

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND CASE NO. 159 OF 2014

WARDA HASSANI.....PLAINTIFF

VERSUS

NATIONAL BANK OF COMMERCE.....1st DEFENDANT

ALLY MOHAMED MSHARE2ND DEFENDANT

J U D G M E N T

Date of last Order: 1/6/2018

Date of Judgment: 22/6/2018

MGONYA, J.

The Plaintiff **WARDA HASSANI** has instituted this suit against the Defendants seeking for this Court to nullify the mortgage deed executed between the Defendants in respect of **Plot No. 26 Block K. Magomeni Area, Dar es Salaam and Plot No. 18 Kongowe in Kibaha District Coast Region.**

The Plaintiff further stated that she is a lawful wife of the 2nd Defendant, hence her consent was mandatory in the mortgaged

transaction executed by the 1st and 2nd Defendant. Since she is stated that her consent was not sought and granted then the mortgage transaction was null and void.

The Plaintiff further prayed for the judgment and Decree against the Defendants on the following reliefs:-

- i. A declaration that the mortgage transaction between the 1st Defendant and 2nd Defendant is null and void***
- ii. An order of perpetual injunction restraining the 1st Defendant from selling/auctioning Plot No. 26 Block K Magomeni area, Dar es Salaam [CT NO. 58943] and Plot No. 18 Kongowe in Kibaha District Coast Region [CT No. 55158];***
- iii. The 1st Defendant be ordered to return the original Certificate of Title of Plot No. 26 Block K. Magomeni Area, Dar es Salaam [CT NO. 58943] and Plot No. 18 Kongowe in Kibaha District Coast Region [CT NO. 55158] to Plaintiff.***
- iv. Costs***
- v. Any other relief (s) this honourable Court deems fit and just to grant***

The Plaintiff was represented by Mr. Kambo learned Advocate whereas the 1st Defendant enjoyed the legal services of Mr. Nyika learned Advocate and Mr. Khalifa learned Counsel appeared for 2nd Defendant.

And so, after the completion of the Pleadings, the course during final Pre-trial Conference this court framed the following issues for trial:-

- 1. Whether the Plaintiff's consent was required during creation of mortgage over the suit property under Plot No. 26 Block K. Magomeni Area and Plot No. 18 Kongowe Area at Dar es Salaam.***
- 2. Whether the suit properties were legally mortgaged to the 1st Defendant to secure the overdraft facilities;***
- 3. To what reliefs are the parties entitled.***

PW1, **WARDA HASSAN** led by Mr. Kambo testified that the 2nd Defendant is her legal husband pursuant to the marriage contracted on 26th April, 2006. It was a Islamic marriage. The marriage certificate was tendered and admitted as **Exhibit P1**. She successfully registered the marriage as per **Exhibit P2**. Plaintiff further obtained marriage translation from **BAKWATA** and the Government as per **Exhibit P3**.

PW1 testified that during the marriage with the 2nd Defendant, they were blessed to obtain two houses. The first one at Magomeni, where they are living and the other one is at Kibaha Kongowe. She clarified further that the house at Magomeni is **Plot No. 26 K.** while that of Kibaha is **Plot No. 18.**

The witness went on saying that the 2nd Defendant mortgaged the said two Plots without the Plaintiff's consent. PW1 testified that she had no any information that the 2nd Defendant has another wife who consented for the mortgage.

In view of the above testimony, the Plaintiff prayed for the Court to nullify the mortgage, and the Court to issue permanent injunction from selling the said two houses. She further prayed for the Court to return original titles of the houses since Plaintiff has no any place to stay. She prayed also for on order of costs.

On the other hand, the 1st Defendant through DW1 testified that the 2nd Defendant was given a letter by 1st Defendant creating an intention to enter into a contract of the loan facility which was admitted as **Exhibit D1.** The witness successfully tendered the Mortgage Deed of Right of Occupancy of Magomeni and Kibaha properties which were collectively admitted as **Exhibit D2.** The witness proceeded to testify that there was a consent from one

Zainabu Said Wasi as a legal wife of 2nd Defendant as evidenced by **Exhibit D2**.

In closing his evidence in Chief, DW1 maintained that the Plaintiff's prayers have no merits since there was a legal consent from one Zainabu Saidi Wasi a legal wife of 2nd Defendant.

On his part, DW2 one ALLY MOHAMED MSHARE, testified that the Plaintiff is his wife since he has two wives. The witness went on saying that indeed the 1st Defendant executed a loan facilities and he offered two securities i. e houses as collaborated above. DW2 deponed further that since there was a requirement of spouse consent then he sought the said consent through spouse consent forms which was signed by his 2nd wife and submitted to the 1st Defendant. The witness identified one Zainabu Said Wasi who had signed a spouse consent. DW2 went on saying that initially the loan advanced was **165 Million Tshs.** and he has already paid about **250 Million** with interest.

Being cross examined by Mr. Kambo, DW2 confessed that the Plaintiff is his first wife, and that he has married the second wife traditionally and they doesn't know each other. It was admitted that the loan was advanced in 2008 and by that time the 2nd Defendant was living with the Plaintiff at **Magomeni in Block No. 26 House No. 10.**

DW2 admitted further that one Zainabu Said Wasi was living with him at Kinondoni kwa Manyanya. DW2 was of the view that he didn't fault in not involving the Plaintiff to the bank consent since he had two wives and he decided to opt Zainabu for consent.

Being cross examined by Ms. Kivuyo for 1st Defendant, DW2 testified that he married Zainabu Wasi in the year 2007. When he was taking loan, Zainabu was his legal wife; Since the Bank instructed him to get consent from his wife. DW2 proceeded to notify the court that the collaterals are in his name and there is nowhere the Plaintiff has been registered in the said properties in her name.

After conclusion of the hearing of the case, the Court ordered the parties to submit their written final submission. Cheerful the order was complied and honored by both parties since they both successfully filed their written final submission for purpose of assisting Court to determine the matter in controversy.

I have with keen attention sensibly and significantly considered the evidence adduced by both parties, and to a great extent the reasoned final submission of my learned friends, that is counsel for the Plaintiff Mr. Kambo, the 1st Defendant's Counsel, Mr. Nyika and 2nd Defendant's Counsel Mr. Khalifa.

If I may start, I do appreciate the parameters of the burden of proof erected by the law of **Evidence Act Cap. 6** and which provide:-

"110. 1. Whoever desires any Court to give Judgment as to any legal rights or liability defendant 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 fact, it is said that the burden of proof lies on that person;

111. the burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side;

112. the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person;

113. The burden of proving any fact necessary to be proved in order to enable any person to

give evidence of any other fact is on the person who wishes to give such evidence.”

It follows therefore that it is a cherished principle of law that, generally in Civil cases, the burden of proof lies on the party who alleges anything in his favour.

I am familiar indeed that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in cases is on a balance of probabilities. The decisions by the Court of Appeal of Tanzania in which this principle of law has been enunciated are now legendary. See the case of ***ANTHONY M. MASANGA VS. PENINA (MAMA NGESI) AND OTHERS, Civil Appeal No. 118 of 2014 (Unreported)***.

A synopsis by the learned author, **SARKAR ON EVIDENCE, 14TH EDITION 1993 at page 1339** persuasively commenting on Indian provision of the Law similar to ours on the burden of proof partly has the following:-

“.....that the initial onus is always on the Plaintiff and if he discharges that onus and makes out a case which entitled him to relief, the onus shifts on to the Defendant to prove those circumstances, if any which would disentitle the Plaintiff to the same (BASIRUDDIN VS. SAAEBULLA, 32 CW No. 160).”

In the matter under scrutiny since, it is the Plaintiff who is alleging that the mortgage transaction between the 1st and 2nd Defendant is null void for want of Plaintiff's consent, then the burden of proof lies on the Plaintiff. The onus shifts to the Defendants to prove those circumstances if any which would disentitle the Plaintiff to the same.

The question is whether the Plaintiff has successfully discharged her duty to prove the facts she alleges in her favour.

As stated earlier in this Judgment, the first issue reads:-

"whether the Plaintiff's consent was required during creation of mortgage over the suit properties under Plot No. 26 Block K. Magomeni Area and Plot No. 18 Kongowe Area, Kibaha Dar es Saalam."

In resolving the instant issues, I feel it is important to restate portions of the evidence presented to court, portions which are not disputed.

First, the 2nd Defendant entered a mortgage contract with 1st Defendant which Plot No. 26 Block K, Magomeni Area, Dar es Salaam with Certificate of Title No. 58943 and Plot No. 18 Kongowe, Kibaha District Coast Region with Certificate of Title No. 55158 were deposited as security for loan facilities.

Second, the Plaintiff is the lawful wife of the 2nd Defendant.

Third, the requirement of law for disposition of matrimonial property by way of Sale, gift, lease or mortgage needs consent of other spouse.

These averments have not been challenged.

The law is very clear under the provision of **Section 59 (1) of the law of Marriage Act 1971** that spouse cannot alienate matrimonial home by way of sale, gift, lease, mortgage or otherwise without the consent of the other spouse while the marriage subsists.

However, the provision of **Section 112 (3) of the Land Act No. 4 of 1999** provides that a mortgage of a matrimonial home shall be valid only if the document or form used in applying for such mortgage is signed or assented by the borrower and any spouse of the borrower **living in that matrimonial home**.

The said **Land Act, under Section 161 (3)** goes further to provide partly that where a spouse who holds land or a dwelling house for a right occupancy in his or her name alone undertake a right to disposing for that land or dwelling house, then the lender shall be under a duty to make inquiries of the borrower has consented to that mortgage in accordance with the provisions of

Section 59 of the Law of Marriage. And where the aforesaid spouse undertaking disposition deliberately misleads the lender, the assignee or transferee as to answers to the inquires made and disposition shall be voidable at the option of the spouse who have not consented to the disposition.

The above position on the requirement of spouse's consent in disposition of matrimonial property was also reiterated by my learned brother Kalegeya, J. (as he then was) in the case of ***SAMWEL OLUNG'A IGOGO & 2 OTHERS; Commercial Case No. 3 of 2004.*** I quote:-

"What is obvious therefore is that the lender did not conduct inquiries regarding Rukia's and Ruth's consent under Section 161 (3) and this takes us back to Section 112 (3) of the Land Act.

The spouse who has no ownership in the matrimonial home is not rendered destitute by the other spouse who, being the owner of the matrimonial home decides to alienate it. This interpretation accords with the stipulation in subsection (1) that if the matrimonial home is alienated without the consent of the other spouse, then non consenting spouse shall be deemed to have an interest therein capable of being

protected by caveat or caution. For, where the matrimonial home is jointly owned by the spouse, the question of the non-consenting spouse being deemed to have an interest therein does not answer because such spouse actually has an interest in the matrimonial home."

However, **the Mortgage Financing (Special Provision) Act 2008** has amended **Section 114** by repeating subsection **(2)** where the new position is that **it shall be the responsibility of the mortgagor to** disclose that he has a spouse or not and upon such disclosure the mortgage shall be under the responsibility to take reasonable steps to verify whether the Applicant for a mortgage has or does not have a spouse. However a mortgage shall be deemed to have discharged the responsibility for ascertaining in the marital status of the Applicant and any spouse identified by the Applicant. If by an Affidavit or written and witnessed document, the Applicant declares that there were spouse or any other third party holding interest in the mortgaged land.

Indeed the provision of **Section 114 (1) of Land Act as amended by the Land (Amendment) Act No. 2 of 2002,**

which its subsection has not been amended by Mortgage Financing **(Special Provisions)** Act provides in Clear terms that:-

114(1) A mortgage of matrimonial home including 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.

Now, as far as the 1st Issue is concern, the legal burden is on the shoulder of the Plaintiff also to prove the following:-

i. Whether the Plaintiff at the time of creation of mortgage was living in either of the properties mortgaged to the 1st Defendant by 2nd Defendant;

- ii. Whether Plot No.26 Block K, Magomeni Area, Dar es Salaam and Plot No. 18 Kongowe, Kibaha District are matrimonial properties;*
- iii. Whether the Plaintiff contributed by her labour, to the productivity upkeep and improvement to the mortgaged properties before creation of mortgage over a suit property.*

Upon the established evidence on the above issues then the question of Plaintiff consent as depicted in the first issues come into play. I am of the view that in absence of cogent and credible evidence by Plaintiff that she was living in either of Plot No. 26 or 18, or the evidence which shows that Plot No. 26 Block K, Magomeni Area and Plot No. 18 Kongowe Kibaha are matrimonial Properties and the Plaintiff has contributed her labour, to the acquisition, productively or upkeep the same renders the 1st issues answered in **negative to the Plaintiff.**

Being cross examined by Mr. Nyika, the Plaintiff confessed that she was not residing in Kibaha but was residing in House No. 10 Magomeni Area. Such confession proved that on Plaintiff words that she was living neither in Plot No. 26 Block K, Magomeni nor Plot No. 18 Kongowe, Kibaha District.

Apart from such confession by Plaintiff during the trial, the Court has not been furnished with cogent and credible evidence from the Plaintiff which established that Plot No. 26 Block K Magomeni Area and Plot No. 18 Kongowe Kibaha District are matrimonial properties acquired by Plaintiff and 2nd Defendant. In the same vein, there was no any evidence or proof which establish that the Plaintiff was living in either of the properties which were mortgage by 2nd Defendant to the 1st Defendant. The only evidence which the court was furnished was the status that the Plaintiff is a lawful wife of the 2nd Defendant by Islamic Marriage.

Having carefully considered the evidence at hand, I am convinced that since the Plaintiff has not proved to the standard required as to whether the mortgaged properties are matrimonial properties and the same she has not proved that she was living in either of the properties mortgaged then in such circumstances the Plaintiff's consent had no any place during creation of mortgage over the suit property. In addition since it is a duty of mortgager to disclose that he has a spouse and according to DW1 and DW2, there is an evidence that the 2nd Defendant disclosed one **Zainab Said Wasi** as a spouse of 2nd Defendant who consented to the mortgage. I proceed to find the issues is answered negatively on the part of the Plaintiff to the effect that the Plaintiff's consent was not required during creation of mortgage over the suit property

under Plot No. 26 Block K, Magomeni Area and Plot No. 18 Kongowe Area at Dar es Salaam.

On the 2nd issue **whether the suit properties were legally mortgage to the 1st Defendant to secure the overdraft facilities**, this should not steal a bit of my breath since the controversy lies as to who was required to consent over the creation of mortgage between the Plaintiff and one Zainab Said Wassy.

From the evidence adduced by **DW1** through **Exhibit D2** shows that the one who consented over the creation of mortgage was one Zainab Said Wasi as a wife of 2nd Defendant.

The said evidence is supported by testimony of **DW2** who confessed that one Zainab Said Wasi is his wife who consented the creation of Mortgage by 2nd Defendant to the 1st Defendant.

Now since the provision of **Section 8 of the Mortgage Financing (special Provision) Act 2008** which amended **Section 114 of the Land Act** by reating 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.

The 2nd Defendant did disclose to the 1st Defendant that he has a spouse one Zainab Said Wassy who consented the creation of mortgage as spouse consent. DW1 during the hearing testified that 1st Defendant came to the knowledge that the 2nd Defendant has a spouse one Zainabu Said Wassy since they are living together, then he concluded that 1st Defendant did take reasonable steps to verify that 2nd Defendant has a spouse.

The above said, pursuant to **Exhibit D2** and the spirit of the provision of **Section 8 (2) and (3) of the mortgage Financing (Special Provision) Act 2008**, and the testimony by **DW1** and **DW2**, this court find that the **suit properties were legally mortgaged to the 1st Defendant to secure the overdraft facilities.**

Finally but not least, what reliefs are the parties entitled to. It is trite law that the Plaintiff ought to get such relief as she is entitled on 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 miserably failed to prove her case on to the standard required in Civil Litigation.

Consequently, **the suit is hereby dismissed with costs.**

Right of Appeal Explained.



L. E. MGONYA

JUDGE

22/6/2018

COURT: Judgment delivered in the presence of Defendant in person, Advocate Maleta for Plaintiff and Ms. Emmy in my chamber today 22nd June, 2018.



L. E. MGONYA

JUDGE

22/6/2018