

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

AT DAR ES SALAAM

LAND CASE NO. 18 OF 2018

AZZA MOHAMED MASSOUD ----- PLAINTIFF

VERSUS

I & M BANK (T) LTD ----- 1ST DEFENDANT

NASSOR KHALIFA GHARIB ----- 2ND DEFENDANT

J U D G M E N T

Date of last order: 16/11/2022

Date of Judgment: 5/5/2023

MGONYA, J.

The Plaintiff herein, **AZZA MOHAMED MASSOUD** filed a suit claim against the Defendants jointly and severally for the following reliefs:

- i) A permanent injunction restraining the Defendants or any other person working and or acting under instructions of the Defendants from selling or interfering in any way with the Plaintiffs landed property described as C.T.***

43480, L.O. 113719, Plot No. 774 Msasani Beach Area Dar-es-Salaam City;

- ii) a declaration that the mortgage deed dated 21st May 2003 on C.T. 43480, L.O. 113719, Plot No. 774 Msasani Beach Area Dar es Salaam City, is null and void for not being accompanied with spousal consent;***
- iii) An order to discharge the mortgage deed dated 21st May 2003 on C.T. 43480, L.O. 113719, Plot No. 774 Msasani Beach Area Dar es Salaam City;***
- iv) A declaration that the default notice dated 20th April 2018 emanating from the mortgage deed dated 21st May 2003 on C.T. 43480, LO. 113719, Plot No. 774 Msasani Beach Area Dar es Salaam City is a nullity;***
- v) General damages to be assessed by the Court and;***
- vi) costs of the suit.***

Upon service, the Defendants filed Written Statement of Defense whereby along with it, the 1st Defendant filed a Counterclaim disputing all claims by the Plaintiff. In her Counterclaim, the first Defendant claimed that the second Defendant was indebted to the tune of **Tshs. 865,276,394.20 (Say Eight Hundred Sixty-Five Million Two Hundred**

Seventy-Six Thousand Three Hundred Ninety-Four Cent Twenty). Further that, the loan was not served, hence through a Counterclaim, she prayed for Judgment and Decree in the following orders namely: -

- a. *Declaration that the Mortgage executed by the 2nd Defendant over the landed property on **Plot No. 774, Msasani Beach Area, Dar es Salaam City** registered with **Certificate of Title No.43480** is **lawful**;*
- b. *Declaration that the 2nd Defendant and the 1st and 2nd Parties are in breach of the Credit Agreement as constituted under the facility letter executed by the 1st Party to the Counterclaim and thus the Plaintiff in the Counterclaim is entitled to realize the Mortgage on Plot No 774, Msasani Beach Area, Dar es Salaam City registered with Certificate of Title No. 43480 and other securities executed in favour of the Plaintiff in the Counterclaim for full repayment of the credit facilities extended to the first Party;*
- c. *Payment of **TZS. 865,276,394.20** (Tanzanian Shillings Eight Hundred Seventy-Seven Million Three Hundred Thirty-Seven Thousand Nine Hundred and Two Cents Eighty-Two) as pleaded;*
- d. *Dismissal of the main suit; and*

- e. Costs both in the main suit and the Counterclaim each party to bear own costs.*

The background of this matter albeit in brief goes as follows; The Plaintiff and the second Defendant are wife and husband since 1995 married under in Islamic rite. The Second Defendant mortgaged C.T. 43480 L.O 113719 Plot No. 774 situated at Msasani Beach Area, in favour of the first Defendant to secure a loan to a tune of **TZS 312,500,000/=** extended as a term loan to the New Muscat Investment Company Limited. The Second Defendant did not repay the said loan, as a result he was issued with a default notice giving him sixty days to pay the outstanding loan. Failure of it, the mortgage will be executed. It is the said notice which moved the Plaintiff to file this suit seeking the reliefs indicated above on the reason that she did not consent to the mortgage.

The efforts to mediate the parties became futile, hence following issues were framed and confirmed by the Court: -

- i. Whether the mortgaged property is matrimonial home;*
- ii. Whether there was spousal consent in creating a legal mortgage over landed property in CT 43480, LO 113719, Plot No. 774, Msasani Beach area Dar es Salaam;*

- iii. Whether the 1st party is indebted to the Plaintiff (counterclaim) on account of the credit facility and if an answer is in the affirmative to what tune;*
- iv. Whether there is a structured loan agreement between the first Plaintiffs to the counterclaim; and*
- v. To what reliefs parties are entitled?*

During the hearing, both the Plaintiff and Defendant were represented by Ms. Mariam Masandika and later by Mr. Juventus Katikiro, Advocates while the 1st Defendant was represented by Mr. Patrick Mtani Advocate, later on Mr. Tarzan Mwaiteleke, Advocate and 2nd and 3rd Defendant in the Counter Claim were represented by Mr. Adrian Mhina and Mr. Stephen Frank Advocates respectively.

In a bid to prove her case the Plaintiff **AZZA MOHAMED MASOUD** the sole witnesses who testified as PW1, stated that; she was married to the Second Defendant since 1995 (**exhibit P1**). They are living with their children on Plot No. 774 Msasani Beach Dar es Salaam. She went on to state that, they purchased Plot No. 774 in 1997 and agreed that it should be registered in the name of the second Defendant for a good family relationship. The Certificate of Title No. 43480 in respect of Plot No. 774 Msasani was tendered for evidence and admitted as **Exhibit P2**. She testified further that, what brought her before the court is

the Mortgage contract entered by her husband (second Defendant) in May 2003 without her consent as a spouse. The said mortgage contract dated 21st May, 2003 was tendered and admitted as **Exhibit P3**. She stated that in 2018, her husband received a notice of default (**Exhibit P4**) from the first Defendant requiring him to pay his loan of 2003 within 60 days otherwise the bank will sell their matrimonial house. It is PW1's prayer that the disputed premise be discharged from auction or sale and also this court to declare that the mortgage of the disputed premise was unlawful for want of spouse consent. Further to that the issued default notice to declared illegal.

During cross-examination, PW1 insisted to have known the loan agreement of 2017 only. The witness admitted that she has never entered any caveat to the disputed premises.

On the other side in defending this case, in the main case there was only one witness while in a counter claim there were three witnesses as herein below:

MWANAHAMISI MOHAMED PAZI, the First Defendant's employee as a Recovery Manager, who testify as **DW1**, apart from narrating her duty which involves making follow up on the non-performing loans, she testified that; the loan advance of 2003 was in favour of **NEW MUSCAT INVESTMENT LTD**, where the security/collateral to the said loan was House on Plot

No. 774 Mikocheni Dar es Salaam. She said, in 2003 before the bank, (the 1st Defendant herein) created a mortgage for the property engaged, and conduct a search of the same and they were satisfied that there was no any encumbrance. That the owner of the said property is **NASSOR KHALIFA GHARIB** who is the 2nd Defendant herein. They proceeded to prepare a Mortgage Deed between **I & M Bank** and **Nassor Khalifa Gharib**.

DW1 went on to testify that in 2003, there was no need for a spouse's consent to create a Mortgage, and that the Mortgage was prepared in the year 2004 which makes a total of 14 years up to the time of instituting this case. A Mortgage of a Right of Occupancy in Respect of Title No. 43480 LO No. 43719 dated 21st May 2003 issued by **MR. NASSOR KHALIFA GHARIB** to M/S CF UNION BANK was tendered as **Exhibit D1**. It was further testified that the advanced loan in that mortgage was Tshs. 250,000,000/= which was the 1st loan advance. The same was followed by another four different loan advances which were added and came to the tune of **Tshs. 867,379,000/=**.

Testifying on a Counter Claim against **Azza Mohamed Masoud, ABLA ESTATE DEVELOPERS; NASSOR KHALIFA GRARIB**, and **AHMED NASSOR KHALIFA**, the witnesses testified that, I & M Bank claims Abla Estate Development Bank. Their client and guarantors to its loan who are **NASSOR**

KHALIFA GHARIB and **AHMED NASSOR KHALIFA**, in respect of other loan advances issued in **2006, 2012, 2015,** and **2017** respectively. To make a total of five loan advances. To prove those loan advances, DW1 tendered variation mortgage of 2006 dated **13/03/2006**; variation mortgage of **05/04/2012**, variation mortgage of **16/05/2015** the fourth Deed of Variation is of **31/12/2017**. Four Deeds of Variation of **2006, 2012, 2015,** and **2017** in respect of the property located on Plot No. 774, Msasani Beach area Dar es Salaam City issued between **MR. NASSOR KHALIFA GHARIB and M/S CF UNION BANK LTD/ I&M BANK (T) LTD** were all tendered as **Exhibit D2**.

The witness informed the court that, the **Credit Facility Agreement**, between I & M bank ltd and **ABLA ESTATE DEVELOPERS & AGENCY CO. LTD**, dated 3rd October 2017 (**Exhibit D3**), clause 2:2:1 named the securities to the loan facility to be one property on **Plot No. 774 Msasani Beach Area vide Certificate of Title No. 43480** in the name of **NASSOR KHALIFA GHARIB**; while another security is joint and severally guarantees issued by the Directors of the Company, namely **NASSOR KHALIFA GHARIB** and **AHMED NASSOR KHALIFA**.

DW1 stated that they prepared the deed which was attached with the declaration in respect of spouse consent under

section 59 of the Law of Marriage Act 1971 and Section 114 of the Land Act Amendment Act 2008. All three wives of the second Defendant signed it. The spouses' consent was in respect of **Plot No. 774 at Msasani Beach** where, the borrower to this loan advance is **ABLA ESTATE DEVELOPERS**. This loan was supposed to be paid within a period of five years from January 2018 with the return of **Tshs. 25,000,000/=** per month including principal and interests. However, from 2017 December to the time of the institution of the case, the Borrower has never served any amount to the advanced loan. Hence, the status of this client is a non-performing as the client. Owed by the Bank the amount of **865,276,394.20/= as of 14/09/2018**. The bank statement issued by I & M Bank (T) Ltd, in respect of **Ms. ABLA ESTATE DEVELOPERS AGENCY CO. LTD'S** account from 17th December 2017 to 31st August 2018, and the Affidavit of **Mwanahamisi Pazi** were collectively admitted for evidence as **Exhibit D4** respectively. Further the second supplementary of Directors Joint Personal Guarantee and Indemnity by **NASSOR KHALIFA** and **AHMED NASSOR** to I & M Bank (T) Ltd dated 31st December 2017 was admitted for evidence as **Exhibit D5**. Further, the Notice of default issued to **NASSOR KHALIFA GHARIB** duly signed by Lender is Principal Officer (I & M Bank (T) Ltd the Mortgage/Lender dated 20th April 2018 was respectively admitted for evidence as **Exhibit D6**.

It was further testified that, the claim in the Notice of Default is for the Loan advanced in the year **2017**. However, DW1 mentioned the Mortgage of **2003** since the same is a Root Mortgage. The 2017 default narrates all the loan advances to the beneficiary (**ABLA/GHARIB**) hence Plaintiff's claim in the main case against the bank is meritless and baseless.

DW1 finally prayed the bank be allowed to recover the loan through the security that has been offered in respect of the loan i.e. **Plot No. 774 at Msasani Beach** in Dar es Salaam City.

DW2 was **AHMED NASSOR KHALIFA**, affirmed and state that he is a real estate businessman, where his business is registered under the name of **ABLA ESTATE DEVELOPERS' AGENCY & CO. LTD.** When the witness referred as **Exhibit D1**, he confirmed to be a Mortgage between **Mr. NASSOR KHALIFA** and **CF UNION Bank** signed on 21/05/2003 of which does not concern **ABLA ESTATE**.

When the witness was referred to **Exhibit D5**, he recognized the same to be Personal Guarantee of which he signed the document. DW2 further informed the Court that, he signed the said personal Guarantee under pressure or rather duress as I & M bank was to sell his house.

DW3 RIZWAN KARAG affirmed and stated that he is the Operation Manager since 2011 in the ABLA estate. He knows the relationship with I & M Bank as they had a loan with them. They used to repay the loan every month. However, since the business has gone down, they have failed to pay as before. Up to 2017, they were owed about **827,535,476/= Tshs.** by the bank, and they defaulted to pay since the business has fallen.

That marked the end of the both cases.

Having heard the parties' evidence, the following task is to analyse the evidence adduced before the court and make a decision with reasons for each issue framed.

At the outset, I do appreciate the parameters, of the burden of proof established by the **Law of Evidence Act Cap. 6 [R. E. 2002]** which provides: -

110 (1) whoever desires any court to give judgment as to any legal rights or liability dependent on the existence of facts which he asserts must prove those facts exist;

2) When a person is bound to prove the existence of any facts, it is said that the burden of proof lies on that person;

3) The burden of proof in a suit proceeding ties on that person who would fail if no evidence at all were given on either side.

It is trite that, in civil cases, the burden of proof lies on the party who alleges anything in his favour. It follows therefore the party with the legal burden also bears the evidential burden on the balance of probabilities.

Now from the issues framed by Parties and the Court, starting with the first issue is **whether the mortgaged property is a matrimonial home**. In order to determine the issue at hand, I find it imperious to resolve the question of what amounts to matrimonial property.

The definition of matrimonial property was well elaborated in the case of ***BI HAWA MOHAMED VS. ALLY SEIF [1983] TLR 32***, where the Court of Appeal made the following observations:

"In our considered view, the term 'matrimonial assets' means the same thing as what is otherwise described as 'family assets'.... it refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as whole."

In the case of ***BANK OF COMMERCE LTD VS. NURBANO ABDALLAH MULLA, CIVIL APPEAL NO. 283 OF 2017***, the

Court of Appeal defined the term matrimonial property in the following terms:

"On the other hand matrimonial property has similar meaning to what is referred as matrimonial asset and it includes matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage",

From the above-cited cases, the terms matrimonial asset and matrimonial property have the same meaning. The matrimonial home is also one of the matrimonial properties. In order to distinguish between what amounts to private property and what is matrimonial property, the intention of the parties is a primary consideration; that is, whether they intend the property acquired before or during the marriage to be a joint property or not. **Section 58 of the Law of Marriage Act, Cap. 29 [R.E 2019]** is the operating provision as it states that marriage shall not operate to change ownership of the properties privately acquired before marriage unless there is an express agreement between the parties. The case of **MARIAM TUMBO vs. Harold Tumbo [1983] TLR 393** is very elaborate in this aspect. The Court stated:

"It may be possible, however, for spouses to enter into an agreement for the joint ownership of property otherwise separately acquired. Section 58

of the Marriage Act is relevant in this regard. But in the absence of such agreement the fact of the marriage would not operate to change ownership of the property to which either the husband or the wife may be entitled."

For a spouse to claim ownership over a property jointly acquired, there must be proof that the property was acquired during the subsistence of the marriage or the same was acquired by one spouse but developed by the other spouse during marriage. Efforts in the acquisition of matrimonial property are subject to evidence and proof as stated in ***GABRIEL NIMROD KURWIJIIA VS. THERESIA HASSAN MAIONGO, CIVIL APPEAL NO. 102 OF 2018 (UNREPORTED)***, where the Court of Appeal while quoting its previous decision in ***YESSE MRISHO VS. SANIA ABDA, CIVIL APPEAL NO. 147 OF 2016 (UNREPORTED)*** observed:

"There is no doubt that a court, when determining such contribution must also scrutinize the contribution or efforts of each party to the marriage in acquisition of matrimonial assets."

In the case at hand, the proof that the suit property is a matrimonial home comes from the evidence of the Plaintiff that they got married in 1995 and the suit property was jointly purchased in 1997. Also **Exhibit D2** shows that in 2017 when

the second Defendant made another variation, the Plaintiff being a spouse was involved to sign the consent declaration form. That process indicates that the mortgaged property was a matrimonial one. Therefore, this Court finds nothing on the evidence on record to disprove that the suit property is a matrimonial home. In that effect the first issue is answered in affirmative.

The second issue **Whether there was spousal consent in creating a legal mortgage over landed property in CT 43480, LO 113719, Plot No. 774, Msasani Beach Area Dar es Salaam.**

In determining this issue indeed the provision of **Section 114 (1) of the Land Act** as amended by the **Land (Amendment) Act No. 2 of 2002**, which its subsection has not been amended by the Mortgage Financing (Special Provisions) Act provides in clear terms that:

"114(1) A mortgage of a matrimonial home including a customary mortgage of a matrimonial home shall be valid only if

(a) Any document or form used in applying for such a mortgage is signed by or there is evidence from the document that it has been assented by the mortgage and the spouse or spouses of the mortgage living in that matrimonial home;

(b) Any document or form used to grant the mortgage is signed by or there is evidence that it has been assented to by the mortgage and the spouse or spouses living in that matrimonial home."

From the above provision, in 2003 when the 2nd Defendant acquired a loan from the bank, the spouse's consent was not mandatory in the mortgage of a matrimonial home. Section **59(1) of the Law of Marriage Act 1971** provides that: -

*"Where any estate or interest in the matrimonial home is owned by the husband or by 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 the caveat**, caution or otherwise under any law for the time being in force relating to the registration of title of the land or of deeds."*

Reading the above provision of the law between the lines, it is it comes into my mind that the spouse has the duty to protect his or her interests in the registered land by **caveat or caution**. Therefore, the Plaintiff herein was supposed to enter a caveat on the mortgage of the matrimonial home as evidenced by DW1. The above said, pursuant to **Exhibit D1**, and **D2** and the spirit of the provision of **Section 8(2) and (3) of the Mortgage**

Financing (Special Provision) Act 2008 which amended **Section 114 of the Land Act** by creating **subsection 2** and introduce a new provision; that it shall be the responsibility of the mortgagor to disclose that he has a spouse or not and the mortgagee is under responsibility to take reasonable steps to verify whether the Applicant for a mortgage has or does not have a spouse.

However, in this case the spouse's consent was signed on **08/12/2017**. Three wives of the second Defendant namely **MARIAM NASSOR SULEIMAN** (1st Wife), **AZZA MOHAMED MASOUD** (2nd Wife) who is the Plaintiff herein and Defendant to the Counter Claim, and **SALMA NASSOR RASHID** (3rd Wife) all signed the Spouse Consent Form. That being the facts and via the testimony by PW1 and DW1, this court finds that the **second issue is answered in affirmative.**

In dealing with the third issue **whether the 1st party is indebted to the Plaintiff (counterclaim) on account of the credit facility and if an answer is in the affirmative to what tune I have the following.**

It is agreed by DW1 during cross-examination that in 2017 the Spouse Consent Form was testified by their Advocate, for the outstanding balance of the Abba Estate Developers which was **USD 175,468,000**. The 2nd loan which was from AUTO WARD TRADING LTD was **Tshs. 360,645,542/=** of which was taken

over. To the **counterclaim**, DW1 claim **Tshs. 828,000,000/=** of which is against Abla Estate Developers. Those are not for **Azza Mohamed Mohamed** hence it can be concluded that the counterclaim for the credit facility does not owe by the Plaintiff. Therefore, the **third issue attracts the negative response.**

The fourth issue is to **whether there is a structured loan agreement between the first Plaintiffs to the counterclaim.**

It is evidenced that there is no Loan Agreement between the Plaintiffs to the Counterclaim. From the evidence, the Plaintiff is involved in this case as she is objecting the disposal of the mortgaged property. No contract has been entered between the Plaintiff and the first Defendant. The Plaintiff was involved to sign a spouse's consent form only with regard to the loan overdraft in 2017 (exhibit D2). That being the case, **the fourth issue is answered in negative.**

The fifth and last issue as to what reliefs the parties are entitled to. It is trite law that the Plaintiff ought to get such relief as she is entitled to facts established on evidence even if the relief has not been specifically prayed. The contents of this Judgment are sufficient testimony that the Plaintiff has failed to prove her case to the standard required in Civil cases. The content of **Section 59 of the Law of marriage, Cap 29** which

is the base of the Plaintiff's case, has been subject to discussion by this court and the court of Appeal in a number of cases. In all cases, the court keeps on insisting that ***the spouse's interest as provided must be protected by registering a caveat.***

To mention some of the cases are; ***MTUMWA RASHID VS ABDALLAH IDDI & ANOTHER CIVIL APPEAL NO.22 OF 1993***, the case ***OF EVELYNE MAGEMBE CHEYO VS FURAHA FINANCE LTD AND ANOTHER, CIVIL CASE NO. 15 OF 2002 AND HADIJA MNENE V/S ALLY MBAGA CIVIL APPLICATION NO. 40 OF 1995***, the decisions of this court. In ***HADIJA MNENE*** (Supra) this court [Lugakingira, J. (as he then was)] had this to say:-

"A prudent spouse would seek to protect that interest by actually causing a caveat to be registered ... A bare interest in an estate would not operate to prevent its alienation where registered land is involved.

Likewise, this court in the case of ***NATIONAL BANK OF COMMERCE LTD Versus MNAYA CHALAMILA, DC CIVIL APPEAL NO. 7 OF 2008***, (The High Court of Iringa) stated that;

"It is therefore incorrect to think that the mere existence of S. 59 (1) is sufficient to protect an estate from being sold ... or mortgaged".

Turning to the present case, the certificate of title of the mortgaged Plot did not indicate that the Plaintiff was one of the owners, as her name since the property was not registered in her name. Therefore, to protect her interest she was supposed to register a caveat to the Registrar of title which could save as a caution that the property was a matrimonial one. As testified by DW1 that they conducted an official search towards the property to find whether there was any encumbrance but there was none. With that reason it was not an error for the first Defendant to believe that the property belonged to the Second Defendant (husband) only.

Apart from that, it is evidenced that the second Defendant secured the loan in different terms from 2003. The same Plot No. 774 situated at Msasani Beach was surrendered as the security in all variations. The last variation was made in **2017** whereby both the second Defendant's wives signed the consent Declaration Form (Exhibit D2). Unfortunately, the said loan facility to a tune of **Tshs. 865,276,394.20** was not repaid. Since there is evidence from the document that, the Plaintiff assented the last loan with the same security which she claims to be the matrimonial house, this court finds her claim that the Mortgage was illegal due to lack of her consent relying on 2003 loan, is an afterthought. The same was filed as a technique to

deny the first Defendant her right to get the amount landed to the Second Defendant as they agreed.

Being guided by the law and decisions I have referred to and discussed hereinabove, **I find and hold that the Plaintiff case is baseless and, in that event, this court proceeds on to dismiss her case with costs.**

Turning to the counter claim filed by the first Defendant against the Plaintiff, the second Defendant and another third party. For a better analysis of this claim, I find it imperative to reproduce **Order VIII Rule 9(1) and (2) of the Civil Procedure Code Cap 33 R.E 2002.** The said provisions stipulates that;

9.- (1) Where in any suit the defendant alleges that he has any claim or is entitled to any relief or remedy against the plaintiff in respect of a cause of action accruing to the defendant before the presentation of a written statement of his defence the defendant may, in his written statement of defence, state particulars of the claim made or relief or remedy sought by him:

(2) Where a counterclaim is set-up in a written statement of defence, the counterclaim shall be treated as a cross-suit and the written statement shall have the same effect as a plaint in a cross-suit, and

the provisions of Order VII shall apply mutatis mutandis to such written statement as if it were a plaint.

A point to note from the quoted provision of the law above is that, the **Counter Claim is a cross suit**. Also, the law provides that the Counter Claim is filed when the Defendant alleges to have any claim against the Plaintiff. With those facts in my mind, I find that, the first Defendant's Counter Claim in this suit is misplaced.

The reasons for the findings are; going through the loan agreement which is the cause of action in the Counter Claim the Plaintiff was not a party to it.

I am aware that the law allows the third party to be joined in the Counter Claim. However, I'm not read to agree that, the second Defendant can be joined in the Counter Claim. This is due to the clear facts that; the Second Defendant appears in the Pleading as the co-defendant hence no Counter Claim can be filed against the co part as it is clearly provided that Counter Claim is a cross suit.

That said and done, **I find the Counter Claim in this suit is misplaced. Consequently, the same is struck out. Regarding the circumstances of this case, I make no order as to costs in relation to the Counter Claim.**

Order accordingly

Right of Appeal Explained.



L. E. MGONYA

JUDGE

05/05/2023

ORIGINAL