

IN THE HIGH COURT OF TANZANIA

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

LAND CASE NO 275 OF 2017

STAMILI SELEMANI KIBIGA..... PLAINTIFF

VERSUS

**TIB DEVELOPMENT BANK LTD. 1ST DEFENDANT
AYUBU ALLY MKONDE 2ND DEFENDANT
KAM COMMERCIAL SERVICES 3RD DEFENDANT
SABEKI GENERAL TRADING CO LTD. 4TH DEFENDANT**

JUDGMENT

November 16 and December 7, 2020

Masara, J

The Plaintiff, **Stamili Selemani Kibiga**, filed this suit contending that the mortgage of the house registered in the name of the 2nd Defendant to secure a loan facility to the 4th Defendant from the 1st Defendant was illegal for lack of consent from her, being the lawful wife of the 2nd Defendant. The house is situated at Plot No.41 Block 20, Kibada Area, Temeke Municipality, Dar es Salaam Region, under Certificate of Title No. 111884, measuring about 585 square metres (the suit property). The Plaintiff thus prays for judgment and decree against the Defendants for a declaration that the suit property registered in the name of **Ayubu Ally Mkonde** (2nd Defendant) is a matrimonial property and matrimonial home; that the mortgage and subsequent intention of the 3rd and 1st Defendants to sell the said house and a parcel of land is unlawful and henceforth null and void for want of spouse consent from the Plaintiff; a permanent injunction be issued against the 1st

and 3rd Defendants restraining them or through agents /workmen/assignees/servants or any other person acting under their instruction, from trespassing to the suit property or from removing the Plaintiff or his family and or disposing the suit property or changing the names currently appearing in the certificate of title No.11188; payment of general damages as may assessed; costs of the suit and any other reliefs (s) as the Court may deem just to grant.

The 1st Defendant, in their written statement of defence, denied the Plaintiff's claims and prayed that the suit be dismissed with costs and an order of foreclosure and sale of the mortgaged property be issued. Not surprisingly, the 2nd Defendant did not oppose the orders craved by the Plaintiff. He reiterated the Plaintiff's prayers in his written statement of defence. The 3rd Defendant did not file their written statement of defence nor enter appearance. The record shows that he was originally shown as being represented by the counsel for the 1st Defendant. Likewise, the 4th Defendant did not appear or file their written statement of defence. Incidentally, there is no record to show that the 3rd and 4th Defendants were summoned. However, on 22nd November, 2018, De-Mello, J, who presided over the suit at the time, directed that the suit proceeds for hearing in the absence of the 1st, 3rd and 4th Defendants. On 16th August, 2019 the 1st Defendant filed an application to set aside the *ex parte* hearing order. This Court, V.L. Makani, J, dismissed the application on 18/05/2020. Thus, this suit proceeded to finality against the 2nd Defendant only.

When parties appeared before me for hearing, the following issues were drawn for determination:

- a) Whether consent of the Plaintiff was required before the 2nd Defendant mortgaged the suit property with the 1st Defendant;*
- b) Whether it was proper to subject the suit property to sell before selling properties mortgaged by the borrower (4th Defendant); and*
- c) To what reliefs are the parties entitled to.*

Before deliberating on the above issues, it is pertinent to provide a brief background of the suit and the evidence. There is no dispute that the Plaintiff is the wife of the 2nd Defendant under Islamic marriage and that the two are blessed with 6 issues in their marriage. They got married on 14/9/1977. It is also not in dispute that the suit property was built and registered in the names of the 2nd Defendant during the subsistence of their marriage and that they have been living and using the suit property as a matrimonial home. Sometimes in 2017, it came to the Plaintiff's knowledge that the 2nd Defendant had mortgaged the suit property with the 1st Defendant as a guarantee to secure a loan to the 4th Defendant and that following default of repayment of the loan by the 4th Defendant, the 3rd Defendant was appointed to auction the suit property. The information was gathered from the Daily Newspaper issue of 12th July, 2017. It is that information which led the Plaintiff to prefer this suit claiming that the said mortgage was unlawful due to lack of consent from her as the spouse of the 2nd Defendant, the house being a matrimonial home.

To prove her case, the Plaintiff summoned three witnesses including herself.

These are **Stamili Selemani Kibiga** (PW1), **Said Pazi Shomari** (PW2) and **Mbwana Mvumbo Chuma** (PW3). Two Exhibits were tendered by the Plaintiff. These are Certificates of Marriage (exhibit P10) and the Daily Newspaper dated 12 July, 2017 (exhibit P2). The 2nd Defendant testified as the sole witness for the Defendants. He did not tender any exhibit. After hearing of the evidence from both sides, counsels opted not to make any closing submissions, leaving it to the Court to determine the case on the basis of the issues herein.

Turning back to the first issue, the pertinent question is whether the mortgage of the suit property should be vitiated for lack of spousal consent. Testifying in Court, Ms. Kibiga stated that she filed this suit to claim for her interest in the suit house where she, her husband and her children reside. She further stated that the said house was mortgaged by her husband (2nd Defendant) to secure a loan without her consent and that she was shocked when she learnt that their house was to be sold for a loan secured on behalf of the 4th Defendant. She testified that the 2nd Defendant did not inform her that he was mortgaging the house which she had contributed towards purchase of the plot and construction of the house. She estimated her contribution to be Tshs. 3,000,000/=for acquisition of the plot and about Tshs. 5,000,000 for construction of the house.

Mr. Shomari's evidence was that he is the Executive Officer of Nyakwala hamlet, Kibada area where the suit property is located. He informed the Court that he knows the Plaintiff and 2nd Defendant as wife and husband and

that none of them or any other person or institution have ever approached him for identification of any sort, including for any loan application. On his part, Mr. Chuma testified that he knows the Plaintiff and 2nd Defendant for a long time and that they live together with their children in the suit property. That the house in the suit property was constructed during the subsistence of their marriage. Regarding the mortgage, it was his evidence that he saw a notice about the sale of the house whereby he asked the 2nd Defendant about it and was informed that the 2nd Defendant guaranteed a loan to another person. He then asked the 2nd Defendant whether he had sought consent of his wife whereby the 2nd Defendant said he had not. He advised them to go to court for remedy.

On the other hand, **Ayubu Ally Mkonde**, the 2nd Defendant herein, confirmed that he is the Plaintiff's husband since 1977. He stated that he got to know the 4th Defendant as his customer who used to buy from him some crops. That the 4th Defendant owned a milling factory. He guaranteed the 4th Defendant to get a loan from TIB Bank (the 1st Defendant). The loan was about 230million shillings. According to him, the suit house that was mortgaged was valued at Tshs. 80,500,000/= but that his guarantee was for only Tshs. 30,000,000/=. On 12/7/2017 he was told by his son that there is notice of the sale of their house and other properties of the 4th Defendant. He went to TIB to inquire and was told that the 4th Defendant defaulted payment of the loan. As to whether he had sought his wife's consent, he stated that he did not inform her when he mortgaged the house because he is not an expert of such contracts and that TIB did not inform him whether

his wife's consent was necessary. During cross examination, the 2nd Defendant stated that Sarah Nicas was the director of the 4th Defendant and that he does not know where she is at the moment. That he had guaranteed the loan knowing that the 4th Defendant could not default payments considering the size of their milling business. Further, it was his evidence that he did not inform TIB that he was married as they had not asked him about that fact.

After a careful scrutiny of the evidence from both sides, it is apparent that whether or not consent of the Plaintiff was required before the mortgage was created pivots on the ascertainment of the contents of the mortgage and the identification of the mortgaged property. Notably, other than facts obtained from the pleadings, the Plaintiff and the 2nd Defendant did not lead any evidence regarding the contents of the mortgage agreement or of the property mortgaged. The evidence available is that the suit house was mortgaged and that the Plaintiff did not consent to the disposition (mortgage). In the absence of the 1st Defendant it was expected that the Plaintiff or the 2nd Defendant would tender the Mortgage Deed, the Guarantee Agreement and associated documents, to prove the existence of such agreements and that they ought to be vitiated as craved. It is noted that in the pleadings, the 1st Defendant had stated that the mortgage of the suit property was done after due diligence was conducted and there was annexed an affidavit allegedly attested by the 2nd Defendant confirming that no consent was required. The Plaintiff and the 2nd Defendant did not file a reply challenging such facts. Unfortunately, the Court cannot make use of

those pleadings, documents and affidavit to ascertain the legality or otherwise of the mortgage as they were not tendered in evidence. The Plaintiff and the 2nd Defendant had also annexed similar documents (minus the affidavit) in the Plaint and written statement of defence respectively but opted not to use them in their testimony. The Court is thus left with no records from which the terms of the loan/mortgage can be deduced. Further, whereas the Plaintiff asks this Court to vitiate the contract for lack of consent, not even a copy of the certificate of title of the suit property is available for the Court's scrutiny and ultimate decision.

In light of the above, the Court is at a brim of where to draw an inference of whether there was a mortgage of a matrimonial property without the consent of one of the spouses. 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 her witnesses, there is no other evidence supporting the assertion that the mortgaged property was a matrimonial property. In fact, there is no evidence proving the existence of the said property in the first place. It would be inexplicable for this Court to decide the issue of a mortgage the existence of which has not been proved and the object of which is not in the Court's records. On the premises, and on the reasons advanced, the first issue cannot be conclusively determined either in the affirmative or in the negative. The evidence available only attest that the Plaintiff is a spouse of the 2nd Defendant. Invariably, she is expected to give consent to any disposal of a matrimonial property. Whereas the law requires that a mortgage of a matrimonial property be consented to by the other spouse; in situations where the mortgage's existence and that of the suit property are unknown, like in this case, the Court cannot vitiate such purported mortgage.

Regarding the second issue, the Plaintiff did not lead evidence on the 4th Defendant's mortgaged properties that were supposed to be sold prior to selling the property mortgaged by the 2nd Defendant. The 2nd Defendant, on the other hand, informed the Court that the 4th Defendant had mortgaged their properties as collaterals to secure about 200million Shillings and that only 30million shillings was to be secured from his mortgaged property. The 2nd Defendant mentioned those properties to include milling machines and a Hotel Building. According to his evidence, the Newspaper which advertised

to sell the suit property also included the properties of the 4th Defendant but that up to September 2019, the 1st Defendant had not sold those properties belonging to the 4th Defendant.

I have meticulously examined and considered the evidence tendered and the pleadings that are in the Court file. I have not been able to gather any proof that there was another collateral mortgaged to secure the loan. Further, there is no proof that the 2nd Defendant's mortgaged property was for an amount less than the mortgaged value. In the Complaint and in the 2nd Defendant's written statement of defence, such facts were not included; instead, they annexed a Mortgage Agreement and the Guarantee Agreement both of which showed the amount of security to be Tshs. 236,846,000/=.

The Security appearing in both agreements is Certificate of Title No. 111884 Plot No. 41, Block '20' Land Office No. 352569, Kibada Area, Temeke Municipality. The general rule is that a party is bound by his pleadings and should not be allowed to depart from what he has pleaded in the pleadings.

In ***Yara Tanzania Limited Vs. Charles Alloyce Msemwa t/a Msemwa Junior and 2 Others***, Commercial Case No. 5 of 2013, Commercial Court, DSM (unreported) this court observed:


"It is a cardinal principle of law of civil procedure founded upon prudence that parties are bound by their pleadings."

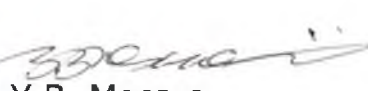
See also **James Funke Gwagilo Versus Attorney General** [2004] T.L.R 161.

Regarding the Notice that was admitted in Court as Exhibit P2, there is no mention of any property concerning the 4th Defendant as alleged. The only property mentioned in relation to the 4th Defendant is the suit property. The second issue would therefore be answered in the affirmative, all things being equal.

The last issue is on the reliefs which the parties are entitled to. Considering what I have elucidated hereinabove, the Plaintiff has not been able to establish her entitlement to the reliefs sought. Consequently, the suit is dismissed in its entirety for lack of merits. Considering the fact that the remaining Defendant in this case is the husband of the Plaintiff, I direct that each party shall bear her or his own costs.

It is so ordered.




Y.B. Masara
JUDGE
December 7, 2020