

IN THE HIGH COURT OF TANZANIA

**(LAND DIVISION)
AT DAR ES SALAAM**

LAND CASE NO 398 OF 2017

MARY GEORGE MIHAMBO PLAINTIFF

VERSUS

SHADRACK WILLIAM LUHWA 1ST DEFENDANT

EFC TANZANIA MICROFINANCE BANK LTD. 2ND DEFENDANT

COMRADE AUCTION MART COMPANY LTD. 3RD DEFENDANT

RONOTHE CONSULT LIMITED 4TH DEFENDANT

JUDGMENT

December 8 & 11, 2020

Masara, J

1.0 Introduction

The dispute in this case exhibit yet another case where a business loan entered between one spouse with a financier is later objected to by the other spouse for lack of consent of that other spouse. **Shadrack William Luhwa**, the 1st Defendant herein, intending to revamp and expand his business of selling foams and mattresses, approached **EFC Tanzania Microfinance Bank Limited**, the 2nd Defendant, for a business loan in February 2014. After scrutiny, the 2nd Defendant issued a term loan facility of Tanzania shillings 16 million only to be repaid within a period of 18 months. The term loan was signed on 24th February, 2014. As security for the loan, a mortgage deed was created whereby Mr. Luhwa deposited a title deed to his landed property located at Plot No. 739, Block G, Mbezi with certificate of title No. 112456 (the suit property). In compliance with the law regarding mortgage

financing, the borrower (Mr. Luhwa) is said to have signed an affidavit dated 24th February, 2014 confirming that the mortgaged property did not require spouse consent as the property does not constitute matrimonial property.

After taking the loan, Mr. Luhwa defaulted and the loan repayment schedule was not honoured. On 15th May, 2014, the 2nd Defendant issued a Notice to Mr. Luhwa informing him of the default and requiring him to pay the arrears within sixty days from the date of the notice. Failure to pay was to attract one of the following remedies for the 2nd Defendant: to sue for all monies due and owing under the mortgage, to appoint a receiver, to lease the mortgaged land, to enter into possession of the mortgaged land or to sell the mortgaged land (where the mortgage is not a small mortgage). Apparently, the arrears were not paid. The 2nd Defendant went quiet until a notice to sell the suit property was issued on 27/10/2017 and the 3rd Defendant allegedly sold the suit property to the 4th Defendant on 28th October, 2017. It is at this juncture that **Ms. Mary George Mihambo**, the Plaintiff herein, appears in the picture.

Ms. Mihambo filed this dispute contesting both the mortgage and the sell of the suit property. She states that, as a wife of the 1st Defendant, she did not consent to the creation of the mortgage of the suit property by the 1st Defendant and the 2nd Defendant, the property being a matrimonial one. She avers to have gotten the information about the mortgage when she heard skirmishes and gathering of the people who attended the auction sell of the suit property. She immediately rushed to the office of the area Executive

Officer whereby she was handed with the Notice of sale dated 27th October, 2017 (exhibit D3). She therefore decided to take legal measures against all the Defendants, thus this suit which she filed craving for the following orders: A declaration that the mortgage of the matrimonial house situate (sic) on Plot No. 739, Block G, Mbezi Area by the 1st Defendant in favour of the 2nd Defendant is null and void; a declaration that the sale of the suit house by the 2nd and 3rd Defendants to the 4th Defendant is null and void; An order of permanent injunction to restrain the 2nd, 3rd and 4th Defendants from interfering with the Plaintiff's ownership and peaceful possession of the suit house; the 2nd defendant be ordered to hand over the original certificate of occupancy with title No. 112456 to the Plaintiff; payment of general damages to be assessed by the court; costs and any other reliefs.

Not surprisingly, the 1st Defendant does not challenge the Plaintiff's prayers. The 2nd Defendant vehemently contests the Plaintiff's averments. They are of the view that the suit should be dismissed in its entirety, the mortgage and ultimate sale of the suit property be declared lawful and the 4th Defendant be declared the lawful owner of the suit property. The 2nd defendant had initially filed a counter claim but abandoned it when the Plaintiff filed an amended Plaint pursuant to the order of this Court dated 11/4/2019. The 3rd and 4th Defendants did not enter appearances despite services, including substituted service for the 4th Defendant. It was ordered that hearing proceeds ex parte against the 3rd and 4th Defendants.

During hearing, Ms. Mariam Mtalitinya, learned Advocate appeared on behalf of the Plaintiff, the 1st Defendant appeared in person, unrepresented while the 2nd Defendant enjoyed the services of Mr. Cleoplace James, learned Advocate. Ms. Mihambo (PW1) was the sole witness for the Plaintiff. Similarly, Mr. Luhwa (DW1) testified himself. Mr. Adam David Kessy was also a sole witness for the 2nd Defendant. At closure of the hearing, parties requested and were granted leave to file closing submissions. They all filed as directed. During the final pre-trial conference, the following issues for determination were crafted:

- a) Whether the suit property; namely, House in Plot No. 739 Block G Mbezi, Dar es Salaam, is a matrimonial property;*
- b) Whether the mortgage of the suit property was valid;*
- c) Whether the sale of the suit property was lawful; and*
- d) To what reliefs are the parties entitled to.*

2.0 Is the suit Property a Matrimonial Property?

Testifying in Court, the Plaintiff stated that she filed this suit to claim for her interest in the suit premises where she, her husband and her children reside. She further stated that the said suit was mortgaged to the 2nd Defendant without her consent. To prove that she is married to the 1st Defendant, she produced a Marriage Certificate No. B – 0520795 dated 29th July, 2006 (exhibit P1) between her and Mr. Shadrack William Luhwa (the 1st Defendant). She informed the Court that she had met the 1st Defendant and lived with him as his lover in 2004. That in 2005 they got the plot and they started developing it while residing at National Housing Houses at Uhuru Street, Dar es Salaam. She went further to state that the house at the suit area was completed in 2013 and they moved in it. The house was surveyed

and registered in the name of the 1st Defendant following their joint agreement. During cross examination, Ms. Mihambo informed the Court that she contributed in getting the plot, construction of the house and in the process of getting the title deed which was issued in 2009. She therefore stated that the house is a matrimonial home. This version was supported by Mr. Luhwa in his sworn evidence. He confirmed the marriage between them and that they were residing in the house with one of their two children, aged 9 after the other one died. DW2, however, testified that the 1st Defendant has declared to be unmarried. He supported it with the Affidavit deposed by the 1st Defendant (exhibit D6) in which the 1st defendant had stated that the mortgage did not require spousal consent as it is not a matrimonial property.

In the closing submissions, Mr. James was of the view that the suit property is not a matrimonial property based on the certificate of Title (exhibit D5) which is in the sole name of the 1st Defendant and Exhibit 6. He further argued that failure of the Plaintiff to register a caveat in terms of Section 59(1) of the Law of Marriage Act she was barred from seeking the protections provided for under Section 59(2) of the law of Marriage Act and Section 161 of the Land Act. He also relied on the decision of the Court of Appeal in the case of ***Hadija Issa Arerary Vs. Tanzania Postal Bank***, Civil Appeal No. 135 of 2017 (unreported) and the decision of this Court in ***Charles Issack Ndosi Vs. Mary Adrian Zalalila***, Land case No. 279 of 2013 (unreported).

On his part, Ms. Mutalitina submitted that the suit property is a matrimonial property as provided for under Section 114(1) and (3) of the Law of

Marriages Act. That as the suit property was acquired by joint efforts of the Plaintiff and the 1st Defendant during the existence of the marriage, the mere fact that it was registered in the name of the 1st Defendant cannot deprive it the status of a matrimonial property. This view is shared by the 1st Defendant in his final submissions.

Having considered the evidence from the parties, the Court is satisfied that the Plaintiff and the 1st Defendant were legally married as per exhibit P1, the marriage certificate. The objection raised by the 2nd Defendant is not supported by any cogent evidence. Considering that no evidence was brought to challenge the authenticity of exhibits P1 this Court has no basis to decide otherwise. Only one conclusion is open to this Court; that is, at the time when the Defendants entered into the contract of mortgage of the suit property in February 2014, the Plaintiff was legally married to the 1st Defendant.

Having decided that the Plaintiff was legally married to the 1st Defendant at the time of the mortgage of the suit premises, it is pertinent to decide whether the said mortgaged property fall in the category of matrimonial property which would require consent of the other spouse before it is mortgaged. The Court of Appeal in ***Idda Mwakalindile Vs. NBC Holding Corporation & Anor***, Civil Appeal No. 59 of 2000 and ***NBC Holding Corporation Vs. Agness Masumbuko & Ors***, Civil Appeal No. 51 of 2000 (both unreported) where it was held:

"It is beyond dispute that a matrimonial house owned by the wife or husband ought not to be alienated by way of sale, mortgage, lease or gift without the consent of the other spouse."

In order to resolve the issue at hand, I need first to resolve the question of what amounts to a matrimonial property. This was well elaborated in the case of ***Bi Hawa Mohamed Vs. Ally Seif*** [1983] TLR 32, where the Court of Appeal made the following observations:

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

In ***Bank of Commerce Ltd Vs. Nurbano Abdallah Mulla***, Civil Appeal No. 283 of 2017, the Court of Appeal defined the term matrimonial property in the following terms:

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

From the above cited cases, the term matrimonial asset and matrimonial property have the same meaning. Matrimonial home is also one of the matrimonial properties. In order to distinguish between what amounts to private property and what is a matrimonial property, the intention of the parties is a primary consideration; that is, whether they intend the property acquired before or during the marriage to be a joint property or not. Section

58 of the Law of Marriage Act, Cap. 29 [R.E 2019] is the operating provision as it states that marriage shall not operate to change ownership of the properties privately acquired before marriage unless there is express agreement between the parties. The case of ***Mariam Tumbo Vs. Harold Tumbo*** [1983] TLR 393 is very elaborative in this aspect. The Court stated:

"It may be possible, however, for spouses to enter into an agreement for the joint ownership of property otherwise separately acquired. Section 58 of the Marriage Act is relevant in this regard. But in the absence of such agreement the fact of the marriage would not operate to change ownership of the property to which either the husband or the wife may be entitled."

For a spouse to claim ownership over a property jointly acquired, there must be a proof that the property was acquired during the subsistence of their marriage. Efforts in acquisition of matrimonial property is subject to evidence and proof as stated in ***Gabriel Nimrod Kurwijila Vs. Theresia Hassan Malongo***, Civil Appeal No. 102 of 2018 (unreported), where the Court of Appeal while quoting its previous decision in ***Yesse Mrisho Vs. Sania Abdu***, Civil Appeal No. 147 of 2016 (unreported) observed:

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

From the evidence on record, there is no doubt that the suit property is a matrimonial property as it was acquired during the existence of the marriage. Further, even if it was to be said that the property was obtained before the Plaintiff's wedding in 2006, the same will be covered by the provisions of Section 114(3) of the Law of Marriages Act, Cap. 29 which provides:

"For the purposes of this section, references to assets acquired during the marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts."

The evidence of substantial improvements came vividly in the evidence of PW1 and DW1. On the premises, the first issue is answered in the affirmative, in that the suit property is a matrimonial property.

3.0 Was the mortgage of the suit property valid?

In this case, the Plaintiff is asking this Court to declare the mortgage of the suit property by her husband to the 2nd Defendant invalid. Her main ground is that the suit property, being matrimonial property, should not have been mortgaged by the 1st Defendant without her consent. The 1st Defendant supports that view in his written statement of defence, his testimony in Court and in his final submissions. Submitting on this issue, Ms. Mutalitina was of the view that the mortgage was invalid for lack of consent of the Plaintiff, the lawful spouse of the 1st Defendant. She backed up her argument with the decision of the Court of Appeal decisions in ***NBC Holding Corporation Vs. Agness Masumbuko & Ors*** (Supra) and ***Hadija Issa Arerary Vs. Tanzania Postal Bank*** (Supra). She also referred to Section 112 of the Land Act, Section 114 of the Law of Marriage Act and Regulation 4(1) of the Land (Mortgage Financing) Regulations, 2009 to back up her assertions.

The Plaintiff's position encountered strong opposition from the 2nd Defendant. DW2 was categorical in his evidence that they did a due diligence to ascertain that the suit property was free from all encumbrances, including

obtaining an affidavit from the 1st Defendant proving that no spousal consent was required before the mortgage was created. In his final submissions, Mr. James reiterated the assertion that the mortgage of the suit property was proper and valid.

A careful consideration of the evidence on record reveal that the 1st Defendant did not seek the consent of the Plaintiff before submitting the Title to the suit property as security for the loan extended to him. The Plaintiff stated as such and the 1st Defendant, interested as he might be, confirmed it. The 2nd Defendant contend that the mortgage was valid on the grounds that the title to the suit property was in the sole name of the 1st Defendant and that no caveat had been filed by any interested party, including a spouse; and on the fact that the 1st Defendant confirmed to them that no spousal consent would be required as the property was not a matrimonial property.

We have already decided that the suit property is a matrimonial property. What remains to be decided is whether the 2nd Defendant did what was required to ascertain facts allegedly given to them on the status of the suit property. The Court does not agree with the 1st Defendant in his claims about legibility of the terms of the loan, the mortgage deed and the affidavit. He consciously entered into the term loan agreement and he is quoted to have confirmed that he was advised about seeking independent legal advice before concluding the agreements. Whether he sought that legal advice or

not remains to be his sole responsibility. That, however, does not exonerate the 2nd Defendant from complying with the legal requirements.

The Land Act mandates the issuer of a loan (mortgagee) to undertake due diligence to ascertain that the right consent is provided. Section 161(3) of the Land Act provides as follows:

(3) Where a spouse who holds land or a dwelling house for a right of occupancy in his or her name alone undertakes a disposition of that land or dwelling house, then-

*(a) where that disposition is a mortgage, **the lender shall be under a duty to make inquiries if the borrower has or, as the case may be, have consented to that mortgage accordance with the provisions of section 59 of the Law of Marriage Act;***

(b) where that disposition assignment or a transfer of land, the assignee or transferee shall be under a duty to make inquiries of the assignor or transferor as to whether the spouse or spouses have consented to that assignment or transfer in accordance with section 59 of the Law of Marriage Act,

*and where the aforesaid spouse undertaking the disposition **deliberately misleads the lender** or, as the case may be, the assignee or transferee as to the answers to the inquiries made in accordance with paragraphs (a) and (b), **the disposition shall be voidable at the option of the spouse or spouses who have not consented to the disposition.*** (emphasis added)

Similarly, the Law of Marriage Act, Cap. 29 provides almost similar prohibitions under Section 59. Section 59 (1) thereof states as follows:

*"Where any estate or interest in the matrimonial home is owned by the husband or the wife, he or she shall not, **while the marriage subsists and without the consent of the other spouse, alienate it by way of sale, gift, lease, mortgage or otherwise,** and the other spouse shall be deemed to have an interest therein capable of being protected by caveat, caution or otherwise under any law for the time*

being in force relating to the registration of title to land or of deeds."
(Emphasis added)

Equally, Regulation 4(1) of the Land (Mortgage Financing) Regulations, GN No. 355 of 2009 requires an applicant for a mortgage to declare his marital status in a prescribed form. It states:

"4(1) The applicant for a mortgage shall be required to declare his marital status as follows:

- a) **By stating in the application form whether he is married or not;***
- b) Subject to paragraph (a) where the applicant states that he is married he shall state the names and address of the spouse or the spouses as the case may be; and*
- c) Where the Applicant states that he is not married, mortgagee shall require the Applicant to declare in an affidavit or written and witnessed document that **he has no spouse** or any other third party holding interest on the mortgaged land."*(Emphasis added)

Exhibit D6, which is a copy of the affidavit said to have been relied by the 2nd Defendant as proof of no spouse, only attest that no spousal consent was required as the property is not a matrimonial property. It does not seem to suggest that the 1st Defendant was unmarried at the time. In compliance with the law, the 2nd Defendant was duty bound to inquire whether or not the 1st Defendant was married in terms of Section 161 of the Land Act and Section 59 of the Law of Marriages Act. As they did not do so, they cannot rely on the said document to assert validity of the mortgage between them and the 1st Defendant. The 2nd Defendant also sought to rely on the decision of the Court of Appeal in ***Hadija Issa Arerary Vs. Tanzania Postal Bank*** (Supra) on the requirement of a caveat from an interested part. I believe that Mr. James' interpretation of the said decision is wrong. Whereas it is

true that filing on a caveat assists the other spouse or a third party in protecting her interest in the property, filing of a caveat is not mandatory.

At page 9 of the cited decision, the Court of Appeal stated as follows:

*"Prior to the amendment of section 114 of the Land Act which was effected through section 8 (2) (3) of the Mortgage Financing Act, the duty was imposed on the mortgagee under section 59(1) of the LMA compelling any party who had an interest over a property to be mortgaged to register a caveat so as to preserve his/her interest. After the amendment, **the lodging of a caveat is no longer a requirement of the law** as per section 8(2) (3) of the Mortgage Financing Act which has shouldered the responsibility to the mortgagor to disclose the information of the spouse."* (emphasis added)

Consequently, the term loan and consequently the mortgage of the suit property cannot be vindicated on the evidence available. It is hereby declared invalid for lack of spousal consent.

4.0 Was the sale of the Suit property was lawful?

After holding the mortgage of the suit property, it follows that the sale that followed thereof cannot be justified. The Court of Appeal in **NBC Vs. Nurbano Abdalla Mulla**, Civil Appeal No. 283 of 2017 (unreported) which held partly as follows:

"..it is clear in our minds that even if the mortgaged property is under the name of one spouse alone, then he/she cannot deprive the other spouse his rights over the mortgaged property.."

I should however say a few things that this Court noted. DW2 testified that the suit property was sold to the 4th Defendant in this case following a lawful auction conducted by the 3rd Defendant. It was expected that details of the sale of the suit property and the amount of outstanding loan were to be

disclosed in Court. These facts did not come out at all. Furthermore, it was expected that the 3rd Defendant, as the agent of the 2nd Defendant was to be defended by counsels for the 2nd Defendant (although not necessarily so), but the 2nd Defendant allowed the case to proceed ex parte against the 3rd Defendant! Worse of all, this Court expected the 4th Defendant to appear and defend his acquired interest over the suit property. Quite unusually, the 4th Defendant could not be traced even after his attendance was sought through an advertisement in a local newspaper. Those facts lead this Court to doubt whether the sale of the suit property ever took place. Court's doubts are exacerbated by the fact that the notice of auction was given a day before the auction and had been preceded by a notice of default issued three years prior to the auction. There is no evidence that the 1st Defendant was given any other notice other than the notice dated 15th May, 2014 which, incidentally was not served on him but was sent through Afisa Mtendaji, Mtaa wa Mbezi Beach B.

Having so observed, it is my conclusion that the sale, if any, of the suit property was null and void as the 2nd Defendant did not have proprietary interest over the same.

5.0 Conclusions and Reliefs

The last issue is on the reliefs which the parties are entitled to. Considering what I have elucidated hereinabove, the Plaintiff has been able to establish her entitlement to some of the reliefs sought in her Plaint. Consequently, the suit has merits as above explained. It is hereby declared that the mortgage and the ultimate sale of the suit property on Plot No. 739, Block G, Mbezi,

Dar es Salaam with certificate of title No. by the 1st Defendant to 2nd Defendant is void ab initio for lack of spousal consent of the Plaintiff. The 2nd Defendant should surrender the Certificate of Title No. 112456 with respect to the suit property to the Plaintiff and the 1st Defendant henceforth. Considering the fact that the 1st Defendant in this case is the husband of the Plaintiff, also considering that the 2nd Defendant may have been misled in entering into the mortgage agreement of the suit property, I direct that each party shall bear their own costs.

It is so ordered.



Y.B. Masara

JUDGE

December 11, 2020