and transfer of the Right of Occupancy.

The suit premises may have been matrimonial, and the 2nd and 4th defendants, but just in the back of the plaintiff conspired and they obtained the purported spousal consent yes, but even when, according to the plaintiff she became aware in 2016 for no reason at all she did not


attempt to register caveat or report the forgery to police until 2 years when she instituted the instant suit it follows therefore that the possibilities of the plaintiff having had consented to it, but in the end she just changed her mind it could not 100% be ruled out given the complex nature of human psychology. She ate the cake therefore she cannot have it! Issue number 1 is answered in the affirmative.

The sale of the disputed premises may have not been duly advertised therefore in terms of procedure the house improperly sold yes, but I think the dictates of the principles of sanctity of contract require that once there was breach of a contract, in this case the guarantor 2nd defendant having had breached the mortgage deed, the ancient saying "the means justifies the end" cannot have a room for this reason. Whether or not the principal borrower had acted irresponsibly it was immaterial in my considered opinion much as the 1st defendant's testimony that by that time the outstanding sum stood at shs. 171.50m and the suit premises were not sold below 25% of the market and use value I suppose, it was not sufficiently disputed. In fact the moment they failed to discharge their contractual obligation, the plaintiff the 2nd defendant risked and foresaw all this happening. The Latin maxim **Volenti Non Fit Injuria** (see the case of

Haruna Saidi Mbeo v. Zamda Ramadhani Mohamedi (t/a ZARAD ENTERPRISE) & 2 others, Land Case No. 367 of 2017 Hc at Dsm (unreported). For that reason I would part the company with my sister and brother judges in the cases of **Registered Trustees of AIC Tanzania V. CRDB Bank & 2 others**, Commercial case No. 7/2017 (Hc) at Mwanza unreported and **Lengai Lemako Laiza @ Paulo Lengai V. CRDB Bank PLC & 2 others**, Land case No. 58/2016 (Hc) at Arusha unreported. Issue numbers 2 – 4 also are, in favour of the defendants answered in the affirmative.


Both the suit and the 2nd defendant's counter claim lack merits they are, with greatest respect dismissed with costs.

Right of appeal explained.


S.M. Rumanyika
JUDGE
13/03/2021

The judgment delivered under my hand and seal of the court in chambers this 22/03/2021 in the absence of the parties.




S.M. Rumanyika
JUDGE
22/03/2021