

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

LAND CASE NO 96 OF 2017

CHRISTINA RAJA L. ITEBA PLAINTIFF

VERSUS

GEOFREY ITEBA 1ST DEFENDANT

PRAYGOD MMBAGA 2ND DEFENDANT

JUDGMENT

December 4 and December 11, 2020

Masara, J

1.0 Introduction

Christina Raja L. Iteba, the Plaintiff herein, is suing the Defendants jointly on the grounds that she was not consulted and did not consent to the disposition of matrimonial properties located at Plots No. 359 and 360 Block D, Sinza, Kinondoni Municipality bearing certificate of title No. 26889 (the suit property). The said houses are said to have been sold by her husband, **Geofrey Iteba**, to **Praygod Mmbaga** for Shillings 40 million on 28th November, 2011. The Plaintiff contends that she realised about the sale of the matrimonial The Plaintiff when the 2nd Defendant was in the process of transferring the properties into his name. The Plaintiff thus prays for judgment and decree against the Defendants jointly and severally for a declaration that the sale of the two houses on Plot No. 359 and 360 Block D, Sinza, Kinondoni Municipality, Dar es Salaam by the 1st Defendant to 2nd Defendant is illegal that is to say null and void ab initio and an order that the 2nd Defendant return the sold houses to the Plaintiff and the title deed with

Certificate of title No. 26889 which is currently in possession of the 2nd Defendant. She also prays for costs of the suit and any other reliefs (s) as the Court may deem just and equitable to grant.

The 2nd Defendant did not oppose the claims by the Plaintiff, he supported them stating that he was married to her and that they are blessed with two issues, Zebedayo and Sarah. The 1st Defendant, in his amended written statement of defence, denied the Plaintiff's claims. He contended that the Plaintiff is not the wife of the 1st Defendant as the first Defendant could not contract a marriage with the Plaintiff in 1995 as he had an existing Christian marriage. The 2nd Defendant filed a counter claim against the 1st Defendant and the Plaintiff. In the counter claim, the 2nd Defendant stated that the 1st Defendant legally sold the disputed property to him and that during the said sale, the 1st Defendant assured him and guaranteed that he had no spouse and that no spousal consent was required. He reiterated his position that the two Defendants in the counterclaim were not spouses. In the alternative, it was his view that if the two were legally married, then there was a conspiracy to defraud him. He claimed for the refund of Shillings 40 Million being the purchase money, Shillings 100 million as general damages for mental torture and a further 100 million as exemplary damages.

When parties appeared before me for hearing, the Plaintiff was represented by Mr. Philemon Mutakyamirwa, learned Advocate, the 1st Defendant was represented by Mr. John B. Tendwa, learned advocate while Mr. Samson Mbamba, appeared for the 2nd Defendant. The following issues were agreed:

- a) Whether the Plaintiff is a legal wife of the 1st Defendant;*
- b) Whether the suit premises are matrimonial properties;*
- c) Whether the sale of the suit premises by the 1st Defendant to the 2nd Defendant was valid;*
- d) Whether at the time of sale there was non-disclosure of existence of marriage between the 1st Defendant and Plaintiff; and whether the 2nd Defendant suffered any damages; and*
- e) To what reliefs are the parties entitled to.*

After oral evidence from the parties, their Advocates opted to file closing submissions. Their submissions will be considered alongside the evidence on respective issues as hereunder.

2.0 Is the Plaintiff a legal wife of the 1st Defendant?

In his testimony, Mr. Geoffrey Iteba (DW1) vehemently opposed the Plaintiff's assertion that she was legally married to the 1st Defendant at the time when the sale of the suit premises was done. He informed the Court that after the Plaintiff had filed a suit against him vide Land Case No. 101 of 2012, he suspected that the Plaintiff's case was fraudulent, she had attached a Notice of Intention to marry in lieu of a marriage certificate. A criminal case was filed at Kinondoni District Court against the Plaintiff and the 1st Defendant. They were both convicted of forgery of the said Notice in Criminal Case No. 237 of 2012. Mr. Iteba therefore contended that Exhibit P1 (the marriage certificate dated 8th May 1995) was not genuine as the Plaintiff should not have attached a Notice of Intention to marry if she was in possession of a marriage certificate. Regarding Exhibit P2, which is an extract from the Marriage Register maintained by RITA, DW1 stated that in his understanding RITA can easily register a fictitious marriage as information come from a

party to the marriage. He further doubted the marriage as in Exhibit P1, the 1st Defendant is recorded as "single" while he was married since 1968 and that no divorce certificate was tendered to show that the 1st Defendant's marriage contracted in 1968 was broken and a divorce granted. DW1 also stated that the suit property does not have two houses as testified, that there is only a hall which is now rented out by the 1st Defendant. The views of the 2nd Defendant were augmented by the closing submissions by Mr. Mbamba who contended that as there is no proof that the marriage between the 1st Defendant and Caroline Malkizedek was not subsisting in 1995, the marriage with the Plaintiff is void as per Sections 10(2), 15(1) and 38 of the Law of Marriage Act. Therefore, a spouse from a void marriage cannot consent as alleged.

The Plaintiff, on the other hand, maintained that she is legally married to Mr. Iteba and that the marriage certificate and the extract from the marriage register testify to that effect. Mr. Iteba, whose evidence was adduced through an affidavit due to his ill health, also confirmed the existence of the marriage between him and the Plaintiff. On the issue of his previous marriage, Mr. Iteba testified that the marriage was annulled after a divorce was granted by Ngarenaro Primary Court, Arusha in 1974. That he was unmarried up to 1995 when he got married to the Plaintiff. In his closing submissions, Mr. Mutakyamkirwa was of the view that the evidence adduced to prove the existence of marriage was not controverted as DW1 did not tender any evidence to the contrary. This view is supported by Mr. Tendwa's submission.

Having considered the evidence from both parties, the Court is satisfied that the Plaintiff and the 1st Defendant were legally married as per exhibit P1 and P2, the marriage certificate and extract of the marriage register respectively. The objection raised by the 2nd Defendant may have a bearing on the credibility of the Plaintiff and the 1st Defendant, but there is no basis for this Court to challenge the existence of the marriage between them. The 2nd Defendant relied on the decision of the District Court of Kinondoni which convicted the Plaintiff and her husband for forging a notice of intention to marry. The said Judgment was admitted in evidence as Exhibit D1. The Magistrate made it clear that the Court was not dealing with the legality of the marriage of the accused persons, it was only asked to decide on the authenticity of the Notice of Intention to Marry which had been attached to the Complaint filed by the Plaintiff. On the same breath, there is no dispute that the two were found guilty of forgery and that decision was not appealed against. The Plaintiff threw the blame on his previous attorney when asked why she attached a forged notice of intention to marry instead of attaching the marriage certificate and the extract from the Register of Marriages, both of which were in her possession at the time of filing the suit in 2012.

Furthermore, although the 2nd Defendant had annexed a copy of the marriage certificate between the 1st Defendant and one Carolina Melkizedeki and had filed a notice to produce, he did not lead that evidence nor was there evidence to support the assertion that the said marriage is still subsisting or that it was subsisting at the time the Plaintiff got married to the 1st Defendant. Considering that no evidence was brought to challenge

the authenticity of exhibits P1 and P2, this Court has no basis to decide otherwise. Only one conclusion is open to this Court; that is, at the time when the Defendant entered into the contract of sale of the suit premises, the Plaintiff was legally married to the 1st Defendant. On the premises, the first issue is answered in the affirmative.

3.0 Are the suit premises matrimonial properties?

Having decided that the Plaintiff was legally married to the 1st Defendant at the time of sale of the suit premises, it is pertinent to decide whether the said premises fall in the category of matrimonial properties which would require consent of both spouses before they are disposed of. 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 premises were sold to the 2nd Defendant without her consent. When asked where she was at the time of sale, she informed the Court that she had travelled to the village to attend a sick relative and that she came to realise about the sale when she was served with an eviction order. She testified that the plots where the suit premises are located were bought by the 1st Defendant before their marriage but that during the existence of the marriage, they jointly developed it and constructed some houses therein. In one building, she said, they have rented it out to a Nigerian preacher so as to raise money.

The 2nd Defendant contested the evidence given by both the Plaintiff and the 1st Defendant. In his view, the suit premises comprised of a hall building that

was being utilised as a school, not as a home to the Plaintiff, the 1st Defendant and the children. The 2nd Defendant stated that he was a friend to the 1st Defendant and that he never saw the Plaintiff residing at the suit premises or at all. That the 1st Defendant lived alone with his children. The 1st Defendant had informed him that he used to have several women before but that he was not married to them and he chased them. That before selling to him, the 1st Defendant used to borrow money from him several times for the purposes of paying teachers' salaries but at this occasion, the 1st Defendant needed more money in order to travel to India for medical treatment. Mr. Mbamba submitted that the suit premises are not matrimonial properties as the Plaintiff had not filed any caveat before the disposition and the fact that the two are not husband and wife. He cited the decisions of the Court of Appeal in ***Idda Mwakalindile Vs. NBC Holding Corporation & Anor***, Civil Appeal No. 59 of 2000 and ***NBC Holding Corporation Vs. Agres 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."

None of the parties tendered the title documents with regard to the suit premises. Similarly, the sale agreement was not tendered in evidence. The Plaintiff had annexed copies of the Certificate of Title No. 26889 to Plot No. 360 Block 'D', Sinza, Dar es Salaam, "Mkataba wa Mauzo ya Nyumba" dated 28 November, 2011 between Geoffrey Henry Iteba and Praygod Mbaga with respect to a House in Plot No. 360, Block D, Sinza and "Makubaliano ya

Kuuziana Nyumba” dated 28 November 2011 with respect to the house in Plot No. 360 Block D bearing certificate of Title 26889, Sinza. These documents were not tendered in Court by the Plaintiff during her testimony. Furthermore, the two purchase agreement documents related to the same property but while the “Mkataba wa Mauzo ya Nyumba” was for a consideration of Tshs. 40 million, the “Makubaliano ya Kuuziana Nyumba” was for Tshs. 20 million only. There was no document showing that Plot No. 359 was also sold. The Plaintiff, however, had also annexed in her Plaint a valuation report of the properties in Plots 359 and 360. The Report showed that there are about 5 buildings therein whose market value was estimated at Tshs. 403 million. But as earlier stated, she did not tender these documents in evidence.

The Defendants who are parties to the purchase agreement did not tender the sale agreement or the certificate of title to the suit premises. The 1st Defendant, in his testimony by way of affidavit, annexed the agreement of sale titled “Mkataba wa Mauzo ya Nyumba” similar to the one that had been attached to the Plaint. He also attached two other documents; namely, “Withdrawal of Notice of deposit of Certificate of Title” dated 28th November, 2011 and a copy of the Certificate of Title No. 26889. The 2nd Defendant was allowed to challenge the 1st Defendant’s testimony. He did so by filing a counter affidavit. In the Counter affidavit, the 2nd Defendant only contested introduction of the sale agreement labelling it as “stranger to the pleadings”. With regard to the number of plots sold, the 2nd Defendant attested that the 1st Defendant had admitted in his written statement of defence and in his

testimony made in Criminal Case No. 237 of 2012 that he had sold both plots. In his oral testimony, the 2nd Defendant informed the Court that the 1st Defendant sold to him two plots; namely, Plots 359 and 360, as they are in one piece. He said that he had possession of the title to both plots although he was yet to register them in his name due to a caveat. On cross examination, he said that he could not ascertain the size of any of the two plots or of the two combinedly. He also stated that the sell agreement did not include a clause about the marital status of the 1st Defendant but the 1st Defendant was accompanied by his son, Zebedayo. He did not tender any document to substantiate such contention. He also did not substantively challenge paragraph 10 of the Complaint which annexed the valuation report within which there was a sketch plan showing five separate buildings.

I have given due consideration to the evidence as well as the pleadings in this Court. Besides the oral evidence from the Plaintiff and the 2nd Defendant, there is no proof that the 2nd Defendant bought the entire suit premises comprising of Plot No. 359 and 360, Block D, Sinza, Dar es Salaam. All evidence direct to the fact that the Plot sold was Plot 360 Block D, Sinza which has certificate of title No. 26889. Plot 360 is registered in the name of the 1st Plaintiff and was for a tenure of 33 years from the year 1977. By the time of sell, the right of occupancy of the 1st Defendant had expired, but that may not be relevant in this case. From the evidence on record, I will proceed to remove Plot No. 359 from the suit premises. That leaves only Plot 360, Block D, Sinza. Unfortunately, the 2nd Defendant did not state which part thereof was for residential and which part was for school purposes. I will

therefore proceed on the assumption that the plot was utilised for both residential and non-residential activities. The annexed certificate of title set Plot No. 360 for residential purposes only. However, the same does not constitute evidence before this Court. The Court has therefore a duty to determine whether Plot No. 360 which was sold alongside the house sold therein is a matrimonial property.

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."

In the case at hand, other than the oral evidence by the Plaintiff and the affidavit attested by the 1st Defendant, there is no other evidence supporting

the assertion that the suit premises are matrimonial property. Incidentally, the evidence that the same is not a matrimonial property is insufficient to make me reach such a conclusion. The 2nd Defendant did not take any precautions to ensure that the suit premises sold to him belonged solely to the 1st Defendant. Having concluded that the Plaintiff was legally married to the 1st Defendant at the time of sale, and there being no evidence to dispute that the suit premises were utilised as a family residence, this Court is satisfied that the same is a matrimonial property in terms of the law as above explained. The second issue is likewise decided in the affirmative.

4.0 Was the sale of the Suit Premises by the 1st Defendant to the 2nd Defendant valid?

In this case, the Plaintiff is asking this Court to invalidate the sale of the suit premises by her husband to the 2nd Defendant. Her main ground is that the suit premises, being matrimonial property, should not have been sold by the 1st Defendant without her consent. The 1st Defendant supports that view in his written statement of defence and in paragraph 9 of the affidavit taken in lieu of oral evidence. In that paragraph the 1st Defendant stated as follows:

"That I did not tell neither (sic) consulted my wife on this sale agreement because I knew she would refuse and that time I was sick, I needed the money to go to India for treatment."

In the closing submissions, Mr. Tendwa was of the view that the contract was void ab initio in light of the decision of this Court in ***Irent Redent Emmanuel Sok Vs. Asley Ally Said & Anor***, Land Case No. 363 of 2015 (HC -Land Division, Wambura, J). on his part, Mr. Mutakyamkirwa contended that such contract could not be held valid in light of Section 161(3) of the

Land Act and Section 59 of the Law of Marriage Act. He referred the Court to the decision of 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.."

That piece of evidence is contested by the 2nd Defendant. His main ground is that there was no need for consent from the Plaintiff as she is not legally married to the 1st Defendant and that the 1st Defendant confirmed to him that he was unmarried. That evidence was reiterated in the final submissions. In Court, the 2nd Defendant added yet another reason for challenging the requirement of consent; that is, the 1st Defendant is still married to one Caroline Melkisedeki. He does not say whether he sought the consent of the said Caroline either nor did he submit the contract of sale containing the disclaimer allegedly given to him by the 1st Defendant.

After a careful scrutiny of the evidence from all the parties to the dispute, it is apparent that the 2nd Defendant does not seem to have sought the consent of the 1st Defendant's spouse before buying the suit premises. It follows therefore that the contract of sale of the suit premises was void for lack of consent by the Plaintiff.

5.0 Whether at the time of sale there was non-disclosure of existence of marriage between the 1st Defendant and Plaintiff; and whether the 2nd Defendant suffered any damages

Submitting on this aspect, Mr. Mbamba was of the view that considering the admission of the 1st Defendant that he did not inform the Plaintiff about the sale of the suit premises, that amounts to criminal fraud which should be condemned by payment of damages. He further stated that as the 2nd Defendant has been denied use of the suit properties for almost 10 years, he has therefore suffered damages as prayed in the counterclaim.

On his part, Mr. Mutakyamkirwa submitted on this issue that the 2nd Defendant had a duty to ascertain the existence or non-existence of a spouse. That the mere assertion by the 2nd Defendant that he was informed that the 1st Defendant has no wife is insufficient as he did not bring any evidence of such assertions.

Both the 1st Defendant and the 2nd Defendant seem not to have been keen in involving the spouse of the 1st Defendant in this case. There is no doubt that most blames fall on the 1st Defendant who utilised the absence of his wife to sell the house and remain quiet even when she returned. Consequently, the 2nd Defendant has suffered damage as per his testimony in Court. But the damages are not attributable to the Plaintiff as she may not have been aware as per her evidence and that of the 1st Defendant.

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. Regarding the prayers contained in the 2nd Defendant's Counter Claim, the Court is satisfied on the balance of probabilities that he is entitled to the refund of the purchase money. The 1st Defendant does not object to the fact that he sold the suit premises; that is Plot 360 Block D, Sinza area bearing certificate of title No. 26889, to the 2nd Defendant for Tshs. 40,000,000/= . He also acknowledges that he did not inform the Plaintiff about it. Considering that the 2nd Defendant innocently believed that the 1st Defendant was competent to dispose the suit property, the money paid out should be refunded to him. Regarding the claims for exemplary damages sought by the 2nd Defendant, the Court finds no cogent grounds or evidence to justify such claims. However, the Court, considering the time that the 1st Defendant has stayed with the 2nd Defendant's money, and considering the fact that the 2nd Defendant is a businessman who could have made profits out the money given out, I grant him Tshs. 40,000,000/= to be paid by the 1st Defendant as general damages.

Consequently, the suit has merits as above explained. It is hereby declared that the sale of the suit premises on Plot No. 360 Block D, Sinza, Kinondoni Municipality, Dar es Salaam by the 1st Defendant to 2nd Defendant is void ab initio for lack of spousal consent by the Plaintiff. The 2nd Defendant should surrender the Certificate of Title No. 26889 with respect to the suit premises

to the Plaintiff and the 1st Defendant henceforth. The 1st Defendant to pay to the 2nd Defendant Tshs. 80,000,000/= being a refund of Tshs. 40,000,000/= given to him as purchase money of the suit premises and Tshs. 40,000,000/= as general damages. 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 sale agreement of the suit premises, I direct that each party shall bear her or his own costs.

It is so ordered.

A handwritten signature in black ink, appearing to read "Y.B. Masara".

Y.B. Masara

JUDGE

December 11, 2020