

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO 279 OF 2013

CHARLES ISSACK NDOSI.....PLAINTIFF

VERSUS

MARY ADRIANO ZALALILA.....1ST DEFENDANT

WASWARD WILSONI MAPANDE.....2ND DEFENDANT

EFC TANZANIA MFC LIMITED.....3RD DEFENDANT

JUDGMENT

5/4/2018 & 1/6/2018

MZUNA, J.:

Charles Issack Ndos has instituted this suit against **Mary Adriano Zalalila** whom he says is his wife. She is alleged to have guaranteed **Wasward Wilsoni Mapande** to obtain a loan facility of Tshs 35,000,000/- from the **E.F.C Tanzania M.F.C Limited** but there was no payment of the loan within time set. Consequently, the Bank issued a thirty days' notice so as to exercise the power of sale for the mortgaged property, a house. On the other hand **Charles** says the said house being a matrimonial property, was mortgaged without his consent and is therefore not liable for attachment and sale.

He prays among others for the following reliefs:- A declaratory order that the mortgage transactions of the house with residential License No. TMK O41053 situated at Mbagala Kuu, Temeke Municipality is null and void and costs of the suit.

Issues for determination as framed and agreed upon by the parties are:-

1. Whether there was a valid marriage in law between the plaintiff and 1st defendant at the time of the mortgage?
2. If the 1st issue is answered in the affirmative, whether there was spousal consent?
3. What are any other reliefs to which the parties are entitled thereto?

Let me start with the first issue. ***The question is, was there a valid marriage in law between the plaintiff and 1st defendant at the time of the mortgage?***

Testifying as PW1 Charles Issack Ndosi, the only witness said that he is known by two names being Charles Issack Ndosi and Elikana Isack Ndosi. Currently he works as a Mechanics and reside in Zambia.

He further said that he cerebrated a Christian marriage with Marry, the first defendant in 2000 at Mbagala Dar es Salaam in the name of Elikana Isack Ndosi which he said is his second name. That they are blessed with

four issues of the marriage namely Emmanuel, Issaya, Innocent and Irene Ndosu. He admitted to have the marriage certificate but never tendered it for what he says escaped his mind.

She admitted that in the loan agreement she said that she was not married after she was told that in saying so, the money for the loan could easily be obtained. Further that the loan agreement was written in English, a language which she was not versed in.

At one time he came back to Tanzania and saw a notice issued by the 3rd defendant on 3rd September, 2013 to the 1st defendant requiring him and his family (including the second defendant) to vacate from the house in dispute.

The defence by DW1 Mary Adriano Zalalila she is the legal wife of the plaintiff. They celebrated a Christian Marriage though she did not tender a marriage certificate in court. According to her their plot is divided in two divisions, one for her husband (the one with the house in dispute) and another one which is empty is hers. She admitted to have mortgaged the house so as to get some money for treatment. The loan was secured in favour of the 2nd defendant Mr. Waswada.

He confirmed that she is married to the plaintiff though he stays at Ifakara while she resides at Dar es Salaam to enable children attend their school.

On the other hand DW2 Wasward Wilson Mapande, his testimony was that, he approached the 3rd defendant that he needs a loan but he did not have security. So, the 3rd defendant's officers assured him that they will help him to get a title deed to secure a loan. It is during this time when the 1st defendant guaranteed him to secured a loan of Tshs. 35,000,000/-. With the assistance of the Bank officers they went to Mbagala where they met the 1st defendant alone with her children. That during time for signing the 1st defendant told them that she was married and has a husband. However during the time of signing documents she stated different from what she said in order to speed up time for receiving some money.

On their part, the third defendant through Douglas Invocavit Mmari, a lawyer with EFC Tanzania Micro Finance Bank Ltd. He said that in 2012, the second defendant obtained a Bank loan of Tshs 35,000,000/- and the security was a Residential Licence in the name of the Guarantor, Marry Adriano Zalalila (2nd defendant). She being a guarantor said that it was her personal property not a matrimonial property and therefore no spousal

consent was required. In support thereof, she swore and affidavit with her signature and photo. The same was admitted as exhibit D1. DW1 confirmed that at the time of mortgage it was not a matrimonial property. Therefore, there was no need for the consent and approval of her husband.

There was also the evidence of DW4 Salehe Mohamed Mgumba the Street Chairman at Kibonde Maji, where the plaintiff and 2nd defendant resides. He said that they are married couples since 1992 when he first knew them. That the disputed House No. 26/300 belongs to the plaintiff while the 2nd defendant's plot is No. 26/301 which has a foundation only.

Now, based on the above evidence, has the plaintiff proved that there was valid marriage between him and the 1st defendant?

Mr. Mwita, the learned counsel for the plaintiff has submitted that there was presumption of marriage as provided for under section 160 (1) of the Law of Marriage Act, Cap 29 RE 202.

Mr. Fiandomo, the learned counsel has insisted that there is no proof of such marriage by tendering a marriage certificate. Further even the plaintiff said that he is not living together with the 1st defendant. That there was no valid marriage at the time of mortgage.

The plaintiff has relied on the presumption of marriage as provided for under section 160 (1) of the Law of Marriage Act, Cap 29 RE 202. In other words, marriage certificate is not prima facie the only proof that there existed marriage. That fact is indeed a position of the law. There are some issues which however raises some doubts if the plaintiff and the defendant are married couples. I say so because, although PW1 said cerebrated a Christian marriage with the plaintiff, he failed to mention the name of his best man during the wedding.

Similarly, he failed to mention even the age of their first born. These are simple question which no father could have failed to answer. As if that was not enough, he was not sure for the House Number where they reside.

The plaintiff's evidence must be weighed independent of the defence case. The evidence by the plaintiff that he has **two** names, that of Elikana and Charles Isack Ndosu was deliberately made to hoodwink the court. In any case, the issue of validity of the marriage was not an issue but whether the mortgaged property was a matrimonial property.

Even assuming he was such for argument sake, still **the second issue** which is on whether there was a spousal consent would also fail for the following reasons:-

First, the allegation by Mr. Mwita, the learned counsel for the plaintiff that the mortgage was void as the 3rd defendant never exercised due diligence for failure to seek and obtain spousal consent is with due respect with reservations.

His submission presupposes that every loan agreement for a mortgaged property, there must be spousal consent. However, to my considered view, this is not the correct approach. It is only where the property is a matrimonial property. I am fortified to this view by the interpretation of Section 114 (1) of the Land Act, Cap 113 RE 2002 which was cited by Mr. Fiandomo, the learned counsel for the 3rd defendant. He has submitted, I think rightly so, that the property never needed a consent as it never formed part of the matrimonial properties.

This finding is also given support by the evidence of the DW3 and Exhibit D1 (affidavit of Marry Adriano Zalalila). DW3 for instance said that

she was allowed to seek independent legal advice prior to executing the affidavit (exhibit P1). In the said affidavit, she said at paragraph 4 that:-

"4. I hereby confirm that no spousal consent is required as the property does not constitute matrimonial property."

The above words, direct and specific as they are, cannot be ignored by mere words from the plaintiff. I hold and find that the mortgage property which was used to secure loan in favour of the second defendant was the property of the first defendant. That is even given support because it is written in her personal name. The allegation that she signed without knowing the contents simply because she does not understand English is an afterthought.

Similarly, the allegation that she was advised to say she is not married so that the loan will be given immediately without delay cannot nullify what she did because she has a capacity to enter into a contract in view of what is stated under section 10 of the Law of Contract Act, Cap 345 RE 2002.

Second, the law on mortgage as it stands has reached its advanced stage from infancy. The Mortgagee is mandated only to obtain spousal consent where the borrower declares that there is another person be a spouse or third party holding interest in the property. That can be deduced

from the affidavit. That is clearly stated under Section 114 (2) of the Land Act Cap 113 RE 2002 which was amended by **the Mortgage Financing (Special Provisions) Act, 2008**. It repealed subsection (2) and substituting for it the following new provisions:

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

(3) A mortgagee shall be deemed to have discharged the responsibility for ascertaining 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."

(Emphasis mine).

The tendered affidavit (exhibit D1) sworn by the first defendant serves that purpose. Mr. Mwita, the learned counsel relied on section 114 (1) of the said Act, which had the proviso as above shown. The third defendant therefore

exercised due diligence that is why the said affidavit was sworn. The defence by the first defendant therefore lacks merit.

The 2nd defendant is a beneficiary and everything he said was so said to favour the first defendant. He admitted to have received the loan money and paid her Tshs 1,000,000/- out of good will otherwise it was planned that she gets 10,000,000/- which was however taken by some Bank officers through fraudulent means. They are the ones who made all the processes which made it possible for the 1st defendant to guarantee the 2nd defendant to acquire a loan facility.

I can not as well buy the 1st defendant's story that the property in dispute is a bare plot and not a house as alleged. Evidence was adduced that they visited the suit plot. It is the same property liable for sale because it is in the 1st defendant's name and that it is not a matrimonial property.

In civil cases under Section 111 of Evidence Act, Cap 6 RE 2002, the burden of proof lies on the plaintiff. He was expected to prove his case albeit on the balance of probabilities.

The plaintiff has failed to establish on the adduced evidence that the property liable for sale is the matrimonial property. There is no proof as

alleged by the plaintiff that though the residential license reads Mary Adrian O. Zalalila however it belongs to the family and not to Mary alone.

If the plaintiff was smart enough, he should have lodged a caveat right from when the first loan advance to one Mr. Isack Nambali never materialized leading to the present loan advance to the second defendant. DW1 said she became seriously sick and was transferred to Iringa where she stayed for four months. When she came back she was told that the first person she guaranteed failed to honour the loan, so she was told to secure another loan in favour of Mr. Waswada Mapande. She further said there was communication break down with the plaintiff.

Lastly, on the reliefs. From what I have demonstrated above, I find and hold that the plaintiff has totally failed to prove his case. I proceed to dismiss the suit with costs.



M. G. MZUNA,
JUDGE. 8/11/2018