

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

LAND CASE No. 10 OF 2017

HAPYNESS JOHN.....PLAINTIFF

VERSUS

1. BAVESH HINDOCHA

2. YOHANA NKWABI NTAKI

3. JAMES JULIUS NDEKI

4. MOSES ABDUL SWALEHE

*(Administrator of the estate of the
Late **Diana Ignatus Semakula**)*

.....DEFENDANTS

JUDGMENT

Date of last order: 08/09/2022

Date of Judgment: 11/10/2022

A. MATUMA, J.

In this land case there are several disputes between the parties. The core dispute though not subject to the instant matter is between the first and second defendants whereas the first defendant alleges to have lend money to the second defendant amounting to Tshs. 97,000,000/= in lieu of which the second Defendant mortgaged two title deeds of Plots no. 598 Block "B" and 62 Block "U" at Nyasubi area within Kahama District in Shinyanga Region. On the other hand the second defendant admits to have handled

the two title deeds to the first defendant but denies to have borrowed any money from him. His explanation as to why he surrendered the two titles is that the first defendant begged him such tittles so that he could use them as security to borrow some money from the Bank in lieu of which he would have been given some percentage of the borrowed money. Who speaks the truth between the two defendants, only them alone and the almighty creator of the world and the universe knows. As I have said earlier, such dispute is not before me and it is not subject for determination as it has its own cases reported to have reached to the Court of Appeal.

Such dispute crosses in this matter only because the first defendant successfully sued the second defendant for recovery of the alleged loan and obtained execution order for attachment and sale of the landed property on Plot no. 62 supra which is now referred to as Plot no. 196 Block "U" Nyasubi. That property was attached and sold on a Public Auction whereas it was the third defendant who bought the same. Prior to the changing of tittle to himself the third defendant sold it to the fourth defendant who developed it into a Guest House.

The Plaintiff appeared in the lower court through objection proceedings contending that she is the wife of the second defendant and her consent was not sought and obtained in mortgaging the properties in dispute which are matrimonial properties. The lower court overruled her by finding that for the purposes of the matter before it, the Plaintiff was not a wife to the second defendant as she contracted the marriage on the same very day when she instituted the objection proceedings and therefore the marriage was intended to defeat the end of justice as by the time the first and

second defendants contracted for the loan the Plaintiff was yet married to the second Defendant.

In the circumstances, it is when the Plaintiff started this case contending her legal rights to the suit properties as a lawful wife of the second respondent. The second respondent supports her that she is his wife whom she married customarily since 1999 but solemnized in the year 2014 by contracting the marriage afresh at the District Commissioner's office.

During the final pre-trial conference the following issues were drawn;

- 1. Whether the sale or intended sale of plot No. 598 Block "B" Nyasubi area was lawful in absence of the plaintiff's consent*
- 2. Whether the sale of the house located in plot No. 62 Block "U" Now plot No. 196 Block "U" was lawful without the consent of the plaintiff*
- 3. Whether landed properties in plot No. 598 Block B" and plot No. 196 Block "U" are matrimonial assets.*
- 4. Whether there was valuation conducted in plot No. 62 Block "U" prior to sale.*
- 5. To what reliefs are the parties entitled to.*

At the hearing of this case the Plaintiff and the second defendant appeared in person unrepresented while the first, third and fourth defendant were represented by learned advocates Mr. Mutongore and Gahise.

The Plaintiff Happyness John in her sworn evidence stated that she was married to the second defendant since 1999 customarily and they are blessed with four issues who were born in 2000, 2004, 2006 and 2009 respectively (exhibit P2). Later they solemnized their marriage by

contracting a Civil Marriage at the District Commissioner's office on 12/03/2014 as per Marriage certificate exhibit P1. That the properties were mortgaged by her husband the second defendant to the first defendant without her knowledge and or consent. She thus seeks to redeem the properties from the attachment and sale. She got collaborated by PW2 Lau Kavama and PW3 Juma John who testified to have known the Plaintiff and the second defendant as a wife and husband for a long time. They are neighbours and understand that the Plaintiff and the second defendant live under the same roof.

The first Defendant Bavesh Hindocha (DW1) as I have said testified to the effect that he lend Tshs. 97,000,000/= to the second defendant who mortgaged the suit premises as security for the loan. That at the time the second defendant was handling the certificate of tittles, he was in a company of a certain woman whom he do not recall. That only plot no. 62 Block "U" was sold and obtained Tshs. 50,000,000/= from the sale and still claims from the second defendant Tshs. 47,000,000/= and thus prays for sale of the remaining security to recover such sum.

The second defendant on his party as I have highlighted earlier denied to have borrowed any money or do any business with the first Defendant. That he only gave the title deeds to the first defendant for him to mortgage them to the bank so that he obtains a loan and give him a share thereof. He acknowledges the Plaintiff's claims that she is his wife and had not consulted her in giving the certificate of tittles to the first defendant. He faulted the manner in which the tittle deed of plot no. 62 supra was changed from him to his previous vendor and later to the fourth defendant.

He had support from DW3 Makoye Lubigisa Geba and DW4 Manyanda Yumbu Imon who were his masons. The two testified on how they constructed the suit house up to its finishing stage.

The third defendant James Julius Ndeki testified as DW5 to the effect that he bought Plot no. 62 Block "U" in the public Auction at Tshs. 50,000,000/= and later sold it to the fourth defendant. He tendered the Notice of the Public Auction as exhibit D5 and the Certificate of Sale as exhibit D6. He averred that when he purchased the house it was unfinished.

DW6 Yusuph Shabani Luhumba the Authorized Land officer gave evidence to the effect that his official records shows that the original owner of the suit property plot no. 62 supra was Elias Madinda since 1995. On 21/05/2007 there was a transfer of the property to the second defendant Yohana Nkwabi Ntaki but when it got 2014 they received court documents including a ruling and Certificate of Sale to the effect that the house in dispute was sold to James Julius Ndeki at the Public auction. Prior to their change of title James Julius Ndeki sold the property to the fourth defendant Diana Ignatus Semakula and thus they changed the tittle to her. This witness tendered the Land Register as exhibit D8 to fortify his evidence supra.

DW7 Moses Abdul Swalehe is the administrator of the estate of the late Diana Ignatus Semakula. He testified that his late mother Diana bought the suit house from James Julius Ndeki when it was still unfinished (pagala) and renovated it into being a finished and furnished guest house. He

tendered the certificate of title to show that it is the late Diana who is registered owner of the suit property. This witness also faulted the valuation report in that the same was done by the second defendant on the property which was not his.

The last witness was DW8 Ruben William who testified that he is the neighbor to the suit house, he used to work there as an assistant mason and that the house was sold when it was unfinished.

Now let me put it clear that whether or not the suit property at the time of the Public auction was finished, whether or not it was sold at a throw away price, whether or not the valuation report is valid and whether there was any business transaction between the first and second defendants from which the properties were mortgaged are all irrelevant matters in relation to the dispute at hand. Those are issues to be resolved between the two defendants in their ongoing dispute now reported to be pending in the court of Appeal.

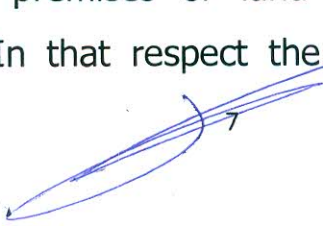
It would suffice for the purposes of this case to determine the interests of the Plaintiff in the suit properties and determine whether such interests are protected under the provision of any laws of the land against the defendants. To do so this court is going to resolve the drawn and agreed issues starting with the third issue as to ***whether landed properties in plot No. 598 Block B" and plot No. 196 Block "U") are matrimonial assets.***

To make it clear plot no. 196 Block "U" wherever referred to also means Plot no. 62 Block "U" Nyasubi area within Kahama District in Shinyanga

Region. The two plots referred to in this issue no doubts by the time of the alleged transactions between the first and second Defendants were registered in the names of the second defendant. There was no any caveat in the land register at that particular moment to represent interests of any third party other than the second defendant in respects of the two plots. Even though, the spouse is always presumed an interested party to a **matrimonial home** unless the contrary is proved. In that respect no sale, mortgage or transfer may be effected without the spouse consent in respect of **matrimonial home** regardless the fact that the property might have been registered in the names of one spouse. That is the spirit within the meaning of section 59 (1) of the Law of Marriage Act, Cap. 29 R.E 2019 which provides;

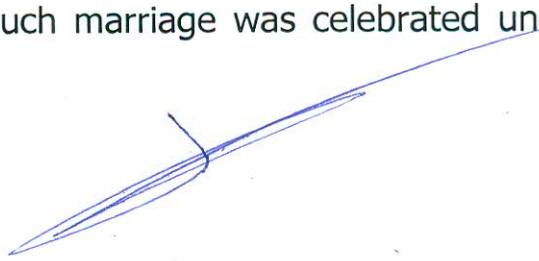
"Where any estate or interest in the matrimonial home is owned by the husband or the wife, he or she shall not, while the marriage subsists and without the consent of the other spouse, alienate it by way of sale, gift, lease, mortgage or otherwise, and the other spouse shall be deemed to have an interest 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".

The matrimonial home is defined under section 2 (1) of the Law of Marriage Act supra to mean the building or part of a building in which the husband and wife ordinarily reside together. That might include the outer part buildings in the premises or land attached to the property for agricultural activities. In that respect the spouse would only require to



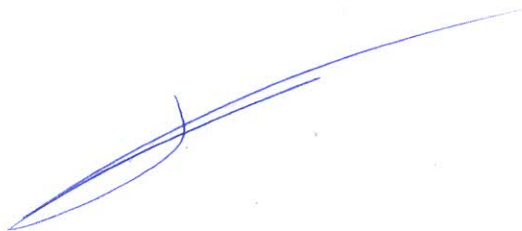
establish the existence of the marriage and that his or her consent was not sought and or obtained to have his or her interests protected.

In the instant matter the properties under dispute are two; Plot no. 598 Block "B" and 196 Block "U" at Nyasubi area. Although there is no clear evidence on record as to the effect that the two plots are matrimonial homes, but at least in the cause of asking questions to the parties for clarifications of certain matters during their testimonies it transpired to me that the plaintiff and the second defendant resides on plot no. 598 block "B" Nyasubi. In that respect such property is a matrimonial home subject to proof of marriage between the two prior to the same having mortgaged. The Plaintiff and the second defendant claimed to have married customarily since 1999 and later in the year 2014 solemnized their marriage by Civil Marriage. To that effect we have in evidence a Certificate of Marriage dated 12/03/2014 exhibit P1. It is my firm finding that prior to 12/03/2014 there was no marriage between the plaintiff and the second defendant because had there been such marriage, there would have not been any need and effort to contract another particularly when the dispute between the parties had started to erupt. This is because the marriages celebrated customarily, religiously, or civil have equal weight. Customary marriage stands by its own so does religious or Civil marriages. It would only require a proof that such marriage was celebrated under customary rights.



In the instant case we have no any evidence that the plaintiff and the second defendant celebrated their alleged marriage under any custom of whatever tribe. They did not even bring any witness who attended their marriage or participated anyhow. It would appear that the two had love affairs for long time prior to getting into marriage. During their love affairs they got blessed with several issues as stated herein above. Love affairs is not defined as a customary marriage.

The marriage cannot be presumed out of love affairs. Before me there is no question of presumption of marriage. There is a claim of a marriage having been contracted. In that respect only evidence that the marriage was actually contracted in either way is required. As I have said there is no such evidence as far as the customary law is concerned. I therefore conclude that the plaintiff and the second defendant married on 12/03/2014 as per their marriage certificate supra and thus are husband and wife from that date regardless as to when exactly they started to enjoy each other as lovers. Bearing children in itself is not evidence of marriage. In our judicial jurisprudence we have children born out of wedlock whose rights have been exercised the minds of the court for quite some time. That in itself establishes that children are not evidence of marriage. In the circumstances it doesn't matter when the Plaintiff and the second defendant started to have their first born and the subsequent children thereafter.



Although the marriage was contracted when the dispute had already erupted but still plot no. 598 block "U" acquires the status of being a matrimonial home because the two are ordinarily residing therein. Even though I am aware that the same was mortgaged prior to the said marriage and thus the rights of the mortgagee are not defeated by the mere fact that there was a marriage contracted after the property was mortgaged, otherwise it would be dangerous to the interest of justice for indecent mortgagors to contract marriages just for the purposes of defeating the rights of the mortgagees. In that respect the first defendant has a right to redeem his rights against the property but this is not his case for that purpose. This is because there is still a dispute between the first and the second defendant on whether they had any transactions subjecting the properties to their agreements. My duty thus ends by declaring that plot no. 598 Block "U" Nyasubi area at Kahama is a matrimonial home as from 12/03/2014 but the existed right of a third party prior to that date was not defeated by the mere fact that the plaintiff was married to the second defendant and started to live in that property.

The question however is whether such plot and the other no. 196 or 62 are matrimonial assets. Matrimonial homes are different from matrimonial assets. While matrimonial home needs no proof for the contributions of its acquisition or improvements by each spouse but a mere proof that the couples are ordinarily residing therein, the matrimonial assets are established by proof of the extent of contributions by the couples towards

their acquisitions and or improvements, that is; the further joint efforts in the improvements of the property.

In the instant case I did not see the evidence from either the Plaintiff or the second defendant establishing the extent of the Plaintiff's contribution either in the acquisition or improvement of the two plots. In her sworn evidence the Plaintiff merely testified;

"In our marriage we have engaging ourselves in small businesses and got some funds to construct the house in plot No. 598 at Nyasubi and also a house in plot No. 62 Nyasubi kahama"

These words by themselves are not evidence for the acquisition of the property by joint efforts. They are general claims which required further elaborations as to the specific roles the Plaintiff played in the acquisition of the property. The court of law cannot in any way act on general claims. The essence of requiring proof to the extent of contribution by each spouse for the purposes of establishing the property as a matrimonial asset is to give wide range of spouses to acquire, use and dispose their own properties without being too tied to matrimonial sanctions. That is the spirit of section 58 of the Law of Marriage supra which provides;

*"Subject to the provisions of section 59 and to any agreement to the contrary that the parties may make, **a marriage shall not operate to change the ownership of any property to which either the husband or the wife may be entitled or to prevent either the husband or the wife from acquiring, holding and disposing of any property**".*

Therefore the marriage is not there to mean; private ownership of properties by either spouse dies with the marriage and an automatic change of ownership thereof from either spouse to both spouses. Each spouse shall continue to enjoy legal rights in relation to his previously owned properties and even to acquire some new one during the existence of the marriage. Such rights extend to disposition of the property without necessarily requiring consent of the other spouse. There has been a long standing misconception by the public at large and even some judicial staffs that once the marriage is established both spouses are owners of each and every property acquired by one of them. It is the high time now we stop such misconception. Only the matrimonial home is protected under the law from disposition by either spouse irrespective of any contribution to its acquisition. The matrimonial assets are not, and in fact unless the contributions by both spouses towards their acquisitions and or their further developments are sufficiently proved, they are not matrimonial assets. In the case of ***Bi. Hawa Mohamed versus Ally Sefu (1983) TLR 32*** the Court of Appeal of Tanzania demonstrated the meaning of a matrimonial asset to be;

*"Family assets - Assets envisaged u/s 114 (1) of the Law of Marriage Act, Matrimonial assets acquired by spouses during marriage **by their joint efforts**"*

The referred section 114 (1) supra particularly subsection (2) (b) and (3) thereof provides that the property is regarded as a matrimonial asset when both spouses contributed in its acquisition by joint efforts or it was acquired by one spouse but substantially improved by the other spouse or

by their joint efforts. We thus have a good law in place protecting each spouse' rights to acquire and dispose of, his or her own properties without any encumbrances from the other spouse but the misconceptions and activisms are nearly killing the law.

In the instant matter there is no dispute that it was the second respondent who acquired the two plots by his own. They were subsequently registered in his own names. Thus for instance in respect of plot no 196 he testified;

"I purchased the house from Eliasi Madinda. I have a contract with me between Elias Madinda and Nkwabi I purchased in 2007 May, 4th".

He tendered his contract for the purchase of the property as exhibit D3. The Plaintiff was not a co-purchaser and or even a witness to such acquisition of the property. Under section 60 of the Law of Marriage Act supra there is a rebuttable presumption that when the property is registered in the names of one of the spouses even if it was acquired during the subsistence of the marriage, such property is his or her own property to the exclusion of the other spouse. Just to quote paragraph (a) and (b) thereof;

"Where during the subsistence of a marriage, any property is acquired;-

(a) in the name of the husband or of the wife, there shall be a rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse; or

(b) in the names of the husband and wife jointly, there shall be a rebuttable presumption that their beneficial interests therein are equal”.

From the spirit of such provision and the others earlier on named, the property isn't a matrimonial asset by the mere fact of marriage. There is a mandatory requirement to establish the joint efforts by the spouses towards acquisition or improvements to make the property their matrimonial asset. In the instant case, in the absence of proof of the plaintiff's contribution to the acquisition of the properties at issue or even their improvements, there should have been at least an explanation as to why the properties were registered in the names of the second defendant alone to the exclusion of the plaintiff so that the plaintiff's interests in them could at least be sniffed.

With the herein observations, I conclude the third issue that Plots no. 598 and 196 previously known as plot no. 62 both on Block "B" and "U" respectively at Nyasubi area within Kahama District in Shinyanga Region are not matrimonial assets. They were properties solely acquired and solely owned by the second defendant Yohana Nkwabi Ntaki.

Back to the first and second issues as to *Whether the sale or intended sale of plot No. 598 Block "B" Nyasubi area was lawful in absence of the*

plaintiff's consent, and Whether the sale of the house located in plot No. 62 Block U" Now plot No. 196 Block "U" was lawful without the consent of the plaintiff, I am of the strait determination that the intended sale of plot no. 598 Block "B" supra in the absence of the Plaintiff's consent is lawful because the same as determined in the afore third issue is not a matrimonial asset though currently a matrimonial home. The intended sale is lawful despite of the fact that the same is a matrimonial home because by the time the property was mortgaged the Plaintiff and the second defendant had not yet contracted any marriage. They were not husband and wife by all means and intent within the spirits of the law of marriage Act. In that regard and as I have previously stated herein above the rights of the mortgagee are not defeated by marriage subsequent to the mortgage agreement. The Plaintiff should cooperate with the second defendant to rescue the property by paying the debt and not acting as an obstacle against the innocent mortgagee (first defendant).

In respect of plot no. 196 Block "U" supra the sale was lawful and absolute. The reasons have already been stated herein above but for clarity I may repeat them by summary to the effect that it was sold in execution of the decree after the defeat of the second defendant by the first defendant in a Civil suit, Civil case no. 31 of 2012 in the District court of Kahama. There is no any order of superior court setting aside the decree, it is not a matrimonial asset and by the time the house was mortgaged by the second defendant to the first defendant the plaintiff was not yet married to the second defendant. Therefore within the meaning of section 60 (a) and (b) of the law of marriage as quoted supra, the consent of the spouse in the

disposition of the property owned solely by him or her against the other spouse is not a pre-requirement. The second defendant mortgaged his own property and having failed to fulfill the mortgage agreement the property was lawfully sold in execution of the decree. I therefore decree that the sale of the said suit house at the Public Auction to the third defendant was lawful, the subsequent sale thereto by the third defendant to the fourth defendant was as well lawful and the registration of the fourth defendant as the lawful owner of the property is lawful. In that respect Plot no. 196 Block "U" previously Plot no. 62 block "U" is a lawful property of the late Diana Ignatus Semakula subject to be administered by Moses Abdul Swalehe who is the administrator of the estate of the late Diana Ignatus Semakula.

Coming to the fourth issue as to *Whether there was valuation conducted in plot No. 62 Block "U") prior to sale*, the answer is strait forward. There was no Valuation conducted prior to the sale. The subsequent question would thus be what was the prejudicial against either the Plaintiff or the second defendant for the sale of the house without valuation thereto. In respect of the Plaintiff there was no whatever prejudice as she has failed to establish her interests in the property. Therefore whether the property would have been valuated or not she would not benefit anyhow or be injured anyhow. In respect of the second defendant, I stand and agree with the evidence of DW7 Moses Abdul Swalehe that when the house is to be sold at the public auction, valuation Report is immaterial. It is the highest bidder who will finally buy the house. The fair value of the property would be determined by the market value. Even though whether or not the house was finished

at the time of sale, whether or not the same was sold at a throw away price, isn't the question to be determined in this case. It is the question to be determined on the ongoing dispute between the second defendant, the court blocker, the first defendant and the buyer, now the third defendant. Lastly is the issue relating to the reliefs which the parties are entitled to. For the reasons stated in here, the Plaintiff is entitled to have her case dismissed in its entirety for having been brought without any sufficient cause, the first and second defendants are entitled to retain their rights of further litigations as to whether they had really contractual obligations which subjected the suit properties as securities. This suit is therefore not their case. Their rights have already been determined vide the herein above named Civil Case. They went on appeal to the High court and finally the second Defendant informed this court that he is at the court of appeal protesting for his rights against the first defendant. Thus, this judgment is not meant to prejudice the decisions in the afore mentioned cases and whatever outcome of the Court of Appeal decision. This judgment is confined to the claims of the Plaintiff which I find to have not been established anyhow. The third defendant is entitled to be discharged from any Civil obligations in respect of this case for he was an innocent and bonafide purchaser for value. He bought the suit house at the public auction under the court order. The fourth respondent is entitled to a declaration that she is the lawful owner of plot no. 196 block "U" at Nyasubi area and thus entitled to a peaceful enjoyment of the property without any disturbance from any person including the parties herein or their agents.

Having said all these I therefore dismiss this suit with costs. The fourth defendant is hereby declared a lawful owner of plot no. 196 Block "U" at Nyasubi area and the Plaintiff together with the second defendant are restrained from inconveniencing her to her enjoyment of the property. The first defendant cannot use this judgment to execute his remaining claims against the second defendant as I have said this was not their case nor there was any specific issue drawn to resolve their misunderstandings. They should thus abide to their previous suit and appeals thereto. Whoever aggrieved with this judgment has the right of appeal to the court of appeal subject to the guiding laws and rules thereto. It is so ordered.



A. MATUMA

JUDGE

11/10/2022