

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
LAND DIVISION  
AT DAR ES SALAAM**

**LAND CASE NO. 161 OF 2016**

**IDDI ALLY MSUMAGILO, suing as  
administrator of the Estate of the  
Late LYDIA ELISALI MUSHI**

**@ LYIDIYA MUSHI, deceased..... PALINTIFF**

**VERSUS**

**TIB DEVELOPMENT BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**EQUITY BANK (TANZANIA) LIMITED.....2<sup>ND</sup> DEFENDANT**

**NORBERTY DONATUS KAYUGWA.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

**Date of last order:**

**Date of judgment: 09/10/2020**

**F. K. MANYANDA, J.**

**1. Introduction**

In this case, the Plaintiff **Iddi Ally Msumagilo**, as administrator of the Estate of the **Late Lydia Elisali Mushi @ Lyidiya Mushi**, deceased, is suing the Defendants jointly and severally for declaration that the mortgage of property situated at Plot No. 368 Block 'D' Kigogo Area, Kinondoni Municipality, Dar es Salaam an area currently known as Mabibo

Farasi or Mabibo Jeshini, registered under Title No. 26596 in favour of Equity Bank (Tanzania) Limited, hereafter referred to as "**the suit property**" is null and void, payment of general damages, interests and costs.

## **2. Background**

The brief facts averred in the plaint are that **Lydia Elisali Mushi @ Lyidiya Mushi** who passed to her next external life intestate on 10<sup>th</sup> January, 2016, was granted a right of occupancy over the suit property and was subsequently issued with a Certificate of Occupancy for a period of 33 years with effect from 01/07/1981. She applied for a loan from the now defunct Tanzania Housing Bank hereafter "**the THB**" for purposes of erecting a house; she was granted with a loan by mortgaging the Title Deed in respect of the suit property which was received by the THB on 22/12/1981. In September, 2014 the Plaintiff noted that the suit property was used as a security in respect of a loan facility of TShs. 80,000,000/= by the 2<sup>nd</sup> Defendant to the 3<sup>rd</sup> Defendant, hence filed this suit.

The 1<sup>st</sup> Defendant contend that she never possessed the Plaintiff's Title as the same was not among the customers handed over from the THB liquidators. The 2<sup>nd</sup> Defendant contend that the documents concerning application for the loan to the 2<sup>nd</sup> Defendant by the 3<sup>rd</sup> Defendant were genuine, that the Plaintiff is not a lawful owner of the suit property and that **Lydia Elisali Mushi** and **Lyidiya Mushi** are two different persons, hence the suit property was rightly mortgaged for securing the loan by the 3<sup>rd</sup> Defendant from the 2<sup>nd</sup> Defendant under the guarantee of **Lyidiya**

**Mushi.** The 3<sup>rd</sup> Defendant contend that there was a different **Lydiya Mushi** other than that of the Plaintiff.

### **3. Issues**

This Court framed four issues which were agreed by the parties as follows:

- i. Whether the Plaintiff is the owner of the suit property;
- ii. Whether the mortgage of the suit property to the 1<sup>st</sup> Defendant is valid;
- iii. Whether the Plaintiff has suffered any damage; and
- iv. To what reliefs the parties are entitled to.

### **4. Representation**

At the hearing of this case the Plaintiff was represented by Mr. Denis Michael Msafiri, learned Advocate; the 1<sup>st</sup> Defendant enjoyed representation services of Ms. Tausi Swedi, learned Advocate; the 2<sup>nd</sup> Defendant was represented by Mr. Karoli Valerian Tarimo, learned Advocate; and the 3<sup>rd</sup> Defendant was represented by Mr. Armando Swenya, learned Advocate.

### **5. Summary of the Plaintiff's Evidence.**

To prove their case, the Plaintiff called two (2) witnesses namely, **Iddi Ally Masumagilo** who testified as **PW1** and **Brasto Peter Mushi** testified as **PW2**.

The Defence summoned a total of four (4) witnesses to defend against the suit namely, **Mwajuma Maafary Milanzi** who testified as DW1,

**Norbert Donatus Kayugwa** who testified as DW2; **Charles Shauri Massawe** who testified as DW3; and **Godfrey Mapunda** who testified as DW4.

The Counsel for the Plaintiff and the 2<sup>nd</sup> Defendant made closing submissions which have been of great assistance to the Court.

PW1 testimony is to the effect that he married **Late Lydia Elisali Mushi @ Lydia Mushi @ Lydiya Mushi** since 1986 under Islamic rites who passed to her next eternal life on 10<sup>th</sup> January, 2016 intestate. He produced in Court the Letter of Administration of her estate and her Death Certificate as Exhibits **P1** and **P2** respectively. That during her life time she owned the suit property after been granted a right of occupancy over the same vide a letter of offer dated 16/07/1981 which was admitted as **Exhibit P3**. She accepted the same and dully paid for land rent fees per **Exhibit P4**.

Exhibit P3, a letter of offer, was issued to her using her name **Lydiya Mushi**. In Exhibit P4 collectively, the land rent payments notification letter and Receipts No. 571442 dated 16/07/1981 and No. 303064 dated 17/07/1981 her name was written as **Lydiya Mushi**. These documents referred to the same Plot No. 368 Block 'D' Kigogo Area, Dar es Salaam, which is the suit property. Exhibits P3 and P4 Collectively used one address of P. O. Box 4318, Dar es Salaam which was her address. A letter acknowledging payment of land rent from *Ofisi ya Mkuu wa Wilaya* dated

22/07/1981 was copied to her abbreviating her name as L. Mush of P. O. Box 4318, Dar es Salaam.

It was PW1 testimony that his wife was granted with a long term right of occupancy and paid the requisite **land rent and property tax** in respect of the suit property per **Exhibit P10 Collectively**. Further, she applied for and got supplied with public utilities namely water and electricity supply from NUWA and TANESCO respectively to which she paid the requisite fees. He produced in Court application form for supply of water and electricity and payments receipts as **Exhibit P11 Collectively**.

PW1 further testified that his wife also applied for the **Building Permit Exhibit P5** and erected a building at the suit property after obtaining a loan from THB in which she lived until her life on this world came to an end, it is a house the Plaintiff now is in occupancy to date. Before his wife passed away she informed him that the Certificate of Title of the suit property was handed to the THB as a security for the loan and handed to him a letter from the THB acknowledging receipt of the said Certificate of title the same was admitted as **Exhibit P6**. That his wife satisfied repayment of the loan and was issued with a letter acknowledging the same dated 17/07/2014 which was admitted as **Exhibit P7**. He also produced in Court a demand letter by **Lydia Elisali Mushi** to the THB demanding to be handed back her Certificate of Title No. 26596 after satisfying the loan as **Exhibit P9**.

PW1 further testified that he and his wife after learning that the suit property was mortgaged to the 2<sup>nd</sup> Defendant, the Equity Bank (Tanzania) Limited to secure a loan to the 3<sup>rd</sup> Defendant, **Norbert Donatus Kayugwa**, conducted a search in respect of the suit property and got a positive answer that the same was mortgaged as such. The search report was admitted as **Exhibit P8**. PW1 also produced in Court a loss report in respect of the National Identity Authority (NIDA), Voter's Registration Card both Cards bearing the name of **Lydia Elisali Mushi** both were admitted as **Exhibit P12** collectively. Further, he produced in Court a Mortgage Deed with Land Form No. 40 and affidavit to create a mortgage attached to it in respect of the suit property as **Exhibit P13 Collectively**.

PW1 testimony was supported by **PW2, Brasto Peter Mushi**, the brother of PW1 wife who testified that his sister **Late Lydia Elisali Mushi @ Lyidiya Mushi** was allocated with the suit property on which she erected a house which he partly occupies and partly was occupied by tenants who paid rental fees to her.

## **6. Summary of the Defendants' Evidence.**

The defence evidence was led by **DW1 Mwajuma Maafary Milanzi**, a Senior Officer Managed Fund at the TIB Development Bank Limited which is a liquidator of the THB. She issued the **Exhibit P7**, a letter of satisfaction to verify that the loan was full repaid, the borrower was **Lydia Mushi**. TIB Development Bank Limited did not return the Title Deed to Lydia Mushi because the same was not received from the co-liquidator

**Simon S. Matafa**, hence reported to police about the loss of Lydia Mushi's Title Deed because it was a duty of TIB Development Bank Limited to return the Title Deed to Lydia Mushi, the process of re-issuance of the Title Deed was stopped due to this case.

On cross examination she testified that Lydia Mushi demanded for her Title Deed after satisfying the loan. After been referred to Exhibit P8 she stated that according to the encumbrances clause in the search report, the Title Deed of **Lydiya Mushi** was already passed to Equity Bank (Tanzania) Limited by 13/09/2012 and there was no evidence of loan purchase from TIB Development Bank Limited by Equity Bank (Tanzania) Limited.

DW2 was **Norbert Donatus Kayugwa** he used a Title Deed of Lydiya Mushi to borrow money from the Equity Bank (Tanzania) Limited. He managed to borrow from that Bank after been connected to an officer of the Equity Bank (Tanzania) Limited namely **Mwinyi** by a broker at Kariakoo namely **Koba** who used to find guarantors in the streets in 2013. The Equity Bank (Tanzania) Limited being new in Tanzania and under promotion had adopted the use of brokers as its agents. Koba and Mwinyi evaluated the house at TShs. 71,000,000/= and forced sale value of TShs. 53,000,000/= and he added his three motor vehicles to secure the loan he wanted of TShs. 80,000,000/=. He repaid the loan and added an overdraft of TShs. 150,000,000/= after mortgaging another house belonging to Paulina Stanislaus Chagoha which was sold after his failure to service the overdraft loan. He was jointly with the Equity Bank (Tanzania) Limited sued by **Lydiya Mushi** and **Paulina Stanislaus Chagoha** in Land Case No.

150 of 2014 compelling him to pay the loan in order to prevent selling of the mortgaged properties which he failed. The case which ended up been dismissed for want of prosecution after the Plaintiffs abandoning the same. He knew **Lydiya Mushi** not **Lydia Elisali Mushi**.

On cross examination by the Counsel for the 1<sup>st</sup> Defendant upon been shown Exhibit P12 (the photographs of NIDA and Voters' Identification Cards) stated that the age of **Lydiya Mushi** he knew is younger been about 40 years old than the **Lydia Elisali Mushi** on the exhibits. Equally when he was referred to Exhibit P6, a letter addressed to **Lydia Mushi** in respect of Plot No. 368 Block 'D' Kigogo Title Deed No. 26596 dated 22/12/1981, conceded that in the circumstances, that letter could not have been addressed to **Lydia Mushi** he knew because likely she was born between 1979 and 1980. He stated further that after completing the loan of TShs. 80,000,000/= and been discharged, the Title Deed remained with the Equity Bank (Tanzania) Limited for reasons he did not know.

He stated further that Exhibit P13, the Mortgage Deed was executed on 10/09/2012, the Exhibit P8, the Search Report, shows the Mortgage Deed was registered on 13/09/2012 while the loan was disbursed in May, 2012.

When he was cross examined by the Counsel for the Plaintiff, he stated that the market value of the suit property been TShs. 71,000,000/= and the 10% commission he paid Lydiya Mushi been TShs. 8,000,000/=, then in the circumstances, it means Lydiya Mushi risked a value of TShs. 63,000,000/= by allowing her house to be mortgaged to him without any

other security. Further he stated that neither the said Lydia Mushi nor her father, the Mzee Mushi, followed him to complain about the withheld Title Deed. After completing loan repayment was not issued with any satisfaction letter by Equity Bank (Tanzania) Limited to witness completion of loan repayment nor asked for the same.

**DW3, Charles Shauri Massawe**, a recovery Manager of Equity Bank (Tanzania) Limited testified that DW2 obtained a loan facility from their Bank after complying with the credit facility procedures including deposition of security. It was Lydiya Mushi who deposited the Title Deed of a house at Plot No. 368 Block 'D' Kigogo Area to guarantee him. He recognized the documents in **Exhibit P13 Collectively** comprising of a Mortgage Deed, Mortgage Guarantee Affidavit and the Mortgage of a Right of Occupancy (Land Form No. 40), that they were prepared by Trustworthy Attorneys who were deployed by the Bank as external lawyers per practice and procedures of the Bank in securing loans. The same were signed by **Lydiya Mushi** before **Godfrey Mapunda**, Advocate, of Trustworthy Attorneys on 10/09/2012. That the Bank issued a Default Notice to DW2 and his guarantors namely **Lydiya Mushi** and **Paulina Stanislaus**. The guarantors rushed to this Court where they filed a Complaint and application for injunction to protect the mortgaged properties from been attached and sold. Both cases were dismissed for want of prosecution and the suit property ordered to be sold for recovery of TShs. 146,126,434.35 of which implementation is pending determination of this case.

He visited the suit property with PW1 and his wife and found a big difference between the evaluated property which had many shop frames and the suit property which no shop frames. He estimated the suit property value to be TShs. 40,000,000/= and reported his findings to the Bank Lawyer who did not act until he left the Bank's employment.

In re- examination in chief DW3 stated that he did not have any gadget or expert witness for proof of location of the house he was shown by PW1 whether it was the same as Plot No. 368 Block 'D'.

The last witness was **DW4** one **Godfrey Mapunda**, prepared Exhibit P13 the Mortgage Deed basing on Exhibit D2 Tentatively been the Title Deed of **Lydiya Mushi** after been instructed by Equity Bank (Tanzania) Limited. The Title Deed (Exhibit D2 Tentatively) was of a third party mortgage; meaning that the borrowing person is different from its owner. It is not indicative whether it was ever been used for any other mortgage, it bears no any encumbrance meaning that it was used for the first time by the Equity Bank (Tanzania) Limited.

On requirements for registration of the Mortgage Deed, PW4 said that there are three requirements namely, absence of any caveat, presence of undischarged mortgage and matching of the names and signatures on the Title Deed and the prepared Mortgage Deed.

Being the attesting officer in Mortgage Deed (Exhibit P13 Collectively) neither stated whether he personally knew the deponent nor that she was introduced to him. He completed his testimony by stating that he believed

on the documents submitted by the Bank because the Bank is a trusted institution.

## **7. Legal Issues on admissibility of documents in Evidence.**

That was the evidence of both sides, it is now my turn to analyse the evidence and the applicable laws. However, before I embark on analyzing the same let me dispose one legal issue. During the hearing of the case I ordered some documents to be admitted tentatively pending admission in evidence following objections raised by the Counsel.

When DWI Mwajuma Maafary Milanzi was testifying sought to tender as exhibit a letter she wrote to police reporting loss of Certificate of Occupancy Title No. 26596 in respect of property located at Plot No. 368 Block 'D' Kigogo Area in Dar es Salaam. Objection was raised by the Counsel for 2<sup>nd</sup> and 3<sup>rd</sup> Defendants which was in three folds namely:

- i. Failure of inclusion of the document in the pleadings or issuance of a notice pursuant to the provisions of Order XIII Rule 1 of the Civil Procedure Code, [Cap 33 R. E. 2019] without sufficient explanations;
- ii. The document did not qualify to be admitted under the general rule provided in Section 51(1) of the Land Disputes Courts Act, [Cap. 216 R. E 2019] that it is worth of belief because it has no any indication that it was from the THB, it has no heading, no water mark or official stamp or seal; and

- iii. Since a copy of the lost Certificate or a Mortgage Deed which were with the 1<sup>st</sup> Defendant were not attached, the document was likely to prejudice their clients.

I directed the documents to be admitted as Tentative Exhibit P1 subject to consideration of the objection when composing the judgement in order to save time for the trial and afford time to the parties to use it in their cross examinations. The parties were accorded with time and utilized the same by going through the one paged document and managed to cross examine the tendering witness about it. More elaboration was given by the witness in her examination in chief and cross examinations.

The clear elaboration was that the document was prepared and signed by herself and that the documents from TIB Development Bank Limited were not headed nor water marked just as Exhibit D1 Tentatively. Other similar documents namely, Exhibits P6 and P7 which were already admitted also had no such features. Moreover, Exhibits D1 is original document. She elaborated that every institution has its own procedure of identifying and keeping records, therefore the objection that Exhibit D1 was not admissible because it was neither headed nor water marked is unfounded.

I believed in her testimony, in fact Exhibit P6 is a letter from THB to Lydia Mushi acknowledging receipt of the Certificate of Occupancy as a security for a loan and Exhibit P7, a letter of satisfaction of repayment of the loan written by the THB to Lydia Mushi are neither headed nor stamped or water marked, but the same were not objected by the learned

Counsel. I think they objected admission of this document because it was not attached to the Plaintiff.

As explained in my ruling, the principle for attaching documents to the pleadings is to prevent surprises to the parties. In this matter the parties got time to go through the one paged document and after satisfying themselves cross examined on it. As stated above I believed the document and the same was being tendered by its author whom the parties cross examined. The parties were not prejudiced in any way. On these premises, it is my firm views that the letter written by DW1 to police reporting loss of Certificate of Occupancy Title No. 26596 is worth of belief and for interest of justice and in upholding the overriding objective in the administration of justice I invoke my discretionary powers and hold that it is admissible in evidence under section 51(1) of the Land Disputes Courts Act, [Cap. 216 R. E. 2019]. The objection is hereby overruled, Exhibit D1 Tentatively hereby remains a full exhibit and forms part of the record in this case. In order to avoid reference confusion, it will be referred to as such.

Also when PW3 was testifying sought to tender as exhibit the Certificate of Occupancy, Title No. 26596 in respect of Plot No. 368 Block 'D' Kigogo Area. An objection was raised by the Counsel for the Plaintiff on ground that the tendering of the intended documentary exhibit was not in compliance of Sections 83 and 85 alternatively Section 67(1)(e) and (4) of the Evidence Act, [Cap. 6 R. E. 2019]. It was argued that since the document was alleged to have been admitted in evidence in another case before this Court, Land Case No. 150 of 2014, then it would be proper to

have the whole proceedings of that case tendered so that the Court could satisfy itself that it was indeed admitted as such.

Just as for Exhibit D1 Tentatively, I directed this document to be admitted also as Exhibit P2 Tentatively pending consideration of the objection when composing the judgment for the same reasons of saving the time of the Court and at the same time affording opportunity for the parties to go through and cross examine on the same. In the course of hearing of the case the judgment and the decree of this Court in Land case No. 150 of 2014 were tendered by DW3 un-objected and marked as Exhibit D3. It is apparent from pages 5, 7 and 8 of the said judgment that through exhibit P4 the Certificate found its way in this Court archives. I found that the copy of the Certificate is worth of belief and its admission does not prejudice the parties who also extensively cross examined DW3 on the same. I overrule the objection, the exhibit forms part of the record and shall be referred as such in order to avoid reference confusion.

The procedure of admitting documents as tentative exhibits is not my invention. My Brother Hon. Maige, J. was encountered with a similar situation in the case of **M/S East West (1991) Investment Co. Ltd vs. Karpresh Sagar and 5 Others**, Land Case No. 54 of 2015 (unreported) at pages 8 and 9 he said:

*"I was inspired by the decision of the Supreme Court of India in **Bipin Shatilal vs. State Of Gujarat And Another**, 2002 (1) LW (Cr.) 115, which was quoted with approval in my decision in **Republic vs. Shule s/o Tanzania and Another**, Criminal Sessions case No. 212*

*of 2013, High Court, Mwanza Registry. In the said decision, the Supreme Court of India facing a similar issue, took the view that, for the purpose of accelerating trials admission of a document with a note that its admissibility shall be considered in the final judgement is the best approach. In their own words, their Lordships, Justices of the Supreme Court of India had the following to say:-*

*'Whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the judge or magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the court has to decide the objection before proceeding further). For all other objection the procedure suggested above can be followed. The above procedure, if followed will have two advantages. First is that the time in the trial court, during evidence taking, would not be wasted on account of raising such objections and the court can continue to examine the witness. Second is that the superior court, when the same objection is re-canvassed and re-considered in appeal or revision against the final judgment of the trial court, can determine the correctness of the*

*view taken by the trial court regarding the objection, without bothering to remit the case to the trial court again for fresh disposal. We may also point out that the measure would not cause any prejudice to the parties to the litigation and would not add to their misery or expenses.'*

*In **Shule Tanzania's case (supra)** I stated how the above principle apply in Tanzania in the following words:-*

*'In my opinion therefore, where an objection to admissibility of evidence other than on insufficiency of stamp duty on instrument is raised the trial court may, in appropriate cases, make a note of such objection and mark the objected document tentatively as an exhibit subject to such objections being considered in the final judgment. I should perhaps make it very clear that, the procedure should not be applied if the tentative admission of evidence would lead to failure of justice. Every case has to be decided according to its own merit.'*

Just as my Brother Hon. Maige, J. in **M/S East West's case (supra)**, I am also inspired by this principle of law which in my opinion is good law because it refers to the existing practice of determining each and every objection as to admissibility of evidence whenever it is so raised where it can be, in some instances, an obstacle towards steady and swift disposal of proceedings.

## 8. Standard of Proof in Civil Cases.

Having done with the legal issue let me now turn back to the case. It is a cardinal principle in law that he who alleges must prove and in civil cases standard of proof is that of balance of probabilities. The principle is enshrined under Sections 110 and 111 of the Evidence Act, [Cap. 6 R. E. 2019].

Section 110 of the Evidence Act, reads:

*"110(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that 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."*

And Section 111 of the same law reads:

*"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."*

The principle is illustrated in the **Sarkar Law of Evidence**, Malaysia Edition, by SC Sarkar, published by Lexis Nexis, at page 2355 thus:

*"(b) 'A' desires a court to give judgment that he is entitled to certain land in possession of 'B' by reason of facts which he asserts and 'B' denies to be true, 'A' must prove the existence of those facts."*

The burden of proving the facts always lies upon the person who asserts. The principle is based on an ancient rule that *incumbit probation qui dicit non qui negat*, which means the burden of proving facts rests on

the party who substantially asserts the affirmation of the issue and not upon the party who desires it; for a negative is usually incapable of proof.

## **9. First Issue**

I will start with the first issue, that is, whether the Plaintiff is the owner of the suit property. However in order to answer this question, it is very important to resolve the controversy of names of the Plaintiff's wife Late **Lydia Elisali Mushi @ Lydiya Mushi**.

In his submissions Mr. Msafiri for the Plaintiff contend that there is cogent evidence that the names of **Lydia Elisali Mushi @ Lydiya Mushi** in various documents was being variably referred to as **L. Mushi**, **Lydiya Elisali Mushi**, all refer to the same person who is the deceased wife.

I have gone through the evidence I agree with the Plaintiff that the deceased wife of PW1 variably used all the names referred in the documents. This fact is corroborated by the testimony of DW1 and DW3 as I shall demonstrate below.

The Plaintiff Iddi Ally Masumagilo testified that in Exhibit P6 a letter dated 22/12/1981, the THB admitted receipt of the Certificate No. 26596, which was addressed to his wife in the name of **Lydia Mushi**. Exhibit P7 is a letter of satisfaction dated 17/07/2014 it was addressed to his wife in the name of **Lydia Mushi**. Exhibit P8, Search Report dated 14/11/2014, which was conducted in the name of **Lydia Elisali Mushi** which revealed

the ex-owner after expiry of the lease term of 33 years as **Lydiya Mushi**. When requesting for search his wife used a name of **Lyidia Elisali Mushi**. Exhibit P9, a demand letter dated 24/11/2014 written by his wife to the TIB Development Bank Limited using the name of **Lyidia Elisali Mushi** and in Exhibit D1 Tentatively, a letter by TIB Bank requesting for a loss report from Police dated 20/03/2015 reported to Police that a Certificate in the name of **Lydia Mushi** was lost.

When acquiring the Plot, PW1's wife was allocated with the same through Exhibit P3 on 16/07/1981 in the name of **Lydiya Mushi** after accepting and making the required payments Exhibit P4, a notification letter by the *Ofisi ya Mkuu wa Wilaya* to the *Mkurugenzi wa Huduma na Makazi* dated 22/07/1981 used a name of **Lydiya Mushi** and the same was copied to her referring her name as **L. Mushi**, but the receipts in Exhibit P4 collectively, the land rent payments notification letter and Receipts No. 571442 dated 16/07/1981 and No. 303064 dated 17/07/1981 were written her name as **Lydya Mushi**. DW3 testimony also is to the effect that he met PW1 with his wife who introduced to him as **Lydia Elisali Mushi**.

On Exhibit P11 Collectively, the NUWA Water Bill and Payment Receipt dated 28/02/1991 show the payment was received from **Lydia E. Mushi**. The TANESCO power supply application namely, *Maombi ya Awali ya Kupatiwa Umeme* dated 07/09/1989 show the name of the applicant as **Lydia E. Mushi**, the Service line particulars in respect of Plot No. 368, Mabibo Jeshini reads **Lidia Mushi** of P. O. Box 16340, Dar es Salaam. The

meter reading for June to August, 1997 billing reads her name as **Lydia Mushi**.

In his own words PW1 stated in re-examination in chief on how the names were interchangeably used in Exhibits P3, P4 and P6 as follows:

*"Exhibit P4 is a payment receipt the name Lydia is spelt Lydya Mushi, it was issued on 15/07/1981, and the demand letter is spelt Lydiya Mushi. Both of these documents concern Plot No. 368 Block 'D' Kigogo Area, Dar es Salaam. The claim mention Kiwanja Na. 368, Kitalu 'D' Kigogo, Dar es Salaam. Exhibit P3 concern Plot No. 368 Block 'D' Kigogo Area, Dar es Salaam. It is addressed to Lydya Mushi. Exhibit P6 concern a letter from THB to Lydia Mushi on Plot No. 368 Block 'D' Kigogo Area, Dar es Salaam. In all these exhibits the number of the Plot resembles."*

He is supported by **DW1 Mwajuma Maafary Milanzi** whose evidence as to the names of the plaintiff's wife is that she borrowed money from the THB, which she repaid but the Certificate of Occupancy was not returned and she used both names **Lyidiya Mushi** when borrowing and **Lydia Elisali Mushi** when demanding for her Certificate of Occupancy which were recognized by the TIB Development Bank Limited. DW1 evidence is not contradicted by either the Plaintiff or the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. It remains a truth. On cross examination by the Counsel of the 2<sup>nd</sup> Defendant DW1 stated that:

*The Title Deed was deposited by **Lydia Mushi**; she had no any middle name.*

DW3 also corroborates the Plaintiff by stating that at different occasions he saw physically the plaintiff's wife whom he knew in her both names of **Lydiya Mushi** and **Lydiya Elisali Mushi**.

I have no flicker of doubt with the evidence of DW1 and DW3 being bank officers with renown and experience as bankers, their evidence was nothing but truth. Therefore, it is my strong conviction that the Plaintiff's wife used the names **Lydia Elisali Mushi** and **Lydiya Mushi** variably and both are her names.

The next controversy to be resolved is whether or not the said Plaintiff's wife was the owner of the suit property.

In this controversy, the Plaintiff contend that the person who submitted the Title Deed as mortgage for a loan the purported **Lyidiya Mushi** was a fake person impersonating his wife **Lyidia Elisali Mushi @ Lyidiya Mushi**.

On the other hand, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are at par contending that according to the documents concerning application for the loan to the 2<sup>nd</sup> Defendant by the 3<sup>rd</sup> Defendant **Lyidiya Mushi** is a different person.

I have gone through the evidence and rival arguments by the Counsel for the Plaintiff on one hand and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants on the other.

In this case, it is not disputed that the said **Lydia Elisali Mushi @ Lyidiya Mushi** is dead. That the Plaintiff **Iddi Ally Masumagilo** is suing as an administrator of the Estate of his wife the Late **Lydia Elisali Mushi @ Lyidiya Mushi**. It is the evidence of the Plaintiff that his wife **Lydia Elisali Mushi @ Lyidiya Mushi** was allocated a Plot of land before he got married to her on which she erected a house. The Plot is No. 368, Block 'D' Kigogo Area in Dar es Salaam. That the Land Authorities issued a Certificate of Occupancy Title No. 26596.

As stated above, DW1 in her testimony admitted that the Plaintiff's wife using the name **Lyidiya Mushi** borrowed money from the THB and mortgaged her Certificate of Occupancy, she completed repayment and was issued with a letter of satisfaction on 17/07/2014 by the TIB Development Bank Limited as THB liquidator, Exhibit P7. The evidence from DW1 is that the TIB Development Bank Limited did not receive the said document from a co-liquidator one **Simon S. Matafa** during handing over. Since her Certificate of Occupancy was not returned to her, on 24/11/2014 the Plaintiff's wife lodged a demand letter using her name **Lydia Elisali Mushi** to the TIB Development Bank Limited, Exhibit P9. As the Certificate of Occupancy was missing at the TIB Development Bank Limited DW1 initiated a process of enabling re-issuance of a fresh Certificate by filing a loss Report to Police on 20/03/2015, Exhibit D1 Tentatively.

On the side of the Defendants the evidence relied on is that of DW2 which is to the effect that he used a Title Deed of **Lyidiya Mushi** to borrow

money from the Equity Bank (Tanzania) Limited whom he knew after been introduced to by **Koba** a broker in the streets. Later on after failing to repay the money he was jointly with the Equity Bank sued by **Lyidia Mushi** and **Paulina Stanislaus Chagoha**.

Further **DW4** one **Godfrey Mapunda**, prepared Exhibit P13 the Mortgage Deed basing on Exhibit D2 Tentatively, the Title Deed of a person known as **Lydiya Mushi** after been instructed by Equity Bank (Tanzania) Limited. It was a third party guarantee, meaning that the borrowing person was different from the Title Deed owner. He did not see physically the said **Lydiya Mushi**, but worked on papers.

In my view, there are two versions here, one is about existence of **Lydiya Elisali Mushi @ Lyidiya Mushi** who is represented in this case by her husband, the plaintiff, as a lawful owner of the suit property. The other version is about existence of a purported person known as **Lyidiya Mushi** who presented the Title Deed No. 26596 to Equity Bank (Tanzania) Limited as a lawful owner of the suit property. One of these versions is true. To unearth the truth I will navigate through the following pieces of evidence:

One, when PW1 was cross examined by the Counsel for the 3<sup>rd</sup> Defendant about the difference of the photographs in the Mortgage Deed and that one on the Identity Cards both purported to be of his deceased wife he stated:

*"The photographs in the mortgage and those in the identity cards are not identical, the one in the Mortgage Deed is not my*

*wife. The one on the Mortgage Deed is younger; she could even be a daughter of my wife."*

Two, DW2 on cross examination by the Counsel for the 1<sup>st</sup> Defendant when he was shown Exhibit P12 Collectively (the photographs of NIDA and Voters' Identification Cards) stated that the age of **Lydia Mushi** he knew is younger than about 40 years old than the **Lydia Elisari Mushi** on the exhibits. Equally when he was referred to Exhibit P6, a letter addressed to **Lydia Mushi** in respect of Plot No. 368 Block 'D' Kigogo Title Deed No. 26596 dated 22/12/1981, conceded that in the circumstances, that letter could not have been addressed to **Lydia Mushi** he knew because likely she was born between 1979 and 1980.

Three, according to the evidence of DW3, at different occasions he saw physically both Lydiya Mushi and Lydiya Elisali Mushi and observed that the two are different persons.

Four, this Court also had the occasion of looking at the photographs appended on Exhibits P12 Collectively and P13 Collectively, the two photographs in Exhibit P12 which are identity cards of **Lydia Elisali Mushi** and those of the purported guarantor **Lyidiya Mushi** in Exhibit P13 which is the Mortgage Deed are conspicuously different and belong to two different persons. The photographs of **Lydia Elisali Mushi @ Lyidiya Mushi** appear more aged than those of **Lyidiya Mushi**.

This Court had no opportunity of seeing the two Lyidiyas physically as none of them was brought before it. The Lyidiya referred to by the Plaintiff

passed away, and the Lyidiya referred to by the Second and Third Defendants was not brought before this Court. However, basing on the available oral testimonies of witnesses and documentary exhibits, I am of the firm view that, according to the evidence on record in this case **Lydia Elisali Mushi** and the **Lyidiya Mushi** purported to present the Title Deed to the 2<sup>nd</sup> Defendant, are two different persons.

What is common is that the two Lyidiyas converge at the ownership of Plot No. 368 Block 'D' Kigogo Area, Da es Salaam. It is common ground that Plot No. 368 Block 'D' Kigogo Area in Dar es Salaam (the suit property) was allocated to a person known as **Lydiya Mushi** on 16/07/1981 (Exhibit P3). It is also not in dispute that the offer was dully accepted by the said **Lydiya Mushi** and the requisite land rent paid by the said **Lydiya Mushi**. It is not disputed that pursuant to such allocation, Land Authorities issued a Certificate of Occupancy with Title No. 26596 in respect of Plot No. 368 Block 'D' Kigogo Area in Dar es Salaam dated 11/08/1981 to **Lydiya Mushi**.

For example, **DW3, Charles Shauri Massawe**, a recovery Manager of Equity Bank (Tanzania) Limited testified that DW2 obtained a loan facility from their Bank after complying with the credit facility procedures including deposition of security. It was **Lydiya Mushi** who deposited the Title Deed of a house at Plot No. 368 Block 'D' Kigogo Area to guarantee him. He went on that Exhibits P4, P6 and D2 Tentatively, talk about one Plot No. 368 Block 'D' Kigogo Area and the Certificate of Occupancy is the same No. 26596.

It is not disputed also that a Title Deed No. 26596 concerning Plot No. 368 Block 'D' Kigogo Area in Dar es Salaam (the suit property) was submitted by **Lydiya Mushi** on 10/09/2012 at the Equity Bank (Tanzania) Limited for security of a loan of TShs. 80,000,000/= issued to DW2 by the Equity Bank (Tanzania) Limited.

The controversy is that, although the suit property was allocated to a person known as **Lydiya Mushi** on 16/07/1981, then which **Lydiya Mushi** between the alleged **Lydiya Mushi** who presented the Title Deed to the 2<sup>nd</sup> Defendant and **Lydia Elisali Mushi @ Lydiya Mushi** whom the Plaintiff represents.

The evidence by PW1 and PW2 is as explained above that the suit property was allocated to Late **Lydiya Mushi**. I have already said above basing on the evidence that PW1's wife used variably the names **Lydiya Mushi** and **Lydia Elisali Mushi** at various occasions. Equally there is a purported **Lydiya Mushi** who presented a Title Deed in respect of the suit property to the 2<sup>nd</sup> Defendant. I have also said basing on evidence that these two Lydiyas are different persons.

To resolve this controversy whether **Lydiya Mushi** is not **Lydia Elisali Mushi** whom the Plaintiff represents one has to look at the totality of the evidence, the documents presented whether or not are genuine; this will entail looking at the whole evidence.

Starting with the ages of as depicted in Exhibit P12 Collectively which is forms of NIDA Identity Card and Voter's Identity Card and Exhibit P13

Collectively which comprises of a Mortgage Deed attached to it the Land Form No. 40 and Mortgage Guarantee Affidavit. The later document was recognized by PW4 who prepared it. It contains passport size photographs of **Lydiya Mushi** who is alleged to have executed the same on 10/09/2012. The two photographs appended on Form No. 40 and the Affidavit are conspicuous that they belong to a relatively young woman compared that on Exhibit P12 which are Identity Cards of **Lydia Elisali Mushi**.

The age difference is so huge; according to testimony of PW1, his wife passed away on 10/01/2016 when she was about 60 years old. When PW1 was cross examined by the Counsel for the 3<sup>rd</sup> Defendant about the age difference of the persons in photographs stated:

*The one on the Mortgage Deed is younger; she could even be a daughter of my wife."*

This fact was conceded by DW2 on cross examination by the Counsel for the 1<sup>st</sup> Defendant that the age of **Lydia Mushi** he knew is younger been about 40 years old.

This fact has made me ask a question whether **Lydiya Mushi** who presented the Title Deed to the 2<sup>nd</sup> Defendant meets the age of been allocated with a plot by the Government in 1981. The answer to this question is obvious in negative.

My answer comes from the testimony of DW2 and DW4 who met the purported **Lydiya Mushi**. DW2 estimated the age at 40 years when he met her in 2012 and that she was still at child bearing age, in fact according to DW2 testimony, she had young children. Taking this age as

decisive, then she was a minor of tender years of about 9 years old or less when the suit property was allocated by the Government on 16/07/1981.

Equally DW2 when he was referred to Exhibit P6, a letter addressed to **Lydia Mushi** in respect of Plot No. 368 Block 'D' Kigogo Title Deed No. 26596 dated 22/12/1981, conceded that in the circumstances, that letter could not have been addressed to **Lydia Mushi** he knew because likely she was born between 1979 and 1980. Obvious she could not be in the age of making an application for land and be successfully allocated with any piece of land at the age of two years.

Two, it has been shown in the evidence by the defence through DW2 that a person known as **Lydiya Mushi** is present but cannot be traced. The said **Lydiya Mushi** was not brought in order to defend her property, if at all. The Court was also told by PW2 that her father **Mzee Mushi** is also available, the same was not summoned either.

This fact when taken into consideration with the testimony of DW2 that when he completed repaying the loan of TShs. 80,000,000/= he abandoned the Title Deed which remained with the Equity Bank (Tanzania) Limited for reasons he did not know. Further that neither the said Lydia Mushi nor her father Mzee Mushi followed him to complain about the withheld Title Deed. After completing loan repayment was not issued with any satisfaction letter by Equity Bank (Tanzania) Limited to witness completion of loan repayment nor asked for the same. He lost interest on the Title Deed because it was none of his business and had nothing to loose.

Supporting in affirmative the first issue the Counsel for the Plaintiff Mr. Msafiri argued that the Plaintiff discharged his duty of proving what he alleges that the suit property belongs to the Plaintiff. He argued that through the testimonies of PW1 and PW2 the evidence is glary that the suit property belongs to the Plaintiff; this casts a doubt on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant version if at all **Lydiya Mushi** was owner of the property.

I am in agreement with the version of Counsel for the Plaintiff that basing of the standard of proof in Civil Cases of balance of probabilities that when the proved facts are weighed on a scale, the Plaintiff has discharged his duty of proving ownership over the suit property.

It is contended by the Counsel for the 2<sup>nd</sup> Defendant in his submissions that Section 35 of the Land Registration Act, [Cap. 334 R. E. 2019] that all allocation documents related to ownership of the suit property are in the name of **Lydiya Mushi** and the Plaintiff must prove that **Lydia Elisali Mushi @ Lyidiya Mushi** is the owner of the suit property, I have canvassed this issue exhaustively that basing on the said allocation documents on the suit property, its not possible for the same land to have been allocated to **Lydia Mushi** who purportedly submitted the Title Deed for mortgage who was at tender age by then. Unfortunately the said **Lydiya Mushi** who purportedly submitted the Title Deed for mortgage did not testify to contest for ownership, if any on said. This leaves only a contention by the 2<sup>nd</sup> Defendant basing on mere possession of a Certificate of Title entitled which basing on the findings above, in my



opinion does not confer ownership to her over the suit property it is tainted with impersonation, hence unbelievable.

To this end I rule that **Lydia Elisali Mushi @ Lyidiya Mushi** whom the Plaintiff is the administrator of her estate, is a legal owner of the suit property. I have answered the issue number one in affirmative.

## **10. Second Issue**

The Second Issue is whether the mortgage of the suit property to the 2<sup>nd</sup> Defendant is valid.

On this issue the Counsel for the Plaintiff argues that there is ample of evidence establishing fraud and negligence on the part of the 2<sup>nd</sup> Defendant in accepting the Mortgage while there is glary evidence of fraud. It is his contention that the Bank ought to have conducted enough due diligence. He based his arguments on the evidence of difference of signatures which the 2<sup>nd</sup> Defendant failed to discover due to failure of conducting due diligence. That he also relied on failure by DW4 to fill in the clauses to show whether he knew the guarantor or was introduced to him marks negligence. He contended further that by failure to call vital witnesses on camouflage that they left the Bank's employment is a mere cover up to disguise the negligence and fraud which enabled the unknowns to impersonate the Plaintiff's deceased wife.

He relied on the authority in the case of **Mbaraka Ali Said Zarara**, Land Case No. 348 of 2014 (unreported) in which it was held by this Court that:

*"I also wish to examine the bank's conduct in the processing the facility. As an honest and prudent banker, it ought to have done a due diligence before creating the mortgage. Apparently, there are a number of lapses including failure by the bank to ascertain the mortgagor's identity and whether he really was the owner of the property. First, it was obliged to verify his identity. The vote registration card of the applicant of the loan he presented to the bank was a photocopy. I think, as suggested by Mr. Msafiri, the bank ought to have verified its authenticity with National Elections Commission. Again, it is clear the bank's officials failed to prove they made a physical visit to the mortgagor's residence or even visited the property. In **Taylor vs. Stibbert** (1803-13) All ER, it was stated:*

*'The failure to take reasonable inquires of the persons in possession and use of the land or purchaser's ignorance or negligence to do so formed particulars of fraud.'"*

The Counsel for the Plaintiff was impressing the Court that fraud has been proved in the circumstances of this case by failure of the bank to conduct due diligence as a result fraud was perpetrated.

The Counsel for 2<sup>nd</sup> Defendant, on the other hand, argues that from the particularized elements of forgery and fraud in the plaint, there is no any witness who sufficiently proved the allegations to the required standard which is higher nearly to that in criminal cases, that is, beyond all the reasonable doubts. He cited the case of **R. G. Patel vs. Lalji Makanji** [1975] E. A. 314 at page 316 where the Court held that:

*"...allegations of fraud must be strictly proved. Although the standard of proof may not be heavy as beyond reasonable doubts, something more than a mere balance of probability is required"*

And the case of **Omary Yusufu vs. Rahma Ahmed Abdulkadir** (1987) TLR 169 where the Court of Appeal said:

*"... I think it is now established that when the question whether someone has committed a crime is raised in civil proceedings that allegation need be established on a higher degree of probability than that which is required in ordinary civil cases, the logic and rationality of that rule being that the stigma that attaches to affirmation finding of fraud justifies the imposition of a strict standard of proof."*

And also he cited the case of **CF Union Bank Ltd vs. Anullah Haidarally t/a Al Munar and Another**, Civil Case No. 06 of 2004 (unreported) at page 18 where the Court of Appeal held that:

*"..... As rightly submitted by Mr. Msuya, an allegation of fraud in civil matters should be supported with cogent evidence because the standard of proof required is higher than the normal standard of proof required in normal civil controversies.... "*

The Counsel argues more that Equity Bank (Tanzania) Limited correctly acted on the Title Deed because it had no any encumbrances. Further, the decision in the counter claim in Civil Case No. 150 of 2014 has affected the decision of this Court.

I agree on the position of the law as far as proof of fraud is concerned in civil proceedings that the standard of proof is higher than that of balance of probabilities as stated in the authorities above. A question

however is whether the evidence adduced by the plaintiff and somehow corroborated by the defence evidence through the testimonies of DW2, DW3 and DW4 as explained above establishes fraud in this case.

In this case, the Plaintiff complain that the mortgage was wrongly and fraudulently created basing on impersonation of his wife. The forgery concerned her signature and photograph.

I have already explained the evidence on the mischiefs concerning the photographs that the ones appended on Land Form No. 40 and on the Mortgage Guarantee Affidavit in Exhibit P13 Collectively do not belong to wife of the Plaintiff but to a different person who purported to be **Lyidiya Mushi**.

In respect of the signatures, there is a big difference between the signatures appended on the documents proved to have been signed by **Lydia Elisali Mushi @ Lydia Mushi** whom the Plaintiff represents and those purportedly signed by **Lyidiya Mushi** who presented the Title Deed to the Equity Bank.

In his testimony when PW1 was re-examined on the features in Exhibit P13 Collectively he stated as follows:

*"In the Mortgage Deed Exhibit P13 Collectively the fake are the signatures and the photography not the names because my wife used the same interchangeably. Before this Court I introduced myself as Iddy Ally Masumagilo. I do write my name as Iddi, others write it as Iddy, others as Idd, also Id, all are the same.*

On requirements for registration of the Mortgage Deed, DW4 said that there are three requirements namely, absence of any caveat, presence of undischarged mortgage and matching of the names and signatures on the Title Deed and the prepared Mortgage Deed. He stated:

*"In case basing on my experience, registration may be rejected if there is any caveat. ... Also if the title deed had a previous undischarged mortgage unless it is discharged. Also a signature of the mortgagor must match with on the title deed. If there is none of these three things, then mortgage will be registered. The names on the title deed must also match with those on the prepared mortgage deed."*

Also the witness DW3 testified positively confirming the differences in the signatures that:

*".....also the signatures in Exhibits P13 Collectively and Exhibit D2 Tentatively, the WSD of Land Case No. 150 of 2014, differ."*

I have taken the pain of examining by comparing the signatures proved to have been signed by the Lydiya Mushi who presented the Title Deed to the 2<sup>nd</sup> Defendant on Exhibit P13 Collectively, comprising of the Mortgage Deed formed of the Mortgage Deed, Land Form No. 40 and Mortgage Guarantee Affidavit and that on Exhibit D2 Tentatively, the Certificate of Occupancy on Title No. 26596, purported to have been signed by the same Lydiya Mushi who presented the Title Deed to the 2<sup>nd</sup> Defendant. My finding is that the same differ materially even to the naked eyes of a lay man.

I have also compared the signatures proved to have been signed by **Lydia Elisali Mushi** on Exhibits P9, the demand letter by **Lydia Elisali Mushi**, and on Exhibit P12 Collectively comprising of NIDA and Voter's Registration Cards with the signature on Exhibit D2 Tentatively, the Certificate of Occupancy on Title No. 26596, purported to have been signed by the same **Lydia Elisali Mushi @ Lydiya Mushi**. My finding is that the same are similar materially even to the naked eyes of a lay man.

I have too compared the signatures proved to have been signed by the purported **Lydiya Mushi** who presented the Title Deed to the 2<sup>nd</sup> Defendant on Exhibit P13 Collectively, the Mortgage Deed and the signature proved to have been signed by **Lydia Elisali Mushi @ Lydiya Mushi** on Exhibit P9, a demand letter by the Plaintiff's wife to the TIB Development Bank Limited and on Exhibit P12 Collectively the NIDA and Voters Identity Cards. My finding is that the same differ materially even to the naked eyes of a lay man.

I am of the firm view that the person who signed on Exhibit P9 and Exhibit P12 Collectively is the very person who signed on Exhibit D2 Tentatively due to similarity of the signatures. This means Exhibit D2 Tentatively, the Title Deed was not signed by the purported **Lydiya Mushi** who presented the it to the 2<sup>nd</sup> Defendant as a mortgage for 3<sup>rd</sup> Defendant.

In his cross examination, DW4 stated that the signature appended against the Photographs in Land Form 40 and that on Affidavit allegedly by

**Lyidiya Mushi** in Exhibits P13 Collectively when compared with the signature appended on Exhibit D2 Tentatively, the Title Deed signed by **Lydia Elisali Mushi @ Lyidiya Mushi**, they are similar. I find that DW4 lied when he said so because any eye naked observer will see the conspicuous differences between the two signatures.

I am fortified in taking this course of comparing the proved signatures of **Lydia Elisali Mushi** with the doubted ones under the Authority by our Superior Court, the Court of Appeal, in the case of **Thabitha Muhondwa vs. Mwango Ramadhani Maindo and Another**, Civil Appeal No. 28 of 2012 (unreported) which was decided in 2017. It stated, after quoting the provisions of Section 75(1) of the Evidence Act, [Cap. 33 R. E. 2019] that:

*"It is clear from that provision that some of the methods of proving a signature is by comparing signature of a person with his other signature. The other methods are under ss 47 and 49 of the same Act."*

Moreover, the Court echoed its earlier stand in the case of **DPP vs. Shida Manyama @ Selemani Mabuba**, Criminal Appeal No. 285 of 2002 (unreported) that among the methods of proving handwriting and signatures is provided by the law under Section 75 of the Evidence Act, [Cap. 33 R. E. 2019], it stated that:

*" .....The third mode of proof under section 75 which, unfortunately, is really (sic) used these days, is comparison by the Court with a writing made in presence of the court or*

*admitted or proved to be the writing or signature of the person."*

A similar course was taken by my brother Hon. A. Mohamed, J. (as he then was) in the case of **Mbaraka Ali Said Zarara's case (supra)** which was cited by the Plaintiff' Counsel. I am satisfied that this is a good law in our land.

Under these circumstances was the requirement of matching of the names and signatures on the Title Deed and the prepared Mortgage Deed as one of the conditions stated by DW for registration of Mortgage Deed adhered to by the 2<sup>nd</sup> Defendant? The answer is in negative.

Moreover, in examining the conduct of the 2<sup>nd</sup> Defendant when processing the facility there are a number of lapses which in my opinion any honest and prudent banker, ought to have done a due diligence before creating the mortgage and taking it for registration.

One, DW4, being the attesting officer on the Mortgage Deed (Exhibit P13 Collectively) neither stated whether he personally knew the deponent nor that she was introduced to him. At one time in his cross examination he said that he did not even see the said **Lyidiya Mushi**. He executed the same without even seen any identity card. He did not bother to take such legal requirement for precautions when preparing and executing the Mortgage Deed because he believed the Bank, in his own words in cross examination by the Counsel for the Plaintiff that he said:

*"I believed on the documents submitted by the Bank because the Bank is a trusted institution."*

However, according to the testimony of DW3, the Bank also believed on his expertise as external lawyers because the Bank is not perfect. When testifying DW 3 stated that

*"In Paragraph 27 of the Plaint, it is alleged that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants personated Lydia Mushi and submitted the Title Deed to Equity Bank (Tanzania) Limited. This is not true because we believed the person who submitted the Title Deed as the one who owned the property, she guaranteed, who is **Lydiya Mushi**. She is the one who went to the Bank External Lawyers and swore affidavit and signed the Mortgage Deed. The External Lawyer can prove that it was Lydiya Mushi who appeared before him."*

Second, the evidence reveal some inaction conducts on the party of 2<sup>nd</sup> Defendant. DW3 on cross examination by the Plaintiff's Counsel said:

*I decided to go with them to their house. Their house did not match with the house in our evaluation report. Basically their house was old house. The way I saw that house it could not meet the security of a loan of TShs 80,000,000/=. It had no many shop frames compared to the one in the file of Norbert Kayungwa. A prudent banker could accept that house as a mortgaged for about TShs. 40,000,000/= not TShs. 80,000,000/=. The house which was mortgaged was at Kigogo Area Jeshini which is the very place Lydia Elisali Mushi and her husband took me.*

He further stated:

*After visiting the suit house (property) I called our lawyer and told him about the difference of the house of Lydia Elisali mushi and Lydia Mushi. The lawyer Mr. Uwezo. he is no*

*longer an employee of the Bank now. The Equity Bank tried to find Lydiya Mushi but her whereabouts were unknown as she was not found through her phone. .... The attesting officer in Mortgage Deed (Exhibit P13 Collectively) neither stated whether he personally knew the deponent nor that she was introduced to him,*

It is clear that DW3 found a huge difference between the value of property allegedly mortgaged in the Mortgage Deed as reported in the valuation report and the actual property he saw. In his re-examination in chief he testified that he had no gadget to use for detecting the location of the house he was shown and that in the Mortgage Deed. However, it was expected that the Bank would have picked it up had it acted seriously.

In my opinion, Mortgage was registered by the Equity Bank (Tanzania) Limited without conducting due diligence otherwise it could have detected the differences in the signatures and refrain from registering the same. Equally the Bank acted negligently by relying too heavily on their agents such as brokers and lawyers who are not professional finance officers. It connived to the dubious and fraudulent mortgage.

It was argued that the Title Deed had no encumbrances, probably the Counsel meant that it was not easy to detect the mischief. All the same my findings are that this fact does not exonerate the Bank from conducting due diligence.

In all these circumstances, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants deny allegations of fraud or negligence. I think to be frank, the evidence is overwhelmingly

on them; the Plaintiff has also discharged his duty of proving fraud and negligence to the required standard.

The Counsel for the 2<sup>nd</sup> Defendant has raised a point of law that a decision in Civil Case No. 150 of 2014 has affected this case. The Counsel did not elaborate how that decision has affected this case. I have read that decision and find that it concerned a different set of parties and had different issues. That case did not deal with ownership of a plot of land but payment of a loan by the Plaintiff/Defendants in a counter claim. The Plaintiffs were Lydia Mushi, the purported Lydia Mushi who presented the Title Deed to the 2<sup>nd</sup> Defendant and another known as Paulina Stanislaus. They were judged in *absentia* after abandoning their case, as explained above they had nothing to lose.

## **11. Third Issue**

Let me turn to the third issue, whether the Plaintiff has suffered any damage. The Plaintiff asked for damages for none use of their property. The Counsel for the Plaintiff has submitted that the Plaintiff has been deprived of use of his property which now is encumbered; it is running the risk of been sold a matter which the owner never consented to. He has been greatly disturbed and psychologically harassed due to the wrongful mortgaging of his property. Therefore he has suffered damage. He cited case laws relating to general damages namely, **Said Kibwana and Another vs. Rose Jumbe** [1993] TLR 175 where it was held that;

*"A plaintiff should only ask for damages and leave the quantification to the Court. The Court determines how much damages are due be it in the contract or tort, which so far as money can compensate, will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act."*

He also cited the case of **Mzee ABdallah @ Abdallah Mzee vs. Joachim Mzee and Another**, Civil Case No. 364 of 1998 (unreported) where the this Court held that:

*"I agree that the Plaintiff suffered damages in that he was deprived of the use of his Title Deed and was generally inconvenienced and embarrassed."*

The Counsel for the 2<sup>nd</sup> Defendant contend that the Plaintiff has not proved anything wrong committed to him because he is not a lawful owner of the suit property and the same was lawfully mortgaged to the 2<sup>nd</sup> Defendant. He does not deserve any damages. He cited the case of **Theodelina Alphaxad, a minor, s/t Next of Friend vs. The Medical In-Charge Nkinga Hospital** [1992] TLR 235 where it was held:

*"General damages for tort or even breach of contract, are such damages, which so far as money can compensate, will give the injured party, reparation for the wrongful act."*

It is his views that since the Plaintiff has not led any evidence of anything wrong done to him, he does not deserve any damages.

I agree with the Counsel for both parties on the position of the law on general damages. Both are at par on the principles applicable in circumstances under which damages are awardable. What they differ is on whether the Plaintiff has proved any damages. I have explained in length how the Plaintiff's wife acquired the suit property and how she mortgaged the same with the THB in 1981 only to learn that her property was about to be sold in 2014. Together with her husband, she started struggling to rescue the same by tracing in various offices including conducting searches in Land Authorities until she passed to her next eternal life. Eventually her husband filed this case.

In my opinion the Plaintiff has at least shown some disturbances which he deserves for reparation at least from 2014 when their need to have the Title Deed in issue arose. The 1<sup>st</sup> Defendant showed cooperation towards the Plaintiff and his deceased wife by joining their efforts of tracing the Certificate of Occupancy and initiating efforts for re-issuance of a new one. The 2<sup>nd</sup> Defendant initially showed cooperation through DW3 who even visited the suit property and recommended some steps to be taken to the lawyer of the Equity Bank (Tanzania) Limited, however the same advice was given a deaf ear. The 3<sup>rd</sup> Defendant was the perpetrator of the fraud through a street brokers whom he named with a single name as **Koba** and **Mwinyi**. He is the one who brought in the others including the impersonator of **Lydia Elisali Mushi @ Lydiya Mushi**. He could not produce any of these persons in Court so as to help resolve the controversy easily. I find that the 1<sup>st</sup> Defendant has no hand in the fraud

and or negligence in this matter. I therefore hold the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as liable and deserve to pay damages to the Plaintiff.

## **12. Fourth Issue**

The fourth issue is what reliefs the parties are entitled to. The Plaintiff contends that after proving his case the Plaintiff is entitled to be declared a lawful owner of the suit property, declaration that the mortgage in favour of the 2<sup>nd</sup> Defendant is *void ab initio*, order directing the 2<sup>nd</sup> Defendant to hand over the Title Deed to the Plaintiff free of encumbrances, general damages of the value of the property of TShs. 80,000,000/= and costs of the case and interest on the judgment debt of 12% per annum from the judgment date to its full satisfaction.

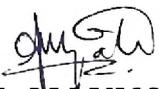
On the other hand the 2<sup>nd</sup> Defendant had nothing except a prayer for dismissal of the suit which I have ruled above that the Plaintiff has proved his case.

I hereby order thus:

- i. The Plaintiff is a lawful owner of the suit property, that is, the property situate at Plot No. 368 Block 'D' Kigogo Area, Kinondoni Municipality, Dar es Salaam an area currently known as Mabibo Farasi or Mabibo Jeshini, registered under title No. 26596.
- ii. The mortgage in favour of the 2<sup>nd</sup> Defendant obtained by fraud is *void ab initio*.

- iii. The 2<sup>nd</sup> Defendant to hand over the Title Deed to the Plaintiff free of encumbrances.
- iv. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to pay the plaintiff damages of TShs. 20,000,000/= which is half the estimated value of the suit property upon DW3 visiting it.
- v. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to pay the Plaintiff costs of this case; and
- vi. Interest on the judgment debt of 12% per annum from the judgment date to its full satisfaction.
- vii. Order accordingly.



  
**F. K. MANYANDA**  
**JUDGE**  
**09/10/2020**