

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

LAND CASE NO. 50F 2018

**SIKUDHAN ABDALLAH MSHANA1ST PLAINTIFF
RAJABU ABDALLAH MSHANA2ND PLAINTIFF**

VERSUS

**BANK OF AFRICA TANZANIA LIMITED1ST DEFENDANT
ABDALLAH IDDI MSHANA2ND DEFENDANT
SHANA GENERAL STORE LIMITED3RD DEFENDANT**

JUDGMENT

~~16/02/2021 & 12/05/2021~~

GWAE, J

Plaintiffs, Sikudhani Abdallah Mshana and Rajabu Abdallah Mshana are the wife and son of the 2nd defendant, Abdallah Idd Mshana respectively. The plaintiffs and the 2nd defendant are the directors and shareholders of the 3rd defendant, Shana General Store Limited, a company incorporated under the laws of Tanzania registered since 24th day of July 2001. The 3rd defendant used to operate her business and her offices are in Moshi and Arusha Region.

Seemingly, the 1st defendant, Bank of Africa-Tanzania Ltd ('BOA') and the 2nd defendant entered into bank-customer relations since the year 2010s as on one hand the money lending institution and borrower on the other hand. The 1st

defendant and 3rd defendant smoothly continued with their commercial relations till 2015.

The 1st plaintiff and 2nd defendant formally contracted their marriage through Islamic rites in 1993 and their marriage apart from being blessed with issues it was also blessed with acquisition of various landed properties including Plot No. 53 Block 'JJJ', section V Karanga area -Moshi Municipality with title deed No. 11635, Plot No. 58 Block 'JJJ' section V Moshi Municipality with title deed No. 11277 and Plot No. 60 Block 'JJJ' Pasua area-Moshi Municipality with title No. 13286.

However, through the plaintiffs' plaint duly filed in this court on the 21st day of March 2018, the 2nd defendant is alleged to have mortgaged the said matrimonial land properties to the 1st defendant in obtaining loan facility in the favour of the 3rd defendant without the 1st plaintiff's consent.

The 2nd plaintiff also on his part vide the plaint, claims that, he is a lawful owner of the landed property on Plot No, 453 Block "DD" located at Sombetini area in Arusha Municipal Council with Title Deed No. 19432 but the 2nd defendant had entered into a loan agreement with the 1st defendant without his awareness and that, the loan secured in favour of the 3rd defendant by mortgaging the said property was without his pre-requisite consent.

Both plaintiffs also alleged that, after the issuance of default notice by the 1st defendant that is on the 20th May 2016 is when they were made aware of the

existence of the loan agreement between the 1st defendant and 3rd defendant as well as the said mortgages by the 2nd defendant to the 1st defendant without their consent. Subsequently, the plaintiffs conveyed a family meeting on the 20th May 2016 at which the 2nd defendant admitted to have mortgaged the landed properties aforementioned but he assured the family members that, he was to certainly clear the outstanding loan and accrued interests thereof, Also the 1st plaintiff applied for an official search whose report is dated 12th May 2017 in respect of the mortgaged matrimonial assets.

Following the above complaints, the plaintiffs are now before this court praying for judgment and decree against the defendants jointly and severally for the following reliefs;

1. Declaration that, the 1st plaintiff being a legal wife of the 2nd defendant is the lawful owner of the properties situated at Plot No. 53 Block 'JJJ', section V Karanga area -Moshi Municipality with title deed No. 11635, Plot No. 58 Block 'JJJ' section V Moshi Municipality with title deed No. 11277 and Plot No. 60 Block 'JJJ' Pasua area-Moshi Municipality with title No. 13286, the act of mortgaging the properties by the 2nd defendant and 1st defendant is illegal and unlawful as no spousal consent was obtained by the 2nd defendant.
2. Declaration that, the intention to conduct sale over the properties situated at Plot No. 53 Block 'JJJ', section V Karanga area -Moshi Municipality with title deed No. 11635, Plot No. 58 Block 'JJJ' section V Moshi Municipality with title deed No. 11277 and Plot

No. 60 Block 'JJJ' Pasua area-Moshi Municipality with title No. 13286, is illegal as no consent from the 1st plaintiff was obtained by the 2nd defendant

3. Declaration that, the 2nd defendant is a rightful owner of the property situated at Plot No, 453 Block "DD" located at Sombetini area in Arusha Municipal Council with Title Deed No. 19432, the act of mortgaging the property is illegal and unlawful as no consent from him that was obtained by the 2nd defendant
4. An order that, the 2nd defendant and 3rd defendant pay general damages which shall be assessed by the court
5. Costs of this suit
6. Any other relief (s) that this court shall deem fit to grant

Through, her written statement of defence duly filed on the 11th April 2018, the 1st defendant seriously contends that, the plaintiffs as directors and shareholders of the 3rd defendant consented to the mortgages of their respective landed properties to secure loan in favour the 3rd defendant and that, both plaintiffs were aware and did duly sign the mortgage deeds. The 1st defendant's further contention is to the effect that, both plaintiffs and 2nd defendant had passed a Board Resolution allowing the 2nd defendant to conduct the questioned mortgages.

Admittedly, the 2nd and 3rd defendant briefly stated via their joint written statement of defence that, the mortgages by the 2nd defendant were executed without the requisite consent of the plaintiffs adding that, it was the 1st

defendant who made the 3rd defendant's failure to repay the loan as per the loan agreement adding that the default was due ill motive of the 1st defendant who had been remitting 20 % instead of 18 mutually agreed during execution of the loan agreement.

During trial of this suit, the plaintiffs were being represented by **Mr. Augustino Kusalika**, the learned advocate while **advocate Kaloli Tarimo** appeared for the 1st defendant and **Mr. Saidi Saidi** assisted by **Mr. Munisi**, both the learned advocates appeared for the 2nd and 3rd defendant.

Before beginning of hearing of testimonies of witnesses for the parties, ~~there were three (3) issues that were edged by the court for determination after~~ thorough consultation of the parties' advocates named above, these are;

1. Whether the land properties, four disputed houses were illegally mortgaged to the 1st defendant.
2. Whether the Plaintiffs as directors of the 3rd defendant passed Board Resolution for the loan facilities from the 1st defendant.
3. To what reliefs are parties entitled.

In support of the suit, the plaintiffs were able to call four witnesses, to notably; Sikudhani Abdallah Mashana (PW1), Salim Hassan Salim (PW2), Assistant Superintendent of Police (ASP) Maria who appeared in court as PW3 and 2nd plaintiff who appeared as PW4. The plaintiffs were also able to procedurally tender five **(5)** documents in support of their case, these were;

marriage certificate which was received and duly marked as plaintiffs' exhibit 1 (PE1) establishing existence of marriage between the 1st plaintiff and 2nd defendant, a chairperson of the clan meeting minute sheet dated 20th May 2016 (PE2) that establishes that the plaintiffs' family members including the plaintiffs and PW2, (chairperson of the said meeting) that sat regarding the plaintiffs' complaints against the 2nd defendant as to the mortgaged landed properties aforementioned and four other houses not in dispute in this case as well as demand notice dated 22nd April 2017 issued by the 1st defendant to the 3rd respondent on a total payment of Tshs. 60,753,323. 62 being outstanding loan plus accrued interest payable within seven (7) ~~effectively from the date of the~~ notice.;i

The plaintiffs further via PW1 produced an official search dated 12th May 2017 in respect of Plot No. 53, 58 and Plot No. 60 named herein above which was evidentially admitted as plaintiffs' exhibit 4 (PE4) establishing that, the said plots have encumbrances of being mortgaged to Bank of Africa to secure unspecified amount and forensic report/handwritten expert report prepared and tendered by PW3 and duly received by the court as (PE5) establishing that, the disputed signatures appearing in the mortgaged deeds and board resolution dated 29th December 2015 and the purporting spousal consent in respect of Plot No. 53, 58 and 60-Moshi and the collected specimen from the plaintiffs are of different persons.

On the other the 1st defendant summoned one witness one Masoud Ally Nanya (DW1) and tendered a total of five (5) documents namely; facility letter dated 11th December 2015 for the loan of Tshs. 1.4 billions (DE1) bearing the names and signatures of the 1st plaintiff and 2nd defendant, Extract of the 3rd defendant's Board Resolution dated 29th day of December 2015 (DE2) bearing the names of and duly signed by the 1st plaintiff and 2nd defendant (DE3) and 2nd and 3rd defendant had one witness, a mortgage deed on Plot No. 60 issued and signed by the 2nd defendant (DE1) for loan facility mortgage deeds in respect of the Plot No. 53, 58 and 453 which were tendered and received collectively as DE5.

Essentially, the plaintiffs' evidence is to the effect that, they came to discover that, five certificates of titles named above were missing from where the 1st plaintiff used to safely keep and them, they eventually came to learn that, the 2nd and 1st defendant entered into loan agreement for unspecified amount of money whose securities or mortgages were the said three land properties located in Moshi without the consent of 1st plaintiff as wife of the 2nd defendant and equally, without the requisite consent of the 2nd plaintiff being a rightful owner of the landed property located at Sombetini area in Arusha Municipal Council. Such discovery led to lodging of caveats by the plaintiffs. That, the plaintiffs patently denied to have signed four mortgage deeds used in securing

unspecified amount of loan from the 1st defendant nor to have signed the 3rd defendant's board as well as spousal consent resolution especially the 1st plaintiff

The plaintiffs further testified that there were accusations lodged against them by the 1st defendant to Police Head Quarter, the then Dar es salaam now at Dodoma whereby they were ordered to go to Dar es salaam for investigation purposes and that, subsequently, the plaintiffs' hand written specimen together with that of the 2nd defendant were taken by police for investigation by Forensic Bureau whose examination was conducted by PW3 and its result was negative in regard to the plaintiffs as far as their alleged handwritings particularly; their signatures in the said mortgage deeds, names of the 1st plaintiff and her signature as appearing in the board resolution (PE2), spousal consent and facility letter dated 11th December 2015.

The 1st defendant's defence through DW1 was as follows; that the 3rd defendant secured an overdraft facility at the tune of Tshs.1. 5 billion and Tshs. 800,000,000/=being loan term loan securities being the suit properties and four others not subject of this case adding that six properties offered as securities were the lawful properties of the 2nd defendant two houses were the belongings of the 2nd defendant, the 2nd plaintiff, inclusive and that another house (Plot No. 60) was owned by one Hassan Hussein.

The DW1's testimony is also to the effect that, the 3rd respondent was regularly and properly servicing the loan as per the loan agreement however in

the year 2014 she started defaulting repayment which ultimately led to restructuring of Tshs. 1.4 billion in the year 2015. The restricted loan was to be repaid within 31 months period effectively from 24th December 2015. Further to that, DW1 went on testifying that, there was diligence on the part of the 1st defendant by ensuring that she was availed with the 3rd defendant's board resolution and spousal consent regarding the properties that were jointly owned by the 1st plaintiff and 2nd defendant as earlier explained herein and consent of the 2nd defendant's wife before release of the applied loan.

Nevertheless, DW1 testified that, the spousal consent was obtained as matter of convenience since the said three houses alleged to have been jointly acquired by the 1st plaintiff and 2nd defendant were registered in the name of the 2nd defendant nor were, they for residential houses but for commercial purposes adding that one Hassani Mshana was a minor whose guardian was the 2nd defendant. Hence, there was no requirement of obtaining his consent.

On his part, the 2nd and 3rd defendant via DW2 who admitted to have received loan in favour of the 3rd defendant, securities being the landed properties and that he personally signed the mortgage deeds however he seriously contended that, he was not required to bring any witness nor did he prepare any document as he is illiterate. DW2, 2nd defendant also testified that, the signatures appearing in the documents tendered by DW1 other than his signatures were neither of the 1st plaintiff nor of the 2nd plaintiff. In spite of

refuting the signatures purported to be of the plaintiffs, the 2nd defendant admitted to be in default of repayment of the outstanding loan in the tune of 1.7 billion and that he brought the 2nd plaintiff's photo to the 1st defendant but he lamented that it was the 1st defendant's officials who filled the 3rd defendant's board resolution in his absence.

That is what in a nutshell transpired during hearing of this particular suit. The parties' advocates, after closure of their case, sought and obtained leave of the court to file their final submissions which I am going to intensely consider as herein under. Perhaps I find myself compelled to speak out that, ~~when parties' advocates appeared before me on the 16th February 2021 with a~~ view of fixing a date of pronouncement of judgment, I was sadly informed of the demise of one Abdallah Idd Mshana, 2nd defendant, reported to have occurred on the 15th February 2021. Nevertheless, I was of the considered thought, for the purpose of this judgment, that I could proceed composing it notwithstanding the 2nd defendant's death for reason that, the trial was concluded since 4th December 2020 when he indeed testified on his behalf and on the behalf of the 3rd defendant.

Now, I should therefore come to determination of the issues framed as depicted herein above. I would like to start with the 1st issue which reads;

"Whether the landed properties, four disputed houses were illegally mortgaged to the 1st defendant".

In determining this issue, I have noted that there is no doubt that the 1st plaintiff and 2nd defendant are wife and husband respectively and that the 2nd plaintiff and one Hassan Hussein are the sons of the 2nd defendant. It follows therefore, I have to consider the following while determining the 1st issue; whether the 1st defendant was to ensure that, the 1st plaintiff's consent was sought and obtained and submitted to him in order to have 3 matrimonial houses mortgaged for the loan facility in favour of the 3rd defendant and if answered in affirmative, whether there was no requirement to obtain a spousal consent for the houses which are not meant for residential purpose as contended by the 1st defendant in her defence, whether the three (3) houses registered in the name of the 2nd defendant did not require consent from the 1st plaintiff on the basis that, they are registered in the name of the 2nd defendant.

In order to non-violently address these sub-issues, it is pertinent in my view, if I reproduce provisions of section 59 of the Law of Marriage Act, Cap 29 Revised Edition, 2002 which read together with provisions of section 161 of the Land Act as herein under;

59 (1) Where any estate or interest in the 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 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 to land or of deeds.

(2) Where any person alienates his or her estate or interest in the 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 (Emphasis supplied)".

Basing on the provisions quoted above, it my understanding that the 1st ~~plaintiff's consent for the mortgage of the said three landed properties was~~ mandatorily necessary particularly to the said house (Plot No. 60 (supra)) which was said to have been for dwelling purposes and taking into account that this kind of evidence went unchallenged. Despite the fact that said other two plots (Plot No. 53 and 58 -Moshi (supra) if the same were for residential houses or otherwise yet the facility letter dated 11th December 2015 titled "Securities held /Required provides for condition precedent namely; approval and transfer which is not the case as there was no registration as plainly depicted in the four mortgage deeds produced by the 1st defendant (DE4 and DE5) after restructuring of the credit facility.

More so the no consent that has been sought and obtained as stipulated in the facility letter in respect of Plot No. 453 and 58 (supra). To hold, as

adduced by the 1st defendant, that the said Hassan Hussein was a minor whose guardian was the 2nd defendant, therefore there was no need of seeking and obtaining consent is, my decided view, not legally justifiable since the facility letter clearly provides for such requirement ("The company shall be required to submit consent from HASSAN HUSSEIN HASSAN'S and RAJABU ABDALLAH MSHANA'S spouses"). Considering this requirement as stipulated in the facility letter, I find that, the 2nd and 3rd defendant were contractually required to submit the consent from the wives of the said Hassan Hussein and 2nd plaintiff. Equally, the 1st defendant was duty bound to ensure that, the consent from the said spouses were submitted otherwise this omission justifies the court to unhesitatingly hold that there were no consents to the mortgage deeds in respect of Plot No. 543 and Plot No. 58 by the wives of the 2nd plaintiff and Hassan respectively.

Furthermore the 1st defendant's contention that, Plot 53, 58 and 60 (supra) are registered in the name of the 2nd defendant, therefore, there was no necessity to seek consent of his wife and that, the 1st defendant did obtain the 1st plaintiff's consent just for a convenience purpose, I am increasingly of the view that the 1st defendant's assertion is legally baseless since there is ample evidence adduced by the plaintiffs including the 2nd defendant that, the same were matrimonial assets and taking into account that no evidence given during trial rebutting the presumption that the said three houses were matrimonial

assets as provided for under section 161 (1) of the Land Act, Cap 113, Revised Edition, 2002 and section 60 (a) of the Law of the Marriage Act (supra). This position of the law was settled in the case of **Chakupewa v. Mpenzi and another** (1999) 1 EA 32, held:

“The suit property was a matrimonial asset which had been acquired through the joint efforts of the Appellant and her husband. Although the suit property was registered in the name of the husband, the **Appellant had beneficial interest** and in law, the purchaser got only what the husband owned, he could not have purchased the Appellant’s beneficial interest without her consent.....”

See also a decision of the case cited by the plaintiffs’ counsel in **NBC v. Nurano Abdallah Mula**, Civil Appeal No. 283 of 2017 (unreported where it was correctly held by the Court of Appeal of Tanzania that a certificate of title bearing a name of one spouse does not automatically deprive the right of other spouse over the mortgaged property. Be it in any case, the consent of the mortgaged properties mentioned above was necessary not only by the plaintiffs but also by the spouses of the 2nd plaintiff and that of the said Hassan Hussein.

Likewise, to hold that the plaintiffs and wives of the 2nd plaintiff and one Hassan had no registrable interests in the matrimonial properties and that the 1st defendant could not have known while the facility letter **is indicative** to such requirement as a conditional precedent for the release of the loan

Having determined that, there was a need to have obtained consent from the 1st plaintiff and 2nd plaintiff as owner of their respective properties mortgaged by the 2nd defendant to the 1st defendant in securing the loan as well as to the spouses of the 2nd plaintiff and one Hassan. If the said Hassan or 2nd plaintiff or both were not married yet there ought to be a proof to that effect and documented in order to meet the requirement stipulated in the facility letter since the facility letter provides for such requirement. As it is, the spousal consent was therefore necessary.

That, being the position, I will now discuss hereinafter on the validity and ~~credibility or otherwise of the spousal consent of the 1st plaintiff in the mortgage~~ of matrimonial assets, board resolution and spousal consent. Throughout the trial, the 1st plaintiff has patently denied to have signed spousal consent (DE3), Board Resolution (DE2), facility letter (DE1) and mortgage deeds in respect of the Plot N. 53, 58 and 60.

Similarly, the 2nd plaintiff plainly testified that, he did not sign in the created mortgage deed in respect of his property on Plot No. 453 nor did he write his name thereto. Both plaintiffs utterly added that, their handwritten specimen were taken to police for investigation purpose however it was revealed that the specimen taken by police were different from the disputed handwritings, signatures (for both plaintiffs) and names (1st plaintiff) in the mortgaged deeds, board resolution and facility letter whereas the 1st defendant maintained that

both plaintiffs duly signed the said documents necessary for the execution of the loan facility.

In support, of the plaintiffs' testimonies in this regard, PW3 appeared and produced a forensic report whose analysis was to the effect that, the disputed signatures appearing in the said documents produced by the 1st defendant purporting to be of the and 2nd defendant and specimen handwritten taken from him tallied or were written by one person as opposed to the specimen of the plaintiffs. I am aware that forgery is an offence which ought to have been reported to Police Force and eventually be prosecuted if there would be sufficient evidence as rightly submitted by the 1st defendant's counsel. I hold the view that the plaintiffs' complaints that there was a forgery of their signatures/writings appearing in the documents tendered by the 1st defendant ought to be strictly proved though not as heavy as that of beyond reasonable doubt in criminal cases but it is expected to be more than a miserable balance of probabilities (See **Omari Yusuph v. Rahma Abdulkadir** (1987) TLT).

I am also unsound of the principle that the evidence of an expert does not bind the court however if I decide to depart from it there must be reason (s) given for doing so since the evidence of an expert in a certain field is, in the ordinary prudence, to be considered have more weight than that of an ordinary person as was rightly stressed in the case of **Republic v. Kirstin Cameroon** [2003] TLR 84, where it was stated;

"Since the evidence of an expert is likely to carry more weight than that of an ordinary witness, higher standards of accuracy and objectivity are required from him.

(See **David Kamugisha Mulibo v. Bukop Ltd - Bukoba** (1994) TLR 217)

In our instant case, I do not see any justifiable reason to disregard the testimony of PW3 which amply supports the evidence given by the plaintiffs unless there are reasons given questioning her integrity or expertise since during she has physically demonstrated similarities and differences of disputed handwritings and specimen collected from the plaintiffs and 2nd defendant by physically pointing and how she was aided by technological devices to come into conclusion, it follows therefore, I have no good reason to refrain from giving its evidential weight

I was urged by the plaintiffs to make comparison of the handwritings of the plaintiffs in their plaint and other exhibits such as PE1 and PE2 and those appearing in the exhibits tendered by the 1st defendant and received by the court as intimated herein above as per section 75 of the Evidence Act, Cap 6 R. E, 2002, I have physically examined the documents and made comparison with my eyes, I find that, there are slight differences however a an ordinary person, I do not see any justifiable reason to depart from the evidence of PW3 together the forensic report. I have further taken into consideration that, the 1st defendant who initiated the criminal investigation against the plaintiffs as well as the 2nd

defendant on the disputed handwritings but he either neglected or by design failed to tender the same. I hold that view simply because even DW1 vividly testified that, they were unable to produce the original 3rd defendant's board resolution (DE3) due the fact the same was sent to police for forensic examination but, according to him, it was not returned to the BOA despite their follow ups to have it returned. In the premises, the 1st defendant's conducts namely his failure to produce or abstinence from collecting the report, is inevitably considered to have an adverse inference against him (1st defendant) as far as execution of the mortgage deeds by her officials in concern.

~~I have further considered the fact that, there was serious contention as~~ who played role of commissioners for oaths in the making of 4 mortgage deeds (Three attesting officer being Celestin and two others by advocate Patrician) and spousal consent (DE3-Advocate Nelson Merinyo). As the 1st defendant was made aware of the plaintiffs' case from their pleadings and during trial but neglected to bring the attesting officer who played roles of Commissioners for oaths as exhibited in the mortgage deeds.

Since there is a serious dispute as to the signatures appearing in the documents so received by the court which purport to be of the plaintiffs and since DW1 has never testified that he was present during the execution of the mortgage deeds and therefore witnessed their execution, I therefore thoughtfully find that it was necessary for the 1st defendant to summon the attesting officers

to testify as to whether the plaintiffs appeared before them as depicted in the documents. The said attesting officers would be able to procedurally tender the same as required under section 70 of the Tanzania Evidence Act, Cap 6 Revised Edition, 2002, for the sake of clarity, the same is reproduced herein below:

70. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness has been called for the purpose of proving its execution, if there is an attesting witness alive and, subject to the process of the court, capable of giving evidence

According to the above quoted provision of the law, it was therefore, in my firm view, obligatory for the 1st defendant to have the commissioners for oaths entered their appearance in order to testify and produce such allegedly executed documents whose signatures are seriously in dispute. The position as to this legal requirement of attesting officers to produce such documents has been consistently stressed in numerous judicial decisions in our jurisdiction, for instance in **Asia Rashid Mohamed v. Mgeni Seif**, Civil Appeal No. 128 of 2011 (unreported) where Court of Appeal of Tanzania sitting at Mwanza Registry held inter alia that:

"It is well settled law in our jurisdiction that the doctrine of estoppel cannot be invoked to defeat the performance of a statutory duty.....Since the other evidence depended on proper proof of the execution of Exhibit 'P1' once the later piece of

evidence is discounted, the appellant's claim of ownership over the suit house is left with no leg"

(See also **DPP v. Marwa Mwita and two others** (1980) TLR 306.

Failure to summon the vital witnesses, justifies this court to draw an adverse inference in that, if the witnesses were called would have given the testimonies not in favour of a person party who called them. Having analyzed the parties' testimonies as herein above, the exhibits tendered by the 1st defendant and received by the court as DE1, DE2, DE3, DE4 and DE5 are therefore of less value. The oral evidence of the plaintiffs together with their witnesses (PW2 and P3) and of the defence (DW2) plus documentary evidence (PE5) as to the disputed handwriting and signature is found to be more credible than that of the 1st defendant which leaves a lot to be desired, the 1st issue is therefore answered in affirmative. The plaintiffs landed properties were thus illegally mortgaged to the 1st defendant by the 1st defendant.

In the 2nd issue; **whether the Plaintiffs as directors of the 3rd defendant passed Board Resolution for the loan facilities from the 1st defendant.**

It is evident from the board resolution that, it was the 1st plaintiff who is alleged to have signed the resolution with the 2nd defendant. However, this issue should not curtail me since it is answered by the finding in the 1st issue nevertheless it suffices to hold that according to the disputed handwriting and

signature contained in DE2 and specimen handwriting and signature of the 1st plaintiff were tested to be different and written by two different persons. It follows therefore it was not the plaintiff who signed the 3rd defendant board resolution.

As to the 3rd ground, **extent of reliefs that the parties are entitled.**

As it is the well-known principle that a party is bound his own pleadings, my hands are therefore tied up by the 1st defendant's failure to file counter claim of which I could conclusively determine parties' rights and obligations instead of in piecemeal. In the circumstances of this case, the 1st defendant and 2nd defendant ~~must share the burden as far as their wrongful acts of mortgaging the landed~~ properties without seeking obtaining the requisite consent or involving the interested parties is concern in the mortgaged properties. The defence advanced by the 2nd defendant that, he is illiterate and therefore he did not understand the contents of the mortgage deeds and other related documents so admitted by the court is, in my decided opinion, in my opinion, is of no legal effect as he was certainly sound, matured and above all it has been proved that he duly signed them as per testimony of PW3 and PE5 as rightly admitted by him. The assertion that he did not understand or know the meaning of the words written in English language because he was not familiar with such language is meaningless since he ought to take trouble to ensure that, a person to whom he appeared before him as a commissioner for oath cause the same to be known by him. My stance

is judicially guided by a precedent in the case of **Sluis Brothers (E. A) Ltd v Mathias & Tawari** (1980) TLR 294 where the principle was discussed at length and it was further held and I quote;

"It is broad principle of law that whenever a man of full age and understanding who can read and write, signs a document which, it is apparent on the face of it, is intended to have legal consequences, then if he does take the trouble to read it, but signs it as it is, relying on the words of another as to its character or contents of effect, he cannot be heard to say it is not his document;"


In the light of the above decision and my reason, the 2nd defendant is thus found misplaced.

That told and done as well as in the balance of probabilities, the plaintiffs' suit succeeds, I hereby make the following orders in their favour;

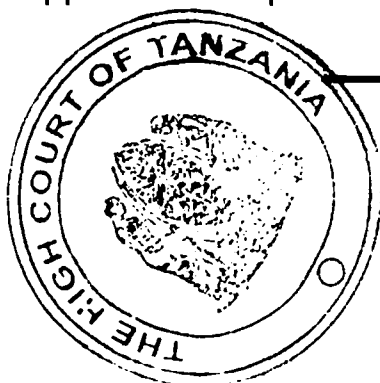
1. That, the 1st plaintiff being a legal wife of the 2nd defendant is the lawful owner of the properties situated at Plot No. 53 Block 'JJJ', section V Karanga area -Moshi Municipality with title deed No. 11635, Plot No. 58 Block 'JJJ' section V Moshi Municipality with title deed No. 11277 and Plot No. 60 Block 'JJJ' Pasua area-Moshi Municipality with title No. 13286, the act of mortgaging the properties by the 2nd defendant to the 1st defendant is hereby **declared** illegal and unlawful as no spousal consent was obtained by the 2nd defendant


2. That, the 1st defendant's intention to conduct sale over the properties situated at Plot No. 53 Block 'JJJ', section V Karanga area -Moshi Municipality with title deed No. 11635, Plot No. 58 Block 'JJJ' section V Moshi Municipality with title deed No. 11277 and Plot No. 60 Block 'JJJ' Pasua area-Moshi Municipality with title No. 13286, is declared illegal as no consent from the 1st plaintiff was obtained by the 2nd defendant and not submitted to the 1st defendant
3. That, the 2nd plaintiff being rightful owner of the property situated at Plot No, 453 Block "DD" located at Sombetini area in Arusha Municipal Council with Title Deed No. 19432, the act of mortgaging his property by the 2nd defendant to the 1st defendant without seeking and obtaining his consent is declared illegal and that, the intention to sale the said property by the 1st defendant is consequently illegal
4. Costs of this suit shall be jointly and severally borne by the defendants

It is so ordered.


M. R. Gwae
Judge
12/05/2021

Right of Appeal and its pre-requisite application explained




M. R. Gwae
Judge
12/05/2021