

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN TH DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

LAND CASE NO. 83 OF 2017

SIKUDHANI ABDALLAH MSHANA.....1ST PLAINTIFF

HASSAN HUSSEIN HASSAN2ND PLAINTIFF

VERSUS

BANK OF AFRICA TANZANIA LIMITED.....1ST DEFENDANT

ABDALLAH IDDI MSHANA.....2ND DEFENDANT

JUDGMENT

07/12 & 26/02/2021

MZUNA, J.:

This court is invited to make a judgment based on the issue (among others) as to whether the mortgage and sale of the mortgaged properties (four houses on a registered land) were legal?

Apparently, **Sikudhani** the first plaintiff, is the wife of **Abdallah**, the 2nd defendant. Hassan, the 2nd plaintiff is their biological son. At one time, Shana General Store, to which the said Abdallah is the Managing Director, obtained a draft facility from **Bank of Africa Tanzania Limited** (the 1st defendant) to the tune of Tshs 1.4 billion after mortgaging four houses. The plaintiffs'

main argument is that they never blessed such mortgage and or were not consulted, the argument which was strongly disputed by the 1st defendant. The second defendant never filed his defence within time and therefore was not allowed to give his defence.

During hearing, Mr. Augustine Mathern Kusalika and Mr. Karoli Valerian Tarimo the learned counsels, appeared for the plaintiffs and 1st defendant respectively whereas, Mr. Munisi appeared for the second defendant. Three issues are subject for determination. First, whether the houses were legally mortgaged; Second whether the sale of the said houses was legal, and lastly on the reliefs.

Let me start with *the first issue as to whether the mortgage of the houses situated on:- Plot No. 56 Block JJJ Section Karanga Industrial Area, Moshi Kilimanjaro; Plot No. 26 Block 'G' Moshi Kilimanjaro; Plot No. 220 Block 'DD' Sakina Area Arusha Municipality and; Plot No. 126 Block 'DD' Sakina Area Arusha Municipality which are subject of the suit were legally mortgaged?*

In this case, a total of four witnesses testified for the plaintiffs. One witness testified for the 1st defendant. There are undisputed matters first

that Sikudhani Abdallah is the wife of Abdallah Idd Mshana. Both are co-Directors and share holders of Shana General store Ltd. The latter is a Managing Director.

The evidence of PW1 Sikudhani Abdallah Mshana, is that she being the wife of Abdallah Mshana, as evidenced by exhibit P1 was not consulted during the mortgage process while the properties (lien) were acquired jointly during the subsistence of their marriage. She only learnt that the title deed for their houses were missing at home which prompted her to convene a meeting at their home, Usangi, Mwanga Kilimanjaro under the Chairmanship of PW3 Salim Hassan Salim, who is the brother in law of Abdallah Idd Mshana. Her husband admitted to have used them to obtain a bank loan. Minutes of the clan meeting was admitted as exhibit P2. Mr. Mshana admitted to have received the mortgaged money. He made an apology and promised to pay the money back.

PW1 says, they were served with the demand notice (Exhibit P.3) The official search revealed that the said houses were mortgaged as evidenced by three official search (Exhibit P.4 collectively).

She decided to institute this case because Bank of Africa (BOA) and her husband colluded to mortgage the family houses without consulting her as a wife who jointly acquired the properties with her husband since 1986. She admitted that though her husband said had serviced the loan and promised to pay the loan, all this does not feature in the minutes (exhibit P2).

Subsequently thereafter, she filed a caveat at the Land office. That was on 30/10/2017 and 31/10/2017. In that caveat she included a house on Plot No. 126 Block "DD" Sakina area Arusha which was given to their son Hassan, the second plaintiff. The said two caveats of 30th October 2017 and that of 31/10/2017 were admitted as Exhibit P.5 collectively. She denies to have taken part during the mortgage of the said houses as alleged by the defence because even the documents which were used to mortgage does not bear her signatures as it appears in her passport and voter's Identification card.

She insisted that the transaction between her husband and the Bank was illegal because she was not consulted and knew nothing about that deal. This is also the same argument which was advanced by PW2 ASP Maria Tryphone Njenga of the Forensic Bureau Dar-es-Salaam Headquarters. She

testified in relation to the handwriting and signatures of Abdallah Idd Mshana, Sikudhani Abdallah and Rajabu Abdllah Mshana in relation to the mortgage, extension of mortgage, facility letter, spouse consent, Affidavit and Board Resolution. She then made her Forensic Bureau report (Exhibit P.6) whereby she used the modern video spectral comparator (VSC 6000) to compare the specimen signatures and disputed ones. It was her view that the disputed signatures resembled that of Abdallah Mshana. However those marked "X2" after comparing with that of Sikudhani Abdallah were different, so Sikudhani Abdallah never written them or even signed them. Her expert opinion is that, the sample of Rajabu Mshana has the same similarities in the hand writing.

The evidence of PW1 is similar to that of PW4 Hassan Hussein Hassan, who said that he has instituted a suit against Abdallah Iddi Mshana and BOA Bank because they mortgaged his house located at Plot No. 126 Block "DD" Sakina Arusha without his consent. He got that house from his father and Mother when he was still schooling. The title deed was stored by his parents. He tendered official search as exhibit P7 while the caveat was received as exhibit P8.

To counter such evidence, the court was informed on the procedure for loan advance by mortgage deed by DW1 Masoud Ally Manyu, who is the Head of recoveries at the Bank of Africa. He said that Mr. Abdallah Idd Mshana brought the title deeds which were used as security for the loan in respect of certificate of the Title for Plot No. 26 Bloc "G" Moshi Township; Second Plot No. 56 Bloc "JJJ" Karanga Industries Area, Section "V" Moshi Township; Third is for Plot No. 220 Block "DD" Sakina in Arusha Municipality which were received and marked as Exhibit D1, D2 and D3 respectively.

Further that the second defendant Hassan Hussein Hassan as a Mortgagor brought a landed property, that is a Title deed of his property Plot No. 126 Block "D" Sakina Arusha Municipality, received as Exhibit D.4.

The witness highlighted on the procedure before advancing Loan including that a Bank had to ensure that there is a genuineness and the relevant information of the borrower. If it is a Company, as in this case, they have to know ownership and the Directors; What is the purpose of the Loan; Place where the business is Located as well as to know where the security is located. All these are done by the Relationship Manager.

It was revealed that the purpose of the Loan was to boost them (i.e Shana General Stores) in the whole sale business as can be seen in exhibit D5, facility letter. The Bank received the title deed and Mortgage deed and then visited them for confirmation of its existence. It was followed by valuation and verification of its report from the Land Registry through search.

That, according to the search all the Title deeds were legally owned by the persons whose names appears thereon without any encumbrance. They proceeded for registration of the mortgage deed at the Land Registry and were accordingly stamped. The witness said that Exhibit D.1 which relates to Plot No. 26 Block "G" Moshi Township, was registered for security to BOA Bank on 5/5/2010 by file document No. 27928. As for Exhibit D2, Plot No. 56 Block "JJJ" Karanga Industrial Area Moshi Township, it was registered on 1/6/2012 by file document No. 32840. As for Exhibit D3, Plot No. 220 Block "DD" Sakina, Arusha Municipality, it was registered on 5/5/2010 by file document No. 27930. As for Exhibit D4, Plot No. 126 Block "DD" Sakina, Arusha Municipality was Registered for Mortgage on 5/5/2010 vides file document No. 279226.

The Registrar registered them as per the law without any problem. The documents which were submitted to the Registrar were the title deeds, and

Mortgage documents. The Mortgage documents are signed by the Mortgagor and the Bank as the Mortgagee. According to the tendered documents, the three properties (title deeds) were signed by Abdallah Idd Mshana in the presence of his Advocate. As for the last one it was signed by Hassan Hussein Hassan.

After obtaining the Loan, DW1 said, Shana General Stores Ltd never paid for the Loan as per the loan schedule agreement. Then there was a default. The default started in 2014. Then the Bank demanded the customer with the demand notice so as to pay the amount which appeared on the default notice. The client never heeded to the demand notice. Then he was given a statutory demand notice or default notice.

The Bank and the Client entered into an agreement so as to cure the default. It was aimed at entering into selling part of the security. That is four out of the eight properties which were mortgaged, were to be sold so as to reduce part of the loan. It was agreed that there should be special arranged sale whereby the Mortgagor agreed to sell the properties to the Bank. The Bank should purchase it by way of "Buy Back arrangement". That is an arrangement whereby the borrower agrees with the Bank to buy the properties so as to reduce the accrued Loan. Then after the customer gets

the money he can buy them and be given first priority to return it into their hands. That agreement was made in 2015. It was agreed that the properties of Abdallah Idd Mshana, two houses located at Moshi and another at Arusha together with the property located at Arusha belonging to Hassan Hussein Hassan should be sold. That is where the problem started. The defence insisted that the suit be dismissed because upon default they served them with default notice, demand notice and statutory notices, then the said properties must be sold so that the bank can realize the advanced loan.

The 1st plaintiff has relied on the forensic report exhibit P6 in respect of the mortgaged deed, facility letter (exhibit D5), and spousal consent, affidavit and board resolution that they bear no signature of the plaintiff. That is cemented by the minutes of the family meeting (exhibit P2) which shows that the second defendant mortgaged the matrimonial properties without spousal consent of the 1st plaintiff. The court was referred to the case of **National Bank of Commerce Limited vs Nurbano Abdallah Mula**, Civil Appeal No. 283 of 2017, CAT at Tanga (unreported) to emphasize a point that matrimonial home cannot be sold without spousal consent for a mortgaged property. As for the second plaintiff it is contended that he did

not mortgage or consented for his property to be mortgaged to the 1st defendant.

In response, the learned counsel for the 1st defendant said that it is upon the plaintiffs to prove what they allege, citing **Barella Karangirangi vs. Asteria Nyalwambwa**, Civil Appeal No. 237 of 2017, CAT at Mwanza (unreported) which interpreted section 110 and section 111 of the Law of Evidence Act, Cap 6 RE 2002. That the 1st plaintiff had the burden of proving that indeed never signed any consent to the sale to the mortgage and/or sale of three properties. The second burden of proof is on the allegation that the said properties are matrimonial properties. In the first category it is said never produced such documents alleged to have been forged. The same submission was made in respect of the second plaintiff who tendered his passport exhibit P9 without tendering another document with disputed signature.

That the first plaintiff never produced evidence to show the year when the said properties were acquired. That, merely having marriage certificate is not proof that it was matrimonial property because the same were solely registered in the name of the 2nd defendant. That, in any case, the court is not dealing with matrimonial case. The court was referred to the provisions

of section 60 (a) of the Law of Marriage Act Cap 29 RE 2019 on a 'rebuttable presumption' that "the property in the name of the husband" (as in our case) belongs 'absolutely' to the husband or a spouse in that name. The 1st plaintiff never showed why it was in the name of the 2nd defendant and never have interest on the properties such that it could be said to be matrimonial properties. It was their view that they are not matrimonial home as defined under section 2 of the Law of Marriage Act, Cap 29 RE 2019 because "the husband and wife" did not "ordinarily reside together" or were not living in that matrimonial home. It was the learned counsel's submission that section 59 (1) of the Law of Marriage Act, cannot come to her rescue citing the case of **Idda Mwakalindile vs NBC Holding Corporation** Civil Appeal No. 59 of 2000, CAT (unreported).

The learned counsel for the defendant No.1 asked the court to believe the evidence of DW1 who said that the said properties were mortgaged and sold to the 1st defendant with a view of redemption upon payment of the purchase price. That all the procedure was followed as exhibited by certificates of title exhibit D1, D2, D3 and D4. That, the three houses and that of Mr. Hassan Hussein Hassan were mortgaged after securing a loan from the Bank of Africa. Any allegation of fraud must be strictly proved,

argued the learned counsel for the 1st defendant. Above all that even the alleged forged documents have not been tendered.

Now, in answering the above first issue on the legality of the mortgage of the said houses the 1st plaintiff has relied on the fact that she was not consulted and or never consented. That she did not sign spousal consent form. That it is a matrimonial property and therefore cannot be sold. PW1 is quoted to have said the following:-

"I disputed the signatures appearing in the facility letter because it is not my signature...My husband and BOA Bank knows better. My signature must have been forged. I noted about it after receiving a demand notice letter. I never complained to the Police but BOA took action before me by reporting the matter at the fraud section."

On the other hand, the defence says she consented she being one of the Directors of Shan General Stores to which the second defendant is the Managing Director. That the advanced loan is of since 2010 where as the caveat is of 2017, which it is said is an afterthought.

This court has the following to say, first issue of spousal consent is the obligation of the Borrower, the applicant (in our case the husband, second defendant) to declare her. This is in line with Section 8 of the Mortgage

Finance Special Provisions Act, 2008 (Act No.17/2008) which amended and repealed section 114 of the Land Act, Cap 113. The new section 114 (2) of the Land Act, reads:-

"(2) For the purpose of subsection (1), it shall be the responsibility of the 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 affidavit or written and witnessed document, the applicant declares that there were spouse or any other third party holding interest in the mortgaged land.

Sub section (4) creates an offence for the applicant who gives false information.

In the case at hand there was spousal consent by a sworn affidavit. It was held in the case of **General Tyre EA Ltd vs HS BC Bank PLC** [2006] TLR 61 that parties must abide to their contractual agreement not to go against the express agreement by issuing court orders. In our case there was contractual agreement the moment they signed the facility letter (exhibit D5) which was signed by Abdallah Mshana and Sikudhani Rajabu. The mere

typographical errors or intentional defrauding malpractices, to sign sometimes as Sikudhani Abdalla Mshana and or Sikudhani Rajabu, was given explanation by DW1 that at times she uses the name of her husband and sometimes use that of her father. She is one and same person, wife of Abdallah Idd Mshana, the first plaintiff. They signed on behalf of Shana General Store Limited. The dispute on spouse consent does not arise and even if it was there, the Bank acted on the information given by Abdallah Mshana.

The first plaintiff admitted that the properties (houses) subject in this case were in the names of her husband Abdallah Iddi Mshana. She admitted the houses are not registered in her name and are not used for residential purpose. In view of the decision in the case of **Hadija Issa Areray vs. Tanzania Postal Bank** (supra), citing with approval the case of **Idda Mwakalindile vs NBC Holding Corporation** (supra) it was held that:-

"Under the Law of the Marriage Act, a spouse had a registrable interest in the matrimonial home. In this instance the Appellant had not registered her interest. There was therefore no way the First Respondent could have known of her interest considering that the house was in the sole name of her husband."

As above noted the three houses were registered in the name of the 2nd defendant. The 1st plaintiff's interest could not have been known by the 1st defendant. There was no registered interest as well stated by DW1 who said that:-

"I confirm to the court that there was consent. Above all even the challenged securities are not in her name. They are in the name of Abdallah Idd Mshana and Hassan Hussein Hassan. There has never been any registered interest of hers since 2010.

Even when the Bank conducted valuation of the properties, there was no any caveat which was registered for those properties. It has also never been proved that she resided in the said houses. The said houses are not used for residence. They were used for other businesses."

The said witness goes further to say that the plaintiffs' caveats were sent to the Registrar in 2017 October while the loan fund was issued to Shana General Stores in 2010 and restructuring in 2015. So there was a lapse of almost 7 years. I tend to agree with DW1, that this case is just an afterthought, after the default.

PW2 having found that the handwriting and signature is that of Abdallah Idd Mshana, then I tend to agree with DW1 that he is the one who introduced the 1st plaintiff during the signing of the forms. So issue of spousal consent is

resolved in favour of the first defendant that there was spousal consent. It is highly probable there were deliberate move to sign differently, which however does not negate the culpability of the borrowers. The law is clear that where there is a dispute on the forged document the one who produced the title deed, is the person to be answerable specially so if he/she benefited therefrom. I say so based on the decision in the case of **Normallah A. Pacasum vs People of the Philippines**, G.R. No. 180314 delivered on 16th April, 2009 (Supreme Court) that:-

"The rule is that if a person had in his possession a falsified document and he made use of it (uttered it), taking it and profiting thereby, the presumption is that he is the material author of the falsification..."

The one who made use of the falsified documents to benefit therefrom are the plaintiffs and the second defendant. I find and hold that they are material authors of the falsification. The proof of fraud, I am aware in civil cases, its standard of proof is higher than it is in normal civil cases. It was held in the case of **Omari Yusufu vs Rahma Ahmed Abdulkadr** [1987] TLR 169 (CA) that:-

"When the question whether someone has committed a crime is raised in civil proceedings that allegation need be established on a higher degree of probability than that which is required in ordinary civil cases."

The plaintiffs have not successfully proved the alleged fraud by the 1st defendant. There was a move with the second defendant which were designed for prejudice of the Bank. The properties, four houses above mentioned were legally mortgaged. The first issue is bound to fail.

I revert to ***the second issue*** as to *whether the sale of the above listed properties was legal?* The plaintiffs say, based on fraud that sale could not issue. The first plaintiff said:- "*Actually Shana General Store, Boa Bank and my husband colluded to obtain the loan.*" Further that it was a matrimonial home as well as matrimonial property. On the other hand, the second plaintiff said never complained to the Police and PCCB about the forgery because they opted to institute this case. He insisted that the signatures on the sale agreement and affidavit are not his. Even the contents are illegal "batili". The defence says it was legal because all the required procedure was followed including notice.

My finding is that, upon default as well stated by DW1, sale was a must. After expiry of sixty days' notice served to the mortgagor, the mortgagee is empowered to exercise the right to sale the mortgaged land under section 127 (2) (d) and section 132 (2) of the Land Act, as amended by section 14 and 15 of the Mortgage Financing (Special Provisions) Act.

There was an argument that a default notice does not relate to the case, this argument is unassailable because by then the instant case had never been instituted. In any case, they do not deny the fact that notice was served. As for the second plaintiff, one may argue that he is not among the Directors of Shana General Stores, this however cannot deny his culpability having signed the facility letter as well. In similar vain, the argument that company resolution has not been tendered, in my view, could have been given weight if the said company was joined in the suit, the option which was not exercised by the plaintiffs, for reasons best known to themselves.

In conclusion (on issue of reliefs), the family meeting (exhibit P2) having resolved that loan due should be paid but have not been paid to date, the inevitable conclusion is that the suit is without merit. It is hereby dismissed against the first defendant, who however never filed any counter claim. Judgment is hereby entered against the 2nd defendant under Order VIII Rule 14 (2) (b) of the Civil Procedure Code, Cap 33 RE 2002, with costs.



M. G. MZUNA,
JUDGE.
26/02/2021