

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT MOSHI

LAND CASE NO. 17 OF 2017

ELIZABETH ZACHARIA YANGA.....PLAINTIFF

VERSUS

1. PATRICIA ISMAIL MATAGO

(As administratrix of Estate of late Ismail Elisall Nkya)

2. NOLIC COMPANY LIMITED

3. TANZANIA POSTAL BANK PLC

.....DEFENDANTS

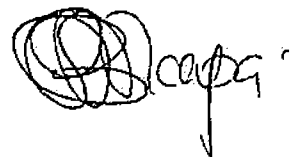
JUDGMENT

11/06/2021 & 13/08/2021

**MKAPA, J**

The plaintiff, Elizabeth Zacharia Yanga preferred this suit against the three Defendants for a declaration that:-

1. *Plots Nos. 315-316, Block F, with Certificate of Title No. 27490, and Plot No. 314 Block F, with Certificate of Title No. 27491, both situated at Msaranga, Moshi Municipality Kilimanjaro Region (the suit properties) are owned by the plaintiff as part of matrimonial property.*
2. *General damages against the defendants for trespass.*
3. *Costs of this suit*



*3. Costs of this suit*

*4. Any other relief(s) this Honourable Court may deem fit to grant.*

At the commencement of the trial, Mr. Elikunda Kipoko, learned advocate appeared for and represented the plaintiff, while the 1<sup>st</sup> defendant had the services of Mr. Modestus Njau, learned advocate and Mr. Innocent Mhina, also learned advocate represented the 3<sup>rd</sup> defendant.

Four issues were framed for determination by the Court. These are;

- 1. Whether the plaintiff is the owner of the suit premises.*
- 2. Whether the suit premises were mortgaged to the Tanzania Postal Bank PLC at Moshi.*
- 3. Whether the 1<sup>st</sup> defendant trespassed into the plaintiff's Plot/Land.*
- 4. To what relief(s) are parties entitled.*

The plaintiff summoned three witnesses and did not tender any exhibit to advance their case. The witnesses are Ms. Elizabeth Zakaria Yanga (PW2), Mr. Egideous Mushobozi Rutare (PW1) and Mr. Evomini Thomas Oriyo (PW3). On the other hand, the defendants also summoned two witnesses and tendered nine exhibits. The defendants witnesses are; Ms. Patricia Ismail Mataga (DW1), and Mr. Gasper Baltazar Rwegarulila (DW2). At

the closure of the evidence parties opted to make closing remarks.

PW2, Elizabeth Zakaria Yanga testified that she used to be a chef and also in charge of cuisine at the suit property (Zakaria Secondary School). That, Zakaria Secondary School used to belong to her and her husband Zakaria Yanga. She informed the Court that she filed a case against the 1<sup>st</sup> defendant and the 3<sup>rd</sup> defendant (Third Party) because they had invaded the school. That, the school used to accommodate 250 students out of whom 100 were in boarding scholars and the rest 150 were day scholars. Those who were in boarding were paying school fees amounting shillings one million eight hundred thousand (Tshs.1,800,000/=) per year while day scholars were paying shillings one million two hundred thousand (Tshs. 1,200,000/=) annually. She told the court that Zakaria Secondary School is situated in Msaranga area within Moshi Municipality. That after the suit properties had been trespassed she has been living a very miserable life at Msaranga area not far from where the suit properties situate and she never heard of any advertisement concerning the auction of the suit properties.

She went on tesfying that, she was not aware of the loan from the Postal Bank which is alleged to have been acquired by her husband because she never consented to the mortgage of the suit properties.

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That, had she known that her husband was indebted to the Postal Bank she could have paid back the loan because the suit properties were valued at more than eight hundred million. That, apart from the school building, the school owned other items namely, desks, chairs, tables, mattresses, beds, computers, classrooms, and some food for boarder scholars who were living in the dormitories and the said items were left at the school at the time when the defendants trespassed into the suit properties. It was her further testimony that the suit land in which the the properties are situated is measured about three and a half acres. That, they procured the suit land way back in 2009 from Mr. Jesse Maro. She informed the Court that she is blessed with five children and taking care of them for their basic needs including food, shelter, and payment of their school fees. That, after the suit properties were trespassed, todate her husband is mentally confused. That had she known about the loan from the Postal Bank she could have paid back the loan even from contributions from her relatives as the debt was manageable. PW2 denied the spouse consent document as the same was written in English language of which she was not familiar with and that she had never consented nor signed it. PW2 further testified that when the defendants trespassed into the suit priproperties the business license was in both her name and her husband's name. That, the annual profit from the suit

properties amounting shillings two hundred million. She informed the Court that the 1<sup>st</sup> defendant and the third defendants have been collecting school fees for the past four years amounted to shillings Three Hundred and Eighty Million Shillings (Tshs. 380,000,000/). She finally prayed for this court to declare the suit properties and suit land belongs to her.

(PW1) Mr. Egideous Mushobozi Rutare testified that he is a teacher by profession at Zakaria Secondary School and Lonati Secondary School situated at Moshi Msaranga Ward. That, he happened to know Zakaria Yanga and Elizabeth Yanga as spouse and owners of the school. He testified further that, sometime in 2017 when he was in his office one security guard informed him about the visitors who wanted to see him. Then suddenly a group of people forcibly entered into his office and others stormed into the classrooms while forcing teachers and students out of the classrooms. That, the visitors were accompanied by militiamen and one among them introduced himself as Ismail Nkya and another Modestus Njau a lawyer. The school had enrolled more than 200 students for both boarding and day scholars. That the fees for boarding scholars was two million shillings per year while day scholars were paying one million and two hundred thousand shillings. The number of O' level students were between 130-140 per year and for boarding students were paying shillings one million six hundred thousand (Tshs. 1.6 )

per year and day scholars were paying eight hundred thousand shillings (T.shs 800,000) per year. He further testified that the trespassers did not give them chance to explain anything. That, most of the teachers and students were forced out of the classrooms and out of the school. That, he had to remain behind because it was registration season for form four private candidates and he used to be escorted to and from the school by a security guard from a company known as Nolic Company. (2<sup>nd</sup> defendant). He informed the Court that sometime in April examination invigilators visited the school as the school was one of the form four examination centers for private candidates. The team included Education Officer, OCD, and others from Police. That, Mr. Nkya was also present and the team forced him to hand over school documents but he refused and later in July he was denied entrance to the school premises by security guards from the second defendant. Upon cross examination he denied to have witnessed the selling of the school.

Evomini Thomas Oriyo (PW3) testified that from 2009 till 2018 he was a street chairman of Mnazi Mmoja. Being a street chairman he happened to know Zacharia Secondary School situated at Mnazi Street. That, Elizabeth Yanga and Mr. Zakaria were the owners of the school and are spouse. That, the school was sold in 2017 when he was a street chairman of Mnazi Mmoja. He testified further that he was not involved in the

auction of the suit property though procedure requires the street chairman to be informed on the intended sale/auction.

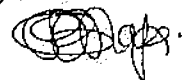
The defendants evidence was generally to the effect that the 1<sup>st</sup> defendant was the rightful owner of the suit properties having acquired the suit properties after emerging the highest bidder from a public auction. Ms. Patricia Ismail Matago (DW1) testified that she is an administratrix of the estate of the late Ismail Elisali Nkya who is now deceased and also her father. That, the late Nkya acquired Zakaria Secondary School through an auction which was conducted by Tanzania Postal Bank. Further it was her testimony that she resides at Dar es Salaam and when she came to visit his late father he informed her that he had acquired Zakaria Secondary School through an auction. That, she visited the school the following year. The following year his late father fell sick and informed her that there was a pending case before the court relating to the suit properties. He also introduced her to the advocate who was in charge of the case. Later his father passed away and she searched through his various documents and discovered certificates of title for Zakaria Secondary School. She produced the certificate of occupancy CT No. 27491 relating to plot No.314 Block F Msaranga Moshi Municipality and CT No. 27490 in respect of Plots Nos. 315-316 Block 1 Msaranga area Moshi Municipality (Exhibit D.1). She further tendered the Certificate of sale of land property of Zakaria Secondary School

(Exhibit D.2) which stated the successful bidder was Mr. Esmael Elisali Nkya and the bidding amount was Tshs. 150,000,000/=. She testified further that, she found another document in the deceased shelves related for auction advertisement/ notice (Exhibit D.3) by the auctioneer Mark Recoveries Ltd. She finally prayed for this court to declare the 1<sup>st</sup> defendant (as an administratrix of the estate of the late Ismail Elisali Nkya) the lawful owner of the suit properties.

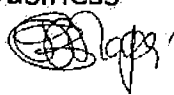
The witness for the 3<sup>rd</sup> defendant, Gasper Baltazar Rwegarulila (DW2) testified that he is an employee of Tanzania Postal Bank PLC and currently a branch Manager at kwa Mromboo Arusha region. Before that, he was stationed at Moshi branch as a loan officer. That he happened to know the plaintiff (Elizabeth Yanga) through her husband Deusdedit Yanga. It was his further testimony that while stationed at Moshi Mr. Zakaria Yanga visited their branch offices with the intention of acquiring a loan amounting shillings Eighty million (Tshs. 80,000.000/=). That, Mr. Yanga was informed about the terms and conditions of loan acquisition to the effect that, he was required among other things to present a business plan, and a guarantor had to sign a mortgage deed. That, Mr. Yanga agreed to the terms and conditions. It was DW2's testimony that he later went to inspect the business premises and intended mortgaged properties. These were school buildings operating a school business. That,



Mr. Zakaria Yanga introduced himself as the owner of Zakaria Secondary School and from his profile he stated that he was married so the bank had to request for spouse consent and place of residence. He further testified that when Mr. Zakaria visited their office he was accompanied by his wife (the plaintiff). The business premises were situated at plots Nos. 314,315 and 316 Block F Msaranga area Moshi Municipality. They requested him to produce copies of the certificate of titles of the properties earmarked for a mortgage. A search was conducted at the Registrar of Titles (at land offices) in order for the Bank to be satisfied as to the validity of the title deeds. DW2 further testified that, the search results revealed that CT for Plots Nos. 314,315 and 316 belonged to Mr. Deusdedit Yanga Zakaria. DW2 produced an application for official search in respect of title No. 27491 and No.27490 respectively, (Exhibit D.4 collectively). That the offer (Exhibit D.5) was prepared on 13/01/2015 and signed by Mr. Zakaria Yanga on the same date. After signing the offer letter, the bank proceeded with preparation of the loan documents including the mortgage deed (Exhibit D.6), loan agreement (Exhibit D.7), and spouse consent (Exhibit D.8). He testified that, when the borrower Mr. Zakaria went to sign the agreement he claimed the original CT for Plot No.314 to have been lost thus he produced original copies of CT for plots Nos. 315-316 only. That the bank did register the mortgage for CT



related to Plots. Nos. 315-316 respectively, as the bank does not register loss reports in lieu of original CT and all the documents were signed before Mr. Zakaria's advocate. It was DW2's further testimony that, the bank deposited the loan amount into Mr. Deusdedit Yanga Zacharia's account amounting shillings Eighty million (T.shs 80,000,000/=) on 25/01/2015. That, the first installment was due for payment in February amounting shillings 4,400,000/=. The borrower defaulted payment from March 2015. That, bank's loan officers always visited the borrower's (Mr. Zakaria Yanga's) business premises and whenever they did, they met his wife Elizabeth Yanga (the plaintiff) who was in charge of the cuisine. (DW2 managed to identify the plaintiff in court.) Finally, they Issued 60 days' Notice (Exhibit D.9) to Mr. Deusdedit Zacharia Yanga and the notice was addressed to him as a borrower which informed him that he had defaulted his payment obligations and further that up until February 2016 the outstanding principal and interest amounted to shillings 53,367,453.71. DW2 went on testifying that after the lapse of 60 days notice they handed over the borrower ( Mr. Zakaria) to the 2<sup>nd</sup> defendant an auctioneer company with instructions to recover the bank's outstanding loan and in the event of a failure to recover, the company should resort to auctioning the business premise.



Further, it was DW's testimony that the auction notice was advertised through Habari Leo newspaper on 10<sup>th</sup> January 2017. After the expiry of 14 days, Mr. Deusdedit Yanga visited the office of VEO for Msaranga and handed him the auction notice. On 03/02/2017 the auctioneer Mark Recovery announced through an audio advert on the intended auction. They also placed notices of the auction on the walls of the (suit properties) Zakaria Secondary School on the same day. Thereafter the auction took place and was well attended. That the VEO for Msaranga, Police (militia), and street chairperson also attended. That, about 50 people participated and the highest bidder was Prof. Ismail Elisali Nkya (now deceased) with a bidding price of shillings one hundred and fifty million (Tshs. 150,000,000/=). The auction fetched shillings one hundred and fifty million (Tshs. 150,000,000/=) and the balance of shillings 44 million was deposited into Zacharia's account. That, the said amount was withdrawn by Mr. Zacharia from the Tanzania Postal Bank Babati Branch in Manyara Region. DW2 finally prayed for the 1<sup>st</sup> defendant to be declared the rightful owner of the Zakaria Secondary School and the suit be dismissed with costs.

Having considered the evidence obtained from the witnesses and the exhibits tendered, in resolving the issues framed, from the very outset, the law is settled that, the burden of proof rests on



the party who alleges. Section 110 of The Evidence Act (Cap. 6 R.E 2019) reads:-

*(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

On the issue as to whether the plaintiff is the owner of the suit premises/properties, it is plain clear from Exhibit D1 on ownership of the suit premises that, certificate of occupancy CT No. 27491 relating to Plot No. 314 Block F Msaranga Moshi Municipality and CT No. 27490 in respect of Plots Nos. 315-316 Block F Msaranga area Moshi Municipality respectively, were registered in the sole name of Mr. Deusdedit Yanga Zacharia. That evidence is not disputed by either party. The plaintiff claimed ownership of the disputed properties as part of matrimonial property because they were acquired during the subsistence of their marriage which subsists to date. Though no evidence was adduced by the plaintiff to prove that she is a legal wife of Mr. Deusdedit Yanga Zacharia her testimony was supported by PW1 who testified to have known her as a wife of Mr. Deusdedit Yanga Zacharia. That evidence was also supported by the testimony of PW3 and DW2. On the balance of



probability, I am satisfied that the plaintiff is the legal wife of Mr. Deusededit Yanga Zacharia.

Having established so, now the question to be determined is whether the suit property is matrimonial property. The plaintiff claimed that the suit plot used to belong to her and her husband. However she did not tender or led any evidence to prove her contribution towards the acquisition or development of the suit premises than a mere allegation. The only evidence that backed up her testimony is the spouse's consent (Exhibit D.8) tendered by defence side which the plaintiff vehemently resisted. In my view the spouse consent is enough proof that she has an interest in the disputed plots. In that circumstance, I find that the suit property is the matrimonial property and the plaintiff has her right to claim her shares over it. Thus the first issue is emphatically answered in the affirmative to the extent explained above.

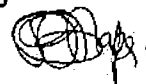
As to the second issue, whether the suit premises were mortgaged to the Tanzania Postal Bank PLC at Moshi, it is plain clear from the evidence of DW2 that Mr. Deusededit Yanga Zacharia applied for a loan amounting shillings eighty million. (Tshs. 80,000.000/=) and that he did agree on the terms and conditions of the loan among them the borrower to sign a mortgage deed. Additionally, Mr Deusededit Yanga Zacharia did present to the Bank certificate of title in respect of Plot. Nos 315-

316 Block F Msaranga area at Moshi Municipality and the mortgage deed (Exhibit D.6) was prepared and signed by the borrower and the Bank on 20<sup>th</sup> January 2015. That evidence was never objected by the plaintiff's counsel.

Section 114(2) of the Land Act (Cap. 113 R.E 2019) provides that:-

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

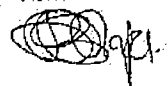
Guided by the above legal requirement DW2 did testify the fact that Mr. Deusdedit Zacharia disclosed to the bank that he had a wife and the witness happened to know her. Consequently, the spouse consent (Exhibit D.8) was prepared and signed by the plaintiff to that effect. On a perusal of a spouse consent it is established that it related to Plot Nos. 315-316 Block F Msaranga and was created in favour of the 3<sup>rd</sup> defendant. The same was attested before a Commissioner for Oath and signed by the plaintiff and annexed with her passport size. The document was tendered by DW2 who had knowledged it which is allowed in the law. The plaintiff maintained that its



authenticity is questionable. My view is, if the plaintiff's counsel thought D8 was not competent he could have objected it before its admission. More so, the plaintiff's denial is not supported by any documentary evidence to prove that the signature or the contents of the document was forged or something else. Additionally, if it was true that her consent was not obtained she could have sued her husband or summoned him as a witness to prove that she was never involved in the process. Alternatively, she could have reported the matter to the police if she thought the document was forged but the mere allegation is not enough to defeat documentary evidence. The case of **Omari Yusuph V. Rahma Ahmed Abdulkadr (1987) TLR 169 (CA)** is illustrative on the fact where the Court held that:

*"(ii) 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."*

Guided by the above authority, I am of the considered opinion that since the plaintiff had failed to adduce cogent evidence to disprove the spouse consent, then the second issue is answered in affirmative that the suit premises were mortgaged to Tanzania



Postal Bank PLC to secure a loan. All original certificate of titles were taken to the 3<sup>rd</sup> defendant to secure a loan which proved that the loan was advanced to the plaintiff's husband.

Turning to the third issue as to whether the 1<sup>st</sup> defendant trespasses into the plaintiff's plot/Land (suit properties) it is clear from DW2's testimony that Mr. Deusdedit Yanga Zakaria obtained the loan on 25/01/2015 and defaulted the payment from March. That, failure to remit the monthly installment moved the 3<sup>rd</sup> defendant to exercise their rights as per the loan agreement by issuing 60 days' notice (Exhibit D.9) to the borrower. The notice stated that the borrower had defaulted to pay the principal and interest as of 16<sup>th</sup> February 2016 which stood at Tshs. 53,367,453.79 the amount extended to him under the mortgage dated 20/01/2015. Clause three of the notice is categorical that in the event of default the Bank shall exercise their right by suing for the monie due, appoint a receiver, lease the mortgaged land, enter into possession of the mortgaged land and sell the mortgaged land. It is sufficiently established that notice was served upon the borrower on 04<sup>th</sup> day of March 2016 and appended his signature to acknowledge receipt. After the lapse of 60 days, the 3<sup>rd</sup> defendant handed over the matter to the auctioneer company. The 14 days notice (exhibit D3) was published by Mak Recoveries Ltd on Habari Leo newspaper of 10/01/2017 stating that the suit properties (Plot Nos. 314, 315,



and 316 Block F Msaranga area Moshi Municipality) of Deusdedit Yanga Zacharia t/a Zacharia Secondary School were to be auctioned in default of payment of the outstanding loan. It is on record that the auction was conducted on 03/02/2017 and certificate of sale (Exhibit D.2) of land properties on Plot Nos. 314, 315 and 316 Block F previously owned by Deusdedit Yanga Zacharia were sold to Ismael Elisali Nkya (the highest bidder) for the sum of shillings one hundred and fifty million (Tshs.150,000,000/=). Later the transfer was effected from Deusdedit Yanga Zacharia to Ismael Elisali Nkya as stated in Exhibit D.1. From the enumerated chronological documentation and on the balance of probability the defendants were able to prove that all the procedures were followed and the suit properties are now legally the properties of the of the 1<sup>st</sup> defendant (the late Ismail Elisali Nkya.)

There is another contention by the counsel for the plaintiff concerning Plot No. 314. DW2 when cross-examined he admitted the fact the mortgage deed and spouse consent related to CT No.27490 for plots Nos. 315 and 316 only. However, when he was re-examined he clarified the fact that, Mr. Deusdedit Yanga informed them that the CT related to plot No. 314 was reported to have been lost thus they could not mortgage the loss report thus why they included Plot No. 314 in the auction. When the auction advertisement was posted in the Newspapers, Mr.



Juma Laibu approached and informed them of the status of CT No. 314 the effect that the same was in his possession due to debt owing to Mr. Deusdedit amounting to shillings 30 million. Thus after the auction, Mr. Zacharia wrote a letter to the Bank to release shillings 30 million from the proceeds of the auction and pay Mr. Laibu. Then after being paid Mr. Laibu surrendered the CT to the Bank. I am persuaded by such testimony due to the fact that the original CT was found in possession of Mr. Laibu which implies that Mr. Zakaria handed it over to him to secure a loan which was later surrendered to Mr. Nkya. The evidence of DW2 is also supported by the application for official search (Exhibit D.4) which stated that Plot No.314 Block F Msaranga Moshi was among the plots that were investigated to be mortgaged. Additionally, in the proposal letter for a short-term loan of Tshs. 100 million (Exhibit D.5) item 5 thereof mentioned CT Plot No. 314 and the same was accepted by Mr. Deusdedit Zacharia. The same was also mentioned in the loan agreement (Exhibit D.7). All these proved on the balance of probability that the CT for Plot No.314 was among the mortgaged properties to secure the loan from the 3<sup>rd</sup> defendant. Therefore the 3<sup>rd</sup> issue is answered in the negative.

Now on the last issue on relief, from the evidence adduced it is sufficiently clear that the plaintiff has failed to prove her case. As no evidence was adduced in support of the pleadings, there

can be no doubt that the plaintiff's evidence on record remains mere allegations thus not entitled to any relief.

On the basis of the foregoing analysis the suit is hereby dismissed with costs.

It is so ordered.

Dated and Delivered at Moshi, this 13<sup>th</sup> day of August 2021.

  
**S.B MKAPA**

**JUDGE**

**13/08/2021**

