

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM  
LAND CASE NO. 8 OF 2016**

**STELLAH DAVID KYAMBA.....PLAINTIFF**

***VERSUS***

**JOEL GERALD KYAMBA.....1<sup>ST</sup> DEFENDANT  
BAGENZI ASSOCIATES CO. LTD.....2<sup>ND</sup> DEFENDANT  
UNITED BANK FOR AFRICA LTD.....3<sup>RD</sup> DEFENDANT  
YONO AUCTION MART.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Date of Last Order: 20/07/2021**

**Date of Judgment: 06/09/2021**

**E. B. LUVANDA, J.**

Stellah David Kyamba, plaintiff to the main suit sued Joel Gerald Kyamba (first defendant), Bagenzi Associates Co. Ltd (second defendant), United Bank of Africa Ltd (third defendant) and Yono Auction Mart (fourth defendant) the defendant to the main suit, faulting the mortgage deed which was issued by the first defendant in favour of the second and third defendants as null and void on the ground that there is no valid consent she issued to mortgage the property on plot No. 605 block "45C" Kijitonyama area, Kinondoni Municipality. By way of counter claim, the plaintiff to the counter claim (third defendant to the main suit) claims jointly and severally against the defendants to the counter claim to wit the second defendant to

the main suit, first defendant to the main suit and plaintiff to the main suit, a sum of Tsh 152,516,645.76 as an outstanding amount for breach of terms and conditions of the mortgage deed, for a loan of Tsh 125,000,000/= which was secured by the first defendant (second defendant in the main suit) on 9/01/2013.

The plaintiff was under the service of Mr. Florence Aloyce Tesha learned Counsel, the first defendant was represented by Mr. George Dogani Mwalali learned Advocate and Mr. Elisa Abel Msuya learned Counsel appeared for the third and fourth defendants.

Agreed issues are: one, whether the first defendant in the original suit guaranteed the overdraft facility which was extended to the second defendant by the third defendant amounting to the tune of Tsh 152,000,000 plus interest; two, if the first issue is on the affirmative, whether the plaintiff consented for the first defendant to mortgage the matrimonial property situated on plot No. 605 block 45C Kijitonyama area at Kinondoni Municipality within Dar es Salaam for the second defendant to secure the overdraft facility; three, whether there is forgery perpetrated by the first, second and third defendants to the process of extension of overdraft facility to the second defendant; four, who between the first, second and third defendant is liable and indebted to the plaintiff in the counter claim for the loan facility extended by the said plaintiff to the second defendant and to what extent; finally, to what reliefs are the parties entitled to.

For the first issue, Asanterabi Barakaeli (DW2) stated that the first defendant to the main suit had mortgaged his title deed (certificate of occupancy exhibit D8) via a mortgage deed exhibit D4 as reflected also in

his personal guarantee exhibit D9. According to DW2, the first defendant had personally presented and surrendered exhibit D8 to the bank alongside with his voter's registration card exhibit D5, as security for a loan of Tsh 125,000,000 secured by the second defendant to the main suit, as per credit facility agreement exhibit D3. On defence, DW1 the first defendant to the main suit, refuted to had mortgaged his title deed. DW1 denied to had surrendered his title deed to the bank. According to his explanation, he (DW1) handed over his title deed to one Bagenzi at the offices of Ministry of Land, ground floor where DW1 visited there to make an official search following a call to pay rent. He (DW1) kept awaiting on the ground floor, but the alleged Bagenzi did not show up downstairs, remained up stairs, thereafter DW1 opted to go back home. To my view, the story of DW1 is suspect. For one thing he did not state if it is a legal requirement for one who seek an official search to exhibit an original title deed. Assuming that, it is a requirement to have an original title deed, still it attract a query as to how and why DW1 take such a high risk to surrender and handover his original title deed situated at such a prime area (Kijitonyama) to a strange person. Why DW1 he acted in such a careless manner, to leave a title deed into the hands of a strange passerby and go back home ceremoniously at peace without taking trouble to inform any officer at the Ministry of Land or any family member of the ordeal. Why DW1 remained quit, until when he alleged seen his house being about to be auctioned where he went to Yono to make an enquiry.

It was the evidence of DW2 he personally visited to the house of the first defendant (DW1) regarding default of the second defendant to service his loan, where DW1 had promised to settle a debt from the proceed of sell of

his alleged plots of land at Mbeya. It was further stated by DW2 that later DW1 had visited at the bank asking for mercy to be forgiven to pay a debt given his health condition, where DW2 stated to had surprised seeing DW1 on a wheel chair. All these facts were not controverted or cross examined, thus signifying concession on the part of DW1.

DW1 had also admitted in his defence, that he paid to the third defendant to the main suit a sum of Tsh 40,000,000 to liquidate the loan of the second defendant to the main suit, in view of an effort to redeem and retain back his title deed. Although later on re-examination, DW1 attempted to recant this fact, but is taken as an afterthought which cannot assist him. This is because in his (DW1) written statement of defence to the main suit, at paragraph 8 he (DW1) vowed to had successful paid a total sum of Tsh 40,000,000 in order to set off the liability of the second defendant to the third defendant.

Apart from that fact, DW2 also stated that a signature of DW1 appearing in his (DW1) title deed exhibit D8, voters card exhibit D5, mortgage deed exhibit D4 and personal guarantee exhibit D3, resemble. In view of these overwhelming evidence, I rule that the first defendant in the main suit had indeed guaranteed the overdraft facility which was extended to the second defendant by the third defendant amounting to the tune of Tsh 152,000,000 plus interest. Therefore, the first issue is in the affirmative.

Issue number two, if the first issue is on the affirmative, whether the plaintiff consented for the first defendant to mortgage the matrimonial property situated on plot No. 605 block 45C Kijitonyama area at Kinondoni Municipality within Dar es Salaam for the second defendant to secure the

overdraft facility. This issue was the corner stone of contention in this suit. It is not in dispute that the defendant to the main suit (DW1) and the plaintiff to the main suit (PW1), are husband and wife. There is no dispute that throughout their subsisting marriage the duo have been living under the same roof in the disputed house, until in 2017 when PW1 (who is the public servant, department of exchequer and audit Ministry of Water and Energy) was transferred to another duty station in Dodoma Capital City. There is no dispute that when she was single, prior marriage, PW1 was known as Stella David Mwaiselage.

In her testimony, PW1 denied to had consented to the mortgage. PW1 disowned a signature appearing in a spouse consent exhibit P4, marriage certificate dated 15/1/1994 exhibit D7 and voters card exhibit D6. PW1 disputed names reflected in exhibit P4, which was alleged to have been signed on 20/1/2013. According to PW1 on 20/1/2013 she was using the name Stella David Kyamba and not Stella David Mwaiselage appearing in exhibit P4. PW1 disputed a photography appearing in exhibit P4. PW1 disputed a photography appearing in exhibit D6 that it does not belong to her and that she was not born on 15/1/1970, rather she was born on 3/12/1963. PW1 attacked exhibit D7 on explanation that she never contracted marriage at Roman Catholic Church Magomeni before Father George Mhina on alleged 15/1/1994. That in the year 1994 she was not aged 24 years and witnesses mentioned therein to wit Maurice John and Anna Kawambwa are strange to her. This fact was supported by DW1. PW1 produced a genuine marriage certificate exhibit P1 depicting her signature, a marriage was contracted at K.K.K.T. Azania Front Church on 31/1/1987 before Rev. Okot Mpayo, witnesses were Patrick Chokala and Frida Samwel

Katue; national identification card bearing the name Stella David Kyamba exhibit P5 and voters card for Stella D. Kyamba exhibit P6. It is to be noted that both PW1 and DW1 imputed forgery in respect of exhibit P4, D6 and D7. However neither of them took the matter to the appropriate forum for investigation and to unearth the perpetrator of forgery, nor lodged any complain to the bank (third defendant to the main suit) or Ministry of Land where PW1 made an official search via exhibit P3, depicting that the plot in dispute was encumbered to secure a loan of Tsh. 125,000,000 to the third defendant to the main suit. The unwillingness of PW1 and DW1 to knock the doors of police, to have this obvious case of criminal forgery and uttering forged documents, investigated and perpetrators prosecuted, signify one thing that probably the dual either were part and parcel of the blatantly forgery committed or were aware as to what was happening step by step towards commission of it. This can be evidenced by the fact that PW1 who is cohabiting under the same roof with DW1, failed to account as to how she did not discover at the earliest opportune that the title of their matrimonial property which PW1 was said to have immensely contributed towards its acquisition and development, was not aware that the tittle deed went missing from 20/01/2013 when DW1 executed mortgage deed exhibit D4, until sometimes on March 2014 where she alleged to have been informed by her relative that her house was about to be auctioned by Yono Auction Mart. PW1 tendered a copy of newspaper exhibit P2. Strangely, an official search was done on 15/7/2014 and a plaint was presented for filing on 16/02/2016, almost after expiry of one year and five months from the date PW1 become aware that her house was mortgaged. This period of seventeen months was also not accounted for by PW1. One could wonder as to why in such a

shocking situation and event, PW1 was reluctant to take legal action against her husband whom she alleged was the custodian of exhibit D8.

There were hybrid ideas as to the source of information for sell of a dispute house. PW1 stated that she obtained the information from exhibit P2 after being tipped by her relatives, later saw names of her defendants in the stop order which was affixed by DW1 at the gate of their house. While DW1 stated that he happened to know that his house was about to be auctioned after a youth from Yono affixed a paper at his house for sell of his house. PW1 was silent as to the notice of sell affixed at the gate of their house. According to PW1, DW1 had opened a case at the Tribunal, secretly without involving her.

Be as it may, the story by PW1 and DW1 are unbelievable. The evidence of PW1 is not persuasive. PW1 failed to convince me that her hands are clean in the whole of this saga. Both two were silent as to who would be the suspect or mastermind for plotting a deal or mission for the trait of indulging in disreputable pranks of forging family documents and handing over to the bank. Had DW1 conceded to had taken part on the ordeal, at least PW1 plea could stand and sustain. But under the circumstances of this case and for reasons depicted above, suggest possible conspiracy and collusion to had happened in between the second defendant (borrower and defaulter), DW1 and PW1. This finding dictate me to rule the second issue in affirmative. this verdict takes into board the third issue as well. It is accordingly ruled in affirmative.

Issue number four as to who between the first, second and third defendant is liable and indebted to the plaintiff in the counter claim for the loan facility extended by the said plaintiff to the second defendant and to what extent.

Having ruled the first, second and third issue in affirmative as above, it goes without much saying that the first defendant counter claim (second defendant to the main suit) who was the borrower and defaulter to the credit agreement; the second defendant counter claim (first defendant main suit) being a guarantor and the third defendant to counter claim (plaintiff in the main suit) consented to the mortgage, they are all held jointly and severally indebted to the plaintiff counter claim (third defendant main suit) a sum of Tsh 152,516,645.76 inclusive interest, as reflected in exhibit D14, entry dated 15/12/2016. These findings take into board the fifth issue as well.

That said, I rule that the defendants to a counter claim are indebted a sum of Tsh. 152,516,645.76

The first, second and third defendants to the counter claim (who are plaintiff, first and second defendants to the main suit) are therefore held liable to pay the plaintiff-counter claim (third defendant main suit) a sum of Tsh 152,516,645.76 or in continued default, the second defendant-counter claim (first defendant to the main suit) property (exhibit D8) mortgaged via exhibit D4 to secure the loan to wit property described under certificate of title No. 86547, plot No. 605, Block "45C", Kijitonyama, Kinondoni Municipality Dar es Salaam, to be auctioned for purpose of liquidating the outstanding sum depicted herein.

The main suit is dismissed and a counter claim succeeds to the extent depicted above with costs.



E. B. Luvanda  
**Judge**  
06.9.2021



**Date: 6.9.2021**

Coram: Hon. J. Fovo, DR

For the plaintiff: Mr. Tesha Advocate

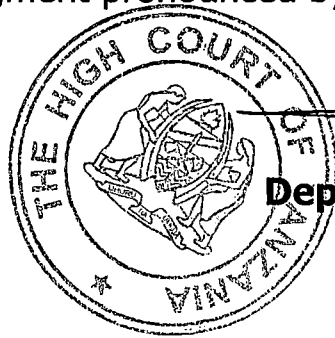
For the defendants: 1<sup>st</sup> present in person

2<sup>nd</sup> Absent

3<sup>rd</sup> & 4<sup>th</sup> Mr. Nderio Ndesamburo Advocate

B/C: Swalehe

**Court:** Judgment pronounced by the court in open chamber.



J. Fovo

**Deputy Registrar**

6.9.2021